1-1-1980

United Nations Procedures for the Protection of all Persons Subjected to Any Form of Detention or Imprisonment Syposium International Human Rights

Daniel Premont

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation


Available at: http://digitalcommons.law.scu.edu/lawreview/vol20/iss3/2
UNITED NATIONS PROCEDURES FOR THE PROTECTION OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Daniel Prémont*

INTRODUCTION

The Secretariat of the European Commission of Human Rights has noted that from 1955 to July 1971, among 5,000 registered applications lodged under article 25 of the European Convention,1 almost 40% came from “persons detained in prison, or otherwise interned.”2 This group of applicants is characterized by the fact that its members, while they had not lost fundamental rights and freedoms, were nevertheless restricted in their enjoyment of certain of these rights as an inherent consequence of their detention. The difficulty was to establish precisely how far these restrictions may go.3 In 1972, a similar finding was made within the United Nations after the Working Group on communications of the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered more than 20,000 communications alleging violations of human rights.4 This trend was confirmed in 1973

---

4. Burke, New United Nations Procedure to Protect Prisoners and Other Detainers, 64 CALIF. L. REV. 205 (1978). According to the article, the Working Group
after the Working Group had considered 7,000 later communications. The Inter-American Commission on Human Rights to the General Assembly of the Organization of American States (OAS) has dealt with communications confirming a disregard for human rights in cases of detained persons. When reporting on the situation of human rights in the Member States of the OAS, the Commission often showed concern over violations of the human rights of detained persons.

Reference by the Secretariat of the European Commission to persons “otherwise interned” should be underlined. The scope of protection of human rights should cover any person subjected to any form of detention or imprisonment, from the moment of his arrest to his release or discovery of his dead body. This would comply with the provisions of the UN Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. The text of the Draft Body has been circulated to all governments for their comments with a view to consideration by the General Assembly at its thirty-fifth session in 1980. The following definitions were adopted in light of these principles:

(a) the word “arrest” means the act of apprehending a person under the authority of law or by any compulsion by any authority;
(b) the word “detention” means the period of deprivation of personal liberty from the moment of arrest up to the time when the person concerned is either imprisoned as a result of final conviction for a criminal offense, or released;
(c) the word “imprisonment” means deprivation of personal liberty as a result of final conviction for a criminal offense.

concluded that the complaints it had received raised the possibility of a continuing and systematic pattern of ill-treatment of detainees, but that a more complete compilation and study of information would be necessary to determine the extent of the practice.

5. See note 31 infra.
9. UN Draft Body, supra note 7, at 17-18.
Which human rights are of particular importance to detained or imprisoned persons? The Secretariat of the European Commission has given some indication of matters which were the common subject of complaints by detained persons in the countries of the Council of Europe. A number of applications complained about matters incompatible with the Convention *ratione materiae*, including: living conditions in prison, the right of persons remanded in custody to be separated from convicted persons, refusal of periods of leave and reductions in sentences, and medical treatment. Complaints examined under the European Convention concerned the following areas: freedom from torture or from inhuman or degrading treatment or punishment; freedom from slavery, servitude, and forced or compulsory labor; freedom and respect for an individual's private life, family life, home, and correspondence; freedom of thought, conscience, and religion; freedom of expression; right to marry; property rights; right to education; right to vote; rights to liberty of movement as well as to leave or enter a country, and freedom from expulsion.

As of 1971 no worldwide current analysis of this situation was available.

The importance of provisions relating to the protection of detained or imprisoned persons was reflected, however, at the national level by the fact that some of the most popular, oldest, and convenient remedies for possible violations of human rights related to arrest or detention. At the international level, most of the provisions of international instruments on

---

12. *Id.* art. 4.
13. *Id.* art. 8.
14. *Id.* art. 9.
15. *Id.* art. 10.
16. *Id.* art. 12.
17. *Id.* First Protocol, art. 1.
18. *Id.* First Protocol, art. 2.
19. *Id.* First Protocol, art. 3.
human rights or humanitarian law also concerned arrest, detention, and imprisonment.\textsuperscript{22} Despite all existing norms and procedures imposed at national and international levels, facts showed that there were gaps in the protection of the human rights of detained persons. Neither the UN Covenants nor the American Convention on Human Rights had been implemented although the European Commission was in force, it had been proven that the authorities of a high contracting party, Greece, had resorted to torture, a measure strictly prohibited under the Convention. New norms, as well as new ways and means to ensure the effective implementation of already existing rules, were needed.

The UN General Assembly, the Economic and Social Council (ECOSOC), the Commission on Human Rights (Commission), and the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) established procedures to deal with protecting the human rights of all persons subjected to any form of detention or imprisonment.\textsuperscript{23} This article will focus on the annual review by the Sub-Commission of developments in this field, on the Chilean case as it was examined by the Sub-Commission, and on the question of enforced or involuntary disappearances.

\textbf{The Annual Review of Developments}

On September 19, 1973, at the twenty-sixth session of the Sub-Commission, Mr. Capotorti, the expert from Italy, sug-

\textsuperscript{22} For example, in the Covenant on Civil and Political Rights, article 4(2) prohibits any derogation even in time of public emergency from, \textit{inter alia}, article 6 (right to life, and particularly the question of death penalty), article 7 (prohibition of torture and other cruel, inhuman or degrading treatment or punishment), article 11 (prohibition of imprisonment merely for inability to fulfill a contractual obligation), and article 15 (prohibition of retroactivity of penal law). \textit{Reprinted in G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant].


suggested that the Sub-Commission should begin to examine the question of the treatment of prisoners in general and political prisoners in particular. Mr. Gros Espiell, from Uruguay, formally proposed that this issue be included in the agenda as worded: "Question of the human rights of persons subjected to any form of detention or imprisonment." Mr. Bouhdiba, from Tunisia, endorsed the proposal, specifying that non-governmental organizations (NGO's) might be able to provide extremely useful information on the subject. Mr. Smirnov, from USSR, noted that the proposal had to be submitted for approval to the Commission. The Chairman, Mr. Khalifa, from Egypt, said that if there was no objection, he would take it that the proposal was adopted. It was so decided.

