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An introduction to the universal system of human rights protection

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1. Spheres of human rights implementation

Adoption and widespread ratification of human rights treaties is an essential condition for an effective protection of human rights world-wide. Only if as many states as possible ratify the international legal instruments proclaiming individuals' and peoples' fundamental rights, the universality of human rights can be something more than a philosophical aspiration, and attain the quality of "positive" law. This goal has almost been achieved: indeed, the largest part of the members states of the international community is currently bound by the norms of human rights-related international conventions and have therefore a legal obligation to protect and promote human rights both internally and internationally. Certainly, many gaps still remain to fill. Important treaties such as that on the human rights of migrant workers, adopted by the United Nations in 1990, have not even entered into force and have been signed only by a handful of governments. Moreover, some leading members of the international community keep themselves obstinately outside the "club" of the states bound by the two main universal human rights instruments, i.e. the 1966 International Covenants on, respectively, economic, social and cultural rights (ICESCR) and the civil and political rights (ICCPR). China, Malaysia, Turkey, Indonesia, and the Saudi Arabia, for instance, have adopted neither of them; other countries such as the United States, have followed a selective approach and have only agreed upon a limited number of human rights instruments. Nevertheless, the trend looks definitely positive, to the effect that nowadays the emphasis is no longer on ratification, but rather on effective implementation of the international norms.

Implementation of human rights is, of course, an immense and endless task. Effective protection and promotion of "all human rights for all" involves an array of policies in the legal, economic, cultural, and strictly political fields. The simple act of ratifying an international treaty and enacting domestic legislation as appropriate does not exhaust all the duties of a state.

Domestic legislation and political institutions in a democratic society are designed to hold local and national decision-makers under pressure so as they give the utmost priority to human rights issues, and comply with the relevant international norms. One could see in this a *continuum* of institutions and rules, from the neighborhood up to the local, the national and the international levels, aimed at granting to the "beneficiaries" of human rights norms – individuals and peoples – some control over the governments as far as human rights policies are concerned.

In the local and national dimensions, government's accountability for human rights policies is assured by constitutional and ordinary legislation, the court system, the political institutions (parliaments, political parties…), and the civil society organs (press, television, free associations, religious groups, and so forth). There is therefore a more or less developed web of formal and informal procedures of human rights implementation on which any single individual may rely. However, as we move towards the international dimension, where the top national decision-makers are involved, we witness a certain downgrade of human rights guarantees.

Indeed, in spite of the encouraging trend towards universal ratification of human rights international instruments, and the widespread consent in the international community on human rights principles, the international procedures designed to hold states responsible for violation of human rights provisions are still weak and generally inadequate. This is particularly striking if we look at the truly "universal" human rights instruments, those open for accession to the whole international community, as compared with the international agreements that only apply to a limited number of states, normally the members of a regional international organisation. While the "universal" instruments (see for instance the two UN Covenants of 1966) focus on a common set of substantive principles and norms on human rights and are relatively poor in providing means for monitoring, ascertaining, and ultimately sanctioning human rights violations committed by the states-parties, a regional treaty like the European Convention of 1950 is much more remarkable for its judicial enforcement mechanism than for the substantial standards it has set forth. As a general rule, we can therefore assume that the broader is the substantial scope of a treaty (in terms of subject matter and geographical area of application), the lighter are its provisions on control and enforcement mechanisms.

State responsibility in international law is an extremely delicate issue. It involves the problem of how to ascertain the lawfulness of a state conduct, lacking a compelling jurisdiction of an international court, and how to sanction the wrongful conduct, in the absence of a supra-national authority entitled with coercive power. The task of establishing state responsibility for human rights violations is even more controversial, as it brings about an intrusion in the realm of a state's domestic jurisdiction, thus a substantial limitation of sovereign power over its own nationals.

Confronted with such mighty difficulties, the international instruments on human rights have developed two lines of action. On one hand, some systems of international "monitoring" have been created sometimes attributing a "triggering role" to individuals and groups, designed to make States somehow "accountable" *vis-à-vis* the international community, represented by an independent body of experts, for failures of their human rights policies. On the other hand, pre-existing rules of general international law as well as ad hoc norms have been elaborated with the intent of making States "responsible" under international law for breach of international obligations in the field of human rights. Judicial or quasi-judicial procedures have been accordingly set up to allow states, and to a certain extent also individuals, to submit a case before an independent international judicial or judicial-like body and obtain some reparation. A new trend has recently emerged, leading to a "criminalisation" of international law: the new front-line of the human rights movement seems to be the prosecution of world criminals, as the most civilised way to cope with the worst and widespread human rights violations.

This Chapter seeks to present a brief overview of both monitoring-like and judicial-like ways of limiting the power of states when dealing with human rights issues, with a view also to introduce to the international criminal law. As the regional systems of human rights protection are the subject of other Chapters in this book, we will focus essentially on the "universal" systems, i.e. the procedures established by international instruments open to the accession of any state, including the mechanisms operating in the framework of the United Nations.

