UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/2005/13
21 June 2005

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-seventh session
Item 3 of the provisional agenda

ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Right to an effective remedy in criminal proceedings

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* The notes are reproduced in the original language.

Summary

By its decision 2004/117 of 12 August 2004, the Sub-Commission on the Promotion and Protection of Human Rights decided, without a vote, to entrust Mr. Mohamed Habib Cherif with the preparation, without financial implications, of a working paper on the right to an effective remedy in criminal proceedings and to ask him to submit the paper to the working group on the administration of justice at the fifty-seventh session of the Sub-Commission.

This preliminary paper addresses the question from two complementary and indissociable standpoints: (a) the international, regional and national sources of the right to an effective remedy in criminal proceedings, and (b) the specific content of that right, namely the right to an independent, impartial tribunal, the right to adequate and prompt reparation and the right to accurate and relevant information.

The study refers both to public international law and to domestic and international procedural law, and aims primarily to establish the sources and content of the right to an effective remedy in criminal proceedings. It attempts to highlight the factual and legal aspects of the issue, at both the theoretical and the practical levels, and urges the effective application of the relevant international and regional instruments in matters of human rights and humanitarian law.

Under any circumstances, the right to a remedy is one of the most important of human rights. It is a cross-sectoral right, and every individual thus has the right to a fair hearing by a competent, independent and impartial court. The parties to a dispute should be free to apply to a court and submit their views to it; the court should then hand down a decision within a reasonable period of time, following fair and public proceedings in which both the accused and the injured party have availed themselves of all their rights and of all the means necessary for a defence, such as the right to be informed, the right to a hearing, the right to legal aid if destitute, etc.

Consequently, every State subject to the rule of law has a duty to establish a judicial system that meets the requirements of a fair trial.

The right to a remedy, leading to a fair trial, is the cornerstone of the rule of law and of human rights mechanisms, and as such is constantly developing and evolving in order to better protect human rights. It covers an ever-expanding field, and the scope of its guarantees, the effectiveness of its machinery and the number of bodies concerned are continually being strengthened, not only at the national and regional levels but also internationally.

Without revisiting all the Sub-Commission’s previous work on the right to a fair trial and an effective remedy, the Special Rapporteur wishes to recall the existence of a draft third optional protocol to the International Covenant on Civil and Political Rights, and recommends that it should be reconsidered and adapted to new national and international circumstances and needs.

CONTENTS

		Paragraphs	*Page*
Introduction		1 - 13	4
I.	SOURCES OF THE RIGHT TO AN EFFECTIVE REMEDY IN CRIMINAL PROCEEDINGS	14 - 86	5
	A. International sources	18 - 35	6
	B. Regional sources	36 - 64	8
	C. National sources	65 - 86	12
II.	CONTENT OF THE RIGHT TO AN EFFECTIVE REMEDY IN CRIMINAL PROCEEDINGS	87 - 136	15
	A. The right to have access to a court	88 - 103	15
	B. The right to reparation	104 - 123	17
	C. The right to information	124 - 136	20
III.	CONCLUSION	137 - 142	21

Introduction

1. Any person whose rights under the Constitution, an international treaty, the law or any other regulation are violated should have the right to seek a remedy from the competent domestic authorities, even where the violation has been committed by persons acting in an official capacity.

2. Judicial, administrative, legislative or other competent authorities should be empowered by the law of the State to make a ruling on the rights of the person seeking the remedy. In States subject to the rule of law, the authority competent in this regard is generally the judicial authority, which has a responsibility to respect the right to a fair trial of all persons invoking a judicial remedy, to apply the law to the actions of the accused, and to establish just reparation for or in respect of the victims.

3. This is why a justice system which rules on the law has such an important place in a democratic society. The right of action is one of the great constitutional principles, for it ties in directly with the notion of the rule of law and with human rights machinery, insofar as it ensures the protection and reinforcement of all other human rights, within the framework of the law.

4. The State's latitude for exercising discretion is continually shrinking in respect of the right to an effective remedy. The State may not take refuge behind a lack of material resources, for example. The right to a remedy, leading - both in theory and in practice - to the right to a fair trial, is becoming a substantial right which cannot be ignored.

5. The right to an effective remedy is intimately linked to the right to a fair trial. It is without doubt one of the most important guaranteed rights in any fair trial, since a right established in law is worthless if it cannot be fully realized in practice and if violations cannot be punished. The right to a remedy is thus the trigger that sets in motion the various stages of a fair trial.

6. The importance of a fair trial and a remedy was highlighted by the members of the Sub-Commission during its discussions on various reports from 1991 onwards.

7. Following these discussions and the Sub-Commission's recommendation in its resolution 1991/15, the Commission on Human Rights, in its resolution 1992/35, called upon all States that had not yet done so to establish a procedure such as habeas corpus by which anyone deprived of his or her liberty by arrest or detention would be entitled to institute proceedings before a court, in order that the court might decide without delay on the lawfulness of his or her detention and order his or her release if the detention was found to be unlawful.

8. The Commission also called upon all States to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency, and, in resolution 1994/32, again encouraged States "to establish a procedure such as habeas corpus or a similar procedure as a personal right not subject to derogation, including during states of emergency".

