

Regional Mechanisms and National Institutions

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I was told that you were now studying the Stream entitled “Tools and Strategies at the National and Regional Levels - Regional Mechanisms and National Institutions.” The objective of this stream is to familiarize the participants with other important human rights instruments and mechanisms. The activities in this stream will focus on regional human rights mechanisms and national human rights institutions. This is the objective that we will pursue this morning. Each speaker this morning will be given 15 to 20 minutes to present his/her material, allowing time for the participants to ask questions.

I am sure that I will be repeating things that you already know very well, but I wanted to put into context what we call regional or local mechanisms. These mechanisms are sometimes called national human rights commissions, sometimes ombudsmen, or even public defenders (*defensores del pueblo*). We have given these mechanisms many different names, and this is because these institutions form a recent part of the democratic tool kit. We know that in a democracy, there are three branches of power: the legislative power, the executive power and the judiciary. It’s not difficult to sort out the roles of each branch.

But in a democracy, people are often democratic only every 4 or 5 years, and sometimes it takes a while for a democracy to emerge. So there was an attempt to establish a dialogue between civil society and the state, which tended to distance itself from its citizens. At the time, there were already NGOs who acted as the voice of the citizens and who called upon the state to respect their rights and interests. So what occurred was that the state, under the pressure of NGOs, created institutions. These institutions were created, in most cases, by statute and they had the objective of promoting human rights education for the citizens as well as to facilitate the application of human rights. These institutions are somewhat “illegitimate,” in the sense that on the one hand, they are financed entirely by the state and yet on the other hand, they must have the confidence of citizens in order to be able to act vis-à-vis the state. So they are hybrid beings which have had, nonetheless, effects in terms of human rights protection as well as the creation of laws, by making sure that these respect human rights.

I will now pass the microphone over to Mr. Mario Gomez.

Mario Gomez

Thank you very much, Mr. Chairman. I would like to focus in this brief presentation on some of the problems with national human rights institutions and human rights commissions and perhaps raise some of the issues related to their potential.

I'd like to start with three stories from three different commissions in the world. My first story comes from South Africa. The new constitution of South Africa created a human rights commission with a very broad mandate. Among the things that the commission has been doing is an investigation into economic and social rights and the obstacles with regard to the eradication of poverty. About 3 years ago, the South African Human Rights Commission initiated an activity together with the Commission for Gender Equality and a broad coalition of South African NGOs, to look at the realization of economic and social rights in that country and the obstacles that prevent South Africans from eradicating and overcoming poverty. They held public hearings in about 10 locations in South Africa and then drew up an agenda to deal with questions of poverty and economic and social rights, which they are now trying to implement.

A few years ago in India, the Indian Human Rights Commission wrote letters to every member of Parliament in India, requesting them not to renew harsh national security legislation which was in force in that country. The legislation was up for renewal, and it would only be renewed if members of the Commission voted in favour of this. The National Human Rights Commission of India, with a fairly limited mandate, at least in theory, was able to convince the members of Parliament not to renew this legislation.

In Sri Lanka, about two months ago, the Human Rights Commission initiated an investigation into the status of internally displaced persons. The Sri Lanka conflict has generated large numbers of displaced people in the country. They have been displaced several times and we have a fluctuating population of between 500,000 and one million people who are displaced. There is a total population of about 18 million. The Commission invited three NGOs to prepare a study and to advise them on the possible roles that the Commission can play with regard to internally displaced persons in that country. The study is currently going ahead and we hope that it will produce some results in the future.

I'm using these stories to illustrate the range of initiatives that national human rights commissions and national human rights institutions can pursue with regard to the protection and promotion of human rights. They are potentially NGOs created within a state structure and occupying a certain space. They are neither part of the state, nor part of civil society, and they are created to investigate the state and to try to protect and promote human rights by using a variety of means and a variety of initiatives. I think these three stories from different parts of the world illustrate the range of activities that these institutions can pursue. I think the stories also illustrate possible areas of collaboration between NGOs and national institutions. How can NGOs work with national institutions, how can they help define their scope of work, and how can they look at creative ways of promoting and protecting human rights?

For the human rights activist, and I speak today from the perspective of a human rights lawyer and an activist, I think national human rights institutions and human rights commissions raise a very fundamental question: Do we work with these institutions, or do we ignore them? I say this because in many countries, especially in the developing world, human rights commissions are being established not out of a commitment to human rights, but in an effort to boost the international image of a country. Governments are embracing the idea of a national human rights commission, not because of a commitment to improve the status of human rights in a country, but because they want to be perceived as governments that are sensitive to questions of human rights. So for human rights activists, we must ask ourselves, should we work with these institutions, or should we ignore them? What does it say for people who work in these institutions? How do people who work in these institutions try and increase the understanding between civil society and the people who work on these commissions? How do they develop areas of collaboration? I'd like to look at some of these issues in this brief presentation.