2. Is there an international "system" for human rights protection?

The traditional approach to human rights procedures portrays the different mechanisms according to an "institutional" and historical perspective. As a result, readers get the impression that the overall matter consists of a sort of patchwork of rules, proceedings, organs that do not really make up a reliable guarantee of international legality, let alone a concrete means of obtaining redress. It is a commonplace to remark that to the ambitious norms imposing to states parties challenging duties towards individuals (see e.g. art. 2 of the ICCPR and ICESCR and art. 2 of the Convention for the elimination of all forms of

discrimination against women - CEDAW), corresponds a system of implementation both fragile and ineffective.

This conclusion is partially true, and international law is still far from having created a consistent and centralised system of human rights protection. However, it is our assumption that such a system is not only desirable in the present status of international relations, but also somehow implicit in the understanding of those who are striving to make the international human rights procedures work properly. Despite the diversity of legal instruments, procedures, organs, scopes, etc. – that are the legacy of a long and controversial struggle for "internationalising" human rights - there is an increasing convergence of opinions and practices worlwide, and some features of an international human rights protection system is envisageable. The many international bodies involved in legal development of the human rights movement do not proceed as separate units, but rely on each other with a view to strengthening their respective action and enhancing their collective role.

Even the existence of many procedures and organs potentially suitable for dealing with human rights breaches, is not in itself a weakness, but can be an asset of the system, provided that some practical "rules of the road" are set up to avoid duplication and stimulate interaction.

It is thus legitimate to present an outline of the universal mechanisms of human rights protection as branches of a – still unachieved – "system", integrating many specialised "sub-systems", whose impact on the national and international institutions is differentiated though conducive to the same effects.

In this perspective, the main distinction we can draw is, as mentioned above, between mechanisms aimed at settling judicial controversies as to the application or interpretation of an international human rights norm on one hand, and, on the other, procedures designed to "monitor" state policies and to enhance their performance in complying with their obligations, independently from any formal legal dispute.

International criminal law norms of "supranational" nature seem to deserve special consideration. They will be presented as renewed attempt to move beyond the opacity of state responsibility, seeking to establish not just a merely inter-state regime, but a proper world order based on the rule of law and the human dignity.

3. "Justiciable" human rights

A legal dispute concerning human rights can arise between states as well as between a state and an individual. Of course, also two individuals can have a row involving human rights issues, but such a case is generally dealt with in domestic courts. If eventually the judiciary allegedly fails to grant one party's fundamental rights, the losing party may, under certain conditions, submit a case before an international body. In such an event, however, the opposing party will be the state, no longer the original litigant, and the substance of the case will not be the original controversy, but whether or not the concerned state has honoured the international law of human rights.

Whilst the inter-state dispute settlement has a long history, the chance given to individuals to challenge the state conduct before an international judicial or quasi-judicial instance is almost unprecedented in international law. At the universal level, the institutions involved are some of the so-called "treaty bodies", that is Committees formed of independent experts, appointed by the states parties to some human rights international treaties according to the provisions thereby established. The treaty bodies having competence to deal with either state-to-state or individual-to-state controversies are, namely, the Human Rights Committee (HRC), the Committee against Racial Discrimination (CRD), and the Committee against Torture (CT). They were created by, respectively, the International Covenant on Civil and Political Rights (ICCPR, art. 28), the Convention for the Elimination of Racial Discrimination (CERD, art. 8), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, art. 17). The Committees are composed by a limited number of nationals of the states parties (18 for the HRC and the CRD; 10 for the CT), who qualify for their expertise in the field of human rights - not necessarily in legal matters. They serve for a term of four years on their own capacity, i.e. not responding to the instructions of any government. Their dispute settlement competence range from considering state-to-state complaint, to give opinions about individual petitions.

3.1. Inter-state dispute settlement

Legal controversies between states about human rights are very rare indeed. States tend to settle their arguments in this matter through diplomatic means (preferably bilateral talks) and avoid even using the "rights" terminology. States that are not parties to a human rights treaty providing for a special inter-state procedure, may seek a settlement of their controversy through all the traditional means of international law, including recourse to the International Court of Justice. In so doing, states actually affirm their interest in general respect of universal principles of law protecting the dignity of individuals, irrespectively of the incorporation of those principles in an international treaty to which they have acceded. The very interest in international legality enables states to suit each other for breach of human rights even when the acting state is not directly affected by the violation.

The *erga omnes* character is a typical feature of international human rights multilateral instruments. Human rights treaties indeed tend to establish a legal network whereby each member state is responsible *vis-à-vis* all the others and each one may take an action against anyone else for non-compliance with the common obligations. This pattern gives human rights norms an "objective" value. Moreover, the concept of *ius cogens*, i.e. coercive rules of international law, extensively applies to human rights issues and corroborates their interpretation as public order (o*rdre public*) norms. Accordingly, some traditional restrictions to international interference in the domestic jurisdiction of states do not apply when human rights are at stake. Indeed, as the 1993 Vienna Declaration points out, "the promotion and protection of all human rights is a legitimate concern of the international community" (Declaration, art. 4).