9. Other relevant human rights mechanisms have recommended that there should be no possibility of derogation from rights such as habeas corpus and *amparo*. The Sub-Commission's Working Group on Detention, for example, discussed habeas corpus as a non-derogable right and one of the requirements for a fair trial in its 1993 report (E/CN.4/Sub.2/1993/22). The members of the Working Group were of the opinion that the guarantees provided by habeas corpus should be incorporated into every country's national legislation as a non-derogable right. They also shared the view that States should maintain the right to habeas corpus at all times and under all circumstances, even in a state of emergency. The Working Group made similar comments in its 1994 report (E/CN.4/1994/27), and several of the other human rights bodies mentioned in the 1992 interim report (E/CN.4/Sub.2/1992/24/Add.3) have recognized the need to institute such procedures and maintain them without derogation.

10. Later, the Rome Statute of the International Criminal Court required the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" (art. 75). The Statute also urges States parties to set up mechanisms for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

11. Most recently, the "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law", which were adopted by the Commission on Human Rights by its resolution 2005/35, of 19 April 2005, call on States to incorporate or implement within their domestic law appropriate provisions for "universal jurisdiction".

12. In the area of human rights it is becoming necessary, at all times and in all places, to establish a remedy for violations of fundamental rights, either to put a stop to a violation or to obtain reparation for material and moral damage arising from a violation. Remedies should also be available to enable all those deprived of their liberty to test the legality of their detention and, where appropriate, to obtain their release.

13. The right to a remedy is one that is generally enshrined in national constitutions and laws, and in bilateral and multilateral treaties, and is increasingly regulated by the international instruments on human rights and humanitarian law. For this reason it has various sources (chap. I) and its content is continually evolving (chap. II).

I. SOURCES OF THE RIGHT TO AN EFFECTIVE REMEDY IN CRIMINAL PROCEEDINGS

14. The right to an effective remedy in criminal proceedings requires courts to apply the standards that afford the best protection for the rights of the individual, whether accused or victim.

15. All the principal international and regional instruments recognizing the right to a remedy derive from article 8 of the Universal Declaration of Human Rights and article 2, paragraph 3 (b), article 9, paragraphs 3 and 4, and article 14 of the International Covenant on Civil and Political Rights.

16. These international and regional instruments apply in the countries that have acceded thereto and in those that have adapted their legislation to such instruments or have promulgated their own laws establishing a given remedy.

17. Thus the right to a remedy, which broadly speaking exists in all countries, derives from international, regional and national sources.

A. International sources

18. In international law, there are several human rights instruments which provide that the individual should always have the right to an effective remedy in a domestic or international court in the event of violation of a right under one of those instruments.

19. This right, bound up as it is with the protection and realization of other rights, cannot exist in isolation; it places on States a positive obligation to provide their nationals, as well as foreigners living on their territory, with the right to seek an effective remedy before an independent body.

20. Articles 8, 10 and 11 of the Universal Declaration of Human Rights, adopted by the General Assembly by resolution 217 A (III) of 10 December 1948, establish the right of everyone to a fair and public hearing by an independent and impartial tribunal, the right to be presumed innocent until proved guilty, and the right to an effective remedy. Under article 8, "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

21. Article 14 of the International Covenant on Civil and Political Rights, adopted by the General Assembly by resolution 2200 A (XXI) of 16 December 1966, reaffirms the right of everyone to a fair and public hearing. Article 9, paragraphs 3 and 4, of the Covenant, under which States parties are obliged to ensure that anyone arrested or detained is brought promptly before a judge or other officer authorized by law to exercise judicial power, provides that anyone deprived of his or her liberty shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

22. Under article 2, paragraph 3, of the Covenant, "each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

23. In respect of the French texts it should be pointed out that, unlike the Universal Declaration of Human Rights, which refers to "*recours effectif*", the Covenant speaks of "*recours utile*", notwithstanding that the violation has been committed by persons acting in an official capacity.

24. The competent authority should give a ruling on the rights of the person seeking the remedy and ensure that the appropriate action is taken where the remedy is deemed justified, i.e. the right to reparation and to full and prompt implementation of decisions, inter alia.

25. Special remedies should also be available to persons deprived of their liberty. Under article 9, paragraph 4, of the Covenant, "anyone who is deprived of his liberty ... shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

26. The provisions of the Covenant thus embody the essential features of *amparo* and habeas corpus, although all specific references to habeas corpus were removed from earlier drafts of the Covenant in order to give States the possibility of developing similar procedures within the framework of their own legal and judicial systems.

27. The only rights which may not be suspended in times of public emergency are those specified in article 4 of the Covenant. The right to a remedy is not one of those listed. However, this should not prevent it from being considered one of the basic human rights which enjoy protection as non-derogable rights.

28. In this regard, the Human Rights Committee has had occasion to point out, in its general comment No. 13, that "if States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".

29. It is clearly of particular importance that the right to a remedy should be respected in times of armed conflict, whether internal or international in nature, yet it is precisely at such times that the right is no longer guaranteed under article 4 of the Covenant.

30. The international instruments relating to human rights and to humanitarian law complement one another, even though they differ in their provisions. International humanitarian law - in particular article 3 of the Hague Convention IV of 18 October 1907, on the Laws and Customs of War on Land, and the four Geneva Conventions of 12 August 1949 and their two Additional Protocols of 1977 - tacitly guarantees the right to a remedy, even during periods of armed conflict: under article 129 of the third Geneva Convention, relative to the Treatment of Prisoners of War, for example, "in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by article 105 and those following of the present Convention".

