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New United Nations Procedure To Protect Prisoners and Other Detainees

Kathryn Jean Burke†

In 1974, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities established a new procedure for implementing international human rights law to deal with worldwide patterns of violations of the rights of detained persons. This Comment explains the new procedure, discusses the action the Sub-Commission has taken and is authorized to take regarding detainees, and suggests ways in which the procedure might be used and strengthened by interested groups.

Recent reports indicate that at least 35,000, and probably more than 55,000, persons are still being detained without charges in Indonesia, ten years after arrest.1 Though the crisis that led to the arrests has long since passed and though thousands more who were arrested at the same time are now free, the Indonesian government apparently plans to release the remaining group at the rate of only 2500 a year.2 It admits having evidence to bring to trial only some 2000 to 5000 of the detainees, and it questions the adequacy of its judicial facilities to process even that number.3 All the others, it says, are either “suspects” who need indefinite rehabilitation (with no trial) or “traitors” who must be isolated whether or not the evidence is adequate.4 While 35,000, or even 55,000, is a small fraction of Indonesia’s population, reintegration of


Special thanks are due to Frank C. Newman, Jackson H. Ralston Professor of International Law, Berkeley, for counsel and critique.

1. AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75, at 91 (1975).
3. Id.; Indonesia’s Concentration Camps, 10 INT’L COMM’N JURISTS REV. 15, 16-17 (June 1973).
that number of people into society inevitably poses serious problems, especially when they are suspected of subversive tendencies. Meanwhile, life in prisons and “resettlement” camps is difficult since, as the government points out, there are insufficient resources to devote to improving the prison conditions.

While Indonesia may have a larger number of arbitrarily detained persons than any other country in the world,7 its dilemma exemplifies grave problems of detention and imprisonment that recur in many countries. The frequency and the similarity of reports of violations of prisoners’ and other detainees’ rights indicate that some of the issues call for international action. Several international organizations have recognized this and are beginning to react: Amnesty International in 1972 inaugurated its worldwide Campaign for the Abolition of Torture;8 the United Nations (UN) General Assembly adopted precedent-breaking resolutions on torture in 1973 and 1974;9 the World Conference of the

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5. AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75, at 94 (1975) (“most released prisoners face difficulties in getting official and private employment because they do not possess the certificates [of non-involvement in the 1965 coup attempt]”); Washington Post, Oct. 14, 1975, at 1, col. 1 (“they likely will be barred from the civil service and from political activity”); Indonesia’s Concentration Camps, 10 INT’L COMM’N JURISTS REV. 15, 17 (June 1973) (“[President Suharto] said that if they were released society would reject them”). But cf. AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75, at 92 (“the 1965 prisoners [are said to] constitute a subversive communist threat if released—despite contrary evidence relating to the majority of those prisoners”).

6. AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75, at 93 (1975); Indonesia’s Concentration Camps, 10 INT’L COMM’N JURISTS REV. 15, 17-18 (June 1973); Speech by Indonesian Attorney-General to Jakarta Foreign Press Correspondents Club, Sept. 20, 1971, copy available in files of International Commission of Jurists.


“Arbitrary” is used here as defined in the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile: “an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.” U.N. Doc. E/CN.4/826/Rev.1, para. 27 (1964).


International Women's Year at Mexico City in July, 1975, recommended UN action against the widespread practice of torture in houses of prostitution; in September, 1975, the 5th UN Congress on the Prevention of Crime and Treatment of Offenders prepared a declaration against torture; and that declaration was proposed in the UN General Assembly in November, 1975.

One of the most practical and imaginative of all the proposed innovations appears to be a new procedure for implementing detainees' rights, recently established by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter called the Sub-Commission). In 1974, by its resolution 7 the Sub-Commission decided "to review annually developments in the field of the human rights of

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In a speech before the General Assembly, the U.S. Secretary of State, Henry Kissinger, said the U.S. urged adoption of the declaration. Secretary of State Press Release 496, Sept. 22, 1975. He added a proposal for "a group of experts, to be appointed by the Secretary General, to study the nature and extent of torture in the world today . . . ." On the same day, the President of the U.S. said at a conference in California that the U.S. could not interfere with allied governments that torture their citizens. N.Y. Times, Sept. 23, 1975, at 26; Remarks of the President and Question and Answer Session at the World Affairs Council Luncheon, Office of the White House Press Secretary, at 6, Sept. 22, 1975, copy on file at California Law Review. Compare the following remark by a State Department official: "We . . . agree that the UN can play a very valuable role in focusing attention on this abhorrent practice and, hopefully, in discouraging it." Letter from Department of State to Congressman Donald Fraser, Aug. 7, 1973, in Hearings on International Protection of Human Rights Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, 93d Cong., 1st Sess., at 808 (1973).
persons subjected to any form of detention or imprisonment." At the 1975 session it took first steps toward a constructive use of that new function in a way that could significantly affect the welfare of countless prisoners and other detainees. The initial aim of the procedure established at the 1974 session is to confront the problems of prisoners and other detainees from an international perspective by examining information and ideas that relate to alarmingly recurrent situations. This Comment discusses the development of the new procedure, outlines the actions that the Sub-Commission is authorized to take regarding detention, and suggests ways in which it could be assisted in its work.

