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COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
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Agenda item 1

ORGANIZATION OF WORK

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Mr. Sattar, Mr. Sorabjee, Mr. Tuñón Veilles, Ms. Warzazi and Mr. Yokota
draft decision**

**2005/... Role of an independent expert body within the reform of
the United Nations human rights machinery**

The Sub-Commission on the Promotion and Protection of Human Rights,

Decides to request its Chairman to transmit the document on the role of an independent expert body within the reform of the United Nations human rights machinery annexed to the present resolution to:

- (a) The Chairperson of the Commission on Human Rights;
- (b) The United Nations High Commissioner for Human Rights, with the request to distribute it widely, in particular, to the permanent missions of Member States at Headquarters and in Geneva.

Annex

ROLE OF AN INDEPENDENT EXPERT BODY WITHIN THE REFORM OF THE UNITED NATIONS HUMAN RIGHTS MACHINERY

Summary

The present text seeks to contribute to the debate about reform of the United Nations human rights machinery. It addresses the following matters:

- (a) The principles on which the reforms need to be based;
- (b) The functions to be performed, including:
 - (i) Policy initiatives;
 - (ii) Standard-setting with regard to:
 - a. New norms;
 - b. Guidelines relating to implementation;
 - (iii) Identifying gaps in standards and methods of monitoring;
 - (iv) Identifying good practice.

These functions are not performed by the treaty bodies, the special procedures or the Office of the High Commissioner for Human Rights. They can best be performed by an elected, collegial, independent expert body. The body must listen to and work closely with as wide a range of representatives of civil society as possible, including non-governmental organizations, national human rights institutions and intergovernmental organizations.

The document also identifies ways to improve the functioning of the Sub-Commission on the Promotion and Protection of Human Rights.

Introduction

1. The Sub-Commission on the Promotion and Protection of Human Rights wishes to contribute to the discussions regarding reform of the human rights system within the United Nations. Such a reform should:

- Be in conformity with the Charter of the United Nations;
- Protect and enhance the strengths of the current system;
- Improve synergies between components in the human rights system.

I. THE NEED FOR A COLLEGIAL INDEPENDENT EXPERT BODY

2. There is a clear need for a collegial independent expert body within the United Nations human rights machinery because certain essential functions within the United Nations human rights machinery can best be fulfilled by such a body. The activities of the United Nations with regard to the promotion and protection of and respect for human rights must form a coherent whole and require greater clarity in relation to the different types of activities performed by different bodies. The reform should improve coherence in the system.

3. The various activities involved in the promotion of human rights are of a clearly different nature:

(a) The treaty bodies perform important monitoring and enforcement functions when they make findings with regard to violations or when they engage in monitoring by adopting concluding observations. The role of the special procedures is more akin to that of an overseer, gathering evidence and identifying criticisms;¹

¹ Generally speaking special procedures, with the exception of the Working Group on Arbitrary Detention, on account of conflicting evidence, cannot reach a conclusion as to the existence of a violation. In the process of discharging their mandates, they may clarify the scope of a particular norm. That does not represent standard-setting in the usual sense but resembles rather the function of a court in determining the scope of a norm that it is called upon to apply. Peer review represents a very particular form of quasi-judicial function. It is based on obligations as Members of the United Nations, rather than on obligations arising under international law generally.

(b) The role that involves the implementation in practice of human rights standards, through law, regulation, policies and practices, is performed principally by the Office of the High Commissioner for Human Rights (OHCHR). The Plan of Action of OHCHR (A/59/2005/Add.3, annex), envisages a greatly enhanced role for OHCHR, especially through field presences. That would suggest that it will become even more difficult for OHCHR to be engaged simultaneously in standard-setting, monitoring and implementation;

(c) The first stage in a process that consists in the identification of issues that may require the adoption of certain rules, regulations, policies and practices should be debated by a group of experts considering the implications of any proposals before making specific suggestions. In this initial phase, as wide a range of input as possible from a variety of sources, including civil society, is needed. Specific proposals can then be considered by a political body which gives legitimacy to the proposals adopted by endorsing them. There is a real danger that the “legislation” will be inadequately considered if it has only been considered by the political body. Generally speaking, rules, principles, guidelines and standards should only be adopted after they have been subjected to scrutiny and discussion by an independent expert body.

4. Standard-setting relates to both primary rules, such as those contained in treaties, and secondary rules, which generally take the form of soft law, in which the scope of the primary rules is clarified and operationalized, as the work and the achievements of the Sub-Commission demonstrates. The ongoing need for primary standard-setting emerges in three contexts:

(a) First, there may be an entirely novel development, requiring a new legal regime to take account of the human rights implications of the development;²

(b) The second context is where the factual situation changes and there is a need to develop standards to address a particular factual situation;³

² An example is the current study on the human rights implications of the work on the human genome.

³ An example is the work on developing guidelines in order to ensure that counter-terrorism measures are in conformity with human rights requirements.

(c) The third situation is when a gap in the current standards or in the methods of monitoring is identified.⁴

There is a significant and ongoing need for secondary standard-setting across the whole spectrum of human rights. An example is the Standard Minimum Rules for the Treatment of Prisoners. Previous authoritative examples initiated by the Sub-Commission include 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 and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. Ongoing studies which operationalize general principles in relation to specific issues include the draft principles governing the administration of justice through military tribunals; the work on the guidelines on discrimination in the criminal justice system and the guiding principles for the implementation of existing human rights norms and standards in the context of extreme poverty, the draft guidelines for the realization of the right to drinking water supply and sanitation and future guidelines on best practices with regard to corruption and its impact on the full enjoyment of human rights.