In November 1973, the General Assembly expressed grave concern that torture was still practiced in various parts of the world. Bearing in mind the request made by the Sub-Commission, the Assembly rejected any form of torture and other cruel, inhuman, or degrading treatment or punishment. It also requested the Secretary-General to inform it, through the report of the ECOSOC, of the consideration given to this question by the Sub-Commission or by the Commission and other bodies concerned.


At the 27th session, Mr. Gros Espiell explained that the proposal had arisen from concern expressed in the Sub-Commission at its 26th session during consideration of the report of the Working Group on communications, which contained a paragraph drawing attention to the problems raised by the situation of political prisoners in certain countries. It had been suggested that the question be removed from the report and made a separate item on the agenda. Sub-Comm'n Summary Records 34-36, U.N. Doc. E/CN.4/Sub.2/SR.690 (1974).

See also Burke, supra note 4, at 205; Dolan & van den Assum, Torture and the 5th U.N. Congress on Crime Prevention, 14 INT'L COMM'N OF JUSTICE REV. 57 (1975).


27. Id. It is not common for the Assembly to refer directly to Sub-Commission proposals, however, it did so in several instances in relation to detention. See text accompanying notes 49, 74, and 81 infra. When urgent problems are faced and a quick reaction by principal organs is needed, the question of the calendar of meetings is of great importance. If, for instance, a proposal adopted by the Sub-Commission in September has to be approved successively by the Commission in March, the ECOSOC in April and the Assembly in December, it would take more than one year
Procedure under Sub-Commission Resolution 7

After obtaining approval by the Commission, the Sub-Commission considered the question at its twenty-seventh session in 1974. This Sub-Commission, gravely concerned that numerous reports of human rights violations on individuals detained or imprisoned persisted in various parts of the world, decided "to review annually developments in the field and for this purpose to retain the item on its agenda." In reviewing those developments the Sub-Commission decided to take into account any reliably attested information from Governments, the specialized agencies, the regional inter-governmental organizations and the non-governmental organizations in consultative status with the Economic and Social Council concerned, provided that such non-governmental organizations act in good faith and that their information is not politically motivated, contrary to the principle of the Charter of the United Nations.

The Secretary-General was requested to transmit to the Sub-Commission this attested information. Although this new procedure of annual review originated from the great number of "communications" alleging violations of the human rights of detained persons, the procedure reached a final decision.

31. Mr. Khalifa introduced the item at further sessions and stated that, by 1974, it had become clear to the Sub-Commission that the great majority of the communications alleging violations of human rights received by the Secretary-General concerned detained persons. By that time, it also became clear to the Sub-Commission that the procedure for the examination of such communications suffered from
dure's basis was neither communications nor "all available sources." All documentation was based on replies to a request by the Secretary-General to send any information to the Sub-Commission. This was neither a "communications procedure" nor a "reporting procedure." Reporting was optional and no control over the effective implementation of and respect for human rights of detained persons by replying governments was provided for. Originally this procedure was designed for the "promotion" of human rights rather than for the "protection" of human rights. The purpose was to find remedies to alarmingly recurrent information with regard to the global situation of certain rights.

The Sub-Commission had already noted that torture continued to occur. "All available information suggested that in several countries there may be a consistent pattern of such violations." Yet the Sub-Commission did not wish to limit its review of developments to the problem of torture. It expressed the belief that persons subjected to any form of detention or imprisonment for any reason whatsoever should enjoy at least the following basic human rights: the right not to be subjected to arrest or detention arbitrarily; the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment; the right to be treated with humanity and with respect for the inherent dignity of the human person; the right to equal protection of the law, without any discrimination; the right to be informed of the reasons or grounds of the arrest or detention; the right to be brought promptly before a court and to have a trial within a reasonable time; the right to communicate with legal counsel; the


33. These replies were addressed to the sources mentioned in Sub-Comm'n Res. 7, supra note 29, at 53.

34. See article 40 of the Convention, supra note 11.


36. Sub-Comm'n Res. 7, supra note 29, at 52.
right to be tried in counsel's presence, and to defend himself in person or through legal assistance of his own choosing; the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; the right to have free assistance of an interpreter if he cannot understand or speak the language used in court; the right not to be compelled to testify against himself or to confess his guilt; the right to a fair and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty according to law; the right not to be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed; and the right not to receive a heavier penalty than the one that was applicable at the time when the criminal offense was committed. The General Assembly, noted with appreciation the decision taken by the Sub-Commission. Considering the increase in the number of alarming reports on torture, the Assembly took a series of decisions concerning the elaboration of new norms for the protection of detained or imprisoned persons against torture.

Information before the Sub-Commision

At its first review during the twenty-eighth session in August 1975, the Sub-Commission was presented with a note by the Secretary-General reproducing information submitted by

37. Id. Note that the right to inform the family of the arrest and to communicate with the family and legal counsel, included in the first-draft of resolution 7, was reduced to "the right to communicate with legal counsel" in the resolution.


