

2010

# Panel III: Interpretation and Implementation of the Convention against Torture Article 22 (Petitions)

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### Recommended Citation

Gallegos, Luis, Barbara Jackman, Francisco Quintana, Julia Hall, and Ann Jordan. "Human Rights Brief 17, no.4 (2010): 41-52.

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## PANEL III: INTERPRETATION AND IMPLEMENTATION OF CONVENTION AGAINST TORTURE ARTICLE 22 (PETITIONS)

### Opening Remarks from Ambassador Luis Gallegos,\* Moderator

Ladies and gentlemen, good afternoon. I have the honor of being the moderator for this panel on the interpretation and implementation of the Convention against Torture Article 22. We have a very distinguished panel with us today.

It is a pleasure to be here and talk about Article 22 interpretations. I will start the ball rolling by saying that it is an honor for me to be a moderator of this panel because. Article 22 has become a very important piece of the work of the human rights system by which individuals can petition against states. I think that the availability of such individual petitions is a remarkable advance in the human rights field.

Of course, for an individual petition to be admissible, there are certain requirements that we will be discussing. But, fundamentally, the Committee against Torture has made an enormous effort to be able to handle the very human aspects of the issues that we deal with. As an expert of the Committee, I think that the issues reaches home when one individualizes a person and is able to identify a specific case where there has been torture, inhumane, and degrading treatment.

With that being said, let's give our speakers the floor. Thank you.



### Remarks of Barbara Jackman\*\*

I will briefly address the complaint system under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment and then I will address the difference between torture and cruel, inhuman, and degrading treatment and make a case for broadening our understanding of that kind of mistreatment.

First of all, states who that have ratified the Convention can also, under Article 22, declare that they are prepared to have the Committee Against Torture consider complaints submitted to it by individuals from within that state who claim to have been

tortured or subjected to cruel, inhuman, and degrading treatment or who claim that their removal from the state to another would put them at a substantial risk of being tortured in the other state.<sup>1</sup> A person is entitled, although not anonymously, to make a complaint to the Committee in such instances. Not all states have agreed to the complaint process. The United States has not; Canada has. Individual complaints to the Committee from persons in Canada have been made, some successfully. One of the well-known ones is *Kahn v. Canada*, where the Committee decided Kahn, who feared retaliation from Islamic fundamentalists, the Pakistan Inter-Service Intelligence, and the government of Pakistan for his affiliation with the Baltistan movement to join Kashmir, should not be removed to Pakistan from Canada.<sup>2</sup>

Once a person makes a complaint, the Committee must decide whether it is able to take jurisdiction. There is no particular form that the complaint must take — submissions can

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be in letter form or any form the author chooses — however, certain information must be included so the Committee can decide if it has jurisdiction to hear the complaint and if it has merit. The complaint must set out the person’s name, address, age, and occupation; the name of the State Party against which the complaint is being made; and the reason why the complaint is being made. If the person has had assistance in preparing the complaint, this should be noted. As well, the person must note the provisions on which the complaint of torture or subjection to cruel, unusual, or inhuman treatment is based, often Article 16 or Article 22.<sup>3</sup> To substantiate that provisions have been violated, the author must outline the facts of the case and provide documentation. For instance, if there are medical reports detailing the type of treatment the person has been or is receiving, they should be provided, even if they are after the fact, which they often are since torture does not usually occur with doctors present at the time.

There is a requirement that domestic remedies be exhausted before a person can make a complaint to an international treaty body like the Committee against Torture. The person must have already gone through the court system in her own country and either exhausted the available remedies or be able to show that no effective remedies are available.<sup>4</sup> For this purpose, unreasonably delayed remedies can be considered to be no remedies at all. Because of this “rule,” the complaint must show what steps have been taken before the courts of the complainant’s country. For instance, in Canada, if the Supreme Court of Canada refuses to hear the case, the complainant has exhausted her remedies. That order would be included with the complaint to demonstrate to the Committee that the requirement to exhaust domestic remedies has been fulfilled.

The easiest means of fulfilling this requirement is generally to actually exhaust domestic remedies. However, there are instances where effective remedies just do not exist in the state. One example would be where a person who claims to have been tortured complains to the investigating prosecutor, asking for an investigation and the laying of charges against the person, and the investigating prosecutor does nothing for three or four years. If there is no judicial remedy to compel prosecutor to complete the investigation and lay charges, then this would likely be considered to be an ineffective remedy. The complainant would not be required to wait for an answer but could file a complaint directly with the Committee, setting out in the complaint why the remedy would be ineffective in the home state.

Finally, a complaint to the Committee should indicate whether or not the complaint has been made anywhere else. This is important because there are numerous treaty bodies, like the United Nations Human Rights Committee and the Committee against Torture, where one can make a formal complaint, and under the corresponding Convention, such a Committee can consider the complaint if the state has made a declaration that they will be bound by the competence of that Committee. Once a complaint is brought before one such treaty body, an individual is precluded from bringing the same claim in another



treaty body. There are, however, other informal, non-treaty body complaint mechanisms which do not preclude a complainant from bringing a formal claim before a treaty body. Examples of these informal mechanisms include bringing a complaint to the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or to the Working Group on Arbitrary Detention.<sup>5</sup> Often those agencies, even if they are not formalized ones, can be helpful in bringing to light wrongdoings in a particular state, and will not preclude the person from bringing a complaint under the Convention against Torture. There is no requirement for a state to agree to permit complaints by those within its jurisdiction to these kinds of agencies, so that any aggrieved person may initiate a complaint.

