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## The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights

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congress convenes in 1990, it will no longer be an exclusively governmental domain, but more of a public exchange between governments and Indian organizations—which, after all, can represent a more concrete achievement than paper declarations.

RUSSEL LAWRENCE BARSH\*

#### THE THREE “THEME” SPECIAL RAPPORTEURS OF THE UN COMMISSION ON HUMAN RIGHTS

In March 1982, the United Nations Commission on Human Rights initiated the appointment of a Special Rapporteur on Summary or Arbitrary Executions. The Special Rapporteur on Summary or Arbitrary Executions has done far more than merely study that grave human rights problem; he has received complaints about impending and past executions, issued appeals to governments about threatened executions and the need to investigate past killings, and reported publicly on much of his activity. The Commission on Human Rights not only has renewed the Special Rapporteur on Summary or Arbitrary Executions in its subsequent annual sessions, but has followed this precedent by appointing in 1985 a similar Special Rapporteur on Torture and in 1986 a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief.

The development of the “theme” special rapporteur is a relatively new and remarkably flexible approach to implementing international human rights norms. Although the concept grew out of the practice of the Working Group on Enforced or Involuntary Disappearances, the special rapporteur, as a single individual of recognized international standing, is ordinarily less expensive and less visible, as well as more efficient, than the five-member working group in achieving similar objectives.

#### *The Working Group on Enforced or Involuntary Disappearances*

The Working Group on Enforced or Involuntary Disappearances, which was initiated by the Commission on Human Rights in 1980,<sup>1</sup> has developed an effective approach to coping with the human rights violations within its narrow mandate.<sup>2</sup> The evolution of the working group not only has given guidance to the special rapporteurs, but has presaged how their activities will develop.

\* The author attended the congress as an observer for the Four Directions Council, a non-governmental organization in consultative status with the United Nations Economic and Social Council, and foreign affairs officer for the Sante' Mawi'omi wjit Mikmaq (Mikmaq Grand Council).

<sup>1</sup> Comm'n on Human Rights [hereinafter cited as CHR] Res. 20 (XXXVI), UN Doc. E/CN.4/1408, at 180 (1980).

<sup>2</sup> See Berman & Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531, 557-59 (1982); Reports of the Working Group on Enforced or Involuntary Disappearances, UN Docs. E/CN.4/1435 (1981); E/CN.4/1492 (1981); E/CN.4/1983/14; E/CN.4/1984/21 and Add.1; E/CN.4/1985/15; E/CN.4/1986/18.

The resolution that established the Working Group on Enforced or Involuntary Disappearances gave that body of five members authority (1) to "examine questions relevant to enforced or involuntary disappearances"; (2) to "seek and receive information from governments, intergovernmental organizations, humanitarian organizations and other reliable sources"; and (3) "to bear in mind the need to be able to respond effectively to information that comes before it and to carry out its work with discretion." It was directed to report to the Commission's next session.<sup>3</sup> While the mandate of the working group to "examine questions" might at first glance appear to suggest an academic study of the issue, the working group relied principally upon its authority to "respond effectively" in raising specific cases of disappearances and in requesting responses from governments without seeking any publicity about the cases.

After receiving the working group's first report,<sup>4</sup> the Commission extended the group's tenure for another year, but made several significant changes in its mandate to reflect both approval of and some limitations on its activities.<sup>5</sup> The Commission noted that governments had not always given the working group the full cooperation "warranted by its strictly humanitarian objectives and its working methods based on discretion."<sup>6</sup> The working group had embarrassed the Argentine Government by reprinting its reply<sup>7</sup> in full, and thus the group was reminded "to discharge its mandate with discretion"; on the one hand, it should "protect persons providing information," and on the other, "limit the dissemination of information provided by Governments."

While the Commission simply extended the working group's mandate in 1982 and 1983 without making significant changes, it did express "complete confidence" in the group.<sup>8</sup> In 1984 the Commission for the first time requested that the working group "help eliminate the practice of enforced or involuntary disappearances" and encouraged governments to permit the group to make site visits to fulfill "its mandate more effectively."<sup>9</sup> The Commission continued this approach in 1985.<sup>10</sup>

The working group's sixth annual report, delivered to the Commission in 1986,<sup>11</sup> follows the general approach of the group's previous reports.<sup>12</sup> In 1985, for example, the group reported having received 4,500 allegations of enforced or involuntary disappearances and it had transmitted some 2,200 sufficiently documented cases to various governments.<sup>13</sup> The 1986 report

<sup>3</sup> CHR Res. 20, *supra* note 1, at 180-81.

<sup>4</sup> UN Doc. E/CN.4/1435 and Add.1 (1981).

<sup>5</sup> CHR Res. 10 (XXXVII), UN Doc. E/CN.4/1475, at 209-10 (1981).

<sup>6</sup> *Id.*

<sup>7</sup> UN Doc. E/CN.4/1435, Ann. IX (1981); *see also id.*, Anns. XI and XII.

<sup>8</sup> CHR Res. 1982/24, UN Doc. E/CN.4/1982/20, at 139-40; CHR Res. 1983/20, UN Doc. E/CN.4/1983/60, at 148-49.

