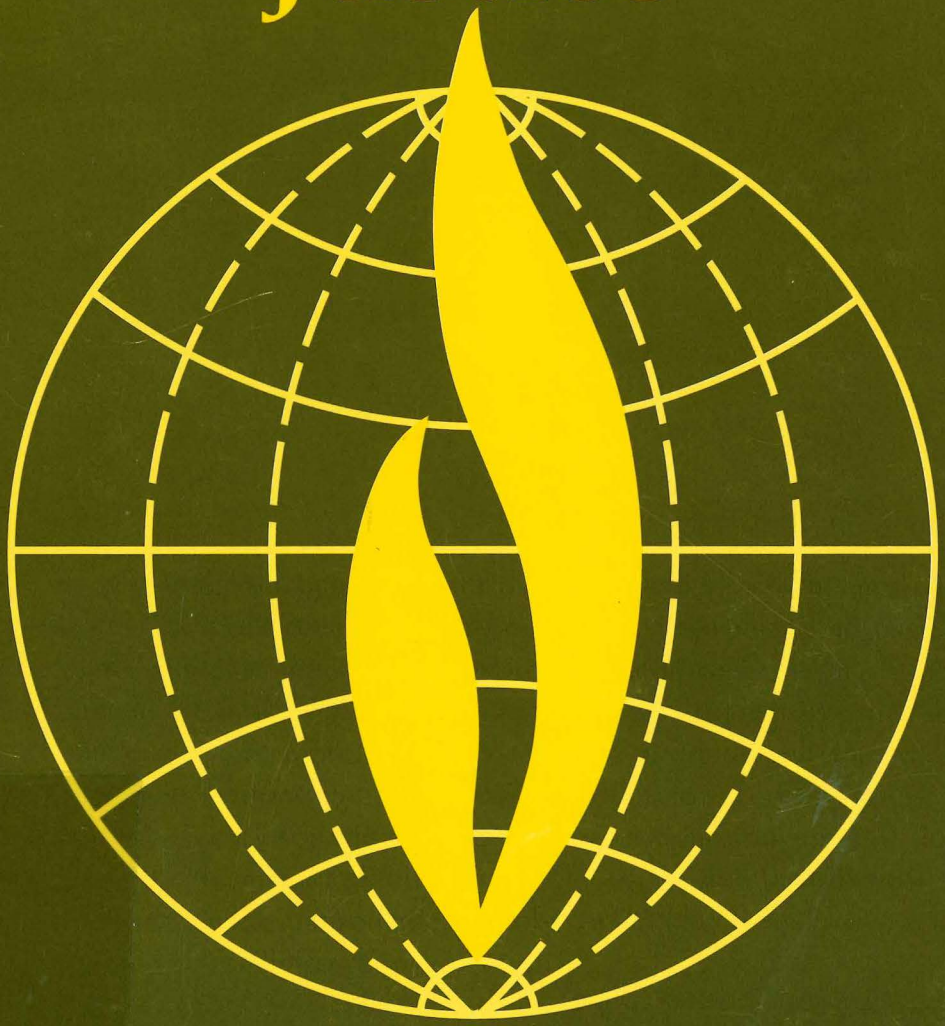
Towards Universal Justice



International Commission of Jurists

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Towards Universal Justice

International Penal Court

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U N Human Rights Mechanisms

International Commission of Jurists
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Preface

More than four decades have passed since the United Nations adopted the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and nations." This year's United Nations World Conference on Human Rights, taking place in Vienna is an appropriate occasion to constructively evaluate the achievements of the United Nations in this field.

Since its establishment in 1952, the International Commission of Jurists (ICJ) has dedicated itself to promoting the Rule of Law and the legal protection of human rights. Based in Geneva, it has had the opportunity to monitor, for more than 40 years, the functioning of the UN human rights programme. In publishing ***Towards Universal Justice***, the ICJ submits some practical recommendations to the UN World Conference in order to strengthen the international mechanisms for the protection of human rights.

The book is divided into two main parts. The first argues for the establishment of a new machinery: a permanent International Penal Court. The second, offers some suggestions on reforming some of the existing human rights mechanisms, known as the extra-conventional mechanisms.

The ICJ is conscious of the lack of adequate international machinery to which individuals whose rights are violated could turn to for protection. For decades, we have been

urging the setting up of an international, regional, and national machinery, preferably of a judicial nature, which could extend some protection to such persons. The establishment of an International Penal Court to try cases of gross violations of human rights and grave breaches of humanitarian law could be an important step in this direction. As indicated in Section 1, *The Establishment of a Permanent International Penal Court*, the International Law Commission (ILC), has last year finalised decades of work on the draft Code of Crimes against the Peace and Security of Mankind. This Code considers gross violations of human rights and grave breaches of humanitarian law as international crimes. The Code is presently in the 6th Committee of the UN General-Assembly for adoption.

Following further instructions from the General Assembly in 1991, the ILC is currently considering the Statute of a permanent International Criminal Court with jurisdiction over the matters which appear in the Code. The ILC is meeting in Geneva between 3 May and 23 July this year, and a draft statute of the permanent Court is on its agenda. The ICJ feels that this significant effort of the ILC should not be wasted. The ICJ urges the World Conference on Human Rights to adopt an adequate recommendation recognising the urgent need for such a Court and urges its immediate establishment.

The second section of this book deals with some shortcomings in the existing extra-conventional mechanisms of the United Nations human rights system. The public as well as the confidential procedures of the Commission on Human Rights and its subsidiary body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, are thoroughly examined. The ICJ considers the questions of politicization, selectivity and confidentiality of procedures as the

main obstacles hindering the effectiveness of the UN human rights work. The section offers specific recommendations to deal with these serious issues.

Omitting from this book the discussion over the so-called conventional mechanisms does not mean, however, that the ICJ considers them less important. Our work on this matter will appear, in due course, in a separate publication.

Indeed the ICJ believes that if human rights are to be universally respected, States must pay serious attention to the various human rights instruments and apply them adequately at the national level. The ICJ is concerned by the fact that international norms are insufficiently applied at the domestic level. To date, many governments have failed to sign and ratify important human rights conventions. Others ratify such instruments with reservations which empty them of their content. Moreover, many of the governments which have signed and ratified the international instruments have failed to bring their laws in conformity with their provisions. In this context, regional bodies entrusted with the promotion and protection of human rights, such as the European Commission on Human Rights, the African Commission on Human and Peoples Rights, and the Inter-American Commission on Human Rights, should become more instrumental in interpreting and designing mechanisms for the domestic implementation of these norms.

The ICJ believes that the international and regional orders should complement each other. While the regional system focuses on the specific human rights needs of each region, the role of the international system is to reconcile these principles into common values and to establish universal minimum norms and systems for their implementation. The specificity of each region should,

therefore, serve as a constructive element to strengthen rather than weaken the universal rules designed to achieve global respect for human rights.

This book is a joint effort of the entire family of the International Commission of Jurists. It is a result of the thoughtful consideration its Executive Committee gives to world events as they affect human rights. Several ICJ Commission-members as well as Honorary Members have given comments on the draft of the Secretariat, and I would like to take this occasion to thank them. The efforts of the ICJ Sections and Affiliated organizations in publicising our early work on these issues are particularly appreciated.

It goes without saying, that without the hard work of the entire ICJ Secretariat staff, this modest contribution of the ICJ to the Vienna World Conference on Human Rights would have been impossible. In particular, I would like to acknowledge the work of Mona Rishmawi, the director of the Centre for the Independence of Judges and Lawyers (CIJL), Alejandro Artucio, the legal officer for Latin America, Peter Wilborn, legal assistant with the CIJL, and Göran Ternbo, legal intern with the ICJ who have spent much time in its accomplishment.

Finally, the ICJ is dedicating this work to all the victims of human rights violations throughout the world. In honouring their suffering, the ICJ is making these specific proposals ***Towards Universal Justice***.

Adama Dieng
Secretary-General

Section 1

International Penal Court

The establishment of a permanent international penal court

The gross violations of human rights and humanitarian law committed in the former Yugoslavia have brought to the public consciousness a point long maintained by international jurists: perpetrators of such crimes must be brought to justice.

Highlighting the absence of an international judicial mechanism to enforce human rights and humanitarian law, various expert bodies, including the International Commission of Jurists (ICJ), have been urging for the establishment of a permanent International Penal Court[1] to try cases of gross violations of human rights and humanitarian law. For decades, several bodies, including the United Nations International Law Commission, have been engaged in studying the feasibility of this idea. No practical steps, however, have been taken in this direction.

As the international community is moving from the phase of standard-setting in the human rights field to the phase of implementation, the ICJ believes that the establishment of a permanent International Penal Court is timely and essential. In the Decade of International Law, this Court should be made a reality.

The crisis in the former Yugoslavia has revived international interest in this matter. Responding to universal calls to try those responsible for serious violations of international law committed in this territory, the U.N.

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[1] *The adjective "Penal", used throughout this paper, is interchangeable with "Criminal".*

Security Council adopted Resolution 808 that decided to create an *ad hoc* tribunal.

The *ad hoc* tribunal approach to international criminal jurisdiction versus the permanent court approach has become the subject of further debates. The ICJ takes the stand that while the *ad hoc* approach could be appropriate to respond to the crisis in the former Yugoslavia, it fails to address the global need for an international judicial mechanism to try cases of gross violations of human rights and humanitarian law wherever and whenever they occur. As stated in the International Meeting Concerning Impunity in November 1992,[2] we believe that it is possible to build on the work of the *ad hoc* tribunal as a step towards establishing a permanent International Penal Court. The work on these two fronts should be carried out in parallel.

This position paper seeks to outline issues surrounding the establishment of the permanent International Penal Court. Part One of this paper briefly discusses the history of developments towards an International Penal Court, including the recent work of the International Law Commission. Part Two addresses the question of why a permanent International Penal Court is needed, and it responds to the most common arguments against the establishment of such a Court. In Part Three, a possible blueprint of the International Penal Court is outlined, raising alternatives and questions concerning the structure and procedure of the Court. Part Four concludes with the ICJ's final recommendations.

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[2] *Organized by the ICJ and the French National Human Rights Consultative Commission, Geneva, November, 1992.*

I Background

A The History

The idea of a court with international criminal jurisdiction is not a new concept.[3] Contemporary efforts to establish such a court started after World War I. Articles 227-29 of the Treaty of Versailles provided for an international court to prosecute war criminals, including Kaiser Wilhelm II. The Kaiser, however, fled to the Netherlands where he obtained refuge, and the Allies abandoned the idea of an international court.

The Allies of the First World War also failed to prosecute those responsible for the killing of an estimated 600,000 Armenians in Turkey. The 1919 Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War recommended the prosecution of responsible Turkish officials, and in doing so, highlighted the concept of "crimes against humanity". The United States, however, opposed prosecution on the technical legal argument that no such crimes existed under positive international law. Consequently, the Treaty of Sèvres (1920), which was to serve as a basis for the prosecution of those responsible, was never ratified, and its replacement, the Treaty of Lausanne (1923), gave the Turkish officials amnesty.

After World War II, the Allies established two international tribunals, at Nuremberg and Tokyo, to try

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[3] *See M. Cherif Bassiouni, International Criminal Law: A Draft International Criminal Code (1980); I International Criminal Law 587 (M. Cherif Bassiouni & Ved P. Nanda eds.) (1973).*

major war criminals. Subsequent to the Nuremberg and Tokyo trials, the Allies established war crime tribunals in their respective zones of occupation in Germany and tried over 20,000 war criminals. Germany then took over the task of prosecuting offenders found in its territory. Formerly-occupied countries of Europe prosecuted Nazis and nationals who had collaborated with them.

