

Thematic Procedures of the United Nations Commission  
on Human Rights and International Law:  
in Search of a Sense of Community



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# Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community

Thematische rapporteurs van de VN Commissie voor de Rechten van de Mens  
en het internationale recht: een zoektocht naar (internationale) gemeenschapszin

(met een samenvatting in het Nederlands)

## PROEFSCHRIFT

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aan de Universiteit Utrecht  
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door

Jeroen Gutter  
geboren op 28 augustus 1972, te Alkmaar

Promotoren: Prof. mr. C. Flinterman  
Prof. dr. T.D. Gill

## ACKNOWLEDGEMENTS

The publication of this book concludes a seven-year journey through the amazing world of the United Nations, human rights, international law and international politics. As with all voyages of exploration and discovery, the route travelled after all these years does not exactly correspond to the one one had in mind at the beginning of it. Not only did the road prove bumpier than the original 'road-map' had foreseen, it also turned out to be marked with unexpected crossroads, junctions, roadblocks and even cul-de-sacs. Looking back, it has been quite a traverse indeed!

Juvenile idealism perhaps, but most of all curiosity, a desire to find out and understand why this world is as it is and, more particularly, why humans, States and organisations behave as they do, induced me to accept the NWO-supported PhD project on the thematic procedures of the United Nations Commission on Human Rights within the context of the Netherlands School of Human Rights Research in December 1998.

The project's intellectually challenging and ambitious objective was to investigate and tentatively redefine the nature of the international legal order in the light of the establishment and practice of the so-called thematic procedures of the Commission on Human Rights. For this objective to be achieved, it would not be sufficient to base oneself solely on the political, legal and institutional developments within the context of the human rights organs of the United Nations over the past 60 years. Any attempt to reformulate the nature of the international legal order would have to go beyond the formal adoption of concepts and rules and the establishment of monitoring mechanisms: it would have to investigate the reception of these concepts and rules in practice and the extent to which thematic procedures are able to make a structural contribution to their implementation.

The problem of the practical impact – or the 'effectiveness' as it is often referred to – of international human rights monitoring procedures may be one of the most sensitive questions human rights research has to cope with. Many commentators clearly do not feel at ease with this question, but somewhere in the back of their minds they still realise that they have to deal with it. In fact, we all know the outcome of such an exercise, so adequately captured by the Finnish international lawyer Martti Koskenniemi in the phrase, '[g]lobalist rhetoric: marginal practice – and none was surprised, indeed, nobody expected otherwise', but we often add excuses, relativisations and justifications why 'for the time being' we do not obtain better results. Not infrequently, the problem is placed in the future: the argument goes that after the era of standard-setting from the end of the 1940s to the end of the 1960s and the era of the development of monitoring machinery from the end of the 1960s to the present, the era of 'implementation' has only just begun.

Acknowledgements

Developing a 'personal vision' on the relationship between the political, legal and institutional changes at the level of the United Nations and the practical effects of these changes – does it make a difference? – proved to be the most difficult and time-consuming aspect of my PhD project. Personally I have reached the conclusion that we do not serve the cause of the development of international law, human rights and multilateral cooperation by constructing an emerging international legal order as we should like to see it or as it should be. I think it is important for legal doctrine not to go too far ahead of the facts, not to succumb to the temptation to engage in an extreme teleological approach, but to accept the consequences of the '*condition humaine*' and to work towards undoing human rights doctrine from its morally perfect pretensions – including its perception of a desired world order – that no one, not even the United Nations in our wildest dreams, is able to honour in practice. I believe that this is neither a cynical, nor a static or conservative view of international relations and the international legal order, but simply one which hopes to bring back a sense of reality to the human rights debate.

While I often experienced my PhD work as extremely solitary, it would be unforgivably unjust not to mention the people who in one way or another made it possible for me to successfully complete this study. First of all, I would like to express my gratitude to my supervisors Cees Flinterman and Terry Gill. Cees has been my mentor ever since he introduced me to the world of human rights at Maastricht University a long time ago and in each phase of the project he remained the indispensable *repère* without which no progress could be made. I also owe a particular debt to Terry not only for his willingness to join in the supervision of the project, but, more importantly, for incessantly reminding me to stay focused and not to get lost in details and, not in the last place, for warning me not to become anyone's disciple. I experienced his enthusiasm and dedication to the science of international law as particularly contagious.

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My colleagues at SIM/Netherlands Institute of Human Rights and the Netherlands School of Human Rights Research deserve special attention. I am indebted to Saskia Bal and Maaïke Hogenkamp at SIM's documentation centre not only for their assistance in looking up remote documents, but especially for maintaining and updating a beautiful collection of (United Nations) human rights documents, making the life of a researcher a lot easier. My thanks also go to Maeyken Hoeneveld and Marcella Kiel at the secretariat for their support and assistance throughout my stay at SIM. Marcella's help in the final stages of this project has been invaluable. Better a near neigh-

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Writing a PhD thesis may be a solitary exercise, but the burden has been made much lighter to bear with the support and friendship of my fellow PhD candidates at SIM and the Research School. I will never forget the coffee breaks, lunch discussions, dimsum dinners and after work drinks with Floribert Baudet, Nicola Jägers, Rolanda Oostland, Hilde Reiding and Simone Wijte. Special thanks go to my friend Jukka Viljanen and not only for keeping me updated on Matti Nykänen's latest adventures and one-liners.

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Jeroen Gutter  
February 2006



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## ABBREVIATIONS AND ACRONYMS

ACM	Advisory Committee on Human Rights and Foreign Policy, the Netherlands (Adviescommissie Mensenrechten)
AJIL	American Journal of International Law
AYIL	Australian Yearbook of International Law
Bulletin	United Nations, Bulletin of Human Rights
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination (1965)
CHR	United Nations Commission on Human Rights
Convention against Torture	United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984)
Declaration on Torture	United Nations Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)
Decolonisation Committee	the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1961)
Disappearances Declaration	United Nations Declaration on the Protection of All Persons from Enforced Disappearances (1992)
ECOSOC	United Nations Economic and Social Council
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
Encyclopedia	Encyclopedia of Public International Law
GA	United Nations General Assembly
GAOR	United Nations, General Assembly Official Records
French draft	the original draft resolution providing for the establishment of the Working Group on Enforced or Involuntary Disappearances introduced by France in February 1980; U.N. Doc. E/CN.4/L.1502
Hague Recueil	Recueil des Cours de l'Académie de Droit International
HRJ	Human Rights Journal
HRLJ	Human Rights Law Journal
HRM	Human Rights Monitor (International Service for Human Rights)

Abbreviations and Acronyms

HRQ	Human Rights Quarterly
HRR	[The] Human Rights Review
ICCPR	International Covenant on Civil and Political Rights (1966)
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICJ Press Release	Press Release by the International Commission of Jurists
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
NGO	Non-governmental organisation
NILR	Netherlands International Law Review (Nederlands tijdschrift voor internationaal recht)
NJB	Nederlands Juristenblad
NQHR	Netherlands Quarterly of Human Rights
OHCHR	United Nations, Office of the High Commissioner for Human Rights
Privileges Convention	United Nations Convention on the Privileges and Immunities of the United Nations (1946)
RDH	Revue des Droits de l'Homme
RGDIP	Revue Générale de Droit International Public
RIAA	United Nations, Reports of International Arbitral Awards
Special Process	Special process on missing persons in the territory of the former Yugoslavia (1994)
Special Rapporteur of the Sub-Commission	the Special Rapporteur concerning the topic of administrative detention established by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (1985)
Sub-Commission	the Sub-Commission on the Prevention of Discrimination and Protection of Minorities/Sub-Commission on the Promotion and Protection of Human Rights (from 1999 onwards)
UDHR	Universal Declaration of Human Rights (1948)
UN Doc	United Nations Document
1988 Body of Principles	United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
	YUN Yearbook of the United Nations

# CHAPTER I

## GENERAL INTRODUCTION

### I.1 INTRODUCTION

An important characteristic of post-Second World War international law has been its steady expansion in scope. One area in which States have started to cooperate with each other has been in the field of human rights. The Charter of the United Nations explicitly mentions the promotion of respect for human rights and fundamental freedoms as one of the main purposes of the Organisation. Moreover, the Charter contains specific provisions establishing the institutional framework for the implementation of this purpose. In so doing, the founding States of the United Nations, through the Charter, propose to internationalise, *i.e.* to bring within the sphere of international law, the way a State treats individual human beings under its jurisdiction.

Of course, it would be naïve to think that the inclusion of the concept of human rights – a concept hitherto largely unregulated by international law – in an international treaty would give it, by that fact alone, equal weight against centuries-old concepts of international law deeply rooted in practice. There is no escaping from the realities of international relations, in particular not from the hard fact that this world is made up of States which are sovereign and equal.

The notions of State sovereignty and the equality of States have a legal as well as a political dimension. In the legal sense, State sovereignty is perhaps best understood by the following statement of Arbitrator Max Huber in the Island of Palmas Case:

‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States, during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.’<sup>1</sup>

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<sup>1</sup> Island of Las Palmas Case (Netherlands v. U.S.A.), Permanent Court of Arbitration, 4 April 1928, in: R.I.A.A. Vol. II, p. 838. A more or less similar description or definition was given by Ermacora in his 1967 Hague Lectures when he wrote that the problem of domestic jurisdiction concerned ‘the independence of the State vis-à-vis other States and vis-à-vis intergovernmental organisations, that is the question of the exclusion of any other State from the internal affairs of a State and the corresponding autonomy of that State in handling its internal affairs.’ Ermacora, Hague Recueil 1968, p. 377. More recently, Schrijver has also referred to Arbitrator Huber’s definition of sovereignty in his inaugural lecture. Schrijver 1998, pp. 10 and 11.

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The complementary notion of the equality of States, embodied in the maxim *par in parem non habet imperium*, refers to the fact that a State is not subjected to the authority of any other State or to any other higher authority.<sup>2</sup>

However, there is also the political aspect of State sovereignty. This aspect relates first and foremost to interests, which States hold as vital and, therefore, propose to keep outside the sphere of international regulation; interests which also touch upon the honour or *grandeur* of the State. It becomes especially acute in relation to the development – in the context of an international organisation for example – of those parts of international law which are on the border of municipal law. In respect of this development, which, as De Visscher remarked, 'is political rather than legal', the State holds in reserve the plea of domestic jurisdiction.<sup>3</sup>

As 'the basic constitutional doctrine of the law of nations', as a leading textbook in international law puts it, the notions of State sovereignty and equality of States and, as a corollary, the concept of domestic jurisdiction have also found their way into the Charter of the United Nations.<sup>4</sup> The Charter incorporates both the principle of sovereign equality of States and the principle of non-intervention in the domestic affairs of a State amongst the fundamental principles guiding the work of the Organisation.

It is this seeming contradiction between the purpose and principles of the United Nations which De Visscher referred to when he wrote that:

'The rights of man, so frequently mentioned in the United Nations Charter, have a place there which is at once eminent and ill-defined – eminent and in full conformity with the postulates of a personalist philosophy in the rank assigned to them by the text; ill-defined, however, because between solemn affirmation and effective observance rises the exception of the reserved domain (...).'<sup>5</sup>

However problematic the formulation of human rights in the Charter might have been, it has not prevented the United Nations from implementing the doctrine of human rights at the universal level. Through its human rights organs, in particular the Commission on Human Rights established in 1946, the United Nations has adopted a great number of human rights (related) instruments. The core of this body of international human rights instruments is made up of the Universal Declaration of Human Rights of 1948 and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights respectively of 1966. After the adoption of these two conventions, the Commission on Human Rights has even begun to develop procedures aimed at verifying and studying States' compliance with human rights standards.

In contradistinction to monitoring procedures contained in international human rights treaties, the procedures of the Commission on Human Rights do not require prior ratification or any other form of consent by States. They find their legal foundation in

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2 Ibid., pp. 11 and 12.

3 See De Visscher 1968, p. 105 and 233 and Ermacora, Hague Recueil 1968, p. 377.

4 Brownlie 1998, p. 289.

5 De Visscher 1968, p. 129.

the general mandate given to the United Nations in the field of human rights and, in particular, in resolutions of the Economic and Social Council (*ECOSOC*) of the Organisation. On the basis of this mandate the Commission on Human Rights first developed the instrument of so-called country-specific mechanisms. These are procedures set up to study and report on the general human rights situation in respect of a specific country.

Meanwhile, in 1980 the Commission took a different approach when it established the Working Group on Enforced or Involuntary Disappearances. This mechanism had been given a mandate to examine one particular type of human rights violation, *i.e.* enforced or involuntary disappearances, wherever it may occur. The idea to establish monitoring mechanisms with a mandate to study or examine a particular phenomenon of human rights violations, unlimited in geographical terms, grew to become the general practice of the Commission on Human Rights.<sup>6</sup> In the years after 1980 the Commission gradually expanded its monitoring capacities to cover other themes as well. In 1982 it established a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, followed by a Special Rapporteur on Torture in 1985 and a Special Rapporteur on Freedom of Religion or Belief in 1986.<sup>7</sup> In particular in the 1990s the number of theme procedures rapidly increased to include, *inter alia*, a Working Group on Arbitrary Detention created in 1991 and a Special Rapporteur on the Independence of Judges and Lawyers created in 1994. In 2002 the Commission on Human Rights counted 27 different procedures. In United Nations jargon these different Working Groups and Special Rapporteurs have become known as *thematic procedures* of the Commission on Human Rights and together with the *country procedures*, they have been categorised as the United Nations *special procedures*.<sup>8</sup>

Not only has the number of special procedures – especially thematic procedures and to a lesser extent country procedures<sup>9</sup> – increased significantly, some would even say proliferated, over the last twenty years, they have also been celebrated as ‘one of the Commission’s major achievements and constitute an essential cornerstone of United Nations efforts to promote and protect internationally recognised human rights and contribute to the prevention of their violation.’<sup>10</sup> The special thematic procedures have obtained their declared prominent status as a cornerstone of the United Nations human rights programme for several reasons.