<sup>9</sup> CHR Res. 1984/24, UN Doc. E/CN.4/1984/77, at 57-58.

<sup>10</sup> CHR Res. 1985/20, UN Doc. E/CN.4/1985/66, at 53-54.

<sup>11</sup> UN Doc. E/CN.4/1986/18.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 5.

names the 34 countries about which information on disappearances had been received. It provides data for all 34 countries on the number of cases reported, the efforts of the government to clarify them and the number resolved. As for the 16 countries with a hundred or more disappearances, the report—besides assessing the reported cases and the efforts to resolve them—in a new departure includes a historical graph tracing the occurrence of disappearances over the years. While the report does not correlate the frequency of disappearances with changes in governmental leadership and other aspects of the situation in each nation, such a correlation could easily be accomplished by interested analysts.

The working group has visited five countries altogether. For the first time in 1986, it issued a separate fact-finding account, which concerns a visit to Peru.<sup>14</sup> The report is well prepared and thorough, and a very useful guide to the situation there.

For the second year in a row, the working group recommended to the Commission that its mandate be extended for 2 years rather than just one, as had been the practice with working groups, special rapporteurs and special representatives.<sup>15</sup> In 1986 the Commission granted the request on an experimental basis, with the understanding that the group would continue to report on an annual basis.<sup>16</sup> Next year there will probably be a similar proposal to extend the mandate of the Special Rapporteur on Summary or Arbitrary Executions or that of the Special Rapporteur on Torture.

The Working Group on Enforced or Involuntary Disappearances has developed incrementally into an effective human rights implementation mechanism on no broader a consensual basis than a consensus of the Commission on Human Rights and without the authority of any human rights treaty beyond the United Nations Charter. The special rapporteurs are gradually following in the footsteps of the working group.

### *The Special Rapporteur on Summary or Arbitrary Executions*

The Special Rapporteur on Summary or Arbitrary Executions was the first special rapporteur on a theme or particular kind of human rights violation. The 1982 mandate of the special rapporteur was styled to some extent upon the 1980 resolution that established the working group, that is, to “examine the questions related to summary or arbitrary executions” and to report annually to the Commission on the rapporteur’s activities.<sup>17</sup>

The Commission had for several years been appointing special rapporteurs and special representatives for particular countries. For example, at its 1986 session the Commission on Human Rights received fact-finding reports from special rapporteurs or special representatives on human rights situations in

<sup>14</sup> UN Doc. E/CN.4/1986/18/Add.1.

<sup>15</sup> UN Doc. E/CN.4/1986/18, at 108.

<sup>16</sup> UN Doc. E/CN.4/1986/L.76, adopted with one amendment and without a vote on Mar. 13, 1986.

<sup>17</sup> CHR Res. 1982/29, UN Doc. E/CN.4/1982/30, at 2–3, 147.

Afghanistan,<sup>18</sup> Chile,<sup>19</sup> El Salvador,<sup>20</sup> Guatemala<sup>21</sup> and Iran.<sup>22</sup> These "country" investigators can provide thorough, relatively detailed, well-analyzed reports that establish what the international community knows about particular situations. They make contacts with the government concerned and may thus attempt to encourage resolution of the human rights problems in question, but they are not authorized to "respond effectively" to violations.<sup>23</sup> They are necessarily less balanced and less global than the theme special rapporteurs who look at a human rights phenomenon wherever it appears around the world. Both types of special rapporteurs, however, rely on similar sources of information, including nongovernmental organizations such as Americas Watch, Amnesty International, Helsinki Watch, the International Commission of Jurists, the International Human Rights Law Group, the International League for Human Rights, the Lawyers Committee for Human Rights and a number of national human rights organizations.

Although his position was initiated in March 1982 and his authority confirmed by the Economic and Social Council in May 1982, the first Special Rapporteur on Summary or Arbitrary Executions, Amos Wako of Kenya, was not actually appointed by the Chairman of the Human Rights Commission until August of that year. Rather than take the incremental approach handed down by the Working Group on Enforced or Involuntary Disappearances, Mr. Wako's first report attempted to begin at the level of activity that the working group had achieved after several years. He evidently failed to note that the authorizing resolution did not instruct him to "respond effectively," but only to gather information, examine the question and report to the Commission.<sup>24</sup> Instead, he had ambitiously identified 37 governments that had allegedly been responsible for summary or arbitrary executions; he had then sent the allegations to those governments, and the responses of 16 of them were summarized forthrightly in his report.<sup>25</sup>

This first report was roundly criticized by members of the Commission—particularly by representatives of the governments that had been discussed. Consequently, Mr. Wako was again in 1983 not given authority to "respond effectively" to summary or arbitrary killings. His second and third reports omitted most references to countries,<sup>26</sup> except for reprinting the telexes he

<sup>18</sup> UN Doc. E/CN.4/1986/24; see UN Doc. A/40/843 (1986). The Commission also for many years has appointed special rapporteurs to engage in various studies without expecting that they would take action on human rights violations. See, e.g., Rannat, Study of Equality in the Administration of Justice, UN Doc. E/CN.4/Sub.2/296/Rev.1 (1972); Inglés, Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963).