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide, codified the jurisdiction of an international criminal court for the first time. The Convention prescribes that "[p]ersons charged with genocide, shall be tried by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties, which shall have accepted its jurisdiction."[4]

As a result of the post-World War II prosecutions, the United Nations established a Committee to codify "Offences Against the Peace and Security of Mankind". In 1951, the Code was prepared, and in 1953, it was amended. Between 1950 and 1952, two Committees on international criminal jurisdiction prepared a draft statute for the International Penal Court. The General Assembly, however, took no steps concerning these developments.

Subsequently, in 1973, the International Convention on the Suppression and Punishment of the Crime of Apartheid provided that persons charged with apartheid acts "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of

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[4] *Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).*

the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction."[5] In 1980, a Draft Statute for an International Penal Tribunal to prosecute apartheid violators was elaborated, but the project has not been acted upon.

More recently, the United Nations and its members have responded to the crisis in the former Yugoslavia by deciding to create an *ad hoc* international tribunal. The Special Rapporteur of the U.N. Commission on Human Rights entrusted to investigate violations of human rights in these territories recognized "[t]he need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators...."[6] In this regard, Security Council Resolution 780 created an impartial panel of experts to investigate the violations of the Geneva Conventions and all other violations of international humanitarian law committed in the former Yugoslavia.[7] Security Council Resolution 808 further decided to create an *ad hoc* international tribunal with the power to prosecute those persons responsible for "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".[8]

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[5] *International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 GAOR (No.50), U.N. Doc. A/9233/Add. 1 (1973).*

[6] *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, E/CN.4/1992/S-1/9, at para. 69.*

[7] *S/RES/780 (1992).*

[8] *S/RES/808 (1993), at para. 1.*

B Recent Work of the U.N. International Law Commission

In 1981, the General Assembly invited the International Law Commission (ILC) to resume its work to elaborate the draft Code of Crimes against the Peace and Security of Mankind (draft Code). Ten years later, the General Assembly specifically requested the ILC to prepare a report on the possibility of an international criminal court within the context of the draft Code. In 1990, ILC-member Professor Stephan C. McCaffrey stated that there was "broad agreement, in principle, on the desirability of establishing a permanent international criminal court within the United Nations system.... The international climate now appears particularly favourable for the establishment of such a court ... and it would be unfortunate if the opportunity were lost."[9] The ILC's 1991 Report offered some provisional formulations and an extended commentary on two issues: 1) the court's jurisdiction; and 2) the requirements for instituting criminal proceedings.[10]

In 1992, ILC Special Rapporteur for the draft Code, Mr. Doudou Thiam, devoted his Tenth Report entirely to the question of international criminal jurisdiction, which led to a debate on the issue during the ILC's 1992 session.[11] The

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[9] *Benjamin B. Ferencz, An International Criminal Code and Court: Where They Stand and Where They're Going, 30 Colum. J. Transnat'l L. 375, 385 (1992), quoting Stephan C McCaffrey, The Forty-Second Session of the International Law Commission, 84 Am. J. Int'l L. 930, 933 (1990).*

[10] *See Report of the International Law Commission on the Work of its Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10 U.N. Doc. A/46/10 (1991) [hereinafter 1991 ILC Report].*

[11] *Special Rapporteur on the draft Code of Crimes of Crimes Against the Peace and Security of Mankind, Tenth Report, A/CN.4/442, para. 47.*

Commission established a Working Group on the question of an international criminal jurisdiction, chaired by Mr. Abdul Koroma. The Report of the Working Group, included as an Annex to the ILC's 1992 Report, concluded that such a court was indeed possible and it set forth concrete recommendations.[12] In his Eleventh Report, dated 25 March 1993, Mr. Thiam formalized the work of the Working Group and proposed a draft Statute of an International Penal Court.[13] This draft Statute will be considered by the Forty-Fourth session of the ILC, which takes place in Geneva, 3 May-23 July 1993.

II The need for a Permanent International Penal Court

A Why a judicial mechanism?

While the U.N. system on human rights has developed immensely since its establishment, the implementation of standards, however well-established, has been notoriously unsuccessful. As an increasing number of U.N. Working Groups and Special Rapporteurs catalogue the steady deterioration of human rights situations around the globe, abuses such as torture, summary or arbitrary executions, and disappearances continue unabated. The lack of adequate international machinery to protect individuals from gross violations of human rights is the alarming and disturbing reality. Now, more than any other time in the past, the

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[12] *Report of the Working Group on the question of an international criminal jurisdiction, Report of the International Law Commission on the Work of its Forty-Fourth Session, A/47/10 (1992) [hereinafter Report of the ILC Working Group].*

[13] *A/CN.4/449.*

international community appears to be ready to proceed in taking practical steps towards the creation of a permanent International Penal Court.

The relevant law exists. A body of international treaties, culminating with the draft Code of Crimes Against the Peace and Security of Mankind,[14] prohibits, *inter alia*, systematic or gross violations of human rights (including torture, disappearances, and extrajudicial executions), crimes against humanity, war crimes, and various other crimes of an international nature. What is conspicuously absent is a method of enforcement to give these laws significance in the real world and to punish offenders of these norms. The burden is now to show how an International Penal Court would satisfy this need.

One of the purposes of any penal system is to ensure that perpetrators are justly made responsible for the crimes they commit. The same is true under international law: as it was recognized in Principle I of the Charter of the Nuremberg Tribunal, "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[15]

Today, many of those who violate human rights law are not made accountable for their acts. Grave violations of human rights are committed with impunity the world over. This impunity lessens and even eliminates the legal effect of the norms which define conduct as criminal. Impunity undermines the principle of equality before the law by

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[14] *1991 ILC Report, supra note 10.*

[15] *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.*

freeing certain persons from all responsibility. As correctly stated by the ILC Working Group,

> "the case for some international jurisdictional mechanism starts from the fact that there have been since 1945 notorious cases of crimes against humanity that have gone unpunished. It has proved extremely difficult to bring such offenders to justice, and the lack of any alternative forum at the international level has exacerbated these difficulties. One reason for the difficulty is that, in many cases, serious crimes against peace or humanity have been committed by persons who were at the time members of the Government of a State. It discredits the norms of international law if they are never enforced."[16]

However, the seriousness of accusing an individual or group of committing gross violations of human rights or humanitarian law requires a cautious approach. No one should be unjustly labelled with such charges. The existence of an international court that fairly examines and verifies these accusations will ensure that they are handled with impartiality and objectivity.

There is also the problem of politicization. Various parties or non-parties to a conflict accuse others of committing crimes against international law to serve their own political ends. Moreover, experience demonstrates that taking action against the perpetrators of such crimes at the international level is also surrounded by political considerations. Creating a court rather than an international political office to deal with such issues should, therefore, minimize the politicization of

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[16] *Report of the ILC Working Group, supra note 12, at para. 419.*

these matters. An impartial and independent court will undoubtedly enhance international cooperation in the respect for international human rights law.

The just implementation of individual punishment will deter others from committing similar crimes. Crime becomes less attractive to potential offenders when punishment will result from their actions as a matter of course. It is equally important to compensate victims of violations of human rights. If international law, painstakingly established over the last five decades, is to have relevance, a permanent International Penal Court, which can justly and surely implement it, is indispensable.

B Arguments against an International Penal Court

Some governments have expressed opposition to the development of an International Penal Court. The following is a list of the most common arguments against the Court, and our responses to them.

First, some governments believe that international agreement on a court, other than on an *ad hoc* basis, is unlikely. Technical and political disagreements will prevent the implementation of international jurisdiction.

While the creation of the Court is a technical task, it is not more complex than was the creation of similar bodies already established, including, the International Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights. Moreover, the International Law Commission has completed a detailed assessment of the technical possibility of creating a Court, and has concluded that such a Court is possible. While we do not agree with all of the findings of the ILC Working Group, we do agree that the

Court would be a "workable system".[17] So far, it has been the lack of political will, not the myriad technical issues, that has stood in the way.

The catastrophe in the former Yugoslavia, however, has prompted political will, dormant since Nuremberg, into action. The *ad hoc* tribunal is the result. Furthermore, the changing political climate presents the possibility for States to work together in a more systematic and comprehensive way. Establishing an International Penal Court is one example of cooperation based on reciprocity, mutual understanding, and reliance.

Second, and more importantly, the idea of the Court has been seen as an infringement of national sovereignty. National courts, according to this view, have exclusive jurisdiction over crimes committed in the territory of a State.

This argument ignores a number of basic points. It is well accepted under international law that "individuals have international duties which transcend the national obligations of obedience imposed by the individual state."[18] Gross violations of human rights, such as genocide and torture, by their very nature, fall under international jurisdiction. They constitute an attack on the very conscience of humanity. They negate the principles and objectives of the United Nations Charter. Many times, they constitute a threat to international peace and security. These matters transcend the claim of national sovereignty.

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[17] *Id. at para. 401(iii)(b).*

[18] *Trial of the Major War Criminals Before the International Military Tribunal — Nuremberg: 14 November 1945 - 1 October 1946, at 168-69 (1947); see also Nanette Dumas, Note, Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals, 13 Hastings Int'l & Comp. L. Rev. 585, 593 (1990).*

Moreover, States have already forfeited exclusive jurisdiction over these types of crimes by ratifying or adhering to the treaties that prohibit them. The supremacy of international law over domestic law is a customary international law principle. Article 14 of the Declaration on the Rights and Duties of States provides that "[e]very State has the duty in its relations with other States to comply with international law and with the principle which holds that the sovereignty of each State is subject to the supremacy of international law." Furthermore, Article 27 of the 1969 Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Of course, the national courts are encouraged to try crimes, but they must do so effectively. Impunity rewarded for human rights violations precisely illustrates the failure of national courts. If national courts were always effective, the world would look a lot different than it does. National judicial sovereignty far from excludes the creation of an International Penal Court, it demands it. This point draws overwhelming support from the 1992 Report of the ILC Working Group:

> "The problem is such that courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures. Reinforcing national criminal justice systems is not likely to address this need."[19]

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[19] *Report of the ILC Working Group, supra note 12, at para. 431.*

III A blueprint for the International Penal Court

The primary purpose of the International Penal Court is to adjudicate the criminal responsibility of individuals charged with crimes under international law, primarily with respect to war crimes, crimes against peace and humanity, and systematic or mass violations of human rights.

The following is a brief and accessible blueprint of the permanent International Penal Court.[20] We claim neither to raise every issue nor to solve every problem. In some instances, we have simply listed possible alternatives to questions that will be answered during the establishment process.

A Structure and Jurisdiction

1 - Creation of the Court

The ILC Working Group has determined that:

> "Other methods of the establishment of an international criminal court have sometimes been proposed (e.g. through a resolution of the General Assembly or the Security Council). But the normal method for the creation of an institution is by a treaty agreed to by States parties. Where

[20] *Our proposals are provided in the context of the work already done by the ILC Working Group. To an extent, we follow the Working Group's order of issues and accept some of its findings. While we do not fully endorse the report, we recognize its value as a thorough and concrete development. Many views expressed here, however, significantly differ from those of the Working Group.*

> that institution is to be part of the United Nations additional steps may have to be taken, but initially the necessary structure needs to be agreed on by States. ...an international criminal court should have its own Statute in treaty form."[21]

The ICJ believes that the International Penal Court could be created either by a multilateral treaty among states or by an amendment to the United Nations Charter. While it is preferable that the Court be a permanent independent organ of the United Nations, the complex process of amending the U.N. Charter may prove more burdensome than the creation of a treaty. In any case, the International Penal Court should seek a formal relationship agreement with the United Nations.