National human rights institutions are part of the process of globalization. There has been a huge interest recently in this idea of a national human rights institution. The UN has promoted it actively and funders

have poured large sums of money to create these institutions in different parts of the world. Many of these institutions now being created have very broad mandates. Ten years ago, we had the Paris Principles, which is now the international benchmark for evaluating these institutions. The Paris Principles emphasize the question of independence of these institutions. These institutions must be independent, and they must have diverse, competent people willing to investigate and protect human rights. Now, this globalization of human rights has made it fashionable for governments to adopt these institutions. But globalization of human rights institutions has also had one positive effect: these institutions are now willing to learn from each other. Like courts, like lawyers taking jurisprudence from one country and using it in another, human rights commissions are drawing from the activities of commissions in other parts of the world and therefore strengthening their activities. I think this process can help in creating more effective human rights commissions around the world. In some parts of the world, like Africa, the creation of these institutions was part of the transition to democracy; the move from one-party dictatorships to multi-party democracy.

So the range of initiatives that national human rights institutions can pursue, I think, is a characteristic of many of these new institutions that are being created. But some of the older human rights commissions, like the Canadian Human Rights Commission, don't have such a broad jurisdiction. They have a very limited jurisdiction to investigate questions of discrimination. But now, the UN is promoting a much broader vision of these institutions, asking them to perform a wide range of functions. These functions are many: commissions are being asked to investigate complaints received from the public; they are being asked to investigate on their own. Human rights commissions, unlike courts, can search for complaints. The commissions are being asked to engage in human rights education and awareness-raising activities. National institutions are also being asked to advise governments on law reform, policy reform and perhaps advise governments to ratify and then to implement international human rights treaties. Some human rights commissions are given the power to conduct public inquiries, inquiries into large-scale and systematic human rights violations. Human rights commissions also have the power to engage in research, to initiate studies and to engage in law reform. Some commissions are given the power to go to court to enforce their findings and to engage in public interest-type litigation activities. And there is now the evolving relationship between the courts and national institutions.

And all of you have been analyzing, during the last day-and-a-half, the very interesting case from South Africa. One of the features of that case was the South African Constitutional Court's decision that the Human Rights Commission of South Africa implements the decision of that case. The decision of the constitutional court was that the right to housing had been violated, the very amorphous, broad right to housing. The court said that the government had to put in place a policy to cater to those in a situation of crisis, the most disadvantaged in South Africa. And it asked the human rights commission to monitor the implementation of this policy. The government would develop the policy and implement it, and the human rights commission was charged with monitoring the implementation of this remedy. So there is now this evolving relationship between the human rights commissions and the courts. In Sri Lanka, we have had the tradition where the Supreme Courts refer human rights complaints to the Human Rights Commission for mediation and settlement.

So flexibility is one important characteristic of the national institutions. I think another one is broad accessibility to the public, which means having regional commissions, being able to approach the Commission with a phone call, a letter, just walking in...and commissions having a broad, local reach. Again, here, commissions can actually go out and search for complaints. They can go out and look for systemic, group and large-scale violations. I think that is another advantage of human rights commissions.

Some Commissions have special functions. Ghana, in a sense a model commission in terms of its mandate, is also charged with investigating bribery and corruption. Fortunately, the Ghanaian

Commission has accepted to take this on, and has established a certain credibility by being willing to take on sensitive issues. In Sri Lanka, the human rights commission has been charged with monitoring national security laws and monitoring detentions under these laws. It can't recommend release, but it can monitor detention and inform relatives when people are taken into custody. So some commissions have special functions like that.

I just want to raise, in these next few minutes, some of the functions of human rights commissions and to invite your comments, especially those of you who have engaged with human rights commissions in your country and those of you who are working with commissions. To me, the power to conduct a public inquiry is a very important power for national human rights commissions. It gives them the power to look at systemic and large-scale violations. It also gives them the power and the capacity to look at social wrongs and conduct social surveys. And although NGOs have developed their own public inquiries, like people's tribunals in India, certainly a public inquiry conducted by a Human Rights Commission will have a greater reach and their findings, I think, will have a greater value and will be able to be disseminated through the media more effectively than NGO findings.

So this is a potential area for collaboration. How can NGOs and human rights activists direct the work of National Human Rights institutions with regard to public inquiries? How can they encourage these institutions to look at systemic and large-scale violations? And more importantly, how can they generate the capacity within these institutions to be able to conduct public inquiries? The Australian Human Rights Commission has been particularly active in this field and it has held a number of public inquiries, acting on its own.