The Assembly had also invited the World Health Organization to prepare a draft code of medical ethics for the protection of persons subjected to any form of detention or imprisonment. The Assembly considered the draft at its 34th session and decided to circulate it for comments. The Secretary-General will submit a report on the information received to the Assembly at its 35th session.
governments, specialized agencies and regional intergovernmental organizations. Replies were received from governments of the five continents and fairly reflected the various existing legal systems. Although reporting is not compulsory, by September 1980 information had been received from about seventy governments, many of which had reported two or three times on further developments. Most of the governments only sent information on their constitution and laws; very few sent information on the implementation of these instruments.

In 1975, several important local remedies or institutions were considered, including amparo, habeas corpus, the ombudsman, and the procuratura. The Netherlands referred to relevant provisions of the European Convention on Human Rights applied directly by its courts. Morocco specified that it had not, even in cases of exceptional public emergency, taken any measures derogating from human rights. The International Labor Organization (ILO) indicated cases considered by its Committee on Freedom of Association concerning arrest and detention of trade-unionists, violations of due process of law, detentions during state of emergency, maltreatment of prisoners, summary procedures, and the non-retroactive nature of the criminal law.

UNESCO mentioned that all relevant information it had received concerned individual complaints. These complaints were considered an indirect source of information, whose content could therefore not be considered as "reliably attested information." UNESCO indicated that "all information received

41. Surprisingly enough, the governments of the following developed countries of the northern hemisphere had not yet reported: Bulgaria, Canada, Czechoslovakia, Iceland, Ireland, Luxembourg, Romania, USA, and Yugoslavia.
44. U.N. Doc. E/CN.4/Sub.2/359 (1979). The Sub-Commission considered "that although States may, in time of public emergency which threatens the life of the nation, take measures derogating from certain rights under certain conditions, art. 4(2) of the International Covenant on Civil and Political Rights nevertheless prohibits derogation of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . ." Sub-Comm'n Res. 7, supra note 29. Such a reference by Morocco to resolution 7 is interesting, for by that time Morocco had only signed the Covenant.
concerning Chile has been brought to the attention of the Secretary-General of the United Nations." UNESCO wished to have the right to education included in resolution 7's list of minimum rights. Particularly, it recalled its activities since 1950 in the Gaza Strip which have ensured that imprisoned students have the possibility of preparing and taking diplomas. Concerning information submitted by NGO's, on the initiative of the Chairman of the Sub-Commission, Ms. Questiaux, from France, a dossier containing photocopies of these replies had been distributed to members.

**First Annual Review: Sub-Commission Resolution 4**

As a result of its first annual review of developments, the Sub-Commission took the view that among many issues needing immediate attention, the following deserve particular concern:

- (a) prolonged and often indefinite detention of large numbers of unconvicted persons without formal charges brought against them;
- (b) the necessity of impartial judicial investigation into alleged illegal practices against arrested and detained persons;
- (c) the lack or ineffectiveness of judicial control over arrest and detention practices;
- (d) the role of secret police and para-military organizations;
- (e) the position of the family and relatives of arrested and detained persons.

---

46. The Council of Europe also submitted a brief outline of the Commission's case law relating to article 5 of the European Convention. See note II supra. It also submitted its publication Human Rights in Prison, supra, note 3.
47. U.N. Doc. E/CN.4.1180, E/CN.4/Sub.2/364 (1975), para. 156; 15 Int'l Comm'n of Jurists 43 (1975). The Secretariat had found it difficult to determine whether such information was or was not reliably attested, whether NGO's acted in good faith, and whether the information furnished by them was or was not politically motivated. Such an interpretation of what was required from the Secretariat seems too expansive for, as the words "any reliably attested information" apply to all sources, the Secretariat would have to screen all information from governments, specialized institutions and regional intergovernmental organizations. The Chairman decided to let the members have a direct knowledge of such information.
It recommended that the Commission on the Status of Women consider the special problems relating to the human rights of detained or imprisoned women.\textsuperscript{48} NGO's, governments, and international organizations were also invited to provide any reliably attested information on the question. However, the Secretary-General was only requested to submit a synopsis of replies by NGO's. In the view of the sponsors of the draft resolution, this synopsis had to emphasize the types of practices rather than the countries that engaged in them.

In December 1975, the General Assembly welcomed the Sub-Commission's resolution. It also requested the Commission to study the question of torture and any necessary steps for ensuring the effective observance of the recently adopted Declaration.\textsuperscript{49} The Commission then recommended that the Sub-Commission examine the information before it in the light of the principles contained in the Declaration.\textsuperscript{50}

\textit{Second Annual Review: Sub-Commission Resolution 3A}

Having considered the information before it in 1976,\textsuperscript{51} the Sub-Commission stressed the need for continuous current information in order to carry out its annual review. It also noted that many of the communications received related to the human rights of detained persons. The Sub-Commission requested the Secretary-General to ask the same sources, as well as INTERPOL, for information. The Sub-Commission particularly referred to information concerning the human rights of detained or imprisoned persons under situations of public emergency or state of siege. The Sub-Commission also emphasized the necessity of judicial and administrative supervision over arrest, interrogation, and detention practices of secret police and military authorities. Finally, it decided that this supervision question, and in particular the rules which govern the authority of the secret police, deserved further attention.\textsuperscript{52}

\begin{footnotes}
\item[49] G.A. Res. 3452, \emph{supra} note 39.
\item[52] Sub-Comm'n Res. 3A, Report of the Sub-Commission on Prevention of Dis-
\end{footnotes}
How Can the Information Received be Handled in a Useful Way?