2 - The judiciary

Most importantly, the composition of the Court must be above suspicion of bias. Its members should fairly represent all the regions of the world. They should not be functionaries of their governments but should be independent jurists of the highest moral and legal standing. The independence and the impartiality of the judges have to be guaranteed by and enshrined in the Statute of the Court. It must be a duty for all governments to respect and observe that independence. An independent and impartial judiciary is an indispensable requisite in any free society under the Rule of Law, including, of course, international society. In keeping with the 1985 U.N. Basic Principles of the Independence of the Judiciary, the judiciary of the International Penal Court shall:

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[21] *Report of the ILC Working Group, supra note 12, at para. 437.*

> "decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason."[22]

Judges must be more than impartial, they must be highly qualified both in matters of criminal justice and international law. Furthermore, any method of judicial selection shall safeguard against judicial appointments for improper motives, and there shall be no discrimination on the basis of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.[23]

The ILC Working Group concluded that the judiciary of the Court will be part-time body; judges would be selected each time the Court was called for. In our opinion, this is coming dangerously close to an *ad hoc* approach to international criminal jurisdiction. To ensure the development of a cohesive, independent, and committed judiciary, the Court should be a full-time body from its inception. In fact, a full-time judiciary is most necessary during the first days of the Court's existence to develop a collective understanding of the Court's procedures and to establish the precedent of consistent jurisprudence.

3 - Jurisdiction

When a crime under international law is committed, there is always at least one State concerned: the State in whose territory the crime was committed, or the State against

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[22] *art. 2.*

[23] *See U.N. Basic Principles of the Independence of the Judiciary, art. 10.*

which the crime was directed.[24] In the best case scenario, a State would confer compulsory jurisdiction to the Court by simply becoming a party to its Statute. While it may seem logical that the acceptance of the Court's Statute is understood as an obligation to confer jurisdiction, the example of the International Court of Justice, in which a State must make a specific declaration to confer jurisdiction, gives reason to doubt the practicality of this approach.

Although the principle of national sovereignty is no longer absolute, States remain reluctant to confer international jurisdiction. The ILC Working Group suggested that this problem be solved in the following way:

> "Each State party to the Statute would be free to accept the court's jurisdiction. This could be done either ad hoc in relation to a particular offence alleged to have been committed by specified persons, or in advance for a specified category of offences against one or more of the treaties which fall within the subject-matter jurisdiction of the court, to the extent that the treaty is in force for the State concerned."[25]

This approach would give the Court solely concurrent jurisdiction; a State having jurisdiction under any of the internationally-recognized theories of jurisdiction, including territoriality and nationality, would be able to exercise that jurisdiction, but could, if it choses, confer jurisdiction to the

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[24] *The ICJ does not consider a State to have jurisdiction because its national is the victim or the perpetrator.*

[25] *Report of the ILC Working Group, supra note 12, at para. 446.*

International Penal Court. This approach might not be sufficient, however.

In our opinion, the question of jurisdiction needs to be further examined when the treaty establishing the Court is drafted. It has been suggested, and we agree, that the International Penal Court should be vested with exclusive jurisdiction over crimes such as genocide, systematic or mass violations of human rights, and apartheid.[26] While we recognize that political reality makes exclusive jurisdiction unlikely, some type of exclusive jurisdiction is necessary for the International Penal Court to fulfil its promise. One possibility is that the Court have exclusive jurisdiction over some crimes, and concurrent jurisdiction over others.

In any case, the Court must be empowered to judge on legal and factual issues. Mere review jurisdiction over legal questions is not sufficient. On this question, the ILC Working Group found that:

> "the case for an international criminal court is essentially a case for a trial court, rather than an appellate or review body. Controversies surrounding allegations of serious international crimes are likely to be controversies about the facts – especially if the offences have already been carefully defined by international treaties in force. In criminal cases, facts are essentially found at trial rather than on appeal or review – especially if such appeal or review is to occur after

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[26] *See Special Rapporteur on the draft Code of Crimes Against the Peace and Security of Mankind, supra note 11, at para. 47.*

national procedures have been exhausted – i.e., at third or fourth remove from the trial itself."[27]

a - Sources of law and subject-matter jurisdiction

The Court must have a subject-matter jurisdiction which includes crimes under international law. These crimes include offences very different from each other. Apartheid and genocide are crimes under international law even if they are committed within the borders of a single State. International terrorism and drug trafficking, however, are international crimes precisely because they take place across national borders. Other actions, like State aggression, are crimes because they threaten international peace and security.

In addition to the treaty establishing the Court, the Court's primary sources of law are treaties defining some offences as crimes under international law. Over the last five decades of standard setting, the international community has created a body of law which provides the outline of the Court's subject-matter jurisdiction. Customary international law also constitutes an important source of reference on this matter.

First and foremost, these sources should include the draft Code of Crimes against the Peace and Security of Mankind. The inter-relationship between the draft Code and the Court has been established by the work of the International Law Commission. The International Penal Court would ensure the most objective and uniform interpretation of the draft Code, the most complete codification of international

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[27] *ILC Working Group, supra note 12, at para. 424.*

criminal law. Crimes under the draft Code include, *inter alia*:

- genocide;
- apartheid;
- mass or systematic violations of human rights, including, e.g., murder, torture, forced transfer or deportation of populations, and persecution on social, political, racial, religious or cultural grounds;
- war crimes, including, e.g., acts of inhumanity, cruelty or barbarity directed against the life, dignity or mental integrity of persons, such as torture and wilful killing;
- other international crimes, including drug trafficking and international terrorism.

The subject-matter jurisdiction should not be limited to the draft Code. Other sources of international law which could be used independently or as reference for the draft Code, include, *inter alia*: Convention on the Prevention and Punishment of the Crime of Genocide; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Convention Concerning the Abolition of Forced Labour; Geneva Conventions and Additional Protocols; International Convention on the Suppression and Punishment of the Crime of Apartheid; and, any other treaties, including those yet to be created, that define crimes under international law.

b - Personal jurisdiction

We tend to agree with the ILC finding that "[t]his is one of the most difficult technical issues to be faced, in part because the potential range of circumstances is so wide, in part because of the different bases for the assertion of personal

jurisdiction in criminal matters under the different national legal systems."[28] Some national legal systems utilize territoriality as the basis for criminal jurisdiction, and correspondingly have few inhibitions about the extradition of their own nationals to a State where the offence was committed. Others, while relying also on territoriality, assert criminal jurisdiction over acts of their nationals wherever committed, and will not extradite them.[29]

The broadest possibility, for example, would be to build on the existing principle of universal jurisdiction. Provided that the International Penal Court is established in a way that does not give rise to questions about political neutrality, independence, objectivity and impartiality, a procedure similar to extradition is no doubt a realistic tool for bringing perpetrators to justice.[30] It must be considered desirable for the international community to bring perpetrators of war crimes, systematic or massive violations of human rights, and crimes against peace and humanity to justice before an impartial international court with fair trial procedures.

Further, it is important not to confine possible perpetrators of crimes to public officials or representatives only, but also to private individuals acting under the acquiescence, order, or tolerance of State authorities, liberation movements, or organised groups exercising *de facto* control over a particular territory.

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[28] *Id. at para. 452.*

[29] *Id. Again, the ICJ does not accept personal jurisdiction based solely on nationality.*

[30] *Extradition is used to bring individuals before foreign courts. The International Penal Court, however, should not be considered as a foreign institution.*

B Procedure & Prosecution

1 - Criminal justice

Criminal procedure has to be established by the Statute of the Court. In this regard, the primary consideration must be the guarantees of fair trial and due process. The principles of non-retroactivity of less favourable criminal laws and penal sanctions, the principles *Nullum crimen sine lege* and *Nulla poena sine lege*, must be upheld.[31] Other fair trial guarantees, such as presumption of innocence, speedy trial, and assistance of counsel, must also be provided for.

These provisions can be based on Article 14 of the International Covenant on Civil and Political Rights, which provides in part:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

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[31] *See International Covenant on Civil and Political Rights, art. 15.*

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.[32]

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[32] *Id. at art. 14.*

2 - System of prosecution

Of the many possible methods of bringing charges against an accused, the ICJ believes that the power to bring charges should be entrusted to an prosecutorial organ, strictly separate from the judiciary and judicial proceedings. An independent office of prosecutors is necessary because the preparation of charges should be accompanied by the complete guarantees of impartiality and objectivity.

The office of prosecutors would be responsible for the investigation, collection, and production of all necessary evidence. Given the importance of this responsibility, selection criteria for prosecutors must embody safeguards against appointments based on partiality or prejudice of any kind, and requirements for a high level of professional experience and expertise in criminal and international law.

In the performance of its duties, the office of prosecutors shall:

- carry out its functions impartially and avoid all kinds of discrimination;
- protect the public interest, act with objectivity, take account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or the disadvantage of the suspect;
- keep matters in its possession confidential, unless performance of duty or needs of justice require otherwise;
- consider the views and concerns of victims and ensure they are informed of their rights in accord with the Declaration of Basic Principles of Justice for Victims of Abuse of Power;

- not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded;

- refuse evidence it believes to have been obtained through unlawful methods, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, and shall take all necessary steps to ensure that those responsible are brought to justice.[33]

The office of prosecutors should accept complaints from a broad variety of sources. States would be able to submit complaints. The same right should be granted to individuals, in particular to victims, as is the case, for example, under the Optional Protocol to the International Covenant on Civil and Political Rights. It must be emphasized that the International Penal Court is a judicial, and not political, organ, and that the office of prosecutors should concern itself only with prosecuting those responsible for crimes under the Court's jurisdiction.

One way of enhancing the authority of the Special Rapporteurs and Working Groups established by the Commission of Human Rights would be to grant them the right to bring complaints before the Court. Given this power, they could more effectively fulfil their tasks, and be more likely to receive the full cooperation of States in their investigations.

3 - Bringing defendants before the Court

As mentioned briefly above in the discussion of personal jurisdiction, the question of how to bring defendants before

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[33] *See U.N. Guidelines on the Role of Prosecutors.*

the Court could present a formidable obstacle. In his tenth report, the Special Rapporteur on the draft Code recommended that the Statute of the Court should provide that transfer to the Court was not to be regarded as extradition. The International Penal Court is not to be equated to a foreign court, but to a court of the transferring State. This direct approach avoids the complications presented by extradition.[34]

This approach, however, could also present conflicts with domestic constitutions. It is necessary, therefore, that the treaty establishing the Court includes the minimum requirements for the transfer of accused persons. State parties to the treaty would be bound by this transfer agreement.

4 - Penalties & implementation of sentences

Another issue to be addressed is the question of punishment. The sources that define crimes under international law, such as those listed above, are silent on this issue. Even the Genocide Convention, which visualises an international genocide court, goes no further than to refer to "effective penalties" for persons guilty of genocide.[35] It is suggested, both by the ILC Working Group and the ICJ, that the treaty establishing the Court deal with the question of penalties.

Regarding the enforcement of execution of sentences the Court might either depend on the cooperation of States, who will

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[34] *Special Rapporteur on the draft Code of Crimes Against the Peace and Security of Mankind, supra note 11, at paras. 76-83.*

[35] *art. V.*

carry out the sentences in their own detention facilities, or the Court might have its own facilities. In any event, prison conditions would be consistently monitored by the Court, in particular to ensure that the United Nations Minimum Standard Rules for the Treatment of Prisoners were followed.

