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Strengthening the Rule of Law: The Right to an Effective Remedy for Victims of Human Rights Violations

Introduction

The Vienna Declaration and Programme of Action was undoubtedly a milestone on the road to an effective universal protection of human rights. The Vienna Conference took place in the middle of a great period of time, when consensus could be achieved on – not revolutionary – but ambitious reforms. The creation of the position of High Commissioner for Human Rights, the multiplication of special procedures, the growing number of States parties to the core human rights treaties and the development of individual complaint procedures under those treaties are a few among a number of important steps that were taken following the conference to further and improve an international right to an effective remedy for all. International criminal law, which for long had been a dream of wishful thinkers, also came of age, with the creation of the two ad-hoc tribunals and the adoption of the Rome Statute. We have to acknowledge this immense progress and realise that all this is a precious *acquis* that may be questioned tomorrow and thus should be strongly defended today. Attempts to weaken this *acquis* are made continuously. In this game, not moving forward means retrogressing. It is not enough to remain constantly alert and to react strongly against any attempt, for instance, to question the independence of special procedures mandate holders or of the High Commissioner, but also to keep alive the dynamic of progress and innovation.

In this paper, I will limit myself to a number of comments and proposals relating to the issue which was dealt with in Working Group 1 during the Vienna+20 Conference, that is, the strengthening of the (international) rule of law and the right of victims to an effective remedy. I will focus on issues relating to the strengthening of the international "system" for the protection of human rights.

I will first address a selected number of more or less "technical" issues, with proposals that could be taken up and implemented on a short or mid-term basis. Then I will look at some policy issues regarding the "system" as a whole, as well as the relations between its parts. Finally, I will try to sketch prospects for reform on the basis of these considerations.

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How to Improve the International Right to an Effective Remedy Today? A Selection of Issues and Proposals

Below are four issues I could identify, among others, in my practice as a special procedure mandate holder. These issues could probably be addressed in the short-term perspective by improving coordination among all stakeholders and devising practical tools and internal procedures; there is no need for big reforms, but only a bit of creativity and good will from all sides.

1. Enhancing the protection of victims through urgent action procedures by special procedures

With time, an impressive system of immediate reaction to allegations of violations of human rights has developed. All special procedures have "urgent appeal" procedures through which they react to allegations received from "credible sources". Most of the time, these urgent appeals take the form of "joint urgent appeals", as several mandates are generally concerned by the same situation. For instance, the case of a person who has been arrested illegally and is at risk of being subjected to an enforced disappearance, to torture and to summary execution calls for the urgent joint intervention of the Working Group on arbitrary detention, the Working Group on enforced or involuntary disappearances, the Special Rapporteur on torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions.

Through this system of urgent appeals, great progress has been made in achieving Immanuel Kant's vision of a cosmopolitan society, in which "a violation of rights in one part of the world is felt everywhere". But there is room for improvement. Very often, special procedures still react too slowly once the allegation has reached them. A letter summarising the allegations has to be drafted, which may reveal itself a cumbersome process. If it is a joint appeal, the letter has to go through all mandate holders who can propose amendments before it is approved. This may sometimes take days. Furthermore, a communication that reaches the secretariat on a Friday will have to wait until Monday until something happens. It is a fact that there is no capacity to react during nights and weekends. But it is also a fact that perpetrators do not rest on week-ends. The ways and means to conceive a 7/7, 24h/24h system of reaction to violations should seriously be examined. The most arduous problem is not to organise such a reaction at the international level, but to find proper ways to have access to the domestic bodies or persons being in the position and having competence to take effective measures of prevention and protection (when they are not perpetrators, civil servants do have rest on weekends).

What about trying to have contact points in every country – through National Human Rights Institutions for instance – that could be reached directly in such circumstances? Of course, the Ministry of Foreign Affairs of one country – through the permanent mission in Geneva – must remain the mandate holders' main interlocutor. But should there not be exceptions when a person's life is at stake?