I

DEVELOPMENT OF THE NEW PROCEDURE

The Sub-Commission is a subsidiary organ of the UN Commission on Human Rights (hereinafter called the Commission). It is composed of 26 persons selected by the Commission to serve for three years. These persons serve as individual experts and not as representatives of governments. The Sub-Commission meets in annual sessions of three weeks to


16. Although resolution 7 speaks of "detention or imprisonment," the word "detention" is used alone in this Comment because it is the general term that includes imprisonment. A UN study on detention defines it as "the act of confining a person to a certain place, whether or not in continuation of an arrest, and under restraints which prevent him from living with his family or carrying out his normal occupational or social activities." Study of the Right of Everyone to be Free From Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, para. 21 (1964).
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detail with prevention of discrimination, protection of minorities, and related matters.17

The need for a global approach to issues involving detention came to the Sub-Commission’s attention in 1972 as it examined communications on violations of human rights. Its Working Group for screening communications 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.18 A similar statement included in the Working Group’s 1973 report persuaded the Sub-Commission to add to the next year’s agenda an item on “the question of the human rights of persons subjected to any form of detention or imprisonment.”19 In 1974, resolution 7 was adopted, with these operative paragraphs:

[The Sub-Commission]

1. Decides to review annually developments in the field and for this purpose to retain the item on its agenda. In reviewing those develop-


18. The report of the Working Group included the following remarks:

Although [the complaints considered by the Group] seemed to relate to isolated incidents in each country considered, such communications had originated from persons resident in several countries. . . . [The] allegations could, if proven, point to a continuing and systematic practice extending beyond the bounds of a single country and reflecting a general deterioration in the standards set by Governments. Of course, at this stage, it is not possible to arrive at any such conclusion simply by comparing isolated communications of this kind.


ments the Sub-Commission will take into account any reliably attested information from governments, the specialized agencies, the regional intergovernmental 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 principles of the Charter of the United Nations;

2. Requests the Secretary-General to transmit to the Sub-Commission the information referred to in paragraph 1 above.²⁰

Importantly the annual review concerns all detainees. The resolution refers to "persons subjected to any form of detention or imprisonment."²¹ Thus, persons who may be affected include not only convicts but also individuals held for trial, administrative detainees, persons confined to hospitals, mental institutions, and juvenile homes, as well as many others.

In 1975 the Sub-Commission graphically sketched the work it plans to do by selecting from the vast range of pertinent problems those on which it will concentrate first, as follows:

(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.²²

In addition, the Sub-Commission recommended that the Commission on the Status of Women consider "the special problems relating to the human rights of women detained or imprisoned."²³ The Sub-Commission also requested the UN Secretary-General to seek reliably attested information, particularly relating to those problems, from governments, specialized agencies, regional intergovernmental organizations, and non-governmental organizations.²⁴

²⁰ Resolution 7, supra note 13.
²¹ Id. (emphasis added).
²² 1975 Resolution, supra note 14, at operative para. 2.
²³ Id. at operative para. 3. Implied in the Sub-Commission's recommendation is a decision to consider for itself the problems of detained women when the Commission on the Status of Women reports back to it. Moreover, since the Commission on the Status of Women will not have met between the Sub-Commission's 1975 session and its 1976 session, the Sub-Commission may wish to take a further look at the problems in 1976, before any such report.
²⁴ Id. at operative para. 5.
Since the procedure itself was new in 1975, and since several members of the Sub-Commission were serving in their first session, thorough consideration of the issues was hardly practicable. The Sub-Commission has only begun to explore the possibilities for implementation of human rights open to it under resolution 7. Yet the 1975 resolution certainly does pave the way for serious, focused action on detention issues in 1976 and following years.

II

EXTENT OF THE SUB-COMMISSION'S AUTHORITY TO PROTECT DETAINES

For guidelines as to what action is authorized on questions of detention, the Sub-Commission must look to the words of resolution 7 and also to its own terms of reference as set out by the Commission on Human Rights in 1949.25

A. "Review"

The power to "review annually developments in the field" originates in operative paragraph 1 of resolution 7, which subsequently was noted with appreciation by the General Assembly in its resolution 3218 of 1974.26 Exactly what "review" means as a Sub-Commission procedure is uncertain because the word has been little used.

The concept may have originated in the annual agenda item, "Review of further developments in fields with which the Sub-Commission has been concerned," under which the Sub-Commission usually surveys related events and work in other bodies, often tying the discussion to its own plan for future work.27 In 1975, for example, the members discussed several issues substantively and asked a sessional working group to consider one of the issues in connection with the plan for future work.28 An analogous approach might help to implement resolution 7.29 In addition, a review under resolution 7 should include

29. "Review" is also used in Sub-Commission resolution 11 (XXVII) on slavery and slavery-like practices. This resolution, adopted in 1974, is as new as resolution 7; and in 1975 the Sub-Commission was cautious in implementing it. Its text appears in U.N. Doc. E/CN.4/1160, E/CN.4/Sub.2/354, at 57-58 (1974). For a summary of discussions and action taken under resolution 11, see Report of the Working Group on
an examination of the information submitted pursuant to its first operating paragraph, followed by whatever resolutions and plans for future work the examination suggests.

For efficiency during the session a small group or even one member might be assigned to do parts of the review. To illustrate, among the items selected for immediate attention by the 1975 resolution, "the position of the family and relatives of arrested and detained persons" might be well-suited to a one-member analysis of the available information. Many Sub-Commission members, as experts, have had notable experience in the field of detention and could contribute significantly to a probing review. One recently reelected member, for instance, was chairperson of the UN Committee on Crime Prevention and Control, which regularly deals with "treatment in custody" from a criminological perspective and has also discussed torture as a form of official violence. Others include a trial judge, a former district attorney, and the author of a book on police.