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6 See also Cassese 2001, p. 364 where he defined a *theme*, for example the theme of enforced or involuntary disappearances, as ‘a major phenomenon of human rights violations world-wide.’

7 In 1981 the Commission established a Special Rapporteur to study the relation between mass exoduses and violations of human rights. This Rapporteur existed for one year only.

8 One will also find the terms thematic mechanisms or thematic mandates (and country mechanisms or country mandates). They are interchangeable. The website of the United Nations High Commissioner for Human Rights uses the term thematic *mandates*. In this study, however, for conceptual reasons the terms *thematic procedures* or *thematic mechanisms* will be used. The term *mandate* will be used as a technical term referring to the scope of the competences of the thematic procedures.

9 The number of country procedures seems to be on the decline during the last year. In 2002 the Commission counted 11 such procedures.

10 U.N. Doc. E/CN.4/1999/104, para. 17 (Selebi report), see *infra* Chapter III.3.2.3, especially note 256.

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In general, the flexible and open terms of reference of special thematic procedures have been praised as allowing them to develop their mandates in an innovative manner. In particular, they have enabled them to develop several different 'techniques' to monitor the human rights performance of States. These techniques usually include the following: (1) routine requests for information from Governments; (2) urgent requests for information from Governments; (3) on-site visits to particular countries and (4) preparing an annual report for the Commission on Human Rights, including, *inter alia*, information concerning its activities, analyses of particular situations in different countries, analyses of the underlying causes of violations of human rights within the mandate of the special procedure concerned as contained in the relevant international instruments and general recommendations concerning the (implementation of the) topic of their mandate.

Moreover, scholarly writing has stressed other aspects of the United Nations thematic procedures which have contributed to their current status. Some authors have pointed at the adherence to standards of independence, objectivity and non-selectivity by the mandate holders. Others have emphasised the specific nature of the procedures, in particular the possibility of examining individual communications concerning violations of human rights, or the complementary nature of the mechanisms in relation to other United Nations (treaty-based) human rights supervision procedures as well as regional supervisory bodies. Still others have ascribed the special procedures a degree of effectiveness, perseverance and professionalism superior to other procedures of the Commission. At this moment in time, the thematic procedures are probably the most complete procedures existing at the level of the United Nations Commission on Human Rights. They cover the entire process of human rights promotion and protection, ranging from preventive strategies to taking concrete action when violations actually occur as well as taking action after violations have occurred, for example by pointing to the need to investigate such violations, punish the perpetrators and demand reparation for the victims and their relatives.

Studies dedicated to the topic of thematic procedures – relatively few up to now – have tended to approach the existence of these mechanisms from an internal, compartmentalised United Nations perspective. The emphasis of such studies has mainly been practical and informative in the sense that their purpose has been to provide an exposé of the main characteristics of the mechanisms, explaining their functioning, the problems they encounter in the implementation of their mandates and other challenges they are currently facing.<sup>11</sup> So far, however, scholarly research has not paid much attention to the theoretical implications of the emergence of thematic procedures. This may be somewhat surprising given the 'flagrant' tension between the purpose and principles of the United Nations mentioned at the beginning of this introduction. Analyses of the work of the organs of the United Nations usually do not take the form of evaluating this practice against the background of evolving concepts of international

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<sup>11</sup> See, for example, Pastor Ridruejo, Hague Recueil 1991; De Frouville 1996 and Lempinen 2001.

law, in particular the principle of non-intervention in the domestic affairs of a State.<sup>12</sup> Most scholarly writings content themselves with making the general statement that the principle of non-intervention no longer applies in the field of human rights and give a general description of the history of the development of human rights monitoring procedures of the Commission on Human Rights in support of this view. The beginnings of an analysis of the 'progressive erosion' of the principle of non-intervention as a result of the practice of thematic procedures can be found in a lecture delivered by Rodley, the then United Nations Special Rapporteur on Torture, in 1996.<sup>13</sup> But even this lecture could do no more than point at developments which are indicative of this erosion and, more generally, at the fact that the times that the principle of non-intervention constituted an absolute bar against the jurisdiction of the United Nations in the field of human rights had passed for good.

A more in-depth analysis of this question, however, would require a more careful and detailed study of the phenomenon of thematic procedures and their practice. This also means that such an analysis should go beyond the conclusion that the era in which it was possible for each and every State to decide autonomously how it wished to treat its own citizens has come to an end. For, having acknowledged that human rights no longer constitute a matter essentially within the domestic jurisdiction of a State, does this mean that any kind of intervention by the United Nations is allowed? Or does this mean that States tolerate any kind of intervention? What constitutes intervention?

Consequently, a first objective of the present research is to clarify the meaning and scope of the concept of domestic jurisdiction as laid down in the Charter of the United Nations in relation to the purpose of that Organisation to promote respect for and the observance of human rights and fundamental freedoms. Subsequently, it will be necessary to retrace the events and decisions of United Nations organs and the practice of its Member States, which contributed to making the concept a relative one in fact as well as in law. Thus, the stage will be set for an evaluation of the practice of thematic procedures as 'one of the most important human rights fact-finding mechanisms of the United Nations, if not *the* most important'<sup>14</sup> and to consider the implications of this practice for the status of the concept of domestic jurisdiction.

However, there is perhaps something more than redefining and searching for the limits of the principle of non-intervention in light of the practice of thematic procedures. The establishment and practice of thematic procedures raises the broader

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12 With some notable exceptions such as Kamminga 1992. Kamminga, however, mentions thematic procedures only very briefly, since he approached the issue from a more general viewpoint, using some case-studies (in particular Chile and China) to illustrate his point. In addition, Kamminga's study was written back in 1992 (as an expanded and revised version of his doctoral thesis defended in 1990). Another – even older – study which related the development of human rights monitoring procedures within the Commission on Human Rights to the changing meaning and scope of the principle of non-intervention has been Zuidwijk 1982 (this book also elaborated upon the author's doctoral thesis defended in 1979).

13 Rodley, EHRLR 1997, pp. 4-10.

14 Lempinen 2001, p. 1.

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question of the changing nature of international law. The emergence of the special body of international law, known as the international law of human rights, challenges some of the foundations of traditional international law, in particular the notion that international law is the law which regulates relations between States. In the concluding observations of his study on thematic procedures, De Frouville briefly touched upon this question when he wrote:

‘Au terme de cette étude, le constat le plus frappant reste sans doute celui de l’apparition et du développement de mécanismes multi-fonctionnels qui, sur une *base empirique*, se sont en quelque sorte *adaptés aux besoins d’une société internationale en mutation*. (...) Le développement de ces mécanismes hybrides [based on a combination of politics/diplomacy and law, JG] traduit en réalité *le développement du droit international lui-même, voire sa ‘mutation’* (...). Le droit international, en effet, tout en conservant une armature en apparence inchangée, ne cesse de se transformer et de se diversifier: l’élaboration du droit international des droits de l’Homme constitue sans aucun doute une étape fondamentale de cette évolution. Conçu dans l’intérêt de l’Homme, ce droit est *un droit ‘à part’ dans le droit international, en ce sens qu’il ne procède pas de la même logique que le droit interétatique traditionnel*. Car si les États en sont à l’origine d’un point de vue formel, ils n’en créent aucunement le contenu: les droits ‘déclarés’ ou ‘reconnus’ par les instruments internationaux adoptés par les États sont attachés à tous les êtres humains et pré-existent à leur formulation juridique par toute autorité, qu’elle soit nationale ou internationale.’<sup>15</sup>

Is international law going through a change of paradigm? Are we moving away from the ‘statist presumption’ in international law to something else?<sup>16</sup> Is it possible to reconcile the ‘statist presumption’ in international law with the normative foundations underlying the (natural) human rights of the individual? How would one formulate and define the relationship between the human rights of the individual and sovereign rights of States?

In a discussion paper entitled ‘*Whose Universal Values? The Crisis in Human Rights*’ Ignatieff dealt with what he called the problems of the success of human rights and the failure of the human rights movement to deal ‘honestly with the implications

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<sup>15</sup> De Frouville 1996, p. 120 [emphasis added]. ‘The most significant finding of the present study has been the appearance and development of multifunctional mechanisms, which, on an empirical basis, have adapted themselves to the needs of a changing international society. The development of these mechanisms is a reflection of the development of international law in general, indeed its transformation. While preserving a seemingly unchanged shell, international law is going through a continuous process of change and diversification: without doubt, the emergence of the international law of human rights constitutes a fundamental stage in this development. Conceived in the interest of Man, this body of law [the international law of human rights] occupies a special place in international law in the sense that it does not proceed from the same logic as traditional inter-State law. Even though States formally adopt this law, they do not create its contents: the rights “declared” or “recognised” in the international instruments adopted by States belong to all human beings and pre-exist their juridical formulation by any national or international authority’ [author’s translation].

<sup>16</sup> See Gill 2002, pp. 7-10.

of its success.<sup>17</sup> He describes how human rights has been 'given real power in the international political arena', which is also 'reflected in its growing cultural prestige.' Human rights, according to Ignatieff, have 'become the lingua franca of global moral thought, as English has become the lingua franca of the global economy.' But he also signals a crisis, especially after the Cold War, reflected in, *inter alia*, the political dilemma of having to choose between rights and stability. According to Ignatieff,

'If taken seriously, human rights calls into question other goals, such as sustaining a large export sector in one's defence industry, for example. (...) [W]hen human rights criteria become guides to policy, they should force a State to re-evaluate its national and security interests. The fundamental policy choice is between furthering the human rights of individuals and maintaining the stability of the nation state system. This is the real dilemma of state actors in the age of human rights (...).'<sup>18</sup>

This dilemma is usually seen as a problem of hypocrisy or double standards: Governments solemnly proclaiming human rights as a policy goal and at the same time aiding States with appalling human rights records. Ignatieff considers this to be a misdiagnosis. Rather, he argues, the dilemma involves a 'fundamental conflict of principle,' a contradiction, which was there from the beginning in the Charter of the United Nations and for which the Charter does not provide a clear solution or method of reconciliation.<sup>19</sup>

The post-Cold War world order provides seemingly unprecedented opportunities for the promotion and protection of human rights and fundamental freedoms and, accordingly, it has 'dramatically raised our expectations.'<sup>20</sup> While it cannot be denied that the relative weight of the concept of human rights has significantly increased over the past fifty years, there is also the risk that we get too far ahead of ourselves and that we overlook the realities of everyday life. Redrawing the balance between the sovereignty of States and human rights is therefore urgently required.

This leads to the second more ambitious objective of the present study. On the basis of the practice of thematic procedures a tentative re-evaluation will be made of the nature of the international legal order.

## L2 SELECTION OF THEMATIC PROCEDURES

In 2002 the Commission on Human Rights counted no less than 27 different thematic procedures. Clearly, the time-frame set for this research does not allow one to deal with all of them in depth and, therefore, a selection of procedures has to be made.

Limiting the research to only certain mechanisms always remains vulnerable to the charge of arbitrariness and, from a substantive point of view, runs the risk of missing

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17 Ignatieff 1999, pp. 12 and 13.

18 Ibid., p. 16.

19 Ibid., p. 19.

20 Ibid., p. 12.

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certain points or of not giving due weight to certain rights or groups of rights, or other developments. Different authors studying thematic (or special) procedures have applied different criteria of selection, depending to a large extent on the purpose of their respective studies. Rodley, for example, primarily based his opinion on the evolution of the United Nations' Charter-based human rights machinery on the practice of thematic mechanisms dealing with what he called 'a triad' of particularly grave or criminal human rights violations', *i.e.*, on the basis of the practice of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions and the Special Rapporteur on Questions of Torture. Moreover, in the course of his lecture, he also referred (indeed he had to do so) to the Working Group on Arbitrary Detention.<sup>21</sup> However, the subject-matter of the mandates did not play any particular role in his analysis.

De Frouville's study on thematic procedures has simply put aside all so-called studymandates and has focused solely on procedures possessing human rights monitoring competences<sup>22</sup> In the light of the purpose of his study, which was mostly descriptive, De Frouville borrowed examples from all selected procedures to explain their working methods and terms of reference.