An important consideration before filing a complaint is to consider the scope and nature of the complaint in order to determine the best venue in which to bring it. For instance, with a complaint concerning torture or where the person is facing deportation to a country where they believe they may be tortured, and there is not an effective remedy in the state, the Committee against Torture may well be the appropriate body to approach. But, in other instances where an individual wants to complain as well about fair trial rights, for example, the UN Human Rights Committee or the Inter-American Commission may be more suitable venues, because the complainant is not limited to addressing only the issues in regards to torture and cruel, inhuman, and degrading treatment, but may also raise broader issues under the International Covenant on Civil and Political Rights, for instance. From what I understand about the Committee against Torture, it is largely focused on the facts of a particular complaint. For example, in addressing the question of whether Canada should send someone back to her country to face torture, if the individual’s attorneys think the facts of

the case are very strong, they will likely bring the complaint before the Committee against Torture. Where the person has not been treated fairly in the process and where they face a risk of torture, the attorneys would probably make a complaint to the UN Human Rights Committee, allowing them to put everything under one umbrella.

The Committee's proceedings are closed. Once the Committee has heard from a state, which is given six months to reply, it will decide whether the complaint is admissible. In addition to the requirement that domestic remedies be exhausted and that the complaint not have been also filed before another treaty body, the Committee must reject any complaint which is anonymous, is an abuse of the right of submission, or is incompatible the provisions of the Convention. If a complaint is found to be admissible, the Committee is then free to decide whether a state has breached the Convention against Torture. It will take further submissions by the complainant and the state before rendering its views.

However, succeeding before the Committee does not necessarily mean the state is going to comply with the Committee's views. There are serious problems of non-compliance with the Committee's rulings. This occurs not only where a state refuses to implement the Committee's final decision on the merits, but as well when the person requests interim measures. Often, with removal or death penalty cases, for example, the complainant may request of an international treaty body such as the Human Rights Committee or the Committee against Torture, that it grant interim measures — in essence an international injunction. So, for example, if the person is being deported to a country where she claims to face a substantial of torture, a request can be made to the Committee to ask the deporting country not to remove the person while that the complaint is being reviewed.

In the UK, the Judicial Committee of the Privy Council found that where someone has made a complaint pursuant to a formal treaty before an international or regional treaty body which has granted interim measures, and where that state's constitution provides for due process, it would be wrong for the state to remove the person until the complaint is decided.<sup>6</sup> I took a case up to our Supreme Court of Canada on that issue.<sup>7</sup> Having lost at the first level, there was a split court all the way up to leave in the Supreme Court. We did not get leave in that Court, but for the first time in Canadian judicial history of which I am aware, there was a split panel on the leave refusal: one judge dissented being in favor of leave being granted. The majority opinion in that case was that, even where there is an international remedy and where the treaty body has asked for Canada to comply with interim-measures, as a matter of fundamental justice, Canada is not required to let the person stay until the complaint is decided by the treaty body. It is likely that this question will be taken up again if an appropriate case comes up. The one thing I have learned in the many years I have practiced is that regardless of a court or Committee ruling, you just keep trying and eventually someone will see the light. That is how the law advances and develops.

I think it is important to use the Committee for a number of reasons. One important one is that it creates a body of law that can be used in domestic proceedings. In the cases in which I have been involved in Canada and which raised fundamental human rights, we used decisions, views, and reports of the Committee against Torture, the UN Human Rights Committee, and other treaty bodies. These documents may be considered soft law in a sense, but they influence courts. Using the Committees to develop a strong and vibrant body of international law that assists in promoting human rights domestically is essential. Another reason is that, notwithstanding their unenforceability, the views of the Committees can have an impact on state practice. Even states which regularly commit human rights breaches do not like to be called to account internationally.

In addition to outlining the complaints process, I wanted to touch upon several areas where there is a need to strengthen the practice of the Committee. One relates to the distinction between torture and other forms of cruel, inhuman or degrading treatment. In preparing to speak at this conference, I reviewed some of the Committee's recent decisions. Taking three cases recently considered, it was difficult to see clear line between what is torture and what is cruel, inhuman, and degrading. In the one case, *Saadia Ali*, where the person was found to have been tortured, she was severely mistreated, including that she was hit and slapped, had her clothes ripped off, and thought she was going to die.<sup>8</sup> In the other two cases, *Osmani*<sup>9</sup> and *Keremedchiev*,<sup>10</sup> the victims were also severely treated, including being beaten — one man had blood in his urine — but their treatment was determined by the Committee to be cruel, inhuman, and degrading treatment. The Convention against Torture defines torture, but does not define cruel, inhuman and degrading treatment. One of the best sources for discerning what is cruel, inhuman, and degrading and what is torture are the judgments of the European Court of Human Rights, which has a more developed body of law around the issue. It is important for the Committee that it advances an understanding of the law so that its decisions are not just rooted in the facts but contribute to a deeper kind of analysis of the problem.

A pressing issue which arises in our post 9-11 world is whether to broaden or expand an understanding of torture and cruel, inhuman, and degrading treatment to respond to developing practices of mistreatment or to limit these concepts to more traditional forms of inflicting severe pain and suffering in the hopes that a more narrow understanding of the concepts will spur state compliance. I do not favor the latter view; I think the broader the definitions are, the better, because just as the ways of mistreating people are expanding, so must our definitions.