There should also be a thorough reflection on how to make best use of

new technologies as tools of protection. Recent events have shown the potential impact of immediate communication of information on violations of human rights. Of course, there may be concerns regarding the credibility and authenticity of the information posted. Would it be conceivable to have a social network dedicated to early warnings and urgent appeals in the field of human rights, accessible by identified credible sources in the field, who would have the possibility to post, on a continuous basis, their allegations or testimonies?

2. The protection of human rights defenders

The great progress made in terms of protection of human rights defenders since the 1993 World Conference and since the adoption of the 1995 Declaration on the protection of human rights defenders should also be acknowledged. Those last years, there has been a worrying trend of States taking repressive measures and adopting laws designed to deter and limit the capacity of human rights defenders to undertake their activities. Not only is there a need to react against this trend, but there is also a need to affirm and protect the right of every person to protect and promote human rights. In other words, there is a need to encourage the widening of the space given to free discussions and exchanges of ideas, including through critical contributions, in any political society. This is the foundation not only of national democratisation, but also of international peace. If the Syrian people's right to protest and to claim their universal human rights had been protected effectively, crimes against humanity and crimes of war would not have to be deplored.

The Human Rights Council adopted a landmark resolution addressing this issue in March 2013.[1] The Human Rights Council should take actions in future resolutions to target specific country situations and specific laws which are contrary to international standards, including the Declaration on human rights defenders.

There has been a recent practice of the Chair of the Human Rights Council to react to threats or measures of intimidation against human rights defenders who cooperate with the UN system. New measures should be contemplated to build on this positive practice. For instance, the Human Rights Council President could be mandated, with the assistance of a group of ambassadors, to immediately contact the relevant missions in Geneva when receiving allegations that a human rights defender is being threatened, intimidated or subjected to reprisals because of his/her activities in relation with the UN system. The idea of establishing a UN-wide focal point on reprisals, mentioned in the Vienna+20 conference report, should also be supported.[2]

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1 UN Human Rights Council resolution 22/6, of 21 March 2013.

2 In the meantime, while this article was written and edited, this proposal was taken up by the Human Rights Council in its resolution 24/24 "Cooperation with the United Nations, its representatives and mechanisms in the field of human rights", adopted on 27 September 2013, by a vote of 31 in favour, 1 against and 15 abstentions. See para. 8 requesting the Secretary-General to designate a United Nations-wide senior focal point on the issue of reprisals.

3. The challenge of the right to access to information as a condition for an effective remedy

A condition for the effective respect and realisation of human rights is free expression and freedom to communicate and impart ideas and information. In particular, access to information about the procedures for the protection of human rights available at the international level is a condition for victims to enjoy an effective remedy.

A major channel of access to information today is the internet. Millions of people are searching for information on their rights and on the procedures to enforce their rights on the Web. Providing access to information on rights and procedures available to all peoples of the world should be a priority for the United Nations. Unfortunately, the Office of the High Commissioner for Human Rights (OHCHR) has never been up to this challenge and its website is still defective in many ways. This situation constitutes a serious obstacle to access to information, and thus to an effective remedy for victims of human rights violations. Measures should be taken to make the website of the OHCHR a useful and user-friendly resource of information on rights and procedures.

Another dimension of the right to access to information is the right to receive information in a language that one understands. In Geneva, there seems to be a difficulty in realising that not everybody in the world is necessarily part of this cosmopolitan elite for which English has become a common language. If victims all over the world are to be provided with an effective remedy it is still of major importance that the website and all relevant documents be translated, at least into the six official languages of the UN.

4. International criminal justice and human rights: challenges and opportunities

International criminal justice is a major opportunity in terms of enhancing the effectiveness of human rights. Nowadays, human rights violators are progressively realising that their deeds may not only trigger State responsibility in international law, but also their personal responsibility under international criminal law. It is not only that the State will have to pay for the damage its agents have caused. It is that the actual perpetrators will find themselves behind bars at some point.