B. "Recommendations"

Paragraph (a) of the Sub-Commission's terms of reference gives it the power "to make recommendations to the Commission," provided that the recommendations concern "the prevention of discrimination of any kind relating to human rights . . . and the protection of racial, national, religious, and linguistic minorities." For guidance on the scope of the phrase "discrimination of any kind" one must look to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which forbid "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Treatment of detainees often depends on discrimination of these kinds and is there-

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30. 1975 Resolution, supra note 14, at operative para. 2(e).
33. Terms of Reference, supra note 25, para. (a).
35. Ethnic and racial discrimination in prisons of the United States is an example. A group of individuals and organizations submitted a complaint on this issue in 1972 to the United Nations for handling under the procedures of ECOSOC resolution 1503
fore a proper subject of Sub-Commission recommendations arising out of resolution 7. Protection of minorities also is involved, as such groups frequently have detention problems.36

In the context of a resolution 7 review, for example, it might be appropriate for the Sub-Commission in 1976 to elaborate on its 1975 recommendation to the Commission on the Status of Women.37 It could identify issues raised in its examination of relevant information and request that the Commission on the Status of Women be given copies of the information. In this connection, the Sub-Commission should perhaps invite a representative of the Commission on the Status of Women to participate in its discussions on sex discrimination in detention, in accordance with an earlier request of the Economic and Social Council.38

The Commission on the Status of Women is, of course, only one of many UN bodies that might aid the Sub-Commission. The Committee on Crime Prevention and Control, for example, might comment on technical assistance and other advisory services in connection with "the role of secret police39 in countries where training is inadequate." At (see notes 46 & 47 infra). G. Jackson et al., Communication on Human Rights, 1972, copy on file at California Law Review. See also, e.g., Bedau, Book Review, JURIS DOCTOR, Dec. 1972, at 41 ("job discrimination in prison industries, which like all other social differentiations within Attica, reflected the prevailing racial bias of the custodial staff"); San Francisco Chronicle, June 2, 1975, at 20 ("a brawl between white and Chicano prisoners").

Another example is detention in the Soviet Union for political or religious beliefs. According to an Amnesty International Study reported in TIME, Dec. 1, 1975, at 47, there are at least 10,000 such persons in the Soviet Union, often subjected to torture by hunger.

36. E.g. the report on Iraq in AMNESTY INTERNATIONAL, ANNUAL REPORT 1974/75, at 129 (1975) ("[Amnesty International] had received the names of 551 Kurdish civilians, including women and children, who had been detained, and 43 Kurds who had allegedly been tortured to death.").

37. The 1975 resolution "Recommends that the Commission on the Status of Women consider the special problems relating to the human rights of women detained or imprisoned . . . ." 1975 Resolution, supra note 14, at para. 3. That Commission will not have been able to respond because its next session is not to be held until after the Sub-Commission's 1976 session. Cf. Human Rights of Women Who Have Been Detained or Imprisoned, U.N. Doc. E/CN.4/Sub.2/NGO/55 (1975).

38. In its resolution 48, the Economic and Social Council requested the Sub-Commission "to invite the Commission on the Status of Women to send a representative to participate in its deliberations when items relating to discrimination based on sex are to be discussed." ECOSOC Res. 48, U.N. Doc. E/437, E/425, at 34-35, operative para. 5 (1947).


39. 1975 Resolution, supra note 14, at operative para. 2(d).

the 1975 session of the Commission on Human Rights, the representative of Iran made a plea for an understanding attitude toward violation of human rights in developing countries that lack well-trained police. Perhaps a country like Iran, often publicly accused of arbitrary arrests and torture, would be aided by an offer of training in police methods and administration of criminal justice. The Sub-Commission might recommend that the Committee on Crime Prevention and Control consider the possibility of increasing these services and making them readily available to governments especially in need of them.

C. "Studies"

Paragraph (a) of its terms of reference authorizes the Sub-Commission "to undertake studies" on discrimination and protection of minorities. The word "study" in UN human rights procedure sometimes is confusing since it can describe several distinct methods of work.

One type of study is the "thorough study of situations which reveal a consistent pattern of violations of human rights" done by the Commission pursuant to ECOSOC resolution 1235. The Sub-Commission has little direct involvement in this type of study, though it may recommend that a thorough study be made (as it did in the case of Chile in 1974 under the agenda item on detention). Further, the task of making a thorough study might be assigned to the Sub-Commission by the Commission for various reasons.

More important for the Sub-Commission's work are the types of studies it may initiate itself. It often has undertaken "special studies,"

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*Considering* that some developing countries, owing to the lack of technical and financial means, are unable to contribute to the control of narcotic drugs as effectively as they earnestly desire,

*...*

*Considers* that the United Nations system, through the United Nations Fund for Drug Abuse Control, can make a major contribution in this respect. . . .


which are scholarly discussions of miscellaneous topics that take Special Rapporteurs from two to five years to complete.\(^{45}\) Clearly they are ill-suited to resolution 7's annual review of developments regarding detention. Nevertheless, that annual review could be aided by background information certain special studies might provide.\(^{46}\)

The terms of reference do not expressly authorize the special study, and certainly they do not restrict the Sub-Commission to that type of study. Recently the Commission and Sub-Commission both have expressed dissatisfaction with the number of special studies on the Sub-Commission's agenda—10 of the 17 substantive items on the 1975 agenda were progress reports on studies underway.\(^{47}\) Guidelines for the Sub-Commission's work prepared in 1974 propose that "other studies" be made, on a shorter schedule and as a basis for future work plans.\(^{48}\) If completed during the session such studies would have an immediate impact and would impose no unusual financial burden on the Sub-Commission. At the 1975 session, a working group was requested to conduct such a sessional study.\(^{49}\) Of course some studies might require more time and would be appropriately extended until the next session.\(^{50}\)