Arising from this is the question of whether the Committee and domestic courts are sufficiently aware of the forms of severe mistreatment that are being implemented by states. For example, in United Kingdom and Canada, people are not beaten, but nevertheless are being subjected to severe mistreatment under the control order and security certificate systems in these countries, respectively. In both systems, persons suspected of being

terrorists are either detained or subjected to severe controls for an indefinite period of time, including lengthy solitary confinement. In the case of *Hassan Almrei*, he spent more than seven years in solitary confinement in Canada for no reason; the court ultimately recognized that there were not reasonable grounds to believe that he was a member of a terrorist organization.<sup>11</sup> “Reasonable grounds” is defined as something more than a possibility, but lower than a balance of probabilities, one of the lowest thresholds in Canadian law. Consequently, this means that the Canada was unable to prove it was possible that Almrei was involved in any way with terrorism, yet he was held years in solitary confinement before this was finally determined. The individuals subject to indefinite detention and controls in place in Canada and the United Kingdom are unable to cope as the years pass. I have clients who suffer mentally under security certificates. The control orders in the United Kingdom are equally harmful: approximately five of the people on control orders have been in psychiatric institutions. If a person is destroyed, such that some may never be released from a psychiatric institution, it

does not matter that there was no physical injury. This mistreatment is cruel, if not in some instances torture.

It is important to recognize that torture and other forms of cruel, inhuman, and degrading treatment do not necessarily involve hitting someone or, as is becoming typical, using white lights or noise; there are other, less obvious forms. States are becoming very sophisticated. Canada and the UK, I think, are leading the way, and their measures are court approved. It is telling that the Supreme Court of Canada did not find that Mr. Almrei had suffered torture or cruel, inhuman, or degrading treatment when we raised the issue before it.<sup>12</sup> It is likely more difficult for countries, which do not approve of torture or other cruel measures, to accept that they themselves are involved in inflicting them on people. This makes it all the more important to recognize that treatment is cruel, inhuman, or degrading, if not in some instances torture, so that it is stopped now before it develops further and becomes standard practice. Thank you.

*HRB*

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## Remarks of Francisco Quintana\*

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### A COMPARATIVE APPROACH TO PETITIONS AT THE INTER-AMERICAN COMMISSION AND THE UN COMMITTEE AGAINST TORTURE

Thank you very much. I would like to thank American University Washington College of Law and Amnesty International for this fantastic opportunity. Last night, Dean Grossman said that this kind of space is necessary to create an exchange of new ideas between academics, civil society, and members of international bodies. Today I will talk about Article 22 of the Convention against Torture, and Other Cruel, Inhumane, or Degrading Treatment or Punishment<sup>1</sup> from a comparative perspective contrasting the Inter-American system (IAS) and the United Nations system. The Center for Justice and International Law (CEJIL)<sup>2</sup> is a regional NGO whose mission is to achieve full implementation of international standards through the use of tools for the protection of human rights available in the Organization of American States (OAS) and also international instruments. Our approach is a victim-centered one. This means that we are not going to take any steps that are contrary to victims’ interests, even if those steps would allow us to create some new jurisprudence. We work in partnership with human rights defenders and organizations throughout the Americas. As an effort to integrate international standards in torture, CEJIL worked in conjunction with the Association for



the Prevention of Torture (APT) to publish a guide<sup>3</sup> that will help to ensure that international and regional legal norms for the prevention of torture and other ill treatment are universally respected and implemented. Professor Juan Mendez of the Washington College of Law made reference to this instrument on an earlier panel.

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As a first step, we introduced and promoted standards without focusing on the implementation of Article 22 petitions. The literature on this particular mechanism is scarce, and the few books that refer to this Article 22 petition system only address the requirements that must be established. My presentation will compare the different systems to try to decide which organ is the best one in which to present a petition. This is a decision that we face in our work all the time. Some of the questions that we must address are how long the procedure will last; how much knowledge the international body has of the region or the country at issue; whether the jurisprudence on that particular point in the international body is sufficient; and finally which kinds of reparations are available in the particular case. As we analyze these complex issues, we will refer to Article 22 and the correspondent articles of the Inter-American Convention. I will focus mostly in Latin America, because that is where the IAS has the most impact. As Barbara Jackman mentioned, there have been many cases brought against Canada before Committee against Torture: 68 of these cases have been registered. I will not address Canada because this country is not a State Party to the American Convention on Human Rights<sup>4</sup> or to the Inter-American Convention to Prevent and Punish Torture.<sup>5</sup> Nonetheless, I would like to point out that Canada is the third on the list of countries with the most cases before the Committee against Torture.

Now, let's compare the presentation of a petition under both systems. Under the UN Convention against Torture, petitions are regulated by Article 22 and clarified by its rules of procedure. In contrast, in the IAS the American Convention on Human Rights embodies the initial procedure in several articles in more detail than the Convention against Torture. Both instruments recognize a broad concept of access to justice. As Barbara mentioned, in the Committee against Torture, a petition can be presented without any formalities; any person can submit a communication. This is also true for the IAS where the protection is stated in even clearer terms. The American Convention expressly mentions that a petition can be presented by any person or any international human rights organization registered in the Member States of the OAS.