<sup>19</sup> UN Doc. E/CN.4/1986/2; see UN Doc. A/40/647 (1985).

<sup>20</sup> UN Doc. E/CN.4/1986/22; see UN Doc. A/40/818 (1985).

<sup>21</sup> UN Doc. E/CN.4/1986/23; see UN Doc. A/40/865 (1986).

<sup>22</sup> UN Doc. A/40/874 (1985). The special representative of the Commission presented an interim report to the General Assembly, but resigned before he had completed his report to the Commission.

<sup>23</sup> See, e.g., CHR Res. 1985/35, UN Doc. E/CN.4/1985/66, at 74 (mandate of special rapporteur on El Salvador).

<sup>24</sup> CHR Res. 1982/29, *supra* note 17, at 147.

<sup>25</sup> UN Doc. E/CN.4/1983/16.

<sup>26</sup> UN Docs. E/CN.4/1984/29 and E/CN.4/1985/17.

had continued to send, without clear authority, in an attempt to avert specific summary or arbitrary executions. Accordingly, the special rapporteur's reports became less controversial; his mandate was more easily renewed in 1984<sup>27</sup> and 1985,<sup>28</sup> and he was finally given authority to "respond effectively to information that comes before him."

The fourth report<sup>29</sup> largely returned to the practice of identifying the governments that had allegedly engaged in summary or arbitrary executions. Indeed, the greatest part of the report contained the substance of the special rapporteur's appeals against summary or arbitrary executions during the previous year, the requests made by the special rapporteur for information about past executions and the responses of governments. This laudable record demonstrated that the special rapporteur had finally achieved the credibility he had sought at first and that his initially weak authority had been enhanced by the Commission. The report indicates that the special rapporteur has been quite active in pursuing his mandate and in attempting to prevent summary or arbitrary executions. The report makes no effort, however, to resolve the issues raised by the allegations and the replies of governments, and it makes only a rudimentary effort to synthesize the material presented and to draw useful conclusions and recommendations.

Two aspects of the special rapporteur's fourth report may illustrate its defects and the potential for future work. These two aspects relate to juvenile executions and the development of standards for the adequate investigation of suspicious deaths, including adequate autopsies.

*Juvenile Executions.* In his fourth report, the special rapporteur notes that he made an appeal to the Minister of Foreign Affairs of Bangladesh to prevent the execution of a student aged 16 or 17 who had been condemned to death by a special military court in Dhaka.<sup>30</sup> The report fails to recount that the special rapporteur had made appeals to the Government of the United States on behalf of two youths who faced execution in South Carolina and Texas for offenses committed while they were under the age of 18. The U.S. Government apparently responded to the appeal on behalf of the Texas youth; it questioned the special rapporteur's authority to make such appeals. Instead of reprinting the appeals and the response, the special rapporteur made the following statement in the last paragraph of his report:

In conclusion, the Special Rapporteur would like to refer to one issue which he feels deserving of further consideration by the Commission. The International Covenant on Civil and Political Rights proscribes the application of the death penalty to anyone below the age of 18 at the time when the offence was committed. While some reservations have been formally entered to this provision, the Covenant nevertheless has a special status, having been proclaimed and adopted by the General Assembly and having received for the most part widespread acknowledgement throughout the international community. In some recent

<sup>27</sup> CHR Res. 1984/50, UN Doc. E/CN.4/1984/77, at 8-9, 85.

<sup>28</sup> CHR Res. 1985/37, UN Doc. E/CN.4/1985/66, at 3-5, 79 (adding "in particular when a summary or arbitrary execution is imminent or threatened").

<sup>29</sup> UN Doc. E/CN.4/1986/21.

<sup>30</sup> *Id.* at 4-5.

instances the attention of the Special Rapporteur has been drawn to persons executed or about to be executed, having been duly convicted and sentenced in accordance with the law although it has been established beyond doubt that they were under 18 years of age when the crimes in question were committed. These executions have posed a difficult principle for the Special Rapporteur because, while it is clear that the persons in question were duly tried and sentenced and had every opportunity to appeal, the point nevertheless remains that a United Nations standard of global validity was not adhered to. The Special Rapporteur feels that this issue deserves further examination and he would be grateful for such guidance as the Commission may be able to offer on this question.<sup>31</sup>

In response to this request for advice, the Norwegian delegate stated that the

Special Rapporteur has, quite rightly, reminded us that the International Covenant on Civil and Political Rights prohibits the application of the death penalty to anyone below the age of 18 when the offence was committed. The Norwegian Government agrees that this issue deserves further examination. We believe that such cases are within the mandate of the Special Rapporteur and should be included in future reports.<sup>32</sup>

This advice is particularly significant because Norway was the chief sponsor of the resolution<sup>33</sup> that extended the mandate of the special rapporteur and because this view was not contradicted by any other delegation.