\(^{46}\) Pending special studies in which the Sub-Commission should request data on detention include the following (citations are to recent progress reports on the studies):

(a) Mr. Capotorti's study on persons belonging to minorities, U.N. Doc. E/CN.4/Sub.2/L.621 (1975);


(c) Ms. Elles's study on individuals who are not citizens of the country in which they live, U.N. Doc. E/CN.4/Sub.2/L.628 (1975);

(d) Mr. Khalifa's study on the adverse consequences for human rights of assistance to colonial and racist regimes in southern Africa, U.N. Doc. E/CN.4/Sub.2/L.624 (1975);

(e) Mr. Martinez-Cobo's study on discrimination against indigenous populations, U.N. Doc. E/CN.4/Sub.2/L.622 (1975); and


The working group was assigned the task of studying the future work, making recommendations on a five-year programme of work, and considering the possibility of studying the consequences of the entry into force of the international covenants.


As the Sub-Commission itself recognized, two completed studies in the field of detention make a preliminary inquiry unnecessary at this stage. Many hypotheses are set forth and analyzed in the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the Study of the Right of Arrested Persons to Communicate with Those Whom it is Necessary for Them to Consult in order to Ensure Their Defence or to Protect Their Essential Interests.\(^1\) The Sub-Commission can now undertake studies of supplementary topics relating to detention.

For example, a member or a working group could study information received to single out those countries where the situation of detainees seems to have improved, with a view toward identifying the conditions and measures that permit such progress.\(^2\) Proposals for future work might include a request that UN public information services give such developments appropriate publicity.\(^3\)

The role of secret police and para-military organizations\(^4\) is another subject mentioned in the Sub-Commission’s 1975 resolution—one that might require a study for a full year or more, following an exploratory inquiry during the 1976 session. The Sub-Commission, after reviewing the information specifically requested on that topic, may see a

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53. The UN recognizes the role of public information in protecting rights. See United Nations Action in the Field of Human Rights, U.N. Doc. ST/HR/2, at 197-98 (1975). It sometime uses publicity to focus attention on violations; publicity on instances of protection of rights might also be worthwhile.

54. See, e.g., the comment of one Sub-Commission member as reported in the provisional records of the 1975 session:

The secret police of other countries were also well known. The South African BOSS, the AAA in Argentina, the Death Squad in Brazil, the secret police in Iran, etc. were often mentioned. It seemed, moreover, that, at present, the network was truly multi-national, and that secret police throughout the world were co-operating with each other and often beyond the control of Governments.

Another study might focus on a problem as it is experienced in one country. Indonesia, as noted above, is plagued by "prolonged and often indefinite detention of large numbers of unconvicted persons without formal charges brought against them," one of the problems emphasized in the Sub-Commission's 1975 resolution. The government has reported that due to a lack of judicial personnel it could not possibly process all its prisoners who ought to be scheduled for trial. A Sub-Commission member could study the matter to determine if an offer to arrange for pro tem judges or hearing officers might be useful. For Indonesian prisoners believed to be too politically dangerous for release in their own country but against whom sufficient evidence is not available, the Sub-Commission could even study the possibility of referring the government to the UN High Commissioner for Refugees for assistance in releasing those persons outside of Indonesia.

55. Data on secret police and para-military organizations are not necessarily secret. See, e.g., remarks of the Shah of Iran regarding SAVAK, in TIME, Nov. 4, 1974, at 34. If gathered together, such data could lead to a highly informative study. See, e.g., International Cartels Blamed in Repression, San Francisco Chronicle, Sept. 25, 1975, at 30; Brazil Said to Continue Torture, N.Y. Times, Nov. 4, 1974 ("the principal organization for anti-subversive activities is . . . a semiclandestine organization with personnel from various military and police branches"); Anderson, The CIA Linked to Foreign Police, San Francisco Chronicle, Jan. 15, 1975; The Word From Washington, The Progressive, Apr. 1975, at 12 ("For more than ten years OPS has been in the business of channeling technical and financial aid to police forces of some of the world's most repressive regimes."); American Traditions and Secret Police, SATURDAY REVIEW, Aug. 9, 1975, at 4.


57. See text accompanying notes 1-6 supra.

58. 1975 Resolution, supra note 14, at operative para. 2(a).

59. See note 3 supra.

60. Participation by the High Commissioner can be very effective. Cf. report of the High Commissioner regarding Chilean refugees, 28 GAOR Supp. 12A, para. 28, U.N. Doc. A/9012/Add.1 (1975); UNHCR Announces Peaceful Solution to Hostage Situation in Buenos Aires, UN Press Release WS/732, Oct. 17, 1975, at 6. See also Indonesia's Concentration Camps, 10 INT'L COMM'N JURISTS REV. 15, 19 (June 1973) ("If the suggestion is that they could not be allowed for their own safety to return to
Paragraph (b) of the Sub-Commission’s terms of reference authorizes it “to perform any other functions which may be entrusted to it by the Economic and Social Council (ECOSOC) or the Commission on Human Rights.”\(^\text{61}\) ECOSOC and the Commission already have entrusted to it three additional functions relevant to resolution 7.

