

## **History of the Special Procedures: A ‘Learning-by-doing’ Approach to Human Rights Implementation**

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The existence of United Nations Special Procedures is the unintended result of the competence accorded to the United Nations Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in the 1967 Economic and Social Council Resolution 1235 (XLII). This Resolution authorised both bodies ‘to examine information relevant to gross violations of human rights and fundamental freedoms’.<sup>1</sup> The lack of foresight in the creation of such mechanisms, now known as ‘Special Procedures’, is a fundamental factor in explaining the evolution of methods of work developed by different mandate holders. The ‘soft’ legal basis and geo-political factors surrounding the creation and renewal of mandates explains the freedom and flexibility they have enjoyed in establishing innovative activities that are more intrusive upon state sovereignty than any other UN human rights mechanism. As the significance of the Special Procedures’ work has grown, attempts to curtail their autonomy and impact have increased accordingly, facilitated precisely by what has been seen as, until recently, their major strength: the lack of a strong institutional and coherent legal framework regulating their activities. This chapter analyses the geopolitical factors, institutional efforts, and individual initiatives by mandate-holders of Special Procedures that have resulted in their current understanding as a ‘system’ within the United Nations human rights machinery. The misalliance between the original conception of Special Procedures and their subsequent organic growth has determined their distinctive features both in terms of strengths and weaknesses.

### **I. Introduction**

By June 2015, 74 independent experts were mandate-holders of 55 Special Procedures. Of those, 41 belong to the category ‘thematic mandates’, using the terminology of the UN Office of the High Commissioner for Human Rights (OHCHR) and focus on a wide range of human rights topics such as arbitrary detention, violence against women, albinism or water and

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<sup>1</sup> ‘Resolutions: Economic and Social Council Official Records, 42nd Session, 8 May-6 June 1967’ (1 January 1967) ESCOR Supp. (No.1) at 17, UN Doc E/4393 (1967) para 2

sanitation.<sup>2</sup> The remaining 14 address the situation of human rights in specific territories, known as ‘geographic mandates’, cover Belarus, Cambodia, Central African Republic, Côte d’Ivoire, Democratic Peoples’ Republic of Korea, Eritrea, Haiti, Islamic Republic of Iran, Mali, Myanmar, Somalia, Sudan, Syrian Arab Republic and the Palestinian Territories.<sup>3</sup> All geographic mandates, and the majority of thematic mandates, are served by individuals (under the denomination of ‘Special Rapporteur’ or ‘Independent Expert’).<sup>4</sup> Working groups composed of five members – one from each of the five UN regional groupings<sup>5</sup> – are in force for the thematic mandates on: people of African descent; arbitrary detention; issues of human rights and transnational corporations and other business enterprises; enforced or involuntary disappearances; the use of mercenaries as means of violating human rights and impeding the exercise of rights of people to self-determination; and the issue of discrimination against women in law and in practice. There is no clear relationship between the denomination received (independent expert, special rapporteur – and, in the past – special representative, or special envoy) and the content or institutional position of Special Procedures. This is a politically motivated decision,<sup>6</sup> with the denomination Special Rapporteur reserved for situations considered more ‘serious’. Still, it is possible to find examples where the change of denomination has influenced the mandate-holder’s understanding of his work.<sup>7</sup> Thematic

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<sup>2</sup> The full list can be found on the OHCHR website at:

[http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM)

<sup>3</sup> See OHCHR website:

[http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx)

<sup>4</sup> The denomination of Independent expert applies to the geographic mandates on Central African Republic, Côte d’Ivoire, Haiti, Mali, Somalia, and Sudan. It is also the chosen denomination for the thematic mandates on: the enjoyment of human rights by persons with albinism; the effect of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights; the promotion of a democratic and equitable international order; human rights and international solidarity; and the enjoyment of human rights by older persons.

<sup>5</sup> Member States of the UN are grouped into five unofficial regional groups to take into account the purposes of GA Res 1991 (XVIII) (17 December 1963), 33/138 (19 December 1978) and 2847 (XXVI) (20 December 1971). For an updated list see United Nations Handbook 2014-2015 (New Zealand: Ministry of Foreign Affairs and Trade, 2015) 15–7. See also Sam Daws, ‘The origin and Development of UN Electoral Groups’ in T Ramesh (ed.) *What is Equitable Geographic Representation in the 21st Century?* (UN University, 1999) 11–29.

<sup>6</sup> On the meaning of the different denominations, see Helena M Cook, ‘International Human Rights Mechanisms. The Role of the Special Procedures in the Protection of Human Rights. The Way Forward After Vienna’ (1993) 50 Brooklyn L.Rev. 31, 43-4; Tom J Farer and Felice Gaer, ‘The UN and Human Rights: At the End of the Beginning’ in Roberts and Kingsbury(eds.) *United Nations, Divided World. The UN’s role in international relations* (2<sup>nd</sup> ed., Clarendon Press, 1993) 240, 284; Allison Jernow, ‘Ad-hoc and extra-conventional means for human rights monitoring’ (1996) 28(4) N.Y.Univ.J.Int’l.L. & Pol. 785, 791-2.

<sup>7</sup> When the Special Rapporteur on the situation of human rights in Guatemala was renamed ‘Special Representative’ he stated: ‘...The Special Representative has studied paragraph 7 and 8 which provide in specific terms his instructions. It is clear that the Commission intended a different exercise from the investigative role of the Special Rapporteur. Information has been collected from the Government and from other reliable sources, but no attempt has been made to follow up individual denunciations of abuses of human rights. An evaluation is made subject by subject, and the Special Representative has not attempted to reach any overall conclusion. He does not consider that he has been instructed to make recommendations’, ‘Report of the

Special Procedures were not affected by the variety of denominations until the Commission created contested mandates focused on economic, social and cultural rights, and people on vulnerable positions.<sup>8</sup>

In 50 years of their existence, Special Procedures have grown in number and scope. However, these developments have merited little attention in academic literature. The first 40 years of operation of Special Procedures have been addressed in a limited number of monographs<sup>9</sup> and relevant articles,<sup>10</sup> which number cannot compare to the myriad of material produced, during the same period, to address the work of treaty-bodies, the other main UN

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Special Representative, Viscount Colville Of Culross, on Guatemala, prepared in accordance with paragraph 8 of Commission Resolution 1986/62 of 13 March 1986' (5 December 1986) UN Doc E/CN.4/1987/24 para 1. Conversely, stating the irrelevance of the change of denomination, see eg, Report on the human rights situation in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr Reinaldo Galindo Pohl, pursuant to Commission resolution 1991/82, UN Doc E/CN.4/1993/34 paras 369-78; also 'Report on the human rights situation in the Republic of Equatorial Guinea submitted by the Special Representative of the Commission, Mr Gustavo Gallón, pursuant to Commission resolution 1999/19' (27 January 2000) UN Doc E/CN.4/2000/40 para 3

<sup>8</sup> See below Section II.B.

<sup>9</sup> See: Elvira Domínguez-Redondo, *Los procedimientos públicos especiales de la Comisión de Derechos Humanos de Naciones Unidas* (Tirant lo Blanch 2005); Concepción Escobar Hernández, *La Comisión de Derechos Humanos de Naciones Unidas y la violación de derechos humanos y libertades fundamentales: un estudio de los procedimientos públicos especiales* (PhD thesis, 3 volumes, Universidad Complutense de Madrid, 1998); Miko Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Institute for Human Rights, Åbo Academi University 2001); Beate Rudolf, *Die thematischen Berichtersteller und Arbeitsgruppen der UN-Menschenrechtskommission. Ihr Beitrag zur Fortentwicklung des internationalen Menschenrechtsschutzes* (Springer 2000).

<sup>10</sup> See eg Theo C van Boven 'Political and 'Legal' Control Mechanisms: Their Competition and Coexistence' in A Eide and B Hagtvet (eds) *Human Rights in Perspective. A Global Assessment* (Blackwell Publishers, 1992) 36; Marc J Bossuyt, 'The development of special procedures of the United Nations Commission on Human Rights' (1985) 6 HRLJ 179; Antonio Cassese, 'The Admissibility of Communications to the United Nations on Human Rights Violations' (1972) HRJ 375; Cook (1993) (n 5); Felix Ermacora, 'Procedure to deal with human rights violations. A hopeful start in the United Nations?' (1974) Hum.Rts.J. 670; Concepción Escobar-Hernández, 'Algunas consideraciones críticas sobre los mecanismos extracovencionales de control establecidos por la Comisión de Derechos Humanos de las Naciones Unidas' in *Hacia una Justicia Universal* (Comisión Internacional de Juristas, 1993) 47; M. Francisca Ize-Charrin, 'Procedimientos relativos a violaciones de los derechos humanos en el escenario internacional' (1986) XXVI Foro Internacional 453; Jernow (1996) (n 6); Frank Newman, 'The New UN Procedures for Human Rights Complaints: Reform, Status Quo, or Chamber of Horrors?' (1974) 34 *Annales de Droit* 129; José Antonio Pastor Ridruejo, 'Les procédures publiques spéciales de la Commission de Droits de l'Homme des Nations Unies' (1991) 228 R.C.A.D.I. 183; Jorge Rhenán Segura, 'Los procedimientos extracovencionales de las Naciones Unidas en material de derechos humanos. Los Relatores Especiales: un intento de definición' in L González Volio (ed) *Presente y Futuro de los Derechos Humanos: Ensayos en Honor a Fernando Volio-Jiménez* (Instituto Interamericano de Derechos Humanos, 1998) 318; Nigel Rodley, 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in H Hannum (ed) *Guide to International Human Rights Practice* (3rd edn, Transnational Publishers & Procedural Aspects of International Law Institute 1999) 61-84; Nigel Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights. Complementary or Competition?' (2003) 25 Hum.Rts.Q. 882; Lyal S Sunga, 'The Special Procedures of the UN Commission on Human Rights' in Alfredson, Grimheden, Ramcharan and Zayas (eds) *International Human Rights Monitoring Mechanisms. Essays in Honour of Jacob TH Möller* (Martinus Nijhoff Publishers, 2001) 233; Maxime E Tardu, 'Human Rights Complaint Procedures of the United Nations: Assessment and Prospects' in X Jerewitz and others (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Josef Partsch zum 75. Geburtstag* (Duncker & Humblot 1989); ME Tardu, 'United Nations Response to Gross Violations of Human Rights' (1980) 20 Santa Clara L.Rev. 559.

mechanisms, served by independent experts, monitoring the implementation of human rights by States. The shortage of literature reflects two different difficulties inherent to the birth and evolution of Special Procedures. It took many years for Special Procedures to find their own identity within the UN human rights machinery and therefore many of the first publications addressed the work of the Commission as a whole rather than ‘Special Procedures’. Once they became well established, the lack of coherence in their creation and implementation of methods of work – two features of their evolution examined below, made it progressively difficult to study them as a single category. As a result, when Special Procedures attracted the attention of scholars, they would, for the most part, be tackled selectively, with the most attention being given to thematic mandates<sup>11</sup> focusing on ‘traditional’ civil and political rights.<sup>12</sup>

The scarcity of literature has been partially addressed in recent years, in what seems to be a positive collateral effect of the creation of the Human Rights Council in 2006. The published outputs released by some non-governmental organisations, such as the International Service for Human Rights have facilitated research on Special Procedures and other Charter-based bodies, by following and producing summaries of the colossal number of reports and special rapporteurs’ work during (and outside) the sessions of the Human Rights Council and the General Assembly.<sup>13</sup> Nonetheless, most of the published research deals with specific mandates<sup>14</sup> – or certain aspects of their methods of work – rather than representing

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<sup>11</sup> The limited literature addressing geographic mandates includes Marc J. Bossuyt ‘La Commission des Nations Unies des Droits de l’Homme et la crise en Afrique Centrale’ (1998) 75 Rev Dr Intern & Comp 103; Manfred Nowak, ‘Country-Oriented Human Rights protection by the UN Commission on Human Rights and its Subcommission’ (1991) XXII NYIL 39; José Antonio Pastor Ridruejo, ‘La función del Relator Especial de la Comisión de Derechos Humanos de la ONU en el caso de El Salvador’, (1985) 2 *Revista del Instituto Interamericano de Derechos Humanos*, 5.

<sup>12</sup> See eg Theo Van Boven, ‘Facing Urgent Human Rights Cases: Legal and Diplomatic Action’, in Lawson & Blois (eds) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (vol. 3 Martinus Nijhoff Publishers, 1994) 61; Concepción Escobar Hernández, ‘Un Nuevo paso en la protección internacional de la libertad de pensamiento, conciencia y religión: el procedimiento público especial de la Comisión de Derechos Humanos’ (1990) VI Anuario de Derecho Eclesiástico del Estado 87; Olivier de Frouville, *Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l’homme* (Pedone, 1996); Menno T Kamminga, ‘The thematic procedures of the UN Commission on Human Rights’ (1987) XXXIV NILR 299; Peter Kooijmans, ‘The Role and Action of the UN Special Rapporteur on Torture’ in A Cassese (ed.) *La lutte internationale contre la torture* (Nomos Verlagsgesellschaft, 1991) 56; Nigel Rodley, ‘United Nations Action Procedures Against “Disappearances”, Summary or Arbitrary Executions and Torture’ (1986) 8 Hum.Rts.Q. 700; Beate Rudolf, ‘The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights’ (2000) 4 Max Planck Yrbk UN L 289; Bernhard Schäfer, ‘The United Nations’ Struggle against Racism and Racial Discrimination. The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’ 33 *Papers in the Theory and Practice of Human Rights* (Human Rights Centre, University of Essex, 2001).