Amnesty International and one other nongovernmental organization elaborated on the Norwegian views by recalling that Article 6(5) of the International Covenant on Civil and Political Rights provides that the sentence of "death shall not be imposed for crimes committed by persons below eighteen years of age."<sup>34</sup> This provision may not be the subject of derogation under any circumstances. Similar provisions are found in Article 4(5) of the American Convention on Human Rights<sup>35</sup> and Article 68 of the Geneva Convention on the Protection of Civilians in Time of War.<sup>36</sup> The special rapporteur notes in his report that "some reservations" have been entered to Article 6(5) of the Covenant, but this statement appears to be incorrect. No government has made a reservation on the prohibition of juvenile executions.<sup>37</sup>

<sup>31</sup> *Id.* at 100.

<sup>32</sup> Statement by Representative of Norway to Commission on Human Rights, Mar. 6, 1986, at 10 (in the author's files).

<sup>33</sup> UN Doc. E/CN.4/1986/L.68, adopted without a vote on Mar. 11, 1986.

<sup>34</sup> Art. 6(5), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

<sup>35</sup> ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 29, Art. 4(5), OEA/Ser.L/V/II.60, doc. 28, rev.1 (1983).

<sup>36</sup> Art. 68, Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 (entered into force Oct. 21, 1950).

<sup>37</sup> In proposing a general reservation to the death penalty limitations of Article 6 of the Civil

Over two-thirds of the governments of the world have entirely rejected executions of juveniles by having ratified either the International Covenant or the American Convention, or both; having abolished the death penalty totally or allowing it for exceptional crimes only; or having exempted juveniles from the death penalty. In those countries which still permit the death penalty, juvenile executions are exceedingly rare in practice. Since 1979 there have been 11,000 executions in 80 countries; but only 7 of them in five countries were for offenses committed while under the age of 18.<sup>38</sup>

The rapporteur's mandate clearly encompasses appeals to prevent the execution of juvenile offenders. The special rapporteur may be guided in this regard by the UN Secretary-General; in January of this year, he issued a public appeal for the life of a young man in South Carolina who was 17 at the time of his offense but had a mental age of only 12. Javier Pérez de Cuéllar acted pursuant to General Assembly Resolution 36/22, which called upon the Secretary-General "to use his best endeavours in cases where the minimum standard of legal safeguards [in the International Covenant on Civil and Political Rights] appears not to have been respected."<sup>39</sup> Commission on Human Rights Resolution 1985/37 confers essentially the same mandate on Special Rapporteur Wako: "to respond effectively to information that comes before him, in particular when a summary or arbitrary execution is imminent or threatened."<sup>40</sup> Considering this mandate, the discussion at the 42d session of the Commission ought to constitute sufficient guidance for the special rapporteur to continue his efforts to prevent the execution of youthful offenders.

*Investigations of Suspicious Deaths.* On December 13, 1985, the General Assembly adopted Resolution 40/143 on summary or arbitrary executions; it requested that the special rapporteur "consider in his next report possible measures to be taken by the appropriate authorities when a death occurs in custody, including adequate autopsy."<sup>41</sup> In only a few weeks, the special rapporteur's report was scheduled for submission to the February–March 1986 session of the Human Rights Commission. His initial response appeared in the following paragraph:

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and Political Covenant, the Department of State declared that its purpose was "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 1, 55 (1979) (response by Department of State).

<sup>38</sup> See Letter from Eric Prokosch, Coordinator of Amnesty International Program for the Abolition of the Death Penalty, to Mary E. McClymont, Feb. 19, 1986: "In addition, Amnesty International received a number of reports of executions of prisoners under 18 years old in Iran, but the organization was unable to give an exact total."

<sup>39</sup> GA Res. 36/22, 36 UN GAOR Supp. (No. 51) at 168, UN Doc. A/36/51 (1982). The resolution specifically refers to "the provisions on capital punishment in the International Covenant on Civil and Political Rights, particularly its articles 6, 14 and 15." Furthermore, in General Assembly Resolution 35/172, entitled "Arbitrary or summary executions," member states are urged to "respect as a minimum standard the content of the provisions of articles 6, 14, and 15 of the International Covenant on Civil and Political Rights." GA Res. 35/172, 35 UN GAOR Supp. (No. 48) at 195, UN Doc. A/35/48 (1981).

<sup>40</sup> CHR Res. 1985/37, UN Doc. E/CN.4/1985/66, at 79.

<sup>41</sup> GA Res. 40/143 (Dec. 13, 1985).



One of the ways in which Governments can show that they want this abhorrent phenomenon of arbitrary or summary executions eliminated is by investigating, holding inquests, prosecuting and punishing those found guilty. There is therefore a need to develop international standards designed to ensure that investigations are conducted into all cases of suspicious death and in particular those at the hands of the law enforcement agencies in all situations. Such standards should include adequate autopsy. A death in any type of custody should be regarded as *prima facie* a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption. The results of investigations should be made public.<sup>42</sup>

One nongovernmental organization<sup>43</sup> commented on the need for international standards on the investigation of suspicious deaths, including adequate autopsy. There are many reasons for such standards, the most basic of which is to ensure that an adequate autopsy and investigation are performed in the often too brief time when an optimal autopsy examination and investigation are possible. In controversial cases, proponents of different interpretations may take advantage of any shortcomings in the investigation; it therefore behooves forensic physicians and other investigators to tolerate as few omissions or discrepancies as possible. Finally and perhaps most importantly, the existence of internationally accepted standards will enable the international community of forensic scientists, police officers, prosecuting lawyers and judges to provide support, some protection and autonomy for physicians and investigators who might otherwise be intimidated by their governments or other groups into performing inadequate investigations or reaching unjustified conclusions.