The United Nations (as well as other international organisations) provides some specialised political arena in which state representatives may openly discuss and make recommendations concerning the human rights situation a given country. The Human Rights Commission, a subsidiary organ of the Economic and Social Council (ECOSOC) of the UN, has played a key role in making human rights a central issue in international politics.

Some international treaties provide for a proper inter-state complaint procedure centred on an independent international body. The HRC, the CRD, and the CT have competence to consider, on the initiative of a state party, the alleged violation of the respective

parent conventions, provided that – in the cases of the ICCPR and the CAT - both the involved states have expressly accepted the competence of the relevant Committee.

If the Committee is unable to find a solution to the dispute, it can establish, in agreement with the concerned states, an ad hoc conciliation commission mandated to reach a compromise through its good offices.

Although many states have made the required declaration of acceptance of such a procedure (46 states parties for the CAT, 47 for the ICCPR: the declaration is not required under the CERD), no case has been brought so far before any of the three Committees. This is a dramatic evidence of the reluctance of states to frame in legal terms their controversies involving human rights. Similarly, even the clause inserted in some human rights instruments attributing to the International Court of Justice the ultimate say over inter-state disputes as to interpretation and application of the treaty norms, has been widely neglected by states parties.

More successful in generating inter-state claims has been in the framework f the Council of Europe, the European Convention of Human Rights and Fundamental Freedoms. A dozen of petitions has been brought before the Convention's bodies so far, concerning cases of remarkable political momentum. But this could happen in a relatively advanced environment, that one of the Council of Europe, and is apparently very unlikely that this trend can be reproduced at the universal stage.

However, inter-state complaining has proved not to be the most practical means for making human rights issues justiciable under international law. New mechanisms had to be established to grant the role of "human rights guardian" to an actor other than the state. The first, most obvious candidates for such a role were of course the individuals themselves.

3.2 Individual complaint procedures

A provision enabling an international body to deal with communications from individuals who are subject to a state for alleged violation of human rights, under condition that the state itself has accepted such a competence, was firstly introduced by the CERD in 1965. The procedure before the CRD however entered into force only in 1982. The complaint procedure under the CERD was chiefly meant to be an international remedy for cases

already decided by the ad hoc national body competent to receive individual petitions that states might set up according to the same Convention (cf. CERD, art. 14, paras.1 and 2). A similar procedure was established in 1966 by the First Optional Protocol to the ICCPR (OP1) and entered into force in 1976. The HRC received the first individual "communications" in 1977. A third procedure of individual petition of similar type was established by the CAT before the CT, and entered into force in 1987.

These three proceedings are characterised by some important element. First of all, they introduce a form of standing of the individual under international law. The principle that individuals are the most suitable watchdogs of state behaviour as far as human rights are concerned is boldly affirmed, in spite of the traditional "positivist" approach that drastically denies individuals any legal position. An exception to this supposed rule was the proceeding under the European convention of human rights, which commenced to function in 1953 and has been revised several times over the years. Most recently, Protocol 11 has amended the procedural section of the European convention setting up a fully-fledged international judicial proceeding, leading to a judgement binding under international law. Also the 1969 American Convention on human rights established an individual complaint procedure. In this framework, as it was under the European convention before the Protocol 11 reform, any individual, group or NGO within the jurisdiction of a member state may lodge a petition with the Inter-American Human Rights Commission, an independent organ that investigates over the case and seeks to achieve a friendly settlement. If it fails to do so, it may submit the case, along with its opinion, to the Inter-American Court of human rights, whose judgement is binding for the states that have accepted its jurisdiction. However, the examples taken from regional systems were of little help when one had to cope with international law at the largest scale. The entry into force of the three mentioned conventions and the implementation of the procedural provisions thereof were thus of especial importance in endorsing a new pro-individual attitude in international law.

Another key feature of the procedures we are considering is the non-judicial nature of the organs that deal with the individual petitions, i.e. the HCR, the CRD and the CT. None of them is an court, even if the proceeding before them is somehow inspired by the judicial model. Their nature has been described as "quasi-judicial", meaning that, although the individual plaintiff and the respondent state, are given a broad possibility to

submit evidence and memorials like in an adversary trial, the final decision is not the equivalent of a proper judgement. Committees' conclusions indeed are not binding for the state, but only contain "views", "suggestions", "recommendations" deprived of the compelling force of adjudication.

The quasi-judicial procedure can be divided into three parts (this description applies to all the three Committees we are considering, though the most advanced and remarkable examples are provided by the HRC, that is undoubtedly a model for the others).

The first step is the lodging of a "communication", alleging that a human right protected by the relevant instrument (the ICCPR, the CAT or the CERD) has been violated by a state party that has conceded to the individual complaint procedure. It goes without saying that the Committees can not deal with any individual case unless the state concerned is not only party to the main convention, but has also made the special declaration or acceded to the optional instrument that attributes to the Committees their quasi-judicial competence. Both the conditions are necessary, and indeed, only 98 states have ratified the OP1, out of 148 that are parties to the ICCPR; the CERD has been ratified by 157 states and the CAT by 123, but only respectively 29 and 43 have recognised the competence of the respective Committees to receive and process individual complaints (cf. art. 14 CERD and art. 22 CAT). Author of the communication can be a single person or a group under the jurisdiction of any "opting-in" state, who claims to be the victim of the alleged breach – then, no *actio popularis* allowed. Moreover, the HRC has consistently expressed the opinion that the right of peoples to self-determination, enshrined in common art. 1 of the two 1966 Covenants, cannot be the object of an individual communication under OP1.

