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COMMITTEE AGAINST TORTURE

Thirty-sixth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)*
OF THE 698th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 2 May 2006, at 3 p.m.

Chairperson: Mr. MAVROMMATIS

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* No summary record was prepared for the second part (closed) of the meeting.

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The meeting was called to order at 3.10 p.m.

DIALOGUE WITH Mr. MANFRED NOWAK, SPECIAL RAPPORTEUR ON THE QUESTION OF TORTURE

1. The CHAIRPERSON welcomed the Special Rapporteur on the question of torture on the occasion of his first visit to the Committee. Their respective experiences were complementary and could be expected to be mutually enriching. Moreover, it was important to continue to ensure collaboration between the system of special procedures and the various United Nations treaty bodies in order to promote respect for human rights and fundamental freedoms.

2. Mr. NOWAK, Special Rapporteur on the question of torture, said he was grateful for the opportunity to engage in an open dialogue with the Committee and thus strengthen their collaboration. In addition to the four fact-finding missions that he had conducted respectively in Georgia (E/CN.4/2006/6/Add.3), Mongolia (E/CN.4/2006/6/Add.4), Nepal (E/CN.4/2006/Add.5) and China (E/CN.4/2006/6/Add.6), since taking up office on 1 December 2004, he had carried out, in collaboration with four other special procedures mandate holders, an investigation into the situation of persons detained in Guantánamo Bay (E/CN.4/2006/120), without however being able to visit the detention facility. He had made several other unofficial visits to a number of countries, including Sweden and the United Kingdom, centred mainly on the issue of torture in the context of counter-terrorism measures, an area in which the Committee's decision in the *Agiza* v. *Sweden* case had been a landmark. Other work carried out during his first year in office had consisted in particular in promoting ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and advising Governments on how to put in place independent national preventive mechanisms.

3. The CHAIRPERSON asked the Special Rapporteur to provide the Committee with detailed information concerning his missions in Georgia and Nepal, in so far as he could do so without departing from the obligation of confidentiality by which he was bound.

4. Mr. NOWAK, Special Rapporteur on the question of torture, recalled that he only sought an invitation from a Government when he had good reason to think, in view of allegations he had received, that the situation in the country was grave or when recent events opened up new possibilities for cooperation with the Government concerned. Such had been the reason for the visit to Georgia, a country which, after the Rose Revolution and the advent to power of the Saakashvili Government, had clearly demonstrated its determination to improve the human rights situation and establish a national action plan against torture, supported in that endeavour by an NGO community that had already been very active before the change of Government.

5. The principal subjects of concern in regard to Georgia related to the maintenance of the practice of torture and, generally, the appalling conditions of detention, particularly for persons in pre-trial detention. On the latter point, progress had been made, in particular through the opening of two new detention centres. However, three major incidents had recently occurred in one of them, in which numerous detainees had died or been wounded. An investigation was under way.

6. With regard to the follow-up given to recommendations, Georgia had amended its Criminal Code and its Code of Criminal Procedure and had ratified the Optional Protocol to the Convention. It was therefore required to put in place by September 2006 an independent national preventive mechanism. The Government did not so far appear to have done anything to that end; the three existing commissions that visited places of detention were not independent institutions within the meaning of the Paris Principles.

7. Concerning the mission to Nepal, undertaken in September 2005, it was to be noted that that country was to date the only one where the Special Rapporteur on the question of torture had good reason to conclude that torture was practised systematically, not only by the various police forces and the Nepalese royal army against the Maoists, but also by the Maoists themselves within their own ranks. That conclusion had been reached on the basis of evidence, including medical evidence, gathered in detention centres, but also in view of the acknowledgment by senior police and army officials that torture was used as a means of obtaining confessions.

8. The CHAIRPERSON wished to know whether any clear signs of improvement or at least of a desire for change on the part of the Governments concerned had been observed.

9. Mr. NOWAK, Special Rapporteur on the question of torture, said that, in the case of Georgia, the improvements were notable. It should not be forgotten that, like other former Soviet Union countries, Georgia had inherited a judiciary that lacked independence and had a tradition of brutal police methods. Since the Rose Revolution, numerous measures had been taken to give the judiciary greater independence and reform the police, in particular through the gradual replacement of the old guard of judges and police officers. In addition, the Ombudsman was sufficiently independent to conduct visits in places of detention and work in cooperation with NGOs. Unfortunately, incidents that had occurred in recent months seemed to point to a worsening of the situation.

