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Panel II: Ensuring Reparations for Victims of Torture and Other Ill-Treatment

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PANEL II: ENSURING REPARATIONS FOR VICTIMS OF TORTURE AND OTHER ILL TREATMENT

Opening Remarks from Dean Claudio Grossman, Moderator

Dear friends, we are going to begin the second panel on ensuring reparations for victims of torture and other ill-treatment. Each panelist will speak for approximately ten minutes, after which there will be time for questions.

Let me start by noting that the comments in this and other panels today are made *à titre personnel* (in a personal capacity) and, accordingly, do not necessarily represent the views of the UN Committee against Torture.

To open this panel, I would like to begin by saying that reparations cover everyone who has been subjected to torture and other violations defined under the Convention. That includes a right to reparations for, in some cases, “very bad people” such as common criminals or terrorists. As chair of the UN Committee against Torture, I oversee the meetings with States Parties, some of which tell the Committee, “You listen to terrorists and very bad people,” and on occasion that is true. I respond at those times that some individuals who claim that they have been tortured are not people who work for the local Rotary Club, go home early each night, and tuck their children in bed. Some petitioners who resort to the Committee are accused of being terrorists, but I do not know of any provision in the Convention that says, “A terrorist cannot complain if tortured.”

Exercising the right to petition to the Committee does not mean that what is being alleged is true. Let me add that the exclusion of a petition on the basis that the petitioner is a “bad person” would arguably have one up side: since the Committee has very limited resources, this would free up valuable Committee time. However, States Parties that have drafted and adopted these international instruments have been very clear, and in my view rightly so, in establishing that no one can be tortured. By choosing to act in accordance with the respect due to the human rights tradition, States Parties have reaffirmed what we have learned in this hemisphere and elsewhere: that you cannot defend the human rights of everyone unless you establish that every human being must be treated in accordance with validly accepted norms by states.

Another important consideration is consistency as a matter of legitimacy. Judicial, semi-judicial, and administrative organs must accord everyone the same treatment. Some tensions arise, however, when, in the process of interpreting a norm, supervisory organs encounter flawed or conflicting jurisprudence. These matters have been the object of extensive theoretical analysis, and at this point I would like to mention that the need

for “consistency” could in some instances prevent the evolution of the law. That does not mean that consistency is unimportant, but in the complex decision-making process of collective supervisory organs, sometimes uncertainty or vague formulation may become unavoidable. This brings to mind, for example, the evolution that has taken place with regard to the treatment of extraordinary renditions or rape as a form of torture.

Relevant to our panel is that, for the Convention against Torture to be effective, full compliance with its obligations including an adequate system of follow up to the Committee’s findings is necessary. To illustrate this point, allow me to refer to the following comments attributed to a Central American dictator: “I don’t know why people complain that we don’t have free elections here. Everyone can be a candidate, everyone can campaign, everyone can vote. The only thing that I do is count the votes.” If individuals can come before the Committee, file petitions, and receive a finding in their favor, but there is no redress, we will find that the system’s legitimacy will be ultimately and rightly imperiled. As we discuss today how to ensure reparations, let us keep in mind that what is at stake is not only the right of the victims but also the value of the Convention against Torture as a whole.

To explore what we can do to ensure reparations for victims of torture and other ill-treatment, we have assembled a very unique panel. The panelists will enhance our understanding of important obligations laid down in the Convention. This includes, for example, answering the questions: Who qualifies as a victim? Is the definition limited to the person who was tortured or does it encompass his or her dependents? The right to redress applies not only in cases of torture, but also of cruel, inhuman, or degrading treatment or punishment. What tests should be used in these instances to prove that redress is warranted? What are the scope and extent of state obligations under Article 12? What is the scope of redress, compensation, and rehabilitation, and what are the respective meanings of these terms? Anyone who has worked with victims of torture knows that while there are material damages, immaterial damages, and measures of rehabilitation, of utmost importance to the victims is the certainty that their ordeal will not be inflicted on anyone else. Accordingly, for victims, the provision of symbolic measures, such as high-level government authorities asking forgiveness, the opening of human rights museums, the naming of schools and streets, etcetera, is essential. Equally, the adoption of domestic norms to prevent torture, reject impunity, and ensure full reparations — measures which have taken place

within the Inter-American system — are important components of ensuring full redress. Is it possible to follow such an approach within the universal system? To what extent should reparations be the subject of a general comment? Some of us believe that general comments are not the solution for every matter, but taking into account the importance of reparations, a general comment would provide guidance to petitioners and governments, as

well as the Committee itself, thereby increasing the legitimacy of the prohibition against torture.

Without further delay, please join me in welcoming our first panelist, Christopher Keith Hall, and welcome again to everyone here including those who came from afar.

Remarks of Christopher Keith Hall*

My presentation will focus on how the UN Committee against Torture can strengthen its scrutiny and recommendations concerning the implementation of Article 14 of the Convention against Torture. First, I will discuss some of the essential elements of the awkwardly worded article. Article 14¹ requires each State Party to ensure in its legal system, normally entailing legislation, that a victim² of torture³ obtains “redress,” or an obligation of result. Redress is a term that today is understood to include all five forms of reparations — restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition — and an enforceable right that requires access to a court, and to fair and adequate compensation, including the means for as full a rehabilitation as possible. The ungainly phrase from 1984 would certainly include all forms of reparations today.