Article 22(1) of the Convention against Torture requires express consent of the State Party through the means of a special declaration, which has been subject to reservations, in order for individuals to present a petition. In the IAS, all states that have ratified the American Convention can automatically present to or be subject to the jurisdiction of, the Inter-American Commission, as the competence of the organ is incorporated in the Treaty. In the case of the Inter-American Court, a declaration similar to the Convention against Torture, Article 22 is necessary in order to recognize the competence of the tribunal. The admissibility requirements of Article 22, paragraph 5 establish that domestic remedies have to be exhausted. This is true for almost any international body that receives individual complaints, but on this issue we can find two main differences between the IAS and the UN system. The UN Convention only

expressly mentions exceptions to this rule when remedies are unreasonably prolonged or are unlikely to bring effective relief to the victim. By contrast, in the IAS Article 26 gives a much broader definition, as well as much broader exceptions to this rule. Jurisprudence both from the Inter-American Commission and the Inter-American Court have expanded these exceptions and clarified the exhaustion of domestic remedies rule. In the IAS, when domestic remedies have been fully exhausted the case must be presented six months after the final notification of a decision that satisfies exhaustion of domestic remedies. In the case of the Convention against Torture, there is no express time limitation for the presentation of a petition in the case of full exhaustion of domestic remedies.

Barbara also mentioned some additional requirements to present a petition: the name, address, and age of the petitioner. This is also expressly mentioned in the IAS instruments, but there is a difference. The American Convention expressly mentions the requirements that a petitioner must fulfill. In the UN system, it is not the Convention but rather Rule 99 of the Rules of Procedure that clearly states the formal requirements that the Secretariat will review. This Rule 99 states that the Secretariat will make a follow-up request if the petition fails to comply with any requirements. Another requirement for admissibility mentioned in both Conventions is that the petition has not been presented to another international adjudicatory organ.

A ground for inadmissibility in both bodies is that the communication is anonymous. In the IAS, it is also stated in Article 46 of the American Convention that failure to comply with certain requirements, such as insufficient facts that support the alleged violation or that a petition that is groundless or obviously out of order, could be ground for inadmissibility. According to the UN Committee, a ground for inadmissibility is that the communication is considered to be an abuse of the right. The UN Committee has considered a communication to be in this latter category when the submission of a matter amounts to malice or a display of bad faith or intent at least to mislead; is frivolous; or the acts or omissions referred to must have nothing to do with the Convention.

Another aspect that I would like to point out in the procedure for torture petitions at the UN level is the fact that there is a very long time limit for states to submit a written explanation in response to a communication that has been transmitted to them. Article 22, paragraph 3 establishes a six-month period for the state to present its written observations. On a first look, this would seem an excessive period of time because of the nature of the crime of torture that is considered by the UN Committee. Although in the IAS time limits appear to be shorter, in practice, almost at every stage of the procedure the Inter-American Commission will give two-to-four months for parties to submit any written observations requested, but the IAS seems to be flexible with minor delays. Nonetheless, in the early stages of the procedure, there is a huge backlog in the IAS that effectively delays initial petitions for up to two years before the Commission even requests information from the state. Thus,



if we take the Commission's backlog into account, the UN Committee's six-month rule does not seem so long.

As Barbara mentioned, there are some stages of the UN Committee procedure that are more clearly defined in the IAS. The IAS has the admissibility stage, the merits stage, and also some follow-up to ensure compliance. Another very effective feature at the IAS is the friendly settlement procedure,<sup>6</sup> which is not present in the UN Committee procedure.

I also want to mention the impact of the UN Committee in Latin America. At present, only twelve states in Latin America have presented Article 22 declarations allowing individuals to present petitions against them to the Committee against Torture. The OAS encompasses 34 Member States, thus the UNCAT covers only 35 percent of countries in Latin America.

According to the most recent survey on the status of communications done by the UN Committee against Torture in November 2009,<sup>7</sup> a summary of the presentation of petitions in Latin America is as follows: only four cases have been reported

against Argentina; one against Argentina; and one against Venezuela, for a total of six cases. In the rest of the countries, Bolivia, Brazil, Chile, Costa Rica, Guatemala, Mexico, Paraguay, Peru and Uruguay, the number of petitions is zero. We have to point out that some of these countries have only accepted the competence of the Committee a couple of years ago. This official information presented just three months ago leads us to ask the question: Why should we in Latin America go to the UN Committee on Torture when we have an Inter-American system that has proven to be effective? Some answers to that question have been debated today and I will just mention one: the cases and the problems that are faced at the international level are different from the ones faced at the regional level, so there can be good complementarity when working with both systems.

However, in conclusion, I can say that when representing victims in the Inter-American region, we recommend going first to the Inter-American Commission of Human Rights. Thank you very much.

**HRB**

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## Remarks of Julia Hall\*

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### THE CONVENTION'S *NONREFOULEMENT* OBLIGATION IN THE CONTEXT OF THE "WAR ON TERROR"

Thanks to Dean Grossman for joining with Amnesty International to host this very timely meeting, and thanks as well to all of the people who organized the event logistics.

In terms of my own work in the national security and counterterrorism realm, there are two individual cases that I am going to discuss today: *Attia v. Sweden*<sup>1</sup> and *Agiza v. Sweden*.<sup>2</sup> They comprise an extremely small but vitally important subset of international jurisprudence that is crucial to the effort to seek accountability for human rights abuses committed in the context of this so-called "War on Terror." The *Agiza* case in particular, I would argue, is a seminal case in terms of that type of accountability.

In the interest of full disclosure, I was deeply involved in both cases and worked with counsel in both cases. So when I talk about these cases, they are deeply personal to me. But, it also means that you are really getting an insider's view of how some of these types of individual communications unfold and how advocacy organizations can have an impact.