We have to examine carefully how and under what conditions international criminal justice and human rights can be mutually reinforcing. In recent years, a number of “commissions of inquiry” have been created by the Human Rights Council to investigate not only human rights violations but also potential international crimes perpetrated in different countries. This has led to a change of perception not only by States, but also by victims, of on-site visits by special procedures. Commissions of inquiry are generally collecting evidence with a view to transmitting it to international or domestic criminal tribunals, in case subsequent prosecutions occur.

But special procedures mandate holders generally neither have sufficient staff nor proper methodology to proceed to such kinds of criminal investigations. In addition, no witness protection programme exists in

order to protect those who – believing that special procedures' visits may lead to prosecutions – are delivering criminal evidence at great risk to their lives.

The question is thus whether we have to reflect on the similarities but also the differences between "human rights investigations" and "international criminal justice investigations". Should we apply the same standards and the same procedures?

Some Policy Considerations about the Evolution of the "Universal System for the Protection of Human Rights"

Examining the evolution of all systems for the protection of human rights at the national, regional or international levels, one can deduce two general trends. The first general trend is the growth of the independent component of the system to the detriment of the political component. This is true in most countries, this is also true for regional systems like the European system, and this is true again for the UN system. More space is progressively given to independent bodies – third parties, "experts", judges – because only such independent bodies are able to decide upon human rights issues as legal, and not as moral or political issues. This does not mean that political bodies no longer have a role to play: political bodies keep legislative and executive powers, while the application of the rules to individual cases is devolved to independent bodies.

The second general trend is empiricism: a step-by-step approach is always preferred to radical institutional reforms. Judges have slowly gained powers in modern democracies on issues relating to human rights; the European Court jurisdiction was conditioned by a special expression of consent before it became mandatory for all parties to the European Convention and all members of the Council of Europe, etc. On such a sensitive issue it is hard to accomplish great steps at one time in societies torn apart by political conflicts. The idea of creating a High Commissioner for Human Rights was flagged in the very beginnings of the Commission of Human Rights by Uruguay, but it took almost fifty years to come to reality. It is not that stakeholders have no ideas about what should be done. It is rather that, very often, good ideas are defeated and replaced by bad ideas, or second-rate ideas, which more easily gather consensus.

At the universal level, the evolution, following the two general rules explained above, has led to the creation of a great number of independent expert bodies, namely the special procedures of the Human Rights Council and the treaty bodies, to which one must add the Consultative Committee, and other more ad-hoc bodies like commissions of inquiries on specific country situations. There is now a profusion of those bodies – some would use the more pejorative word of "proliferation" – with a number of positive effects that should be acknowledged.

One positive effect is that States and other stakeholders got used to it: there has been a process of normalisation regarding international monitoring of human rights situations and issues. Thirty years ago, the idea that States' compliance with their obligations in the field of torture, right to food, or the death penalty would be permanently monitored seemed unconceivable.

It is now accepted as something normal. If the Universal Periodic Review has done any good to the system, it is to shed light on that (almost) universal willingness of States to publicly justify themselves in the field of human rights. The other positive effect is the remarkable densification of the protection net – which notably relates to what I have said above about the huge progress made in terms of urgent interventions. It is now becoming very hard for a State to blatantly violate human rights without the international community taking notice of it. The world is definitely more transparent than it used to be and it is more difficult for torturers to hide their deeds.

But there are also negative effects flowing from the multiplication of independent bodies: if the world is more transparent than it was before, the "system" itself becomes more and more complex, redundant and opaque. In fact, it is even an abuse to speak of a "system", as all the UN mechanisms and procedures relevant to human rights are relatively unconnected and uncoordinated. But what is even more problematic is that it is almost impossible for an outsider – for example an individual victim of human rights abuse – to understand how it works exactly without having been thoroughly trained to this effect. Quantity creates a certain efficiency until it reaches a certain level where efficiency does not grow anymore and may even decrease, as conflicts of jurisdiction, duplication and loss of energy is increasing. My submission is that we are nearly at this point as far as the UN mechanisms relative to human rights are concerned.