In yet another study, Lempinen did not select any procedures in particular, since his main concern was to point at the strengths and challenges facing the special procedures system of the Commission on Human Rights as a whole. He illustrated these strengths and challenges on the basis of concrete examples, practices and/or incidents pertaining to certain special procedures, to the attitude of particular States or to developments in the Commission in general.<sup>23</sup>

In the light of the objectives of the present research, which is concerned primarily with the competences of the United Nations in the field of human rights, it has been decided to focus first and foremost on the practice of the Working Group on Enforced or Involuntary Disappearances. Additionally, the practice of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention will be taken into account, whenever appropriate. The principal considerations behind this selection have been the following:

- (1) the historical value of the Working Group on Enforced or Involuntary Disappearances as the first thematic procedure and its importance for having set precedents

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21 Rodley, EHRLR 1997, pp. 6 and 7.

22 De Frouville 1996, p. 17. De Frouville studied the Working Group on Enforced or Involuntary Disappearances, the Working Group on Arbitrary Detention, the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions, the Special Rapporteur on Torture, the Special Rapporteur on Freedom of Religion or Belief, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on Violence against Women, its Causes and Consequences.

23 Lempinen 2001.

- which have subsequently been followed by other procedures, notably the Special Rapporteur on Torture and the Working Group on Arbitrary Detention;
- (2) the Working Group on Enforced or Involuntary Disappearances as well as the Special Rapporteur on Torture and the Working Group on Arbitrary Detention have been endowed with/have assumed monitoring competences, *i.e.* they have been mandated to *respond* to information concerning a violation of the human rights falling within their mandate;
  - (3) the Working Group on Enforced or Involuntary Disappearances as well as the Special Rapporteur on Torture and the Working Group on Arbitrary Detention have a sufficiently long record to evaluate their evolution over a longer period of time;
  - (4) the choice to supplement, where necessary, the findings in relation to the Working Group on Enforced or Involuntary Disappearances with examples taken from the practice of the Special Rapporteur on Torture (1985) and the Working Group on Arbitrary Detention (1991) has been made with the objective of finding out whether the settled practice of the Working Group has been immediately incorporated in the mandates of other thematic procedures or, alternatively, of finding out whether new elements have been introduced for the first time in the mandates of the two younger thematic procedures (and, subsequently, have been important for the development and interpretation of the older mandates).

This has been particularly true for the Working Group on Arbitrary Detention. As will be shown below, this Working Group has been given a mandate 'to investigate cases' of arbitrary detention, thereby going even a step further than mere authorisation 'to respond to information'. This development has also affected the approach taken by other thematic procedures, notably the Special Rapporteur on Torture and the Working Group on Enforced or Involuntary Disappearances.

The case of the Special Rapporteur on Torture is of some interest, since its establishment more or less coincided with the adoption of the United Nations Convention Against Torture (1984) which also provided for (treaty-based) supervision mechanisms. Consequently, the establishment of a Special Rapporteur on Torture raised important questions concerning the coexistence of the political thematic procedures with international treaty régimes.

Finally, it must be emphasised that the practice, events and incidents relating to other thematic procedures – those that have not been selected – will still be referred to in the context of this research, if they have had consequences or effects for the status and evolution of thematic procedures as a whole.

### **I.3 DEFINITION OF TERMS**

Before explaining the methodology and structure of the present study, the meaning of some important terms should be clarified. Firstly, the analysis presented below occasionally uses the term *precedent*. This term does not refer in any way to the legal doctrine of binding precedent or *stare decisis* as it exists in the national legal order of

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common law countries. Rather, it should be understood in accordance with its ordinary meaning of

‘something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or an analogous kind.’<sup>24</sup>

Thus conceived, the use of the term leaves open the question of the legal significance of precedents, which this study precisely attempts to answer. As the expression goes: one swallow does not make a summer. Similarly, where this research describes and analyses an essentially political process, *i.e.* the implementation of the doctrine of human rights through the political organs of the United Nations, it is especially relevant not just to point at isolated remarkable events, but to continue to follow the practice of these organs as it evolves. Subsequent practice may then confirm the break with previous practice (until then accepted as law) or alternatively confirm the event as an incident or an exception or it may simply be too early to draw any definite legal conclusions. However, when evaluating the significance of precedents and practices, it is important to keep in mind that:

‘Precedents, which are often conscious derogations from the law in force, or which at least are almost always autonomous and uncoordinated acts, do not win the general adherence that makes custom until they take *the appearance of a coherent practice containing the elements of an order that is morally and socially acceptable because it is sustained by sufficient forces and is adapted to generally felt needs.*’<sup>25</sup>

Another term that requires some clarification is the notion of *procedure*. In its ordinary meaning the term refers to, *inter alia*,

- (1) ‘a particular way of accomplishing something or of acting’; or
- (2) ‘a series of steps followed in a regular definite order <legal *procedure*> <a surgical *procedure*>’; or
- (3) ‘a traditional or established way of doing things.’<sup>26</sup>

Within the context of the United Nations the term does not exactly correspond to this ordinary meaning. In the United Nations a ‘procedure’ first and foremost refers to a certain activity undertaken by a particular organ or organs: e.g. the so-called 1235 procedure;<sup>27</sup> special procedures, *i.e.* thematic procedures or country procedures and the so-called 1503 procedure.<sup>28</sup> *Some* of these activities, for example the 1503 procedure, possess to a greater or lesser extent the qualities normally associated with the term

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24 See Merriam-Webster Dictionary Online: <http://www.m-w.com>

25 De Visscher 1968, pp. 153 and 154 [emphasis added].

26 See Merriam-Webster Dictionary Online: <http://www.m-w.com>

27 Named after ECOSOC Resolution 1235 (XLII) of 6 June 1967, see *infra* Chapter II.4.4.

28 Named after ECOSOC Resolution 1503 (XLVIII) of 27 May 1970, see *infra* Chapter II.4.4.

procedure, in particular the qualities mentioned under (2). Other activities, such as the 1235 procedure, at least on paper, possess these qualities much less and here the term procedure is perhaps not much more than a name given to a *process*, which otherwise lacks the degree of predictability or regularity to speak of a procedure. As Ermacora correctly observed 'it is due to participation of political organs in the development of the case-law that this development has at times been irrational. In such cases there can only be given a political, but no logical explanation.'<sup>29</sup> The present study, however, may well find that the practice of these organs and in particular the practice of thematic procedures has *in fact* obtained such a degree of uniformity and consistency – evidence of an established consensus 'sustained by sufficient forces' and 'adapted to generally felt needs' to repeat the words of De Visscher – that one may truly speak of a *procedure*.

#### **I.4 METHODOLOGY**

This research has been based on a thorough analysis of primary sources, particularly the official United Nations documents containing the *annual reports* and *addenda* of the three selected thematic procedures as well as reports and addenda of any other thematic procedure if relevant. Similarly, official United Nations documents containing the *Summary Records*, whenever available, of the relevant meetings of the Commission on Human Rights have been analysed, especially those relating to discussions involving, *inter alia*, Governments, NGOs and special (thematic) procedures mandate holders, concerning the topics of the three selected thematic procedures. Furthermore, any case-law of international judicial organs, particularly the judgments and advisory opinions of the International Court of Justice, have been taken into account whenever relevant for the development of the competences of the United Nations in the field of human rights and, more specifically, the functioning of the Commission's special (thematic) procedures.

The information retrieved from these official United Nations sources has been supplemented with information collected by NGO observers, for example, the Human Rights Monitor published by the International Service for Human Rights and containing a full factual report and account of noteworthy developments of the annual sessions of the Commission on Human Rights, including the work of special (thematic) procedures.

Secondary sources have been used to place the above primary information in the right perspective, particularly in the light of the principal objectives of the present study. These sources include, amongst other things, other indepth studies relating to the Commission on Human Rights and its system of special (thematic) procedures, scientific articles relating to the functioning of thematic procedures, human rights handbooks, articles, handbooks and other publications relating to the broader field of

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29 Ermacora, Hague Recueil 1968, pp. 388 and 389.

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international law, particularly the development of international legal concepts in the light of developments in the field of international relations.

## **I.5 STRUCTURE OF THE STUDY**

The present study has been structured around four major chapters, including a final chapter containing the conclusions and a discussion concerning the research objectives formulated above in Chapter I.1. The first major chapter, Chapter II, introduces and analyses the topics (and concepts) of human rights and domestic jurisdiction as laid down in the Charter of the United Nations and developed in practice by the organs of the United Nations, emphasising particularly the role of the Organisation's political organs up to 1980. The second and third major chapters, Chapters III and IV, contain the very core of this study. Chronologically, they take up developments in the field of human rights within the political organs of the United Nations, particularly the Commission on Human Rights, from 1980 onwards up to 2003/2004. In these two chapters the establishment of and developments relating to the three selected thematic procedures have been scrutinised in detail. Chapter III contains the more general aspects of the three selected thematic procedures, including their history, their structure, composition, independence and status as 'experts on missions for the United Nations.' This chapter also deals with the question of competence *ratione personae*, *i.e.* questions relating to the actor held responsible for human rights violations by thematic procedures and the question of competence *ratione materiae*, *i.e.* questions relating to the subjectmatter of the mandates of thematic procedures. Chapter IV has been dedicated exclusively to an analysis of the working methods of the three selected thematic procedures and deals with the topics of transmissions, sources of information and the admissibility of communications, the question of competence *ratione temporis* and the specific techniques of urgent actions, country visits and annual reports. The fourth and final major chapter, Chapter V, contains, as already mentioned above, the main conclusions concerning the findings of this research as well as a tentative evaluation of the nature and characteristics of the presentday international legal order.

## CHAPTER II

# DOMESTIC JURISDICTION AND HUMAN RIGHTS IN THE UNITED NATIONS

### II.1 INTRODUCTION

As a concept existing under general international law, the concept of domestic jurisdiction and the complementary duty of non-intervention are the principal corollaries of the doctrine of State sovereignty.<sup>1</sup> The concept has, however, derived most its current fame from its incorporation as a general principle in Article 15 paragraph 8 of the Covenant of the League of Nations and, particularly, Article 2 paragraph 7 of the Charter of the United Nations.

Although Article 2 paragraph 7 of the Charter broadly corresponds to the general prohibition of non-intervention under international law, it is important to deal with it, in the first place, as a detail of this general (customary) principle contained in a treaty provision. In this regard, the provision may be considered a *lex specialis* of the principle under general international law. Article 2 paragraph 7 of the Charter is primarily concerned with the delimitation of the sphere of competences between the State and the organs of the United Nations.<sup>2</sup>

Seen in this light, the present study is not so much concerned with the concept of domestic jurisdiction under general international law, but first and foremost with the concept as formulated in the Charter of the United Nations and the *effects* of this Charter provision for general international law. For, as Charter-based sub-organs of the Commission on Human Rights, the thematic procedures, in the exercise of their respective mandates, are formally bound to observe the principles of the Organisation as laid down in Article 2 of the Charter.

Posing the concept of domestic jurisdiction as a question of delimitation of competences between the international organisation and individual States requires us, first of all, to determine which (positive) competences exactly have been vested in the United Nations in the field of human rights. It also requires us to establish which organs of the United Nations are to perform these competences and which specific functions each of these organs have been attributed. The clarification of these three points will enable us to have a better view of the context in which the concept of domestic jurisdiction, as embodied in Article 2 paragraph 7 of the Charter, will evolve in the daily practice of the organs of the United Nations. In particular, it may help us to understand which organs determine its applicability to a concrete case at hand. This, in turn, should make

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1 See Brownlie 1998, pp. 289-299.

2 Ermacora, Hague Recueil 1968, pp. 380-383. Id., in: Simma (ed.) 1994, p. 150.

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clear to what extent the delimitation of competences between the United Nations and its Member States is a simple technical affair that can be dealt with entirely in terms of law. [Chapter II.2] Next, the specific terms of Article 2 paragraph 7 of the Charter will be explained. The objective will again be to establish the context in which it evolves and the potential effects it might have on the exercise of (positive) competences by the relevant organs of the United Nations. [Chapter II.3] Having more or less outlined the theoretical framework within which the United Nations and its Member States are to implement the purposes of the Organisation in the field of human rights, the practice of the organs of the United Nations in the period 1945-1980 will be considered in order to establish the development of the concept of domestic jurisdiction in relation to the concept of human rights. This overview of the practice will briefly touch upon the standard-setting activities of the United Nations and will concentrate in more detail on the implementation activities of the Organisation. For analytical purposes the latter type of activities will be dealt with in two phases: the period 1946-1966 and the period 1966-1980. [Chapter II.4] Finally, from this evaluation of the practice, certain conceptual conclusions will be formulated, which will be further developed and put to the test in the next chapters [Chapters III and IV] dealing specifically with the practice of the three selected thematic procedures. [Chapter II.5]

## II.2 COMPETENCES OF THE UNITED NATIONS IN THE FIELD OF HUMAN RIGHTS

As a political document, the Charter of the United Nations holds the promise of organising international society and relations in a peaceful manner. To that end, the Charter proposes a blueprint for cooperation, notably in relation to the promotion and protection of human rights and fundamental freedoms. In its form (as an international treaty) the Charter is a legal document establishing the framework within which the legality of (any) action of the United Nations and its Member States must be determined. In this sense, like a national constitution, the Charter establishes the material or substantive competences of the United Nations and attributes their performance to the different organs of the Organisation. It also purports to regulate the decision-making powers of these (principal) organs as well as their mutual relations.

The basis for the activities of the United Nations in the field of human rights can be found in Article 1 paragraph 3 of the Charter, which reads:

‘The purposes of the United Nations are:

(...)