5. The first stage of the standard-setting process, as identified, can best be performed by such a body:

(a) OHCHR, on account of its role in implementing standards, should not undertake standard-setting functions. It can make proposals with regard to standards but they need to be considered by a body independent of OHCHR;

(b) The special procedures cannot perform this role because:

(i) They have specific mandates, and what is required is a body with a general mandate;

(ii) They can only clarify their mandates and not enlarge them; and

⁴ An example is the development of the Principles on Housing and Property Restitution for Refugees and Internally Displaced Persons.

- (iii) One person cannot do the work of a group representing a variety of legal systems, situations and professional disciplines;

Even if every special procedure were to have the benefit of an advisory group or even if the special procedures were to get together to propose new standards, their experience would remain compartmentalized according to their mandates;

(c) The treaty bodies cannot perform that role because they are limited by the terms of the particular treaty. They can provide guidance as to the scope of particular provisions, for example by means of general comments, but they cannot create detailed guidelines for the implementation or operationalization of the rules.

6. Consequently, there is a need for a representative independent expert body that is able to think collectively, free from specialized mandate constraints and political considerations, in order to initiate and pursue new and innovative thinking in human rights standards and implementation. It should ensure balanced attention to civil and political rights and economic, social and cultural rights.

II. THE FORM SUCH AN INDEPENDENT EXPERT BODY SHOULD TAKE

7. The independent expert body must be sufficiently large in number to represent not only different regions but differences within regions. The body should be of sufficient size to represent a variety of legal traditions, professional backgrounds, and regional and national expertise. Experience suggests that the body would function best with a membership of around 25 or 26, perhaps somewhat larger. The members need to be both independent and expert. Membership should be by election, rather than by appointment, in order to ensure the transparency and democratic legitimacy of the body.

III. RELATIONSHIP OF THE INDEPENDENT EXPERT BODY WITH OTHER ORGANS AND INSTITUTIONS

8. The independent expert body needs to have close links with the political body which can adopt standards (the Commission on Human Rights or Human Rights Council) and with special procedures and treaty bodies. The secondary standard-setting on implementation will be of considerable assistance to the treaty bodies and the special procedures, on condition that it takes

into account the principles which they have already established. It is also important for such a body to coordinate with the International Law Commission (ILC), to avoid duplication and to ensure that human rights concerns are taken into account in the work of the ILC.⁵

9. The body should ensure the widest possible access - at least the same as that currently provided - by and the active involvement of civil society in its work. This includes both non-governmental organizations (NGOs) and national human rights institutions. The current Sub-Commission is generally recognized as providing the best access to NGOs in the field of human rights activity within the United Nations. The intersessional working groups of the Sub-Commission are particularly important in this regard. They allow focused, specialized and interactive participation to both NGOs in consultative status with the Economic and Social Council and other associations and NGOs. Evolution in practice starts in these working groups.⁶

10. The body should also be in dialogue with the specialized agencies of the United Nations and other international organizations. The current work of the Sub-Commission is followed by many agencies such as the United Nations High Commissioner for Refugees and the United Nations Children's Fund. The representatives of the International Labour Organization, the World Bank, the United Nations Development Programme, the International Monetary Fund and the World Trade Organization, among others, actively contribute to the work of the Social Forum.

IV. THE SUB-COMMISSION

11. The Sub-Commission has at its fifty-seventh session continued to prove its willingness to scrutinize its own working methods. Issues which require examination include:

(a) Consideration should be given to the formulation of guidelines or criteria for membership; the issue of term limits;

⁵ Examples of the need for coordination in the current work of the ILC include reservations to treaties, the effect of war on treaties and the responsibility of international organizations.

⁶ For example, there have been reports jointly authored by NGOs and members of the Sub-Commission.

(b) The improvement of the prioritization, choice and discussion of working papers and reports;⁷

(c) The examination of how to make more effective use in its work of information on empirical country situations to identify themes, emerging issues and threats to human rights protection as befits a think tank;

(d) Consideration of restoring the role of the plenary Sub-Commission in the 1503 procedure.

V. CONCLUSION

12. For 58 years, the political standard-setting organs have felt the need for an independent expert body.⁸ The need for a think tank and for an independent group of experts to engage in initial standard-setting and the formulation of guidelines and principles to operationalize human rights rules has not disappeared and will increase in the future.

⁷ Working paper by Mr. Decaux on the methods of work of the Sub-Commission with regard to reports (E/CN.4/Sub.2/2005/5); resolution 2005/... [L.36]; working paper by Mr. Alfredsson on research and study topic proposals (E/CN.4/Sub.2/2004/46).

⁸ “Over the years, the Sub-Commission has provided the Commission on Human Rights with insights and ideas, based on expertise and experience of its members (and) helped to identify and develop new areas for further consideration”. Louise Arbour, United Nations High Commissioner for Human Rights, 25 July 2005. “[The Commission on Human Rights] recognized not only the valuable contribution made by this body [the Sub-Commission] to the human rights work of the United Nations over the past 58 years, but also its important contribution to the development of a better understanding of human rights through the study of important issues, the elaboration of international standards and the promotion and protection of human rights throughout the world.” Ambassador Makarim Wibisono, Chairman of the sixty-first session of the Commission on Human Rights, 25 July 2005.