1. \textit{Report on Violations}

In operative paragraph 2 of its resolution 8 of 1967, the Commission requested the Sub-Commission to prepare annually “a report containing information on violations of human rights . . . from all available sources,”\(^\text{62}\) and ECOSOC concurred with the request in its resolution 1235.\(^\text{63}\) It appears that the Sub-Commission has never prepared such a report, but resolution 7 now provides it with a basis for reporting to the Commission on violations of detainees’ rights. The report need not accuse or condemn named countries as violators, but rather could present troubling patterns—e.g., circumstances giving rise to the use of torture—and could illustrate with examples. The Commission could then use the report in its annual consideration of the question of violations, pursuant to operative paragraph 1 of its resolution 8 of 1967.\(^\text{64}\)

Two of the issues highlighted in the 1975 resolution that might be appropriate for a violations report are “judicial control over arrest and detention practices” and “judicial investigation into alleged illegal practices.”\(^\text{65}\) The Sub-Commission has already invited the Commission, in the 1975 resolution, to give urgent consideration to the Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the draft principles annexed to it.\(^\text{66}\) Since that study deals primarily with judicial and administrative rules and practices regarding detention, current information on related violations might be of great assistance to the Commission. The report also could provide the Commission with background information for determining whether amendments to the principles are advisable and whether certain principles are more basic, and thus call for more immediate attention than others.\(^\text{67}\)
2. **Bring Consistent Patterns of Violations to Commission’s Attention**

Operative paragraph 6 of the Commission’s resolution 8 assigns to the Sub-Commission a task of narrower scope: “to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms, in any country.”\(^{68}\) Although it focuses attention on problems of a specific country, this procedure involves neither a “gross violation” requirement nor the admissibility and confidentiality standards of the later-adopted procedure for dealing with individual communications.\(^{69}\) The Sub-Commission may simply pass a resolution pointing out to the Commision its concern over a situation, as it did regarding detention in Chile in 1974 and in Haiti and Greece in 1967.\(^{70}\) In addition it might submit its own study on a situation when referring it to the Commission. On the basis of the referral and other information, the Commission might decide to make a thorough study of the situation, pursuant to its authority under paragraph 3 of ECOSOC resolution 1235.\(^{71}\) It might even adopt a Sub-Commission study as its own.

A resolution 7 review is likely to disclose to the Sub-Commission situations that, although they may illustrate a worldwide practice, also reveal a consistent pattern of violations in one country. The Sub-Commission could bring these to the attention of the Commission by the referral procedure, with or without its own summary made pursuant to paragraph 2 of Commission resolution 8.\(^{72}\)

3. **Consider Communications Handled Under ECOSOC Resolution 728F**

Finally the Sub-Commission has been entrusted with duties involv-
ing the thousands of communications alleging human rights violations that are received by the Secretary-General each year and are handled under ECOSOC resolution 728F. ECOSOC authorized the Sub-Commission, in resolution 1503, to establish a pre-session working group to conduct a preliminary screening of the communications, according to special admissibility rules. Resolution 1503 also requested the Sub-Commission to consider the communications its working group selects, in order to determine whether it will refer to the Commission particular situations revealing "a consistent pattern of gross and reliably attested violations."

The information requested by the Sub-Commission for its resolution 7 review is of course quite separate and receives quite different treatment from the 728F communications. However, many of those communications do concern the rights of detainees. The magnitude of the detention problem, particularly the apparent existence of a worldwide pattern of torture, might induce the Sub-Commission to give priority treatment to the pertinent communications and to instruct its working group accordingly. Current methods do not permit the Sub-Commission to give close attention to all communications. It might therefore be efficient to concentrate, though not exclusively, on those dealing with detention, an area in which the Sub-Commission will be acquiring special expertise because of its annual review. The Sub-Commission could also invite the Commission to act with urgency on the detention-related situations referred according to resolution 1503.

III
ROLE OF OTHER BODIES IN THE NEW PROCEDURE

Resolution 7 and the supplemental 1975 resolution state that the Sub-Commission in its review will look at reliably attested information


75. See, e.g., text accompanying notes 18 & 19 supra.

76. Id. See also AMNESTY INTERNATIONAL, REPORT ON TORTURE (American ed. 1975).

77. The working group meets for two weeks prior to each session of the Sub-Commission. Private reports suggest that in the first three years of its operation it received
from governments, specialized agencies, regional intergovernmental organizations, and non-governmental organizations (NGOs) that are in consultative status with ECOSOC. Much information received by the UN is directly concerned with the rights of detainees. Some is handled through the procedure of resolution 1503; some is channeled to other bodies such as the Special Committee on Apartheid. The Sub-Commission apparently intended not to provide merely one more procedure for handling information already available to other bodies, but rather to establish a method for receiving information tailored to its own specific aims.

A. Methods of Providing Information

1. Written Submissions

   After the adoption of resolution 7, the Secretary-General requested the named sources to send him relevant information for transmission to the Sub-Commission. In 1975, the Sub-Commission had before it the replies to that request and asked the Secretary-General to make another request for its next session.

   While replies from governments, specialized agencies and regional inter-governmental organizations were reproduced in official UN documents distributed at the 1975 session, information from NGOs was not given similar treatment. Instead, during the last week of the session, dossiers containing photocopies of the NGOs' replies were distributed to members of the Sub-Commission. The Secretariat had indicated doubts over 44,000 communications. Apparently, in 1972 none were referred to the Commission; in 1973, 24 were referred; in 1974, 16 were referred. No official figures are available, since the UN Secretariat treats all aspects of the communication procedure as confidential. See sources cited in note 18 supra.

   78. Consultative arrangements between NGOs and ECOSOC or its subsidiary bodies are established in accordance with ECOSOC Res. 1296, 44 U.N. ECOSOC Supp. 1, at 21, U.N. Doc. E/4548 (1968).