10. Mr. WANG Xuexian referred to the special forces' intervention in two prisons and a hospital in March 2006 and said that he was surprised at the justification proffered by the Government, which had stated that those measures had been necessary to prevent the spread of riots throughout all the prisons in the country.

11. Mr. NOWAK, Special Rapporteur on the question of torture, said that, as the incidents had occurred very recently and were the subject of an ongoing investigation, so far he only had reports which, although from reliable sources, were for the time being no more than allegations, according to which, contrary to official contentions that the number of casualties and deaths were due to acts of violence among the prisoners, an armed operation had indeed been carried out by special forces, supposedly to quell the riots and prevent them from spreading to the rest of the country. A letter containing allegations had been addressed to the Government, which had not yet replied. Since then, no further incident had been reported.

12. Mr. MARIÑO MENÉNDEZ, wishing to know more about how the visits were conducted, asked whether it was difficult to obtain guarantees of free access, without prior notification of the places to be visited; a fact-finding mission could not be effective without such guarantees. It would also be useful to know whether the Special Rapporteur on the question of torture was planning any follow-up visits,

it being understood however that there was a limit to the number of visits that could be made in the space of a year.

13. Mr. NOWAK, Special Rapporteur on the question of torture, reiterated that he only accepted a Government's invitation if it complied with the fact-finding mission procedures of the Special Rapporteurs and Representatives of the Commission on Human Rights (E/CN.4/1998/45, appendix V), in other words, if the Government guaranteed him free access to all detention centres, without prior notice, and the possibility of talking in private with detainees. Indeed, it was because the United States Government had refused to give him the latter guarantee that the Special Rapporteur had finally cancelled the planned visit to Guantánamo Bay. Governments generally provided the required guarantees of access, usually in the form of a letter of accreditation from the highest authorities written in the language of the country concerned, which the Special Rapporteur used as a pass in the places he wished to visit. The country where it had been most difficult to obtain the guarantee of free access to places of detention without prior notice had been China, but he had finally had access to all the places of detention he had wished to visit, particularly in Tibet and Urumqi, and had been able to talk confidentially with detainees. However, many of them had refused to speak for fear of reprisals.

14. On the question of follow-up, the procedure was that all countries visited submitted to the Special Rapporteur on the question of torture a report on steps taken to put his recommendations into effect, which was subsequently annexed to the annual report of the Special Rapporteur. In so far as each visit was for the purpose not only of fact-finding but also of initiating long-term cooperation, it was quite possible to envisage a follow-up visit, particularly, among other reasons, if the situation in the country deteriorated or in order to help the country to implement earlier recommendations.

15. Mr. GROSSMAN said that the Committee could serve as a follow-up mechanism for visits made by the Special Rapporteur in countries where he had found systematic use of torture. Under article 20 of the Convention, "if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information". The information from the Special Rapporteur formed part of such "reliable information" and could therefore serve as a starting-point for an inquiry under article 20. Thus, in the event of Mr. Nowak finding that a State Party was not taking any account of the conclusions in his mission report, he could so inform the Committee, which could ensure a follow-up to the recommendations of the Special Rapporteur under article 20 of the Convention.

16. Other possible ways of cooperating with the Special Rapporteur could be envisaged. In particular, the Committee could include in its agenda an annual meeting with the Special Rapporteur and set discussion topics in advance, with priority being given to the question of visits to countries where there were good reasons to believe that torture was practised systematically.

17. The question of follow-up was crucial since there was no point in establishing maturely considered recommendations or solidly grounded decisions unless care was taken to ensure that they were translated into acts. Moreover, the Committee had appointed a Rapporteur for follow-up and had initiated activities in that area, but it could go further, for instance by inviting States parties to collaborate with it

and by requesting information not only from other United Nations organs but also from regional bodies like the Inter-American Court of Human Rights. He wished to know how the Special Rapporteur envisaged follow-up activities and what was his experience with States in that regard.