One component of this obligation under Article 14 is the obligation for each State Party to ensure that each victim of torture subject to its jurisdiction has the enforceable right to obtain reparations for torture committed abroad, whether the torture was committed by a national or by a foreigner. The reasons why this is so are set out in some detail in an article in the *European Journal of International Law*.⁴

Article 14, potentially one of the most important articles of the Convention against Torture, was largely overlooked by states, scholars, and the Committee itself for nearly two decades. Then, the Committee at its May 2005 session confronted Canada’s defense of its court’s decision in the *Bouzari* case against Iran, upholding Iran’s claim of state immunity in a civil suit for reparations based on torture committed in Iran.⁵ After carefully considering the mutually exclusive and entirely speculative arguments as to why Article 14 only applied to torture committed in territories in a State Party’s jurisdiction, and not committed abroad, the Committee expressed its concern about Canada’s inability to provide compensation to victims of torture in all cases, and recommended that Canada review its position under Article 14 of the Convention to ensure provision of compensation through its civil jurisdiction to all victims of torture.⁶



Victims and those working on their behalf welcomed this bold step forward to make Article 14 the effective tool for reparations envisaged by the drafters. They hoped this decision would mark the beginning of a consistent approach by the Committee in its examination of each State Party’s report, leading perhaps to an authoritative general comment on the scope of Article 14. Finally, victims hoped that the general comment would lay to rest once and for all doubts about the Article’s scope.

What happened and what may have been the consequences? First, the Committee did not ask other States Parties at subsequent meetings whether they provided for universal jurisdiction under Article 14, nor express concern about the failure of states to do so, nor recommend that States Parties that had failed to do so amend their legislation forthwith. Instead, over the next few sessions, the Committee made three cryptic statements, which possibly could be taken to refer to the obligation under Article 14 for the right of victims to recover reparations for torture

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committed abroad. First, it asked about compensation awarded against an Austrian civil police officer abroad;⁷ second, it urged the Republic of Korea to ensure that all victims be able to obtain redress;⁸ and third, it welcomed a French procedure for victims of terrorism abroad.⁹

At that point, Amnesty International, REDRESS, INTERIGHTS, and JUSTICE intervened in the House of Lords in a case called *Jones v. Ministry of Interior of Saudi Arabia* involving four United Kingdom nationals suing Saudi Arabia and its officials who allegedly tortured them.¹⁰ The interveners argued that the Committee against Torture's conclusions and recommendations with respect to Canada's report were an authoritative interpretation of the Convention and that the United Kingdom had an obligation to ensure that the four victims could recover. In the absence of either an authoritative general comment on Article 14, or a consistent examination by the Committee with respect to each State Party in subsequent sessions, however, this argument fell on deaf ears. The House of Lords, in marked contrast to the International Court of Justice and national courts in other states, dismissed the legal authority of the Committee's recommendation as "slight."¹¹ One judge went as far to say that "as an interpretation of Article 14, or as a statement of international law, I regard it as having no value."¹²

Bearing this national court discussion in mind as the four victims began to apply to the European Court of Human Rights to challenge it, Amnesty International wrote to the Chair of the Committee on November 2, 2007 to urge that it use an eight-point checklist to assess the compliance of the States Parties under Article 14, hoping that by the time the European Court of Human Rights heard the case, the Committee would establish a strong, consistent approach confirming the conclusions and recommendations it took in 2005.

What were the eight points on the check list? One simply asks states to provide relevant legislation and court decisions, including full copies, not simply an account, of the legislation. Another asks whether the right to reparation was restricted to victims who were nationals of the States Parties, whether the right to reparation was restricted to ill treatment committed by nationals of the State Party, and whether reparations were restricted to torture or ill treatment committed in territories subject to a State Party's jurisdiction.¹³

What has been the practice of the Committee since the November 2007 letter? A review of the past two sessions (April-May 2009 and November 2009) reveals some positive developments but also considerable disappointments. The Committee examined fourteen state reports: Azerbaijan, Chad, Chile, Colombia, El Salvador, Honduras, Israel, Moldova, New Zealand, Nicaragua, Philippines, Slovakia, Spain, and Yemen. On the positive side, there has been far greater scrutiny of reparations programs, particularly addressing discriminatory access to such programs, and greater, but still not uniform consistency

in the scrutiny of complaints by victims seeking reparations from officials and courts.

There are disappointments, however. First, the Secretariat and the Committee could insist that States Parties provide electronically all relevant legislation and court decisions in the form of links or legible, scanned versions. Even when such documents are not available in a UN language, making them accessible in their original language on the website would facilitate analysis by civil society of the relevant passages and, therefore, facilitate the dialogue between the Committee, States Parties, and civil society. One such example of analysis by civil society that could assist the work of the Committee are the "No Safe Haven" series of papers of universal, civil, and criminal jurisdiction, which Amnesty International began publishing in October 2008 on the tenth anniversary of Pinochet's arrest in London. Of the 192 UN Member States, papers have been published so far on six: Bulgaria, Germany, Solomon Islands, Spain, Sweden, and Venezuela.¹⁴