In response to such concerns, the Commission on Human Rights took note of "the need to develop international standards designed to ensure that proper investigations are conducted by appropriate authorities into all cases of suspicious death, including provisions for adequate autopsy."<sup>44</sup> The Commission then invited the special rapporteur "to receive information from appropriate United Nations agencies and other international organizations and to examine the elements to be included in such standards and to report to the Commission on Human Rights on progress made in this respect."<sup>45</sup>

The Special Rapporteur on Summary or Arbitrary Executions has not been as careful and successful in developing his mandate as the Working Group on Enforced or Involuntary Disappearances. Nevertheless, he has generally followed the approach of the working group and has been given the additional responsibility of helping to develop standards on such important subjects as international norms for the investigation of summary or arbitrary killings. As will be seen below, the Special Rapporteur on Torture has benefited both from the mistakes of the Special Rapporteur on Summary

<sup>42</sup> UN Doc. E/CN.4/1986/21, at 99.

<sup>43</sup> See UN Press Release HR/1848, Mar. 4, 1986, at 6; UN Press Release HR/1848/Corr.1, Mar. 10, 1986.

<sup>44</sup> UN Doc. E/CN.4/1986/L.68; see note 33 *supra*.

<sup>45</sup> UN Doc. E/CN.4/1986/L.68.

or Arbitrary Executions and from the guidance afforded by the Working Group on Enforced and Involuntary Disappearances.

*The Special Rapporteur on Torture*

During its session in 1985, the Commission on Human Rights established a Special Rapporteur on Torture with the authority to "respond effectively to credible and reliable information" on torture.<sup>46</sup> It was understood at the time that the Chairman of the Human Rights Commission would appoint Professor P. H. Kooijmans of the Netherlands. Professor Kooijmans had been the head of the Netherlands delegation that had led the effort to establish a special rapporteur. In addition, the selection of the Dutch delegate seemed appropriate since the Netherlands was relinquishing its seat on the Commission to give Belgium an opportunity to represent the Benelux countries. The special rapporteur's first report was to be presented to the Commission at its 42d session in 1986.<sup>47</sup>

In many ways, the special rapporteur's report is a model first step in what promises to be a very effective United Nations approach to a serious human rights problem. Professor Kooijmans describes the nature of the problem, his mandate, international legal norms against torture<sup>48</sup> and his activities, including the material he received from governments, the Organization of American States and nongovernmental organizations such as Amnesty International. He established his authority to transmit allegations of torture to national authorities by sending such information to 33 governments. The special rapporteur avoids angering these governments unnecessarily in his initial report by identifying only those nations which were already on the Commission's agenda, that is, Afghanistan, Chile, El Salvador, Guatemala and Iran.<sup>49</sup>

Professor Kooijmans also records that he engaged in consultations with governments, nongovernmental organizations and individuals; without identifying those involved, he thus established his authority to undertake such consultations. In addition, he reports his decision to make eight urgent appeals to governments to prevent the occurrence of torture in Chile, the Comoros, Ecuador, Honduras, Indonesia, South Africa, Uganda and the USSR. The special rapporteur identifies some of these urgent situations very briefly and is careful to describe the governmental response, if any. For example, the report states, "The Special Rapporteur was informed that the USSR rejected the allegation sent to it as baseless and false and pointed out that the action of the Special Rapporteur violated the provisions of the Commission resolution 1985/33."<sup>50</sup> While the report does not contain even

<sup>46</sup> CHR Res. 1985/33, UN Doc. E/CN.4/1985/66, at 71.

<sup>47</sup> Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1986/15.

<sup>48</sup> E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1986).

<sup>49</sup> UN Doc. E/CN.4/1986/15, at 16.

<sup>50</sup> *Id.* at 17.

a vague description of the problem that prompted this brusque reply, it appears to have been reports of psychiatric abuse in the USSR.<sup>51</sup>

The remainder of the report largely deals with national legislative provisions forbidding torture; the barring of statements induced by torture as evidence in proceedings; the provision of remedies, such as *amparo* or habeas corpus, for torture allegations; and legislative provisions on matters creating a risk of torture, such as incommunicado detention, states of emergency and trade in implements of torture. Although countries are very rarely identified, except in a positive light, the United States is mentioned because of the export regulations regarding "specially designed implements of torture."<sup>52</sup> The report concludes by listing the kinds of torture that have been identified, analyzing briefly the relationship between torture and other sorts of human rights violations (such as disappearances, arbitrary killings) and submitting a set of recommendations.