18. Mr. NOWAK, Special Rapporteur on the question of torture, said that, where country visits were concerned, he endeavoured to avoid overlapping by refraining from going to those that mandate holders under the 1503 procedure were expected to visit, unless he was expressly requested to do so. Similarly, if he had knowledge of the fact that the Committee was conducting a confidential inquiry in a country under article 20 of the Convention, he did not visit the country in question. As for follow-up, he was fully in favour of it being ensured by the Committee in countries where he had concluded that torture was systematically practised and that did not give effect to his recommendations, as in Nepal; he invited the Committee to conduct an inquiry in that country under article 20. He, for his part, took the opportunity of his country visits to follow up the recommendations and decisions of the Committee. For example, during his visit to Sweden, he had strongly urged the Swedish authorities to implement the Committee's decisions in the *Attia* and *Agiza* cases (CAT/C/31/D/199/2002 and CAT/C/34/D/233/ 2003) by granting compensation to the complainants. He further suggested that the Committee should take the opportunity of the examination of a report of a State Party which it would be useful for him to visit to call on the State in question to extend an invitation to him. In particular, such a proposal could be made to the delegation of the United States of America during examination of that country's periodic report, which was scheduled for the current session. The Committee and he himself should consult with each other so as to avoid going to the same countries and endeavour to exchange a maximum of information in order to ascertain whether their respective recommendations were being implemented.

19. Ms. GAER noted that the Committee had provided itself with two Rapporteurs for follow-up, one with responsibility for decisions on communications and the other to deal with recommendations formulated in connection with the examination of periodic reports. For the time being, that new method was at the experimental stage and any suggestion would be welcome.

20. She wished to know what efforts were made by the Special Rapporteur to coordinate his urgent visits with visits by the Sub-Committee on Prevention that would be called on to monitor implementation of the Optional Protocol to the Convention, and inquiries undertaken by the Committee under article 20 of the Convention.

21. Concerning the distinction between torture and cruel, inhuman or degrading treatment or punishment made by the Special Rapporteur in his report (E/CN.4/2006/6), she said that one of the main principles of the Convention was the obligation to prevent all acts covered by that instrument and that she consequently did not see how there could be any distinction between the obligation to prevent torture and the obligation to prevent cruel, inhuman or degrading treatment or punishment. She therefore hoped that the Special Rapporteur would provide fuller explanations concerning that distinction and the proportionality principle to which he had referred. She would also like to know his opinion in regard to violence against women and the idea that rape might be seen as a form of torture.

22. Mr. NOWAK, Special Rapporteur on the question of torture, taking up the question of the coordination of his activities, said that he did not carry out visits that might duplicate those conducted by the Committee under article 20 and other mandate holders. He did, however, plan visits for preventive purposes with the European Committee for the Prevention of Torture (CPT). Moreover, he drew largely on that body's reports on improvements to prison conditions and, similarly, CPT referred to reports by Special Rapporteurs concerning European countries. Since the visits were preventive, he did not see any drawback to them being undertaken at the same time as CPT or at a short interval. However, with regard to the Sub-Committee, the Committee should, before undertaking a mission of inquiry under article 20, make sure that the Sub-Committee was not planning to visit the country concerned, as divergences might arise that would harm the credibility of the two bodies. Another party with which it was very useful to collaborate was the national police monitoring mechanism, when there was one in the country; he would usually turn to it in order to determine which prisons he should visit first.

23. With regard to the distinction between torture and cruel, inhuman or degrading treatment or punishment, he had reached that reasoning after hearing the United States of America assert, at the sixty-first session of the Commission on Human Rights, that the prohibition of torture was indeed absolute but that recourse to cruel, inhuman or degrading treatment was admissible whenever an individual represented a threat to national security. In a word, the means used to interrogate a suspect were proportional to the danger he or she presented. In reaction to that standpoint, he had undertaken a theoretical study based on the *travaux préparatoires* of the drafters of the Convention and on the Committee's case law. First, he had noted that the drafters of the Convention had not contemplated any context for torture other than detention, which he found too restrictive. For example, as the Committee had concluded in a communication directed against Serbia and Montenegro, the excessive use of force by the police on the occasion of a demonstration could be assimilated to inhuman or degrading treatment. The whole question was whether or not the use of force in such circumstances was proportional to the act it was supposed to punish. The United States invoked in support of its position the fact that many international courts and treaty bodies took into account the proportionality principle in cases involving the use of force. According to that country, if that principle was applicable in a context where the ill-treated person was free, it should also be applicable in a situation of detention. He for his part was firmly convinced that the former situation should be distinguished from the latter, in which he included the case of an individual rendered powerless. For example, the use of firearms in the context of a violent demonstration was lawful but, once a demonstrator was immobilized on the ground, recourse to ill-treatment must be considered unlawful, and a fortiori in a situation of detention. The main difference between torture, as defined in article 1 of the Convention, and cruel, inhuman or degrading treatment hinged not on the intensity of the pain but on the underlying intention and on the victim's state of powerlessness.