Two other specific disappointments could be mentioned. First, apart from the example of the conclusions and recommendations concerning Chile's report, the five forms of reparations have not been mentioned.¹⁵ Second — and this is directly relevant to the case against the United Kingdom in the European Court of Human Rights¹⁶ — the Committee, echoing some of the problems regarding its scrutiny regarding the universal criminal jurisdiction obligation under Article 5, missed the opportunity in each of the fourteen State Party examinations in 2009 to ask if the State Party has provided for universal civil jurisdiction. Moreover, the Committee missed the opportunity to recommend that States Parties do so, without any improper conditions, such as recognition of claims of state or official immunities regarding torture, statutes of limitation, and *ne bis in idem* applicable to foreign court decisions, even when the foreign proceedings were a sham or unfair. This recognition of universal civil jurisdiction should also apply despite any shams: prohibitions of retrospective national legislation to conduct that was already a crime under international law; dual-criminality, recognition of foreign amnesties, and similar measures of impunity; improper defenses, such as superior orders, duress, and necessity; weak principles of superior responsibility, such as those modeled on Article 28 of the Rome Statute of the International Criminal Court;¹⁷ and a requirement that the defendant had been in the territory of the State Party before a criminal investigation or a request for extradition is made. This is important because most civil law countries permit civil claims to be made in criminal cases or require that the defendant be a resident of the State Party for a civil suit to be filed. Many states also provide for political control over the institution of cases or mutual political assistance requested or granted. Finally, there are weak mutual assistance provisions in national law or in treaties.

It is to be hoped that the Committee will address these concerns as it strengthens its methods of work.

Remarks of Juan Méndez*

Thank you very much for the invitation to speak; it is a pleasure to do so at Washington College of Law and at the invitation of Amnesty International.

It can be very hard to distinguish reparations from remedies, although nominally they should be treated differently. In legal literature, these two subjects are generally discussed together and sometimes even interchangeably. In the case of torture, it is perhaps even necessary to consider remedies and reparations in total, because our goals are to prevent torture, to punish acts of torture, and to make victims whole. It is difficult to do all three of those things with a narrow vision of compensation. I will deal with this in a very general way, by looking at reparations and remedies together, guided by *Torture in International Law: A Guide to Jurisprudence*, an excellent book produced by the Association for the Prevention of Torture and the Center for Justice and International Law in 2008,¹ which shows how broad and diversified the jurisprudence of many different organs addressing these issues has been. Jurisprudential developments give us a lot of guidance not only on all aspects of torture, but also on issues of reparations and remedies for torture. I hope that a comparison of different organs and mechanisms can help the UN Committee against Torture, an organ that has made great contributions to the field of torture prevention, continue to deepen those contributions and coordinate them as much as possible with the jurisprudence of other organs.

I will start by discussing remedies in domestic jurisdiction. *Habeas corpus* is both a remedy and a safeguard, and is a very important preventive mechanism. The Inter-American Court on Human Rights, in Advisory Opinion OC-9 on “*Habeas Corpus in Emergency Situations*,” made it very clear that *habeas corpus* cannot be suspended even in a state of emergency because it not only protects against arbitrary detention, but also against mistreatment, disappearances, unlawful prison conditions, etcetera.² Because of this, it is important that we continue to acknowledge that domestic jurisdictions have a very robust way of dealing with *habeas corpus*. It is not enough to have *habeas corpus* on the books or for magistrates and judges to have a mechanical way of dealing with questions of *habeas corpus*. Instead, it’s important for treaty organs to identify and develop what is required of a judge in *habeas corpus* proceedings: to conduct a robust investigation, to mobilize and go to detention centers, to insist on seeing the victim of an arrest personally and physically.

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All of these things leave room for development in international jurisprudence, so that we can give guidance to domestic courts and treat them as requirements under international law.

The second important remedy is the exclusionary rule, which is well treated in the treaties themselves. We must go beyond the letter of the treaties, because both the Inter-American Convention to Prevent and Punish Torture³ and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴ establish only that a confession obtained under torture is inadmissible. In order for this remedy to be effective as a preventive mechanism, we need to exclude all evidence which the investigator secures through use of torture. In that sense, the “Fruit of the Poisonous Tree” doctrine, developed in American constitutional law, should be our *desideratum*, our goal. We should make it such that it is counterproductive for the investigator to torture, because it will jeopardize the whole prosecutorial case.

I think it is also very well developed and well established by now — although it was not the case 30 or 25 years ago — that torture triggers an obligation on the part of the state to investigate, prosecute, and punish those responsible. As far back as 1980, at the height of the military dictatorship in Argentina, the Inter-American Commission on Human Rights said in a case called *Frigerio v. Argentina*, concerning the treatment of a young girl in my hometown of Mar del Plata, Argentina, that the state was obligated to investigate, prosecute, and punish the perpetrators of the disappearance, torture, and eventual killing

of Rosa Ana Frigerio.⁵ This decision was incredibly pioneering, because at that time, the Commission must have thought it was completely futile — that Argentina would never investigate, prosecute, and punish — but the Commission also said we should never say never. In Argentina today, Ms. Frigerio’s case is still being investigated and prosecuted, and the perpetrators are going to pay for what they did, even if it takes thirty-some years.

This leads us to the prohibition of amnesties, pardons, and other factors leading to impunity. The Committee made a great decision in the case of *Guridi v. Spain* addressing pardons to Civil Guard torturers.⁶ I also want to highlight the Inter-American Court of Human Rights decisions in *Barrios Altos v. Peru*⁷ and in *Almonacid-Arellano v. Chile*,⁸ where the Court not only said that all obstacles to prosecution for crimes of torture have to be removed, but also that the state is obligated to deprive these obstacles of any legal effect in the domestic jurisdiction. Interestingly, these decisions have been followed. For instance, in Peru and in Chile, domestic jurisdictions felt bound by these decisions and deprived amnesties, pardons, statutes of limitations — of all legal effects — so that these major crimes can be punished.