31. Similarly, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide for the right to a remedy and to reparation for victims of violations of international human rights law.

32. Moreover, the international standards which are not in the form of treaties, such as the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles on the Independence of the Judiciary, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34

of 29 November 1985, are intended to apply at all times; implicit in all of them is the right to a remedy and a fair trial and, in particular, the ability to challenge the legality of one's detention and to obtain reparation.

33. The right of victims of human rights violations to a remedy and reparation is also guaranteed in international criminal law by articles 68 and 75 of the Rome Statute of the International Criminal Court and by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the Commission on Human Rights by its resolution 2005/35 of 19 April 2005.

34. It would appear from all these provisions, principles and guidelines that the right to an effective remedy, which gives rise to the right to a fair trial in criminal proceedings, is a key right which is not subject to derogation either in peacetime or at times of armed conflict, whether internal or international.

35. Moreover, this basic concept which is found in international legal sources is by no means absent from the regional sources of the right to an effective remedy.

B. Regional sources

36. The following are the most important regional human rights instruments establishing the right to an effective remedy in criminal proceedings.

(a) Charter of Fundamental Rights of the European Union

37. The Charter of Fundamental Rights of the European Union establishes the right to a remedy in chapter VI, on Justice.

38. The guarantees deriving from chapter VI fall into two broad categories - those applying to all who are covered by a given jurisdiction, and those applying specifically to individuals facing criminal charges within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights).

39. A similar provision to article 9, paragraph 4, of the International Covenant on Civil and Political Rights is contained in article 5, paragraph 4, of the European Convention: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

40. The European Convention makes clear and specific reference, in article 13, to the right to an effective remedy giving the right to apply to an impartial tribunal: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

41. Under article 47 of the Charter of Fundamental Rights of the European Union, "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an

effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".

42. Under European case law and in accordance with a decision of 3 December 1992 handed down by the Court of Justice of the European Communities, a judicial remedy should be granted even where not provided for by domestic procedure.

(b) American Convention on Human Rights

43. Article 8 of the American Convention on Human Rights (Pact of San José, Costa Rica), of 22 November 1969, deals with the right to a fair trial.

44. Under article 8, paragraph 1, "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

45. Article 25 of the Convention establishes the right to a remedy and the right to reparation for all victims of human rights violations. It should be recalled that the Convention institutes an Inter-American Court of Human Rights, whose work for the moment is confined to seeking amicable settlements, since the right of individual remedy may be invoked only against States that have recognized the jurisdiction of the Court.

46. In addition, article 27 of the Convention authorizes the suspension of guarantees "in time of war, public danger or other emergency that threatens the independence or security of a State Party". However, in respect of several important rights and principles, including the right to a fair trial, and more particularly the right to a remedy, it does not authorize any such suspension.

47. In fact the "guarantees" that may not be suspended under article 27 of the Convention are not clearly defined, but it may be assumed that they include the right to a remedy and the guarantees of a fair trial as established in article 8, which relate in the main to criminal proceedings.

48. The equivalents of *amparo* and habeas corpus are also found in this Convention. Under article 7, paragraph 6, "anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies".

49. The remedy of *amparo* is a feature unique to the inter-American system and is established in article 25 of the Convention ("judicial protection"). It is a quick, straightforward remedy designed to protect constitutional rights and laws recognized under States parties' domestic legal systems and under the Convention.

50. The Inter-American Court of Human Rights ruled in 1987 that habeas corpus is a non-derogable right. Article 27 of the Convention authorizes States parties to take measures derogating from their obligations in time of war, public danger or other emergency that threatens their independence or security, but only to the extent and for the period of time strictly required, and provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination. It expressly prohibits derogation by States parties in respect of 11 articles of the Convention, including those establishing the judicial guarantees essential to the protection of human rights.

51. The Inter-American Court of Human Rights has handed down two advisory opinions to the effect that habeas corpus and *amparo* are non-derogable even during states of emergency, since they are "'essential' judicial guarantees" for the protection of rights, whose suspension is prohibited under article 27, paragraph 2, of the American Convention.[1]

52. In the first of these opinions, the Court stated that "habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment". The Court buttressed its conclusions by reference to the harsh fact of the disappearances, torture and murder committed or tolerated by some governments, which had demonstrated that the right to life and to humane treatment were threatened whenever the right to habeas corpus was partially or wholly suspended.

53. In the second of these advisory opinions, the Court ruled that the essential judicial guarantees that cannot be suspended under article 27 include habeas corpus, *amparo* and any other effective remedy before competent tribunals that is designed to guarantee respect for the rights and freedoms whose suspension is not authorized by the Convention. It also emphasized that the judicial nature of those guarantees implied the active involvement of an independent and impartial judicial body having the power to rule on the lawfulness of measures adopted in a state of emergency.

(c) African Charter on Human and Peoples' Rights

54. The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 by the eighteenth Assembly of Heads of State and Government of the Organization of African Unity (OAU), and entered into force on 21 October 1986 upon its ratification by 25 States.