In general, the special rapporteur's work was well received by the Commission in March 1986. Some human rights advocates did find fault with one of Kooijmans's recommendations, i.e., "Incommunicado detention should be kept as short as possible and should not exceed seven days."<sup>53</sup> While they welcomed the special rapporteur's concern that incommunicado detention might foster torture, they were worried that specifying 7 days might make permissible such a lengthy period of incommunicado detention, during which torture might be undertaken.

When the Commission debated the agenda item entitled "Question of the human rights of all persons subjected to any form of detention or imprisonment," which includes a review of the work of the Special Rapporteur on Torture, the Australian delegation introduced an idea borrowed from the Special Rapporteur on Summary or Arbitrary Executions: that international standards be set for investigations into "cases of suspicious death, and that these investigations should include an adequate autopsy." Australia pointed to "the general need for accurate information to determine the cause of death where there is suspicion of torture" and reiterated the advantages international standards would confer on practitioners that were mentioned in the debate on summary and arbitrary executions.<sup>54</sup>

Although these sentiments were not reflected in the Belgian resolution to prolong the special rapporteur's mandate for another year, the Commission is definitely beginning to see the theme special rapporteurs as a mechanism not only for implementing human rights norms but also for developing standards. Ireland, Norway and the United States cosponsored the resolution as members of the Commission, and the Netherlands cosponsored it as an

<sup>51</sup> The delegates of the Soviet Union at the Commission indicated their displeasure, but failed to explain why they believed that this brief mention of their country was somehow beyond the special rapporteur's mandate. Indeed, the sensitivity of the Soviet authorities to this appeal by the rapporteur bodes well for his effectiveness.

<sup>52</sup> UN Doc. E/CN.4/1986/15, at 30.

<sup>53</sup> *Id.* at 35.

<sup>54</sup> Australia, Statement to the UN Commission on Human Rights on Agenda Item 10, Mar. 12, 1986, at 4 (in the author's files).

observer. Only the Soviet Union spoke against the resolution, but its opposition was undercut by the decision at the last moment of Argentina and Senegal to add their names as cosponsors. With such broad support, the resolution was adopted on March 13, 1986 without a vote.<sup>55</sup>

*The Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief*

The most significant single development at the 42d session of the Human Rights Commission was its decision in March 1986 to establish a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief.<sup>56</sup> The newest special rapporteur will presumably follow the same approach as his predecessors, that is, to study the phenomenon of intolerance and discrimination based on religion or belief; to "respond effectively to credible and reliable information that comes before him and to carry out his work with discretion and independence";<sup>57</sup> and to report to the Commission at its next session in 1987 about his activities.

The decision to establish a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief arose from a long history of United Nations activity on this issue<sup>58</sup> culminating in the proclamation by the General Assembly in 1981 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>59</sup> The Declaration was the product of 20 years of drafting work in the Commission on Human Rights and the very thorough Study on Discrimination in the Matter of Religious Rights and Practices, released in 1960.<sup>60</sup> The new special rapporteur has been asked to "examine" "incidents and governmental actions in all parts of the world which are inconsistent with the provisions of the Declaration."<sup>61</sup>

The United States was the principal sponsor of the resolution that established the Special Rapporteur on Religious Intolerance; cosponsors included

<sup>55</sup> UN Doc. E/CN.4/1986/L.83, adopted without a vote on Mar. 13, 1986.

<sup>56</sup> The Commission on Human Rights decided on Mar. 10, 1986 to adopt (with a few amendments) the resolution contained in UN Doc. E/CN.4/1986/L.45/Rev.1, which proposed the appointment of the special rapporteur. See CHR Res. 1986/20, UN Doc. E/CN.4/1986/65, at 66.

<sup>57</sup> UN Doc. E/CN.4/1986/L.45/Rev.1.

<sup>58</sup> See Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197 (1978); S. LISKOFKY, UNITED NATIONS DRAFT DECLARATION ON THE ELIMINATION OF ALL FORMS OF RELIGIOUS INTOLERANCE (1981).

<sup>59</sup> GA Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171-72, UN Doc. A/36/51 (1982).

<sup>60</sup> A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960); see also R. Clark, Background Paper for United Nations Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters Relating to Religion or Belief, Geneva, Switzerland, 3-14 December 1984, UN Doc. HR/GENEVA/1984/BP.3.

<sup>61</sup> UN Doc. E/CN.4/1986/L.45/Rev.1. The Declaration forbids discrimination on grounds of religion or beliefs; protects the right of parents to organize their family life in accordance with their religious beliefs; assures rights to worship, assemble for worship, establish religious institutions, observe religious holidays, teach religion, designate appropriate religious leaders, etc.

Belgium, Canada, Costa Rica, the Federal Republic of Germany, Italy, Norway and Senegal. In addition, the Holy See lobbied for the resolution, particularly with predominantly Catholic countries.

The United States had to overcome several impediments to getting the resolution adopted. First, since religious intolerance is very widespread, many governments might have feared that the special rapporteur would criticize their countries. The Soviet Union and its allies in particular suspected that the special rapporteur might be used to criticize them. Second, since 1983 religious intolerance had been the subject of a study by another special rapporteur under the aegis of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>62</sup> Some delegates believed that the Sub-Commission's special rapporteur, Elizabeth Odio Benito of Costa Rica,<sup>63</sup> should complete her work before the appointment of another special rapporteur with a far broader and more active mandate.