Once the Committee has satisfied itself that it has the competence to deal with the case, it has to decide over the admissibility of the communication. This is a crucial phase of the process, and indeed a huge number of communications are struck down because they fail to stand the admissibility test. The most important feature of admissibility that is worth considering in this Chapter, apart the requirement of non-anonymity, is the "subsidiarity rule". It entails that only cases for which no effective remedy under domestic law is left can be examined by the international body, unless – to quote the words of the OP1 – "the application of the remedies is unreasonably prolonged" (art. 5.2 (b)). In other words, an international petition is admissible only against the final decision of a state in a given

controversy, an act that is no longer likely to be reformed according to domestic law but that nevertheless brings about a breach of the state's international obligations. A merely theoretical possibility of reform is not however sufficient to halt the procedure: the international body may decide to go further in examining the merits of a case even when some internal remedies are still open, but it is proven they are extremely time-consuming, hazardous, or even too expensive. The European Commission and Court of Human Rights have elaborated a conspicuous case law about this issue, which has extensively reverberated on the Committees' practice. Another aspect of the subsidiary nature of the remedies provided by the Committees system is that a claim cannot be admitted before the Committees if the same case is being investigated under another international procedure (before the European Court of human rights, for instance).

The second phase of the proceeding is the exam of the merits. Also before entering in the merits of the case the Committee can receive – as well as urge the petitioner and the state to send – written statements and all materials they deem it is relevant for deciding any aspect of the case. The "dialogue" with and between the parties is particularly important when the Committee starts examining in depth the allegations of the petitioner. The state is given a time limit of 6 months to submit its commentaries to the communication; then the individual can reply. The two parties are actually put on the same footing before the Committee. A huge departure from an adversary procedure model lies however in that the all procedure is carried out in closed meetings. Moreover, the Committees take into account only written information made available by the parties, although oral sessions are not expressly forbidden. Nor the procedure approaches the inquisitorial system, as the Committees are not given any autonomous investigation power. Only the CT has been attributed a fact-finding function, that may result in the establishment, always in co-operation with the concerned state, of an inquiry mission on the spot, when reliable information of systematic practice of torture so requires. The inquiry is confidential, but a summary of its results can be included in the CT annual report to the General Assembly (cf. art. 20 CAT). The fact-finding procedure is however completely separate from the CT competence regarding individual complaints.

While the Committee's conclusion over admissibility is a proper "decision", the outcome of the examination on the merits is a "views", that ascertains whether the alleged violation of the human right protected by the relevant treaty occurred or not in a given

single case. On the legal value of such "views" the OP1 is just silent, and so are the other treaties. In the Committees' practice – the HRC leading by example – their final findings con not be denied a certain binding nature, although they are not immediately enforceable within the national systems. Several times, the findings are assorted with detailed recommendations as to the future behaviour of the state in the specific case, and a Committee may ask the government to further report as to the measures taken to cope with the problem that the communication has highlighted. Indeed, throughout the proceeding the Committees may request the state to take some interim measures designed to protect the individual who raised the claim. This is particularly important when the claim concerns, e.g., the right to life or the protection from torture, because any delay in these matters could entail an irreparable harm to the individual. At the final stage of the procedure, the Committees' requests do not present a merely humanitarian character, but are grounded on the legal content of the treaty. Apart from protecting measures, the Committee may recommend the state to pay compensations to the victims of a violation, to stop executing a penal sentence pronounced after a trial whose procedure violated human rights norms, or to provide other forms of reparation.

Yet, it is evident that the Committees lack any enforcement power and necessarily rely on the state's authorities for their recommendations to be effectively implemented. Moreover, as the treaties do not provide these bodies with any power of sanctioning recalcitrant states, the ultimate responsibility for granting states to honour the treaty bodies recommendations lies on intergovernmental mechanisms – with all the related shortcomings.

Nonetheless, the Committees do have some means at their disposal to emphasise the moral and political strength of their "views". One is publicity: in spite of the confidential nature of the proceeding, the outcome is made public through the report to the General Assembly. In recent years, the use of electronic databases has dramatically increased the availability in the Internet of documents produced by the treaty bodies. Wide access to this material has eventually enhanced the support to the Committees' work from NGOs and organs of civil society.

Another improvement to the practice of the Committees – in particular the HRC - has been the introduction of a follow-up procedure. This enables the Committee through a Special Rapporteur to monitor on a regular basis the state's conduct, by requiring it to

report about implementation of the Committee's views. States have proved to be all but enthusiastic about this new deal in the HCR practice. This reluctance is maybe evidence that the right avenue has been taken.