The perfect example is the review of periodic reports by treaty bodies: efficiency grew in the beginning, as more and more States became parties to the relevant treaties. However, the curve became flat when the committees began lacking time to review all reports submitted by States parties. The fact that a great number of States parties are either late or even have never submitted their report is a concern. But it is of even more concern that, if all States scrupulously respected their obligations, the committees would be unable to deal with all the reports anyway.[3] The review of periodic reports has become relatively inefficient, not because the quality of the monitoring has deteriorated – on the contrary, the treaty bodies' final observations and views have reached a very high standard – but because they face inevitable limits in terms of the number of reports they can review without an undue delay and thus without losing the momentum.

At this point, the question is whether the usual methodology based on empiricism should be continued, or whether a more ambitious approach should be adopted, with a view to devising new and more efficient

3 See the High Commissioner's report on Strengthening the UN human rights treaty body system, Geneva, June 2012, p.9, "Currently (…) only 16% of States parties report on time, and even with this low compliance rate, four out of nine treaty bodies with a reporting procedure are facing significant and increasing backlogs of reports awaiting consideration. (…) The treaty body system is surviving because of the dedication of the experts, who are unpaid volunteers, the support of staff in OHCHR and States' non-compliance with reporting obligations. However, at a time when human rights claims are increasing in all parts of the world, it is unacceptable that the system can only function because of non-compliance."

institutions? Which means proposing an ambitious reform. Reforming at the United Nations is always perilous. Reforming means negotiating a reform. The negotiation may end up in a deadlock or may even result into endangering the *acquis*. Reform must not turn into "rationalisation", a word which always sounds a bit frightening in the United Nations, as it basically means suppressing mandates and weakening the system overall. The only way to avoid this risk is to progressively create the consensus and support for an ambitious reform. The support should come not only from States, but also from civil society. What is needed today is a strong "citizens of the world campaign" in favour of the reform of the United Nations in general, and of the United Nations in the field of human rights in particular, knowing that human rights is not so "particular", but is said to be, and should be, effectively dealt with as one of the three pillars of the Organisation along with security and development.

Prospects for Reform: A Global Campaign on Institutions for the Protection of Human Rights?

1. The project of a World Court of Human Rights

Julia Kozma, Manfred Nowak and Martin Scheinin have spelt out a number of excellent reasons why we should support the idea of having a World Court of Human Rights. I fully concur with this proposal, as shaped by the three of them in their draft Statute. The proposal is not only realistic and feasible, it is a necessary step to take in order to preserve and enhance the existing treaty bodies system.

What could be done to promote this initiative? A world coalition of "Friends of the World Court of Human Rights" composed of all interested stakeholders (States, NGOs, experts, academics and others) could be created. The goals of the coalition would be, first, to promote this initiative, and second, to actively contribute to the drafting of the treaty, after having determined the best tactic to achieve the best result. It is clear that some time must be devoted to think about the best tactic to achieve this goal. For instance, should the Statute be negotiated within the UN? Or is an autonomous process that would result in a diplomatic conference in the end not preferable?

2. The prospects for a World Commission of Human Rights

The special procedures of the Human Rights Council are often said to be the "jewels and crown" of the UN Human Rights Council. This is perfectly true. The special procedures are the most precious *acquis* of the long and tumultuous history of the Commission of Human Rights. In 2006, the General Assembly decided that the new Human Rights Council would assume the special procedures created by the Commission, which was a great relief, even though the continuity was not totally guaranteed, as mandates had to go through a process of "review" and "rationalisation".[4]

4 General Assembly resolution 60/251, para. 6.

This process went relatively well and the jewels were finally preserved and have even multiplied since then. Today (August 2013), there are 73 mandate holders for 49 special procedures (13 country procedures, 36 thematic procedures). These last three years, ten new mandates have been created (six country specific procedures and four thematic procedures). The special procedures completed eighty visits to 55 States in 2012 and sent 603 communications, 54 per cent of which were urgent communications.[5] To put it briefly, special procedures represent an impressive task force at the service of human rights worldwide, a strong and tight net to monitor and protect all human rights in each and every country of the world, be they party to the human rights treaties or not.