Towards a review of summaries. By reviewing the chapters of the synopsis the reader can easily identify the main issues. Additionally, in 1979, the Secretariat included a summary of the main trends brought out by NGO's. However, facts were still described without mentioning the names of the countries or regions concerned. When considering the information submitted by governments on the one hand, and the situation analyzed by the ILO, the Council of Europe, the Inter-American Commission, and the synopsis on the other, members of the Sub-Commission may feel that the gap between the texts and the facts, between abstraction and reality, is widening.

Moreover, according to recent UN rules on control and limitation of documentation, it is possible that information not only from NGO's but also from specialized agencies and governments, will be summarized in the future by the Secretariat. Of course, members of the Sub-Commission may look at the originals of the replies on file at the Secretariat. Yet the Sub-Commission does not have much time to devote to the review of developments and may limit itself to a review of summaries. At the thirty-second session, Ms. Questiaux hoped that the Sub-Commission could directly study the documents received from NGO's and to that end unofficially set up a sessional working group. This proposal was a follow-up to repeated unsuccessful attempts to have an "official" working group established.

Proposals for a Working-Group. By 1976 the Sub-Commission had already received information from thirty-eight countries, three specialized agencies, two regional intergovern-
mental organizations, and twenty-one non-governmental organizations for its first two reviews. It recommended that the Commission request the ECOSOC to authorize the Sub-Commission Chairman to appoint a group of five of its members to meet for five days prior to each session of the Sub-Commission. This working group would analyze the material received and prepare the Sub-Commission's annual review of developments. Such a working group might have contributed to solve some discrepancy between information received from governments and information otherwise received, for instance concerning situations of emergency and the activities of secret police. However, the proposal apparently raised difficulties for a number of delegations at the thirty-third session of the Commission and therefore was not endorsed.

In 1977, the Sub-Commission recalled its request for the establishment of a working group and asked the Secretary-General to prepare a detailed analysis of the material received during the first three annual reviews.

In 1978, the Sub-Commission requested the Commission to act upon resolution 3A. However, in March 1979 the Commission only invited the Sub-Commission to consider the documents received at its previous session, together with subsequent reports submitted for the thirty-second session.

At its thirty-second session, the Sub-Commission exten-

---

56. See text accompanying note 51 supra.
57. Sub-Comm'n Res. 3A, supra note 52.
58. Many governments stated that no secret police or para-military organizations existed in their country. For instance, Iran mentioned that "No secret police or any kind of para-military force as defined in the resolution of the [Sub-Commission] interferes in the work of the judicial authorities." See statements by Mr. Van Boven, from the Netherlands, Ms. Questiaux, and Ms. Burke (I.C.J.) in U.N. Doc. E/CN.4/Sub.2/S.R.755 (1979), at 44-47; Burke, supra note 4, at 212.
sively commented upon the information before it, however no resolution on a working group was adopted. The following year the Sub-Commission once again adopted a resolution in which it reiterated strongly the need for a working group to analyze the material received and prepare the Sub-Commission's annual review of developments.

Means for the Protection of Human Rights of Detained or Imprisoned Persons

The Sub-Commission was confronted with massive violations of human rights concerning sometimes tens of thousands of people, as described in the ILO and Inter-American Commission reports, as well as in the synopses. In addition to its function of promotion of human rights under the annual review procedure, the Sub-Commission had already tried to consider any means available to protect the fundamental human rights of detained or imprisoned persons.

In 1977, the Sub-Commission expressed grave concern over reports from which it appeared that, in some countries, State authorities were systematically resorting to such practices as arbitrary arrest, indefinite detention without trial, torture or other cruel, inhuman or degrading treatment or punishment, and disappearances and summary executions of detained persons. Such practices tended to become institutionalized. The Sub-Commission called upon those states engaged in such practices to discontinue them forthwith and to restore full respect for the basic human rights of detained persons. It also decided to give urgent consideration to this question at its next session with a view to examining what means within its competence could be used to protect basic human rights in those countries where state authorities resorted to such practices.

65. The Sub-Commission may: (a) undertake studies, particularly in light of the Universal Declaration, and make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights, fundamental free-
However, at its thirty-first session the Sub-Commission had several other important questions to deal with under the item of detention. Although it was stated that the review had already proved very fruitful in leading to the identification of certain types of critical issues, no follow up to its previous resolution 9 was given. In fact, under the item of detained or imprisoned persons, the Sub-Commission reacted on several occasions and by various methods to very critical issues identified under this question. It undertook studies concerning new international standards for the protection of detained or imprisoned persons, the implications for human rights of recent developments concerning situations known as state of siege or emergency, the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. It also made recommendations concerning the situation of human rights in Chile and concerning the phenomenon of “disappearance” of arrested, detained, or imprisoned persons.