<sup>13</sup> See eg the International Service of Human Rights: Human Rights Monitor at: <http://www.ishr.ch/human-rights-monitor>

<sup>14</sup> See eg P Alston, JM Foster and W Abresch, ‘The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’ (2008) 19

the full range of mechanisms and activities falling under the umbrella of Special Procedures.<sup>15</sup>

This chapter explores in detail the factors leading to the creation of Special Procedures and their subsequent transition from ‘exceptional’/ad hoc (and therefore ‘special’) mechanisms born from a specific political conjuncture, to their contemporary characterisation as a ‘system’. Many of the challenges faced by these human rights bodies remain linked to the misalliance between their conception in origin and their organic growth. The lack of clear legal framework governing their operations and status has allowed mandate-holders to develop innovative methods of work. However, Special Procedures remain more exposed to geopolitical factors than other human rights monitoring bodies composed of independent experts. The decisions about the creation of Special Procedures, the renewal of mandates, the selection of individuals to serve in these roles, and reactions to Special Procedures findings and conclusions are made within a governmental body. This ensures the political relevance of their activities but also their vulnerability within the United Nations system.<sup>16</sup>

Section II of the chapter explains the geopolitical coordinates under which the Commission on Human Rights decided its own competence to address situations of human rights violations in 1967. By exercising this new power, the Commission used subsidiary *ad hoc* bodies to assist in dealing with the situation of gross and systematic violations in specific territories. As explained below, the expansion of territories under study by *ad hoc* bodies and

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EJIL 183; Michael Kirby, ‘UN special procedures – reflections on the office of UN special representative for human rights in Cambodia’ (2010) 11(2) *Melb. J. Int’l. L.* 491; Laura Smyth, ‘Country-Specific Mandate-Holders: The Role of the Special Rapporteur on the Situation of Human Rights in Cambodia’ (2014) 15 *Melb. J. Int’l. L.* 155.

<sup>15</sup> See eg Philip Alston, ‘Hobbling the Monitors: Should the U.N. Human Rights Monitors be Accountable?’ (2011) 52 *Harv.Int’l L.J.* 561; I Biglino, C Golay and I Truscan, ‘The Contribution of the UN Special Procedures to the Human Rights and Dialogue’ (2012) 9 *Sur Int’l J. Hum. Rts.* 15; Claire Breen, ‘Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security’ (2008) 12 *Max Planck Yrbk UN L* 177; Elvira Domínguez-Redondo, ‘Human Rights Through the Backdoor: Contribution of Special Procedures to the Normative Development of International Human Rights Law’ in C Buckley, A Donald & P Leach (eds) *Towards Coherence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/Nijhoff, 2015, *forthcoming*); Elvira Domínguez-Redondo, ‘Rethinking the legal foundations of control in international human rights law –the case of special procedures’ (2011) 29 *NQHR* 261; Jeroen Gutter, ‘Special procedures and the Human Rights Council: achievements and challenges ahead’ (2007) 7 *H.R.L.Rev.* 93; Hurt Hannum, ‘Reforming the special procedures and mechanisms of the commission on human rights’ (2007) 7 *H.R.L.Rev.* 73; Jed Naples-Mitchell, ‘Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights’ (2011) 15 *I.J.H.R.* 232; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005); Ted Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights* (Brookings Institute Press, 2012); Bertie Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff, 2008); Nigel Rodley, ‘On the responsibility of special rapporteurs’ (2011) 15 *I.J.H.R.* 319.

<sup>16</sup> On the politicisation of the decisions leading to the creation, modification and termination of mandates, see the overview in Lempinen (2001) (n 9). See also Rosa Freedman, ‘The United Nations Human Rights Council: More of the Same?’ (2013) 31 *Wis.Int’l L.J.* 209.

their utilisation by the Commission to also address phenomena of violations of human rights worldwide resulted in the bulky apparatus of mechanisms known as ‘Special Procedures’.

Section III elaborates on the consequences of this unintended result, in terms of working methods and the institutional position of Special Procedures. These have evolved without the will of States, but on the basis of decisions adopted by simple majority by an inter-governmental body particularly sensitive to political conjunctures. The absence of uniformity and clear terms of reference in the resolutions creating or renewing mandates has determined that Special Procedures mandate-holders have enjoyed autonomy and flexibility in developing methods of work. Nevertheless, it is possible to outline the main trends and features common to Special Procedures’ working methods. It will be concluded that, through the implementation of their mandates and the efforts to coordinate activities, Special Procedures have become a distinct category, defining themselves as ‘a system’ with distinct institutional structures supporting their work. The ‘system’ of Special Procedure still lacks coherence. One of the uncertainties regarding their future concerns whether or not a more uniform, coherent approach will prove beneficial; or whether as history shows, their main strength remains the flexibility and autonomy they have enjoyed in the past.

## II. An Unintended Result: ‘Fact-Finding Missions’ as the First Special Procedures

It is difficult to summarise the events leading to the creation of Special Procedures because, when the first mechanisms we now call ‘Special Procedures’ were created, State Members of the Commission on Human Rights did not intend to create a new category of human rights mechanisms. The human rights bodies, now understood as the first Special Procedures, were portrayed as ‘fact-finding’ missions by the scholarship at the time,<sup>17</sup> or as ‘1235 procedure’ – a terminology that has taken a long time to disappear despite its uncertain meaning.<sup>18</sup> It took 20 years for the Commission on Human Rights to broaden its scope of actions vis-à-vis human rights violations, and another decade to confirm it had competence to establish monitoring mechanisms to investigate situations of gross violations of human rights. The history of Special Procedures is, for the most part, the history of the creation of each mandate,

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<sup>17</sup> See eg R Miller, ‘United-Nations Fact-Finding Missions in the Field of Human Rights’ (1970-3) AUST YBIL 40; Stephen B Kaufman, ‘The necessity for rules of procedure in ad hoc United Nations Investigations’ (1969) 18 Am UL.Rev. 739; and E Schwelb and P Alston, ‘The Principal Institutions and Other Bodies Founded Under the Charter’ in K Vasak (ed.) *The International Dimensions of Human Rights* (UNESCO, 1982) 231, 295

<sup>18</sup> The terminology ‘1235 procedure’ was used to refer to all mechanisms created by the UN Commission on the basis of the competence contained in Resolution 1235 (XLII) and distinguishing between ‘public general procedures’ and ‘public special procedures’, see eg Pastor Ridruejo (1991) (n 10) 209 ; Henry Steiner and Philip Alston, *International Human Rights in Context. Law, Politics, Morals. Text and Materials* (2<sup>nd</sup> edn, OUP 2000) 620–3.

at least until the mandate-holders and the Secretariat supporting their activities started coordinating their work and treating them as a distinct category. This section will outline the events leading to the birth of the first public and confidential Special Procedures to highlight the unexpected positive outcomes of highly politicised processes. Among the many achievements of the erstwhile Commission on Human Rights, Special Procedures are its most important legacy.

#### A. Competence for Addressing Human Rights Violations (1947-1967)

The idea that human beings deserve special legal protection lies at the foundation of the modern conception of the system of promotion and protection of human rights at the domestic, regional and universal levels. It is therefore unsurprising that the creation of human rights mechanisms has been accompanied by claims to widen their jurisdiction to the subjects it is meant to serve: the individual rights-bearers. Nonetheless, it took a long time for the United Nations to open its apparatus to individuals.

In 1947, the Economic and Social Council (ECOSOC) endorsed the view of the Commission of Human Rights by which the Commission declared that it had ‘no power to take any action in regard to any complaints concerning human rights’.<sup>19</sup> This was perceived as a regression in comparison to the minority petitions system established by the League of Nations<sup>20</sup> as it denied a right of petition to individuals deriving from the UN Charter.<sup>21</sup> The ECOSOC was also contradicting itself; a year earlier it had endorsed the view that the Commission’s role was to:

(...) assist the appropriate organs of the United Nations in the task defined for the General Assembly and the Economic and Social Council in Articles 13, 55, and 62 of the Charter, and that it might aid the Security Council in the task entrusted to it by Article 39 of the Charter, by *pointing to cases where violation of human rights may constitute a threat to the peace*.<sup>22</sup>

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<sup>19</sup> See CHR, ‘Report of the First Session of the Commission on Human Rights’ ‘Commission on Human Rights: Report to the Economic and Social Council on the 1<sup>st</sup> session of the Commission held at Lake Success, New York, from 27 January to 10 February 1947’, UN Doc E/259 (Supp.) para 22, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/259%28SUPP%29](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/259%28SUPP%29) last accessed 16 February 2016; and ECOSOC Res 75(V) of 5 August 1947, ‘Resolutions adopted by the Economic and Social Council during its 5<sup>th</sup> session from 19 July to 16 August 1947’ UN doc E/573 (2 September 1947) .

<sup>20</sup> Tardu (1989) (n 10) 287-88.

<sup>21</sup> H Lauterpacht, *International Law and Human Rights* (Praeger, 1950) 177-88. See also, JW Bruegel, ‘The Right to Petition an International Authority’ (1953) 2 ICLQ 542.

<sup>22</sup> See ‘Report of the Commission on Human Rights to the 2<sup>nd</sup> session of the Economic and Social Council’, UN doc. E/38 (17 May 1946) p. 228 & E/38/Rev.1 (21 May 1946) p. 408 [italics are mine]. See also Nabel J

Within the United Nations, the only individual complaint procedure in force established under the authority of the UN Charter (article 87) was the one operated by the Trusteeship System,<sup>23</sup> the successor to the Mandate system under the League of Nations.<sup>24</sup> From 1961, the Committee of the 24 (Decolonization Committee) monitored the situation of human rights in non-self-governing territories using individuals as sources of information. The Special Committee on Apartheid, established in 1962 by the General Assembly, also dealt with petitions.<sup>25</sup> The individuals benefiting from access to these two international mechanisms were very limited.<sup>26</sup>

The Economic and Social Council Resolution 75 (V), declaring a lack of competence to deal with allegations of human rights violations, established a symbolic procedure to process the thousands of communications by individuals concerning alleged violations of human rights reaching the Secretariat since the creation of the United Nations.<sup>27</sup> Following several amendments, a procedure to handle communications was established by Economic and Social Council Resolution 728F (XXVIII) of 30 July 1959.<sup>28</sup> Defined by John Humphrey, then Director of the United Nations Division on Human Rights, as ‘the most elaborate

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Fareed, *The United Nations Commission on Human Rights and its work for human rights and fundamental freedoms* (Diss. Washington State University, 1979) 82-3.

<sup>23</sup> The International Trusteeship System, operated by the Trusteeship Council – a main organ of the United Nations – was established by Chapter XII of the UN Charter to oversee Trust Territories with the objective of supervising their administration by responsible States and to promote their development towards self-determination. According to article 77 of the Charter, the Trusteeship System applied to: a) territories held under Mandates established by the League of Nations after the First World War; b) territories detached from ‘enemy States’ as a result of the Second World War; and c) territories voluntarily placed under the System by States responsible for their administration. After the 11 Trust Territories under this system realised their right to self-determination, the Trusteeship Council terminated its operations in November 1994.

<sup>24</sup> For historic precedents of the right to petition internationally prior and during the League of Nations’ period, see: Donald P Parson, ‘The Individual Right of Petition: a Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violations of Human Rights’ (1966-7) 13 Wayne L.Rev. 678, 678-88.

<sup>25</sup> See UNGA Res 1761 (XVII) ‘The policies of *apartheid* of the Government of the Republic of South Africa’ (6 November 1962), operative para 5, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/192/69/IMG/NR019269.pdf?OpenElement> accessed 16 February 2016

<sup>26</sup> See John Carey, ‘The United Nations’ Double Standards on Human Rights Complaints’ (1996) 60 AJIL 792; also Nigel Rodley, ‘Monitoring Human Rights by the U.N. System and Nongovernmental Organizations’ in Kommers & Loescher (eds.) *Human Rights and American Foreign Policy* (University of Notre Dame Press, 1979) 157, 161-2.

<sup>27</sup> The scattered data available is not very helpful to gain an insight of the number of communications received by the Secretariat. For instance, the Commission on Human Rights informed that over 25,000 communications were referred to it between 3 April 1951 and 7 May 1952, compared to 2,118 communications received during the period 7 May 1952 to 7 March 1953 (‘Commission on Human Rights Report of the Ninth Session, 7 April-30 May 1953’ UN Doc E/2447-E/CN.4/689 (6 June 1953) para 293).