24. Turning to the text of the Convention, he said that he would like to know how the Committee interpreted article 16 in relation to articles 3 and 15. In the case of article 14, it was clear that the obligation to compensate also extended to the victims of cruel and inhuman treatment. However, some clarifications concerning article 15 would be useful. Article 3 was more of a problem in view of the position of the European Court of Human Rights and the Inter-American Court of Human Rights. It

was true that a person should not be expelled or extradited to a State where he would be in danger of being subjected to cruel treatment, but fuller information on that article would be welcome.

25. Gender-based torture and violence did of course form part of his mandate, but in practice they received limited attention since most allegations of violence against women were addressed to the Special Rapporteur on violence against women. That being said, the two Rapporteurs sent jointly a large number of letters containing allegations and urgent appeals when violations were brought to their notice.

26. Ms. BELMIR referred to the passage in the report (E/CN.4/2006/6, para. 34) where it was said that some countries used the Convention's distinction between torture and cruel, human or degrading treatment to justify "harsh interrogation methods". According to those countries, the absolute prohibition applied only to torture. She raised the question of the meaning of the expression "harsh interrogation methods" and said that it was up to the judicial authority and not the executive to determine what constituted a harsh interrogation. Moreover, the acts covered by article 1 of the Convention were criminal offences. However, there could be no criminal offence that was not underpinned by intention. Similarly, there could be no cruel treatment without intention to harm. The European Court of Human Rights and the Inter-American Court of Human Rights had in identified in their case law ways of determining the constituent elements of torture and cruel, inhuman and degrading treatment. Any interpretation aimed at justifying such acts would void article 1 of the Convention of its substance.

27. Mr. NOWAK, Special Rapporteur on the question of torture, said that when the International Covenant on Civil and Political Rights had been prepared, unlike other fundamental rights, no restriction had been placed on the right not to be tortured and the right not to be reduced to slavery. Those rights were absolute and non-derogable: he did not call that principle into question. That being said, when law-enforcement services deliberately inflicted acute pain and suffering for specific ends, there was not necessarily any violation. In all countries, law-enforcement services had the right to use force; that was a legitimate right confirmed by the courts and by many international bodies. When police intervention was justified, the scope of application of fundamental rights was limited: according to the European Convention on Human Rights, an escaping detainee could be shot down without there being any violation of his right to life. There lay the full importance of the distinction between situations of detention and others. The "harsh interrogation methods" authorized at Guantánamo Bay in a situation of detention were contrary to the right not to be subjected to inhuman treatment and could even be regarded as tantamount to torture if acute suffering was inflicted. In addition, intention was a decisive criterion in the case of torture but not in that of cruel treatment since a person could be subjected to such treatment through negligence. He cited the example of a detainee forgotten in his cell and left without bread or water for 14 days. The detainee had been subjected to inhuman treatment but not to torture since it had not proceeded from any intention to make him suffer.

28. Ms. SVEAASS welcomed the dialogue begun with the Special Rapporteur and expressed the hope that it would be continued regularly. The presentation of the issues bound up with the definition of torture and cruel, inhuman or degrading treatment had led her to wonder about its implications in the case of persons placed in psychiatric care. However, that was a huge subject that might be addressed at

another session. The dialogue with Mr. Nowak had enabled her to understand better the concepts of intention and context, which were often disregarded when acts were considered in isolation. The Committee must be particularly clear on those points at a time when the absolute prohibition of torture was being called into question. Lastly, she wished to know whether the Special Rapporteur took his own interpreters with him when he visited a country.

29. Mr. NOWAK, Special Rapporteur on the question of torture, replied that, during his visits, he was usually accompanied by doctors and interpreters, except when he could rely on the facilities provided by international bodies already on the spot.

30. Mr. CAMARA thanked the Special Rapporteur and stressed that the distinction between torture and the acts referred to in article 16 of the Convention would merit more extensive consideration. Norms of general criminal law were involved which tended to be downplayed in the face of the "necessity" invoked by some States within the framework of counter-terrorism measures in order to justify torture. Such an interpretation undermined the absolute protection guaranteed by article 2. The adoption of the Convention and torture itself should be placed in their historical context. Torture was a concept that fell exclusively within the bounds of judicial process. In the Middle Ages, torture was lawful and even regulated. In the present day, it was an unlawful means of obtaining evidence. Attention should therefore be given not to what was specified in article 1 or article 16, since resistance to pain varied from one individual to another, but rather to the goal. However, intention, on which depended the classification of an act as an offence in criminal law, was all too often confused with motive. In considering the question raised by the Special Rapporteur, the Committee should take care not to stray from the true context of the Convention. By keeping to the strict definition in article 1, it avoided the trap laid, deliberately or not, by some States.