Finally, we must insist that torture give rise to both civil and criminal remedies in domestic jurisdictions. I recently read that as far back as 1939, the eminent jurist Roberto Ago, when he was a Special Rapporteur of the International Law Commission on State Responsibility, believed that when it comes to certain international crimes, civil and criminal jurisdictions must exist together. I read this in a separate opinion by Antônio Cançado Trindade in the *Myrna Mack* case against Guatemala.⁹ The European Court of Human Rights has also made it clear that there are some violations for which the main remedy, or at least the indispensable remedy, is criminal prosecution.¹⁰

In discussing reparations at the international level more generally, we must embrace the idea that reparations have to be integral, holistic, and comprehensive, and that we cannot let states pick and choose what kind of reparations are offered to victims. This was very clearly established more than twenty years ago in a report by Theo van Boven,¹¹ who was Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, and has also been reaffirmed in the reports of Rapporteurs Joinet¹² and Bassiouni¹³ and more recently, Diane Orentlicher,¹⁴ all on the same subject. It seems to me that in the case of torture, as with other crimes against humanity, the state is obligated first to the truth, second to justice, third to reparations, and fourth to institutional reform, including vetting or excluding from newly democratic forces those people who are known to have committed atrocities like torture.

Specifically addressing compensation in cases of torture, if the victim has survived, it is relatively possible to apply the principle of *restitutio ad integrum*; that is, to restore the things as they were before the episode. Here, I want to spend a minute on the notion of punitive damages. When Claudio Grossman and I were representing the victims in the *Velasquez Rodriguez* case,¹⁵ we went out of our way to persuade the Inter-American Court to establish punitive damages for the phenomenon of disappearances. We did this, in part, because disappearances were still raging in many parts of Latin America and we wanted a weapon or an instrument by which we could dissuade countries from engaging in this practice. We got an *amicus curiae* signed by many Latin American and European jurists saying that punitive damages were warranted because disappearances and torture within disappearances were such wanton and cruel acts. Unfortunately, the Court did not agree with us; they basically said in one sentence that punitive damages were not a part of international law.

In the separate opinion I just mentioned by Antônio Cançado Trindade in the *Myrna Mack* case,¹⁶ he goes against the Court and says that punitive damages are a part of international law and that they should be contemplated. He defines punitive damages somewhat differently than we did in the *Velasquez Rodriguez* case. He basically says that what the Court has been doing in establishing the obligation to name schools after the victim, to name streets, to express public apologies, or even to pay damages to communities like in the *Aloeboetoe* and *Moiwana* cases against Suriname,¹⁷ can be defined as punitive damages. Maybe he is right; maybe that is the way to go. He does say, and I agree with him, that we have to avoid the sensation that we can create windfalls for victims of torture, because then the organs will be accused of being an industry of reparations. He has a very important point. But, the question of whether punitive monetary damages are necessary to dissuade countries or states from engaging in patterns of deliberate, systematic, wanton crimes is still open.

I would like to finish with the question of practices and patterns, an issue that needs to be explored a little further. When torture is conducted as a matter of an ongoing state practice and pattern, or it is very systematic or widespread, it constitutes a crime against humanity and the Rome Statute of the International Criminal Court clearly makes it a punishable crime in international law.¹⁸ Some of these organs have called it “aggravated torture.”¹⁹ In this sense, it is important to note that the European Court of Human Rights was regrettably very hesitant to find patterns of violations in the 1990s, although this may have changed in more recent jurisprudence, but the Court always tried to find a violation of the prohibition of torture on a case-by-case basis. I think that is a start, but when torture is state policy, we need more than that in order to make it stop and treating this as individual cases may not do the trick. I am very grateful for your time.

Remarks of Lorna McGregor*

Thank you to the Washington College of Law and Amnesty International for inviting REDRESS to participate in this event.

I am speaking from the perspective of an organization with a mandate to seek justice and reparation on behalf of torture survivors; we very much take a victim-orientated approach. In this respect, the Committee against Torture, as the authoritative interpreter of the Convention, is one of the key bodies to which we look for guidance on the scope and implementation of the right to a remedy and reparation. When we look at the Committee's concluding observations and individual views on cases, the more detail that we see, in terms of what the standards are on the right to effective remedy and full and adequate reparation, the better. For states, greater detail assists in knowing concretely what they must do to comply with the Convention. For us, greater detail is particularly useful in relation to implementation and measuring whether or not a particular state has complied with the Committee's views and the Convention. We increasingly see this detailed approach in the Committee's practice. For example, in a number of cases including *Guridi v. Spain*,¹ to which Juan Mendez already referred, and also a number of cases against Tunisia.² We increasingly see the Committee looking at Article 14³ and interpreting it as not only requiring fair and adequate compensation, but the Committee increasingly refers to reparation as requiring restitution, rehabilitation, and measures to guarantee non-reoccurrence.