<sup>28</sup> See ECOSOC ‘Official Records 28<sup>th</sup> Session’, (30 July 1959), UN Doc E/3290 at 19. The Resolution consolidates in one document minor amendments introduced to ECOSOC Resolution 75(V) (n 19). The amendments can be found in ECOSOC Res 116 A (VI) (1 March 1948), UN Doc E/777; ECOSOC Res 192 A (VIII) (9 February 1949), UN Doc E/1310; and 454 (XIV) (28 July 1952), UN Doc E/2332. See also proposals to modify procedure contained in UN Doc. E/CN.4/64-E/600, supp. 6 (1947) 7 & 8; E/CN.4/351 (1949); E/CN.4/358 (1950) & E/CN.4/361 (1950).



wastepaper basket ever intended’,<sup>29</sup> the Secretariat compiled a public list of communications dealing with human rights ‘principles’ and a confidential summary of communications concerning human rights violations.<sup>30</sup> States concerned received a copy of the human rights communications and were provided the opportunity to reply. The authors of human rights communications were informed that their communication was to be handled in accordance with this procedure, with a reminder that the Commission had no power to take any action in regard to any complaint concerning human rights.<sup>31</sup> At the end of each session the Commission took note of the receipt of the compiled lists of communications and restated its non-action position, until 1959, when this formality was dropped.<sup>32</sup> This way of circulating communications became the basis of the confidential ‘1503 procedure’ (pertaining to the number of the ECOSOC resolution creating it) established in 1970 as explained below.<sup>33</sup> The 1503 procedure was reformed in 2000<sup>34</sup> and, following the creation of the Human Rights Council in 2007, was replaced by the ‘complaint procedure’.<sup>35</sup>

In 1967, the Commission on Human Rights changed its ‘no power’ stance towards human rights violations. Geopolitical factors were decisive in making this position unsustainable. The decolonisation process dramatically changed the composition of the United Nations: between 1945 and 1960, more than 40 countries and 800 million persons (a

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<sup>29</sup> John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers, Inc. 1984) 28.

<sup>30</sup> CHR, ‘Report of the First Session of the Commission on Human Rights’, (27 January – 10 February 1947), UN Doc E/259 para 21, 23; and ECOSOC Res 75(V) (n 19) . See also CHR, ‘Report of the Sub-Committee on the Handling of Communications’, (5 February 1947), UN Doc E/CN.4/14/Rev. 1; and CHR, ‘Report of the Sub-Committee on the Handling of Communications’, (6 February 1947), UN Doc E/CN.4/14/Rev. 2 para 2, 5.

<sup>31</sup> See ECOSOC Res 728 F(XXVIII) of 30 July 1959 which consolidates minor amendments to ECOSOC Res 75 (V) (n 19) introduced by ECOSOC Res 116 A (VI) (1 March 1948), UN Doc E/777; 112 A (VI) [on these amendments see also suggestions by the Committee ad hoc on Communications in UN Doc E/CN.4/64-E/600, sup. 6 (1947) 7- 8; and suggestions of the Sub-Commission concerning its own role in the study of communications in UN Doc. E/CN.4/351 (1949); E/CN.4/358 (1950); and E/CN.4/361 (1950)]; 192 A (VIII) of 9 February 1949 (UN Doc E/1310; see also UN Doc E/800); 275 B (X) of 17 February 1950 (UN Doc E/1661) (also UN Doc E/1371, sup. 10, 12 & 13). In addition, this resolution puts an end between State members of the Commission and non-State members regarding the receipt of a copy of the communications [established by paragraph e) of Res 75 (V)]; and 454 (XIV) of 28 July 1952.

<sup>32</sup> “(...) but would continue to mention it in its report to the Economic and Social Council that the list and the replies have been circulated by the Secretary-General and received by the members of the Commission, as has been done heretofore in the opening paragraph of the chapter dealing with communications in its report to the Economic and Social Council”, Res 15 (XV) of 8<sup>th</sup> April 1959. See also, *Methods Used by the United Nations in the Field of Human Rights*, UN Doc A/CONF.32/6 (1967).

<sup>33</sup> ECOSOC Res 1503 (XLVIII) of 27 May 1970.

<sup>34</sup> ECOSOC Res 2000/3 (16 June 2000) *Procedure for dealing with communications concerning human rights*.

<sup>35</sup> See Human Rights Council Res 5/1 *Institution Building of the United Nations Human Rights Council*, of 18 June 2007.

quarter of the inhabitants of the planet) achieved independence.<sup>36</sup> By 1967, 57 per cent of the 127 UN Member States were Asian and African States.<sup>37</sup> The new ‘Third-World’ majority at the UN supported the creation of human rights monitoring mechanisms to avoid the risk of their marginalization as second-rate countries with consequent reduction of foreign aid’.<sup>38</sup> Between 1960 and 1963, the General Assembly created a Special Committee to monitor the implementation of the Declaration of Independence to Colonial Countries and Peoples<sup>39</sup> with competence to carry out its task by employment of all available means;<sup>40</sup> it commissioned the second ever UN fact-finding mission<sup>41</sup> in South Vietnam in connection with the allegation of human rights violations of the Buddhist community,<sup>42</sup> and designated a Special Committee on the apartheid policies of the Government of South Africa.<sup>43</sup> The first ‘treaty-bodies’ make their appearance during these years too, with the adoption of the two 1966 Covenants and the 1965 Convention on the Elimination of All Forms of Racial Discrimination. The Commission’s self-denied competence to deal with human rights violations was at odds with other UN bodies, particularly taking into account its role as the main UN human rights institution.

The unanimous condemnation of *apartheid* should be considered the decisive instigator of the creation of a fact-finding mission, which set the basis for the first ‘Special Procedure’. The Chairman of the General Assembly’s Special Committee on the Policies of Apartheid of the Government of South Africa called upon the Commission on Human Rights, on 3 February 1947, to carry out an international investigation of charges of torture and ill-

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<sup>36</sup> R Aracil, J Oliver & Antoni Segura, *El mundo actual. De la Segunda Guerra Mundial a nuestros días*. (2nd ed. Universitat de Barcelona, 1998) 123; MJ Peterson, ‘General Assembly’ in Weiss and Daws (eds) *The Oxford Handbook on the United Nations* (Oxford University Press, 2007) 97, 106-9.

<sup>37</sup> On the impact of the new UN memberships on the composition of the Commission on Human Rights, see Fareed (1979) (n 22) 71-6.

<sup>38</sup> Tardu (1989) (n 10) 287-314; See also, S Chesterman, TM Franck and DM Malone, *Law and Practice of the United Nations* (Oxford University Press 2008) 457-8.

<sup>39</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 September 1960).

<sup>40</sup> The Situation with Regard to the Implementation of the Declaration on Granting of Independence to Colonial Countries and Peoples, UNGA Res 1654 (XVI) (27 November 1961), para 5.

<sup>41</sup> The first one was established by ECOSOC Res 350 (XII) (17 March 1951) to investigate the question of forced labour as a means of political coercion or punishment for holding or expressing political views. Its final report can be found in UN Doc E/2431 (1953) para 7-547.

<sup>42</sup> The report of the mission is contained in UN Doc A/5630 (1963). For the precedents of this Mission, see Kaufman (1969) (n 17) 752-5.

<sup>43</sup> UNGA Res 1761 (XVII) (6 November 1962). See Theo van Boven, ‘Chartering New Grounds in Human Rights’ in *Human Rights from Exclusion to Inclusion; Principles and Practice. An Anthology from the Work of Theo van Boven*, Fons Coomans et al (eds) (Kluwer Law International, 2000) 5 and RB Ballinger, ‘UN Action on Human Rights in South Africa’ in Evan Luard (ed.) *The International Protection of Human Rights* (Thames and Hudson, 1967) 248, esp. 257-66.

treatment in South African prisons of prisoners and other persons in police custody.<sup>44</sup> Acceding to this request required the Commission to claim competence for such action, overturning its 20-year denial of such powers.

In March 1967 the Commission appointed an Ad Hoc Working Group of Experts on the situation of human rights in southern Africa<sup>45</sup> and a Special Rapporteur on the politics of apartheid.<sup>46</sup> The Commission also sought authorisation from its parent body, the Economic and Social Council, to deal with human rights violations in the future.<sup>47</sup> The authorisation became effective that same year with the adoption of Economic and Social Council Resolution 1235 (XLII). The text of Resolution 1235 (XLII) restricted the sources of information available to the Commission to those contained in the communications listed by the Secretary General pursuant to Economic and Social Council Resolution 728 F (XXVIII) of 30 July 1959. However, a particular reading of the 1235 resolution in conjunction with others approved formerly by the Commission on Human Rights, the General Assembly and the Economic and Social Council, as well as the public nature of the annual sessions of the Commission on Human Rights, privileged an interpretation according to which the Commission on Human Rights (and the former Sub-Commission for the Promotion and Protection of Minorities) were authorised to use all sources of information to investigate situations of human rights violations.<sup>48</sup> Although contested and the object of several legal analyses within the UN, this interpretation prevailed and was decisive in terms of the birth of two different procedures, one public and one confidential, to deal with allegations of human rights violations: the so-called ‘1235’ and ‘1503’ Procedures. The information included in the list prepared according to Resolution 728 F (XXVIII) was processed within the framework of the so-called 1503 Procedure. The 1503 Procedure became ‘the first procedure within the framework of the United Nations under which private individuals and non-governments [could] raise complaints about violations of human rights within a State and [had] those

<sup>44</sup> See Robert Miller, ‘United-Nations Fact-Finding Missions in the Field of Human Rights’ (1970-3) AUST YBIL 40.

<sup>45</sup> CHR Res 2 (XXIII) (6 March 1967).

<sup>46</sup> CHR Res 7(XXIII) (16 March 1967).

<sup>47</sup> See CHR Res 8 (XXIII) and 9 (XXIII) (both 16 March 1967). See also ECOSOC Res 1102 (XL) (4 March 1966) & 1164 (XLI) (5 August 1966); and UNGA Res 2144 (XXI) (26 October 1966) determining the change of direction of the Commission. Former proposals can be found in reports of the Commission on Human Rights on its annual sessions of 1962 (UN Doc E/3616/Rev.1-E/CN.4/832/Rev.1); 1963 (UN Doc E/3743-E/CN.4/857); 1964 (UN Doc E/3873- E/CN.4/874) and 1966 (UN Doc E/4184-E/CN.4/916). On the competence of the Commission to establish monitoring bodies without waiting to previous authorization see Escobar Hernández (1998) (n 9) 366-71.

<sup>48</sup> See Bertram G. Ramcharan, *The concept and present status of the international protection of human rights. Forty Years after the Declaration* (Martinus Nijhoff Publishers, 1989) 65-70. Also *Theo v Boven* (1968) 15 ‘The United Nations Commission on Human Rights and violations of human rights and fundamental freedoms’, NILR, 379, 380-2.

complaints investigated and reported upon by an impartial international body'.<sup>49</sup> All the other sources of information became the object of public scrutiny, either in the context of the (public) annual sessions of the Commission on Human Rights or under what became known as the system of Special Procedures.<sup>50</sup>

Early accounts of the approval of Resolutions 1235 (XLII) and 1503 reflected an understanding that communications could only be dealt with under the confidentiality of the 1503 Procedure. In the words of Howard Tolley:

...The unintended result was the creation of two procedures for considering violations—one public, under Resolution 1235, *without benefit of the communication*—and a separate, confidential procedure for reviewing communications<sup>51</sup>

The methods of work developed by mandate holders<sup>52</sup> concerning individual cases made it clear that both the confidential and public mechanisms depended on the Commission on Human Rights' competence to deal with communications. The scope of the 1503 Procedure was universal in terms of countries and rights covered by it. Admissibility criteria to submit a complaint were framed by the then Sub-Commission for the Prevention of Discrimination and the Protection of Minorities Resolution 1 (XXIV) of 1971.

The reformation of the 1503 Procedure in 2000 during the general period of reform of the UN human rights mechanisms included renaming it the 'complaint procedure' in 2007,<sup>53</sup> while retaining its original objective: to reveal a consistent pattern of gross and reliably attested violations of human rights. Thus while the mechanism is nourished by individual complaints, it does not seek to redress individual cases but rather to address patterns of violations, in cooperation with the State concerned, with the confidentiality of the procedure meant to facilitate cooperation. A possible outcome of this procedure is the creation of new Special Procedures, as explained below.<sup>54</sup>

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<sup>49</sup> Cassese (1972) (n 10).

<sup>50</sup> A detailed account of the circumstances leading to this result can be found in Elvira Domínguez-Redondo, 'La Comisión de Derechos Humanos a Debate: El Procedimiento 1503', 2 *Revista Iberoamericana de Derechos Humanos* (2006) 35.

<sup>51</sup> Howard Tolley, 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) 6 *Hum. Rts. Q* 420, 429. [emphasis added] See also Theresa González, 'The Political Sources of Procedural Debates in the United Nations: Structural Impediments to Implementation of Human Rights' (1981) 13 *N.Y.Univ.J.Int'l.L.* 427

<sup>52</sup> See below section III regarding competence and working methods developed by mandate-holders to deal with communications.