5 - Right to Appeal

The right to appeal a decision of the International Penal Court must also be guaranteed. We emphasize the importance of Article 14 (5) of the International Covenant on Civil and Political Rights: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

It is conceivable that the permanent International Penal Court be composed of two level of jurisdictions, one of first instance and another of appeal. It is also possible that the International Court of Justice be entrusted with review competence over questions of law decided by the International Penal Court.

IV Recommendations & conclusions

The ICJ proposes the establishment of an independent and permanent International Penal Court to prosecute those responsible for crimes under international law. The International Penal Court should:

1. be a full-time, permanent, impartial, and independent body associated with the United Nations;

2. be composed of highly-qualified independent and impartial jurists representing all regions of the world;

3. have subject-matter jurisdiction over all crimes under international law, including, those listed in the draft Code of Crimes Against the Peace and Security of Mankind, including;

   - genocide;
   - apartheid;
   - mass or systematic violations of human rights, including, e.g., murder, torture, forced transfer or deportation of populations, and persecution on social, political, racial, religious or cultural grounds;
   - war crimes, including, e.g., acts of inhumanity, cruelty or barbarity directed against the life, dignity or mental integrity of persons, such as torture and wilful killing;
   - other international crimes, including drug trafficking and international terrorism.

4. ensure all due process and fair trial guarantees, such as those provided for in Article 14 of the International Covenant on Civil and Political Rights;

5. contain an independent and full-time prosecutorial organ to bring charges against accused persons and to collect, prepare, and present necessary evidence;

6. accept complaints from a broad variety of sources, including States and individuals.

This is not the first time the ICJ has urged for the creation of an international judicial mechanism. In 1968, the year of the first World Conference on Human Rights held in Tehran, then-Secretary-General Seán MacBride wrote:

> "The great defect of the present efforts of the United Nations to provide implementation

machinery is that it is piecemeal, disjointed and is political rather than judicial. Effective implementation machinery should confirm to judicial norms, it should be objective and automatic in its operation; it should not be ad hoc nor dependent on the political expediency of the moment. Has the time not come to envisage the establishment of a Universal Court of Human Rights analogous to the European Court of Human Rights with jurisdiction to pronounce on violations of human rights? Even if its judgments were initially to be only declaratory, they would be of considerable moral value and would help to create judicial norms in the field of human rights. Its findings would certainly carry far more weight than those of transient and often ill-equipped part-time U.N. Committees or Sub-Committees, selected on a political basis.

...Such a permanent judicial tribunal would not suffer from the inherent defect of being set up on an ad hoc basis to deal ex post facto with a particular situation. The decisions of such a tribunal might remain temporarily unenforceable in some regions. But behind every act of cruelty there is an individual who perpetrates or inspires the act of cruelty. That individual could at least be identified and branded as an outlaw. Such a sanction would have a restraining influence and would reduce the trend towards the brutalization of mankind.

In protecting human rights, it is not sufficient to enunciate the rights involved; it is essential to provide a judicial remedy accessible to those

affected. In curbing cruelty and crimes against humanity it is not sufficient to deplore them; it is essential to pass judgment and if necessary outlaw the individuals responsible."[36]

Twenty-five years later, we can conclude no better than to repeat these words. Our hope is that this time, in 1993, they will be heeded.

[36] *Seán MacBride, Introduction, 8 Journal of the I.C.J. iii, iv-vi (1968).*

Section 2

United Nations Human Rights Mechanisms

Critical Observations on the Human Rights Extra-Conventional Mechanisms*

More than forty years after the United Nations was established and the Universal Declaration of Human Rights adopted, the U.N. human rights activities must, on balance, be favourably received. Once the reluctance of governments – expressed in the early years –, such as the insistence on States having sole sovereigty, had been overcome, and once the competence of the U.N. had been consolidated, the Human Rights programme did not confine itself merely to standard-setting and promotion but introduced also important protection and monitoring functions. These efforts work through both the *ad hoc* conventional mechanisms and the extraconventional mechanisms set up under the general human rights mandate granted to the Organisation in the Charter.

This multifaceted range of activities together with the U.N. pragmatic human rights approach has created a complex and not very structured system, involving many tasks of a very different nature. Added to that is the large number of bodies concerned. The lack of coordination between conventional and general bodies whose competence stems from the U.N. Charter further complicates the picture. There is, therefore, an obvious need for rationalisation in order to enhance and strengthen the effectiveness of current mechanisms, most particularly those known in Organisation parlance as extraconventional mechanisms.

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* *This section has been prepared with the special collaboration of Concepcion ESCOBAR HERNANDEZ, Professor of Public International Law, Universidad Complutense, Madrid.*

I Extraconventional mechanisms: general remarks

Extraconventional monitoring mechanisms are the direct response of the United Nations to massive and sytematic violations of human rights. These mechanisms flow from the work of the Commission on Human Rights and are closely linked to the gradual expansion of the spheres of competence assigned to the Commission and to its becoming a protection and monitoring body.

Since the 1946 adoption of a resolution in which it declared itself incompetent to take up "communications" with regards to human rights violations, the Commission has gradually evolved [1] to the point specified in ECOSOC Resolutions 1235 (XLII) and 1503 (XLVIII). The first, known as 1235, expressly authorizes it to deal with the "question of violations of human rights and fundamental freedoms in all countries, with particular reference to colonial and other dependent territories". The second, known as 1503, lays down a proper procedure for dealing with communications.

Using both instruments, the Commission on Human Rights has developed an interesting practice in considering human rights violations. This has given rise to two broad categories of procedures: public, pursuant to resolution 1235 (XLII) and confidential, pursuant to resolution 1503 (XLVIII).

The main difference between the two lies in the public or confidential nature of the various activities involved in the monitoring procedure. Related to that, is the varying effect of

[1] *Through an intermediate stage characterized by lists regulated in ECOSOC Resolution 728F (XXVIII)*

the will to cooperate of the government concerned on one or another procedure. This is all the more striking under procedure 1503. These differentiations also affect the effectiveness of each procedure since it should be remembered that extraconventional mechanisms rely on international pressure generated by the monitoring exercise to achieve their ends. That pressure is clearly greater in public procedures.

Despite these differences, both procedures 1235 and 1503 have one unifying factor which relates to the subject to be monitored and ultimately the purpose of the procedure. In both cases, then, monitoring the State's performance of its obligations refers to "situations which reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". This excludes dealing with one individual case of a specific violation. The purpose of both procedures is not, therefore, so much to condemn the State as to bring about an improvement in the situation by fostering the removal of obstacles to full and genuine enjoyment of human rights. The protective function of these procedures does not flow from every alleged specific individual violation brought to the knowledge of the Commission. Hence, we are not dealing with a mechanism based on the right of petition in the strict sense of the term. To the contrary, the exercise of the right to petition acts only as a source of information whereby it is possible to define the existence of a situation which calls for investigation. From this point of view, it must be made clear that there is very little if any direct protection for the individual.[2]

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[2] *In recent years this protection has been increased through emergency procedures or urgent actions which enable the Commission or its investigative bodies to react promptly to alleged specific violations within its ken.*

Both, procedure 1235 and procedure 1503, fall within the ambit of the Commission on Human Rights which is central to both mechanisms. In practice, however, both have come to be used as a basis for action by other permanent bodies within the United Nations system, namely the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the General Assembly, the Secretary-General and, to a far greater extent, the Economic and Social Council. In addition, under procedure 1235, a good many *ad hoc* bodies responsible for investigating specific situations involving human rights violations were established. Participation by all these bodies, while in itself a source of enrichment, nonetheless is the outcome of a pragmatic approach and, except for action by the Sub-Commission under procedure 1503, does not follow a structured model. The picture is, therefore, unclear and systematic delineation is, thus, required. In any event, the central role under both procedures lies with the Commission on Human Rights, which is assisted by the Centre for Human Rights within the Secretariat.

Although the very fact that these mechanisms have been established is to be welcomed, it cannot be denied that they suffer from major failings which adversely affect their effectiveness. From this point of view, we shall take up a critical study of each procedure, pointing out the main shortcomings and mentioning methods to remedy them. Then, we shall offer a few overall remarks about the effectiveness of extraconventional mechanisms, with regard to the many bodies involved, connections with the programme of advisory and technical assistence services, and finally, the need to establish techniques whereby on-going follow-up to monitoring activities can be ensured.

II Procedure 1503

The generic name of procedure 1503 covers a number of activities of differing kinds regulated by resolution "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms". That resolution is but a partial development of resolution 1235 (XLII) and hence, despite its name, also refers to situations which seem to reveal a clear and reliably attested pattern of gross systematic human rights violations. So, communications considered will be taken into account only if they serve such purposes, and the rest will be filed.

Criteria and norms governing the admissibility of communications were established in resolution 1 (XXIV) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This resolution is a partial development of resolution 1503. In accordance with such criteria, communications may be referred by individuals or by groups, regardless of whether or not these are direct victims of the violation complained of, provided that they have direct reliable knowledge of such violations. NGOs may also refer such communications within the terms stated, provided that they are acting in good faith and not pursuing political ends that run counter to the principles of the U.N. Charter. Anonymous communications are not considered admissible, neither are those where the plaintiff has learned of violations only through the media. Communications couched in language offensive to the government denounced are not admissible since these are politically motivated or have a purpose which runs counter to the principles of the Charter, the Universal Declaration of Human Rights, or other instruments applicable to the human rights sphere. Finally, for communications to be admissible, they must be transmitted in reasonable time, after the exhaustion of domestic remedies

(where these exist and are effective) and they must not prejudice the workings of the United Nations specialised agencies.

A Stages of Examination

Communications are dealt with in four stages and involve in succession: a) The Working Group on Communications, consisting of five members of the Sub-Commission; b) the Sub-Commission on Prevention of Discrimination and Protection of Minorities itself; c) The Commission's Working Group on situations; and finally d) the Commission on Human Rights.

The activities of these bodies under procedure 1503 and the decisions adopted are always reached in closed session and no publicity may be given to them until the Commission on Human Rights decides to make recommendations to the Economic and Social Council.[3] Here, therefore, emerges the principle of confidentiality which becomes the characteristic feature of this procedure, which sets it apart quite clearly from procedure 1235 which is always public.

In the first instance, the Secretary-General sends a copy of the communication received to the Government against which the complaint is laid. The first of the aforementioned bodies is reponsible for considering communications received together with possible observations from governments The analysis is designed to select those communications which seem to reveal a consistent pattern of gross human rights violations. To make that aspect easier, the Secretary-General every month distributes a list to Sub-Commission members

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[3] *Resolution 1503 (XLVIII, paragraph 8)*

showing communications received and makes available to the Working Group once in session the originals of the communications themselves, together with replies and observations from the State concerned. On the basis of the report of the Working Group, the Sub-Commission, considers

"the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of Governments relating thereto and any other relevant information" in order to determine "whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission;"[4]

As is clear from the foregoing, the Sub-Commission plays an essential role in regard to procedure 1503. Not only does it act as a filter for communications received, but also as a real driving force for the procedure. It has been given sole competence to select the situations to be referred to the Commission for consideration. This function assigned to the Sub-Commission is particularly apposite if we bear in mind that it is a technical body of experts, and therefore less susceptible to the political slant underlying all the extraconventional mechanisms. However, the decision-making power which characterises the monitoring function lies solely with the Commission which may even decide to adopt no measure at all with regard to situations referred to it by the Sub-Commission.