Just by way of technical information, as Dean Grossman has noted, the vast majority of individual petitions to the Committee



against Torture involve Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, which is the *nonrefoulement* obligation.<sup>3</sup> This obligation refers to the absolute prohibition of sending someone back to a place via a variety of transfers — deportation, rendition, or simple return expulsion — where they would be at risk of torture, especially

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\* Julia Hall is a researcher on counter-terrorism and human rights in Europe at Amnesty International.

where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. It is important to look at this issue in light of the Committee's General Comment No. 2,<sup>4</sup> the newest of the general comments, which was adopted in 2007. We can add to that discussion in a more authoritative way, per Barbara Jackman's comments, that the absolute prohibition extends to cruel, inhuman, and degrading treatment. Of course, that is a very evidence-based test.

It is important to go back to General Comment No. 1 by way of background.<sup>5</sup> Unfortunately, this Comment is woefully outdated and remains extremely vague, but we have not heard these words yet today, so let me say them. Based on this Comment, the authors of a petition have to prove certain things. They have to prove that the risk of torture upon the individual's return to a state is not merely theoretical, or that they merely suspect that the person could be tortured. But, they do not have to prove that it is highly probable that the person will be tortured. There is a lot of room in between those two things. So, in terms of evidence and standards, this is a very subjective process. In some cases that is really helpful, but in other cases it is not. I would argue in the *Agiza* case, it was in fact helpful.

Relevant information can be submitted by both the petitioner and the State Party. I would say that up until the very recent past, there has been an inequality of arms in terms of the provision of information. I think that the Committee has tended to rely more on the information from the State Party. But I also think that is changing. The forms of evidence that can be submitted include a pattern of gross, flagrant, or mass violations of human rights, the past torture of a person, medical evidence of that past torture or ill treatment, changes on the ground since the person had been mistreated that indicate at this point the person would be safer elsewhere, and evidence as to the credibility of a person. Now, when you work in the national security and terrorism realm, credibility becomes quite an issue. We do not understand yet, or at least I do not understand yet, what types of factors the Committee against Torture looks at when it comes to credibility. And greater clarity in terms of what impacts the credibility of an author would be very useful for us.

Now it is no secret that in terms of *nonrefoulement*, this obligation has taken quite a hit in the years comprising the global "War on Terror." As noted in previous presentations, persons have been unlawfully transferred from one country to another in the context of the U.S.-led rendition program and national security suspects in Europe, Asia, and the Commonwealth of Independent States, have been transferred to places where they have been at risk of torture. But, the undermining of *nonrefoulement* obligations really cannot be pinned on only one country; it has truly been a global hit job.

However, in terms of Committee's rule in mediating this most recent damage to the principle, let's just say that since 9/11, there has been a pair of cases that do deal with what the media calls "extraordinary rendition," or what Amnesty International calls "unlawful rendition," which was the subject of these two critically important individual petitions.

The two cases, *Attia v. Sweden* and *Agiza v. Sweden*, deal with the expulsion of two Egyptian individuals seeking asylum from Sweden to Egypt in the context of this rendition program led by the U.S. Central Intelligence Agency (CIA). In order to understand the immense value of these cases, you must read them together. They cannot be read separately if you want to actually pull the full value out of them. I would argue that the second case, *Agiza v. Sweden*, is a correction to the first case and that this correction contains a damning critique of rendition and of the type of complex webs of transfers that we saw during the Bush years.

So maybe it is best to begin with the story. What is the story of these victims of torture? On December 18, 2001, Ahmed Agiza was at a bus stop and Mohammad al-Zari was at school. They were apprehended in those separate locations by Swedish law enforcement officers. They were bundled into cars and were mistreated in transit to Stockholm-Bromma airport.<sup>6</sup> When they arrived at Bromma Airport, their clothes were cut off. Jumpsuits were put on them. They were hooded and blindfolded. They claim that suppositories were inserted into their rectums. They were bundled onto a plane in the presence of U.S. security and intelligence agents who actually conducted the security check in Sweden. At that point they were then transferred to Egypt, where both men claim that they were tortured.<sup>7</sup> The men had no recourse to a court or any proceeding allowing them to challenge their expulsions. Swedish law at the time permitted summary expulsions in national security cases. And here is the rub; here is how Sweden justified these transfers on human rights grounds: Sweden claims that they had gotten something called "diplomatic assurances" from the authorities in Cairo. These diplomatic assurances guaranteed that the men would not be tortured or ill-treated upon return, that they would not be subject to the death penalty, and they would have access to fair trials.<sup>8</sup> In *Agiza's* case it would be a retrial, as he had been tried *in absentia* before.<sup>9</sup>

For those of you unfamiliar with diplomatic assurances — and I am not sure that there are many of you anymore because it is become something of a cottage industry in universities to research and analyze diplomatic assurances — these promises have been criticized up and down by not only by advocacy organizations like Human Rights Watch, like Amnesty International, like the International Commission of Jurists (ICJ), and the Association for the Prevention of Torture (APT), who have actually joined a global coalition against their use, but also in fact by many other organs of the United Nations: by the UN Special Rapporteur on Torture, by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, and by the Working Group on Arbitrary Detentions. So there is broad criticism. And what does the criticism entail? If an official in Cairo said, "We're not going to torture this guy," why can't you believe that? The damage to the standard comes from the fact that torture is routine in Egypt, and the Egyptian authorities routinely deny that torture occurs. That idea that you would trust the authorities in Cairo to keep these two men safe when in fact torture is endemic throughout their system is really incredible, in the most generic sense of the word.



But our critique goes beyond that — it goes really into the dynamics of torture. What is torture about? Some of the speakers have said that governments that practice torture deny it all the time. It is practiced in secret. In many countries, even medical personnel are involved in the torture and ill-treatment of detainees. It leads to problems with detection, as detainees are afraid to talk about the abuse that they suffered because they are afraid of reprisals. So, I think built into the dynamics of torture is the critique of why actually these assurances, as Louise Arbour said so eloquently, cannot work and should not be used.