<sup>53</sup> ECOSOC Res 2000/3 (n 34) and HRC Res 5/1 (n 35)

<sup>54</sup> See section II.D.

## B. The First Geographic Mandates

In March 1969 the Commission established its second ‘fact-finding’ mission, this time to investigate human rights allegations concerning Israel’s violation of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, in the occupied territories resulting from the 1968 ‘Six Day War’.<sup>55</sup> The creation of this mechanism was connected to difficulties faced in nominating members of the General Assembly Committee to Investigate Israel Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.<sup>56</sup> Once the Committee became operative, the Commission’s Working Group on the same topic ended its mandate. While many name this body as the ‘second’ Special Procedure created by the Commission, its existence was limited to provisionally replacing a mandate taken over from the General Assembly.<sup>57</sup>

It was not until 1975 that the Commission addressed another country’s human rights situation, despite attempts made by the former Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>58</sup> to promote the investigation of other territories in 1968.<sup>59</sup> Both the investigation on the policy of *apartheid* and the occupied Arab territories had been the object of worldwide condemnation, actions by the Security Council and the General Assembly, and were relatively easy to justify as not pertaining to the domestic affairs of a State by their own nature and, therefore, not in open conflict with article 2.7 of the UN Charter.<sup>60</sup> This explains the lack of resistance enjoyed by the Commission when it decided

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<sup>55</sup>CHR Res 6(XXV) (4 March 1969).

<sup>56</sup> GA Res 2443(XXIII) of 19 December 1968. On the circumstances preventing the appointment of the members of the Committee, see Kurt Herndl, ‘Recent Developments concerning United Nations Fact-finding in the field of human rights’ in Nowak, Sterurer & Tretter (eds) *Progress in the Spirit of Human Rights. Festschrift für Felix Ermacora* (Engel, 1988) 1, 11.

<sup>57</sup> See eg Lempien (2001) (n 9) 139-44; Nifosi (2005) (n 10) 15; and Marc Limon and Hilary Power, *History of the United Nations Special Procedures Mechanism* (Universal Rights Group, 2014) 6.

<sup>58</sup> The Sub-Commission was established in 1974 (UN Doc E/259 para 18-20. Composed by 12 expert members, it was expanded to 14 1959 (ECOSOC Res 728E (XXVIII) 30 July 1959), 18 in 1966 (ECOSOC Res 1074G (XXXIX) 28 July 1965), and 26 in 1969 (ECOSOC Res 1334 (XLIV) 31 May 1968). It was renamed as Sub-Commission for the Promotion and Protection of Human Rights in 1999 (ECPSPC Res 1999/256 of 27 July 1999). The ‘rebel child’ of the Commission was replaced by an Advisory Committee with the creation of the Human Rights Council. On its mandate and influence in the creation and evolution of Special Procedures, see Asbjørn Eide, ‘The Sub-Commission on Prevention on the Elimination of Racial Discrimination’, in Philip Alston (ed.) *The United Nations and Human Rights. A Critical Appraisal* (Clarendon Press, 1992) 211.

<sup>59</sup> The Sub-Commission tabled proposals for investigations regarding Greece and Haiti (UN Doc E/CN.4/947-E/CN.4/Sub.2/286, 32-41 in particular Res 3(XX) 6 October 1967) which was not welcome by the Commission. On discussions concerning the powers of the Sub-Commission to recommend actions, see UN Doc E/CN.4/976-e/cn.4/Sub.2/294-E/4475 (1968) 58-79; also: Peter Haver, ‘The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities’ (1982) 21 Colum.J.Transnat’l L103; Tom J Farer, ‘The UN and Human Rights: More than a Whimper, Less than a Roar; in Roberts and Kingsbury (eds) *United Nations, Divided World. The UN’s roles in international relations* (Clarendon Press, 1988) 95, 127-31.

<sup>60</sup> See for instance: Felix Ermacora, ‘Human Rights and Domestic Jurisdiction (article 2 paragraph 7 of the Charter)’ (1968) 124 RCADI 451, 406-423; Nigel Rodley, ‘The United Nations and Human Rights in the Middle East’ (1971) 38 *Social Research* 217; Antônio Cançado Trindade, ‘Co-existence and co-ordination of

the mandates on southern Africa without waiting for confirmation of its competence to investigate human rights violations. It is also reflected, in sharp contrast with the highly controversial discussions that have followed the birth and life of every other geographic mandate since, the almost unanimous political support enjoyed by the Commission in relation to decisions addressing this territory, including the designation of a separate point in its agenda or the 2 year extension of its mandate in 1969.<sup>61</sup>

The Commission's decision to create a Working Group on the situation of human rights in Chile in 1975 signalled a radical change of direction.<sup>62</sup> While the events instigating its creation were also surrounded by international outcry and were in parallel to other interventions by the UN and regional bodies, they could not be ascribed to a question of racist policy or decolonisation, as those used as the title of Resolution 1235(XLII).<sup>63</sup> The situation of human rights violations under scrutiny was clearly one traditionally considered within the domestic affairs of a State. The creation of the Working Group resulted in strong contestation by States of the legitimacy of actions decided by the Commission, and represents the first example of the political confrontations that have accompanied the creation of every country-specific mandate to date, and the calls for their removal from the system.<sup>64</sup> In any case, the mandate on Chile opened the door to other geographic mandates and, in the following years, geographic procedures rapidly extended the scope of their actions around the world. The Commission entrusted mandates to the Secretary General on the situation of human rights in Cyprus (1975),<sup>65</sup> Kampuchea (1978)<sup>66</sup> and Nicaragua (1979).<sup>67</sup> In 1979, it also decided, for the first time, to use the possibility of public scrutiny – and the appointment of a Special Rapporteur – to study the situation of a country that was being investigated at the time under

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mechanisms of international protection of human rights (at global and regional levels)' (1987) 202 RCADI 35-42.

<sup>61</sup> With the exception the South African government who opposed UN actions based on article 2.7 of the UN Charter. See Ballinger (1967) (n 44) 251-271.

<sup>62</sup> CHR Res 8(XXI) (27 February 1975); see also Sub-Commission Res 8(XXVII) (21 August 1974) and UNGA Res 3219 (XXIX) (6 November 1974).

<sup>63</sup> Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories (n 1)

<sup>64</sup> On the debate generated over the Chilean mandate, see Gonzáles (1981) (n 52). On subsequent attempts to remove country-specific mandates, see Elvira Domínguez-Redondo, 'UN Public Special Procedures under Damocles' Sword – Two Particular Innovations: Mechanisms for the Appointment of Mandate-holders and the Adoption of a Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council' (2008) 29 HRLJ 32, 35-6.

<sup>65</sup> CHR Res 4 (XXXI) (13 February 1975).

<sup>66</sup> CHR Res 9 (XXXIV) (8 March 1978).

<sup>67</sup> CHR Res 14(XXXV) (13 March 1979).

the confidential 1503 Procedure (Equatorial Guinea).<sup>68</sup> In 1978, the General Assembly provided the final endorsement needed, settling the Commission's competence to create geographic mandates. After acknowledging and welcoming the work carried out by the Ad Hoc Working Group on the Situation of Human Rights in Chile, it called upon the Commission to use it as basis for its future actions when dealing with consistent patterns of gross violations of human rights.<sup>69</sup>

This endorsement of the General Assembly confirming the merits of the Special Procedures as a tool to guide future actions of the Commission came at a crucial time. The adoption of Resolution 1235 (XLII) was facilitated by the absence of any other body able to deal with human rights violations within the UN. The approval of Resolution 1503 (XLVIII) had already prompted some governments to argue that every situation and communication on human rights violations should follow the confidential route established in 1970.<sup>70</sup> After all, such States argued, Resolution 1235 (XLII) only provided competence, not a procedure to deal with human rights violations – and, as seen above, the letter of the resolution seemed to restrict sources to those contained in Resolution 728F(XXVIII).<sup>71</sup> The creation of public mandates on southern Africa, and the support to this action prevented the proposals to prosper. However, it was the decision to create the Chilean mandate that ended the discussion on whether or not two routes of dealing with human rights violations – one public, and one confidential – had been created. By 1978 several human rights treaties had entered into force – significantly the two Covenants on Civil and Political Rights and Economic, Social and Cultural Rights – which raised again the question of the necessity of retaining the mechanisms established by the Commission.<sup>72</sup> However, by the time this debate was ignited, Special Procedures had been consolidated enough to prevent their removal.

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<sup>68</sup> ECOSOC Res 1979/35 (10 May 1979). A summary of actions addressing the situation in the country can be found in the first report of the Special Rapporteur (UN Doc E/CN.4/1371 (1980) para 5-23). See also below section II.D.

<sup>69</sup> UNGA Res 33/176 (10 December 1978).

<sup>70</sup> Nigel Rodley, 'Towards a more effective and integrated system of human rights protection by the United Nations' (A/CONF.157/PC/60/Add.6) (1 April 1993) para 14

<sup>71</sup> Theo van Boven, 'United Nations and Human Rights. A Critical Appraisal' In Antonio Cassese (ed) *UN Law/Fundamental Rights. Two topics in International Law* (Sijthoff Noordhoff, 1979) 119, 121-4; and Tolley (1984) (n 52) 425-9.

<sup>72</sup> Although these discussions were generally on the 1503 procedure and attempts to eliminate or reform it. See UN Commission on Human Rights Res E/CN.4/16(XXIV) of 7 March 1976 and resulting report by the Secretary General in UN Doc E/CN.4/1317 (1978). See also Theo van Boven, 'Creative and Dynamic Strategies for Using United Nations Institutions and Procedures: The Frank Newman Files' in Coomans *e.a.* (eds) *Human Rights from Exclusion to Inclusion: Principles and Practice: An Anthology from the Work of Theo van Boven* (Kluwer Law International, 2000) 89, 90-95.

### C. First Thematic Procedures

The Commission's expansion of members in 1980<sup>73</sup> reinforced the membership of 'non-aligned' countries which, contrary to some pessimistic prognosis, facilitated the proliferation of geographic mandates, and contributed to the creation of the first thematic Special Procedures.<sup>74</sup> As one of the many remarkable developments witnessed at the time, oral interventions of non-governmental organisations during the Commission's sessions would refer to any country whether or not their study was included in the agenda, facilitating the creation of new geographic procedures.<sup>75</sup> Special Procedures rapidly became the main focus of the Commission's agenda and their reports discussed under a growing number of points in the agenda, consolidating their position in the Organisation.

The expansion of territories coming under the scrutiny of the Commission also fuelled tensions in a particularly dark period of the UN's history. Between 1979 and the mid-80s, the UN witnessed an intensification of the cold war confrontation, a proliferation of new categories of armed conflicts to which it was unable to respond, the accusations of application of 'double standards' along with allegations of espionage within the secretariat (exacerbated by the departure of the Director of the Human Rights Division, Theo van Boven),<sup>76</sup> the disagreement on the role of the UN when dealing with human rights, and the claim of involvement in war crimes of a former UN Secretary General, Kurt Waldheim.<sup>77</sup> The

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<sup>73</sup> The Commission was born with 18 members, becoming 22 in 1961, 32 in 1965, 43 in 1979 and 53 in 1992, see ECOSOC Res 845 (XVII) (3 August 1961); 1979/36 (10 May 1979) and 1990/48 of (25 May 1990).

<sup>74</sup> On the pessimist forecast environment of the 1980's session of the Commission, resulting from the extension of members, the invasion of Afghanistan and the Andrei Sakharov case see International Commission of Jurists: 'UN Commission on Human Rights (Commentaries, 36<sup>th</sup> session)' (1980) 24 *International Commission of Jurists/Review* 29-36; Howard Tolley, "Decision-Making" at the United Nations Commission on Human Rights, 1979-1982' (1983) 5(1) *Human Rights Quarterly* 25-57.

<sup>75</sup> The circulation of written statements was restricted by the rules contained in ECOSOC Res 1919 (XLVIII) of 5 May 1975, although they have not been respected in practice. See Maya Prasad, 'The Role of Non-Governmental Organizations in the New United Nations Procedures for Human Rights Complaints' (1975) 5(1) *Denver Journal of International Law and Policy* 441-462. Several opinions on the topic were issued by the UN Office of Legal Affairs: *Circulation of Written Statements: Opinion Dated 28 April, 1977 from the Office of Legal Affairs to the Under-Secretary for Political and General Assembly Affairs; Principles for the Issuance and Circulation of Written Statements by NGOs: Legal Analysis Dated May, 1977; Oral Statements in the Commission on Human Rights: Legal Analysis (1978); Written Statements by Non-Governmental Organizations: Legal Analysis Dated 22 February, 1984* reproduced in Bertram G. Ramcharan (ed) *The principle of legality in International Human Rights Institutions. Selected Legal Opinions* (Martinus Nijhoff Publishers, 1997) 349-355. See also Rodley (1993) (n 71) para 30-1.