55. Under article 7, paragraph 1, of the Charter, "every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ...".

56. Thus the Charter makes the right to a remedy the key to all other rights relating to fair trial - one that encompasses all other rights and guarantees.

57. It contains no provision for States to be absolved of their obligations under the Charter in situations of public danger. It would therefore appear that none of the rights established therein may be suspended.

58. An effective remedy similar to habeas corpus derives from article 6 of the Charter, under which "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

59. Article 7, paragraph 1, could similarly be interpreted as providing protection against violations of fundamental rights, since it stipulates that "every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force …".

(d) Arab Charter on Human Rights

60. The Arab Charter on Human Rights was adopted in 1994 and amended and "modernized" in 2004 by the Summit Conference of the Arab League Council in Tunis (decision No. 6405, dated 4 March 2004, of the 16th ordinary ministerial meeting; adopted 23 May 2004). Under article 12, "all persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels".

61. Under article 14, paragraphs 6 and 7, of the Charter, "anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful … Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation".

62. Under article 17, children have the right to a special court, insofar as "each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and enforcement of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society".

63. Such special juvenile criminal courts are empowered both to order appropriate measures and to supervise their enforcement, and thus may receive informal complaints from children, in accordance with the Convention on the Rights of the Child and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, under which States should provide effective remedies for violations of the rights contained therein, including compensation when injuries are inflicted on juveniles.

64. As can be seen, while the above-mentioned international and regional human rights instruments, to which the overwhelming majority of States are parties, contain similar provisions, the basic right to an effective remedy is also proclaimed in most national domestic legal systems.

C. National sources

65. The right to an effective remedy in criminal proceedings is a protected fundamental right, i.e. a universal "right-cum-guarantee". In national legal systems, such rights are construed as guarantees that individuals will be able to assert their rights under the most favourable conditions and that the law will be applied to them correctly, fairly and equitably.

66. In almost all systems of positive law, the right to a remedy falls into the category of fundamental rights of universal scope which are certainly the most important and on which there is the widest agreement, since such rights are not amenable to differing interpretations depending on the country. The right to an effective remedy in criminal proceedings is being enshrined in the constitutions or legislation of almost every State in the world today. Thus, every individual should be able to find a judge in order to assert his or her rights.

67. The "right to a judge" is an indispensable corollary of the rule of law. As a primary guarantee underpinning the exercise of the other fundamental rights and freedoms, the right to a judge goes hand in hand with the general notion of the law as the embodiment of the vital principle of non-denial of justice.

68. Increasingly, States are bringing their legislation into line with international norms in order to make sure that their domestic law is compatible with their international legal obligations.

69. In some countries, this right to a judge is beginning to acquire the force of constitutional law, being included in the fundamental guarantees accorded to citizens for the exercise of civil liberties. In this connection, the French Constitutional Council, for example, issued a judgement on 21 January 1994 asserting that the right to a remedy is established in article 16 of the Declaration of the Rights of Man and of Citizens of 1789, which provides that "every community in which … a security of rights is not provided for … wants a constitution". The right to an effective remedy, then, goes to the very heart of every constitution. In a decision of 9 April 1996, the Constitutional Council adduced the same line of argument, holding that "a law which confers a right without an effective matching remedy does not guarantee that right".

70. In certain other systems, the right to an effective remedy in criminal proceedings takes the form of a general guarantee. The British principle of habeas corpus, which guarantees a remedy against arbitrary arrest or imprisonment, and the principle of due process, as proclaimed, inter alia, in the Magna Carta of 1215, are the key sources of these "general" guarantees. But, it was the elevation of these principles to the constitutional plane in the United States of America that would have a decisive impact on the development of the right to a judge or procedural rights in the legal systems of continental Europe.

71. It is clear that the fairly recent trend for these rights to gain greater prominence in European constitutions is directly rooted in Anglo-American constitutional law. (By way of illustration, the celebrated judgement delivered by the European Court of Human Rights in 1979, in *Airey v. Ireland*, concerning legal aid and the effective enjoyment of the right to have access to the courts, can be directly traced back to the United States Supreme Court ruling of 1963 in *Gideon v. Wainwright,* applying the guarantees of a fair trial provided for in the sixth amendment to the United States Constitution.)

72. Article 19, paragraph 4, of the Basic Law of the Federal Republic of Germany guarantees the right to legal protection against any act performed by the public authorities, through the right of action. The law on the organization of the justice system and various procedural regulations flesh out these guarantees.

73. Germany's Federal Constitutional Court takes a broad view of the right to a remedy, and sets out the requirement for effective judicial protection involving the existence of mechanisms such as proceedings with suspensive effect and full judicial review on points of law and fact. The right to a judge underpins the requirement of independence and impartiality, without which there can be no effective protection of rights and freedoms. The legislator must therefore establish such courts in accordance with constitutional norms, without having the ability to vest the administrative authorities with any kind of judicial power, particularly in criminal matters.

74. In short, the German experience is a model of a constitutional system that offers maximum guarantees with regard to the right to a judge, obviating the need for nationals to invoke article 6 of the European Convention on Human Rights.