Another area that I feel allows for collaboration between NGOs and national institutions is with regard to the annual report. Most human rights commissions are required to submit an annual report. I think we need to take this reporting exercise beyond just a reporting exercise. It provides a window for the human rights community to engage with the human rights institutions every year; to critique their activities and then to use that as a tool to raise public awareness on the issues that the institution has either addressed, or not addressed. So this reporting exercise provides an opportunity for civil society to critique and review the activities of the commission and to take this report out to the public and create a larger awareness.

A third area, perhaps more controversial, is the role of human rights commissions in preparing reports under the different treaty bodies. Should national human rights commissions be involved in the preparation of state reports under the treaty regimes? Do the national institutions have a role to prepare government reports, when the government reports under any of the major human rights covenants? I think this is controversial. My own view is that national human rights commissions should stay away from this because these are government reports. If commissions were to be involved in the creation of these reports, clearly they become identified with the government's point of view. In Hong Kong, the Equal Opportunities Commission was able to create a parallel report when the government of Hong Kong reported under some of the treaties. Now, here is a role for national institutions, together with civil society, to work together to try and develop shadow reports. The whole process of developing a shadow report can also be a very empowering process. It's not just the writing of a report, but the process itself can allow the community to engage with and discuss human rights, to raise awareness on human rights and to improve our understanding of what these rights really mean.

A fourth area relates to the very controversial area of economic, social and cultural rights. Very few human rights commissions have an explicit mandate to deal with economic, social and cultural rights. The South African Human Rights Commission is an exception. It has a constitutional mandate to monitor, every year, how certain government departments are implementing economic, social and cultural rights. I think that, where human rights commissions don't have a mandate, clearly then we, as human rights activists, have a role to try and interpret the mandate so as to encompass economic, social and

cultural rights. I think we have a number of examples in the case law, where courts have stretched anti-discrimination laws and equal protection laws to encompass economic and social rights. We have the jurisprudence of the Indian Supreme Court, which has said that the right to life includes the right to human dignity, which includes a number of economic, social and cultural rights: the right to a clean and healthy environment, the right to compulsory education up to the age of 14 and the right to emergency medical treatment.

So clearly, if the mandate of the commission does not permit the commission to address economic and social rights, I think we need to look into how to interpret this mandate in a creative way that clearly enables the commission to address economic and social rights. I say this because this is a category of rights that has been ignored, and if the human rights discourse is to have a broader relevance in much of the developing world, I think we need to find ways of making these rights more effective and more concrete.

Another problem I wanted to flag is the question of mediation. Many human rights commissions are given the power to mediate and to solve problems through mediation and conciliation. I think mediation can have some problems when you are talking about human rights. So long as you don't compromise on some fundamental principles of human rights, then perhaps mediation is all right. But let me give you an example from Ghana, where a police officer requested a bribe from a person before charges against that person were withdrawn. Now, the Human Rights Commission negotiated this by asking the police officer to return the money. I think that this solution does not address the larger, systemic problem of corruption. Sometimes, we might compromise on fundamental principles of human rights in our effort to mediate and conciliate and produce a satisfactory outcome for the plaintiff.

I just wanted to conclude with a few comments, Mr. Chairman, to say that human rights commissions can never replace courts and they can never replace civil society organizations. They can only support courts and support the work of civil society organizations. I think one of our challenges is to create links between human rights commissions and civil society. The nature of these links will depend largely on human rights activists and the human rights commissions themselves. We also have to be realistic about what these human rights institutions can do. We often have great expectations because they have such broad mandates. But I think we need to be realistic and try and define the priorities for these commissions. So we know that commissions can do some things better than others - what are those things? I think you, as activists from your societies, will be able to identify these goals and activities better than I. It's important to try to identify those priorities; we can't expect too much from a commission. We have to know that its capacity is limited.

I think the credibility of human rights commissions will lie in their public accessibility. Secondly, it will lie in their willingness to confront sensitive issues and to challenge the state when this requires that such challenges be made. Thirdly, I think it will lie in their willingness to use innovative methods, especially their willingness to investigate large-scale, systemic human rights violations. I think in all these areas, civil society organizations have a role to play. National institutions don't operate in a vacuum, they work in a political and social context. Their success also depends on how human rights activists interact with institutions. We have a role to play in trying to take those institutions forward.

Thank you.

Mr. Andrew Drzemczewski

Coming from Western Europe, there should be an element of humility; the First World War and the Second World War started thanks to our part of the world and yet here we are showing how our wonderful human rights mechanisms in Europe are the model to be followed.

A few words of introduction: I am a civil servant, and I have been working for the past 16 years in an intergovernmental organization, the Council of Europe. The Council of Europe is principally known outside of Europe for its jewel, the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a regional institution that presently has 43 member states. The two most recent members are Armenia and Azerbaijan, which joined in January of this year.

Due to time constraints, I will have to make a very brief overview of what we have accomplished at the Council of Europe. Then this afternoon, there will be time to discuss in detail areas of interest and questions that participants raise.