<sup>76</sup> The reports surrounding this event are worth reading for those who are interested in the dark side of the Secretariat and its not so independent role, see Eric G. Berman, *Bringing a new life to UN human operations* (United Nations Association of the United States of America, 1998) 12; Ian Guest, *Behind the Disappearances. Argentina's Dirty war against human rights and the United Nations* (University of Pennsylvania Press, 1990) 80; Evan Luard, *The United Nations. How it Works and What it Does.* (2<sup>nd</sup> ed. Macmillan, 1994) 118 & 119; Tolley, *The U.N. Commission on Human Rights* (Westview Press, 1987) 32.

<sup>77</sup> A Roberts and B Kingsbury, 'The UN's roles in a divided world', in *United Nations, Divided World. The UN's Roles in International Relations*, ed. Adam Roberts and Benedict Kingsbury (Clarendon Press, 1988), 1, esp. 11-4.



translation of these conflicts to the Commission's negotiations resulted in a historic milestone for the evolution of Special Procedures: the creation of thematic mandates.

The situation leading to the creation of the first thematic procedure is well documented, arising in the context of disappearances in Argentina. Under pressure from well-organised civil society, the Commission was compelled to react. The Director of the Human Rights Division, Theo van Boven, actively supported campaigns led by the International Commission of Jurists and Amnesty International. Several international organisations had adopted measures on the topic, including UNESCO, the Organisation of American States, the 1980 Conference on Women's Rights and the sixth UN Congress of the United Nations for the prevention of crime and treatment of offenders.<sup>78</sup> The General Assembly, the Economic and Social Council and the Sub-Commission all called upon the Commission to address the issue.<sup>79</sup> However, the accusations of selectivity in the choice of countries and the diplomatic manoeuvres of the Argentinian government, then under scrutiny by means of the confidential 1503 procedure, were impossible to overcome in order to reach the necessary votes to create a public geographic mandate.<sup>80</sup> A different strategy was then followed and the proposals for a Special Procedure on Argentina were replaced by proposals for the creation of a Working Group to study the phenomenon of disappearances taking place anywhere in the world. The government targeted was notorious, and the draft resolution circulated to establish the working group was known as the 'Argentinian Resolution'.<sup>81</sup> Still, the lack of reference within the text of the resolution to Argentina allowed the adoption of Resolution 20 (XXXVI) of 29 February 1980, by which the Commission decided to appoint, for a year, a Working Group to examine questions relevant to enforced or involuntary disappearances of persons. A few months later, The Sub-Commission dared to submit a proposal for a specific mechanism, similar to *habeas corpus* to deal with particularly urgent cases of disappearances.<sup>82</sup> The proposal was not approved but inspired future work of the Working Group on Enforced Disappearances.

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<sup>78</sup> See eg David Kramer and David Weissbrodt, 'The 1980 U.N. Commission on Human Rights and the Disappeared' (1981) 3 Hum.Rts.Q. 18; Hurst Hannum, 'Human Rights and the United Nations: Progress at the 1980 U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1981) 3 Hum.Rts.Q. 1;

<sup>79</sup> See ECOSOC Res 1979/38 of 10 May 1979; GA Res 33/173 of 20 December 1978; Sub-Commission Res 5(XXXII)B of 5 September 1979 (UN Doc E/CN.4/1350-E/CN.4/Sub.2/435).

<sup>80</sup> See Guest (1990) (n 77) Also Patrick J Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, 1998) 50-61.

<sup>81</sup> Nigel S. Rodley, 'The Evolution of the United Nations Charter-based Machinery of the Protection of Human Rights' (1997) 1 E.H.R.L.R. 4, 6.

<sup>82</sup> Subcommission Res 18 (XXXIII) (11 September 1980) Question of the human rights of persons subjected to any form of detention or imprisonment, UN Doc E/CN.4/1413-E/CN.4/Sub.2/459 (1980) 75

Following this example, many other *ad hoc* organs (Special Procedures) with thematic mandates were created. Most are still in force although some have changed denomination or composition over the years. The short existence of the Special Rapporteur on human rights and mass exoduses, created in 1981 for a year and not renewed,<sup>83</sup> is an exception among thematic Special Procedures that have otherwise existed indefinitely once established.

#### D. Confidential Special Procedures

The Human Rights Council can decide, among other measures, to create a ‘Confidential Special Procedure’ by appointing an independent expert to monitor the situation of a State and report back to the Council under the confidentiality of the complaint procedure.<sup>84</sup> The Commission on Human Rights created several such confidential Special Procedures before this competence was expressly acknowledged by ECOSOC<sup>85</sup> and subsequently, by the Human Rights Council.<sup>86</sup> For instance, a confidential Special Procedure was created in 2004 to address the situation of human rights in Uzbekistan.<sup>87</sup> In 2005, the Commission extended the mandate of the independent expert (Michèle Picard) and, after considering her report,<sup>88</sup> the newly created Human Rights Council<sup>89</sup> decided to discontinue the consideration of the human rights situation in Uzbekistan in 2007.<sup>90</sup> In 1999, the Commission terminated similar confidential Special Procedures on Chad, Armenia and Azerbaijan.<sup>91</sup> Douré M’Bam Diarra (1996) and Emma Aouij (1996-7) were appointed independent experts on the situation of human rights in Chad.<sup>92</sup> The mandate was terminated in favour of providing advisory services

<sup>83</sup> CHR Res 29(XXXVII) (31 March 1981).. The first and only report of the Special Rapporteur can be found in UN Doc E/CN.4/1503 (1982).

<sup>84</sup> HRC Res 5/1 (n34) para 109 c).

<sup>85</sup> ECOSOC Res 2000/3 (n 34) para 1. See also CHR Dec 2000/109 (26 April 2000)

<sup>86</sup> HRC Res 5/1 (n 32) para 109 c

<sup>87</sup> See Report of the Secretary General on the situation of human rights in Uzbekistan, UN doc A/61/526 (18 October 2006) para 31.

<sup>88</sup> The independent expert’s report was examined by the Human Rights Council in September 2006. The Report on the situation of human rights in Uzbekistan (restricted) was circulated as UN Doc E/CN.4/2006/WG.16/R.3 (5 January 2006), see *United Nations Document Index* (Vol. 9 No. 3, October-December 2006) Part 2, UN Doc ST/LIB/SER.N/34 (Part 2) (United Nations, 2008) 1300.

<sup>89</sup> The mandate was extended by the HRC Dec 1/102 (30 June 2006) Annex, in the context of the transfer of responsibilities and mandates from the Commission to the Council.

<sup>90</sup> UN doc A/HRC/4/123, 48 para 119-121 (12 June 2007)

<sup>91</sup> Commission on Human Rights Report on the Fifty-Fifth Session UN doc E/1999/23-E/CN.4/1999/167 (1999) para 246-8.

<sup>92</sup> See Commission on Human Rights Report on the Fifty-Second Session (18 March-26 April 1996) UN Doc E/1996/23-E/CN.4/1996/177 (1996) 286-7: CHR Dec 1996/101 [dd]; Commission on Human Rights Report on the Fifty-Fourth Session (16 March-24 April 1998) UN doc E/1998/23-E/CN.4/1998/177 (1998) para 419 and 282-3: CHR Dec 1998/101 (17 March 1998) [dd]; see also Carlos Villán Durán, *Curso de Derecho Internacional de Los Derechos Humanos* (Trotta, 2002) 638.

and technical cooperation to the country instead<sup>93</sup> Hugh Templeton was appointed independent expert on the situation of human rights in Armenia and Azerbaijan in 1996<sup>94</sup> but his mandate was short-lived since the Commission decided, the same year, to discontinue consideration of these territories under the 1503 procedure.<sup>95</sup> Confidential Special Procedures have also existed, in the past, concerning the situation of human rights in Uganda (1978-81),<sup>96</sup> and Haiti (1981-7).<sup>97</sup> On several occasions, the Commission requested the Secretary General to designate the expert or to exert his good offices with the government concerned.<sup>98</sup> The confidentiality of the complaint procedure has made it difficult to know whether an independent expert has been appointed to examine a particular territory. The official information available is restricted to public statements made by the Chair of the Human Rights Council regarding the territories examined under this mechanism,<sup>99</sup> compiled and published by the OHCHR.<sup>100</sup> To the author's knowledge the Human Rights Council has not established any new confidential Special Procedure since its creation in 2006.

<sup>93</sup> CHR Dec 1999/102 (22 April 1999).

<sup>94</sup> CHR Dec 1996/101 (n 93) [dd].

<sup>95</sup> UN Doc E/1996/23-E/CN.4/1996/177 (n 93) 365 para 382; see also Villán Durán (2002) (n 93) 638

<sup>96</sup> This was the first confidential Special Procedure established by the Commission, see Report of the Secretary-General on the Effective functioning of the various mechanisms established for the supervision, investigation and monitoring of the implementation of the treaty obligations entered into by States in regard to human rights and of the existing international standards in this regard, UN Doc E/CN.4/1994/42 (14 February 1994) para 73 and fn4. On the unsuccessful attempts to make this situation public see Tardu (1980) (n 10) 574-5; Gonzáles (1981) (n 52) 457-8; and RB Lillich and Hurst Hannum, *International Human Rights. Problems of Law, Policy and Practice* (3<sup>rd</sup> ed. Aspen Pub, 1995) 16-32.

<sup>97</sup> See CHR Res 1987/13 (2 March 1987) preliminary paragraph 1, referring to the confidential report of the Special Representative of the Commission, UN Doc E/CN.4/1987/R.2 (1987); on different experts designated for this territory, see America Watch Staff: *Reverting to Despotism: Human Rights in Haiti* (Human Rights Watch, 1990), 137, 140 and 141

<sup>98</sup> Until 1997, the Secretary General would have facilitated direct contact with governments, acting under the 1503 procedure, with Armenia and Azerbaijan (1995); Chad (1994-5 and 1997); Equatorial Guinea (1977-8); Ethiopia (1979-80); Haiti (1981-3 and 1986); Myanmar (1990-1); Paraguay (1978-90); Somalia (1992); Sudan (1992); Uruguay (1979-84); and Zaire (1992), see M Francisca Ize-Charrin '1503: A serious Procedure' in Alfredsson, Grimheden, Ramcharan and Zayas (n 10) 293, 304 (fn 7).

<sup>99</sup> The result of a confidential agreement, this practice commenced in 1978 and by 1984, the list expanded to countries no longer examined by the Commission. This practice was later codified by Resolution 2000/3 (n 33) and HRC 5/1 (n 34). See Nigel Rodley (1997) 1 'The Evolution of United Nations Charter based Machinery for the Protection of Human rights', *European Human Rights Law Review*, 4; Christian Tomuschat, 'Human Rights in a World-Wide Framework. Some Current Issues' in *Zeitschrift für Ausländisches Öffentliches Recht Und Völkerrecht. Begründet von Viktor Bruns.*(Kohlhammer, 1985)547, 579-80; and Peter Kooijmans, 'Introduction to the International Systems of Protection of Human Rights', (1986) *Recueil des Cours. Strasbourg Institut International des Droits d l'Homme* 6, 17.

<sup>100</sup> See 'List of situations referred to the Human Rights Council under the Complaint Procedure since 2006' OHCHR at:

<http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/SituationsConsideredUnderComplaintProcedures.pdf>. However, the confidentiality does not cover NGOs and other sources of information. Therefore non-official –scattered and not always verifiable- information is available elsewhere, see Ermacora (1974) (n 5) 684; Tolley (1984) (n 52) 442, 446, 448 and 454; Rodley (1979) (n 22) 169-70. Pauline Egret, 'Outcomes of the 1503 and 1235 procedures' in Meghna Abraham, *A New Chapter of Human Rights* (International Service for Human Rights and Friedrich Elbert Stiftung, 2006) Annex 5.1 available at: <http://oldDocisshr.ch/handbook/Annexes/CommProcs/1503outcms.pdf>

In some instances, the decision to discontinue reviewing the situation of the State concerned under the confidential procedure in favour of taking up public consideration of the matter has resulted in the creation of new geographic public Special Procedures. Equatorial Guinea (1979) was the first country subjected to this treatment due to its lack of cooperation with the Commission.<sup>101</sup> An emblematic example of the relationship between the 1503 (now complaint) procedure, and Special Procedures is represented by the manner in which the Commission tackled the situation of human rights in Haiti. Following the creation of a confidential Special Procedures to examine Haiti in 1986, the report submitted by the appointed Special Representative was later made public in 1987 by the same resolution deciding the creation of a public Special Procedure.<sup>102</sup> Other public Special Procedures, preceded by an examination of the country under the confidential 1503 procedure include: Afghanistan, Liberia, Myanmar, Rwanda, Chile, Democratic Republic of Congo (Zaire), El Salvador, Guatemala, Iran, Somalia, Sudan and Uzbekistan.<sup>103</sup> In the lifetime of the Human Rights Council, Eritrea has also become a country examined under a public Special Procedure as an outcome of the complaint procedure.<sup>104</sup> Despite numerous voices demanding its elimination<sup>105</sup> it has endured for 45 years, revealing State support for its confidential nature, and the belief that States may be in a better position to present their viewpoint without being exposed to public pressure, while remaining under the threat of a public investigation if they do not cooperate with the procedure.<sup>106</sup>

<sup>101</sup> Confidential CHR Dec of 8 March 1979 and CDH Res 1979/35 (10 March 1979), endorsed by ECOSOC Dec 1979/35 (n 69). A summary of the confidential decisions undertaken under the 1503 procedure including a transcription of the confidential decision requesting the creation of a public Special Procedure can be found in the first and only report of the Special Rapporteur on the situation of human rights in Guinea, UN Doc E/CN.4/1371 (1980) para 5-23.