For that purpose, the Commission on Human Rights set up a 5-member Working Group. From 1991, this Working

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[4] *Resolution 1503, paragraph 5*

Group has become a standing body. The Group meets annually for one week before the beginning of the Commission session with the mandate of considering information submitted by the Sub-Commission. The purpose is to prepare a new report which serves as a basis for debate in the Commission under agenda item 12 – and specifically with regard to the sub-item entitled "Study of situations which appear to reveal a persistent pattern of gross violations of human rights".[5]

Based on the Working Group's recommendations, the Commission may adopt one of two procedures:

a) Initiate a thorough study and "report to ECOSOC with recommendations" in conformity with paragraph 3 of resolution 1235 (XLII); or
b) Set up an *ad hoc* committee to deal with the subject of investigation "which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it".[6]

Both decisions open the way to two subsequent Commission activities differing in kind. The first measure presupposes termination of procedure 1503 (confidential) with regard to a given situation and its transfer to procedure 1235 (public). In the second, work continues to be maintained within procedure 1503, and although a special investigation procedure comes on the scene, it is kept confidential. What is more, the special confidential procedure and subsequent establishment of an *ad hoc* committee cannot be carried through without the express consent of the State concerned,

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[5] *Provided for in Commission resolution 8(XXIII) and Economic and Social Council resolutions 1235 (XLII) and 1503 (XLVIII)*

[6] *Resolution 1503, paragraph 6*

which plays a decisive role throughout the entire investigation process. This primacy of the will of the State has meant that until now no *ad hoc* committee has ever been established. Hence, in practice, procedure 1503 has been reduced to a general mechanism for dealing with the communications described above.

Obviously, together with these two categories of decisions dealt with in resolution 1503 (XLVIII), the Commission may also decide not to take any explicit measure on any of the situations submitted to it for consideration. This decision may imply both termination of the 1503 procedure and referral of the situation to a later session to allow for further information to be sought from new communications or from government observations. Another mechanism, therefore, has come into being, which is not expressly mentioned in the aforementioned resolution. It consists of establishing direct contacts with the Government concerned, either through the Secretary-General, or through the appointment of Special Rapporteurs or Special Representatives. To date, this intermediate mechanism has been used in cases such as Haiti, Paraguay, Uruguay and the Philippines.

B The Question of Confidentiality

The confidentiality which characterizes procedure 1503 involves the "prohibition" on the members of the Commission and Sub-Commission from referring in public sessions to communications or situations considered under that procedure. It is worth noting that the "prohibition" is restricted to referring either to the content of the communication or the confidential decision taken by the Sub-Commission or the Commission. This must not, however, be taken to imply, as has sometimes been said, that reference cannot be made in public session to any human rights

situations arising in a country, as distinct from the specific issue discussed in closed session.

This confidentiality, which is the distinctive feature of procedure 1503, also becomes its main failing, particularly when it runs up against what governments want. In fact, confidentiality was originally designed as a guarantee of the procedure's effectiveness, since it would foster better co-operation from the governments concerned as there would be no public airing of their reponsibility for events regarded as particularly serious by the international community. However, the result has been completely different. States, acting in self-interest, have largely managed to turn procedure 1503 into an umbrella to shield them from incipient public discussion without any *quid pro quo* of an improvement in the situation concerned.

All of this logically means that the monitoring system is less effective not only with regard to procedure 1503 but also – which is more serious - to the overall extraconventional mechanism considered. Confidentiality is now also prejudicial to procedure 1235. Aware of this, the Commission itself has tried in some measure to offset the adverse effects of confidentiality by various means.

First, using a practice begun in 1978 and now is consolidated, whereby the Chairman of the Commission each session publishes a list of States that have been the subject of follow-up under procedure 1503. This means that the names of the states subjected to this procedure can be known.[7]

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[7] *The number currently stands at 42 i.e. Afghanistan (1981-83), Albania (1984-88), Argentina (1980-84), Bahrein (1992), Benin (1984-85, 1988), Bolivia (1978-81), Brunei Darussalam (1988-90), Burma (1979), Central African Republic (1980-81), Chad (1992,1993), Chile (1981), El Salvador (1981), Equatorial Guinea (1978), Ethiopia (1978-81), Gabon (1986), German Democratic Republic (1981-83), Granada (1988), Guatemala*

However, this practice has its own shortcomings insofar as only the name of the State is made public but not the scope of the situation under investigation nor the measures that the Commission has adopted. Clearly this greatly reduces the ability of the international community to follow up developments in the situation concerned, even situations that are particularly serious, indeed notorious, such as those in some Latin American countries.

The second technique to counteract confidentiality is changing over to a special public procedure for discussion of a question previously dealt with under procedure 1503. In practice, this decision is used as a kind of penalty on governments who do not cooperate and has been brought into play a good number of times. This technique was first used in the case of Equatorial Guinea and most recently in 1993 of Sudan and Zaire. This procedure, however, raises the difficulty of the relationship between procedures 1503 and 1235, which affects the system of the monitoring mechanisms considered overall, so will be dealt with separately.[8] On this question, the Commission has acted arbitrarily. While it is true that in every case where the change-over has been made there has been a lack of government co-operation and a persisting situation, it is also true that in other cases with similar circumstances

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(1981), Haiti (1981-87, 1989-90), Honduras (1988-89), Indonesia (1978-81), Indonesia on East Timor (1983-85), Iran (1983), Iraq (1988-89), Japan (1981), Republic of Korea (1978-82), Malaysia (1984), Malawi (1978-79), Mozambique (1981), Union of Myanmar (1990-92), Pakistan (1984-85, 1988), Paraguay (1978-90), Rwanda (1992, 1993), Syria (1989,1992), Somalia (1989-92), Sudan (1991-92), Turkey (1983-86), Uganda (1978-81), Uruguay (1978-85), Venezuela (1982) and Zaire (1985-89, 1991-92).

[8] *See section IV.A below.*

discussion of the situation has continued under the confidential procedure.

C Time of Consideration

Concentrating solely on those communications taken up by the Sub-Commission, where there is a situation of human rights violations, it must be remembered that the successive action of the four bodies mentioned earlier together with the periodicity of their sessions, means that it would take a year for any communication received in the Centre for Human Rights to become the subject of a Commission decision under procedure 1503. This is an excessively long period if we take into account an alleged systematic violation of human rights. This criticism is weakened by the fact that procedure 1503 does not cover specific individual human rights violation cases but general situations involving violations where time constraints have to be given a flexible interpretation. However, such delays undermine the real effectiveness of the procedure, given that the communications on which the Commission bases measures to be adopted are outdated. From that point of view, it would be appropriate to establish some special procedure whereby any new information available could be referred to the Commission on communications recommended by the Sub-Commission for consideration. This would not be too burdensome since it would suffice for the Sub-Commission's Working Group on Communications to be authorised to meet before February so as to select new communications received on siituations dealt with by the Sub-Commission.

D The Role of the Plaintiff under the Procedure

On the second failing mentioned, treatment of communications as mere instruments for conveying

information prevents individuals or NGOs from following up or having proper knowledge of the measure taken on their communication. Or even whether it has in fact been discussed. There is another more serious consequence: the plaintiff cannot submit new remarks and comments to the Sub-Commission once the latter has begun discussion of the communication and received observations or replies from the government concerned. The result is that the two parties involved in the procedure are not treated even-handedly. This inequality takes on special connotations if we bear in mind that the procedure is confidential and therefore Working Group and Sub-Commission meetings are private, held behind closed doors, which means that debates are carried on without participation by NGOs which could offer information to counterbalance government contributions.

Although the failings mentioned are the logical outcome of the system structure it would be appropriate to reform the procedure in two different directions. First, by authorising the Centre for Human Rights to inform individuals of the use made of their communication once it has gone through the competent bodies.

This, however, raises substantive as well as procedural difficulties. The requirement of confidentiality raises the main difficulty. The individual could simply be required not to make the answer public. Given that the bulk of communications come from NGOs or are instigated by them, their willingness to continue participating in the procedure would without a doubt avoid any failure to abide by that requirement. Neither should it be forgotten that breaches of confidentiality can and do occur as a result of action by the government concerned. The main difficulties lie in procedural reform given the large number of communications received every year by the United Nations (300,000 in 1989).

The fact that the U.N. Centre for Human Rights lacks the technical resources and personnel required to do the job. Once again, this is a sound argument for considering allocating more funds to the Centre.

The second reform would call for plaintiffs to be authorised to submit supplementary remarks thus bringing procedure 1503 closer to the rules governing an adversarial procedure. The same sorts of substantive and procedural difficulties mentioned above would arise with this reform.

In any event, despite the difficulties mentioned, the benefits of the changes suggested are obvious as such practices would give individuals and NGOs greater confidence in the system. Such confidence is essential for it to work smoothly since both NOGs and individuals are the main sources of information without which the mechanism could not be maintained.

III Procedure 1235

Procedure 1235 describes the monitoring activity carried out by the Commission on Human Rights on the basis of Commission resolution 8 (XXIII) and ECOSOC resolution 1235 (XLII). This activity is always public according to two clearly defined models: general public procedure and special public procedures.

A General Public Procedure

The general public procedure is the simplest form of monitoring carried on by the Commission on Human Rights. It consists solely in public debate of a situation involving human rights violations under agenda item 12 ("Question of

gross violations of human rights and fundamental freedoms in all countries, with particular reference to colonial and other dependent territories") on the basis of information available to the delegations of the 54 Member States of the Commission and of non-members admitted as observers. Observers from other intergovernmental agencies contribute information and comment (ILO, UNHCR, Council of Europe, OAS, OAU) and essentially NGOs. Without a prior *ad hoc* document drawn up by the Commission or one of its subsidiary bodies to determine the facts involved in the situation, however, monitoring takes the form of discussion which does not necessarily have to lead to measures' being adopted by the Commission.

It is easy to see, therefore, that this monitoring mechanism has a high political factor and may just be the mechanism furthest from objectivity and impartial legal process that exists. However, while largely inevitable, this does not undermine the importance of debate and so it has been the point of departure for subsequent establishment of most of the special public procedures.

B Special Public Procedures

Special public procedures originate with resolution 1235 paragraph 3, whereby the Economic and Social Council authorises the Commission to "make a thorough study of situations which reveal a consistent pattern of violations of human rights (...); and report, with recommendations thereon, to the Economic and Social Council".

On the basis of these thin provisions, the Commission has established special public procedures on the human rights situations in Southern Africa, Occupied Arab Territories including Palestine, Chile, Democratic Kampuchea,

Nicaragua, Equatorial Guinea, Guatemala, El Salvador, Bolivia, Poland, Iran, Afghanistan, Cyprus, Cuba, Romania, Haiti, Iraq, occupied Kuwait, Myanmar, Sudan and Zaire. It has also established special public procedures on forcible disappearances, summary or arbitrary executions, torture, intolerance and discrimination based on religion or belief, the use of mercenaries, arbitrary detention and trafficking in children.

There emerge from this two types of public procedures:
a) special country procedures; and
b) special thematic procedures which nonetheless have some features in common.

The first of these procedures was established in 1967. The Commission has developed a wealth of practice from which can be deduced the defining characteristics of this system of protection based on a pragmatic approach. From such practice, special country procedures can be defined as the extraconventional monitoring mechanism consisting in the analysis of a situation characterised by massive, flagrant violations of human rights based essentially on an *ad hoc* report drawn up by an information body (or *ad hoc* investigative body). That report is important but not decisive. The Commission also uses information and comment provided by its Member and non-Member States, other intergovernmental agencies and essentially Non-Governmental Organizations (NGOs). In all cases the information may be submitted in writing or orally (within set date-limits). So the the monitoring exercise is carried out through public debate mainly, although not solely, in the Commission under agenda item 12, the purpose being to adopt specific measures, usually in the form of resolutions and decisions.