That said, when I was asked to speak about regional human rights systems and in particular, the European system, one must keep in mind that the region of Europe is a fairly complex region. In this regard, let us not forget the European Union, with its 15 member states that have a strong jurisprudence over the fundamental rights established by the Court of Luxembourg. There is now the Convention of Fundamental Rights that will become, in a few years, restrictive. Also, I forgot to say that there is the OSCE (Organisation for Security and Cooperation in Europe) with its office in Warsaw. There is also an attempt, or if you wish, a convention that, in principle, was implemented with the creation of the Community of Independent States in Minsk in 1995. There are three signatory countries. It is something that comes from the former USSR.

I am attempting, if you wish, to paint a general picture that shows that there are also many other factors. Human rights, in international law, have become a bit fashionable. This means that all organisations and governments find it « charming » to have national human rights authorities, and to involve themselves in human rights. Being a lawyer myself, I am rather comfortable with a restrictive system – for example, with a treaty whereby NGOs, individuals and governments can undertake a legal procedure, exhaust all internal recourses and afterwards, resort to an international authority. In this system, which presently exists at the Council of Europe, if a state violates a convention, that state is forced to change its legal system, to compensate the injured individual and eventually, to change the law so that people who find themselves in the same situation will not be faced with the same obstacles.

Permit me to give an overview and mention five principal measures for ensuring control and respect for human rights that exist at the Council of Europe. The first, a system which is the most recognized, obviously, is the European Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) – I intend to come back to this. Mario Gomez spoke about the problems relating to social, economic and cultural rights. There is always the idea that we have (the second system) the European Social Charter. This charter must be the counterpart to the CPHRFF.

The European Social Charter of 1961 created a collective claims system that allows NGOs and certain domestic, legal organizations and international NGOs to undertake proceedings before a European authority in the context of economic and social rights. To give you an example, and this is a very recent system, there are presently requests against Portugal, Finland, France, Greece and Italy. It is necessary to remove the artificial barrier that says that social and economic rights are not justiciable.

I now continue with the third mechanism. This third mechanism is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. There is, in fact, a committee that travels to areas where people are being detained. This system dates back to 1987 and is probably the system which, after the European Convention on Human Rights, has had the most success at

the European level. There is a Committee for the Prevention of Torture which, since this system started, has made numerous visits to detention sites, not only prisons but also other detention sites such as police stations, psychiatric institutions and military bases. This means that the Committee can, where the state has jurisdiction, visit (sometimes without prior notice) detention sites to see if the person concerned is being treated properly. The Committee has made, since last year, 111 visits: 77 regular visits and 34 *ad hoc* visits. The most recent visit was in Turkey. I don't know if some of you are aware, there were riots in the prisons of Turkey, not long ago, and so the Committee traveled around many times.

I will continue to give a brief overview and I will come back to this subject this afternoon. The fourth mechanism of control is the European Commission against Racism and Intolerance. This system has existed for a few years because, with the Council of Europe having become larger, we have a tendency to point to the bad human rights problems in the new member states – often forgetting that the existing member states have also had many problems: racism, intolerance, etc.

There are perhaps some among you that have read the recent report published on the United Kingdom. It was on the first page of newspapers in England, about how the European Commission against Racism and Intolerance found many problems (a polite way to put it) in a long-standing democracy. This means that even France, the UK, and Germany have problems relating to racism and intolerance. If we speak of the European family, we must be honest and not forget that long-standing democracies sometimes have serious problems.

There is a fifth control procedure that was just implemented a few years ago. It is the Framework Convention for the Protection of National Minorities. Reports are made by a committee but at present, I could just tell you which countries it has studied. But we will come back to this subject this afternoon.

There is also an authority which, for the moment, many people outside of Europe do not know. It is the Human Rights Commissioner. At the present time, the Commissioner is Alvaro Gil-Robles, from Spain. His mandate is the following: the Commissioner is a non-judicial authority responsible for promoting human rights education and awareness, as well as respect for human rights, as dictated by the Council of Europe's instruments. The Commissioner can eventually identify the gaps in laws and practices among member states. This is an authority that must personify human rights protection in Europe. The Commissioner has undertaken many activities in the past year in Chechnya.

A question presents itself: the Human Rights Commissioner visited Chechnya when Mary Robinson and the OSCE could not gain access. In visiting the area, he spoke with authorities and obviously, with those involved in the conflict. He proposed that the Council of Europe send its own staff to conduct an investigation in the office of Mr. Kalamonov – at this time, he is the person put in charge by Vladimir Putin to collect information on human rights violations in Chechnya. This is one example.