<sup>102</sup> CHR Res 1987/13 (n 89) para 1 and 11 See also Report on Haiti by the Expert, Mr. Philippe Texier, prepared in conformity with Commission on Human Rights resolution 1988/51, UN Doc E/CN.4/1989/40 (6 February 1989) para 1-14. See also UN Doc A/49/513 (14 October 1994) para 1-15.

<sup>103</sup> Egret (2006) (n 95).

<sup>104</sup> See HRC Res 20/20 (6 July 2012) and HRC Res 21/1 (26 September 2012). A summary of the situations and outcome of the situations referred to the Human Rights Council under the complaint procedures since 2016 can be found is available on the OHCHR at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf>

<sup>105</sup> See eg International Commission of Jurist, 'UN Commission on Human Rights' (1980) 24 I.C.J.Rev 29, 34-5; Philip Alston, 'Individual Complaints: Historical Perspectives and the International Covenant on Economic, Social and Cultural Rights' in S Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (Zed Books Ltd, The Federation Press, 1998), 81, 81-3; Eric Lane, 'Mass Killing by Governments: Lawful in the World Legal Order?' (1979) 12 N.Y.Univ.J.Int'l.L. & Pol 239, 268-73; Manfred Nowak, 'Proposals for Improving the UN Human Rights Programme' (1993) 11 N.Q.H.R. 153, 156.

<sup>106</sup> Stefan Oeter, 'Inspection in international law. Monitoring compliance and the problem of implementation in international law' (1997) XXVIII NYIL 129, 135. See also: David Weissbrodt, 'Protecting the Right to Life: International Measures against Arbitrary or Summary Killings by Governments' in B Ramcharan (ed) *The Right to Life in International Law* (Martinus Nijhoff, 1985) 297, 303; and Eibe Riedel, 'Commission on Human Rights' in Wolfrum and Philipp, *United Nations: Law, Policies and Practice* (vol.1, Martinus Nijhoff, 1995) 116, 124.

### III. The Legacy of Growing Organically: Trends in Working Methods

This section outlines several salient features determining the evolution of the work carried out by mandate holders of Special Procedures over the years. Their methods of work and support received by the Secretariat have varied from mandate to mandate and from inception in 1967 until today. Special Procedures were created by resolutions adopted by a political organ and were therefore framed in vague terms. This enabled mandate-holders to determine their own working methods, which goes to explaining methodological variations on the part of different Special Procedures. The first individuals appointed to Special Procedures had little in terms of precedents to use as guidelines. The creation of a substantial number of geographic Special Procedures covering territories beyond the ‘unholy trinity’ (Middle East, apartheid and Chile), and the evolution of thematic mandates occurred in a short period of time without the approval of rules to guide their work. Between 1980 and 1987, new thematic Special Rapporteurs were appointed on the issues of summary and arbitrary executions,<sup>107</sup> torture,<sup>108</sup> religious intolerance,<sup>109</sup> and the use of mercenaries as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination.<sup>110</sup> During the same period, geographic Special Procedures were entrusted to a Special Representative on El Salvador;<sup>111</sup> a Special Envoy on Bolivia;<sup>112</sup> a Special Rapporteur on Guatemala;<sup>113</sup> a Representative of the Secretary General on Poland;<sup>114</sup> a Special Representative on Iran,<sup>115</sup> and

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<sup>107</sup> Although following a Commission’s recommendation (CHR Res 1982/29, 11 March 1982) it is ECOSOC the organ creating this mandate by ECOSOC Res 1982/35 (7 May 1982). In 1992, the Commission extended the scope of the mandate adding the word ‘extrajudicial’ to the name of this Special Procedure (CHR 1992/72 (5 March 1992).

<sup>108</sup> CHR Res 1985/33 (13 March 1985). On the origin of the mandate, see: Nigel Rodley, *The Treatment of Prisoners Under International Law* (2<sup>nd</sup> ed., Clarendon Press, 1999) 18-45 and 134-46.

<sup>109</sup> CHR Res 1986/20 (10 March 1986). Its mandate was different from others at the time, since it was the first one focused on a specific international instrument, i.e., the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UNGA Res 36/55, 25 November 1981). On the background concerning the creation of this Special Procedure, see UN Doc E/CN.4/1987/35 para 1-11. The Special Rapporteur was renamed Special Rapporteur on freedom of religion or belief by CHR Res 2001/42 (23 April 2001) para 11

<sup>110</sup> CHR Res 1987/16 (9 March 1987). On the political alliances around the creation of the mandate on religious intolerance and mercenaries –as late symbols of the Cold War- see Boven (1992) (n 11) 45 and Frouville (1996) (n 12) 25-7.

<sup>111</sup> CHR Res 32 (XXXVII) (11 March 1981).

<sup>112</sup> CHR Res 34 (XXXVII) (11 March 1981).

<sup>113</sup> CHR Res 1982/31 (11 March 1982)

<sup>114</sup> CHR Res 1982/26 (10 March 1982).

<sup>115</sup> CHR Res 1984/54 (14 March 1984).

a Special Rapporteur on Afghanistan.<sup>116</sup> Without rules to guide their operations, mandate-holders of Special Procedures designed their working methods from scratch.

#### A. Attempts to Codify Model Rules

The absence of guidelines to follow by Special Procedures in their operations contrasts with the efforts made to address this gap, affecting many UN bodies trusted with human rights mandates. The first attempts to codify general rules applicable to ad hoc bodies of the UN entrusted with studies of particular situations alleged to reveal a consistent pattern of violation of human rights, are as old as the Special Procedures. Taking into account the competence contained in ECOSOC Resolution 1235 (XLII) and the Commission on Human Rights resolutions appointing the first ad hoc working groups,<sup>117</sup> the 1968 Teheran International Conference on Human Rights recommended the adoption of ‘Model rules for bodies dealing with violations of human rights’.<sup>118</sup> The Secretary General suggested a Draft Model in 1970,<sup>119</sup> and, in 1974, the Economic and Social Council requested it to be drawn to the attention of all potential fact-finding bodies, although it did not approve or adopt the Draft Model as such.<sup>120</sup> The Draft Model informed a memorandum agreed between the Working Group on Chile and the Chilean government in 1978,<sup>121</sup> but has not been widely used (if at all known) by mandate holders since. Neither Special Procedures’ reports nor their Manual of Operations<sup>122</sup> refer to them. It does not appear that other private initiatives such as ‘The Belgrade Minimum Rules of Procedures for International Human Rights Fact-Finding

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<sup>116</sup> It is again the ECOSOC, rather than the Commission, the body creating the mandate by ECOSOC Res 1984/37 (24 May 1984) following the Commission’s proposal (CHR Res 1984/55, 15 March 1984). A summary of the precedents leading to the creation of this Special Procedure can be found in the first report of the Special Rapporteur, Felix Ermacora, UN Doc E/CN.4/1945/21 para 8-40.

<sup>117</sup> See above n 45 and 47.

<sup>118</sup> Resolution X (12 May 1968) contained in the Final Act of the 1968 Teheran International Conference on Human Rights, UN Doc A/CONF.32/41 (1968) 12. See also, Thomas Franck and Scott H. Fairley, ‘Procedural due process in human rights fact-finding by International Agencies’ (1980) 74 AJIL 308.

<sup>119</sup> See ‘Draft model rules of procedure for the Ad Hoc bodies of the United Nations entrusted with studies of particular situations alleged to reveal a consistent pattern of violations of human rights’, UN Doc E/CN.4/1021/Rev.1 (1970) and CHR Res 8(XXV) (4 March 1969). The Commission established a working group to revise the Draft Model. The final Draft Models are contained in UN Doc E/CN.4/1086 (1973) and E/CN.4/1134 (1974).

<sup>120</sup> The ECOSOC only took note of them rather than endorsing them, ECOSOC Res 1870 (LVI) (17 May 1974). See also the ‘Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security’ U.N. Doc A/RES/46/59, Annex (1992).

<sup>121</sup> See Philip Alston and Sarah Knuckey, ‘The Transformation of Human Rights Fact-Finding. Challenges and Opportunities’ in P Alston and S Knuckey, *The Transformation of Human Rights Fact-Finding* (Kindle edn, Oxford University Press, 2015) ch 1, part III, text above n 49.

<sup>122</sup> Manual of Operations of the Special Procedures of the Human Rights Council (August 2008) in Report of the 15th meeting of special procedures assumed by the Human Rights Council, from 23 to 27 June 2008, UN Doc A/HRC/10/24, November 2008. Also available at OHCHR website:

[http://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf)

Missions'(1981)<sup>123</sup> or, more recently, the 'Siracusa Guidelines' (2013)<sup>124</sup> have had a significant impact on Special Procedures' implementation of mandates either.<sup>125</sup> As eloquently articulated by Bassiouni, 50 years of fact-finding missions by Special Procedures and other UN bodies have not been supported by any standard operating procedure, negatively impacting on data collection, continuity of mandates and comparability of results. In his words:

...In short, there is nothing to guide, instruct, or assist the heads and appointees to these missions of how to better carry out their mandates. It strains one's belief that in fifty years the most elementary aspects of standardized organization, planning, documentation, and reporting have not been developed. Thus, each mission has to reinvent the wheel and, in an organizational sense, has to reinvent itself as a mission. The results are usually poor or mediocre performance, except where particularly competent persons are appointed (...) This situation also means that there is little consistency and predictability as to the methods and outcomes.<sup>126</sup>

#### B. Heterogeneity of Practices and Trends in Working Methods of Special Procedures

The absence of any coordinating mechanisms, until the initiation of an annual meeting of mandate-holders in 1993, exacerbated the heterogeneity of practices on the part of Special Procedures. Firstly, only a minority of mandate holders published their methods of work. Potential users of Special Procedures had to infer what to expect from these mechanisms by reading the summaries of activities included in their reports. Among geographic Special Procedures, the Working Group on Chile published its working methods from its first report in 1975.<sup>127</sup> These were contested by the Chilean government but endorsed by the General

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<sup>123</sup> The formulation of these standards came from the initiative of the International Association of Jurists and are published in 75(1) *American Journal of International Law* (1981) 163-175.. On the attempts to codify rules explained here and more current initiatives, see Alston & Knuckey (2015) (n 113) ch 1, Part III, text above n 40-60

<sup>124</sup> MC Bassiouni and C Abraham (eds) *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Intersentia, 2013).

<sup>125</sup> However the Special Rapporteur on extrajudicial, summary or arbitrary executions lists the 'Siracusa Guidelines' as one of the instruments to bear in mind in the context of the Revision of the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, Annex 2, Consultation document, available at the OHCHR website: <http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>. See also, OHCHR, *Training Manual on Human Rights Monitoring* (Professional Training Series, No 7, United Nations, 2001) On the attempts to codify rules explained here and more current initiatives, see Alston & Kuckney (2015) (n 123) ch 1, Part III, text above n 40-60.

<sup>126</sup> M Cherif Bassiouni, 'Appraising UN Justice-related fact-finding missions' (2001) 5 Wash. U.J.L. & Pol'y, 35, 40-1.

<sup>127</sup> UN Doc A/10285 (1975) Annex para 13-39

Assembly and the Commission.<sup>128</sup> The Ad Hoc Working Group of Experts on the situation of human rights in southern Africa devoted a section of its reports to the ‘organisation of its work’, but its content was limited to summarise the activities of the Group during the examined period and the international legal framework of reference. From 1971, the Group added the procedure and formalities followed to take testimony.<sup>129</sup>

Other exceptional examples of early publication of methods of work in reports submitted to the Commission or the General Assembly, were authored by the Working Group on Enforced or Involuntary Disappearance and the Special Rapporteur on Torture. The Working Group on Enforced Disappearances refers to its sources and methods of work from its first report, with special attention to the procedure to follow for ‘urgent appeals’:

... A procedure was approved whereby in such cases the Chairman was authorized immediately to dispatch a cable seeking information from the Government concerned and its assistance in tracing the person or persons involved. This procedure, which has been used on a number of occasions, has provoked some response and achieved certain results (...) Thus, while the Working Group has been in existence, it may well have been realized by those, throughout the world, who contemplated the detention of a person and his disappearance, that the Group was continuously acting as the eyes of the international community, and acting with that sense of urgency which alone can save lives. Just as older cases must be investigated too, new ones must be prevented.<sup>130</sup>

From its third report, statistical data is included in the Working Groups’ reports,<sup>131</sup> which become more complete and systematic after 1985.<sup>132</sup> Following the approval of new methods of work in 1986,<sup>133</sup> the Working Group established its admissibility criteria for communications in 1988.<sup>134</sup>

The Special Rapporteur on torture outlined its methods of work concerning communications since 1986.<sup>135</sup> The working methods published by the Working Group on Enforced Disappearances and the Special Rapporteur on torture were followed, to a greater or

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<sup>128</sup> On this discussion see the fourth report of the Working Group in UN Doc E/CN.4/1221 (1977) para 29-41.