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;<sup>3</sup>

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<sup>3</sup> See also Article 1 paragraph 2 of the Charter.

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In the system of the Charter, the realisation of the purpose of promoting and encouraging respect for human rights and fundamental freedoms has been made the specific object of the Organisation's efforts in the field of economic and social cooperation.<sup>4</sup> Chapter IX of the Charter, entitled 'International Economic and Social Cooperation', provides in Article 55 paragraph (c):

'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote (...) c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.'

The Charter entrusts the responsibility for the implementation of the above task to various organs. In the first place, reference must be made to Article 10 of the Charter, which establishes the general competence of the General Assembly to 'discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter (...) and [to] make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'<sup>5</sup>

Moreover, pursuant to Article 13 paragraph 1 (b), the General Assembly 'shall initiate studies and recommendations for the purpose of (...) b. (...) assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' Paragraph 2 of the same Article provides that 'the further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X [entitled 'The Economic and Social Council', JG].'

Under Chapter IX, the Charter provides in Article 60 that '[r]esponsibility for the discharge of the functions of the Organisation set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth

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4 One can also find this objective integrated in Chapter XII of the Charter, in particular Article 76, dealing with the (now obsolete) trusteeship system.

5 This is a discretionary power in the hands of the General Assembly: it *may* discuss (...) and it *may* make recommendations (...). See Simma (ed.) 1994, pp. 226-242 (Hailbronner/Klein); also Preuss, Hague Recueil 1949, pp. 579-587.

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in Chapter X.<sup>6</sup> This article also provides the legal basis for the activities of ECOSOC in the field of human rights.<sup>7</sup>

ECOSOC's competences have been laid down in Article 62 paragraph 2 of the Charter (Chapter X), which provides that '[i]t may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.' Furthermore, pursuant to Article 68 ECOSOC 'shall set up commis-

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6 There seems to be some doctrinal confusion on the correct interpretation of Articles 55 (c), 13 (1)(b) and 60, in particular when it comes to determining whether Article 13 (1)(b) or Article 60 lays down the responsibility of the General Assembly to be active in the field of Article 55. In a commentary on the Charter of the United Nations, Meng, commenting on Article 60 of the Charter, argues that responsibility does not flow from this article, but from Article 13 (1)(b). Partsch, however, in the same commentary, concludes that the organs entrusted with the task of carrying out Article 55 (c) are specified in the Articles 60 and 68 of the Charter. Still in the same commentary, in relation to the interpretation of Article 13 (1)(b), Fleischhauer writes that United Nations practice has shown that the General Assembly, upon the request of ECOSOC and its subsidiary bodies as well as other United Nations organs, has initiated numerous studies designed to promote the subject-matters mentioned in Article 13 (1)(b), including human rights, and that it has adopted countless resolutions on these matters addressed to, *inter alia*, ECOSOC and its subsidiary bodies, but 'that the requests for the studies and the recommendations were not made under Art. 13 (1)(b) but rather under the articles setting forth the further responsibilities, functions and powers of the General Assembly with respect to the subject areas mentioned in Art. 13 (1)(b); Art. 13 (2) specifically refers to those further responsibilities, functions and powers of the General Assembly. (...) the legislative bases for the activities of the General Assembly in the field of human rights are Chapters IX and X of the Charter rather than Art. 13 (1)(b).' [emphasis added] See Simma (ed.) 1994, pp. 278 and 279 (Fleischhauer), p. 780 (Partsch) and p. 821 (Meng). As is implicit in Fleischhauer's considerations, the best way to approach the issue is probably to recognize that there exists a legal basis (bases) for the actions of the General Assembly in the field of human rights and to see whether the actual practice of the organ can be reduced to any of these bases. This pragmatic (empirical) approach will be further highlighted throughout this section (II.2) as being inherent in the institutional structure developed for the purpose of promoting and encouraging respect for human rights and fundamental freedoms.

7 Article 60 also establishes a hierarchy between the General Assembly and ECOSOC – both principal organs of the United Nations pursuant to Article 7 of the Charter – as the phrase 'under the authority of the General Assembly' makes clear. According to an early commentary of the Charter, the relevance of this phrase must be considered 'in contrast to responsibility for the maintenance of international peace and security which, by Article 24, is placed primarily on the Security Council', but 'nevertheless, the Charter envisages an important role for the Economic and Social Council as a kind of standing committee of the General Assembly.' See Goodrich Hambro 1949, pp. 364 and 366. In a later version Goodrich and Hambro mention General Assembly Resolution 5 (1) of 29 January 1946, which provided that 'the Economic and Social Council should be allowed the widest possible freedom to carry out its work.' Nevertheless, they conclude, on the basis of the practice of the organs, that '[g]enerally speaking, the General Assembly has viewed its relations to ECOSOC as permitting detailed review of the acts of that organ and free revision of its recommendations (...) it was probably inevitable from the beginning that the General Assembly should assume the role it has in view of its more representative character and the extent of its Charter powers.' Goodrich Hambro and Simons 1969, pp. 404-406. Another commentator, Meng, writes that 'Article 60 is (...) clear in transferring to the General Assembly a power of supervision and in regulating the activities of ECOSOC, and also in giving it the authority to be active in its own right. Simma (ed.) 1994, p. 821, also pp. 877-879.

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sions in economic and social fields *and for the promotion of human rights*, and such other commissions as may be required for the performance of its functions.<sup>8</sup>

In June 1946 ECOSOC established the Commission on Human Rights composed of (at that time) eighteen Government representatives selected by the Council.<sup>9</sup> The original mandate given to the Commission entrusted it with the following tasks:

- ‘The work of the Commission shall consist of submitting proposals, recommendations and reports to the Council concerning
- a. an international bill of rights;
  - b. international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters;
  - c. the protection of minorities;
  - d. the prevention of discrimination on grounds of race, sex, language or religion;
  - e. any other matter concerning human rights not covered by items (a), (b), (c) and (d).’<sup>10</sup>

In 1947 at its first session the Commission on Human Rights, authorised by ECOSOC, established the Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>11</sup> (*Sub-Commission*) composed of experts acting in their personal capacity and designed to assist the Commission in different ways in carrying out its tasks.

Other principal organs of the United Nations, in particular the Security Council and the International Court of Justice, have not been given specific competences in the context of the promotion of human rights and fundamental freedoms. This does not mean, however, that these organs never play a role in the realisation of this purpose. Human rights matters may come within the ambit of the competences of the Security Council whenever they raise questions relating to the maintenance of international peace and security.<sup>12</sup> Similarly, the International Court of Justice may deal with such matters whenever States – provided they have recognised the Court’s jurisdiction – bring them before it<sup>13</sup> or, alternatively, whenever it is seized by the General Assembly or the Security Council to give an advisory opinion on any legal question.<sup>14</sup>

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8 [Emphasis added] Article 68 must be read in conjunction with Article paragraph 2 of the Charter, authorising the principal organs of the United Nations to establish subsidiary organs.

9 ECOSOC Res. 9 (II) of 21 June 1946. A ‘nuclear’ Commission on Human Rights, composed of nine members appointed in their individual capacity, established on 16 February 1946, paved the way for this ‘full’ Commission [ECOSOC Res. 5 (I)]. See Lauterpacht, *Hague Recueil* 1947, pp. 57 ff.

10 Restated in Lauterpacht, *Hague Recueil* 1947, pp. 56 and 57. For the drafting history of the mandate see also Alston 1992, pp. 126-129.

11 Later, in 1999, renamed the Sub-Commission on the Promotion and Protection of Human Rights.

12 See Article 24 of the Charter.

13 See Article 92 of the Charter in conjunction with Articles 34 and 36 of the Statute of the International Court of Justice.

14 See Article 96 paragraph 1 of the Charter. Pursuant to Article 96 paragraph 2, other organs of the United Nations or specialised agencies may be authorised by the General Assembly to request an advisory opinion from the Court ‘on legal questions arising within the scope of their activities.’

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Three particular aspects of the substantive and institutional framework established by the Charter need to be highlighted since they are key determinants of the nature of the process and practice of the United Nations in the field of human rights in the years following its establishment in 1945. These aspects are:

- (1) The rather vague terms of the (substantive) human rights provisions of the Charter;
- (2) The primary role of the political organs of the United Nations in the implementation of the purposes of the Organisation in the field of human rights;
- (3) The limited powers of the competent United Nations organs, in particular the absence of the power to take legally binding decisions for the Member States.

However, before doing so, it is relevant to note that the nature of the process is, in fact, to large extent pre-determined by the negotiations preceding and leading to the adoption of the Charter. The process, in other words, has a history which is reflected in the provisions of the Charter. This history consists of tension between, on the one hand, a necessity and a will on the part of Governments to establish an international organisation aimed at maintaining international peace and security and promoting international cooperation between States<sup>15</sup> and, on the other hand, a reluctance by the same Governments to confer upon the newly established organisation, *ab initio*, far-reaching competences in fields hitherto largely unregulated by international law.<sup>16</sup> The reasons for this tension must be sought, *inter alia*, in the sphere of the domestic policies of the major powers and the repercussions of the 'internationalisation' of these policies both at the national and the international level.<sup>17</sup> From the perspective of international relations this tension is perhaps best understood in the light of the general consideration that '[b]y its object, any organisation of international relations tends to change more or less profoundly the conditions of exercise or even the principle of the distribution of political power among nations.'<sup>18</sup> More particularly, the issue must be

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15 A necessity, triggered by Nazi Germany's aggression and the demise of the system established by the League of Nations; and a will, expressed through important declarations such as U.S. President Roosevelt's Four Freedoms Speech (January 1941) or the Atlantic Charter (August 1941), which set in motion a process – put in full swing with the entry of the United States in the Second World War in December 1941 – eventually leading to the adoption of the Charter and the establishment of the United Nations. See, Grewe and Khan in: Simma (ed.) 1994, pp. 1-12. Also, Lauren 1998, pp. 139-171 and Cassese 2001, pp. 275 ff.

16 Lauren 1998, pp. 165-171.

17 Racial segregation policies in the United States of America, the colonial policies of the United Kingdom and not in the last place the brutalities of Stalin's Soviet Union. The repercussions may be something that touches upon democracies (freedom of speech, of the press etc.) more than dictatorial régimes. As Lauren writes: 'Indeed, it was World War II that demonstrated as never before in history the extreme consequences of the doctrine of national sovereignty and ideologies of superiority. This, in turn, forced those engaged in the war to look in a mirror and see their own reflections, and consider whether they had any responsibility to change their ways.' This was particularly true for the United Kingdom and the United States of America where 'governments (...) found themselves forced – as never before – to acknowledge their hypocrisy.' *Ibid.*, pp. 139-151, especially pp. 145 and 150.

18 De Visscher 1968, p. 107.

considered in the context of the growing tension between the Soviet Union and the United States.<sup>19</sup>

(1) *The rather vague terms of the (substantive) human rights provisions of the Charter.*<sup>20</sup>

The Charter does not contain a concrete catalogue of human rights standards by which the Member States and the Organisation should be guided in their efforts to promote human rights and fundamental freedoms. Although a proposal to append a 'Declaration of Essential Human Rights' had been made at the San Francisco Founding Conference of the United Nations, it was agreed that specific human rights standards should be adopted separately, in particular through the traditional treaty-making process.<sup>21</sup> Also, the Charter only refers to the *promotion* of respect for and observance of human rights and does not include a reference to the *protection* of human rights as a task of the United Nations. The incorporation of the latter term in the Charter was rejected on the ground that it might be interpreted as giving the United Nations the competence to impose actively upon its Member States the implementation of human rights standards, a competence remaining the concern of individual States.<sup>22</sup> In this respect, it must also be mentioned that the Charter does *not* contain a *specific obligation* for States to take *separate* action at the *national* level to promote human rights. Article 56 of the Charter only provides that 'All members pledge themselves to take joint and separate action *in cooperation with* the Organisation for the achievement of the purposes set forth in Article 55.'<sup>23</sup>

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19 In relation to the sphere of suspicion and unreality in which the Charter was drawn up De Visscher wrote: 'the phraseology that paints the San Francisco Conference in the colors of a 'great hope' belongs to the literature of imagination.' *Ibid.*, pp. 110 and 433.

20 See Ermacora, *Hague Recueil* 1968, pp. 401 ff.

21 A proposal for a 'Declaration of Essential Human Rights' to be appended to the Charter had been proposed by Panama. See Alston 1992, p. 127. Also Cassese 2001, p. 352. In his closing speech to the San Francisco Conference U.S. President Truman stated, *inter alia*, 'Under this document [the Charter, JG] we have good reasons to expect an international bill of rights acceptable to all nations involved. That Bill of Rights will be as much part of international life as our own Bill of Rights is part of our Constitution. The Charter is dedicated to the achievement of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security in the world.' Taken from: Mc Dougal and Bebr, *AJIL* 1964, p. 613.

22 Lauterpacht, *Hague Recueil* 1947, p. 14. Also Kamminga 1992, p. 74.

23 [Emphasis added] As a commentary on this article makes clear, it reconciled two opposing views existing at the San Francisco Conference: 'one, that each member should pledge itself to take independent, separate, national action to achieve the purposes set forth in Article 55, and the other, that such a pledge of separate national action went beyond the proper scope of the Charter – the encouragement of international cooperation – and might infringe upon the domestic jurisdiction of members.' Goodrich Hambro and Simons 1969, pp. 380-382.