With the growth in number of special procedures came inevitable problems of coordination. Some mandates are more or less overlapping by nature. Facts are complex and very often several mandate holders are concerned by a single case of violation. Joint actions, if not joint activities, tend to become the rule rather than the exception. This is facilitated to a certain extent by the OHCHR that has a global view on the activities of all special procedures mandate holders. But this is becoming more and more difficult as the number of special procedures grow. The way special procedures deal with countries is particularly problematic, as there is no country-by-country common strategy. All mandate holders are approaching permanent missions in a more or less disordered manner, with no common agenda. States are playing on this, including when it comes to planning visits: with ten to twenty requests for visiting the country, the government will make its own choice and go for the mandate it deems the less bothering for its reputation. States are making the priorities. The work of special procedures is progressively becoming redundant. There is a profusion of recommendations made to States, which are hardly followed up. Finally the relation of special procedures with the Human Rights Council gets diluted, as more than ten mandate holders per session are making statements in clusters of two.

Here again, at a certain level, quantity becomes a factor of inefficiency. Special procedures are trying to cope with these new difficulties by improving their internal tools of coordination. Annual meetings of mandate holders had been held since the Vienna Conference on Human Rights. In 2005, mandate holders decided to appoint a “Coordinating Committee” (CC) whose role and importance has progressively grown. The CC is increasingly acting as a representative body of all special procedures mandate holders. The CC as a whole or the Chair of the CC may issue statements on behalf of all mandate holders on special occasions. The CC may also defend mandate holders when their independence is questioned by States or others. Conversely, States may address complaints to the CC against a mandate holder and the complaint is dealt with under a specific “internal advisory procedure”. These are significant developments. It means that special procedures are slowly growing into what may resemble an

5 See United Nations Special Procedures Facts and Figures, 2012. The communications sent by the Working Group on enforced or involuntary disappearances (WGEID) are not counted in these statistics as the WGEID uses a specific methodology.

integrated “system”, taking into account the interconnectedness of human rights issues. It also means that special procedures tend to speak more and more with a single voice on major issues, alongside the Human Rights Council as the political body and the UN High Commissioner heading the UN Secretariat in the field of human rights.

The question is: how much longer can we go on like that, with this semi-formal type of coordination mechanism? Another question is the voluntary nature of the office of mandate holders. Most of the mandate holders know what it implies and are devoting their nights, weekends and holidays to their mandate. They bring their experience from civil society with them, as well as their creativity. But good will also has its limits and it seems obvious that more could be done by experts employed on a full time basis, like judges of a court, while not excluding the possibility of punctually entrusting a mandate, on a voluntary basis, to a person especially qualified on a specific topic.

Year after year, the Human Rights Council is adding new mandates to the list of special procedures. It seems to be fashionable for States to have “their” own special procedure. From a diplomatic perspective, it is undoubtedly quite rewarding: one specific dimension of the State’s human rights foreign policy is made highly visible, through a Human Rights Council’s resolution and a specific mandate. But again, how far can we go like this? It is troubling to see that, despite these new initiatives, there are still issues which remain totally or partially uncovered, like the right for privacy, for instance.

Should we not contemplate an alternative to the traditional rule of empiricism and try not to “rationalise” special procedures, but to find an institutional solution that would preserve creativity while ensuring effectiveness in the protection of human rights?

A possibility would be the prospect of the creation of a World Commission of Human Rights. For once, the universal system would take inspiration from the regional systems, that is the Inter-American and African systems. The idea would be to have a body of about thirty to fifty independent experts working on a full time basis and based in Geneva. The experts would be appointed or elected by the Human Rights Council along a specific procedure that would guarantee that all candidates and appointed experts fulfil the highest standards of integrity, independence and knowledge.