Equally, in the Committee's concluding observations, as Christopher Hall mentioned in relation to Chile, we again see a more comprehensive approach to the question of reparation.⁴ For myself, as the lawyer of an individual who was tortured in Chile under the Pinochet regime, who is now based outside of Chile and who is seeking justice for his torture, these concluding observations were incredibly helpful in addressing the extent to which Chile satisfies the right to reparation under the Convention in a detailed manner. For example, the observations not only included concrete statements on the incompatibility of the amnesty decree that is still in force in Chile with the right to reparation under the Convention, but the Committee also went further and looked at the actual practice in Chile. The Committee acknowledged that in some cases the courts have not applied the amnesty decree, thereby enabling some victims to bring their cases before the courts. However, the Committee noted that the existence of the decree still means that it is at the discretion of the Chilean courts as to whether to apply the amnesty. The Committee also pointed out that, in some of these cases in which the amnesty is not applied, the amnesty decree has adversely impacted the victim's right to reparation nonetheless, as the Chilean Supreme Court



has reduced penalties on the basis of the amnesty decree. In the observations, the Committee commended the health care systems available in Chile as part of rehabilitation but highlighted the lack of them for victims who live outside Chile, like my client who was forcibly expelled from Chile under the Pinochet regime. This nuanced and detailed approach in the Committee's concluding observations has been incredibly helpful to us as victims' representatives.

The Chilean example is very much what we are looking for from the Committee: a very practical, detailed, and comprehensive analysis and interpretation of the Convention's requirements on the right to an effective remedy and full and adequate reparation. This includes not only the substantive aspects of the right to a remedy and reparation, but also the procedural dimension of access to justice and the compatibility of procedural barriers such as amnesties and immunity, and the practical requirements to ensure that victims can exercise their right to a remedy and reparation. For example, as Florence Simbiri-Jaoko from the Kenya Human Rights Commission pointed out in the first panel, victim and witness protection is a necessary component of the right to a remedy and reparation. The integral nature of victim and witness protection to the right to a remedy and reparation was also raised by the Committee in its last state party report on Kenya.⁵

Finally, the institutional dimension to the right to a remedy and reparation is also an important issue. In this respect, the Committee has been quite good at examining the compliance of reparation programs, particularly within a transitional justice

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context, with the right to a remedy and reparation under the Convention. The more we can understand about how and when these reparation programs comply with the right to reparation and remedy under the Convention, the better. For example, the Committee often references the need for states to implement the findings of their national human rights commission on compensation and other forms of reparation. In this regard, it would be very useful for us when trying to use these recommendations if the Committee could further develop its analysis and reasoning as to why states are obliged to implement the findings of national human rights commissions as quasi-judicial institutions.

All of these points come from my perspective as a representative of torture survivors and my interest in understanding the Convention's requirements on remedies and reparations in order to strengthen our engagement with the Committee with the goal of having its observations and views implemented. This is also important when we are litigating and representing torture survivors outside of the Committee context in order to ensure that the Committee's decisions are used as a key reference point for the interpretation of the Convention. For example, as Christopher Hall mentioned, when we are litigating before the regional courts or at the national level, we increasingly face questions regarding what the absolute prohibition of torture requires of states, particularly in terms of positive obligations. We look to the Committee to understand what all of these provisions mean, and the more citation to its own jurisprudence, the *travaux préparatoires*, and other international and regional tribunals' jurisprudence on the same points that are included in Committee decisions, the more difficult it will be for other courts to dismiss the Committee's interpretation of the Convention. This may assist in overcoming commentary such as that advanced by the British House of Lords in the case that Christopher Hall already mentioned, *Jones v. Saudi Arabia*,⁶ in which it dismissed the Committee against Torture findings on Canada as:

[N]ot an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.⁷

The more that jurisprudence is cited in the Committee's recommendations and concluding observations, the more the *travaux préparatoires* are engaged, and the more other regional and international jurisprudence is included in the decisions, the harder it will be for courts to say that there is no legal analysis and that this is not an international legal decision, even if the body is considered different from a regular court.

In the short time left, I would like to flag two particular issues on reparation that I think are interesting from the Committee's perspective. The first is that we often focus on Article 14⁸ as the key provision for reparation within the Convention. Of course,

it is one of the crucial provisions, but as Claudio Grossman mentioned at the beginning of this conference, Articles 12⁹ and 13¹⁰ are also very important from a victim's perspective in understanding investigations as part of the right to reparation. This may be an area which the Committee could develop further when it is looking at the state's duty to investigate not only as leading to other forms of reparation,¹¹ but also as a means to realize the victim's rights to participate and to the truth. In a number of cases where the Committee has looked at this issue, it has commented on the state's failure to inform the victim of the results of the investigation, characterizing this as problematic in that it prevents them from bringing private prosecutions.¹² However, it would be interesting if the Committee could develop this analysis further to look at why the failure to inform the victim of the results of investigation in and of itself violates the victim's right to reparation.

Since we are short on time, I am going to move quickly to the issue of rehabilitation, which I think Nora Sveaass is going to discuss more fully next.¹³ From our perspective, this is an issue which it is particularly important, and not only the Committee against Torture, but also other bodies, should flesh out what this right entails. The drafters of the Convention were leaders in recognizing the right to rehabilitation when they specifically included it in Article 14. The Committee frequently refers to this right in its jurisprudence, asks for information on rehabilitation services, tries to find out which victims are benefitting from these services, and encourages states to provide rehabilitation programs. But, the difficulty is that neither the text of the Convention nor the *travaux préparatoires* explain what rehabilitation means. We therefore need to understand this more fully in order to implement this right in practice. I think it is quite clear that the right includes medical and psychological services, but there are other broader services that might be included.

The Convention on the Rights of Persons with Disabilities is quite helpful in understanding that this right also relates to mental, social, and vocational abilities of different victims, including torture survivors, to fully participate in all aspects of life.¹⁴ It would be interesting for the Committee to look into these other forms of rehabilitation services in addition to the medical and psychological services that are normally understood to be included. It would also be interesting to look at what Chair Claudio Grossman mentioned earlier regarding to whom the right applies — not only the direct torture survivor, but also the next of kin. Finally, it would also be helpful to understand what a social service actually is when it does not include employment, housing, education, and other similar types of services.