In addition, and I think it is critical in terms of the Committee against Torture cases that I will talk a little bit more about, there is absolutely no incentive on the part of either the sending government or the receiving government to acknowledge that there has been a breach of the assurances. The sending government would have to make an admission against its own interest that it had sent someone back to a place where the risk of torture had been recognized. The receiving government would have to acknowledge to some extent that they had been responsible for an act of torture. So again, built into the very process that we are talking about is the disincentive for accountability. I would like to note as well that the *über* context for this issue is a 2005 speech by Condoleezza Rice, where she acknowledged on the eve of a trip to Europe that the United States government did in fact render people in this complex web of transfers, but that the safeguard was that in every case where there was a risk of torture, the government got diplomatic assurances. So it is quite the global lock in terms of justifying these transfers.

I would like to quickly talk about the individual cases. The first case, *Attia v. Sweden*, involves Hanan Attia and her five children. Hanan Attia is Ahmed Agiza's wife. When Agiza was transferred, she went into hiding.<sup>10</sup> Swedish human rights groups helped her go into hiding until she could lodge a petition with the Committee against Torture. She did that on December 28, 2001, ten days after her husband's transfer. On January 14, 2002, the Committee asked the Swedish government not to expel her until they had been able to review her case. Hanan Attia argued that, as the wife of a terrorism suspect who had been previously been tortured in Egypt, she herself would be subject to intimidation, harassment, ill treatment, and possibly torture.<sup>11</sup> It is not beyond the pale that the Egyptian authorities do threaten, intimidate, and torture family members.<sup>12</sup> It is an unfortunate feature of the jurisprudence of the Committee that, at this point, a family link is considered too tenuous. So, Hanan lost on that mark. Her second argument was that diplomatic assurances from the Egyptian government were unreliable, and that in fact she had evidence that the Egyptian government could not be trusted to comply with the assurances.<sup>13</sup> As the case proceeded, she presented evidence that she thought was compelling, such as the fact that her husband had in been tortured and ill treated upon his arrival in Cairo.<sup>14</sup> Based in large measure on information provided by the Swedish government to the Committee, they ruled against Hanan Attia. The ruling was first based on the tenuous nature of Hanan's claim as her argument was founded in relationship to her husband, and they made the argument that she did not personally have personal and present danger. But secondarily, and more importantly

for our purposes today, the Committee endorsed the notion that the Egyptians were complying with the assurances that they had given.<sup>15</sup> I want to emphasize that they endorsed that notion based largely on information from Sweden, which had conducted a series of monitoring visits to Ahmed Agiza in his prison in Cairo. So the Committee said, "In light of the passage of time, the Committee is also satisfied by the provision of guarantees against abusive treatment which also extends to the complainant, and are in the present time regularly monitored by the State party."<sup>16</sup> To paraphrase, the Committee said, "We think the assurances are being observed and we think that those assurances extend to you, and so we are going to rule against you."

In the meantime, Ahmed Agiza's counsel lodges a petition with the Committee in 2003. His petition is before the Committee, and Hanan Attia's petition has been denied. Then I get a phone call in the spring of 2004 from a Swedish journalist who says, "I have a secret report from the Swedish government, do you want to see it?" It was all very "cloak and dagger," and it was in fact cloak and dagger. So, they sent me a report. It was the first monitoring report that Swedish officials had written up after visiting Ahmed Agiza in prison five weeks after he was transferred. I got two copies, a redacted copy that was largely blacked out, and a leaked copy which was the full text of the monitoring report. In that report, Ahmed Agiza told the Swedish monitor that he had been tortured and ill treated, that he had been beaten, that he had been subjected to electric shock, that he had been harassed, that he had been placed in a very small cell, that he had been deprived of sleep — there was a range of claims in terms of his ill-treatment. So this was information that the Swedish government had not shared with the Committee in its deliberations of Hanan Attia's case; those deliberations took place between 2001 and 2003, and the report was from 2002. Thus, they had failed to share that information with the Committee.<sup>17</sup>

When Ahmed Agiza's claim came before the Committee, it was the first time anywhere in the world that extraordinary rendition was under a microscope. Nobody had looked at this before Agiza's claim. There was not one accountability process. I want to congratulate both the Committee and the High Commissioner's Office for taking this as case seriously as they did. It is a 36-page decision, and I think it is the longest decision that the Committee has ever written. And at the end of the day, the Committee determined that Sweden had violated the prohibition against sending someone back to a country where there was a risk of torture.<sup>18</sup> But, what is interesting about that assertion is that anyone who would have looked at this case on its face would have determined the same thing: sending a person who is suspected of terrorist offenses back to Egypt, at that time, would have put him at risk. The richness of the case comes in the Committee's analysis of the interests of three separate security agencies — the Egyptian, the Swedish, and the American — colluding to send Agiza back to a place where he would be tortured. Not only that, but the Committee also addressed the collusion of the Swedish government in terms of covering up of what they heard from Agiza while on the ground in Egypt. When I read the decision, I sense a certain amount of anger on the part of the Committee. There were all sorts of mechanisms that could have

been used to ensure that the Swedish government could justify the return on human rights grounds and that the intelligence services could do the same based on diplomatic assurances.