The special thematic public procedures are those where the Commission on Human Rights appoints a Special Rapporteur or a Working Group mandated to submit a report on how a given aspect of human rights is dealt with in various parts of the world, or around the world (torture, forcible disappearances, mercenarism, summary or arbitrary executions, etc.). This procedure is frequently used as a method of tackling a given type of particularly serious violation of human rights.

The main characteristics of the special public procedures, public being the operative word, are as follows: the power vested in the Commission to establish the procedure and define its mandate without needing to request the prior consent of the State concerned; and, finally, the ability to carry out genuine investigation work. All these elements make this potentially the most effective extraconventional monitoring mechanism for the protection of human rights.[9] These considerations have, doubtless, led to a strengthening of the procedure as of 1980.

1 - Shortcomings in Procedure 1235

The general nature and scope of Procedure 1235 mean that special attention should be given to the various factors involved in this category of procedure, with emphasis on the shortcomings of the system in practice. We shall look in turn at problems relating to the establishment of the procedure, the creation of the basic information body, the scope of the mandate given such bodies, the position of the individual with regard to the procedure, and the methods of work and rules of procedure used in investigation. To end with some

[9] *On the understanding that such protection relates to a comprehensive situation of human rights violations and not to separate individual cases.*

general considerations on the need to establish forms of cooperation within this category of procedure and in relation to other mechanisms outside the extraconventional system.

Setting aside the principle of publicity which became a guarantee for the system's effectiveness, the most noteworthy element in the special public procedures is without a doubt the presence of a basic information body which, given its capacity as a panel of experts, serves to render the monitoring process its objectivity.

To date, the Commission has established a complex system of *ad hoc* bodies with multifarious names that may be linked to certain categories of collegiate bodies [10] and functions carried out by individuals, one-man institutions or bodies [11], to which the Commission has on occasion requested the Secretary-General or his Representative to carry out the investigative work to be done, or has entrusted the task to the Sub-Commission. Aside from the specific designation of each and every one of these bodies, they all share a common structure, both with regard to the capacity of independent expert on which they are predicated and the competence and purview allotted them.

Given the importance of these bodies for the smooth running of special public procedures, attention must be drawn to questions which affect respectively the capacity of independent expert and effectiveness in carrying out the functions concerned, *i.e* the process of appointing bodies and the duration of their mandates.

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[10] *Special Panel of Experts, ad hoc Working Group*

[11] *Special Rapporteur, Special Representative, Special Envoy, Expert and Independent Expert*

The basic information bodies follow the general concept of expert. That means a person of recognised international standing with competence in human rights, who will carry out his duties in an individual capacity. These requirements that have largely been set forth in Commission resolutions are a guarantee of the objectivity of the body concerned and must, therefore, be the foundation for all decisions relating to the selection of candidates.

Although this rule has been generally applied in Commission practice, there are two major obstacles. The first relates to collegiate bodies that may be set up by the Commission on the basis of two different rules: ECOSOC resolution 9 (II) paragraph 3, and Rule 21 of the Rules of Procedure of the Subsidiary Bodies of ECOSOC. With regard to the first category, the capacity of expert is beyond a shadow of doubt. With regard to the second, that capacity is less distinct because the aforementioned Rule 21 requires that *ad hoc* working groups be made up of members of the Commission or, which amounts to the same thing, government representatives. In procedures where this second option has been exercised (Chile and Forcible Disappearances), however, members of the Group have been appointed as experts, together with individuals who do not represent governments. This allowed the group to act independently. However, in given cases – as everyone is well aware – the connection of the person through his or her post to a given government proves at least potentially prejudicial to the very concept of expert and therefore to the reliability of the investigation. This government link anyway, albeit one in form only, prompts serious doubts about the nature of the investigating body to the point where it may be seen as an intergovernmental body. It would be appropriate, should the Commission decide to set up new collegiate bodies, to do so

always on the basis of powers attributed to it under ECOSOC resolution 9 (II) paragraph 3, as happened with the Working Group on Forcible Disappearances.

Although the failing just described is major, it is not the worst. No. Attention has to be drawn to something in Commission practice with regard to one-man bodies and collegiate bodies: the dangerous tendency to designate eminent persons who have represented or are still representing their respective countries in the Commission, or who hold responsible posts which link them hierarchically and politically to the Government of the day (officials with direct political responsibility, and most particularly dipomats). Regardless of whether they are appointed in an individual capacity or as experts, the fact that at one and the same time they are agents of the State cannot but serve to distort the investigative work. That in turn fosters the political admixture which permeates all special public procedures.

There is also the tendency of States concerned to take action in various ways in the selection and appointment of experts. Aside from the doubtless beneficial effects to be gained from government cooperation – which is necessary for the smooth running of the special public procedure – the dangers inherent in this tendency are obvious. The State may act in its own interest in order to defer the beginning of the investigation as has happened in practice (Guatemala and Afghanistan).

These failings are the immediate consequence of the hybrid nature of special public procedures which, depite their legal bent continue to leave a great deal of room for political control. However, given how far the system has evolved, in order to maintain and consolidate it as an effective, reliable

mechanism, the Commission must adopt measures to guarantee that it will gradually become more objective and legal in process. Clearly, legal impartiality in the selection and appointment process for *ad hoc* investigative bodies must be given priority.

From this standpoint, the first requirement is rationalisation and simplification of scenarios used to determine *ad hoc* investigative bodies, by keeping only what is essential in the existing categorization and by achieving uniformity in the designations used. This would obviate time-wasting discussion as to the nature of the bodies concerned and the proper activity to be entrusted to them.

Secondly, there is a need to institutionalize mechanisms which allow for a prompt and sure appointment of a person to carry out investigative work so that the following basic requirements are met:

First, as far as possible avoid the aforementioned practice of appointing government officials and particulary career diplomats. Here, the Commission has the possibility to allocate investigative duties to the Sub-Commission on Prevention of Discrimination and Protection of Minorities or to some of its members. This possibility – which has been used in practice from time to time – has the advantage that Sub-Commission members have been elected as experts by the Commission itself. This means that they have a permanent organic link to the Commission and the United Nations. They are also presumed to have sufficient human rights capability and to be sufficiently knowledgeable about the universal and regional systems of protection.

Finally, there is an alternative form of establishing an on-going list of experts in accordance with the model chosen by the Commission in resolution 1992/55 relating to the

establishment of an emergency mechanism of the Commission on Human Rights. There is nothing to prevent such a mechanism from being used also in regular situations. The advantages of this system are obvious since the drawing up of a list would effectively pare down the definition of expert capacity among those serving on the Commission and would reduce the latitude or discretion open to the Commission.

2 - Duration of the Mandate

With regard to the duration of the mandate of the basic information bodies, it must be noted that it is *de facto* identified with the duration of the procedure. To date, given that we are dealing with *ad hoc* bodies, the Commission has adopted a decision to renew periodically the mandate of each and every one of these bodies. Except in the case of the Group on Southern Africa which has a two-year mandate, and that of the thematic procedures bodies, which as of 1991 have a three-year mandate, the remainder have only a one-year mandate. Consequently, not only the mandate of the *ad hoc* body, but also the term and validity of the procedure are constantly subject to change. Particularly as a result of the self-interested use of such instability by States concerned, as they seek to transmogrify the act of renewal into something that will allow them, either to tinker with the mandate attributed to the body concerned, or change the person doing the job. Moreoever, there is the added inconvenience of obtaining ratification from ECOSOC of the decision to renew, adopted by the Commission on Human Rights.

There have been attempts to justify the different treatment of a specific country, as opposed to thematic procedures, by invoking the inherent nature of the situation investigated. If this were to be followed, a case of human

rights violation on world scale would be assumed to be more long-lasting than a situation of violation within a State. Quite apart from the doubtful nature of this argument, there is no doubt that no rule requires this distinction or the need for the procedure *a priori* to have a date-limit. In fact, the contrary is true. There is nothing to prevent the procedure from being envisaged as a continuing process, without the need for periodic renewals, until a substantial improvement has been attained in the situation under investigation.

Clearly, the only reasons in favour of the systematic renewal process are budgetary and more particularly political, since States are reluctant to establish a continuing investigation into a situation which prevails on their territory. However, there are unquestionabl advantages to be gained from a standing procedure, and these are good grounds for the Commission to consider institutionalizing it. Or at least extending country procedures in the same way as the thematic procedures. Unlike what happens at present, this would mean a presumption in favour of continuing monitoring and would not represent any threat to the Commission or to the State investigated since, if the desirable improvement in the situation came about, it would be sufficient for the Commission to adopt the formal decision at its next session to terminate the procedure.

3 - Special Public Procedures

It must be remembered that these procedures come into play with the existence of a situation which seems to reveal a consistent pattern of gross violations of human rights; and that, as with procedure 1503, they do not deal with alleged individual cases of violation. The purpose is, therefore, to guarantee an improvement in the situation and not to protect individuals. This is reflected in the mandate assigned

to the *ad hoc* bodies whereby they must investigate the facts of a given situation and draw up conclusions and recommendations for improvement. Good offices, mediation and conciliation, can, in addition, be used together with what are known as direct contacts, which lead to the same end.

This approach leaves the individual whose rights have been violated outside of the monitoring procedure, with no connection to it except that of being a source of information. However, the protective function involved in the monitoring activity has brought about mechanisms which, while abiding by the basic structure of the special public procedures, function as effective forms of protection for the individual. These are actions taken by the *ad hoc* bodies upon receiving information describing the imminent and especially serious danger threatening an individual. In this case, they can immediately address themselves to the authorities concerned, requesting additional information and urging them to see that the danger to the individual is ended. Although the government response is subject to the principle of discretion or confidentiality, these techniques have provided major benefits in relation to forcible disappearances, arbitrary or summary executions and torture.

Thus the protection available under this category of procedure is given greater depth. Unfortunately, in practice, this approach seems to reduce the scope of the thematic procedures with no good cause. Therefore, it would be desirable for the emergency procedures approach to be transferred to the country procedures, in addition to the good offices function mentioned earlier.

4 - Rules of Procedure and Methods of Work

The pragmatic nature of special public procedures has resulted in rules of procedure and methods of work which have to be followed by the *ad hoc* bodies that are not regulated by any general rule, despite efforts made by the Secretary-General and the Commission itself. The latter, in 1974, recommended to ECOSOC the adoption of document E/CN.4/1134 which sets forth the ***Standard Rules for United Nations bodies dealing with human rights violations***. The Council confined itself to noting these and recommending their use but without making this in any way compulsory.

The result is that each basic information body has established its own rules of procedure and methods of work unilaterally and at its own discretion. Furthermore, they have done so pragmatically. In any event, the methods of work are almost identical in all the special public procedures, with the exception of urgent actions used in the thematic procedures. Hence the methods generally used are hearings of witnesses, interviews with intergovernmental bodies and non-governmental groups; contacts with NGOs, and the gathering and systematising of reliable information from various sources, including the mass media. These methods, although they may be used in isolation from a visit to the territory concerned, are particularly significant as part of a field investigation mission. Only through a visit by the investigating body can an informed opinion be arrived at as to the prevailing situation.