   79. For example, UN Press Release GA/AP/501 (Sept. 17, 1975) reports that the Special Committee received a letter from the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., giving information on recent detentions in South Africa. A report from Program for Social Change, a South African organization, to the Special Committee led to the publication of particulars regarding detentions of Black leaders in South Africa in Unit on Apartheid, Notes and Documents, No. 34/74 (Dec. 1974). See also U.N. Doc. A/10156, at 22 (1975), including a paper outlining specific violations of human rights, presented by the International Defence and Aid Fund for Southern Africa to a meeting of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.


   81. 1975 Resolution, supra note 14, at operative para. 5.


about its authority to transmit information from NGOs which might not
conform with the requirements of resolution 7 ("reliably attested . . . in
good faith . . . not politically motivated"); and even its authority to
transmit replies concerning specific countries was questioned.84 In spite
of these hesitations the NGO information was eventually distributed,
though so shortly before discussion of the agenda item that members
had little time to examine it.85

After this experience, the Sub-Commission specifically requested in
its 1975 resolution that the Secretariat "submit timely in advance of its
next session . . . a synopsis of the materials received from non-govern-
mental organizations."86 A well-written synopsis could significantly aid
NGOs in communicating their information and ideas to the Sub-Com-
mission. Members often will not be able to read thoroughly all the NGO
documents—16 NGOs submitted replies in 1975, some quite lengthy.87
Yet members could use a synopsis to select data relevant to their
concerns. If photocopies are again distributed in dossier form, or if
the orginals are made available for consultation, members will be able to
consult in full those replies they find especially useful to their work.
Inapt or poorly prepared material from some NGOs thus would not
distract attention from the highly valuable and precise information that
others submit.

Whether or not NGOs' replies are given wide distribution, resolu-
tion 7 contains no confidentiality requirements for anyone involved—
Secretariat, Sub-Commission members, governments, or organizations.
Information can be discussed in open meetings of the Sub-Commission,
and NGOs can publicize their replies and the Sub-Commission's actions
with assurance that they will not be violating UN rules.88

2. Written and Oral Interventions

Representatives of governments, specialized agencies, regional in-
tergovernmental organizations, and NGOs are entitled to attend Sub-

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85. The dossiers were distributed only hours before discussion began, and some
members mentioned lack of time to study documents as an explanation for the limited
(provisional).
86. 1975 Resolution, supra note 14, at operative para. 5.
87. For example, the International Commission of Jurists submitted a 20-page
memorandum (May 1975), and Amnesty International sent a covering letter with re-
ports and documents concerning ten different countries (June 1975) (copies on file at
California Law Review).
88. Publicized reports on actions regarding the resolution 1503 procedure for deal-
ing with communications led ECOSOC in 1975 to remind NGOs that they must observe
strictly the confidentiality provisions. ECOSOC Res. 1919, 58 U.N. ECOSOC Supp.
Commission meetings and to make oral and written interventions relevant to its work.\textsuperscript{80} The intervention can be a very useful, supplemental (or alternative) method of providing information for a resolution review.

Recent NGO use of the intervention at meetings of UN bodies to make allegations against specific countries has led the Commission to fear abuse of the privilege, and a 1975 ECOSOC resolution reminded NGOs that they must refrain from "systematically engaging in unsubstantiated or politically motivated acts against States Members."\textsuperscript{90} NGOs intervening on the question of detention should be certain that charges they make meet these requirements.

Written interventions by an NGO must also comply with paragraph 29 of ECOSOC resolution 1296, \textit{i.e.}, they must concern subjects on which the organization has a special competence.\textsuperscript{91} The kinds of information and suggestions NGOs receive and then distribute regarding the rights of detainees demonstrate that many of them do have a special competence regarding detention that could valuably be utilized by the Sub-Commission.

\section*{B. Appropriate Types of Information}

\subsection*{1. From Governments}

The 13 governments submitting information in 1975 limited themselves almost entirely to recitations of statutory prescriptions concerning detention in their countries.\textsuperscript{92} That kind of report is of limited value without some indication of how in fact the laws are applied. A government proud of its national legislation should be willing to supply examples of the preventive or corrective effects. A new procedure for judicial review, for instance, may or may not have shortened the average length of detention without trial; and the establishment of a complaint procedure may or may not have improved conditions in prisons.

While governments traditionally are not expected to confess current

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sins, they could still provide information on past problems that have been overcome. Extreme examples are Greece, Portugal, and Mozambique. The new governments could reveal much about the practices they discovered when they unbarred prisons after years of repression and could explain what they have done to help assure that comparable acts are not committed in prisons now. Britain exemplifies a country that has handled some problems of arbitrary detention, torture, and mistreatment without a radical political change. The procedures used for its investigations, the results, and the corrective measures taken could all be summarized for the Sub-Commission and might well be enlightening for other governments.\footnote{See U.N. Doc. E/CN.4/NGO/183 (1975).} Morocco, which did respond to resolution 7 in 1975, noted, "It should be added that Morocco has not, in cases of exceptional public emergency, taken or been obliged to take any measures derogating from human rights and especially those rights dealt with in this note . . . ."\footnote{U.N. Doc. E/CN.4/Sub.2/359, Annex I, at 18 (1975).} It should be of great interest to the Sub-Commission to know how Morocco has avoided the derogations so many other governments have felt impelled to make.\footnote{Article 4 of the International Covenant on Civil and Political Rights recognizes that most rights, including many of those listed in resolution 7, may be derogated to a limited extent in time of public emergency. Human Rights: A Compilation of International Instruments of the United Nations, U.N. Doc. ST/HR/1, at 8 (1973). See also note 104 infra.} Another country, Mexico, offered the information that great progress recently has been achieved in the prison system there.\footnote{U.N. Doc. E/CN.4/Sub.2/359, Annex I, at 19 (1975). But \textit{cf.} reports of mistreatment of American prisoners in Mexican jails; \textit{e.g.}, San Francisco Chronicle, Oct. 23, 1975, at 15, col. 1-2, (Congressman Fortney H. Stark stated, "We have heard of people arrested on minor traffic charges who were jabbed in the genitals with cattle prods.").} Since Mexico faces several problems in common with many other countries, details as to how it handles them could be quite useful.