On that note, I think that it is very important for states and everyone who is working on these issues to understand that the right to rehabilitation is not extinguished when organizations provide humanitarian assistance. This argument is often advanced as a means to avoid providing rehabilitation as part of reparation. For example, some states might claim that as victims have or have the possibility of receiving rehabilitation services as part of a national health system or from a voluntary organization,

they do not need to provide for it. This is incorrect and requires underscoring: states are obliged to meet the victim's rehabilitation needs as part of reparation, and consequently this would be a helpful issue for the Committee to look at.

As we are short of time, I will end here, but I thank the Washington College of Law and Amnesty International again for organizing this interesting conference.

Remarks of Nora Sveaass*

Dean Grossman opened the conference by saying that reparations for victims of torture are more an exception than a rule. I will continue by saying that even where reparations are provided, rehabilitation is the exception and not the rule.

I will address rehabilitation of victims of torture and other ill-treatment, both as a form of reparation and as a form of intervention or assistance understood in terms of necessary healthcare to persons exposed to torture. I will do this for several reasons: first, because it is an issue of high priority; second, because rehabilitation seems to be the least clearly defined form of reparation; and third, because rehabilitation raises a lot of complex questions in relation to the legal framework, to the context in which these rehabilitative services take place, and to the motivation and situation of the tortured person him or herself. Finally, my perspective is that of a clinical psychologist, regularly engaged in work with persons who are survivors of torture. I will take the opportunity to emphasize that rehabilitation of torture victims is unthinkable and undoable without a wider and multi-professional approach, and most often it involves a process where time is of the essence.

I have made a distinction between rehabilitation as a form of reparations and as necessary health care and social assistance, not because they are separate phenomena. On the contrary, this distinction is intended to point out that they may relate to different phases in the process, from infliction of torture to justice and reparations being fulfilled.

Persons who have been subjected to torture, whether they remain in the country where the torture took place or leave to another country as refugees or asylum seekers, will frequently suffer from severe mental and physical consequences, and more often than not are also burdened with problems of a social, practical, and economic nature. We are often confronted with



information and documentation about effects of torture in the form of physically detectable signs and reduced ability for movement and action. But, less visible and often a lot more difficult to document and cure are the scars experienced as a strong sense of shame, guilt, worthlessness and humiliation; feelings that one cannot be regarded as a human being with rights and dignity; a constant lack of trust in others; and problems relating to others after torture and systematic destruction of human contact and communication. Combined with intrusive memories, nightmares, and a consequent lack of sleep, the challenges of everyday life may be seem almost impossible to overcome. One's intellectual as well as sexual identity is often extremely threatened by confusing, degrading, and dehumanizing methods of inflicting pain, directly attacking mind and sexuality. All this may result in a sense of never again being able to work or practice in that which once was one's role, work, or profession. It may include feelings or even convictions of not being able to be a good parent or spouse anymore, or never again being able to concentrate enough or being capable of, for instance, driving a truck, teaching children, or working as plumber, journalist, or doctor. This again may lead to years of inactivity and pain, a process which in itself is destructive and debilitating.¹

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I am currently working with three different individuals, all of whom were subjected to torture and whose experiences and reactions clearly demonstrate our concerns. One of them is a former physical education teacher from Iraq, imprisoned and tortured for months, suffering from pain and nightmares. The main focus of the therapy is for him to believe that he can once more train and use his body. The other is a war-exposed female hairdresser from Mostar, Bosnia, plagued with intrusive memories about what she saw and experienced, who now slowly gets back to work two days a week, followed closely by therapy. The third is a mother of five from Iran, herself a rape victim, who has lost a son in war and is struggling to be a good mother and grandmother; and to do this, has gone through a firewall of shame and resistance. And, all of this continues for years after the torture has taken place.

I raise these examples to illustrate what torture does, which has very important repercussions for the issue we are discussing here today: how do we ensure that victims of torture receive reparations? And, how do we ensure that their needs and voices are listened to with respect to rehabilitation, including both health and social assistance? In this discussion we must constantly remind ourselves that we may be facing individuals who, despite their culture, background, or socio-economic status, may be in a situation in which standing up for themselves is the main difficulty, a common ramification of torture.

The cases we discuss and often refer to — where wrongs are attempted to be righted through cases that finally reach the court and persons who after many years finally obtain reparations of different kinds — are not numerous. In addition, these cases often follow a long period of intense struggle and sacrifice, and are about those who have very good support teams or whose iron-will has survived torture and humiliation.

For too many people with a torture background, even *presenting* their case or story in court is a heavy and painful process. A friend and colleague, who has served as psychologist working with the witness support program for the International Tribunal of Former Yugoslavia has told me about nights and days with persons who are terrified, ashamed, reluctant and in doubt as to whether exposing rape, humiliation, and suffering is worth the price.

So, when we discuss what we all believe in and consider a basic right, namely justice and redress to survivors of torture, we must also take these considerations into account, and strengthen programs of witness protection and witness care. To ensure justice and the different forms of reparations, we must also ensure that respect, support, and care *prior to*, and respect, support, and care *after* cases of torture are dealt with, a process that necessitates multi-professional action.

WHAT IS REHABILITATION?