75. For its part, the Italian Constitutional Court held, in a relatively recent decision, that the right to legal protection is linked to the "principle of democracy" (ruling No. 148 of 1996). Article 24, paragraph 1, of the Italian Constitution provides that "any citizen may initiate legal proceedings in order to safeguard his or her rights and legitimate interests". The "right to be heard by the competent judge" is established by article 25, paragraph 1, of the Constitution, which, inter alia, implicitly prohibits the establishment of extraordinary courts and acknowledges the urgent need to determine in advance which judge is competent to hear a given type of case. To that end, article 25 makes a legal reservation, which is absolute insofar as jurisdiction can only be determined directly in advance by the law. Article 111, paragraph 2, of the Constitution guarantees the right to appeal to the court of cassation on points of law, while article 113 (paras. 1 and 2) guarantees the right to apply for a judicial review of administrative decisions.

76. There is ample constitutional case law on all these forms of protection. In particular, the Italian Constitutional Court has implicitly recognized the right to compliance with court judgements by the public authorities as an integral part of an "effective court decision".

77. Together with the principle of equality, the right to a remedy is the basic right which has been invoked most frequently in Spain, ever since the creation of a system of constitutional justice.

78. Article 24 of the Spanish Constitution recognizes every person's right to "effective protection by judges and courts in order to exercise his or her rights and legitimate interests". The right to effective court protection, which, as in many other systems, is linked with the

right to a defence, is broadly defined. It includes the right to have access to a judge in any dispute, the right to appeal against any court decision, and the right to an effective and easily enforceable decision. It has different meanings, then, depending on whether it refers to an initial proceeding, an ordinary appeal or an appeal to the court of cassation on a point of law, actions which in certain circumstances could be summarily dismissed without detracting from the essence of the right to an effective remedy (rulings 294/144 of 7 November 1994 and 37/1995 of 7 February 1995).

79. While the right to a judge is firmly established in constitutional case law in some Western countries (particularly in the United States and Europe), it is being acknowledged more gradually by other legal systems.

80. Several other systems of law give tacit constitutional recognition to the right to a judge. French law, for example, contains no provisions which directly protect this right: it can only be inferred from other constitutional rights or principles and procedural rules. The same can be said of several other countries with a French legal tradition, including Algeria, Morocco, Tunisia, Senegal and Lebanon. By a process of accretion, the systems of these countries recognize this right indirectly, through the right to bring a criminal action or to file a civil suit.

81. It is also worth noting that the right to a remedy does not allow for *reformatio in peius*, i.e. remedies which, if pursued, would lead to the imposition of harsher penalties than those for which redress is being sought (French Constitutional Council, decision 88-248 DC of 17 January 1989).

82. While the right to a remedy must be effective, it is not limitless, however. Time limits may be imposed on the exercise of the right to a remedy, provided that they are compatible with the right to a defence. The legislature may impose time limits on the bringing of legal proceedings, prescription or loss of rights. The exercise of the right to a remedy may also be regulated by such devices as determining in advance precisely which court has jurisdiction for the complaint and the time limits for the exercise of that right.

83. The imperative of ensuring legal certainty may also justify certain restrictions on the right to a judge, provided that they can be reconciled with the right to a remedy; while the legislature alone regulates the "free exercise of the right to bring legal proceedings", it cannot distort this right or suppress the exercise of it. A restriction that was so general as to dilute the very substance of this right would be unconstitutional.

84. It may be useful to note a certain resemblance or convergence between the experiences of several countries: most modern legal systems assure the right to a judge, the right to a remedy, guarantees of the right to lodge an ordinary appeal or an appeal to the court of cassation, or the right to an effective court decision, albeit under different names.

85. As a result, comparative law increasingly shows that most countries have embraced the same elements of the right to a judge, a right which today is viewed as one of the primary corollaries of the rule of law.

86. This right to a judge in criminal proceedings is truly effective only if the content of the right to an effective remedy is fair and efficacious.

II. CONTENT OF THE RIGHT TO AN EFFECTIVE REMEDY IN CRIMINAL PROCEEDINGS

87. The right to an effective remedy in criminal proceedings consists, firstly, of recognizing the right of all accused persons to be tried by an independent and impartial tribunal (section A); secondly, the right to appropriate and prompt reparation (section B); and, lastly, the right to relevant and accurate information (section C).

A. The right to have access to a court

88. The principle of non-denial of justice underpins the right to have access to a court. This is a very broad concept, which covers any omission or fault committed by the State in the discharge of its responsibility for the organization of the judicial system and the administration of justice.

89. In practice, the right to have access to a court means the right to have access to a judge, who must be independent and impartial.

(a) The right to have access to a judge

90. This right must be available to all, i.e. all natural persons in criminal proceedings who claim that they have suffered harm from any source whatsoever.

91. In addition to individual access to justice, there are increasing calls for States to establish procedures to enable class actions to be brought.

92. The right to have access to a judge is a fundamental right, which provides an effective check against any abuse or interference that is prejudicial to the rights of individuals.

93. However, the right to have access to justice is not an absolute right. Indeed, this right, by its very nature, calls for regulation, often mandatory, on the part of the State, which has some latitude in this sphere. On the other hand, regulation, with all the restrictions that it may bring, must not be so restrictive of open access by any individual to protection, proceedings or reparation as to dilute the very essence of this right.

94. The right to a judge, a general principle that precludes any form of impunity, is broad in scope and is broadening further. This is reflected partly in the fact that the right to have access to a court is extending into areas in which no legal remedies were provided for hitherto, partly in the relaxation of formalities, and partly in wider access to the court of cassation, although this court rules on legal rather than factual questions.