Perhaps the Sub-Commission should make specific requests of governments for the information it needs, beyond simply recommending major issues for emphasis. By seeking identified data it could benefit from the unique opportunity it has to request information of more than 140 governments, a request that most other human rights experts cannot realistically make.

Information from governments may also be obtained through other UN bodies. The Secretary-General receives periodic reports on implementation of the Standard Minimum Rules for the Treatment of Prison-
The Commission on Human Rights receives periodic reports on civil and political rights, with one section covering freedom from torture and another section on freedom from arbitrary arrest and detention and related protections. These reports are not made every year, but when they are the Sub-Commission might wish to include them in its resolution 7 review. Occasionally, such reports appear to conflict with information received from other sources. In those cases, or where the information appears incomplete or unclear, the Sub-Commission might adopt a method like that of the UN Committee on the Elimination of Racial Discrimination by requesting a further report from that government with more particulars.

2. From International Bodies

Specialized agencies and regional intergovernmental organizations replied in 1975 with a variety of information but did not seem to direct it toward any concrete action on the part of the Sub-Commission. They also showed a tendency to report, like governments, that all goes well in their domains.

More penetrating comment surely would be of value, and now that the Sub-Commission has signalled major topics for consideration in 1976, these bodies should provide pertinent details from their experience—problems encountered, remedies tried, questions still unanswered.

Another contribution by the international bodies could be to point out areas needing further attention. For example, the United Nations...
Educational, Scientific and Cultural Organization (UNESCO) in its response suggested that the Sub-Commission focus on the precise meaning of the phrase "derogating from certain rights under certain conditions" in preambular paragraph 3 of resolution 7. It might have suggested further that the special study on limitations of human rights currently being conducted by one Sub-Commission member include an introductory inquiry on the subject of derogation of detainees' rights.

Direct information regarding violations of detainees' rights received by the various bodies could also be sent to the Sub-Commission. The International Labour Organisation did provide information on one country by sending the report of its Fact-Finding and Conciliation Commission on Freedom of Association concerning Chile, drawing attention to the particularly relevant paragraphs. Other bodies may be able to report on certain types of violations—the World Health Organization on participation of medical personnel in torture, for example.

3. From Non-Governmental Organizations in Consultative Status with ECOSOC

For NGOs, requests from a UN human rights body too frequently are seized upon as occasions to present entire files, often unorganized, of allegations against one or more countries. The response to Sub-Commission resolution 8 of 1974 on Chile is an example. Hundreds of pages of poorly prepared, repetitive reports on violations were sent to the Commission. Few, if any, NGOs stated what they hoped the Commission would do to improve the situation in Chile. Though at first glance the volume of allegations might have seemed impressive, it is doubtful whether bulk alone helped Commission members to direct their efforts.

102. Id. at 13.
103. Resolution 7, supra note 14, at preambular para. 3.

Defining permitted derogations is important to the problem of detention because it is often during a public emergency that arbitrary arrests, torture, and other mistreatment take place on a large scale. The International Covenant on Civil and Political Rights proscribes any derogation from some rights, such as freedom from torture, but permits derogations from other rights under certain rather vaguely stated conditions. See sources cited in note 95 supra; 1975 Resolution, supra note 14, at operative para. 1.

Information supplied for the resolution 7 review should be carefully adapted to the aims and possibilities of that procedure. Complaints against named countries usually will be less appropriate than information bearing on widespread practices. The Sub-Commission has shown that initially it intends to consider many issues relating to detainees’ rights, not merely to accuse violators of those rights. Too many violators already are well known, and NGOs have other channels for making accusations.\(^ {108} \) Causes and solutions are less well known, so encouraging the investigation of these may be the most helpful task NGOs can undertake. Yet comments of members at the 1975 session indicated a desire to deal with the over-all issues by examining actual situations.\(^ {109} \) Therefore detailed information about one country might be useful if it illustrates a type of problem. The use of a number of examples could be even more effective and less likely to provoke “acrimonious political debate,” in the words of one Sub-Commission member.\(^ {110} \)

The goals of resolution 7 imply that NGOs should organize their information around two essential points. First, information regarding violations of human rights should attempt to show circumstances and actions that give rise to the violations.\(^ {111} \) Second and most important, NGOs should submit information only when they have some idea of how the Sub-Commission could act regarding the problems posed. For this purpose, NGOs should study the powers of the Sub-Commission and envision their application to the cases at hand. Concrete suggestions could be included.\(^ {112} \) Because these two points are not taken into account in most material prepared for public distribution, NGOs should hesitate to submit solely that kind of material, unrevised.\(^ {113} \)

The subjects of the information will of course be varied. The scope of resolution 7 is extremely broad, reaching from prisons to mental

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\(^ {108} \) See note 114 infra.


\(^ {111} \) This approach, taken by at least one NGO in its 1975 submission, was commended during Sub-Commission discussions. Id.