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*(2) The primary role of the political organs of the United Nations in the implementation of the purposes of the Organisation in the field of human rights*

As set out above, the Charter confers primary responsibility for the promotion of human rights to the *political* organs of the United Nations, in particular the General Assembly, ECOSOC and its ‘functional’ Commission on Human Rights. These organs are all composed of Government representatives.<sup>24</sup> The obvious practical consequence of this institutional structure – and it is worth stating it explicitly – is that these political organs are the first which are called upon to determine the meaning and scope of the human rights provisions of the Charter as well as to give concrete contents to these provisions. It is also, therefore, within this structure that eventual conflicting interpretations of competences given by different organs will be settled. What is important to understand is that where, in the daily practice of the United Nations, provisions are interpreted by political organs, legal reasoning and legal logic, including the application of the rules concerning the interpretation of treaties, play a less prominent role than would be the case before legal organs. This is not to say that law and legal rules are not relevant before the political organs of the United Nations. Indeed, as Higgins observed, ‘Although they are political bodies, they are none the less [formally, JG] bound by legal rules – rules which are both specific, reflecting formal consent of the terms of the Charter, and general, being the rules of general international law.’<sup>25</sup> But, in concrete situations, where one of the competent political organs is called upon to decide on questions concerning human rights, ‘the legal norms serve only as a very wide limitation of the possible methods for solving the case.’<sup>26</sup>

*(3) The limited powers of the competent United Nations organs, in particular the absence of the power to take legally binding decisions for the Member States*

As Lauterpacht remarked in his Hague Lectures on the International Protection of Human Rights, ‘the restraint exhibited by [the provisions concerning the powers of the General Assembly and ECOSOC, JG], studiously falling short of conferment of direct authority, is impressive in its consistency.’<sup>27</sup> The United Nations is not able to give unilateral and binding orders to its Member States. In particular, the legal status of the resolutions of the General Assembly and ECOSOC is that of a (non-legally binding) recommendation, in principle, commanding no more than political value.<sup>28</sup> In other words, neither the General Assembly, nor ECOSOC have been granted legislative or executive powers comparable to those vested in the organs of States at

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24 See Articles 9 and 18 (General Assembly) and Articles 61 and 67 (ECOSOC) of the Charter.

25 Higgins 1963, p. 2.

26 Ermacora, Hague Recueil 1968, p. 389.

27 Lauterpacht, Hague Recueil 1947, p. 15.

28 Articles 13 (General Assembly) and 62 (ECOSOC) of the Charter.

the national level.<sup>29</sup> As a functional commission resorting under ECOSOC, the Commission on Human Rights cannot logically adopt resolutions formally commanding more than political force.

Exceptions to the non-legally binding nature of resolutions of the organs of the United Nations include resolutions and decisions relating to the internal functioning of the Organisation and, more importantly, decisions of the Security Council enacted under Chapter VII of the Charter and decisions of the International Court of Justice in contentious cases for the parties concerned.<sup>30</sup> However, as has been set out above, these two principal organs of the United Nations do not have 'normal' jurisdiction in the field of human rights.

It is clear that, from a formal point of view, the Charter essentially preserves the decentralised nature of the international legal order as a system of sovereign and equal States. And, as another corollary of the concept of State sovereignty, the principle of (State) consent continues to be applicable. With some notable exceptions, the Charter does not provide for such a thing as an international *volonté générale*.<sup>31</sup>

So far, a basic outline has been given of the human rights provisions of the Charter of the United Nations and some of their intrinsic characteristics. However, in addition to providing for 'positive' competences of the United Nations with regard to human rights and fundamental freedoms, the Charter also imposes a (seeming) restriction on these competences in the form of the clause on domestic jurisdiction contained in Article 2 paragraph 7. The basic elements and characteristics of this clause will be outlined in the following section.

### II.3 THE CLAUSE ON DOMESTIC JURISDICTION IN THE CHARTER OF THE UNITED NATIONS

Article 2 paragraph 7 of the Charter reads:

'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

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<sup>29</sup> See also Higgins 1963, pp. 4 and 5. For this reason, also, Ermacora speaks of the 'quasi-legislative' activities of the United Nations. Ermacora, Hague Recueil 1968, pp. 393 ff. Also Jenks 1969, pp. 200 ff.

<sup>30</sup> Article 25 and Chapter VII of the Charter (Security Council), Article 94 paragraph 1 of the Charter and Article 59 of the Statute of the International Court of Justice (International Court of Justice). See also Ermacora, Hague Recueil 1968, pp. 393 and 394.

<sup>31</sup> The term is used by Ermacora, Hague Recueil 1968, p. 381.

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The first part of this provision, *i.e.* the phrase 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State', demands our special attention, since it is this particular phrase that has been said to stand in the way of the United Nations taking up matters in the field of human rights.<sup>32</sup> In order to understand the meaning and scope of this provision as well as its application in the practice of the human rights organs of the United Nations, the following aspects need to be considered:

- (1) The place of the provision in the Charter;
- (2) The standard by which a matter's alleged essentially domestic nature must be measured;
- (3) The entity endowed with the competence to decide authoritatively on a matter's alleged essentially domestic nature;
- (4) Interpretation of the terms '*essentially* within the domestic jurisdiction' and 'intervene'.

Usually when the meaning and scope of Article 2 paragraph 7 of the Charter is discussed, a comparison is made with the domestic jurisdiction clause as contained in the Covenant of the League of Nations. Such a comparison has been said to be helpful to understand the intentions of the framers of the Charter.<sup>33</sup> It also reveals something about political realities, in particular the need to make concessions to the major powers, not in the last place the United States of America, to ensure their participation in the new world Organisation and to make universal membership of the Organisation a reality rather than a remote ideal. As will be shown, some of the principles on which the domestic jurisdiction clause of the League of Nations was founded and which at the time constituted one of the reasons for the United States Congress not to ratify the Covenant, had been sacrificed to make the Organisation 'safe' for States to participate therein.<sup>34</sup>

In the Covenant the domestic jurisdiction clause had been formulated as follows:

'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations as to its settlement.'<sup>35</sup>

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<sup>32</sup> On the background of the second part of the provision, see, *inter alia*, Preuss, Hague Recueil 1949, pp. 588 ff. and Gross, AJIL 1947, p. 543.

<sup>33</sup> Kamminga 1992, p. 70.

<sup>34</sup> These aspects have been highlighted by Gross, AJIL 1947, pp. 531 ff., especially pp. 553 and 554.

<sup>35</sup> Article 15 paragraph 8 of the Covenant.

(1) *The place of the provision in the Charter*

The Charter of the United Nations attributes the domestic jurisdiction clause the rank of a principle of the Organisation by incorporating it in Article 2 of the Charter. Pursuant to the opening phrase of that Article the Organisation and its Member States shall act in accordance with these principles 'in the pursuit of the Purposes stated in Article 1.' The purposes – including the task of promoting and encouraging respect for human rights and fundamental freedoms – and principles of the Organisation make up the first chapter of the Charter.

The classification of the domestic jurisdiction clause as a 'constitutional' principle of the United Nations and its place in Chapter I of the Charter is a first remarkable difference with the conception of the clause under the Covenant of the League of Nations. Under the Covenant, the formula was addressed specifically to the Council of the League of Nations, which had to take it into account, at the request of a State concerned, in the exercise of its conciliatory functions under Article 15 paragraph 1 of the Covenant.<sup>36</sup>

Initially, the Dumbarton Oaks Proposals for the Establishment of a General International Organisation, signed on 7 October 1944 in Washington, envisaged a more or less similar function of the domestic jurisdiction clause for the United Nations. At the San Francisco Conference, held from 25 April to 26 June 1945, these proposals were altered and provision was made for a new paragraph concerning the question of domestic jurisdiction. That new paragraph was to be included in the chapter on the principles of the organisation and, thereby, was intended to become a general limitation on the activities of all organs of the United Nations.

On behalf of the sponsors of this amendment, the US delegate Dulles confirmed that the new proposal dealt with domestic jurisdiction as a basic principle to be applied *ex officio* by the organs of the United Nations 'and not, as in the Covenant and in the Dumbarton Oaks Proposals as a 'technical and legalistic formula' designed solely to apply to the peaceful settlement of disputes.'<sup>37</sup> The principal reason for widening the scope of the domestic jurisdiction clause has been said to be the broadening of functions and the corresponding augmentation of competences of the United Nations to the economic, social and humanitarian fields.<sup>38</sup> In its final final report Committee I/1 of

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<sup>36</sup> Article 15 paragraph 1 reads (as far as is relevant): 'If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement, in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. (...)' See also Preuss, Hague Recueil 1949, p. 572. In practice, an examination of the applicability of Article 2 paragraph 7 *ex officio* before the political organs of the United Nations has not occurred; rather, the parties to a particular case at hand have invoked the clause as an argument in the political debates. See Simma (ed.) 1994, p. 153 (Ermacora).

<sup>37</sup> Preuss, Hague Recueil 1949, pp. 571-579, especially 575 and 576.

<sup>38</sup> See also Goodrich Hambro 1949, pp. 320 and 321.

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the San Francisco Conference, dealing with the general provisions of the Charter,<sup>39</sup> justified the (place of the) new provision as follows:

‘The Organisation we are developing is assuming, under the present Charter, functions wider in scope than those previously assumed by the League of Nations or other international bodies and even wider than those which were first contemplated at Dumbarton Oaks, especially in the economic, social and cultural fields. The tendency to provide the United Nations with a broad jurisdiction is, therefore, relevant and founded. The necessity, on the other hand, to make sure that the United Nations under prevalent world conditions should not go beyond acceptable limits or exceed due limitation called for principle 8 [ultimately, Article 2 paragraph 7, JG] as an instrument to determine the scope of the attributes of the Organisation and to regulate its functioning in matters at issue.’<sup>40</sup>

The Committee of the San Francisco Conference dealing with economic and social cooperation delivered a similar statement :

‘The members of Committee 3 of Commission II are in full agreement that nothing contained in Chapter IX [Chapters IX and X of the Charter, JG] can be construed as giving authority to intervene in the domestic affairs of member states.’<sup>41</sup>

It is this apparent stalemate between purposes and principles that caused some turbulence among commentators, fearing that a broad interpretation of Article 2 paragraph 7 of the Charter, covering all activities of the Organisation, might paralyse the United Nations. On the other hand, even the proponents of the clause apparently did not envisage a completely paralysed United Nations. As delegate Dulles reported back to the US President:

‘in social and economic matters an international organisation could aid in the solution of economic and social problems but could not interfere with the functions and powers of sovereign states. It could not command performance by individual member nations; it should not reach in the domestic affairs of Members. Its tools and procedures are those of study, discussion, report, and recommendation. These are the *voluntary means of a free and voluntary association of nations*.’<sup>42</sup>

Preuss reacted to this passage that it appears ‘to rest upon a basic misconception as to the limitations inherent in an international organisation.’ As has also been shown in section II.2 above, the Charter neither endows any organ of the United Nations with

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<sup>39</sup> Preamble, purposes and principles.

<sup>40</sup> Taken from: Preuss, Hague Recueil 1949, p. 576.

<sup>41</sup> Ibid.

<sup>42</sup> Original source: Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, June 26, 1945 (Department of State Publication 2349, Conference Series 71, 1945), p. 111 [emphasis added], quotation taken from: Preuss, Hague Recueil 1949, p. 578.

the authority to legislate with binding force for its Member States (with respect to social, economic or human rights issues), nor does it grant any of these organs mandatory executive powers (except for matters within the scope of Chapter VII). Therefore, Preuss argued that

‘If Article 2 (7) has the meaning attached to it by the foregoing statements it clearly becomes superfluous, for it would prohibit action which no organ of the United Nations is in any event authorised to take.’<sup>43</sup>

Again, as with the human rights provisions of the Charter, the final say in the interpretation of Article 2 paragraph 7 and, thus, answering the question whether or not it will have the effect of paralysing the work of the United Nations, lies in the hands of those organs called upon to apply it in their daily practice.

*(2) The standard by which a matter's alleged essentially domestic nature must be measured*

A second difference between the domestic jurisdiction clauses of the League of Nations and the Charter is that the former clearly establishes international law as the yardstick for determining the alleged domestic nature of a matter.

As to the formulation used in the Covenant, *i.e.* ‘a matter which by international law is solely within the domestic jurisdiction of that party’, De Visscher remarked that ‘it was accurate if it is taken to mean that the decision as to jurisdiction in each case belongs to international law and not to the unilateral discretion of the interested State. It was misleading if it is interpreted as indicating that general international law contains a principle of demarcation enabling us to fix *in abstracto* and in general terms the configuration of the reserved domain. In the system of the Covenant, this configuration was to be elaborated gradually under the control of the Council, enlightened, if need be, by the advisory opinions of the Permanent Court of International Justice.’<sup>44</sup>

In its Advisory Opinion concerning the Tunis and Morocco Nationality Decrees of 1923, the Permanent Court of International Justice contributed to the process of clarifying the scope of the phrase ‘a matter which by international law is solely within the domestic jurisdiction of that party’ by ruling that:

‘The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations.’<sup>45</sup>

The principle enunciated by the Court clearly establishes that the boundary between the reserved domain and the domain governed directly by international law is not a

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43 Ibid.