95. Thus, the right to have access to a judge, i.e. the right to an effective remedy before a court, is expanding. It must always be effective, and necessarily encompasses the right to pursue different kinds of remedies (applications to set aside a decision, ordinary appeals and appeals to the court of cassation on points of law). While assertion of the right to pursue ordinary remedies (appeals) has largely become a matter of course, appeals to the court of cassation on points of law, which constitute an extraordinary remedy, figure prominently in the development of the

right to an effective remedy against final court decisions. Appeals to the court of cassation on points of law play an ever more crucial and prominent role in all aspects of criminal proceedings, in most countries.

96. However, access to a judge always and necessarily implies that the judge is independent and impartial.

(b) Qualities required of a judge

97. For a trial to be fair, everyone must have the right to a fair hearing before an independent and impartial judge. Independence must be assured with respect to the Government, social forces and the media, while impartiality must be assured, as a matter of principle, with respect to the parties in the proceedings.

98. In order to guarantee the independence of the judiciary, every State is required, under the relevant international instruments, to draw up rules and regulations on the independence of the judges who make up its judiciary. In practice, different domestic legal systems respond to this obligation by means of devices such as security of tenure and an independent career track for judges.

99. Judges must have no links whatever with social forces which could influence their decisions; thus, they are forbidden to join political parties in order to prevent them from being subject to any form of partisan discipline. For their part, the media must refrain from usurping judicial authority by declaring a defendant guilty or innocent, or an act acceptable or unacceptable, before a court handed down a final judgement.

100. The condition of impartiality means that a judge must not be dependent on or linked to a party in a trial either financially or at the family level (otherwise, the challenge procedure may be used). This condition stems from some fundamental general principles of procedural law that are strongly echoed in European human rights case law, according to which:

1. "No one who has already taken up a case may rule on it". According to this principle, "an impartial judge is a judge who has not already heard the same case or taken part in proceedings relating thereto". However, on a purely exceptional basis, a juvenile court judge may play a succession of different roles with respect to the same child defendant, taking up, investigating and ruling on the same case (*Nortier v. the Netherlands*, judgement of 24 August 1993).

2. "No one who has already ruled on a case may do so a second time." This principle has been affirmed by the European Court of Human Rights (*Oberschilde* case, judgement of 26 May 1991). Exceptionally, however, the same judge may act, with respect to the same defendant, as both committing judge in a criminal case and trial judge in a related case involving the same person (*Société Marie v. France*, judgement of 16 December 1992).

3. "No one who has delivered an opinion may adjudicate". This means that a member of the judiciary who has already delivered an opinion on a case may not then

adjudicate that same case. The European Court of Human Rights ruled (in *Procola v. Luxembourg*, judgement of 28 September 1995) that a judgement had been vitiated by the fact that four out of the five members of the Luxembourg *Conseil d'État* had been called upon to rule on the lawfulness of a regulation which they had previously scrutinized.

101. The conditions for bringing a complaint of bias need to be relaxed. Access to this remedy should not be hampered by the somewhat rigid mechanisms used to implement the procedure for challenging judges or for referral of a case to another court on the ground of reasonable suspicion of bias. Even if the interested party has not requested such a procedure, the court dealing with the case must of its motion, conduct an evaluation of it impartiality.[2]

102. Impartiality must first result from an objective observation of the facts: for example, the personal conduct of a judge or jury member before or during trial.[3] It must also be gauged from a subjective viewpoint involving evidence of personal bias or prejudice on the part of a particular judge on a particular occasion.[4]

103. The concept of the capacity of the court means that, in exercising its functions, the court must constitute "a judicial body competent to deal with all aspects of a case". In other words, the court must have sufficient capacity to review the questions of fact and law placed before it. This legal and factual review is central to the right to reparation.

B. The right to reparation

104. In honouring the victims' right to benefit from remedies and reparation, the international community expresses its human solidarity with victims of violations of international human rights law and international humanitarian law. In accordance with the spirit and letter of all international instruments in the field of human rights and humanitarian law, victims should be treated with compassion and respect for their human dignity. From this perspective, the development of appropriate and expeditious remedies for victims has always been viewed as necessary in order to guarantee them effective and equitable access to the courts, and full reparation.

105. The effectiveness of the remedy can be gauged in terms of: the rights and remedies offered to the party seeking reparation for harm suffered as a result of violation of his or her rights, the speed of the process he or she has set in motion, and the persons he or she has cited in the proceedings, while denying them the right to impunity.

106. The reparation provided for injury done to the victim can be a key indicator of the remedy's effectiveness. Consequently all States, relevant United Nations bodies and appropriate human rights mechanisms must respect and support the victim's right to have access to the courts and to reparation.

(a) The extent of reparation

107. Contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively, and against States on account of acts or omissions committed by their agents in various domains. States are

called on to establish national mechanisms for reparation to victims, particularly where the party liable for the harm suffered is a State agent or where the perpetrator of the violation will not or cannot meet his or her obligation to provide reparation.

108. States are also required to enforce domestic, foreign and international judgements for reparation against natural and legal persons, individuals or groups of individuals who have violated human rights or international humanitarian law.