**THE CHILEAN CASE**

*Commission’s Telegram and Sub-Commission Recommendation for a Study*

When the putsch in Chile took place on September 11, 1973, the Sub-Commission was holding its twenty-sixth session. Yet, no action was taken until March 1, 1974 when the Commission decided to send a telegram to the government of Chile expressing particular concern for the protection of de-
tained persons reportedly in imminent danger.69

The Sub-Commission first considered the detention issue in August, 1974.70 Several members then stated that the Sub-Commission should not only focus its attention on studies but take concrete action on the real suffering of detained or imprisoned persons. In this respect, the situation in Chile was felt to require urgent action and the draft resolution was submitted.71 Other members emphasized that the question had already been dealt with under other items. It was even specified that the Sub-Commission had adopted a draft resolution on the same question, with the same objectives, proposing the same recommendations, but requesting additional information.72 Resolution 8 was adopted by seventeen votes to none with four abstentions.73 The view was then expressed that the

---

70. See text accompanying notes 28-30 supra.
73. U.N. Doc. E/CN.4/Sub.2/354 (1974). In this resolution the Sub-Commission, deeply concerned about reports of arbitrary arrest, torture, cruel and inhuman treatment of detained or imprisoned persons in gaols and concentration camps in Chile:

1. [made] an urgent appeal to the Government of Chile to respect the Universal Declaration of Human Rights and to comply with the International Covenants on Human Rights, signed and ratified by the Government of Chile, and to take all necessary steps to restore and safeguard basic human rights and fundamental freedoms in Chile, particularly those involving a threat to human life and liberty;
2. [recommended] that the Commission on Human Rights at its thirty-first session study the reported violations of human rights in Chile, with particular reference to torture and other cruel, inhuman or degrading treatment or punishment;
3. [requested] the specialized agencies, other intergovernmental organizations, as well as non-governmental organizations in consultative status concerned to submit to the Secretary-General for reference to the Commission on Human Rights recent and reliable information on torture and other cruel, inhuman or degrading treatment or punishment in
Sub-Commission departed from regular procedure in removing the mantle of confidentiality from its proceedings when dealing with complaints against governments.

**An Ad Hoc Working Group of the Commission**

In November 1974, the General Assembly took note, *inter alia* of the urgent appeal made by the Sub-Commission. Deeply concerned at continued reports of flagrant violations of basic human rights, the Assembly endorsed the Sub-Commission’s recommendation without waiting for the Commission’s reaction. In February 1975, the Commission considered the Chilean question. During debate, the observer for Chile announced that his government would welcome and lend every assistance to an impartial and unprejudiced fact-finding mission to Chile to seek the truth of detentions and imprisonments in that country. The Commission therefore decided that an *Ad Hoc* Working Group of five members of the Commission, to be appointed in their personal capacity, would inquire into the situation of human rights. This working group would visit Chile, gather oral and written evidence from all relevant sources, and report to the Commission and to the Assembly.

As late as September 1975, the Working Group had been refused entry into Chile. The Sub-Commission urged the Chilean authorities to stop torture, cruel, inhuman, and degrading treatment and persecution for political reasons, and to free all persons detained without charge or arrested for political reasons.

In February 1976, the Commission concluded that the practice of torture had been systematically employed by some Chilean agencies, particularly by the DINA. The Commission

---

78. For more details on the Working Group see Van Boven, *supra* note 71.
called upon the state authorities to undertake effective measures to investigate and put an end to such torturous activities by these agencies.\textsuperscript{80} In August of the same year, the Sub-Commission suggested that the Commission pay special attention to the serious abuses committed by the state security agencies of Chile, particularly by the DINA, often in collaboration with similar agencies of other countries. By December 1976, the Assembly had once again directly endorsed two Sub-Commission proposals. The Commission was thereupon invited to formulate recommendations on possible humanitarian, legal, and financial aid both to persons whose human rights have been violated by detention or imprisonment in Chile and to those forced to leave the country and to their relations. The Committee was also asked to consider the human rights consequences of the various forms of aid to the Chilean authorities.\textsuperscript{81}

Since its creation in 1975, the mandate of the Ad Hoc Working Group had been extended three times by the Commission and the Assembly.\textsuperscript{82} It reported each time to both organs\textsuperscript{83} and finally completed its mandate by reporting to the Assembly on its visit to Chile in July 1978. This visit had been made with the agreement and cooperation of the Chilean authorities.\textsuperscript{84}


A Special Rapporteur and an Expert

In December 1978, the Assembly was seriously concerned with the Working Group's conclusions that violations of human rights continued. The Assembly then invited the Commission to appoint a Special Rapporteur on the situation of human rights in Chile and to consider efficient means for clarifying the fate of disappeared persons in Chile.\textsuperscript{85} In March 1979, the Commission appointed as Special Rapporteur Mr. Dieye, from Senegal, and as expert to study the question of the fate of missing and disappeared persons in Chile, Mr. Ermacora, from Austria.\textsuperscript{86}

In December 1979, the Assembly expressed its regret that the Chilean authorities refused to cooperate with the Special Rapporteur and the expert.\textsuperscript{87} It noted that both reports had concluded by clearly indicating that compared to the situation described in the last report, human rights had not improved and had even deteriorated in numerous areas. The Assembly noted that the Chilean authorities had failed to take urgent and effective measures to investigate and clarify the fate of persons reported to have disappeared for political reasons.

In February 1980, the Commission strongly urged the Chilean authorities to take several concrete measures, such as prosecution and punishment of those responsible for torture, and to report on their implementation both to the Assembly and the Commission.\textsuperscript{88} The Chilean authorities were urged to...
investigate and clarify the fate of persons reported to have disappeared for political reasons, to inform relatives of the outcome of the investigation, to institute criminal proceedings against those responsible for such disappearances, and to punish those found guilty. In this respect, the Commission also urged the Chilean authorities to scrupulously respect the duty of their judiciary and to prevent arrest and detention by employing its constitutional power under *habeas corpus* and *amparo*. Finally, the Commission decided to extend the mandate of the Special Rapporteur for another year. He was also requested to deal with the problem of disappeared persons in Chile in his report to the Assembly at its thirty-fifth session and the Commission at its thirty-seventh session.89

Previous reports by Mr. Dieye were based on information received from individuals, groups, international governmental and non-governmental organizations, as well as testimony heard by the Special Rapporteur and information published in the Chilean press. The latter information related to statements by members of the government or to documents of an official nature. The first part of the report, “Institutional and legal developments affecting human rights,” concerned the state of siege and emergency, the security agencies, and the judiciary. The second part, entitled “Right to life, liberty and security of person,” was also relevant to detention. It may be expected that the next reports will follow these lines and include observations and recommendations to the Assembly and the Commission.