44 De Visscher 1968, p. 231.

45 Publications of the Court, Series B, No. 4, p. 24 (reprinted in: Hudson 1934, p. 156).

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fixed one. In other words, there are no matters which are domestic by nature. Matters, once left by international law for regulation by States themselves, may over time become the subject of international regulation – either through the emergence of rules of customary international law or through the process of treaty-making – and thereby cease to be ‘solely’ within the domestic jurisdiction of States.<sup>46</sup>

Reference to international law is omitted in the formulation of Article 2 paragraph 7. US Delegate Dulles justified this omission, *inter alia*, on the ground that reference to international law would nullify the effects of the clause. In particular, it was feared that, the Charter being an international treaty, the argument could be made that the matters referred to therein, by that fact alone, ceased to be of an ‘essentially’ domestic nature.<sup>47</sup> Whatever the merit of the argument, the ultimate effect of the absence of an objective standard in the provision of Article 2 paragraph 7 can only be verified in practice.<sup>48</sup>

(3) *The entity endowed with the competence to decide authoritatively on a matter's alleged essentially domestic nature*

This brings us to the third difference between the domestic jurisdiction clauses of the Covenant and the Charter: the entity competent to decide authoritatively – that is with binding effect upon all Member States and organs of the organisation – whether or not the domestic jurisdiction clause applies in a concrete case at hand. In the formula of the Covenant the decision as to the alleged domestic nature of a case lies primarily in the hands of the Council of the League of Nations, and, as already referred to above, if need be, assisted by advisory opinions of the Permanent Court of International Justice.

The Charter, on the other hand, does not endow any organ in particular with the competence to decide authoritatively on the applicability of the domestic jurisdiction clause. A proposal to provide for a role of the International Court of Justice in this respect failed to obtain the required majority at the San Francisco Conference. Another amendment, which was aimed at excluding the possibility that individual Member States would be able to decide for themselves whether or not a matter fell within their domestic jurisdiction and, thus, whether or not they accepted the jurisdiction of the

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<sup>46</sup> Also Preuss, Hague Recueil 1949, pp. 567-569.

<sup>47</sup> *Ibid.*, pp. 576 and 577, also pp. 597-604. Other arguments put forward for removing the term ‘international law’ from the provision include: the fact that international law was subject to constant change and that, therefore, it would in any case be difficult to define whether or not a particular situation came within the domestic jurisdiction of a State; that the body of international law on the subject of domestic jurisdiction is indefinite and inadequate; and to the extent that the matter is dealt with by international practice and by drafters, the conceptions are antiquated and not of a character to be frozen into the new Organisation. Preuss also suggested that the omission of a reference to international law may have been due to an anti-legal sentiment which was prevalent among certain delegations at the San Francisco Conference.

<sup>48</sup> See, for example, Kamminga 1992, pp. 70 and 71.

relevant United Nations organ in a particular instance, also failed to obtain the necessary support.<sup>49</sup> At the San Francisco Conference, the question of the interpretation of the domestic jurisdiction clause was only considered a particular aspect of the interpretation of the Charter in general. The relevant Committee report summarised the problem as follows:

'In the course of the operations from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council or the International Court of Justice [or ECOSOC or the Commission on Human Rights, JG]. Accordingly, it is not necessary to include in the Charter a provision either authorising or approving the normal operation of this principle.'

Consequently, any organ of the United Nations confronted in a given case with a plea of domestic jurisdiction will have to take a decision on its applicability and, thus, to establish some form of practice in dealing with such issues. Indeed, this entails that, in principle, both the political and the legal organs of the United Nations may be involved in the process. However, in the light of the attribution of competences described in section II.2, the political organs are most likely to play the primary role in practice. Their political judgments could nevertheless obtain a more legal flavour, if these organs were willing to submit questions relating to the constitutional aspects of the Charter to the International Court of Justice for advisory opinions. On the other hand, the fact that some States, notably the United States of America (1946), accepted the Court's compulsory jurisdiction in contentious cases, subject to the reservation that disputes essentially within its domestic jurisdiction to be determined by the State itself would be excluded, clearly shows the reluctance of States to allow for the legal aspects of domestic jurisdiction to play a decisive role in the daily practice of the Organisation.<sup>50</sup>

*(4) Interpretation of the terms 'essentially within the domestic jurisdiction' and 'intervene'*

At this point it is necessary to say something about the interpretation of the terms 'essentially within the domestic jurisdiction' and 'intervene' as contained in Article 2 paragraph 7. However, some preliminary remarks must be made. The interpretation of the specific terms of the provision is, of course, the part where legal scholars feel most inclined to give their opinion. The present study intentionally deals with the interpretation of these terms after having described the system of the Charter and the different actors engaged in the process of interpretation, since it is precisely these

<sup>49</sup> Preuss, Hague Recueil 1949, pp. 594-597.

<sup>50</sup> Gross, AJIL 1947, p. 541.

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actors that give meaning and contents to the terms of Article 2 paragraph 7 in the first place. And, as already indicated above, in a concrete situation where one of the competent political organs is called upon to decide on questions concerning domestic jurisdiction (in relation to human rights), law and legal reasoning play a different role than they would before a judicial organ. This is even the more so in those areas of international relations where positive organisation and integration is still more a desired objective than an achieved situation in fact. In such cases, legal considerations are brought into in an otherwise political discussion, *i.e.* a discussion which contains elements not yet controlled by law (or reason).<sup>51</sup> Furthermore, this part of the the study is not so much concerned with what *should* be – in accordance with legal logic – the right interpretation of the terms of the domestic jurisdiction clause, but rather to give an analytical account of the conditions and the context within which the clause operates and within which it evolves (in a neutral sense of the term). At the risk of ending up with ‘scholastic discussions’, these constraints, it is submitted here, cannot be left out of the picture when considering the correct *legal* interpretation of Article 2 paragraph 7 of the Charter.<sup>52</sup>

Article 15 paragraph 8 of the Covenant of the League of Nations provides that a State may plead that a certain matter is ‘solely’ within its domestic jurisdiction. Under the system of the League the Permanent Court of International Justice has had the opportunity to further clarify the scope of the term ‘solely’. Again, in its Advisory Opinion concerning the Tunis-Morocco Nationality Decrees, the Court found that:

‘The words ‘solely within the domestic jurisdiction’ seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge.

(...)

For the purpose of the present opinion, it is enough to observe that it may well happen that in a matter which, like that of nationality, is not, in principle regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15 paragraph 8 then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes *in these circumstances a dispute of an international character and falls outside the scope of the exception* contained in this paragraph.<sup>53</sup>

The Court clearly established that for the exception of domestic jurisdiction to apply, it was *not* enough to find that, *in abstracto*, a certain matter belonged solely to the

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51 See also, De Visscher 1968, p. 77.

52 Ibid., pp. 229 and 232.

53 Publications of the Court, Series B, No. 4, p. 24 (reprinted in: Hudson 1934, p. 156) [emphasis added].

domestic jurisdiction of a State. Such a conclusion could only be based on the consideration of the concrete situation at hand, in the light of the specific international obligations the State concerned may have accepted. In the opinion of the Court the existence of such a specific obligation – whether of a conventional or customary origin – was deemed sufficient to set aside the claim that a matter was ‘solely’ within the domestic jurisdiction of the State concerned.<sup>54</sup> But the opposite is probably also true. A finding that, in principle, a certain matter does not belong ‘solely’ – an already rather restrictive criterion – to the domestic jurisdiction of a State may overlook the fact that, in the concrete case at hand, the matter has *aspects* that do belong to the exclusive jurisdiction of a State.<sup>55</sup>

At the San Francisco Conference the drafters of the Charter decided not to uphold the rather restrictive sphere of domestic jurisdiction implied by the term ‘solely’ and the Court’s understanding of that term. Instead, they responded to a demand for a broader scope of the sphere of domestic jurisdiction as expressed, *inter alia*, by the US delegate Dulles:

‘What is there in the world today that is solely domestic? Why, this very Charter recognises the fact that the whole internal life of a State does have some effect upon the peace and safety in the world. That is a precise and very important finding of Chapter IX, that the safety and peace of the world and friendly relations do depend upon the condition of the internal life of a State.’<sup>56</sup>

The broader scope of the sphere of domestic jurisdiction was achieved by substituting the term ‘essentially’ for ‘solely’ in the formulation of Article 2 paragraph 7. In theory, it could now be argued that, while a matter might not be ‘solely’ within the domestic jurisdiction of a State in the light of the existence of international obligations related to the matter, it is still ‘essentially’ within a State’s domestic jurisdiction.

The other term of Article 2 paragraph 7 that needs some clarification is ‘intervene’ or intervention. The interpretation of this term, which did not appear in the formula of the League of Nations, determines to a great extent the potentialities of action by the United Nations; it is at this point that decision-makers are called upon to give a concrete meaning to the contradiction or tension between the positive competences of the United Nations in the field of human rights and the domestic jurisdiction clause of Article 2 paragraph 7 of the Charter. Does ‘intervention’ cover *any* kind of activity by the organs of the United Nations or does it refer to a *particular* type of activity only? In other words, if a matter falls (has been decided to fall) essentially within the jurisdiction of a State, is the corresponding prohibition on the United Nations ‘intervening’ absolute or relative?

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<sup>54</sup> Also, Gross, AJIL 1947, p. 540.

<sup>55</sup> De Visscher 1968, p. 230.

<sup>56</sup> See Preuss, Hague Recueil 1949, p. 600.

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When considering the scope of the term 'intervene', it is important to keep in mind that provisions like Article 2 paragraph 7 did not end up in the Charter by coincidence. Whereas States recognised the need to draw up an ambitious political programme for future cooperation, fundamental political differences (tensions) and preferences still existed and required the finding of compromise formulas to conceal them, not in the last place to ensure universal participation in the new Organisation.<sup>57</sup> In fact, the political situation existing at the time of the adoption of the Charter had been temporarily frozen into the sometimes ambiguous formulas of the founding treaty of the United Nations. These formulas presented a challenge for legal doctrine, which has not always found it easy to come to grips with their terms. This is mainly due to the fact that the tension between different Charter provisions cannot be resolved entirely in terms of law without taking into consideration the political aspects. Precisely because the domestic jurisdiction clause has important political aspects, any theoretical discussion concerning the interpretation of the term 'intervene' or 'intervention' has to pay due regard to the practice of the United Nations' organs concerned.

Basically, legal doctrine saw itself confronted with the dilemma that a broad interpretation of intervention would seriously affect the Organisation's capacity to realise one of its main purposes. In order not to completely paralyse the United Nations in the exercise of its functions, legal doctrine proposed a restrictive interpretation of the term. The principal proponent of this interpretation is Lauterpacht, whose views on the matter have greatly influenced the debates within the United Nations and are (still) often cited by legal scholars.<sup>58</sup>

First expounded in his Hague Lectures on the International Protection of Human Rights, Lauterpacht submitted the following definition of intervention:

'Intervention is a technical term of, on the whole, unequivocal connotation. It signifies *dictatorial interference* in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention – a demand which, if not complied with, involves a threat of or recourse to compulsion in some form.'<sup>59</sup>

Following this classical definition of intervention – upheld and shared by other international scholars<sup>60</sup> – any form of action falling short of dictatorial interference would be permitted, even if the matter had been found to be essentially within the

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57 See Gross, AJIL 1947.

58 For example, in the dispute concerning the treatment of Indians in the Union of South Africa (1949), the representative of India based his Government's position on the views of Lauterpacht and quoted extensively from his lectures. See Preuss, Hague Recueil 1949, pp. 616 and 617. Also the studies by Zuidwijk 1982, pp. 76 ff.; Kamminga 1992, pp. 70-74; De Frouville 1996, p. 20.

59 Lauterpacht, Hague Recueil 1947, p. 19 [emphasis added]. In 1950 Lauterpacht added to this description that a threat or recourse to compulsion does not necessarily involve physical compulsion; Lauterpacht 1950, p. 167.