3.3. Other international procedures for human rights violations

The procedures discussed above, the inter-state ones and those based on individual complaints, centred on the three international committees, the HRC, the CRD and the CT, are not the only ones available under international law. Apart from the regional proceedings, it is worth reminding the complaint systems within the International Labour Organisation – ILO and the procedure under UNESCO.

The ILO was the first international organisation to provide non-governmental actors, namely the organisations of workers and of employers, with the possibility to trigger an international inquiry into allegations of state non-compliance with the ILO Conventions. Articles 24 of the ILO Constitution set forth the "representation" procedure, allowing national and international organisations of workers and employers to submit to the ILO Governing Body a motion of failure of a state party to an ILO Convention to comply with its provisions. The procedure is confidential and can lead to the adoption by the Governing Body of a report, drafted by a tripartite ILO Committee, containing recommendations to the concerned state. The reports are regularly published, while the recommendations and the relative state answers may be made public as a form of moral sanction against the state. The representations procedure has become through the years quite popular. It has often been used to prompt the ILO *Committee of Experts on the Application of Conventions and Recommendations* to take an initiative as the ordinary, independent organ charged with the supervision of the performance of states parties in implementing the ILO Conventions (cf. art. 22 of the ILO Constitution). Article 26 of the ILO Constitution establishes another procedure before the Governing Body, available to states, members of the tripartite state delegations to the ILO and the International Labour Office. Finally, the ILO established in 1950 a special freedom of association complaints procedure, enabling the Freedom of Association Committee to deal with complaints submitted by states or workers' or employers' organisations alleging a violation of the

principle of freedom of association, even if the accused state has not ratified the relevant ILO Conventions (in particular, the ILO Convention No 87, of 1948).

Also the Executive Council of UNESCO in 1978 set up an individual complaints procedure for violation of rights in the field of science, culture, education and information. The competent organ is the UNESCO Committee on Conventions and Recommendations.

4. The Charter-based procedures and the monitoring function

For many years after the United Nations Charter entered into force the UN organs have been prevented from giving any effect to allegations concerning human rights violations occurred within a particular state, as this would have entailed an inadmissible interference in domestic jurisdiction. The UN simply declared they had no power to deal with communications about human rights: these were essentially internal matters, encompassed by the UN Charter art. 2.7 rule. Only in 1959 the Secretary-General was authorised to prepare annually a comprehensive list of all communications that had nevertheless been addressed to him and concerning human rights issues, to be submitted confidentially to the UN Economic and Social Council - ECOSOC.

Nevertheless, even at the Human Rights Commission - the 53 member intergovernmental organ with specific mandate on human rights, and the most important one in this field within the UN - any state representative was reserved the power to stop any discussion about human rights issues by simply raising the domestic jurisdiction clause, without any further motivation. This course was highly criticised by NGOs and human rights movements during the 60s, particularly after human rights concerns became legal and not just political matters, due to their progressive inclusion into international law binding instruments.

With ECOSOC Resolution 1235 in 1967 a first exception to the non-relevance doctrine was introduced, providing for authorising the HR Commission and its subsidiary organ, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (from 1999 Sub-Commission on Protection and Promotion of Human Rights), a 26-member expert body, to examine in public discussion any “information relevant to gross violations

of human rights and fundamental freedoms ... in all countries". The Commission could also "make a thorough study of situations which reveal a consistent pattern of violations of human rights" and address thereby recommendations to the ECOSOC.

This public monitoring process has been extensively used by the Commission after the second half of the 80s. A sophisticated system of working groups and special rapporteurs has been set up mandated to monitor, also through fact-finding missions in the field, subject to state consent, both country-specific situations and thematic issues. The "web" of monitoring instances thereby created has greatly contributed not only to the enhancement of international awareness about human rights issues, but also to the development of local and non-governmental institutions designed to respond appropriately to those challenges. The function of "human rights defender" has been recently solemnly acknowledged by the UN General Assembly with Resolution 53/144 of March 9th 1999.

An indirect monitoring mechanism based on reliable information provided by any individual, group or NGO was set up by the ECOSOC with Resolution 1503 in 1970. Communications received by the UN organs "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedom" are transmitted to a five-member working group of the Sub-Commission. It is the beginning of a lengthy and elaborate confidential process, whose outcome can eventually be a decision by the HR Commission to start a public monitoring procedure or to make otherwise public the situation denounced. The 1503 procedure is thus essentially aimed at drawing the UN's attention to a "situation" of gross human rights violations, i.e. a situation affecting a large number of people or a whole territory, intensively and/or for long, rather than tackling a single case affecting an individual. This procedure - that has proved not to be particularly successful - is therefore intimately different from those discussed above and prompted by an individual communication to one of the three Committees having quasi-judicial competence.

Another procedure very close to the 1503 procedure was set up by the ECOSOC with Resolution 27/1983 for cases involving serious violations of women's rights. Allegations are dealt with by a Working Group of the Commission on the Status of Women - CSW, another subsidiary organ of the ECOSOC, composed by 23 state representatives. Communications are collected by the UN Secretariat (namely the Division for the

Advancement of women - DAW, and the Office of the High Commissioner for Human Rights - OHCHR) and divided into two lists: confidential communications (the large majority) and public communications (very few per year). The CSW Working Group examine them and submit to the whole CSW a detailed report that will be referred to when resolutions are discussed addressing parallel issues.