109. In that context, the question has been raised of replicating, strengthening and expanding redress mechanisms such as national funds for compensation to victims of violations of human rights and humanitarian law.

110. The Rome Statute of the International Criminal Court requires the Court to establish "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" (art. 75). The Rome Statute also requires States parties to establish a trust fund for victims of crimes within the jurisdiction of the Court, and the families of such victims. The International Criminal Court is likewise tasked with protecting "the safety, physical and psychological well-being, dignity and privacy of victims" (art. 68, para. 1), and can authorize victims to participate in all "stages of the proceedings determined to be appropriate by the Court" (para. 3).

111. The "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law", the subject of Commission on Human Rights resolution 2005/35 of 19 April 2005, call on States to incorporate or implement within their domestic law appropriate provisions for universal jurisdiction. To that end, States should facilitate extradition or surrender offenders to other States, or appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses.

112. The State has an obligation to provide reparation for injury caused by any malfunctioning of the justice system. Increasingly, States answer directly for official errors and guarantee victims protection against individual misconduct committed by their agents, without prejudice to the right to seek a remedy against the person responsible, in accordance with the principle of personal liability. While the State must be held liable for any injury caused by the malfunctioning of the judicial system, this liability can come into play only on sufficiently serious grounds (serious misconduct or the denial of justice).

113. State compensation will not be provided indiscriminately for any kind of negligence; only serious misconduct (unjustified arrest, a proven miscarriage of justice, etc.) or the denial of justice entitles a person to claim reparation. In the absence of a legal definition of serious misconduct, case law must define the parameters of this offence, which must be a particularly serious, if not gross, form of negligence, unless a national legislature sees a real need for flexibility in this regard.

114. This rule that a State incurs liability only in the case of serious or grave misconduct on the part of its judicial services is designed to ward off unwarranted attacks that could discredit the judicial services or impair their proper functioning.

115. From the human rights point of view, the objective is to improve the lot of victims of official errors, who for a long time had virtually no means of recourse. The rules relating in particular to the State's responsibility for the operation of the judicial system have their own peculiar characteristics; this responsibility never used to exist, partly because of the traditional principle of State immunity, and partly because judges benefited from broad and enhanced protection. The civil liability of the latter came into play only through the very complicated procedure of appeal against judicial misconduct.

116. The fact that the principle of the State's liability for acts done by its agents has now gained almost universal acceptance is a great step forward. It means that the State must now be obliged to make good any damage caused by any malfunctioning of its machinery, under conditions that closely resemble administrative responsibility under ordinary law.

117. This must not be a contingent liability of the State, i.e. one that depends on the success of an appeal against judicial misconduct, but rather it must be a primary and independent responsibility of the State for any malfunctioning of the justice system, including acts performed by courts and persons subject to their authority and control whatever their status (assistant registrars, experts, the police, judges, etc.). However, account must also be taken of the limitations associated with the nature of the judicial function itself; the judicial function must always be protected, regardless of who discharges it, and trials must be sufficiently swift to guarantee prompt reparation.

118. Reparation must always be commensurate with the gravity of the violations and the injury suffered. It must also be prompt.

(b) Prompt reparation

119. In criminal proceedings, the right to swift justice may consist, in particular, of a trial that is held within a reasonable period of time and of guarantees that court decisions will be enforced within an equally reasonable period of time.

The principle of reasonably swift justice

120. This principle rests on the requirement that the time elapsing before the start of proceedings, and their duration, should be reasonable. Defendants must be protected against summary trials and excessive court delays, since their liberty is central to the debate on the protection of human rights. Claimants for criminal indemnification should also obtain justice relatively promptly in order to ensure that the psychological and social purposes which reparation serves are not undermined. More generally, the condition of a "logical" time frame for the proper functioning of the criminal justice system, for both accused and victim, responds to the need to guarantee the effectiveness, and therefore the credibility, of the courts.

The principle of the right to rapid enforcement of court decisions

121. This is one of the most sensitive issues when it comes to ensuring that "justice is done".

122. There is no point in winning a trial if the court decision is not executed properly. This means that the court decision must be fully executed in all its ramifications, and that this must

be done without delay. It certainly comes as no surprise to see the European Court of Human Rights supporting the idea that, for the purposes of article 6 of the European Convention on Human Rights, the right to execution of a judgement is an integral part of a fair trial.[5]

123. It should be pointed out that the statute of limitations on public and civil proceedings and on the enforcement of judgements must not include violations of international human rights law and humanitarian law, since the principle of imprescriptibility intrinsically rules out impunity and the "right to forget".

C. The right to information

124. The right to information is a valuable component of the right to an effective remedy in criminal proceedings. Information fulfils a twofold purpose: it is both a means of education and prevention and a real guarantee of the right to a defence, which is a prerequisite for a fair and equitable trial.

(a) Information, a tool for education and prevention

125. A legal culture is a bulwark against abuses and unlawful acts. Disseminating a legal and judicial culture, providing information on available remedies against violations of human rights and humanitarian law, particularly among law enforcement officers (policemen, security personnel, guards in prisons and similar institutions, judges, military personnel, etc.), and encouraging the adoption of, and compliance with, codes of conduct and professional ethics, are very effective methods of prevention, training and persuasion.