Third, the Australian delegation and some others were concerned that problems of religious intolerance were not amenable to the relatively direct approaches used by the Special Rapporteurs on Torture and on Summary or Arbitrary Executions. Finally, some delegations were disturbed that the United States had taken this initiative without involving either Ireland or the World Council of Churches. The Irish Government had taken the responsibility in previous years for the Commission's activities in regard to religious intolerance. The World Council of Churches was somewhat upset at having been bypassed, while the Holy See had been consulted. The World Council lobbied and made a public statement<sup>64</sup> to the Commission raising some of the questions enumerated above, but it ultimately supported the resolution after the changes proposed by Australia were incorporated.

The U.S. delegation attacked these obstacles with a concerted lobbying effort that included appeals by U.S. embassy staffs to the foreign ministries of the governments that sit on the Human Rights Commission. There were also extensive consultations within the "Western European and Other Group" of Commission members. While the Irish delegation never became a cosponsor of the resolution, Ireland did in the end support the U.S. initiative. The U.S. delegation in Geneva also lobbied actively with all the other members of the Commission, arguing that the Declaration on Religious Intolerance provided a sufficient basis for its implementation through a special rapporteur.<sup>65</sup> The United States pointed out that the Odio Benito study was progressing rather slowly<sup>66</sup> and that its purpose was sufficiently different to permit the prompt establishment of the new special rapporteur. The United

<sup>62</sup> CHR Res. 1983/40, 1983 UN ESCOR Supp. (No. 3) at 173, UN Doc. E/CN.4/1983/60.

<sup>63</sup> Sub-Comm'n on Prevention of Discrimination and Protection of Minorities Res. 1983/31, UN Doc. E/CN.4/Sub.2/1983/43, at 98.

<sup>64</sup> Oral intervention by Representative of the Commission of the Churches on International Affairs of the World Council of Churches to the Commission on Human Rights, February 1986 (in the author's files).

<sup>65</sup> Statement by Alternative United States Representative to Commission on Human Rights, Feb. 24, 1986 (in the author's files).

<sup>66</sup> Progress report by Elizabeth Odio Benito, UN Doc. E/CN.4/Sub.2/1985/28.

States agreed that a separate resolution should be adopted by consensus to allow Mrs. Odio Benito to complete her study during the coming year.<sup>67</sup> It was also agreed that the Odio Benito resolution should be adopted without a vote before the Commission considered the U.S. proposal.

On the evening of March 10, 1986, the United States introduced the resolution as principal sponsor. On the basis of consultations with Australia, the United States accepted several revisions, which were announced orally at the time of the debate. One revision added the recognition "that the problem of such intolerance and discrimination requires sensitivity in its resolution." Another significant addition indicated that the special rapporteur was "to recommend remedial measures including, as appropriate, the promotion of dialogue between communities of religion or belief and their Governments."

In a lively debate, the resolution was strongly opposed by the delegates of the German Democratic Republic and the Soviet Union. A GDR motion not to take a vote was defeated on a roll call ballot of 7 in favor, 22 against and 14 abstaining.<sup>68</sup> The Human Rights Commission then took a roll call vote in which 26 governments voted for the U.S. proposal. Only 5 governments opposed the resolution, including Bulgaria, Byelorussia, the German Democratic Republic, Syria and the USSR.<sup>69</sup> Twelve governments abstained.

While the U.S. delegation had succeeded in initiating a significant improvement in the international implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, there remained the question of who would be selected as the new special rapporteur. Both supporters and opponents of the resolution agreed that it would be very difficult to find an "individual of recognized international standing" with an appropriate religious background and nationality, and sufficient sensitivity to take action on this difficult issue. However, the experience of the Working Group on Enforced or Involuntary Disappearances and the two other theme special rapporteurs should prove to be instructive to the new special rapporteur.

#### *Ad Hoc Improvements and Orderly Consolidation*

In the interest of rationality and order in human rights implementation, one might have hoped that the Working Group on Enforced or Involuntary

<sup>67</sup> UN Doc. E/CN.4/1986/L.44. Since the UN Sub-Commission's 1986 session was postponed to 1987, the Odio Benito report will presumably be submitted then.

<sup>68</sup> The opponents of the U.S. initiative might have been more successful if they had convinced one or more Third World governments, such as Syria or Algeria, to introduce a series of crippling amendments to the U.S. resolution. For example, one amendment might have delayed the effectiveness of the special rapporteur until the completion of Mrs. Odio Benito's work. Crippling amendments could have delayed a substantive vote or undermined the basic resolution. If the opponents had tired the delegates with procedural obstructions, the Commission might have been sufficiently discouraged to accept the motion not to take a vote on the special rapporteur.

<sup>69</sup> Algeria and Nicaragua voted in favor of the GDR procedural resolution, but abstained on the substantive vote.