It is worth mentioning also the possibility for some Special Rapporteur or Working Group of the HR Commission or its Sub-Commission to consider and process urgent communications, by establishing immediate contacts with the government involved and inviting the competent authorities to take measures as appropriate, on a purely voluntary basis. The "urgent procedure" practice commenced in the mandate of the Working Group on forced and involuntary disappearances and later extended to the Working Group on arbitrary detention and to the Special Rapporteurs on torture and on summary and arbitrary executions.

Apart from the UN institutions just considered, an increasingly important monitoring function has been mandated to the bodies established by human rights legal instruments. The "treaty bodies" in the field of human rights monitoring are not limited to the three ones having competence to deal with inter-state and individual communications, but include also the Committee on the elimination of discrimination against women - CEDAW; the Committee on economic, social and political rights - CESC; and the Child Rights Committee - CRC. While the CEDAW and the CRC have been established by, respectively, the 1979 Convention on the elimination of all forms of discrimination against women and the 1989 Convention on the Rights of the child, the CESC was created in 1985 by the ECOSOC to perform the tasks that the 1966 ICESCR had originally entrusted to it. A monitoring Committee is established also by the Convention on the rights of all migrant workers and the member of their families, though this convention has not yet entered into force.

The basic monitoring activity of all these Committees, including the three ones charged also with quasi-judicial competence, consists in examining the periodic reports, concerning the domestic policies for implementing the substantial provisions of the respective treaties, that all states parties must produce. The reporting obligation is a common feature of all human rights related conventions, with the partial exception of the ICESCR, and further evidence of the *erga omnes* character of their provisions. Every four

or five years (the timing varies from treaty to treaty), states are required to update the basic report that should be submitted within a few years after ratification, providing detailed information about the measures adopted to grant and sustain respect to the rights set forth in the international treaties. A similar obligation is imposed to the ICESCR members states by the ECOSOC.

According to the guidelines set forth by the Committees themselves, state reports should underline the difficulties and the failures encountered, as well as the successful stories; they should not only mention legislative measures taken, but also inform about ongoing political and social trends and substantiate the conclusions with social and economic statistics, with special attention to be paid to the conditions of particularly vulnerable sectors.

Guidelines suggest the reports should be prepared by governments with the assistance of civil society organs, so as to provide the Committees with a genuine overview of the actual situation existing in a given country.

The reports are examined by the appropriate Committee's members in public meetings and discussed with a delegation of the concerned state on the basis of a list of questions worked out by a Committee's member acting as rapporteur. The Committee's members, who are experts serving in their personal capacity, can ask special questions, often suggested to them by "counter-reports" or other documents submitted by national or international NGOs, that supplement the governmental report (see, in particular, art. 45(a) and (b) of the Convention on the rights of the child, that explicitly allows for the CRC to invite the UNICEF and "other competent bodies" to provide expert advice). When a state report is found too elusive on a specific topic, the government can be requested to submit a supplementary report. The final assessment on the state's performance in complying with its international obligations under a given treaty is included in the Committee's report to the General Assembly and made public. The final "observations" summarise the positive and negative aspects of a state's policy, and make suggestions about how to cope with the most problematic issues.

An extremely valuable activity of the Treaty Bodies consists in the framing of "General Comments", also called "General Recommendations" or "General Discussions", whereby the Committees give an interpretation of come treaty's provisions, based on the examination of state reports and, where applicable, on their "case law".

5. From monitoring to prosecuting: international criminal law and human rights

During the last fifty years a penal approach to human rights protection has grown relevant in international law, side by side the traditional "civil" means. This process, joint to the progressive blurring of the historic distinction between internal and international armed conflicts, has brought about a dramatic revival of humanitarian international law - the "Law of Geneva" - as grounded in the broader "constitutional" framework of the human rights international law. Humanitarian standards that the parties to an armed conflict must comply with, tend to be seen as the ultimate manifestation of the general duty of protecting and promoting human rights in peacetime and in all emergency situations, including in wartime - *humana dignitas servanda est*.

The most advanced achievements of international criminal law go beyond the level of inter-state co-operation in penal matters, an area that is nevertheless witnessing a fast development through multilateral instruments aimed at combating the transnational organised crime. Indeed, some feature of a proper supra-national system of crimes and their prosecution and punishment is taking shape, with reference to a few "core crimes" of international concern.

When human rights violations amount to a particularly serious challenge to the very values and interests of the humankind, "ordinary" forms of reaction by the international community - including those available to individuals - turn out to be dramatically unfit. They are not designed to charge individuals with criminal allegations; their fact-finding powers are absolutely inadequate to a criminal prosecution; the non-binding value of their final outcome is patently at odds with the nature of a criminal judgement, that requires enforcement even by coercive means.

Criminal justice is a typical element of state sovereignty. For long, it has been reputed extremely unlikely that international law could be entrusted with criminal competence. In the past century, individuals have been occasionally pointed out as international criminals, and international courts were actually established after the Second World War to prosecute and punish top officials of the German Nazi régime and of Japan. The Nuremberg and Tokyo trials were a watershed in the history of international criminal law.