For its report to the Assembly, the expert invited the ILO, UNESCO, the Council of Europe, the Inter-American Commission on Human Rights, NGO’s in consultative status with ECOSOC, as well as the Association of Relatives of Missing Persons in Chile to provide relevant information. Hearings took place in 1979 and 1980. For his report to the Commission, Mr. Ermacora also referred to testimony by a presumed former member of the DINA. The expert also provided the Commission with case reports on thirty-nine missing persons

---

in Chile.

**How to Cope with the Problem of Disappeared Persons?**

*Description of a Worldwide Phenomenon*

When the Sub-Commission listed the basic human rights that persons subjected to any form of detention or imprisonment should enjoy, the first item mentioned was the right not to be subjected to arbitrary arrest or detention. The first synopsis submitted to the Sub-Commission in 1976 already contained information concerning the alleged “disappearance of a number of prisoners in the hands of the Security Police” in one country.

The OAS drew the Sub-Commission’s attention to part II of the *Annual Report of the Inter-American Commission on Human Rights, 1977*. This section had noted that the situation of the so-called “missing persons” had become a source of deep concern to the Commission. The Inter-American Commission described the phenomenon as follows:

> In various countries, there are numerous cases where the government systematically denies the detention of individuals, despite the convincing evidence . . . that such persons have been detained by police or military authorities and, in some cases, that those persons are, or have been, confined in specified detention centers . . . . As experience shows, a “disappearance” constitutes . . . a serious danger to the personal integrity and safety and to even the very life of the victim. It is, moreover, a true form of torture for the victims’ family and friends . . . . Further, it is a demonstration of the government’s inability to maintain public order and state security by legally-authorized means and of its defiant attitude toward na-

---


91. See Covenant, *supra* note 22, art. 9(1); however, this article is not included among those mentioned in article 4(2) to which no derogation may be made. *Id.* art. 4(2).


tional and international agencies engaged in the protection of human rights.94

In 1978, the UN General Assembly also expressed its deep concern at global reports of enforced or involuntary disappearances.95 It was felt these disappearances were a result of excesses on the part of law enforcement, security authorities, or similar organizations. Such excesses often occurred while individuals were subject to detention or imprisonment. Unlawful actions or widespread violence were also mentioned as possible causes of disappearances.

Action by the United Nations

In his report to the General Assembly on the fate of disappeared persons in Chile, Mr. Ermacora devoted a whole chapter to the UN’s concern about missing persons as a general problem and mentioned specific situations.96 He recalled that since 1975 the Commission and the General Assembly expressed concern by calling for efforts aimed at tracing and accounting for a considerable number of Cypriots who are missing as a result of armed conflict in Cyprus.97 The same year, the Assembly called upon the Chilean authorities to take steps to clarify the status of individuals who had disappeared.98

To cope with the problem of disappeared persons in general, the Assembly called upon governments to devote appropriate resources to searching for such persons and to undertake speedy and impartial investigations.99 The Assembly also requested governments to ensure that law enforcement and security authorities are fully accountable, especially in law, in the discharge of their duties and to respect the human rights of all persons, including persons detained or imprisoned.100 Finally, the government must also cooperate with other govern-

94. Id.
100. Id. Such accountability would include legal responsibility for unjustifiable excesses which might lead to enforced or involuntary disappearances.
ments, relevant United Nations organs, specialized agencies, intergovernmental organizations, and humanitarian bodies in a common effort to search for, locate, or account for such persons. The Assembly also requested the Commission to consider the question with a view to making appropriate recommendations. It urged the Secretary-General to continue to use his good offices in cases of enforced or involuntary disappearances of persons, drawing, as appropriate, upon the relevant experience of the International Committee of the Red Cross and other humanitarian organizations. Due to a lack of time, the Commission was unable to make a decision at its thirty-fifth session.

In May 1979, ECOSOC requested the Commission to consider the question at its thirty-sixth session, with a view to making appropriate recommendations. It also requested the Sub-Commission “to consider the subject with a view to making general recommendations to the Commission at its 36th session and to consider communications on disappeared persons in accordance with the relevant resolutions.”

In September 1979, the Sub-Commission pointed out that, according to information brought to its attention, enforced or involuntary disappearances of persons continued to occur. The danger involved for such persons warranted urgent reactions on the part of all individuals, institutions, and governments. The Sub-Commission proposed that the emergency action called for by this situation be entrusted to a group of Sub-Commission experts. The Sub-Commission requested the Commission to authorize members designated by the Chairman of the Sub-Commission to undertake their task. This proposal was not to set up new machinery for

104. Id.
107. By Sub-Commission decision 7 the Chairman proposed the following mem-
keeping the item permanently on the agenda; if the proposed group had not achieved results in the course of the following year, it would not continue to operate.\textsuperscript{108}

However, the Sub-Commission suggested that if this disappearance phenomenon were to continue, its extreme gravity would justify some form of emergency remedy, based on the notion of \textit{habeas corpus} or any other type of legal protection. This remedy would be designed to induce official organs to devote the necessary means to the search for the missing and disappeared persons in different regions of the world. In this regard, it may be noted that the Assembly expressed its conviction that the application within a state’s legal system of \textit{amparo}, \textit{habeas corpus}, or other legal remedies to the same effect, is of fundamental importance for: protecting persons against arbitrary arrest and unlawful detention; effecting the release of persons who are detained by reason of their political opinions or convictions, including in pursuance of trade union activities; and clarifying the whereabouts and fate of missing and disappeared persons.\textsuperscript{109} The Assembly considered that these remedies may also forestall opportunities to engage in torture or other cruel, inhuman, or degrading treatment or punishment of detainees. In order to extend the global understanding and larger application of such institutions, the Assembly thought that an international seminar on the matter would be timely and useful.