I think that there are several different ways that we need to understand this case. First of all, at the time, it was the U.S. government and a few other governments who were engaged in using diplomatic assurances, including the UK and Canada. In the intervening years, we have seen governments drop like dominoes. It is not just the United States and Canada and the UK, but Italy and Spain and Denmark, which have entertained the possibility of diplomatic assurance, although they have not all engaged in the practice. It was also seen in the Netherlands and in Italy with returns to Tunisia. This case stands out as one of

the few — at the risk of sounding too poetic — cautionary tales against the practice. You now see in cases all over Europe that domestic courts are questioning whether a government can send people back; you see *Agiza v. Sweden* in every last one of these cases. Therefore, in my mind, I am sorry that the Committee initially ruled against Hanan Attia because it struck me that the return on its face deserved more deliberation in terms of Article 3 violations. I was glad to see *Agiza v. Sweden*. I think that this case stands virtually alone at this point, with the exception of a few prosecutions of American intelligence agents in Italy that happened at the end of last year. It stands alone as an accountability mechanism for one of the most horrendous abuses that occurred during the “War on Terror,” and that is rendition to torture and ill-treatment. Thank you very much. **HRB**

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## Remarks of Ann Jordan\*

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### HUMAN TRAFFICKING: IS IT TORTURE?

I would like to start by thanking Dean Grossman, the Washington College of Law, and Amnesty International for hosting this event, and for asking me to participate as this opportunity takes me out of my safe zone of working on human trafficking and forced labor to think about this issue in a somewhat different light. Although the connection between human trafficking, forced labor, and torture may not seem obvious at first, I wish to explore this possible connection and I look forward to the responses from the experts who are here today. I would like to address the question of who can make a complaint to the UN Committee against Torture, that is, who qualifies as a victim of torture.

First, I would like to introduce three typical trafficking and forced labor scenarios: Ismelda, Monica, and Julio decided to go abroad for work. Ismelda planned to work in the house of a diplomat, Monica traveled with her new husband, and Julio planned to work in construction.

However, once in the diplomat’s home, Ismelda found herself in a living hell. She was forced to wake every morning at 5:00 a.m. and work until midnight. She washed, cooked, cleaned, took care of the children, and was not paid. She slept on a thin mat in the basement of the house and was never allowed out, except when she was sent to get the mail. She learned quickly to keep quiet and not complain because, if she did, the “missus,” would beat her with a stick and often made her kneel on a ruler for a long time as punishment. The family also threatened to throw her out on the street and punish her family back



home for any infraction. She was only allowed to eat scraps left over from the family’s table so she never knew if she was going to have enough to eat. She was also not allowed to see a doctor, even when she had a visible tumor on her stomach and her teeth were decaying. Ismelda finally got away when a neighbor saw her at the mailbox and asked about the tumor and helped her escape with only the clothes on her back.

Monica fell in love with a man who she did not know was from a family of traffickers. After marriage and the birth of a child, the family took the baby as ransom and then forced Monica into prostitution in the capitol city, where she was

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held captive and raped repeatedly until she lost all hope. Many women were in her situation, under the control of “husbands” with many wives in forced prostitution, who operated with the full knowledge of the entire community and law enforcement officials. Once she was “broken in,” Monica was sent to another country and circulated among brothels around the country. She was forced to live in deplorable conditions, kept away from any outsiders, and physically punished — once they broke a bottle over her head and threatened to cut her with it. However, the fact that her baby was being held by the traffickers kept her very compliant, listless, and hopeless. Monica finally escaped when the police raided the brothel. However, she still does not have her child and it is not safe for her return to home.

Julio paid a smuggler to take him abroad to work on a farm. However, once across the border, he and other men were taken to an isolated farm where they were forced at gunpoint to work long hours with no pay and beaten for infractions, and knew their families are being threatened back home. One of the men was killed trying to escape.

These are typical stories of trafficking victims all over the world. If these victims had been trafficked into the United States, they would be offered temporary residence, work permits, and support. They would probably obtain permanent residence eventually. Their traffickers would be put in prison and they would be able to get on with their lives. Unfortunately, most countries do not have such legal protections; instead, the most common response of governments is simply to deport the victims to their home countries. So, they need another source of protection. The question I want to open for discussion is whether some victims of trafficking could qualify as victims of torture to satisfy the *nonrefoulement* principle under the Convention against Torture.

Torture can be linked to trafficking in at least two ways: In the first, state-sponsored torture compels a person to emigrate in dangerous conditions and perhaps end up in forced labor. This trafficked person would be able to seek asylum. The second involves the use by traffickers of violence, threats, and psychological coercion as the process by which they reduce their victims to compliance. In this case, the question is whether a trafficked person in danger of being deported into back into the world of the traffickers can meet the criteria of a victim of torture. There has been very little written about this question and even less discussion among anti-trafficking experts. So, while I am not an expert on the Convention, I will attempt to open the discussion on this tantalizing possibility.

The first question to be addressed is whether victims of trafficking are also victims of torture. The torture provisions of the International Covenant on Civil and Political Rights<sup>1</sup> (Article 7) and the European Convention on Human Rights (Article 3)<sup>2</sup> do not define torture, but the Convention against Torture defines it as “severe pain or suffering, whether physical or mental, that is intentionally inflicted on a person.”<sup>3</sup>

Is there any similarity between pain and suffering of torture victims and trafficking victims? The methods used by torturers are remarkably similar to those used by traffickers:

As described by a counselor in Australia:

Women [I see] have histories of torture, or sex trafficking, [and] tell me stories that contain similar features. They did not know where they were being taken and were trapped. Their families had no idea of their whereabouts. No one could help them or save them. The violence and persecution was unpredictable, and this was part of the perpetrator’s power over them. Fear of what might happen next was almost worse than knowing the violence had started. The use of rape, beatings, humiliation, deprivation and witnessing the torture of others was disclosed. These women presented with headaches. . . . Most had had their heads targeted in the violent assaults. . . . Instruments of the state such as police and government officials were used to harm these women in some cases and at best colluded with, or turned a blind eye to, the violence.<sup>4</sup>

It can be argued then that victims of torture and victims of trafficking suffer “severe pain or suffering” that is similar or equal.