<sup>129</sup> UN E/CN.4/1050 and Corr. 1 (1971) para 26. For a critic of the lack of methods of work, see Felix Ermacora, ‘International Enquiry Commission in the field of human Rights’ (1968) 1 HRLJ, 180, 192.

<sup>130</sup> UN Doc E/CN.4/1435 (1981) para 10, 30 and 43

<sup>131</sup> UN Doc E/CN.4/1983/14 (1983) para 42.

<sup>132</sup> UN Doc E/CN.4/1985/15 (1985) para 73-90.

<sup>133</sup> UN Doc E/CN.4/1986/18 (1986) para 32-4

<sup>134</sup> UN Doc E/CN.4/1988/19 (1988) para 2, 3, 16-30 On other changes see also UN Doc E/CN.4/1989/18 para 23 and E/CN.4/1999/13 para 25-28.

<sup>135</sup> UN Doc E/CN.R/1986/15 para 20



lesser degree, by other thematic mandates. For instance, the Special Rapporteur on summary or arbitrary executions explained, in 1989, the scope of his activities – including his intervention on behalf of individuals – and briefly outlined admissibility criteria for urgent appeals.<sup>136</sup> Also in his 1989 report, the Special Rapporteur on religious intolerance outlined his methods of work, but without explaining the rationale followed to react to allegations, beyond the priority given to the most recent cases.<sup>137</sup> During the same period, the Special Rapporteur on the use of mercenaries had explained his activities to the Commission and the General Assembly, but not published methods of work.<sup>138</sup>

Every mandate-holder also had to decide the material and temporal scope of its mandate, and adopted different approaches regarding similar resolutions of the Commission. For instance, ignoring other elements of the Commission's original definition of the scope of its work, the Working Group on Disappearances decided to focus on individual cases of disappearances, prioritising those considered urgent;<sup>139</sup> the Special Envoy on Bolivia elected to limit his analysis to civil and political rights, while acknowledging the relevance of economic, social and cultural rights violations in the country;<sup>140</sup> the Special Representative of the Secretary General on Poland concluded that the refusal of the Polish government to grant him a visit meant he had 'no other choice than to limit [his] analysis of the situation to the normative aspects of the question relating to the application of the relevant international instruments ratified by Poland'.<sup>141</sup> Some mandate-holders understood they had competence to study allegations and events predating their appointment while others took the opposite view.<sup>142</sup> Significant discrepancies can also be observed in the mandates and working methods

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<sup>136</sup> UN doc E/CN.4/1989/25 (1989) para 6-25 and 302-4 More details on admissibility criteria can be inferred from his subsequent report UN Doc E/CN.4/1990/17 (1990) para 6

<sup>137</sup> UN doc E/CN.4/1989/44 para 10-8 and 82-7.

<sup>138</sup> UN doc E/CN.4/1989/14 (1989).

<sup>139</sup> For more details on this, see See David Weissbrodt, 'The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights' (1986) 80 AJIL 685, 685-7 and Ilka Bailey-Wiebecke, 'The UN Working Group on Disappearances: After 15 Years, Focus on Asia' (1995) V Human Rights Forum 51;

<sup>140</sup> UN Doc E/CN.4/1500 (1982) para 125, although he included a small section on the topic in his second report, UN Doc E/CN.4/1983/22 (1983) paras 32-37.

<sup>141</sup> Doc E/CN.4/1983/18, *esp.* § 52

<sup>142</sup> The Special Rapporteur on executions decided that 1980 was the critical date to study allegations (although his mandate was created in 1982), see UN Doc. E/CN.4/1983/16 (1986) paras 71, 125-216 and E/CN.4/1984/29, Annex 4. The Working Group took could not decide on a date and studied cases largely predating its creation, see UN Doc E/CN.4/1988/19 para 14; the Special Rapporteur on Religious Intolerance gave priority to the use of 'recent information' with exceptions, UN Doc E/CN.4/1988/44 (1988) para 13

of Special Procedures when dealing with pre-conflict, conflict and post-conflict situations,<sup>143</sup> or the treatment of non-state actors.<sup>144</sup>

In addition, mandate-holders made unilateral decisions on how they would coordinate their activities with other Special Procedures and other relevant UN human rights bodies. The joint hearings held by the Special Rapporteur on summary and arbitrary executions and the Chairman of the Working Group on southern Africa in 1985 are the first example of a joint country-visit by Special Procedures.<sup>145</sup> It was also the Special Rapporteur on extrajudicial execution the first mandate-holder to establish rules of co-existence with other Special Procedures, using his own (and changeable) criteria.<sup>146</sup> The Commission did not respond when he requested guidelines to coordinate his work with the Working Group in Enforced Disappearances, in 1989.<sup>147</sup> Motivated by the need to delimitate its scope of action in relation to the newly created UN Committee Against Torture, the 1988 Special Rapporteur on torture's report includes an extensive explanation of the term of reference governing its mandate and operations.<sup>148</sup> He also decided to use the criteria of 'dominant violation' to assess which UN organ was better equipped to deal with allegations containing a combination of human rights violations.<sup>149</sup>

Despite the heterogeneity of practices, it is possible to identify trends in the working methods followed by mandate-holders, and a division between geographic and thematic Special Procedures. Until the 1990s mandate-holders did not generally publish full methods of work. Instead these had to be inferred from their reports. Over the years it has become standard practice among thematic mandates to publish this information both in their reports

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<sup>143</sup> Elvira Dominguez-Redondo, 'Making the connection: Security and Human rights' in MC Bassiouni and W Schabas (eds.) *New Challenges of the Human Rights Machinery* (Intersentia, 2011) 255, 259-61.

<sup>144</sup> The Working Group on Enforced Disappearances took the position of not approaching non-state actors, UN Doc E/CN.4/1986/18 (1986) para 34. Conversely, the Special Rapporteur on El Salvador considered the political nature of its mandate allowed him to consider violations committed by non-state actors, see Pastor-Ridruejo (1991) (n 10) 214-5.

<sup>145</sup> UN Doc E/CN.4/1986/21 (1986) para 56, 179-83 and 192-5; the experience was repeated in subsequent years, see eg UN Doc. E/CN.4/1987/20 para 236 and Annex I, E/CN.4/1988/21 para 21, 236-48; E/CN.4/1990/22 para 20; E/CN.4/1991/36 paras 20, 440-64.

<sup>146</sup> The Special Rapporteur initially decided not to study allegations regarding countries examined under geographic procedures, UN Doc E/CN.4/1983/16 (1983) para 71; see also UN Doc. E/CN.4/1984/29 (1984) para 17 and E/CN.4/1985/17 para 64 (1985). In 1986 the Special Rapporteur removed this restriction from his methods of work and considered allegations without justifying the change of position UN Doc E/CN.4/1986/21 (1986).

<sup>147</sup> UN Doc E/CN.4/1989/25 paras 300-1.

<sup>148</sup> UN Doc E/CN.4/1998/17 paras 4-13. See also, UN Doc E/CN.4/1990/17 para 6-18

<sup>149</sup> UN Doc E/CN.4/1990/17 para 9. Further inconsistencies, not adequately explained by mandate-holders in handling communications were highlighted by a note of the Secretariat discussed during the 15<sup>th</sup> annual meeting of Special Procedures, OHCHR Website (2008): [http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/15thsession/Communicationsof\\_SPs\\_Discussions\\_Secretariat.pdf](http://www.ohchr.org/Documents/HRBodies/SP/AMeetings/15thsession/Communicationsof_SPs_Discussions_Secretariat.pdf).

and on the OHCHR website, though it remains rare among geographic Special Procedures. This is partially explained by their intended short-time duration.<sup>150</sup>

The competence conferred on the Commission to deal with human rights violations clearly referred to patterns of gross and systematic violations of human rights.<sup>151</sup> However, the Commission introduced references to communications in thematic mandates, normally limited to a request to ‘respond effectively’ to information coming before them.<sup>152</sup> This was interpreted as competence to deal with individual communications, and while the Commission often limited the sources of information the mandate-holders should use in its resolutions, this was widely ignored. During the 1980s, only the mandate-holder on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination did not deal with individual communications.<sup>153</sup> The Working Group on Arbitrary Detention, created in 1991, was the first Special Procedure to receive a clear mandate of ‘investigating cases’.<sup>154</sup> Only two other Special Procedures were conferred that power since their conception during the life of the Commission: the Special Rapporteur on the independence of judges and lawyers<sup>155</sup> and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.<sup>156</sup> Conversely, resolutions addressed to geographic mandates did not include a request to respond effectively to information coming before them from all available sources (including individual communications).<sup>157</sup> This contributed to geographic mandate holders’ reluctance to deal with individual cases from the early years of evolution of Special Procedures, a trend that remains today.<sup>158</sup> As argued elsewhere, the adoption of the Code of Conduct for Special Procedures<sup>159</sup> has provided for the first time – although indirectly – firm legal basis for the competence of mandate-holders to deal with individual cases.<sup>160</sup>

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<sup>150</sup> On the political and technical reasons explaining this, see Pastor Ridruejo (1991) (n 10) 235-8 and Lempinen (2001) (n 9) 144-8.

<sup>151</sup> See n 64.

<sup>152</sup> See David Weissbrodt (n 139)..

<sup>153</sup> The reports focused on the positions held by States regarding mercenaries and specific situations. For instance, the 1989 report included a section on ‘Complaints of mercenary activities’ listing complaints made by States, UN Doc E/CN.4/1989/44 (1989) para 17-22.

<sup>154</sup> CHR Res. 1991/42 (5 March 1991) para 2.

<sup>155</sup> CHR Res 1994/41 (4 March 1994) para 3.

<sup>156</sup> CHR Res. 1995/ (8 March 1995) para 7.

<sup>157</sup> See Weissbrodt (1986) (n 139) 688.

<sup>158</sup> In 1980, the Group of Experts on southern Africa were endowed with the competence of drawing the Commissions’ attention to cases requiring urgent action, but it was still the Commission who decided whether or not to sent the urgent appeal, UN Doc E/CN.4/1429 (1981) para 21. See also UN Doc E/CN.4/1984/8 (1984) para 17-9 and E/CN.4/1986/9 (1986) para 12

<sup>159</sup> HRC Res 5/2 (17 June 2007).

<sup>160</sup> Dominguez Redondo (2011) (n 15)

The optimism generated by the end of the Cold War is reflected in the creation of new thematic mandates.<sup>161</sup> The euphoria of the early 1990s did not last, with calls for rationalisation of the mechanism dominating endless discussion of reform they have been subjected to since.<sup>162</sup> The attempt to balance the attention paid to civil and political rights with economic, social rights as well as ‘third generation rights’ involved a substantial change in the language chosen for the relevant resolutions of the Commissions. After 1997, several thematic Special Procedures were born with the function of undertaking studies of phenomena related to human rights rather than to investigating or ‘responding’ to human rights violations. States were not ready, for the most part, to approve mandates in charge of investigating human rights violations regarding economic, social and cultural rights, partly because they would argue against their consideration as part of the catalogue of internationally recognised rights. This is illustrated by the discussions leading to the appointment of a Special Rapporteur on adequate housing.<sup>163</sup> This prompted the Special Rapporteur to recommend to the Commission on Human Rights, to provide ‘unequivocal recognition to the human right to adequate housing’,<sup>164</sup> and the competence to deal with communications of human rights violations.<sup>165</sup> Similar discussions marked the birth of the Special Rapporteur on the right to health.<sup>166</sup> Other Special Procedures have for years kept a profile focused on the codification of human rights related topics rather than investigation of human rights violations – such as the Independent Expert on structural adjustment programmes and foreign debt or the Independent Expert (now Special Rapporteur) on extreme poverty.<sup>167</sup> The denomination ‘Rapporteur’ became reserved for mandates on civil and political rights and older Special Procedures, while names only used for geographic

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<sup>161</sup> For instance, between 1990 and 1994 new thematic Special Procedures were created on the question of sale of children and child prostitution and child pornography, CHR Res 1990/68 (7 March 1990); arbitrary detention (n 155); internally displaced persons, CHR Res 1992/73 (5 March 1992); freedom of opinion and expression, CHR 1993/45 (5 March 1993); racism, CHR 1993/20 (2 March 1993); violence against women (CHR 1994/45 (4 March 1994); and independence of judges and lawyers, CHR Res 1994/41 (1 March 1994).

<sup>162</sup> See Dominguez-Redondo (2011) (n 15) 268-272.