They affirmed the principle of the personal responsibility of individuals for the gravest violations of international humanitarian law, even when the conduct is not proscribed by national rules or when committed to accomplish a superior order. Some elements of the right to a fair trial were incorporated, especially the rights of defence. All this, however, does not remove the essential weakness of the two tribunals: they were "partial", because imposed on defeated countries and operated under a political mandate conferred by the winning powers. In addition, the two tribunals were only partially "international", since they represented only the politically dominating part of the international community.

After the Second World War the General Assembly of the United Nations, in Resolution 95 (I) mandated the International Law Commission (ILC) to elaborate a draft statute of an international criminal court. Simultaneously, the ILC worked out a Code of Crimes against the Peace and Security of Mankind. The overall plan was designed to establish an international criminal system, according to the principle *Nullum crimen, nulla poena sine lege*, composed by a criminal code and a criminal court with inherent jurisdiction.

The ILC's enthusiastic commitment led, among others, to the 1950 Report on the Nuremberg Principles, where seven basic rules of international criminal law were established. Unfortunately, changes in the international political environment – the "Cold War" and the subsequent East-West confrontation – froze a project that would have been revolutionary for the time. The two Super-Powers, USA and USSR, subordinated the discussion of the statute of the court to the adoption of the code, and this latter to the definition of the crime of aggression (position adopted by the UN General Assembly in 1954). An agreement on the crime of aggression was met only twenty years later, in 1974. Only after the end of the Cold War and the tragedies of the Former Yugoslavia, Rwanda, and others, was the political deadlock overcome and the international criminal court again became a feasible project.

The establishment of the two ad hoc Tribunals for the Former Yugoslavia and Rwanda was undertaken by the Security Council with respectively resolution 827 of May 25th 1993 and 955 of November 8, 1994. There is no room in this Chapter to go in detail through the Statutes of the ad hoc Tribunals. Some aspects are however worth a short description.

Subject-matter jurisdiction was confined to the "classical" international categories of the war crimes, crimes against humanity and genocide. In the current composition, judges are

distributed in trials chambers in both the Tribunal for the former Yugoslavia, seated in The Hague, The Netherlands, and in the Tribunal for Rwanda, seated in Arusha, Tanzania. The Appeals Chamber, common to the two institutions, is composed by five members and meets in The Hague. The UN General Assembly elects all judges for a four years term. The Prosecutor, appointed by the Security Council, common to the two jurisdictions, is based in The Hague. The Office of Prosecutor includes two Deputy-Prosecutors, investigators and field officers in the Former Yugoslavia and Rwanda, as well as trial attorneys representing the Office in court. Some crucial administrative tasks are entrusted to the Registry offices.

Despite the inherent limits of their ad hoc jurisdiction, the Tribunals constitute an invaluable step forward in the path towards a "supranational' criminal jurisdiction, and a precedent for the solution of many technical problems related to a permanent court.

The legal basis of the ad hoc Tribunals was found in Chapter VII of the UN Charter ("Action with respect to threats to the peace, breaches of the peace, and acts of aggression"). The Security Council considered the creation of the Tribunals a necessary measure for maintaining international peace and security in a special regional context of widespread violence and in the context of increasingly concerned international public opinion. Though challenged by some lawyers and governments, this justification is generally assumed to be sufficient to legitimate the Tribunals according to current international law.

The Security Council's decision was a very innovative step forward: for the first time the supreme executive organ of the United Nations in the field of peace and security created a truly international court and put into practice the principle of fighting impunity to achieve peace.

Statutes, rules of procedures and evidence, and the case law elaborated by the Hague and Arusha courts embody the highest standards in respect of the rights of the defence, fair and impartial trials, the protection of victims and witnesses, and progressive interpretation of humanitarian law.

The statutes of the Tribunals are centred on an independent Prosecutor, to whom is conferred the power to initiate investigations on the basis of communications from governments, NGOs, and individuals.

The weaknesses of these Tribunals however, include the lack of effective rules compelling states to co-operate in supporting investigations and executing arrests. Moreover, the two Tribunals are ad hoc institutions whose impact on the international community as a whole may be relatively timid. Many observers have warned about the risk of proliferation of tailor-made courts (the trend is still vital: an international "special court" for crimes committed in Sierra Leone is going to be established by agreement between the Sierra Leone government and the United Nations). Indeed, with ad hoc tribunals there is the risk of undermining the values of justice and equality, inherent in any judicial system, as a selective approach would condition their effectiveness.

In 1998, a long expected event took place in Rome: an international conference convened by the UN adopted the Statute of the new Permanent International Criminal Court - ICC. Signed by about 100 states, the Statute will enter into force with the deposit of the sixtieth instrument of ratification; three years after the Rome conference the path is half accomplished, in spite of the fierce opposition of some influential state.

ICC jurisdiction will encompass "the most serious crimes of concern to the international community as a whole" (art. 5), namely: genocide, crimes against humanity, war crimes, and the crime of aggression, this latter only once a Preparatory Commission will adopt a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations" (*ibidem*).