The next criterion under the Convention is purpose. The ICCPR and the European Convention do not explicitly require a purpose for the infliction of severe pain or suffering, while the Convention requires a purpose of “obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”<sup>5</sup>

The objective of the torturer and, I argue, the trafficker is: to use pain or suffering to punish victims for refusal to comply with requests, and to force them into compliance; to create a psychological effect upon the victim that results in the total subjugation of the will, and a helplessness to escape; and to break them physically and psychologically so that they will eventually come to accept as inevitable the outcome that the trafficker or torturer wants. It can be argued then that traffickers and torturers use the same or similar techniques to achieve the same purpose — the total control of the victim — and so trafficking cases may be able to satisfy the second criteria.

The difficulty with the “trafficking as torture” argument under the Convention against Torture arises in the third element, which limits the category of persons who are responsible for inflicting the torture. The Convention requires a link between the infliction of severe pain or suffering and the state. Both the ICCPR and the European Convention are silent as to whether the actor must be a state actor or can also be a non-state actor. In *HLR v France*, the European Court stated that non-state actors can commit torture in the context of a state’s obligation

of *nonrefoulement*.<sup>6</sup> Although in that case there was insufficient evidence of torture, the case provides protection to a person in Europe who can prove that there is a real risk of being subjected to torture or inhuman or degrading treatment by a non-state actor.<sup>7</sup> Interestingly, the case involved a drug trafficker claiming he would be tortured by the trafficking network back home, which the court would have accepted if he had produced sufficient proof of the risk of torture.<sup>8</sup> Human trafficking cases are very similar and so victims in Europe could benefit from this ruling if they can produce strong evidence of the risk of torture by the traffickers.

In General Comment No. 20, the Human Rights Committee recognized that states have an obligation to protect people from torture by non-state actors: “It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity.”<sup>9</sup> Although this refers to acts within the territory of the state, the same reasoning would support the responsibility of states, under the ICCPR, to protect people from being returned home to face torture at the hands of non-state actors. However, under the Convention, the state must be involved. The act must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>10</sup>

I recognize that it is extremely difficult under the Convention to find that acts by non-state actors would qualify since the Committee against Torture has restricted recognition of such actors to “*de facto* regimes . . . where ‘those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments.’”<sup>11</sup>

Although the perpetrators of trafficking can be organized criminal gangs that control large numbers of people and may even control territory through violence and payments to local

leaders and operate with impunity for years, as in Tlaxcala, I do not believe that the typical trafficking networks or gangs are *de facto* regimes. They are not armed groups seeking political power; they are simply armed groups seeking to control a base for their criminal activities.

However, is it possible to argue that traffickers operate with the consent or acquiescence of public officials? In the majority of trafficking cases, corrupt public officials are involved in illegal border crossings, in issuing bogus documents, in protecting safe houses *en route*, protecting the brothels and factories in which trafficked persons are held and even ensuring that trafficked persons who escape are returned to their traffickers. They are known to engage in violence and rape of victims, and generally contribute to an atmosphere of fear and hopelessness among victims who know they have no option but to submit to the demands of the traffickers. Officials who collaborate with traffickers and have knowledge of the tactics being used by the traffickers to control, punish, and intimidate victims into obedience and submission are, I would argue, clearly acquiescing in the torture being inflicted by the traffickers. This would implicate the state directly in the torture of the victims and, I believe, support a claim under the Convention against Torture.

So I end as I began with a question: Are there any circumstances under which a victim of trafficking in the types of scenarios I have discussed today could produce sufficient evidence of acts by a non-state actor carried out with the consent or acquiescence of state officials to satisfy the requirements of the Convention against Torture? In other words, is there any means by which the Torture Convention can provide succor to victims of human trafficking, such as Ismelda, Monica, and Julio, who may be deported to a country in which they could be tortured, re-trafficked, and even killed by criminal gangs?

I look forward to hearing your expert opinions on this question. Thank you.



## Closing Remarks from the Moderator

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**T**hank you very much for the very interesting participation of every one of the panel members. Undoubtedly, we have covered an enormous quantity of doctrine and touched on many issues pertaining to the work of the Committee against Torture. I think that each panelist has contributed insight into very complicated matters of legal finesse and of human importance. Each one of you has touched on issues very dear to all of us members of the Committee against Torture, and any human being. I think this has been an enormously worthwhile experience.

On the issue of trafficking, let me just conclude by a reference to the Committee's discussion on one particular country. We were talking of the issue of trafficking, which we have tried

to bring into each country report. To my enormous surprise, this country reported to us that it has estimated one million people who are subject to trafficking. So, we are not talking about two or three cases, but rather hundreds of thousands of people. In that sense, I would also like to contribute by saying that the Committee's General Comment No. 2 equates cruel, inhuman, and degrading treatment to torture. So, I think in the future procedure, we should look more into that aspect of trafficking, not necessarily only under the definition in Article 1.

I would like to thank Dean Grossman and thank all of you for having this wonderful event that will contribute to a better understanding of this enormous and challenging issue of the day. Thank you very much. *HRB*

Endnotes begin on page 56.