The Sub-Commission also considered that the General Assembly\textsuperscript{110} had placed both a legal and a moral obligation on all those participating in United Nations activities to take account of disappearances brought to their knowledge.\textsuperscript{111} By combining their efforts, it would be easier to locate the missing and disappeared persons in different regions of the world.\textsuperscript{112} The Commission transmitted the lists of missing per-

\footnotesize{
111. Sub-Comm'n Res. 5B, \textit{supra} note 106.
112. Ms. Questiaux expressed the opinion that if a member of the Sub-Commission, a UN expert, knew the name of a person who had disappeared, his duty was to try to find out where that person was and if he discovered the whereabouts, to say so without regard to political secrecy. She mentioned she had received a list of 4,500
}
sons communicated by members of the Sub-Commission to the Secretary-General for action (pending decision by the Commission on the proposed Working Group) in accordance with the appropriate procedures and also to such extent as he deems possible, as part of the good offices urged upon him. The Assembly has also called the attention of the Commission, when pursuing the question of disappeared persons at its thirty-sixth session, to the recommendations in the report of the expert on missing and disappeared persons in Chile.

In March 1980, the Commission decided to establish a working group of its own to examine relevant questions or enforced or involuntary disappearances of persons. The Group would be established for a period of one year and consist of five members of the Commission, appointed by its Chairman, to serve as experts in their individual capacity. The Group should seek and receive information from governments, intergovernmental organizations, humanitarian organizations, and other reliable sources. In establishing its working methods, the Group was asked to bear in mind the need for effective response to information and the necessity for carrying out its work with discretion. The Secretary-General was requested to appeal to all governments to cooperate with and assist the Working Group in the performance of its tasks and to furnish all information required. The Sub-Commission was also requested to continue studying the most effective means for


113. See G.A. Res. 33/173, supra note 95.

114. G.A. Res. 34/159, supra note 87.


116. Id. According to the USSR the mandate should not be extended beyond one year. According to the Netherlands, if the question is as important next year as it is this year there is still room for an extension. U.N. Doc. E/1980/13/Add.1, E/CN.4/7408/Add.1 at 142-43 (1980).

117. The Chairman of the Commission appointed Mr. Varela (Costa Rica), Mr. Nyamekye (Ghana), Mr. Al-Jabiri (Iraq), Viscount Colville (U.K.), and Mr. Tovevcki (Yugoslavia). U.N. ESCOR, Supp. (No. 3) 76, U.N. Doc. E/1980/13, E/CN.4/1408.

118. This might include not only sources requested by the Group to provide information, but also informants acting proprio motu.

eliminating enforced or involuntary disappearances of persons, with a view to making general recommendations to the Commission at its thirty-seventh session.

The Working Group on Enforced or Involuntary Disappearances held two sessions in June and September 1980. At the end of each five day session a communiqué on the work accomplished was issued.\(^{120}\) At its first session, the Group adopted its methods of work and methods of dealing with urgent reports of enforced or involuntary disappearances in cases where immediate action might be effective to save lives. It decided to carry out its activities with discretion.

The Group had before it at its first session reports relating to some fifteen countries and received very extensive information. Among the sources of information submitted to the Group at its first session were governments, the ILO, the European Commission on Human Rights, and NGO’s in consultative status with ECOSOC.\(^{121}\) The Group concluded that this information warranted the deepest concern, in particular for the danger to the life, liberty, physical security of persons subjected to enforced or involuntary disappearance, and for the anguish and sorrow caused to relatives of those persons. This conclusion was reinforced at its second session after the Group’s review of information before it showed such disappearances continued to take place in several countries.

The Group took various decisions with regard to the reports it received. In appropriate instances, it requested further information from governments, humanitarian organizations, and other reliable sources. It also expressed a desire to be informed of any special procedures established with a view to determine the whereabouts of disappeared persons and steps taken to prevent disappearances. The Group reviewed the action which was taken between its first and second session on cases where immediate action was warranted to save lives. It explored the possibilities of establishing direct contacts with governments and others. During the second session, the Group met with government representatives and with rep-

\(^{120}\) Press Releases HR/907 (1980) and HR/967 (1980). Mr. Nyamekye was elected Chairman/Rapporteur. Mr. Al-Jabiri did not attend the first session and resigned before the second one.

\(^{121}\) Press Release HR/907 (1980). According to the communiqué, information destined for the Group may be addressed in writing to the Division of Human Rights, UNO, Palais des Nations, Geneva, Switzerland.
representatives of organizations directly concerned, as well as with the Special Rapporteur on Chile. The Group also expressed its readiness to visit countries, in the event an invitation was received.

The reaction of governments to the Group's initial approach has varied. One government presented detailed information. Another offered cooperation in examining individual cases. A third one indicated its willingness to invite the Group for a visit to establish direct contacts. A visit is expected to take place in the near future.