This has meant that the field visit has become the method of work. However, such investigations can happen only with the prior consent of the State. To be effective, they must be carried out in accordance with a programme specially drawn

up by the investigating body, directly controlled by it. Government participation is reduced here to guaranteeing the safety of the *ad hoc* body and accompanying mission members, as well as of the individuals and witnesses who contact the investigating body. It must be said that the States concerned have not always cooperated in this method of work. In some instances access to the territory has been repeatedly denied to the United Nations visiting mission. On occasion, authorization has hinged on conditions likely to prejudice the effectiveness of the visit.

While it is true that the discretion of the State to authorise access to its territory by a visiting mission cannot be restricted, it is also true that such lack of cooperation with the Commission must be strongly critized. Therefore, attention must be drawn to the particularly ideal nature of this method of work, which guarantees balance in the information received and, as a result, is a safeguard of the procedure's effectiveness and of the interests of the government concerned. It would be desirable, then, for States to take note of this fact and for the Commission to do everything in its power to carry out such visiting missions to the field.

On another tack, the lack of compulsory rules of procedure, applicable to all *ad hoc* bodies, also means that each of them unilaterally applies the procedural rules they deem appropriate. While this is largely understandable because of the need to suit investigation to each practical situation, it nonetheless raises unavoidable problems. These include for example: identification of the body to the witnesses or individuals who attend hearings, status of the staff of the Centre for Human Rights that provides technical support to the *ad hoc* body, formal channels of contact with the government and other groups affected (political parties,

trades unions, opposition groups in general, national NGOs and human rights defence groups ...), the manner and place in which hearings must be conducted, guarantees offered the witnesses, and even the content of the very report to be drawn up by the *ad hoc* group, particularly with regard to the place to be given in the report to the information submitted by the government. On this last point, it would be most useful to have a definition of the basic parameters for the drafting of the report, since this has such a bearing on the subsequent debate in the Commission on Human Rights.

The International Commission of Jurists feels that any means of achieving greater objectivity and impartial legal process in the monitoring mechanism calls for the adoption of rules of procedure applicable to all the basic information bodies. This is regardless of the fact that such rules may set forth only general guidelines and basic procedural rules to be followed in any investigation, so that the *ad hoc* body concerned could adjust them individually to the practical implementation of its mandate. The Commission has the Standard Rules as already stated in document E/CN.4/1134 and preparatory work, together with the Rules of the European Human Rights Commission, the Interamerican Commission on Human Rights, the Committee on Freedom to form Trades Unions and other similar ILO bodies.

5 - Country and Thematic Procedures

Within the framework of the critical analysis of the special public procedures special mention must be made of the distinction between country and thematic procedures. The first relate to a general situation of human rights violations in a given country, while the second allows for analysis of a violation of a specific right world-wide, or a human rights violation of a specific nature, again world-wide. Although

Commission resolution 8 (XXIII) and Commission resolution 1235 (XLII) were originally designed to establish country procedures, nothing in the respective texts prevents the Commission from materially taking up the issues of human rights violations.

Thematic procedures have flourished in the last ten years. There are basically two reasons for this. First, thematic procedures have arisen as the Commission's response to the accusation levelled against it of selectivity in establishing country procedures. Thematic procedures make it possible to deal with human rights violations in any country, with no limits, and avoid the isolated naming of a given State. Secondly, thematic procedures dilute the process of attributing responsibility to States for alleged human rights violations. Although violatory practices may be mentioned in a given State, this is done in the context of a long list of other States, which – doubtless – makes it less telling. This has led the Commission to give substantial support to the thematic procedures, as is clear from resolutions 1991/31 and 1992/41.

Hence, country and thematic procedures coexist which, doubtless, helps to give the monitoring system greater depth. Some years ago, certain States supported the idea that thematic procedures should, in the future, become a substitute for country procedures. Despite the fact that this approach had not been adopted, it resurfaced again during the 49th session of the Commission on Human Rights (February - March 1993). Consequently, and at the initiative of certain delegations, the Commission adopted Resolution 1993/47 of 9 March 1993 which tends to strengthen the role of the thematic rapporteurs and of the working groups but does not mention country rapporteurs. This Resolution asks that governments reply to demands for information adressed to

them by the thematic rapporteurs and the working groups. It provides that governments should cooperate with the latter by inviting them to visit their countries. Besides, thematic rapporteurs are encouraged to give more attention to the follow-up given to their recommendations.

The coexistence of both categories of procedures raises the problem of possible duplication of effort: The problem considered under the thematic procedure very often is also being considered under the country procedure. This makes it advisable to establish coordination and cooperation bodies among the various *ad hoc* bodies, not only with regard to available information but also to the methods of work used by one body or another. Such coordination cannot be construed as allowing the loss of any material competence attributed to any one of them.

In practice, some coordination between the bodies responsible for the country and thematic procedures respectively has emerged spontaneously on their own initiative. For such coordination to be effective – and fully serve the purposes of protection sought by the monitoring mechanism – it must be institutionalized.

The coordination model chosen might, *mutatis mutandis*, be that of the Meetings of the Chairmen of the bodies established pursuant to human rights treaties. This would give rise to a structure in which the various *ad hoc* bodies established by the Commission on Human Rights would be integrated for the purposes of cooperation and coordination.

Finally, and closely related to what has just been mentioned, there is a crying need to guarantee also the interrelationship and coordination of special public procedures with other human rights protection mechanisms in

the United Nations system, particularly when the subject of the investigation is the same.

Such coordination proves to be particularly necessary in the case of thematic procedures. Let's think, for example, about the necessary imbrications between the Special Rapporteur on Torture and the Committee against Torture set up under the 1984 Convention, or between the Working Group on the Trafficking of Children and the Committee on the Rights of the Child set up under the 1991 Convention. The country procedure also calls for coordination. This became clear in the case of El Salvador, where many activities undertaken by various United Nations bodies converged. Moreover, contacts between the *ad hoc* investigative bodies and the Standing Committees established under conventional mechanisms as well as others instituted by the United Nations or its specialised agencies (ILO and UNESCO in particular) are essential.

IV Effectiveness of extraconventional mechanisms: overall considerations

The effectiveness of the extraconventional monitoring mechanisms lies, as has been said, in the international pressure brought to bear under resolutions adopted by the Commission on Human Rights. The structure of the extraconventional system, however, may favourably or adversely affect its potential effectiveness from within. We shall deal with the three main sets of problems which, in our opinion, may affect the effectiveness of the mechanisms from within.

A Plurality of Procedures and Need for Coordination

As has been said, the extraconventional system is characterized by a plurality of procedures including the internal rules which determine relationships among these procedures and define the conditions in which each of them has to be applied. The Commission on Human Rights has set in motion a plural monitoring system without establishing any rule to limit absolute discretionary power. So, the Commission may at any time select one or another procedure without following any objective criterion. Quite to the contrary – as has been shown in practice – the decision to apply procedures 1503 or 1235 under special public procedures came about only because, at one session and on one situation, the voting was fairly balanced.

Clearly, both for procedure 1503 and for the special public procedures, the Commission has not applied a universal criterion in the sense of submitting to monitoring each and every situation of violations arising in the international community. There are even obvious examples of situations which, despite their seriousness or notoriety, have not been monitored by the Commission. In addition, there are situations which – despite their extreme seriousness – never went beyond mere discussion under the confidential procedure (Argentina, Paraguay, Uruguay). From this standpoint, the criticism of selectivity that has quite frequently been levelled against the Commission is partly borne out. This cannot, however, be construed as a flat dismissal of the Commission's entire monitoring activity. It would be desirable for the Commission to extend its scope of action on any situation which seems to reveal a consistent and reliably attested pattern of violations of human rights and fundamental freedoms.

The extreme discretionary power of the Commission to select the procedure applicable in a given situation largely affects the effectiveness of the extraconventional mechanism, especially when considering the fact that this is an intergovernmental body and that, paradoxically, its potential "customers" are States. This renders the Commission particularly sensitive to claims by States concerned since in any case they will argue that the procedures will only be taken under resolution 1503 (XLVIII) because there is less intensive monitoring available under that procedure as there is little or no public pressure. In addition, the investigative process can, in the strict sense of the term, be blocked at the outset.

This preference would not be dangerous in itself for the extraconventional mechanism if confidentiality had some counterpart to foster effectiveness. In this respect, it must be remembered that the confidential procedure is justifiable solely as an approach which is guaranteed and helped along by government cooperation. Such cooperation can and must be interpreted only as meaning an effective improvement in the country's human rights situation. However, the practice of the Commission on Human Rights under the 1503 procedure shows that government cooperation has not been forthcoming as often as would be desirable. No State has agreed to the setting up of a Special Investigative Committee and some have understood "cooperate" merely in the sense of answering letters to deny the facts. The 1503 procedure has therefore been used, as was stated earlier, purely and simply to prevent the initiation of the special public procedure which would have higher political and other costs for the State concerned.

In the light of the foregoing, and bearing in mind that the effectiveness of the monitoring exercise of the Commission on

Human Rights is closely related to public international pressure, there is reason to question the appropriateness of maintaining procedure 1503. The answer to this question must in any case be a careful one.

With regard to the discussion of communications, it is important to remember the extraconventional nature of procedure 1503 and the particularly delicate nature of the system of referral of complaints from individuals against a State. From this standpoint, confidentiality would guarantee acceptance of the procedure by States, despite the fact that no conventional norm obliges them to do so at the stage of communications received and considered. Confidential consideration should not, however, be maintained in the case of a worsening or persisting situation where no effective measures are taken by the State to remedy it.

The position is quite different when the *prima facie* situation has not been determined, since in that event the Commission is acting in response to a situation rather than on specified complaints. Obviously then, the place of confidentiality is lesser, and is confined to guaranteeing full and effective cooperation by the government concerned in order to ensure the smooth running of the procedure. If this cooperation is not obtained, then the very existence of a confidential monitoring system is unjustifiable.

These considerations show the need for formal and objective channels of communication to ensure an effective protection system between the confidential procedure and the special public procedure. In particular, the discretionary power of the Commission should be withdrawn when deciding the termination of consideration of a situation under the confidential procedure and the establishment of a special public procedure. This necessarily means that

objective parameters must be defined whenever the change-over mentioned earlier can be brought about, and those are none other than persistence of the situation investigated without substantial improvement. In this regard, one may recall the cases of Paraguay and Uruguay. It is legitimate to ask whether the extension of the 1503 procedure for three years in the first instance and ten in the second was a proper response to the principles underlying the mechanism.

In brief, the effectiveness of the extraconventional mechanisms taken overall requires the review of the interrelationship between procedure 1503 and the special public procedures. The special public procedures must obtain a legal and not just a political frame, and become a more intensive and weightier means of monitoring. This calls for the establishment of objective rules which, in the absence of government cooperation and given a persisting situation, determine the change-over from a confidential to a special public procedure. This should not, of course, limit the competence of the Commission to establish a special public procedure directly when the seriousness of the situation considered makes this advisable. In such instances, prior recourse to procedure 1503 could only damage the effectiveness of the monitoring and protection system, and would not even be justifed by the desire to preserve government cooperation. Cooperation which, incidentally, may also be gained under the public procedure as has been shown in practice.

B Monitoring and Technical Assistance

The very structure of the extraconventional mechanisms, their non-legal nature and humanitarian purpose which aim at restoring full enjoyment of human rights rather than to condemn the infringing State, necessarily leads to a close

link between such mechanisms and the human rights advisory services and technical assistance programme carried on by the U.N. Centre for Human Rights.