If you look at the reaction of NGOs: I was in London a few weeks ago, and people from *Amnesty International* told me the following: it is a good thing that Alvaro Gil-Robles has taken this initiative, and a good thing that you had the idea to send Russian-speaking staff to Chechnya. But doesn't this give an excuse to the Russians, by giving them a « visiting card » that allows them to say that they are cooperating and working with the Council of Europe? We can say that the Council of Europe is used and manoeuvred by the Russians. Is this true or false? But I ask you: if you were the legal council of the Secretary General of the Council of Europe, what would you do?

We presently have staff working in Chechnya at Kalamonov's office – people who, as experts, come from different services from within the organization. Will removing staff from Chechnya really help? The staff from *Amnesty* with whom I spoke are right about the fact that we should leave the area. But is this a

good idea when, at this moment in time, a father or brother comes to Kalamonov's office to say that his daughter or wife has been mistreated by the security forces?

The only alternative right now for this area of Russia is for the people to turn to the superior officers of the security forces. Does not the presence of staff from the Council of Europe at least allow these people to turn to international representatives who, at least, can encourage discussion and eventually tell them how to lodge a complaint with the European Court of Human Rights?

It's very easy to slam the door and say that someone is using us for political reasons. But look at the other side of the coin. It's not so obvious, when people need an international presence.

Coming back, as promised, to the European Convention on Human Rights: there are possibly many of you who know the Convention. It's a mechanism that has had much success. If you will allow me, I will summarize its recent development; we have had - and that is the first point in favour of the ECHR in 1951 - a European Human Rights Commission, the Court and the Ministers' Committee: three monitoring entities. The inter-American system was based on this system in 1969. The Inter-American Convention on Human Rights used the European system. But meanwhile, we are victims of our own success, if you wish. We are obliged, based on Protocol Number 11, to ensure that the system is radically modified.

My first point is that the European Human Rights Commission and Court ceased to exist in 1998. They were replaced by a permanent Court, located in Strasbourg. There is a court which works on a daily basis in Strasbourg. There are judges. They receive, to give you some numbers, about 700 letters per day and 300 international calls from 41 member states of the Council of Europe - 41 out of 43 that have ratified the European Convention on Human Rights. I believe that statistics show that between 500 and 600 judgments are rendered each month, at present. It has become a machine.

My second point: the mechanism in Strasbourg is the European Convention on Human Rights. This system has been rationalized so that complainants now benefit from direct access to the new European Human Rights Court. There is not this filtering system which exists in the inter-American system and which perhaps exists in the African system - when and if the protocol on the African court comes into play.

In a comparative context, we are considered to be at the forefront, assuming that an individual can directly access an international authority, after having exhausted internal recourses. I intend to come back to that because in that case, the role of NGOs and people working for human rights becomes very important.

The third point is perhaps more for those who know the system a little better. We had a system whereby, if the Court cannot be accessed, we could resort to the Ministers' Committee, the executive body - or if they are not available, the ambassadors. These latter made decisions about the situation. It's a hybrid. This meant that when and if the Court could not be used because a recourse had not been accepted, the committee, a political body composed of diplomats, had to decide if there had been a human rights violation. And because they were sometimes obliged to decide by a majority of two-thirds, sometimes they decided that they did not have this majority. So then, they decided not to come to any decision. This was considered an unacceptable system and it has now been abolished through a reform of Protocol No. 11.

The last point is the fact that now, all parties to the CPHRFF and each individual can automatically have recourse to the European Human Rights Court which has an automatic jurisdictional authority. It's

remarkable. If I am not mistaken, it is still the only judicial system where the individual can, after having exhausted all internal recourses, have direct access to an international legal authority.

However, we must review the situation a little. We say that with this system, we are victims of our own success – that there are too many complaints to verify in Strasbourg, and that we can't manage it properly. But my answer is that, to a certain extent, it's because the national systems do not work well enough to prevent this overburdening at the international level. If we look at the situation – and most of you are activists in your own countries and national systems – it's mainly in the national systems that the rights recognized in the European Convention on Human Rights should be anchored. If, among you, there are people involved with, or from, member states of the Council of Europe, or from countries that eventually ratified (for example) the American system, you must verify to what extent these rights have been transformed or incorporated into internal law - so that the respective internal law conventions can be used, rather than automatically resorting to the Court in Strasbourg or eventually, the Interamerican Commission in Washington, D.C.

One last point: there must be a certain intellectual honesty to admit that the Council of Europe has become larger. The Council is now composed of 43 member states. We should not assume that certain countries do not represent a serious threat to the rights of the Convention.

We know that we must recognize that legal norms in certain Eastern and Central European countries are inferior to those of the Strasbourg bodies. When we spoke of the Strasbourg system a few years ago, we had a system that was fairly closed, that was the visiting card of the Council of Europe. This is no longer the case. We are in a situation where we are, in effect, between two chairs – one chair on which sit the sophisticated countries (France, the UK, Germany, Holland), where we must preserve certain gains of the European Convention; and you have another category of countries that, for political reasons, have been obliged to join the Council of Europe and that perhaps ratified the ECHR too precipitously. But the European Court must also help these countries without taking away from (if you wish) the gains obtained with the European Council.