The Court may exercise its jurisdiction only when the alleged crimes took place within the territory of a state party to the Statute or of a state having accepted the ICC competence, or alternatively when the suspect individual is a national of the same categories of states (art. 12). In addition to that, the ICC may only proceed provided that it satisfies itself that no state court is genuinely dealing with the same case. The *non bis in idem* principle also applies. The ICC jurisdiction is, in other words, "complementary" to the state jurisdiction. Indeed, the ICC statute points out clearly that states have the primary responsibility to bring to justice the culprits. As a matter of fact, however, in spite of the "universal jurisdiction" clause enshrined in several treaties, impunity for the harshest crimes committed by military and political leaders has been so far the rule rather than the exception. Thus, the primary reason for creating a "subsidiary" international court is combating impunity. Another reason, among others, is the envisageable effect of inducing

individuals to refrain from committing acts that might eventually be punished as international crimes. Indeed, the very fact that an international court exists raises the probabilities that an investigation may commence, on the initiative of one state or another, or even prompted by the ICC itself.

In the ICC proceeding, the UN Security Council is empowered with special prerogatives, as it may, acting under Chapter VII of the UN Charter, submit a case to the ICC without observing the limits posed by art. 12. It may also, always using the powers conferred to it by Chapter VII, stop any investigation or prosecution which is likely to interfere with an action undertaken by the Council itself (art. 16).

Apart from the Security Council, the input for starting an investigation may proceed from a state party; also the Prosecutor may *motu proprio* initiate an investigation (art. 13).

Whereas enabled to make investigations, to prosecute and adjudicate criminal cases, the ICC has no direct enforcement power. This implies that state co-operation is necessary in carrying out many essential tasks, such as arrest or surrender of indicted persons, taking of evidence, execution of seizures, and eventually the enforcement of the sentence (see Parts 9 and 10, arts. 86 ff.).

6. Conclusions

International law is no longer the realm of state sovereignty and "raison d'état". Indeed, it is encreasingly exposed to the input of the civil society, especially in the contemporary "globalised" world. Concerns about human rights are an evidence of this new deal: they have emerged as a key feature in world politics and are increasingly echoed in international law. Human and sustainable development of the poorest states, intergovernmental co-operation against transnational criminal organisations, reabilitation of child workers and child soldiers, efforts to reduce industrial emissions that affect the environment, measures against racism and xenophobia, policies to fight HIV-related and other diseases...: in all these problems, and many others that one could mention, human rights are the mainstream world politics.

The procedures created according to international law to deal with human rights try to respond, in various degrees of effectiveness, to the challenge posed to the national and the international societies by the international law of human rights.

The inter-state complaint model has proved to be the least reliable, too prone as it is to political manipulation.

The model based on individual complaints is much more finely tuned to human rights. It is a merit of the OP1, the CERD and the CAT to have introduced at the universal level the individual complaint procedures that the European Convention had firstly set up at the regional level. The results obtained by the HRC, the CRD and the CT has prompted the UN to extend the individual complaint procedure with regard to two other human rights instruments.

On October 6 1999, with resolution 54/4, the UN General Assembly adopted an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP), establishing a procedure for individual communications supervised by the CEDAW, largely inspired to the OP1 procedure. In addition to the quasi-judicial competence, the CEDAW-OP enables the Committee to conduct *motu proprio* on-site fact-finding missions (with the consent of the state party), as provided for in the CAT (art. 20). The CEDAW-OP has already been ratified by 17 states. A parallel develoment is envisaged for the ICESCR: a draft Optional Protocol providing for an individual complaint procedure was elaborated by the CESCR in 1996 and is currently under discussion before the HR Commission (cf. UN Doc E/CN.4/2001/62). One of the main shortcomings in this case is how to make the "violation approach" fit the concept of "progressive realization" of the rights, that applies to many articles of the ICSSCR. The Committee ought to develop appropriate indicators and benchmarks in order to evaluate if the ratifying state party has actually done what is possible according to its means to meet its obligations in relation to each individual or group claiming for a violation.

The "violation approach" is especially fruitful when combined with a reliable monitoring system, based on state reporting to the human rithts treaty supervisory bodies and fact-finding initiative of UN organs. The improved interplay between the special rapporteur system of the UN and the treaty bodies experts is a valuable achievement of the co-ordination work of the OHCHR. An enourmous gap still exists between the financial, technical and human requirements for establishing and regularly feeding a reliable "human rights database" and the available resources.

The "criminal shift" occurred in the 90s is not a rejection of the consolidated approach of international law in case of human rights violations, based on monitoring and handling

communications, and not designed to punish the offenders. It rather witnesses the demand for a more active presence on the world scene of the organs of the international community. Instances of supra-national nature are often invoked to combat threats to peace and security, impunity, and other breaches of human rights occurring worlwide. By moving towards "criminalisation", the human rights movement is not turning its back on the "monitoring" and complaint procedures, but rather complementing them, with a view to enhance the overall capacity of domestic and international institutions to effectively defend human beings.

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