In the last five years, however, a dangerous practice has emerged in relation to the link between both categories of activities. This is the use of advisory services as an alternative to or as a substitute for monitoring procedures, even in cases where the situation of human rights violation has not disappeared or improved. There is confusion, therefore, between investigation and technical assistance. Good examples of this are found in the consideration of Guatemala, Equatorial Guinea and Haiti.

It must, therefore, be recognized that the promotional and monitoring functions have to be closely connected within all human rights protection systems. From this standpoint, the simultaneous establishment of an assistance programme for a country that is undergoing investigation is not something that should be criticized. Particularly if the assistance programme was agreed as a result of a clear improvement in the country's situation. Such circumstances even lead towards the suppression of the control procedure whether it may be the special public procedure or procedure 1503. Recall Bolivia (procedure 1235) and Uganda, Central African Republic and Paraguay (procedure 1503).

However, linking between the monitoring mechanism and the assistance programme can in no way lead to confusion or a change in the nature of either activity. This has tended to happen rather frequently in recent years. This practice, which is justified on the basis of preserving government cooperation, has serious consequences on the effectiveness and survival of the monitoring mechanism as well as on the advisory services and technical assistance programme.

The solution to these problems involves necessarily a clear delimitation of both kinds of activities. At first, this requires the Commission to stop using advisory services as an alternative approach to monitoring mechanisms. Secondly, the Commission should not establish such programmes except in those cases where the readiness of the State to remove obstacles to full and genuine enjoyment of human rights in its territory is sufficiently guaranteed. Working from these premises, there is nothing to prevent an advisory services and technical assistance programme from being established at the same time as a monitoring procedure. Otherwise, the procedure should be terminated until respect for human rights has been sufficiently guaranteed. It is true that such a guarantee calls for a value judgment by the Commission, which always involves a political factor. An ongoing follow-up system, as discussed below, may play an essential part in the preparatory work for achieving objectivity.

C The Need for Ongoing Follow-up Techniques

While the follow-up of measures that have been adopted is an essential factor in any international human rights protection system, it becomes even more important with regard to extraconventional mechanisms, since these deal with global situations of violation. So, on-going follow-up techniques are an essential factor in achieving two objectives: first, proper identification of the existence of situations which call for a response from the Commission; second, evaluation of the improvement in or worsening of situations already being monitored, together with the way in which measures recommended by the Commission are carried out - or otherwise - by the States concerned. The achievement of these objectives requires two complementary approaches in the follow-up.

The first relates to global consideration of the situation investigated in all United Nations bodies dealing with human rights. This requires a coordination and cooperation system as already mentioned and that to some extent has been developing in practice. The Commission on Human Rights and the Sub-Commission must work jointly under procedure 1503.

Attention must be drawn here to a practice used by the Commission for special public procedures. By virtue of this practice, the mandate of the special investigative bodies is required to submit two separate reports: one provisional for the General Assembly and the other – definitive – for the Commission itself. The first submitted in September to the General Assembly Third Committee, and the second in February to the Commission on Human Rights. This approach gives greater continuity to follow-up in any given situation, while monitoring is intensified as the function is exercised by the General Assembly and the Commission in turn.

Despite the advantages derived from this practice, the Commission does not apply this as a general rule but only according to selective criteria based mostly on country procedures particularly when the situation seems more serious or where more international pressure is being sought. This, however, has not prevented the General Assembly from dealing with the other situations considered under a special public procedure. In those cases, it has done so through a debate on the annual ECOSOC report taking as its reference point the report that the investigative body sends in the previous month of February to the Commission on Human Rights. Although in both cases General Assembly participation is guaranteed in the monitoring and ongoing

follow-up of the situation under investigation, it may be noted that the existence of an *ad hoc* report drawn up by the General Assembly means better Assembly monitoring.

It must also be taken into account that decisions adopted by the Assembly in cases where a provisional report is submitted, largely constitute a procedural and substantive extension of the decisions adopted earlier by the Commission. At the same time, they gain the greater resonance of having been adopted by the universal representative body of the United Nations. In light of the foregoing, the establishment of a proper ongoing follow-up system for special public procedures undoubtedly argues in favour of the Commission extending the practice described to all procedures within this category.

A similar linkage model could be created for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Mention must be made of the very important role which, pursuant to the legal imperative of resolution 1503 (XLVIII), involves the filtering process of communications on violations of human rights and the identification of general situations. However, the Sub-Commission does not play a similar role once a special public procedure has been established since, in principle, it is excluded from participation unless the Commission decides to entrust it with investigative tasks. So, Sub-Commission participation suffers a hiatus in extra-conventional mechanisms. The Sub-Commission has tried several times to establish *motu proprio* independent investigative mechanisms and even went so far as to request the Commission on Human Rights to modify in part the 1235 procedure in order to endow it formally with such competence. This move, however, has so far not found favour in the Commission.

The Sub-Commission has included in the annual programme of work an item entitled "Question of violations of human rights and fundamental freedoms in all countries, with particular reference to colonial and other dependent territories". Here, the Sub-Commission submits recommendations to the Commission. At the same time, under the same item, the Commission takes up most of the situations dealt with by a special country public procedure on the basis of the report drawn up by the *ad hoc* investigative body it appointed. In this way, a major follow-up is carried out, a process enhanced by the fact that the Commission is an inter-governmental body, and one whereby the on-going nature of the follow-up is given greater weight in consideration of the situation concerned. However, strengthening ongoing follow-up techniques would require the Commission to include in the mandate of its *ad hoc* investigative bodies the obligation to submit to the Sub-Commission a provisional report similar to that submitted by some of them to the General Assembly.

Using this approach, combined with the submission of provisional reports to the General Assembly, there would be a guaranteed periodicity of something under four months in the follow-up to a situation by competent United Nations bodies. Although there may be apprehensions that such ongoing follow-up might lead to unnecessary duplication of effort among the bodies mentioned, this risk is more hypothetical than real since, in fact, the main monitoring activity would continue to be carried out by the Commission on Human Rights. For its part, the activity of the General Assembly and the Sub-Commission would remain, as *de facto* already arises in practice, joint assistants of the Commission.

Besides the ongoing nature of the follow-up process in the development of the monitoring mechanism, the effectiveness of

the extra-conventional systems calls for the setting in motion follow-up techniques for reliable information gathering whereby to identify the *prima facie* existence of a situation involving violations and to proceed to make the proper evaluation. It is precisely at this level where some of the most glaring shortcomings of the extraconventional monitoring system are to be found.

Resolution 1503 (XLVIII) establishes its own information system through communications. However, there is no similar provision for use in the 1235 procedure. This, however, has not prevented the United Nations from establishing a *prima facie* reception and evaluation system of information of various kinds from various sources. That function is carried out by the United Nations Secretariat through the Centre for Human Rights which provides follow-up to the information received on every situation investigated under a special public procedure, and classifies them for subsequent use by the basic information body.

However, this participation by the Centre for Human Rights, despite its signal usefulness, only comes into play once the special public procedure has been set up and is not used preventively. So, general indiscriminate follow-up is not, as would be desirable, applied to world-wide human rights situations in order to identify specific violations. The Sub-Commission however took the initiative of setting up an *ad hoc* Working Group responsible for drafting an annual report on the human rights situation in each and every one of the Member States of the United Nations; the report is intended for submission to the Commission under its resolution 8 (XXIII) and is designed to act as an early-warning system. This initative has so far not been the subject of a decision by the Commission.

Since in any case such activity is essential, ongoing follow-up of necessity implies establishing an information network to receive and process all available information on a human rights situation world-wide. The part to be played by cooperation with NGOs is beyond question since their direct daily contact with human rights problems makes them privileged sources of information whose cooperation with the Commission must redound to the benefit of the system's own effectiveness.

Logically, any information network should be established and maintained within the Centre for Human Rights. The link between the Centre and the United Nations Secretariat makes it the most appropriate body to handle this task.

However, for the Centre to be able to cope with this new activity would require internal reform, particularly in terms of more staff and technical resources, something already repeatedly mentioned in the Commission and the General Assembly in recent years. This means, in particular, increasing the budget which among other things would make it possible to carry through a comprehensive full-scale computerisation of the Centre, which in turn would enable it to process the information received properly, regardless of whether it related to extraconventional or conventional mechanisms. In this way a good data base could be established to enable the Commission among others to give a prompt and apposite response to allegations of particularly serious human rights violations. It would also enable it reliably to evaluate how any human rights situation was developing where the investigating procedure was already in motion.

This improvement in staff and technical resources in the Centre is not enough in itself. Quite the contrary, there will be a need to establish rules of procedure as flexible as desired to

define the arrangements to be followed to deal with specific information, which thus far has been handled only under procedure 1503 pursuant to the rules of admissibility established in Sub-Commission resolution 1 (XXIV). Such rules of procedure would enhance objectivity in the storage and prior processing of information.

Finally, ongoing follow-up could be made effective by defining the status of the Centre's officials, particularly with regard to participation in obtaining and processing information.

With the establishment of this information network, together with the successive action of the Commission, the Sub-Commission and the General Assembly in the procedures, the result would be two-fold: on-going monitoring would be guaranteed and extraconventional mechanisms would be give their proper place in the general human rights protection system.

However, such a follow-up system is not justified except insofar as it may enable the Commission to react quickly to information about the emergence of a new and serious situation of human rights violations. This has been rather difficult given the annual scheduling of Commission sessions, though this obstacle has been overcome in part through ECOSOC resolution 1990/48 which authorizes it to meet in special session when a majority of Commission members so decide. This possibility, used in 1992 for Yugoslavia, calls for an urgent or emergency response mechanism to be set up which would largely be the model set forth in Commission resolution 1992/55. It is to be hoped that this model will be adopted as soon as possible so that, together with the early warning system, it will help provide a rapid deployment approach to suit the action of the Commission to the inherent needs of human rights protection.

Conclusions

An extraconventional system of monitoring and protection for human rights is unquestionably a noteworthy advance in itself since it makes such general activities possible, regarding any State, without the need for the latter's consent.

However, the way in which the said mechanism has been set in motion and the fact that the Commission has, characteristically in such activities, again adopted a pragmatic, unstructured approach have shown up major failings in the system and these require rapid remedy if the system's effectiveness is not to be seriously undermined. The reform must be carried out with the intention of gradually enhancing the objectivity and legal process of the system and essentially must take up the follwoing questions:

One:

the establishment of rules to determine the relationships between procedure 1503 and procedure 1235 so as to define in particular in which cases one or another mechanism should apply. So as to reduce the number of situations to be considered under confidential procedures to the absolutely essential.

Two:

the establishment of norms to clarify the linkage between the monitoring procedures on one hand and the advisory services and technical assisance programme on the other, so that the present process whereby both are distorted is ended.

Three:

the gradual process of making current mechanisms more objective particularly in special public procedures by

appointing to basic information bodies those people who really meet the criteria of independent experts and are not in any hierarchically subordinate position with or acting as representatives of any Government. Also, the need to adopt standard rules of procedure applicable across-the-board to the aforementioned bodies.

Four:

the adoption of measures to give the individual greater place in extraconventional procedures, by extending individual protection mechanisms already applied under some procedures.

Five:

the establishment of an ongoing follow-up system, including the creation of an information network and a data bank that would fulfil the necessary function of an early warning system.

Six:

the setting in motion as soon as possible of a rapid response mechanism in the Commission on Human Rights in cases where an especially serious situation of human rights violation has been identified.

These reforms could benefit individuals but also the international community in providing greater protection and enjoyment of human rights and fundamental freedoms. And those are the objectives sought by the International Commission of Jurists.

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