The Group scheduled its third session for December 8 to 19, 1980. It will adopt the report on its activities, conclusions, and recommendations by January 1981 and will submit it to the Commission at its thirty-seventh session (February-March 1981).122

In July 1980, the World Conference of the UN Decade for Women called upon all governments to prevent the disappearance of persons and to take whatever measures may be necessary in response to any reliable evidence of the disappearance of a person.123 Such measures were to include the provision to request all information at the disposal of the governments concerned relating to such disappearances and to provide assistance towards alleviating the situation of relatives and protecting them against persecution and harassment. The Conference drew the attention of the Group to the effects of such disappearances on women both as direct victims and as relatives of victims.

In August-September 1980, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders adopted a resolution on "extra legal executions" in which it recalled that enforced or involuntary disappearances are frequently related to murder committed or tolerated by governments.124 The Congress therefore called upon all governments to take effective measures to prevent the practice of killing and executing political opponents or of suspected offenders carried out by armed forces, law enforcement or other governmental agencies, or by paramilitary or political groups acting with the tacit or other support of such forces or agencies.

122. Comm'n Res. 20, supra note 115.
The Sub-Commission, in September 1980, urged the Secretary-General to continue to exercise his good offices and to pay special attention to urgent cases where action is necessary to preserve life or integrity of individuals.\footnote{125} It also requested the Secretary-General to invite governments, specialized agencies, regional intergovernmental organizations, and NGO's to transmit to the Commission at its thirty-seventh session, and to the Sub-Commission at its thirty-fourth session, information, views, or comments on matters it decided to study further in 1981.\footnote{126}

The Sub-Commission also urged the Commission on Human Rights, in view of the continuing seriousness and scale of the question of missing and disappeared persons, to extend the mandate of its Working Group on Disappeared Persons.

CONCLUSION

The desperate situations discussed in this article should not lead us to the illusive inference that gross violations of the human rights of detained or imprisoned persons occur exclusively in certain delimited geographical areas or in countries under situations of emergency. A careful reading of the material received under the Sub-Commission's review procedure would indicate that various cases of unacceptable conditions inflicted upon detained or imprisoned persons are reported in

\footnote{126} The matters for discussion will include:
(a) The adequacy of methods utilized at the domestic and international levels in searching for disappeared persons and in undertaking speedy and impartial investigations;
(b) The adequacy of methods for ensuring that law enforcement and security authorities or organizations are legally responsible for unjustifiable excesses which might lead to enforced or involuntary disappearances and to other violations of human rights;
(c) Procedures for regarding as official, as an emergency preventive measure, the detention without trial of any person held on premises whether or not intended for that purpose;
(d) The adequacy of the protection of persons who provide information about disappeared persons, particularly the protection of witnesses and journalists who furnish such information;
(e) Procedures for effective reporting, monitoring, and appraisal of cases of missing persons and of enforced and involuntary disappearances, including cases in which an authority implicated on the basis of relevant facts contented itself with replying by denials without due investigation and without showing itself ready to investigate and to set up an inquiry for the purpose, and when such situations occur, procedures providing for publication of findings relating to such situations.,
all sorts of countries. For instance the following practices of cruel, inhuman, or degrading treatment or punishment were reported: deliberate administering of powerful drugs on persons allegedly forcibly confined in special psychiatric hospitals for political reasons in some countries where there are many legal safeguards with respect to detention;\(^{127}\) routine utilization of chemicals used for riot control on excitable or mentally disturbed prisoners;\(^{128}\) persons allegedly detained for their political activities are said to be subjected, in one country, to routine beatings with metal rods, and, in another country, to banging of the head against the wall;\(^{129}\) rapes, flogging, electro-shocks, forced standing and other strenuous physical exercises were also reported.

On the other hand, the inference that the situation is worse than it has ever been or is worsening throughout the world would also be inadequate. A statistical and historical comparative analysis might indicate that the situation was even worse in 1966 when the Covenants were adopted, or in 1948 when the Universal Declaration was adopted, or in the Middle Ages. The fact that many critical issues in this field have been brought to light and are now more easily discussed in international fora,\(^{130}\) is most probably due to an increase in the concern expressed by governments and NGO's concerned, which is itself most probably due to the fantastic expansion of the mass media since the fifties.

The fact that human rights of the third generation (right to development, right to environment, etc.) have appeared and seem to be welcomed by the international community, does not mean that the ancient rights of the first generation (civil and political rights) cannot be further developed. Breaks in the various systems enacted for the protection and guarantee of these rights, whether universal, specialized, regional, or national, still persist and must be identified. Some efforts toward their identification have been mentioned above.\(^{131}\) In


\(^{131}\) See also the following General Assembly resolutions: Protection of the Human Rights of Certain Categories of Prisoners, G.A. Res. 32/121, 32 U.N. GAOR,
this respect, the development of communications, reporting, and fact-finding procedures has been instrumental. Developments have been kept under continuous review, supervision, or control, if necessary. When adequate, standard-setting has also been used to fill in the gaps.  

In all these respects, initiatives recently taken by the Sub-Commission and by the newly-enlarged Commission on Human Rights are very encouraging. The Commission has called upon governments to see to the strict application of the relevant provisions of the Universal Declaration and of the Covenant on Civil and Political Rights in resolution 26 entitled "Individualization of prosecution and penalties, and repercussions of violations of human rights on families." Under the Covenant, no one can be prosecuted or persecuted merely because of his connection, especially a family connection, with a suspect, an accused person, or a person who has been convicted. By the same resolution the Sub-Commission was requested to study this question at one of its next sessions and submit general recommendations to the Commission for its consideration.

---