60 Lauterpacht referred to Brierly, Oppenheim, Verdross and Stowell.

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domestic jurisdiction of a State.<sup>61</sup> While recognising that they may 'mould' the attitude of the State concerned, Lauterpacht argued that the following actions by the General Assembly, ECOSOC or any other competent organ of the United Nations, including the Commission on Human Rights, would *not* amount to dictatorial interference:

- (1) *discussion* of a situation arising from any alleged non-observance by a State or a number of States of their obligation to respect human rights and freedoms;
- (2) on the basis of such discussion, '*initiation of a study of the problem under the aegis of the United Nations*';
- (3) or, the adoption of '*a recommendation of a general nature addressed to Members at large and covering in broad terms the subject of the complaint*;
- (4) or, even the adoption of '*a recommendation of a specific nature addressed to the State directly concerned and drawing its attention to the propriety of bringing about a situation in conformity with the obligations of the Charter*.'<sup>62</sup>

Now, why is there no compulsion involved in the measures cited above? The main argument Lauterpacht put forward is that:

'There is *no legal obligation* to accept a recommendation or to take into account the general sense of a discussion or to act upon the result of an enquiry. There may be *pressure of the public opinion* of the world as expressed through these channels. That kind of persuasion no provision of the Charter would have been able to prevent.'<sup>63</sup>

At the other end of the spectrum commentators like Preuss and Goodrich/Hambro put more emphasis on the intentions of the drafters as reflected in the (early) practice of the organs of the United Nations. Having regard to these intentions these authors found no Charter basis for the restrictive interpretation proposed by Lauterpacht. Moreover, in the light of the (early) practice of the organs of the United Nations, they concluded that:

'The 'uniformity of definition' [of the term intervention, JG], impressive as it may be in so far as it relates to intervention by *one State in the affairs of another*, disappears when it concerns *action by the United Nations with regard to the domestic affairs of any State*. The practice thus far established does not suffice to disturb conclusions based

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61 Lauterpacht himself argued that, independently of the question of their enforceability, the respect for and the observance of human rights and fundamental freedoms, had become a basic legal obligation of the Member States of the United Nations and this obligation was, therefore, no longer a matter essentially within the domestic jurisdiction of a State, but he admitted at the same time that this was 'a question which must for some time remain a matter of controversy.' Lauterpacht, Hague Recueil 1947, p. 19 and pp. 52 and 53.

62 Ibid., p. 20 [emphasis added].

63 Ibid. [emphasis added].

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upon the *travaux préparatoires*, which indicate a use of the term in the broad and non-technical sense.<sup>64</sup>

The main difficulty Preuss and others had with Lauterpacht's definition of intervention was the fact that it would render 'otiose' the entire provision of Article 2 paragraph 7. Preuss clearly showed that it had been the intention of the drafters of the domestic jurisdiction clause, above all, 'to exclude any action which would 'penetrate directly' into the domestic life of a State', but that intervention prohibited pursuant to Article 2 paragraph 7 would not have to take the extreme form of 'dictatorial interference'. He argued that, in any event, no organ of the United Nations – except for the Security Council acting under Chapter VII of the Charter – had been authorised to legislate *with binding force* for the Member States and thus to 'penetrate directly' or to 'interfere dictatorially' in any aspect of the life of these States.<sup>65</sup>

While authors like Preuss and Goodrich/Hambro admitted that a broad interpretation of the term intervention could have unsatisfactory results for the functioning of the United Nations, they emphasised that it was up to the organs of the United Nations – through their daily practice – to revise the meaning and scope of the formula contained in Article 2 paragraph 7.<sup>66</sup> Preuss, again, remarked that although the *travaux*

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64 Preuss, Hague Recueil 1949, p. 619 [emphasis added]. Goodrich/Hambro reached a similar conclusion: 'The practice of the United Nations makes it clear, as indeed does the phraseology of Article 2(7), that the word 'intervention' as used in the paragraph is not to be given a narrow technical interpretation.' Goodrich Hambro 1949, p. 120.

65 Preuss, Hague Recueil 1949, pp. 605-619. See also above under (1) *the place of the provision in the Charter*. Lauterpacht did however introduce a distinction between a 'normal' recommendation (recommendation *toute simple*) and a recommendation which is 'in fact in the nature of a decision the disregard of which may in certain eventualities involve coercion.' The latter type of recommendation may fall within the terms of Article 2 paragraph 7. Lauterpacht had specifically in mind recommendations taken under Chapter VI of the Charter and referred to the *intention of the drafters* 'to exclude the possibility of the Security Council making a specific recommendation, addressed to the parties to the dispute, in a matter which is essentially within their domestic jurisdiction.' He argued that this did not mean that article 2 paragraph 7 excluded other recommendations 'either general or specific, with regard to other spheres of activities of the United Nations. In these other spheres a recommendation, even if specifically addressed to a State, not being in the nature of a binding decision the disregard of which may entail legal consequences, does not constitute intervention. Neither is it certain that an enquiry would amount to intervention, so long as it does not take place in the territory of the State concerned against its will.' Here Lauterpacht acknowledged that the *intention of the drafters* of the Charter 'was to exclude direct legislative intervention by the United Nations in matters normally reserved to the legislature of the State.' Lauterpacht, Hague Recueil 1947, pp. 20-22. The problem is, of course, that Lauterpacht uses in one instance – *i.e.* in the case of human rights – a purely formal criterion to determine whether or not the action taken by the United Nations amounts to 'intervention' and in another instance *i.e.* resolutions under Chapter VI – he uses a material criterion, the nature of the recommendation, as the basis for making the same determination.

66 Preuss, Hague Recueil 1949, p. 611. Goodrich Hambro 1949, p. 120. See also a later edition of the commentary: Goodrich Hambro and Simons 1969, pp. 67-68.

In marked contrast to Lauterpacht's passionate plea, delivered in 1947, for an active role of 'the science of international law' and admitting that 'there is a definite limit, which it is improper to overstep, to which the science of international law can influence developments in the international sphere', he

*préparatoires* imposed certain limits upon the interpretation of Article 2 paragraph 7, they also 'left ample latitude for a *practical construction* which has gone far toward reconciling the patent contradiction between this paragraph and the broader principles and purposes of the United Nations.'<sup>67</sup>

Indeed, it is important to emphasise the practical (and practicable!) side of the matter. For, it is one thing to criticise those who have sought to reconcile the – at first sight – rigid provision of Article 2 paragraph 7 with the overall effectiveness of the Charter and to reject the restrictive interpretation as being contrary to the original intentions of the drafters and not (yet fully) matched by the practice of the organs of the United Nations, but it is quite another thing to stick so firmly to these intentions so as to deny the Organisation any capacity for future growth. As the above citation from Preuss already shows, both he and Goodrich/Hambro put great emphasis on the practice of the (political) organs of the United Nations and recognised that the key to growth lies precisely in this practice and the dynamics inherent in political organs.

Both sets of authors clearly illustrated this aspect by referring to the debates in the General Assembly and the Security Council concerning the question whether Article 2 paragraph 7 prohibited the 'discussion' of domestic matters, *i.e.* whether 'discussion' constituted intervention prohibited by this provision. In the practice of the political organs of the United Nations, it has been proved not to be *practicable* (or at least very difficult) to separate questions of competence from discussions on the merits of a certain issue. Such would only have been the case if individual States had been granted a unilateral right to even prevent an organ of the United Nations from discussing the question of its own competence in a particular case and taking a decision with regard to that question. Under the scheme of the Charter, an individual Member State, raising the point that discussion constitutes intervention in a matter found to be essentially within its domestic jurisdiction, can at the utmost decide not to participate in the discussion taking place in the organ concerned, the political consequences (loss of reputation, position in the community of States etc.), of course, being borne by that particular Member State.<sup>68</sup>

In fact, the real question whether a specific form of action constitutes intervention (in matters essentially within the domestic jurisdiction of States) comes to the fore when an organ of the United Nations contemplates action going beyond discussion, *i.e.* the initiation of a study, the establishment of a commission of inquiry and the adoption of recommendations both of a general and specific nature. Here again, it must be emphasised that the problem cannot be resolved entirely by reference to legal logic alone, mainly because the political organs of the United Nations play such an impor-

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appealed to international lawyers to avoid what he called 'the tendency to juristic pessimism and timidity in a period of political uncertainty and disillusionment.' Lauterpacht, Hague Recueil 1947, pp. 6 and 7, also p. 11; and throughout the lectures, pp. 15-17 (in relation to the legal character of the human rights provisions of the Charter), pp. 24 and 52 (in relation to the clause on domestic jurisdiction) and p. 73 (in relation to the powers of the Commission on Human Rights).

<sup>67</sup> Preuss, Hague Recueil 1949, p. 605. Goodrich Hambro and Simons 1969, p. 68.

<sup>68</sup> Preuss, Hague Recueil 1949, pp. 619-627. Goodrich Hambro and Simons 1969, pp. 64 and 67.

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tant role in the interpretation of the Charter provisions and especially Article 2 paragraph 7. This also means and it is a reality that has to be accepted that the question of the applicability of Article 2 paragraph 7 becomes to a certain extent the playground of politics. However, even politically motivated decisions by one of the political or functional organs of the United Nations do shape the sphere of domestic jurisdiction and the degree of acceptable intervention. As Ermacora remarked:

‘It depends exclusively on the effectiveness of the political decision of organs of the United Nations, which might well be considered as a legal decision for the internal sphere of the organisation, how variable or how stable the sphere of domestic jurisdiction is kept.’<sup>69</sup>

## II.4 PRACTICE OF THE POLITICAL (HUMAN RIGHTS) ORGANS OF THE UNITED NATIONS 1945-1980

### II.4.1 Introduction

So far an attempt has been made to draw a basic picture of the institutional, procedural and substantive framework established by the Charter, which constitutes the basis for the United Nations to undertake action to achieve its main purposes. It has also been attempted to bring to the fore some of the intrinsic characteristics of the system. These characteristics relate to the (vague) formulation of the human rights provisions of the Charter, the role of different organs, in particular the political organs of the United Nations as well as their competences to prescribe rules for Member States. In relation to the domestic jurisdiction clause contained in Article 2 paragraph 7 special attention has been paid to the place of the provision in the Charter, the standard applied to establish whether or not a matter falls essentially within the domestic jurisdiction of a State, the entity endowed with the competence to make such an assessment and the possible interpretation of the terms ‘essentially within the domestic jurisdiction’ and ‘intervene’. Also, the provision has been compared with the provision of Article 15 paragraph 8 of the Covenant of the League of Nations. In all cases particular emphasis has been placed on the fact that the whole process has political aspects that cannot be resolved entirely in terms of law.

The present section will give an overview of major developments in international relations and more specifically in the field of human rights in the period from 1945 to 1980 (the establishment of the first thematic procedure: the Working Group on Enforced or Involuntary Disappearances). It will be shown how the vague and seemingly contradictory provisions of the Charter have been operationalised in practice. More particularly, it will be seen how the concept of international human rights has more and more emerged as a concept under *positive* international law both as regards the substantive human rights norms that have to be complied with by States and as

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<sup>69</sup> Ermacora, Hague Recueil 1968, p. 440, see also p. 386.

regard the competences of the political (human rights) organs of the United Nations to verify State compliance with these norms. Human rights doctrine usually refers to these two aspects of the concept of international human rights as the *standard-setting* component and the *implementation* component. While the topic of the present study is primarily concerned with the latter component, any analysis must always take into account that the two components are less easy to separate in practice and that developments in the field of standard-setting have had an important effect – and have been a precondition – for subsequent developments in the field of the implementation or supervision of norms and, thus, standard-setting activities have also affected the meaning and scope of the concept of domestic jurisdiction. For this reason, albeit briefly, some words will be dedicated to the standard-setting activities of the United Nations.

#### II.4.2 Standard-setting Activities of the United Nations

In 1947 Lauterpacht appealed to his audience at the Hague Academy of International Law that commentators should ‘resist the temptation to succumb to facile generalisations’ as far as the interpretation of the vague and ambiguous human rights provisions of the Charter are concerned and to conclude that these provisions ‘are a mere declaration of principle devoid of any element of legal obligation.’<sup>70</sup>

According to Lauterpacht:

‘There is a mandatory obligation implied in the provision of Article 55 [the United Nations *shall* promote, JG] (...); or, in the terms of Article 13 [the General Assembly *shall* make recommendations, JG] (...). There is a distinct element of legal duty in the undertaking expressed in Article 56 (...). The legal character of these obligations of the Charter would remain even – which is not the case – if the Charter were to contain no provisions of any kind for their implementation.

Neither is the legal nature of these obligations decisively impaired by the fact that the Charter does not define the human rights and freedoms which the Member States are bound to observe. Undoubtedly, this circumstance impairs the juridical character of these obligations inasmuch as a certain amount of clarity and precision is an important requisite of the law. (...) But there is a *difference between the legal character of a rule being destroyed and its being adversely affected by the absence of the requisite degree of definition.*<sup>71</sup>

Formally speaking, Lauterpacht was right. As an international treaty legally binding for the States which have ratified it, the language of the Charter is the language of law. This is precisely why it has been such an important an innovation to incorporate and institutionalise the moral principles and political ideas of human rights in the founding

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<sup>70</sup> Lauterpacht, Hague Recueil 1947, pp. 15-17.

<sup>71</sup> Ibid., pp. 16 and 17 [emphasis added].

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treaty of the United Nations. For, however vague the formulations of the Charter may be, it did give the concept of international human rights (the beginnings of) a legal basis in positive international law and, thereby, provided proponents of human rights and fundamental freedoms – individuals, NGOs, Governments etc. –, which, until then, had to find the legal basis for their claims in theories of natural law, with more solid ground on which to base their claims.<sup>72</sup> The dynamics initiated by the institutionalisation of the doctrine of human rights at the level of the United Nations should not be underestimated.