<sup>163</sup> Discussions reflected in UN doc E/CN.4/2000/SR.70 (draft resolution contained in E/CN.4/2000/L.7). See Michael Dennis, ‘The Fifty-Sixth Session of the UN Commission on Human Rights’ (2001) 95 AJIL 213, 216-7, ‘The Fifty-Seventh Session of the UN Commission on Human Rights’ (2002) 96 AJIL 181,189-91; On the background of the discussion and the position of the United States, contrary to the recognition of right to adequate housing as an international human right, see Philip Alston, ‘The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum’ (1996) 1 E.H.R.L.R. 120.

<sup>164</sup> UN Doc E/CN.4/2003/5 (2003) para 65(A)

<sup>165</sup> Ibid para 65(b)

<sup>166</sup> See Summary Records of the 56<sup>th</sup> meeting of the 59<sup>th</sup> Session of the Commission on Human Rights, 22 April 2003, UN Doc E/CN.4/2003/SR.56

<sup>167</sup> The change of denomination was decided by HRC Res 17/13 (17 June 2011) para 2

Special Procedures until then – such as expert and special representative – were introduced for thematic mandates.<sup>168</sup>

The different scope of the mandates and methods made Special Procedures very difficult to understand as a whole as demonstrated by the conclusions reached by some experts in the field. Olivier des Frouville advanced the concept of ‘reactive’ thematic procedures (procédure thématique de réaction) to distinguish Special Procedures close to treaty-based mechanisms from those who had not received the mandate to ‘respond’ to allegations of human rights violations.<sup>169</sup> Beate Rudolf sustained that only thematic mandates dealing with cases of human rights violations could be considered ‘authentic’ Special Procedures, which at the time of writing meant that most Special Procedures focusing on economic, social and cultural rights were not part of the category Special Procedures. He named them ‘study rapporteurs’ whose task would be circumscribed to study a specific problem on a theoretical level (although most of these mandates did study situations of human rights violations).<sup>170</sup>

These distinctions were never sustained by strong arguments. The excluded mandate-holders participated in annual meetings, have always been considered Special Procedures by the OHCHR and themselves, mainstreamed mandates (such as those requesting mandate-holder the inclusion of a gender perspective) are directed to all those listed in the OHCHR website, and the methods of work have progressively become more standardised, with independence of the original resolution creating the mandate. However, the disparity in practice regarding cases of violation existed, and survives to some degree today.

#### E. The Office of the High Commissioner for Human Rights

One of the least visible factors decisively impacting the functioning of Special Procedures is the structure of the administrative apparatus of the Secretariat that supports them. In 1997, the administrative support to the High Commissioner and the former Centre for Human Rights – which had been the main body of the Secretariat supporting human rights activities since 1982<sup>171</sup> – were consolidated into a single Office of the United Nations High Commissioner

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<sup>168</sup> The current thematic procedures under this denomination are listed above (n 4). The first thematic procedure created with a name different than Special Rapporteur was the Special Representative on internally displaced persons in 1992 (n 161). Apart from those mentioned here, another example of current Special Rapporteur, born in 2005 as Independent Expert, is the thematic mandate on minority issues, see HRC Res 25/5 (27 March 2014) para 11

<sup>169</sup> O de Frouville, *Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme*. Paris: A. Pedone, 1996, at 16 & 17.

<sup>170</sup> Rudolf (2000) (n 11) 290–1.

<sup>171</sup> The Centre replaced the former Division for Human Rights following GA Res. 37/237 of 21 December 1982, section XII. The Centre co-existed with the Office of the High Commissioner between 1993-1997 creating

for Human Rights.<sup>172</sup> Different reforms of the administrative divisions comprising the OHCHR have improved the support provided to Special Procedures, particularly with the creation of a ‘Special Procedures Branch’ in May 2003,<sup>173</sup> currently under the ‘Human Rights Council and Special Procedures Division’ of the OHCHR.<sup>174</sup> However, not all mandate-holders have been supported by the Special Procedures Branch. This has had a clear impact on how mandate holders have performed their work and coordinated among them since they rely heavily on the unit to which they have been assigned. The number of Special Procedures assigned to each Branch was made public in the 2005 Annual Report of the High Commissioner. The OHCHR explained that 17 thematic Special Procedures were assisted by the Special Procedures Branch and 12 by staff in the Research and Right to Development Branch.<sup>175</sup> The 12 country mandates were assisted by the Capacity Building and Field Operations Branch.<sup>176</sup> A year later, the OHCHR informed about its decision to transfer eight thematic mandates from the Research and Right to Development Branch to the Special Procedures Branch, ‘bringing to 25 the number of thematic mandates directly supported by the latter’.<sup>177</sup> There were 28 thematic Special Procedures at the time, thus three were still not supported by the Special Procedure Branch, but the OHCHR never specified which mandates were assigned to different sections and/or the rationale for it.<sup>178</sup>

The relationship between Special Procedures and the OHCHR is, at times, fraught with tension and mutual mistrust.<sup>179</sup> Nonetheless, significant progress has been made in terms of supporting Special Procedures, including a greater centralisation of the administrative support received by the Secretariat through the creation of the Office of the High Commissioner for Human Rights and the Special Procedures Branch, the computerisation of

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tensions within the Secretariat. On this evolution of structures and conflict that ensued, see P Alston, ‘Neither Fish nor Fowl: The Quest to Define the Role of the UN High Commissioner for Human Rights’ (1997) 8 EJIL 321, 324–5; Eric Berman, *Bringing a new life to the UN human rights operations* (United Nations Association of the United States, 1998) 14-5; and Schwelb and Alston (1982) (n 17) 264–5.

<sup>172</sup> See UN Doc A/51/950 (1997) *Renewing the United Nations: A Programme of Reform*, esp. paragraphs 79, 197 and 198.

<sup>173</sup> See Secretary-General’s Bulletin – Organization of the office of the United Nations High Commissioner for Human Rights, UN Doc ST/SGB/1997/10 (1997) and Re-structuring the Centre for Human Rights UN Doc A/C.5/50/71 (1996). The Special Procedure Branch is created in 2004 following proposals of the OHCHR, see UN Doc A/59/65-E/2004/48 (2004) *Management Review of the Office of the UN High Commissioner for Human Rights*.

<sup>174</sup> See ‘Organizational Chart’ in OHCHR Management Plan 2014-2017 – Working for Your Rights (OHCHR, 2014) 15 at [http://www2.ohchr.org/english/ohchrreport2014\\_2017/omp\\_web\\_version/index.html#/home](http://www2.ohchr.org/english/ohchrreport2014_2017/omp_web_version/index.html#/home).

<sup>175</sup> Annual Report of the High Commissioner for Human Rights 2005 (OHCHR, 2005) 43 at <http://www.ohchr.org/Documents/AboutUs/annualreport2005.pdf>.

<sup>176</sup> *ibid.*

<sup>177</sup> Annual Report of the High Commissioner for Human Rights 2006 (OHCHR, 2006) 118 at <http://www.ohchr.org/Documents/AboutUs/annualreport2006.pdf>.

<sup>178</sup> *ibid.*

<sup>179</sup> See eg Piccone (2012) (n 14) 57-60; also Dominguez-Redondo (2005) 428-36.

the information, the use of shared databases,<sup>180</sup> and greater transparency and availability of information concerning activities carried out by Special Procedures,<sup>181</sup> including statistical graphics.<sup>182</sup> Some OHCHR publications have also contributed to a better understanding of Special Procedures. The now out-dated, and not replaced, Fact Sheet No 27 (*Seventeen Frequently Asked Questions about United Nations Special Rapporteurs*)<sup>183</sup> was the first reference material comprising all Special Procedures, easily accessible by victims and other stakeholders. This publication was facilitated itself by the approval of a Manual of Operations of Special Procedures in 1999, although the document was kept secret by the OHCHR until 2006.<sup>184</sup>

These efforts and the initiative of mandate-holders to coordinate their activities, mainly through the celebration of annual meetings since 1993, alongside the creation of a Coordination Committee in 2005,<sup>185</sup> have contributed to more standardised methods of work, and more importantly to create a clear identity for Special Procedures within the UN human rights machinery, in parallel to their own awareness as a group. In their own words: ‘While it may never have been conceived as a system’, the evolving collection of these procedures and mechanisms now clearly constitutes and functions as a system of human rights protection.’<sup>186</sup>

#### IV. Conclusion: The ‘System’ of Special Procedures

The absence of centralised rules applicable to Special Procedures, their politicisation, the lack of strategy of the Commission on Human Rights (and now the Human Rights Council) with regard to creating and renewing renew mandates, and the correlated lack of clarity on the

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<sup>180</sup> ‘The Special Procedure Branch’s Quick Response Desk’ was established in 2000, to centralize data concerning urgent appeals by Special Procedures, (OHCHR Annual Report 2001, 147) and extended to all mandate-holders in 2003 (OHCHR Annual Report 2003, 106-10 and OHCHR Annual Report 2004, 40). See also, OHCHR Strategic Management Plan 2014-2017, 105. All reports available at OHCHR website: <http://www.ohchr.org/EN/PublicationsResources/Pages/AnnualReportAppeal.aspx>.

<sup>181</sup> See in general OHCHR website devoted to Special Procedures: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

<sup>182</sup> See for instance, UN Doc A/HRC/28/41, Annexes I-X.

<sup>183</sup> It is still available on OHCHR website for historical reference purposes: <http://www.ohchr.org/EN/PublicationsResources/Pages/ArchivesFS.aspx>

<sup>184</sup> See Alston and Knuckey (2015) (n 121) ch 1, Part III, above n 51. Until the Manual became publicly accessible, the author of this chapter, who attended the Special Procedure’s meeting, had to keep a copy in her archives of the first draft of the Manual circulated under nomenclature HR/NONE/98/93. See Report of the 6<sup>th</sup> Annual Meeting of Special Procedures, UN Doc E/CN.4/2000/5. The Manual was updated in 2008 (n 122).

<sup>185</sup> Report of the Twelfth meeting of Special Rapporteurs/Representatives, Independent Experts and Chairs of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme, UN Doc E/CN.4/2006/4, Section B.

Information about its membership, activities, statements and reports of the Coordination Committee are available on the OHCHR website:

<http://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/CCSpecialProceduresIndex.aspx>

<sup>186</sup> Joint Declaration of special procedures for the protection of human rights, UN Doc A/CONF/157/9 (1993)

scope of those, are inherent to the existence of this kind of mechanism. The 1990s witnessed the institutionalisation of the Special Procedures. This development was facilitated by several factors, in particular: their growth in number, their permanence within the UN organic structure, better institutional support and the personal initiative of mandate-holders to coordinate themselves through annual meetings.

Special Procedures, owe their existence to resolutions adopted by majority in the Council, and are thus not subject to specific state consent. The scope of thematic mandates is universal: they monitor how all states uphold their human rights obligations, addressing civil, political, economic, social and cultural rights as well as ‘rights of solidarity’ related to development and the environment. Individual as well as collective rights are under scrutiny. Mandate holders have developed flexible methods of work, and their activities extend beyond mere reportage of their activities and findings. Most accept complaints of human rights violations to which they react through ‘letters of allegations’ or expeditiously through ‘urgent appeals’. Mandate holders carry out country visits to investigate the situation of human rights in given domestic contexts. While these visits require the consent of the state, once the state has consented, the visit is premised on complete freedom of movement and respect for the immunity and independence of the experts.<sup>187</sup> All these positive features inherent to Special Procedures are linked to the autonomy and absence of rigid regulation governing their work. However, the dangers currently threatening Special Procedures also have a long historic trajectory, in what Olivier de Frouville explained as their ‘trivialization’ through their proliferation without logistical or financial support and constantly subjected to successive process of reform, many times labelled as ‘rationalisation’<sup>188</sup>

Special Procedures have acquired a distinct identity within the United Nations and are widely used by victims of human rights and other stakeholders worldwide. However, they remain vulnerable to attacks from States and criticism from different sources, partially because they have developed dissimilar approaches to their mandates. Any further

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<sup>187</sup> The principles governing visits have been included in the Manual of Operations of the Special Procedures of the Council (n 122) paras 52–74. A former attempt to ‘codify’ the terms of references for country visits was made in 1998 (Terms of Reference for Fact-Finding missions by Special Rapporteurs/ Representatives of the Commission on Human Rights, UN Doc E/CN.4/1999/104, 23 December 1998) but was not officially endorsed by the ECOSOC. While not formally approved, the terms of reference for country-visits remain substantially the same as those outlined in the 1970s in documents UN Doc E/CN.4/1021/Rev.1 (1970), UN Doc E/CN.4/1086 (1972) and UN Doc E/ CN.4/1134 (1974). With notable exceptions, these guidelines have been followed by mandate-holders. On the different approach to visits by mandate-holders, mainly during the early years of operations of the Special Procedures, see Dominguez-Redondo (2005) (n 12) 250-7.

<sup>188</sup> Frouville (n 12)32



standardisation of practices must take into account that a distinctive feature of Special Procedures has always been the soft legal and political basis guiding their work.