Without really drawing conclusions, permit me to present a quote that I found [...] very charming because it reflects our weaknesses in Europe. I believe that these institutions and mechanisms can ensure a certain level of respect and perhaps create a link with what I said at the international level. I would like to draw your attention to the fact that you, as human rights activists, are « morally responsible, » like those judges in Strasbourg and the different authorities, to ensure that there is a system of protection for human rights in internal law. You are also responsible for ensuring that there is the possibility of verifying if there are violations of internal law, and that we can have access to norms of international institutions – which is not always easy.

Permit me to present my quote. Perhaps some of you know it, it is so remarkable. It is from the pastor Martin Lee Muller, and I only have the English version:

At the beginning, they came for the Jews and I did not say anything, because I was not Jewish. Then they came for the communists, and I did not say anything because I was not communist. Then they came for the unionists and I did not say anything because I was not a unionist. Then they came for me, but there was no one left to say anything in my defence

It is our role to ensure that it does not happen again, at least in Europe, if not in the rest of the world.

Thank you.

Intervention of the Chairman

In the name of all who are present, I wish to thank both speakers. Now, it is the turn of those who wish to ask questions. If you have questions, we still have 20 minutes left. So go ahead, either in English or in French. Our speakers will try to answer. Please approach the microphones, since the simultaneous translation works only if you are speaking into the microphone.

Participant

I have a question for Dr. Gomez. You gave a good overview of the human rights commissions of different countries. My question is: Not all countries signed declarations and conventions, while certain countries are guilty of human rights violations. How can the global community pressure these countries to adhere to and respect human rights, and set up human rights commissions?

Mario Gomez

First, I believe that we must examine the national protection systems. We must ensure that these systems are effective in protecting human rights. International law, international treaties and systems can only support and complement national protection systems. I think that we must emphasize effective national systems. There is a multitude of ways to use international processes to support national protection.

Even if a country has not signed a treaty, the standards of the international system can serve as a reference point. It is possible to use these standards as universal international standards that can be applied around the world, and to ask your government to incorporate these standards in your constitution, in your national laws or in national policies. Another way in which international standards can be used is by judges. They have more and more recourse to international norms for interpreting constitutions, national laws – the statutory laws – and even for developing “*Common Law*.” This is therefore another way in which activists can use international standards to “enrich” their national system. I think that the third way to use international standards is to mobilize, envisioning extralegal ways to protect rights. One way could be to make people aware of these rights.

Whether or not your country has ratified a convention does not matter much. You can always examine the standards and general recommendations, the general comments that come from the group of treaties and which clarify and broaden these standards. You can use them in your work of human rights education, use them to mobilize, to conduct campaigns against governments and to ask governments to enforce certain measures. I think, therefore, that there are many ways that we can use the international structure of human rights.

Another participant

My country, Sierra Leone, is in a transition phase and is trying to establish a national human rights institution. I wish to make a comment and then ask a question.

The comment is on the function of the preparatory reports for all of the treaties. When we were in the process of developing the mandates for our national institution, there was a major question: When should we let the Commission submit reports in the name of the government?

In your introductory speech and that of Mario Gomez, you said that the establishment of a national institution, especially in Africa, does not result from a commitment towards human rights, but is often to improve the image of the country in the eyes of the international community. We have arrived at a

consensus: we cannot permit the national institutions of our countries to report in the name of the government to treaty authorities. This must be left to the Ministry of Justice or to complaints tribunals.

My question is on the use of the IHL (*International Humanitarian Law*) and the function of national institutions. Because there has been an argument, during our process: Does humanitarian law enter into the category of concepts relating to human rights?

Another participant

Thank you to both speakers for their pertinence in the development of both themes. Nevertheless, I wish to draw the attention of the first speaker to his analysis of the national human rights institution...

What I mean to say is that, in terms of the reports presented by the National Commission in Niger, this commission presents its report independently of the state and government – and the Ministry of Justice presents the government’s report. Regarding the question about the mediating role of a Commission from a country that has been traumatized by military or fascists governments, I think that it is necessary to undertake mediation between communities in order that they be reconciled. It is very difficult to perceive this necessity in this law, but we, at the country level, think that the commission has an important role to play in the reconciliation of national communities around well-identified human rights objectives. This is not a question of compromise in relation to the intangible and international human rights principles, but rather a question of internal process, of societal dynamic. Thank you.