Many different definitions of rehabilitation exist, some of which I will discuss here. Personally, I prefer the direct transla-

tion from Latin, meaning “making fit again.” The World Health Organization defines rehabilitation for persons with disabilities in the following way: a process aimed at enabling them to reach and maintain their optimal physical, sensory, intellectual, psychological, and social functional levels. Rehabilitation provides disabled people with the tools they need to attain independence and self-determination. Rehabilitation can also be understood as the process of restoration of skills by a person who has had an illness or injury so as to regain maximum self sufficiency and function in a normal or as near normal manner as possible. Rehabilitation is sometimes referred to as psychological and medical care, treatment, and training; other times it includes social services, employment, education, and financial and legal assistance. In light of these different understandings of rehabilitation, how can we ensure that persons who have exposed to destructive treatment, such as torture, are awarded the kind of assistance they will need in order to recover as fully as possible?

Rehabilitation as reparation is something that is awarded on the basis of a decision or ruling. Rehabilitation in international human rights law was first and most clearly formulated in Article 14 of the Convention against Torture as “redress . . . and fair and adequate compensation, including the means for as full rehabilitation as possible.”² A recent report from REDRESS, *Rehabilitation as a Form of Reparation under International Law*,³ gives a very good and comprehensive review on the history of rehabilitation in treaties, declarations, and conventions on human rights, and in particular reparation.

There are very good reasons to believe and argue that this particular form of reparation and the problems involved with it not only relates to questions of definitions and delineations, but more importantly, to the lack of mechanisms to ensure that rehabilitation happens, the lack of will to give rehabilitation priority, and the lack of resources and available, competent services.

REHABILITATION AND ARTICLE 14

The litmus test regarding State Party compliance with Article 14 is, of course, the questions raised by the Committee against Torture and the answers given by each State Party whose report is under consideration.

The questions are frequently formulated like the following:

- What measures are in place to secure that persons subject to torture are given redress, including rehabilitation?
- What kind of rehabilitation, if any, has been awarded to particular persons (often named cases) after their exposure to torture or ill treatment?
- What has been done in the area of rehabilitation and redress? What do the statistics say?

Most of the concluding observations from the last few years include formulations pointing to a lack of redress, a near

absence of rehabilitation provided and rehabilitation services in place, and weak accountability mechanisms. The following are examples from some concluding observations:

- Continue to strengthen efforts in respect of compensation, redress and rehabilitation in order to provide victims with redress and fair and adequate compensation, including the means for as full rehabilitation as possible.⁴
- Provide compensation, redress and rehabilitation to victims, including the means for as full rehabilitation as possible and provide such assistance in practice.⁵
- [There is a]lack of State programmes for rehabilitation of [torture] victims.⁶
- Ensure that in practice redress, compensation, and rehabilitation are guaranteed to victims of torture.⁷
- Even where funds are provided to cover a good rehabilitation, it often does not happen.

Some of the relevant questions that arise are: What may be the reason(s) why rehabilitation as reparation seems to be an area where compliance with the Convention is particularly difficult? Why does rehabilitation so often not take place, neither as reparation nor as needed health care? To address these questions we must also ask: Are there available and competent services to do this work? Are they trusted by the person in question? Will being a user of rehabilitation services present new problems to the person?

In order to reflect upon these questions, I need to move to a more general discussion about rehabilitation, addressing what characterizes rehabilitation as necessary to victims of torture and the necessary conditions that must be in place to bring about effective rehabilitation.

A MULTI-DISCIPLINARY APPROACH TO REHABILITATION

I will now touch upon some factors which contribute to the feasibility and effectiveness of rehabilitation. Among these are motivation and preparedness on the part of the survivor, assessment and documentation, able and available services, as well as coordination, follow up, and evaluation.⁸

MOTIVATION

My experience, and the experience of many, is that justice is not necessarily the top priority for victims of torture, especially not at the outset. Rather, the focus centers on putting their lives back together again; their ability to get up in the morning, relate to their families, and see themselves in the mirror; and solving practical problems relating to housing, economy, and security. The public discourse on the issue of justice and accountability for crimes against humanity and the groundwork laid by so

many NGOs fighting impunity will probably bring about some change and raise awareness, not only in the general public, but also to make justice and reparations a faint, but possible, option in the eyes of torture victims themselves.

However, the persons who are made so vulnerable and disempowered by torture will very often need psychosocial assistance before they can even think about reporting violations to a more formal body or claim accountability, justice, and compensation. To embark on such a process rests on the assumption that one is sufficiently worthy and respected to be able to take these steps. The fear of being exposed, or not taken seriously, or of losing what is left of one's dignity may be quite paralyzing, and it is here that psychological and medical care may be a prerequisite. There are many examples of persons who actively refuse to enter into any kind of process of reporting, denouncing, or bearing witness, but who, after having received help, find themselves in quite a different position with respect to pursuing their case. Thus, the process of receiving assistance is important; it may be a very stimulating and morally supportive experience and to many victims, it may serve as a vitamin of unbelievable dimensions.

TIMING

The issue of timing, that is when rehabilitation and assistance take place, is also an important consideration. Assistance and rehabilitative measures should often be available at an early point after torture in order to provide the courage and willingness to go on with a case and to lay the ground to make further steps possible. An important discussion is thus, what kind of services can be provided before cases are settled? How can psychosocial support and urgent medical assistance be provided while cases are being prepared?