Disappearances and the three theme special rapporteurs would have been unified into a single institution rather than resting in four parallel structures.<sup>70</sup> Certainly, these four procedures are quite similar and their human rights concerns may overlap. For example, a "disappeared" person is quite likely to suffer torture, and may well be subjected to a summary or arbitrary execution. At least in some parts of the world, disappearances, torture and arbitrary killings arise out of religious intolerance. Nevertheless, it would have been politically impossible for these four procedures to have been delegated initially to a single special rapporteur, working group or other body; it is doubtful that they will ever be unified; and there are some good reasons against such a combination.

The Working Group on Enforced or Involuntary Disappearances and the three special rapporteurs arose out of a pressing need for international scrutiny of their respective areas of human rights concern,<sup>71</sup> but the Commission on Human Rights initially gave them very limited authority. The four procedures have followed an identifiable pattern of slowly developing their legitimacy and thus their authority to implement human rights within their mandate. Governments have reluctantly accepted these improvements; they would probably have rejected any larger or more unified grant of authority.

Now that these four procedures do exist, it is more likely that they could be unified. Yet for years the United Nations has resisted the concept of a High Commissioner for Human Rights.<sup>72</sup> There is considerable suspicion in the United Nations of any such aggregation of human rights implementation competence in a body that lacks the authority of a specific treaty. Indeed, the working group and three special rapporteurs have relatively rare international authority to take action in emergency situations to prevent or seek prompt governmental attention to disappearances, torture, summary or arbitrary killings and religious intolerance.<sup>73</sup>

There are several good reasons for opposing such a unification. First, the

<sup>70</sup> Cf., e.g., Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AJIL 754, 771, 774-75 (1982).

<sup>71</sup> See, e.g., Kramer & Weissbrodt, *The 1980 U.N. Commission on Human Rights and the Disappeared*, 1 HUM. RTS. Q. 18 (1981); Shestack, *The Case of the Disappeared*, HUM. RTS., No. 4, Winter 1980, at 24, 52.

<sup>72</sup> See R. CLARK, A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (1972).

<sup>73</sup> The Committee against Torture has analogous authority under Article 20 of the Convention against Torture for those governments which do not make a declaration under Article 28 to reject such authority. Convention against Torture, *supra* note 48, Arts. 20 and 28. The Committee on Human Rights and the Committee on the Elimination of Racial Discrimination have treaty-based authority to take interim measures to avoid irreparable damage. Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 34, Art. 5. Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 94, UN Doc. CERD/C/35/Rev.3, at 28 (1986). The Human Rights Committee has taken interim measures under the Optional Protocol. See, e.g., Human Rights Committee, Selected Decisions under the Optional Protocol, UN Doc. CCPR/C/OP/1, at 5-6 (1985). The Inter-American Commission on Human Rights and the UN Secretary-General have regularly undertaken urgent appeals on human rights matters. See ORGANIZATION OF AMERICAN STATES, HANDBOOK, *supra* note 35, at 130; Ramcharan, *The Good Offices of the United Nations Secretary-General in the Field of Human Rights*, 76 AJIL 130, 136-39 (1982).

success of special rapporteurs depends largely on the personal standing, intelligence and motivation of the individuals who hold that position, as well as on their ability to focus on a single issue. Second, although there is some potential overlap in the jurisdiction of the four procedures, it may not be helpful to combine them. For example, the working group has refused to concede lightly that “disappeared” persons may have died and has insisted upon governmental accountings for all disappearances. Such a position would be more difficult to maintain if the working group also had jurisdiction to pursue arbitrary killings. Third, there is some benefit in having several procedures for expressing concern—hence several channels for applying pressure—about a particular case. Fourth, although there are similarities among the four procedures, it is too soon to establish a rigid and uniform approach to such human rights violations while experimentation with ways to “respond effectively” continues. A single unified procedure would probably be given the least common denominator of authority rather than the greatest possible reach.

### *Conclusion*

During the past half-dozen years, the UN Commission on Human Rights has initiated several innovative approaches to implementing international human rights norms. Among the most flexible and potentially effective are the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Torture and, most recently, the Special Rapporteur on Religious Intolerance. Despite their notable gains, the four procedures still have the potential for further improvement and creative interaction. Governments and nongovernmental organizations already recognize the importance of the working group and the three theme special rapporteurs in protecting against particularly grievous violations of human rights throughout the world. To improve their effectiveness, these four procedures deserve more attention, support and constructive criticism from governments, human rights activists, scholars and the media.

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### THE NEW WORLD SATELLITE ORDER: A REPORT FROM GENEVA

In a city that hosts a continuous series of international gatherings, last year's path-breaking Geneva conference on satellite communications went largely unnoticed as the news media concentrated on preparations for the Reagan-Gorbachev summit.<sup>1</sup> Yet for many of the 112 nations attending this

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<sup>1</sup> The *New York Times*, for example, devoted only one major story to the conference. Nether, *Third World Seeks Its Place In Space*, N.Y. Times, Sept. 15, 1985, §E, at 21. The absence of significant press coverage can be attributed, in part, to the ITU's self-imposed exclusion of journalists. Ironically, the world's foremost international telecommunications body is almost the only United Nations agency to maintain such a ban (the other offender is the International