31. Mr. NOWAK, Special Rapporteur on the question of torture, expressed agreement with Mr. Camara. The absolute character of the prohibition of torture should be strongly emphasized.

32. With regard to the *Agiza* v. *Sweden* case, he wished to know whether the Committee considered that, in the case of the return of a person to State where he was in danger of being subjected to torture, diplomatic assurances were in all circumstances a violation of article 3 or whether they could be regarded as acceptable in certain situations. The other question that arose concerned the clause relating to "lawful sanctions" in article 1 of the Convention. His position was that that clause was not applicable in any case, but, should the Committee not be of the same opinion, he would like it to give examples of an act covered by the definition of torture that could be described as a lawful sanction. He wondered whether there would not be in any case a breach of article 16, which contained no clause relating to lawful sanctions. According to the Human Rights Committee, even the mildest forms of corporal punishment were absolutely prohibited under article 7 of the International Covenant on Civil and Political Rights. He wished to know the Committee's position in that regard.

33. Mr. MARIÑO MENÉNDEZ said that diplomatic assurances that a person would not be tortured if he was expelled or extradited to another country could not in any case justify expulsion. He had noted with interest the Special Rapporteur's point of view concerning the distinction that should be made between acts of torture

and cruel, inhuman or degrading treatment, but pointed out that it was often difficult to label an act or to include it in any pre-existing legal category.

34. The Convention against Torture should be set in the context of general international law, which explicitly prohibited the use of torture. The Vienna Conventions provided criteria for interpreting all treaties, including those relating to human rights, and could be usefully referred to in the event of a problem in interpreting the provisions of the Convention.

35. Mr. NOWAK, Special Rapporteur on the question of torture, wished to know the current position of the Committee concerning life imprisonment and the death penalty. In the light of the Committee's case law in regard to article 15 of the Convention, he would also appreciate information about the Committee's current point of view on that question. He referred in that connection to several cases in which complainants had made statements that had been found to have been obtained through torture and that had been used as evidence in proceedings. The States parties concerned had informed the Committee that they had launched inquiries to shed light on those cases but had not awaited their completion before extraditing the complainants. The question of statements obtained through torture was of considerable contemporary interest since some countries had recourse to the practice in counter-terrorism cases.

36. The CHAIRPERSON said that, as time was running short, members of the Committee would not be able to respond in the current meeting to the various points raised by the Special Rapporteur. On the question of the death penalty, there was nothing in the Convention to prohibit its application, whatever the method of execution employed.

37. Mr. KOVALEV wished the Committee to reconsider at a subsequent meeting the many issues raised during the discussion and to adopt a consistent approach. He shared the Special Rapporteur's point of view concerning the distinction that should be made between acts of torture and cruel, inhuman or degrading treatment. He would also welcome further information about the Special Rapporteur's planned visit to the Russian Federation in autumn 2006.

38. Mr. NOWAK, Special Rapporteur on the question of torture, said that he would indeed be undertaking a two-week mission to the Russian Federation in September or October 2006. The programme of the visit had not yet been fixed but he was thinking of going to Moscow, Chechnya and another region and visiting several places of detention whose names he could not divulge for the time being.

39. Ms. GAER said that the question of diplomatic assurances was very complex. The Convention against Torture clearly established an absolute prohibition against expelling, returning or extraditing a person to another State where he would be in danger of being subjected to torture. However, there were also 10 or so international conventions on terrorism which stated that the perpetrators of acts of terrorism should not go unpunished. In its resolution 1373 (2001), the Security Council reaffirmed in particular the obligation of States to refuse asylum to terrorists and the supporters of terrorism. Care must be taken to ensure that diplomatic assurances did not have the effect of creating zones of impunity.

40. Mr. GROSSMAN said that cases of extraordinary rendition, like the *Agiza* v. *Sweden* case, had revealed the inadequacy of the practice of diplomatic assurances. Furthermore, extraordinary renditions were not an effective solution in

the context of the war on terror. It was clearly not acceptable that the perpetrators of acts of terrorism should go unpunished and efforts should be made to ensure that all countries took the required steps to punish acts of terrorism, including through the extradition of terrorists.

41. Mr. NOWAK, Special Rapporteur on the question of torture, welcomed the particularly constructive exchange of views with the members of the Committee and looked forward to the continuation of their collaboration.

The meeting rose at 5.05 p.m.