This body would fulfil all the missions which are currently carried out by special procedures. All current thematic and country specific mandates would be transferred to the Commission and dispatched among the experts who could, like the Inter-American or African Commissions’ experts, cumulate thematic mandates and country mandates. Nothing should be lost in the transfer. Not only all mandates should be transferred, but also their legacy in terms of methods of work, case law or, as far as the Working Group on enforced disappearances is concerned, database. All special procedures would be reconstituted within the Commission. If the transfer cannot happen *à droit constant*, that is without “rationalisation”, then the game is not worth the candle and it is better to keep the “special procedures system” as it is.

Only after this transfer of mandates without change would the Commission have the right to make recommendations to the Council on the abolition of existing mandates or the creation of new mandates. The Commission would thereafter have the right to initiate new thematic studies, to launch preliminary country investigations and to propose the creation of new thematic or country specific mandates to the Council. The Commission would meet on a regular basis to review issues of common interest and adopt resolutions or recommendations. All mandate holders would keep control over their methods of work. They would keep the right to receive individual communications, issue urgent appeals or allegation letters. Nothing should be lost, or all would be lost!

3. Chain reaction and appropriate response to differing situations

I have written elsewhere[6] that the main problem with the system is the lack of systematic links between its components. Too much is left to the appreciation of political bodies with the permanent risk that there is no reaction to issues of concern, or at least no appropriate reaction. This is not to deny the role of political bodies, but to say that political decision should remain within the ambit of law. Every State should be treated equally, and all violations should be addressed on the basis of the same standards. This is still not the case. The Universal Periodic Review (UPR) has not improved the situation in this regard, contrary to what is often said. The UPR leaves all States to choose whether to take the process seriously or not. A "serious" State will have a serious UPR that may have impact on the situation of human rights in the field. But a less serious State will just appear before the Council, reject the recommendations it dislikes, "accept" some vague recommendations, made preferably by some of its close allies, and leave it in the drawer until the next cycle. Equality means that there are standards, and that the standards apply to all in the same manner. As long as the determination of the implementation of the standards is left to States, interests will motivate the decisions and will generate inequality. The only way to approach equality is to entrust the determination of violations to a third party, while leaving the political bodies drawing the consequences. A violation, whatever its type or its gravity, must trigger a chain reaction leading to an appropriate response. All individual violations and all structural problems – violations induced by legislation or practice raised by special procedures – should be referred by them to the Human Rights Council for follow-up with the concerned States. The UPR could be used to this effect. When serious violations occur and a number of special procedures, or the CC (or a World Commission) refer this situation to the Human Rights Council, the Council should have no other choice than taking action by appointing a specific mechanism (be it a

6 See de Frouville, Olivier, "Building a universal system for the protection of human rights: the way forward", in Bassiouni, M. Cherif and Schabas, William A. (eds.), New Challenges for the UN Human Rights Machinery. What Future for the UN Treaty Body System and the Human Rights Council Procedures?, Intersentia, Cambridge 2001, pp. 241-266.

report from the High Commissioner, a commission of inquiry or a new country mandate). If, after a preliminary investigation has taken place, there are reasonable grounds to think that acts of genocide, crimes against humanity or crimes of war have taken place, then the Human Rights Council should automatically refer the situation to the Security Council. Prospects for reform include achieving a necessary reform of the Security Council by the adoption of new rule, according to which the five permanent members would refrain from using their right of veto when serious international crimes have been committed. This would allow the adoption of urgent and effective measures by the Security Council, including referral to the International Criminal Court, adoption of sanctions, and the use of force as a last recourse.

Twenty years after the Vienna Conference, defending the *acquis* is an imperative. But progressing further is an absolute necessity. We should acknowledge what we have, but not be satisfied, as there is still much to do to ensure the rule of law and the right to an effective remedy for all victims at the universal level. Remaining faithful to the spirit of the Vienna Conference implies being creative and ambitious. A lot can be achieved until the next World Conference on Human Rights takes place… in 2018?