

Panel 3: Transparency and Access of Independent Experts to All Places of Detention

Question & Answer Session

VIVIANA KRSTICEVIC: Thank you very much to the panelist. Ms. Felice Gaer is leaving. Because of the time we will only be able to take a couple of questions. I know that the presentations have been very stimulating and I feel bad about having to rush it through. Can you identify yourself?

Q I'm Alvin Bronstein, the president of Penal Reform International in the United States and director emeritus of the National Prisons Project of the American Civil Liberties Union. There's a footnote to this very important last conference session, especially the remarks of Dean Evans. One of the things that came out of Abu-Ghraib was the recognition or the awareness that we are the only Western nation – by Western nation, I include Canada and Western Europe, but not Central and South America – that does not have system of independent outside inspections of prisons. About three years ago, Penal Reform International began the process of trying to educate the United States about this . . . we sponsored a conference with two law schools – it was not AU – in Texas of all places, on the need for independent inspections. We had the Swedish Ombudswoman and the former Dutch Ombudsperson; the Canadian Inspector General who inspects all jails and prisons; and 14 state directors of corrections came. And after that the American Correction Association invited me – knowing that I would speak about that subject – invited me to speak to them about that. The most important thing is that last August, the American Bar Association adopted a policy, calling for the independent, outside inspections of jails, prisons, immigration detention facilities, and juvenile facilities in every jurisdiction in the United States. That is now ABA policy. I've been working on this issue for 50 years. I don't think I'll need another 50 years to see this happen in the United States.

CLAUDIO GROSSMAN: I have a question for Dean Malcolm Evans on this issue of extraordinary rendition regarding the decision taken by the House of Lords in Great Britain. The decision we have taken in the Committee is that extraordinary rendition violated Article 3 – that there are no diplomatic assurances. If you send a person to a country where you have systemic torture, what are the diplomatic assurances that this person will not be tortured? We need to go to the facts themselves, not rely on diplomatic assurances. I think we need to come out very strongly against diplomatic assurances and the violation of Article 3 and that is the only solution. Again, these are some opinions. I would be interested in your opinion. Now, of course, there has been a progression of normal extradition law, sometimes you see diplomatic assurances. But if you have a well-founded reason that torture takes place, what is there to be gained by a piece of

paper or going every day? It is naïveté in the best case and other objectives that are more proper in the worse case.

MALCOLM EVANS: I'm obviously not going to dissent from what you say because my personal view coincides very closely with yours. Of course from a policy perspective, you mentioned that there is a bit of a dilemma, since in many instances, diplomatic assurances are used on a routine basis to justify what would not ordinarily take place. The most obvious example is a return under extradition law of a person to a country where they would otherwise face the death sentence. There is no way that the UK, for example, would return a person to a jurisdiction which still retained the death sentence but for the assurance given that in the case in hand it will not be used. So I can understand why there has to be a degree of caution about shall we say, writing off the significance of diplomatic assurances 'full stop'.

But of course, I would argue that the situation concerning an assurance around the imposition of a particular legal sanction is the result of a process of law, is very different from the circumstance that we're dealing with here. That being said, the position that you outlined, I'm sure you're aware, is somewhat different from the position advanced, for example, by the European Committee for the Prevention of Torture. The ECPT has taken the view that whilst in principle it is possible to accept that assurances can reduce the risk sufficiently to permit return, the safeguards that need to be in place before that point is reached must be of such an order to make this extremely difficult to achieve. Such an approach holds open more prospects of engagement and discussion than the more absolutist response. Thus I would take the view that whilst we cannot rule out the possibility that diplomatic assurances will reduce the real risk sufficiently to mean that a return will be safe, there has to be a very high level of procedural guarantees around those assurances. And of course it's an open question whether, when they are evaluated, whether one can ever be appropriately assured to make them real. I think it is a little difficult in the European context to take the more absolutists approach, simply because the European Court of Human Rights itself has, in relation to article three non-refoulement, accepted the efficacy of assurances of that nature in some instances to reduce the risk in a way that makes that return acceptable. It does mean that there is a difficult line to steer here. And this is what depresses me about the House of Lords' recent judgment: it seems to play down the guarantees that surround the assurances.

In conclusion, another thing which is interesting and worrisome about the House of Lords' judgment is that almost automatically ruled out the arguments that you and I know that the UN Special Rapporteur has advanced, in as much as the technical legal ground for the case moving forward was that the lower

courts had made an error in law in not taking account of or giving credence to the idea that diplomatic assurance could reduce the risk in that factio. That argument was accepted by the Court of Appeal. However, the House of Lords said that it was beyond the jurisdiction of the Court of Appeal to make that decision because it was simply a question of factual assessment and not a question of law. In other words, the argument that, as a matter of law, diplomatic assurances could not reduce the risk is simply untrue and it is simply a question of factual evaluation whether

the assurances reduce the risk. When it is remembered that the House did not seem to think that effective visiting mechanisms were a necessary element of that factual matrix, I think it a fairly depressing judgment from a torture prevention perspective.

VIVIANA KRSTICEVIC: I think we're out of time. So I would invite Dean Claudio Grossman and Mark Thomson to give their concluding remarks. *HRB*