ASSESSMENT

The next crucial point — which I think is an absolute prerequisite — is to obtain, as early as possible, documentation and an assessment of the damage suffered after torture. Here, the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*⁹ is an important guideline. It is of value both to assess the needs for treatment and rehabilitation, and to document signs of torture that may be useful for both reparations and the evaluation of protection needs.¹⁰

PROVIDING CARE

Finally, health services and the identity of care-providing agents must be considered. Is such a system in place, that is, are the rehabilitation services for torture victims established in the public health care systems as part of an integrated health care and in the same way as services for other health problems, such as in cardiac care or cancer treatment? The answer is, of course, often “no.” There may be one forensic doctor here, a gynecologist with special expertise on rape victims there, or

physiotherapists who have specialized in training feet that have suffered falanga in special centers. But more often than not, these services are not coordinated around the care for victims of torture, so such services may be very hard to obtain. For those in need of such services or those trying to coordinate this kind of assistance, it may often seem like detective work to get the necessary overview and the necessary implementation.

WHO DOES REHABILITATION TODAY?

Today, most of the rehabilitation services to victims of torture are performed by national and international NGOs. Some NGOs that have worked during times of crises and torture envision their work as part of a collective reparation program, or collective actions to reconstruct communities and victims. But, this is not strictly speaking a form of reparation. Often, it forms part of a wider post-conflict transition that focuses, for instance, on the fight against impunity. Chile is an example of a state that has employed NGO services to provide rehabilitation as part of reparation.

The best known network for organizations working with rehabilitation worldwide is the International Rehabilitation Counsel for Torture (IRCT), an umbrella for more than 140 independent torture rehabilitation organizations in over seventy countries.¹¹ These organizations treat more than 100,000 torture survivors and their families every year. In addition to these, there is a number of rehabilitation centers not linked to IRCT, particularly in Europe.

Most of the existing rehabilitation organizations worldwide are supported by different funds, including the United Nations Voluntary Fund for Victims of Torture¹² and the European Union. Funding represents a constant challenge to the centers and the important work they are doing in the field of therapy and rehabilitation for torture survivors. In this context, the discussions within the European Union in relation to priorities in the future — whether to focus more on prevention than on rehabilitation — is of special interest and concern to the existing centers.

There are few places where the public health care system has taken on a special responsibility to perform this work. Norway, Denmark, and The Netherlands are some of the few countries where there has been a political aim for mainstream services to cover torture victims. In some countries, for instance in Germany, NGOs working in this field are partly supported by the public sector and partly by donations, whereas other centers are fully based on donations from sources other than the government, such as the Medical Foundation for the Care of Victims of Torture (MF), a registered charity established in 1985 and the only organization in the UK dedicated solely to the treatment of torture survivors. Since its inception, almost 50,000 people have been referred for help. In 2008, MF received 2,025 new requests for help from 79 countries, with significant numbers from Sri Lanka, the Democratic Republic of Congo, Sudan, and Iran.¹³

Further, the question remains as to who is responsible for providing the necessary resources for rehabilitation, both as health care and as part of reparations. The torturing state and the state in which the tortured person lives, the discussion on Article 14, and geographical limitations and restrictions are of the essence. The Directive from the European Council, defining the standards for reception of asylum seekers in Europe, has a special emphasis on the reception of asylum seekers with special needs, including victims of torture and rape, and the need to provide them with special care and health services.¹⁴ Our concern is not only who should pay, but also who takes responsibility that the services exist and are set in motion for the benefit of persons who need them.

Even where centers for health care exist, the victim may not trust them. When asylum seekers with a torture background are repatriated, because there seems to be no need to treat them abroad since available psychologists are working in their hometown, the context may not be right. Receiving therapy for torture in the vicinity of where the offenses occurred, with the added fear of meeting the responsible in the streets, may do more harm than good.

All experts in the field of torture rehabilitation underline the importance of coordination, collaboration, and the proximity of services, which over time will bring about stability, security, and predictability.¹⁵

CONCLUSIONS

To summarize, the important challenges before us, in addition to defining rights, obligations, and mechanisms to ensure reparations, are:

- Assessment and documentation of torture at the earliest possible stage;
- Psychosocial assistance and urgent medical care while waiting for justice;
- Establishment of available, professional, and competent services to provide rehabilitation. This implies that States Parties to the Convention must develop a system with necessary multi-professional services;
- Systems of referrals and coordination detailing clear responsibilities as to how to follow up with victims of torture;
- Monitoring and securing active implementation of services;
- Establishment of family-oriented assistance;
- Follow-up procedures;
- Evaluation of services and out-come assessment after treatment.

Thank you for your attention.

Closing Remarks from the Moderator

I would like to thank all of the members of the panel for their superb presentations. We heard from Christopher Hall about the checklist or roadmap outlining what the Committee should be doing, and received numerous suggestions regarding how to maximize the clearinghouse function. We heard from Juan Mendez on jurisprudence, comparing the Committee against Torture with the Inter-American system. Lorna McGregor discussed the importance for victims to have consistency, and she suggested that we look at the case of Chile. This raises an interesting issue, namely, how the quality of

lawyering by NGOs and states can influence the Committee's proceedings. Then we heard from Nora Sveaass about the psychological impact of torture and other ill-treatment and the importance of rehabilitation together with the role of the Istanbul Protocol.

Let me reiterate the significance of the insightful discussions we have had today. The Committee against Torture simply does not have enough time to think strategically, and I am certain that your valuable reflections will be appreciated by all. **HRB**

Endnotes begin on page 54.