\(^ {113} \) But cf. AMNESTY INTERNATIONAL, WORKSHOP ON HUMAN RIGHTS: REPORT AND RECOMMENDATIONS (1975). This 15-page booklet is organized around the two points of conditions giving rise to incidents of torture and recommendations for action. Workshop participants including former prisoners and torture victims from Greece and Portugal attempted to generalize from their experience and information on the patterns of torture, the effect of international action, and further steps that may help prevent torture. Note that this method is parallel to the one suggested in this Comment for the Sub-Commission. Inexplicably, Amnesty International did not include the booklet in its submission to the Sub-Commission in 1975. See note 87 supra.
institutions and from arrest procedures to forcible use of drugs. At least in the early stages, the new procedure cannot be expected to deal thoroughly with all those problems. The Sub-Commission has pointed out the issues it considers most pressing, and NGOs would do well to follow its suggestions unless they have truly persuasive information and ideas on other areas the Sub-Commission might find equally urgent. Moreover, if NGOs are interested in strengthening the procedure and developing it as a workable device, they will select only the most usefully illuminating cases out of volumes of relevant information they may have.

One consideration NGOs might take into account in selecting information for resolution 7 is the existence of other channels, such as mass media and the regional intergovernmental organizations, as well as other UN bodies. While not mutually exclusive, some channels may be more effective than others in certain situations. Information about detainees in South Africa, for example, may be submitted to the Special Committee on Apartheid or to the Ad Hoc Working Group of Experts on Southern Africa, which will give it close attention and perhaps hear testimony. Information on the same situation could also be sent to the Sub-Commission for consideration under resolution 7, but it should be reframed to fit the methods and purposes of that procedure.

Certain practical problems must also be considered by NGOs. Information intended for a resolution 7 review should be appropriately labelled when sent to the Secretary-General; otherwise it may be handled as a communication "received under resolution 728F" and, if it names countries, quickly ushered into the secret labyrinth of resolution 1503. If NGO information is not distributed as official UN documentation, translation probably will not be provided by the Secretariat. Therefore NGOs may wish to keep their replies brief and in a language most Sub-Commission members can read, or else provide their own translations. As the Secretariat will be preparing a synopsis of the information, an NGO should consider organizing and outlining its information carefully so as to facilitate a summary which reflects its


116. See notes 73 and 74 and accompanying text supra.
intentions; or indeed it may provide its own synopsis for use by the Secretariat. It would be worthwhile to indicate whether the NGO has additional information that it is prepared to make available should the Secretariat or Sub-Commission deem it useful. Finally, NGOs should remember that since resolution 7 is not confidential, they may discuss their information publicly and, further, may make oral and written interventions at the Sub-Commission meetings to comment on and add to their written submissions.

4. From Others

NGOs without consultative status in ECOSOC, individuals, the media, and others also may have useful data and ideas on protection of detainees' rights. Because the Sub-Commission has not decided to include their information in its resolution 7 review,\footnote{117} they should seek out complementary channels. They might contact a government or organization that does have direct access to the Sub-Commission, or they might publicize their message so these groups or Sub-Commission members may be influenced to raise the issues themselves. Finally, they should not overlook other procedures for providing their information to different UN bodies.\footnote{118}


\footnote{118. See note 114 supra. Access to many of the other procedures is not as limited as is the case for resolution 7.
APPENDIX A

Resolution 7 (1974):

THE QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Gravely concerned at numerous reports that violations of the basic human rights of persons detained or imprisoned persist in various parts of the world,

Believing 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 right to be tried in his 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; and the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law at the time when it was committed, nor to get a heavier penalty than the one that was applicable at the time when the criminal offence was committed,

Considering 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, article 4, paragraph 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,

Noting that torture and other forms of cruel, inhuman or degrading treatment and punishment are flagrant violations of human rights that continue to occur notwithstanding their rejection by the General Assembly in resolution 3059 (XXVIII), and that all available information suggests that in several countries there may be a consistent pattern of such violations,
1. Decides 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 will take into account any reliably attested information from Governments, the specialized agencies, the regional intergovernmental 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 principles of the Charter of the United Nations;

2. Requests the Secretary-General to transmit to the Sub-Commission the information referred to in paragraph 1 above.

APPENDIX B

1975 Resolution:

THE QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Noting the conviction expressed in General Assembly resolution 3218 (XXIX) that, because of the increase in the number of alarming reports on torture, further and sustained efforts are necessary to protect under all circumstances the basic human right to be free from torture and other cruel, inhuman or degrading treatment or punishment,

Mindful that the General Assembly noted with appreciation the decision of the Sub-Commission in its resolution 7(XXVII) to review annually the developments in the field of the human rights of persons subjected to any form of detention or imprisonment,

Noting with interest the information received from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council pursuant to paragraph 1 of its resolution 7 (XXVII),

1. Reminds Governments and all other authorities concerned that the entry into force of the Covenant on Civil and Political Rights would lend further legal support to the safeguard of the human rights of persons subject to any form of detention or imprisonment and that that Covenant does not allow any derogation from the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

2. Takes 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.

3. Recommends that the Commission on the Status of Women consider the special problems relating to the human rights of women detained or imprisoned;

4. Invites the Commission on Human Rights to give urgent consideration to the Study on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the draft principles annexed to it;

5. Requests the Secretary-General to invite, in view of the next annual review in this field at its twenty-ninth session, Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council concerned to provide any reliably attested information in particular relating to the problems mentioned in paragraphs 2 and 3 above, and further requests the Secretary-General to submit timely in advance of its next session the information received from Governments, specialized agencies and regional intergovernmental organizations together with a synopsis of the materials received from non-governmental organizations;

6. Also requests the Secretary-General to make available to the Sub-Commission a report on the work done by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in as much as it touches upon the question of the human rights of persons subjected to any form of detention or imprisonment.