Mario Gomez

As relates to the relationship between human rights commissions and treaty authorities, I agree with you. I don’t think that human rights commissions should really have a role to play in the submission of reports relating to conventions. I think that they have a role to play in the production of “shadow reports.” Governments sign treaties and it is their obligation to submit reports. Presently, human rights commissions occupy this function, they are aligned with governments – but it is important to preserve their autonomy and independence. I don’t really see national human rights commissions submitting reports in the name of the government.

With regard to the question relating to international humanitarian law and human rights, I believe that it is now unthinkable that international humanitarian law not be a part of international customary law – it’s a norm that is applicable on a worldwide scale. The basic norms should be respected by all parties in a conflict. I believe that if you examine the work recently completed by Francis Deng in the area of internally displaced persons - where, in a pioneering exercise, he and a number of civil society organizations examined humanitarian law, human rights laws and refugee laws. They developed a group of principles or reference points for internally displaced persons. I think that it is a very creative process that uses existing laws to develop other standards and to clarify the standards that apply to internally displaced persons. They have developed a group of principles or reference points for internally displaced persons.

With regard to the role of mediation, I agree with you. I think that you have raised an important point. When society emerges from a conflict, from violence, and so on, you might need mechanisms that will help to examine the whole question of reconciliation – even if this means making compromises on human rights principles. Sometimes this must be done, because even with groups that use violence and have violated principles of humanitarian law, your first response is to have them accept responsibility in light of these standards. But I know that in certain societies, this can be impossible to do. You will perhaps have to make compromises on these standards in order to achieve peace, when peace becomes an

imperative. If you wish a country to advance, you might have to compromise – the national human rights commission could have a role to play in this process.

The point that I am trying to make is that human rights commissions have a multitude of roles, depending on the context. Another example would be that of Indonesia. The role that the Commission played in the present transition is very different from that of the other human rights commissions in other countries.

A participant

I work with migrant workers and their families in the Philippines. I have two questions for Mr. Andrew Drzemczewski.

Does the mandate of the European Human Rights Commission include the rights of migrant workers? Because in Europe, for example, there are more than half a million Philippine workers. Most of them obviously work as domestic labourers, but there are also Philippine women who are married to Europeans, and many of them are qualified workers. This relates specifically to immigration.

We have certain concerns. The workers that are employed by Arab employers usually spend their vacations in Europe, but their immigrant status in Europe depends on their employer. In fact, their employers take possession of the Filipinos' passports. They do not, therefore, have immigrant status when they go to Europe.

Another of our concerns: the situation where Philippine women are married to Europeans. Some European countries require, before giving citizenship to a woman, that she prove that she has lived with the European person for about three years. So, for example, even in the case where the husband is already beating his wife, some of these women endure this situation for three years in order to obtain citizenship. These are some of our concerns.

The other question is perhaps more for my own knowledge. As we will be leaving soon, I would like you to tell me if there is a regional mechanism that concerns itself with human rights in Southeast Asia. I did not do my homework and do not know if you can give me this information. Thank you.

Andrew Drzemczewski

That is a complex question. The answer can be found in the conventions. We have a specific European convention that deals with migrant workers. We also have the European Social Charter that has a « condition » stating that a person must legally reside in a country. In the case where a Filipino woman is married with a European, she must live in Europe for three years so that her marriage is not declared false. I fear that this issue will be treated differently in different countries. I would be dishonest with you if I said that this situation is not managed on an ad hoc basis where often, a state will permit an individual to stay in its jurisdiction for humanitarian reasons, without questioning the principle that the person must reside in Europe for a certain amount of time. Because in terms of a state's migration policy, whether it be good or bad, whether I agree or not, it could potentially open up Pandora's box.

This said, that is why, in my introductory remarks, I indirectly criticized the Convention for the Protection of Human Rights and Fundamental Freedoms on the legal specificities that it contains. The people living in the European Union must be citizens or legal residents of Europe. If you examine article 1 of the ECHR, it mentions all of the people who are under the jurisdiction of member states – all. Whether the person is stateless, refugee, possesses a nationality or not – if we can prove that the person's human rights have been violated, and that he/she has exhausted all local recourses and that this merits a legal

determination in Strasburg, this person must go to the European Human Rights Court. There is impressive jurisprudence on migrants, in particular relating to the private lives of families and on treatment degrading to the individual. Thank you.

Another participant

I work with a provincial human rights commission in Canada. I have a question on the Paris Principles. The Paris Principles are very important for human rights institutions because they allow us to retain our independence in the face of government and allow us in general to interpret our mandate, and so on.

However, these principles are no more than a declaration of the General Assembly. My question has two parts: could these principles possibly become only a declaration – a treaty, or something that asks for more of a commitment on the part of a state? Can the principles be included in international customary law? We wanted to express this in relation to the Paris Principles, in the context of Ontario, but we are not sure that we can go that far.