126. The dissemination of information on all the judicial, legal, administrative, medical, psychological and social mechanisms through which victims may seek remedies offers a reliable and effective tool for education and prevention.

127. Accordingly, States should allow victims access to all appropriate legal and diplomatic services that enable them to exercise their right to an effective remedy in criminal proceedings. States should allow them access to relevant information about violations, prevention mechanisms and rapid and effective remedies in order to ensure that offenders are punished and that victims are able to obtain redress.

128. However, information about all the remedies available in cases of flagrant violations of international human rights law and humanitarian law should be disseminated by both public and private bodies. Civil society, non-governmental organizations, schools and universities must introduce programmes for, and provide proper assistance to, victims seeking access to justice, since information is a firm guarantee of the right to a defence.

(b) Information, a guarantee of the right to a defence

129. Appropriate information is vital for an effective defence.

130. Any system that truly guarantees fundamental freedoms, particularly the right to a remedy, must respect the right to a defence, which is an indispensable corollary of the right to a judge.

131. Respect for the right to a defence, the right to adversarial proceedings and the right to be represented by defence counsel have long been the main principles underpinning due process and have been enshrined in texts of differing legal authority established by the domestic legal systems of different countries. These guiding principles broadly regulate the workings of the criminal justice system. To be effective, a remedy must be both accessible and appropriate, i.e. it must be adapted to the satisfaction being sought. The right to an effective remedy must guarantee a fair and equitable trial, which protects the accused against any abuse and offers the victim appropriate reparation.

132. For this purpose, trials must be transparent and fair, i.e. they must be held in public, while protecting the legal rights of all parties.

133. The right to have effective access to a court has a major implication. The parties must have a real prospect of access to justice; in other words, they must not be confronted with any obstacle that will prevent them from exercising this right in practice. Economic disadvantage, for example, should be no bar to bringing a matter before a court; the onus is on States, therefore, to guarantee this freedom through the establishment of legal aid schemes to provide even the least well-off with a defence.

134. Justice has a cost, which is shared between the parties and the State. If the cost is too high, it will constitute an obstacle to effective access to the courts for all. In such cases, accused persons are entitled to legal aid if they are destitute, and so are claimants for criminal indemnification.

135. Legal aid consists of all forms of assistance provided to persons who have no practical opportunity to exercise their right to make use of the system of justice for lack of financial resources. Recipients of legal aid are usually individuals (corporations do not, in principle, benefit from legal aid, except for not-for-profit associations and those with insufficient resources).

136. Relevant and accurate information should also cover these mechanisms, making it possible to realize the right to an effective remedy and, in particular, to exercise the right to a defence in criminal proceedings.

III. CONCLUSION

137. **The right to an effective remedy in criminal proceedings is acquiring the status of an independent right. It is increasingly moving beyond cases where an individual is subjected to criminal prosecution and arrested with a view to trial, and linking with the goal of making it possible to protect all the rights and freedoms established in domestic laws and in regional and international instruments.**

138. **In this scenario, the domestic courts are the first port of call with regard to protection. Once all domestic remedies have been exhausted, a matter may be referred to the relevant regional and international bodies. Hence ensuring compliance with treaties is not in principle intended to substitute for domestic remedies, but simply complements and boosts the effectiveness of efforts to ensure that justice is done.**

139. **This is why the Sub-Commission should once again recommend the adoption of the right of habeas corpus or *amparo*.**

140. **In its resolution 1991/15 of 28 August 1991, concerning habeas corpus, the Sub-Commission recommended that the Commission should call on all States that had not already done so "to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful … [and] to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency".**

141. **For this reason the draft third optional protocol to the International Covenant on Civil and Political Rights must be reviewed and adopted. Guaranteeing as it does the right to an effective remedy and a fair trial, the protocol would make the provisions of the Covenant non-derogable under any circumstances, a particularly important step at a time when the right to an effective remedy is being substantially boosted both regionally and internationally, thanks to the establishment of new supranational courts such as the African Court on Human and Peoples' Rights and the International Criminal Court.**

142. **It may be helpful to reflect further on the ideas and recommendations set out in the present report, which has attempted to provide a brief overview of this issue at the national, regional and international levels and to sketch out major future trends with respect to the realization of the right to an effective remedy in criminal proceedings for all injured parties and against all guilty parties.**

Notes

[1] Avis consultatif du 9 mai 1986 (13 OEA/Ser.L/III.15, doc.14, 1986) et avis consultatif du 6 octobre 1987 (13 OEA/Ser.L/V/III.19, doc.13, 1988).

[2] Sur l'impartialité du tribunal, voir Cour européenne des droits de l'homme, *Borgers* c. *Belgique*, 30 octobre 1991, série A, n° 214-B et *Procola* c. *Luxembourg*, 28 septembre 1995, série A, n° 326.

[3] Sur le refus de donner acte à un accusé de propos racistes tenus par l'un des jurés à son encontre en dehors de la salle d'audience, voir Cour européenne des droits de l'homme, *Remli* c. *France*, 23 avril 1996, Rec. 1996-II.

[4] Voir Cour européenne des droits de l'homme, *Pullar* c. *Royaume-Uni*, 10 juin 1996, Rec. 1996-III.

[5] Voir Cour européenne des droits de l'homme, *Hornsby* c. *Grèce*, 19 mars 1997, Rec. 1997-II.