Mario Gomez

My answer to the first question: when these organisations and individuals met to develop the Paris Principles, I do not think that they realized that these Principles would become some sort of reference point for national institutions. The Paris Principles constitute the beginning of a process in which many countries of the world are becoming more interested in the concept of “national institution.” I do not think that that they realize right now that these principles are the standards for national institutions. I do not know if efforts have been made to make the Principles more binding, or to make countries ratify them.

Certain human rights laws push us to look beyond the Paris Principles due to the fact that human rights commissions have evolved so rapidly in the last ten years. We must re-evaluate some of these principles in order to incorporate some of the experiences of the last decade into the new reference points that we create.

The question about international customary law is a good one. I am not persuaded that we can advance this argument. It is certain that for national institutions to function, they need independence and autonomy. This is an intrinsic need of national institutions. That is my answer.

Another participant

I am from Ghana and I work for the Ghana Human Rights Commission, a national institution. I have an observation to make on Mr. Gomez’ presentation. I observed that in many countries that have national human rights institutions, these latter have conflicts with the government – mainly because we are financed by the government and also because we must play a guard dog role in relation to government. This puts the two institutions in conflict. For example, in Ghana, the Commission had an additional mandate, that of identifying corrupt ministries. We presented a report to this effect to the government, but the government refused to budge because it did not want to be discredited. The Commission thus appears, in the eyes of the public, to be a toothless dog. Problems such as these arise in many national human rights institutions.

Besides this, we also have other problems related to the fact that the commission depends on the judicial system to apply its decisions. We realize that often, there are many human rights abuses, that we conduct inquiries in certain cases, that we find concrete solutions to the problem – but that we are reliant on the judicial system. We must go to court before having our decisions implemented and we do not have a

separate human rights court. We must appear before the regular court and it takes an eternity to resolve problems of this nature.

We have a particular problem in our country, related to traditional religious rights. Followers of this traditional religion attempt to impose their belief on others. This has created certain conflicts in the country. The commission had an explanation relating to the Constitution, but we must still go to court and have not been able to resolve this problem. This is what I have personally observed in many national human rights institutions. They lack teeth. The Constitution gave birth to us, but we must have a bit more power if we wish to operate freely and independently. The independence clauses exist, but they do not really make the commissions independent.

Mario Gomez

Briefly: I think that the Ghana Human Rights Commission is perhaps privileged, in that it has more power than most human rights commissions. You have the explicit power to go to court to have your decisions applied, whereas many human rights commissions can only formulate recommendations – that remain just that.

This depends, once more, on what we do with these recommendations. I think that you are privileged because you can go to court to have your decisions applied. But I am not in favour of another system to enforce recommendations, I believe that we should all rely on the judicial system. It is fundamental for me in terms of the rule of law. If you wish to create other systems to have your recommendations and decisions enforced, I think that this can become very dangerous. I do not think that the process must be accelerated, but rather that we must continue to rely on the judicial system to have our recommendations and decisions applied.

Intervention of Andrew Drzemczewski

I would like to make an additional comment. The old European continent must learn from the experience of certain countries outside of Europe. I will give you an example in which we have the old Nordic system of the ombudsman, considered to be the best system to be « sold » to the Baltic states. I know that there is a participant among you who comes from Latvia, or from a Baltic state. What's interesting is that there was a joint meeting between the OSCE, UN and the Council of Europe – which is rare – with Brian Burdekin.

It came out that in certain countries (for example, the new countries emerging from the control of the former USSR), one could not, within the confines of an administrative bureaucracy, work under the assumption that a reactionary institution would be in place – a commission or ombudsman institution – because the ombudsman institution necessarily presupposes that there exists a bureaucracy to administer it. We assisted in the creation of something new. To know to what degree this new creation will effectively function, that is another question.

The Human Rights Office resembles in great part the ECHR that was created. It has the power and the possibility of being proactive – which is very important. For example, it could act *ex-officio* (and still can, I think...) if it determines that there is a structural problem of violence in a family; it does not have to wait until complaints are formulated in a judicial process - sometimes they never see the light of day; it can take this proactive approach. And what is very interesting, in spite of the proximity of the Baltic state of Latvia and the Nordic influence, is that the idea that a human rights commission does not only have to be reactive but must also be proactive was born from a situation where the “old European continent» is no longer very comfortable with parliamentary commissions and ombudsman institutions. We are in the presence of a hybrid that, if I am correct, is inspired by the influence of Burdekin.

Intervention of the Chairman

It is not because I wish to have the last word, but I might have a few comments for the man from Ghana. Having myself presided over a human rights commission that also had, on occasion, a difficult relationship with the state, I would say that we must not neglect the power of the press. You must have visibility every day and you must rely on the existing bodies in society, which can be great allies. It is important that you not forget that elected persons need the vote of their constituencies. And if you deal with their constituencies, and the government sees you doing so, you will have unimaginable power.

Thank you.