Meanwhile, 'the absence of the requisite degree of definition' of human rights and fundamental freedoms in the Charter certainly affected the legal character of the international concept of human rights. In the early years of the United Nations' existence there was indeed a debate as to whether or not the human rights provisions of the Charter were formulated precisely enough to create concrete legal obligations for Member States.<sup>73</sup> Thus, in 1950 Kelsen wrote that these provisions do not place 'strict obligations' on United Nations Member States. More specifically he wrote: 'The language used in the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects. All the formulas concerned establish purposes or functions of the Organisation, not obligations of the Members, and the Organisation is not empowered by the Charter to impose upon the Governments of the Member States the obligation to guarantee to their subjects the rights referred to in the Charter. The fact that the Charter, as a *treaty*, refers to a matter is in itself *not a sufficient reason for the assumption that the Charter imposes obligations* with respect to this matter upon contracting Parties. Besides, the Charter does in no way specify the rights and freedoms to which it refers. *Legal obligations of the Members in this respect can be established only by an amendment to the Charter or by a Convention negotiated under the auspices of the*

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<sup>72</sup> As illustrated by the famous *Bernheim* case before the Council of the League of Nations. Franz Bernheim, a German citizen of Jewish origin, complained to the Council of the League of Nations about breaches of the German-Polish Treaty (on the treatment of minorities in Upper Silesia) by Hitler's Germany in 1933. The complainant who had lived in Upper Silesia had lost his job as a result of the adoption of anti-Jewish laws by the Nazis. In the debate on the issue held in the Council the German delegate denied that there was any link between Bernheim and Upper Silesia. He argued, therefore, that Bernheim had no right to submit a petition on general questions and on the application of German laws in Upper Silesia 'seeing that these laws did not in any way affect him.' In response, the Polish delegate admitted that from a legal perspective the League of Nations only had a right to deal with Jewish minorities in Upper Silesia. Nevertheless, it had '*a moral right to make a pressing appeal to the German Government to ensure equal treatment for the Jews in Germany.*' See Cassese 1994, pp. 19 and 20. Original source: League of Nations Official Journal, Year XIV, July 1933, pp. 833-935 and October 1933, Special Supplement No. 114, pp. 1-3 and 22.

<sup>73</sup> Or, in the words of Ermacora 'obligations of States the non-compliance with which would entail legal and political consequences.' Ermacora, Hague Recueil 1968, p. 425. See also Kamminga 1992, p. 75.

*United Nations and ratified by the Member (...).*<sup>74</sup> Other early commentators shared Kelsen's position.<sup>75</sup>

In 1953 the representative of South Africa, inspired perhaps by Kelsen's argument, made, *inter alia*, the following statement in reaction to the report of the United Nations Commission on the Racial Situation in the Union of South Africa (UNCORS):

'In conclusion, on this point [the wording of Articles 55 and 56 of the Charter, JG], I should draw attention to the fact that *neither the Charter nor any other internationally binding instrument contains any definition of fundamental human rights*. If they had, there would have been no need to set up the Commission [on Human Rights, JG] to frame the proposed covenant on human rights.'<sup>76</sup>

And also:

'*Neither in the Charter nor in any binding international instrument was there a definition of human rights against which the actions of the South African Government or of any other government could be tested. Such a definition was not contained in the Universal Declaration of Human Rights which set a standard for future achievement, but did not contain binding international obligations.*'<sup>77</sup>

However, it was precisely in relation to the question of racial discrimination in South Africa, that the *political organs* of the United Nations (mainly the General Assembly) started to develop their first 'casuistic definition' of a positive norm of human rights flowing from the provisions of the Charter themselves.<sup>78</sup> Or at least, they established the practice of recognising the question of racial discrimination as a question of *international law*. This development also penetrated thinking at the judicial organ of the United Nations, the International Court of Justice. First, in 1966, in his often cited dissenting opinion in the South West Africa Case (Second Phase), Judge Tanaka held that the provisions of the Charter with regard to non-discrimination and non-separation were in fact the *manifestation* and *concretisation* of a norm pre-existing as a general principle of law.<sup>79</sup> Later, in 1971, the Court itself made a direct link between the non-observance of the norm of non-discrimination and equal treatment and a violation of the purposes and principles of the Charter.<sup>80</sup>

<sup>74</sup> Kelsen 1950, p. 29, also pp. 99 ff. [emphasis added].

<sup>75</sup> Amongst others Verdross, Goodrich-Hambro and socialist commentators such as Sonnenfeld and Chernichenko. See Ermacora, Hague Recueil 1968, p. 426.

<sup>76</sup> Taken from: Ermacora, Hague Recueil 1968, p. 422. See also Simma (ed.) 1994, pp. 147 and 148 (Ermacora) [emphasis added].

<sup>77</sup> Ermacora, Hague Recueil 1968, p. 423.

<sup>78</sup> Articles 1 paragraph 3, 13 paragraph 1 (b) and 55 (c) of the Charter.

<sup>79</sup> South West Africa, Second Phase, Dissenting Opinion of Judge Tanaka, I.C.J. Reports 1966, p. 300.

<sup>80</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 131 (paras. 128-132): 'To establish (...) and to enforce, distinctions, exclusions, restrictions and limitations exclusively on grounds of race, colour, descent or national or ethnic origin which

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Another ten years later, in 1980, the Court made clear that the international concept of human rights, as laid down in the Charter of the United Nations, included, *inter alia*, the human rights and fundamental freedoms contained in the Universal Declaration of Human Rights. In the words of the Court:

‘Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental *principles* enunciated in the Universal Declaration of Human Rights.’<sup>81</sup>

Thus, where the representative of the Union of South Africa was still able to maintain with some merit in 1953 that the Universal Declaration of Human Rights contained no legally binding obligations under international law with respect to human rights and fundamental freedoms, this position was no longer tenable some thirty years later. An important ground for this development – apart from general developments in international relations since 1945 – must be sought in the fact that, notwithstanding the objections by some States, the political organs of the United Nations have been willing to apply the Universal Declaration of Human Rights as well as other non-legally and legally binding human rights instruments in their daily practice with the Governments of Member States.<sup>82</sup> Ermacora argued that this willingness was also due to the fact that ‘the United Nations organs apply the *Conventions* and the *Declarations* of the United Nations as *internal law of the organisation* and that the rules contained therein, that is, in resolutions of one of the principal organs are *binding for subsidiary organs* of the United Nations even when they have not yet come into force as international treaties. This is especially true for such organs as the *Commission on Human Rights* and its Sub-Commission or other *fact-finding or study-groups instituted by the political organs of the United Nations*. The application of resolutions in the field of human rights gives them the meaning of internal law of the organisation binding at least United Nations organs, even if their contents have not become legally binding for States as rules of international law.’<sup>83</sup>

As will be seen in more detail in the subsequent chapters on the practice of United Nations thematic procedures (Chapters III and IV) the political organs of the United

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constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.’

81 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 42 [emphasis added]. Note, however, that the Court speaks about the rights and freedoms enunciated in the Universal Declaration as *principles* [in accordance with Art. 38 paragraph 1 (c) of the Statute of the International Court of Justice] and not as norms of customary international law [Art. 38 paragraph 1 (b) of the Statute]. See also again South West Africa, Second Phase, Dissenting Opinion of Judge Tanaka, I.C.J. Reports 1966, pp. 294 ff. on the meaning of principles of law in relation to human rights.

82 Note that the concept of international human rights has also been shaped by the standard-setting activities of organisations such as the International Labour Organisation (ILO) or the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

83 Ermacora, Hague Recueil 1968, p. 403 [emphasis added].

Nations have indeed applied the very standards they have adopted as the 'internal law of the organisation.' Whatever the status of such a concept might be in legal terms, the present author would still emphasise that from the viewpoint of international law the question is simply whether or not the norm in question has relevance in it; in other words, the question is whether the non-observance of the norm entails legal consequences for the State concerned on the international plane. But here again, it must be pointed out that no Member State possesses a unilateral right to prevent a political organ of the United Nations – if a majority so decides – from discussing or dealing with a certain human rights issue, even if, objectively speaking, it would infringe upon the sovereignty of a State.

As Ermacora also explained, it all depends on the practice of the political organs of the United Nations, appealing to the world's public opinion, whether *in fact* they consider as binding for Member States the Declarations and Conventions – even unratified ones – adopted within the context of the United Nations.<sup>84</sup> For a Member State refusing to cooperate with the organs of the United Nations, what is at stake is its reputation and status in the international community of States. On the other hand, for the United Nations what might be at stake, if its political organs push too far their freedom to hold States accountable on the basis of standards, in particular conventional standards they have not accepted, is its credibility as an international organisation based on the rule of law. It is only a very fine line which divides legitimate action based on some form of community interest from action inspired by 'political passions' or 'propaganda'.<sup>85</sup>

However, before any such questions would come up at all, the political organs of the United Nations first had to adopt the norms and standards that it would subsequently *use* in its dealings with the Governments of Member States. Reference must again be made to Ermacora, who rightly observed that:

'Only after United Nations organs had been intensively occupied with various human rights questions and after they had elaborated casuistic definitions (...) there has been a chance to foresee the real scope of the problem involved in the seemingly simple terms 'human rights' and 'domestic jurisdiction'.<sup>86</sup>

In fact, standard-setting was the Commission on Human Rights' core business from 1945 to 1967, its major achievements being the Universal Declaration on Human Rights (1948) and the two International Covenants on Civil and Political Rights and Economic Social and Cultural Rights (1966) respectively.<sup>87</sup> And, indeed, with the adoption of other international human rights standards, notably the Declaration (1963) and the International Convention on the Elimination of All Forms of Racial Discrimi-

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<sup>84</sup> Ibid., p. 430.

<sup>85</sup> See also De Visscher 1968, p. 233.

<sup>86</sup> Ermacora, Hague Recueil 1968, p. 402.

<sup>87</sup> For more details on the standard-setting role of the Commission on Human Rights see Alston 1992, pp. 131 ff.

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nation (1965), the debate in the United Nations gradually shifted to the issue of the implementation and supervision of norms, bringing to the fore, more urgently, questions related to the delimitation of the competences of the Organisation and, from a human rights perspective, questions relating to the effectiveness of United Nations action. It will now be seen how the United Nations gradually developed a set of procedures – if it would be appropriate to speak of procedures in the first place – to verify State compliance with human rights and fundamental freedoms and how these procedures affected the meaning and scope of the concept of domestic jurisdiction as contained in Article 2 paragraph 7 of the Charter.

### II.4.3 Implementation Activities of the United Nations 1945-1966

The present overview does not mean new research. Numerous scholars in human rights and international law have carefully documented and researched the instances in which the political organs of the United Nations, especially the General Assembly and the Commission on Human Rights, dealt with questions of human rights and domestic jurisdiction in the period 1945-1980.<sup>88</sup> An attempt will be made to show the interaction between general developments in international relations and international law and, as a spin-off of such developments, specific processes in the field of human rights taking place within the context of the United Nations, which to a certain extent become autonomous processes.

As already stated above, the perhaps most significant contribution of the Charter of the United Nations to international law has been the introduction of the concept of human rights and fundamental freedoms. Effectively operationalising this concept has been the United Nations' biggest challenge ever since. However, it has also been shown in Chapter II.2 concerning the Competences of the United Nations in the Field of Human Rights and Chapter II.3 concerning the Clause of Domestic Jurisdiction in the Charter of the United Nations, that States, though recognising the necessity and, therefore, showing a willingness to establish an international security organisation, simultaneously sought to safeguard those interests which they regarded as vital and domestic. In the perception of States the establishment of the United Nations was probably more than a great adventure and it certainly had aspects of opening Pandora's box, the image of the United Nations as a 'super-State' always looming on the horizon.<sup>89</sup> Seeking to keep uncertainties within bounds, the Charter of the United Nations came to embody the continuing conflict, the fundamental tension and, thus, all the ambiguity inherent in the demands of States clinging to their sovereignty, on the

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<sup>88</sup> Lauterpacht, Hague Recueil 1947, pp. 5 ff., id. 1950; Preuss, Hague Recueil 1949, pp. 553 ff, especially pp. 636 ff; Higgins 1963, pp. 58 ff.; Ermacora, Hague Recueil 1968, pp. 375 ff., also Simma (ed.) 1994, pp. 139-154 (Ermacora); Zuidwijk 1982; Kamminga 1992, pp. 87-116; and Alston 1992, pp. 138 ff. For an overview of general developments in international relations and how these affected international law, see, *inter alia*, Cassese 1986.

<sup>89</sup> See De Visscher 1968, pp. 107, 110 and 433 (supra notes 18 and 19). Preuss, Hague Recueil 1949, pp. 556 and 557.

one hand, and the requirements of an organised international society and effective international organisation in search of commonly agreed norms and values, on the other. Ambiguity was the price to be paid for ensuring the participation of States – in particular the major powers – in the United Nations.<sup>90</sup> The formulation of the principle of non-intervention in the domestic affairs of States and its prominent rank – together with the principle of sovereign equality of States – amongst the fundamental principles of the United Nations was part of this price.

The question immediately brought to the fore was, of course, whether the desire to ensure universal participation and the concessions made in that respect, would not completely 'paraly[se] the activities of the United Nations in the pursuit of its most essential purposes', including in particular its activities relating to economic and social cooperation, enumerated in Article 55 of the Charter.<sup>91</sup>

When seeking to answer this question, it is important to make a distinction, especially as regards the first twenty years of the United Nations' existence, between the activities of the General Assembly and those of the Commission on Human Rights. Where the practice of the General Assembly, in those first twenty years, made a significant contribution to watering down the much feared paralysing effect of the domestic jurisdiction clause in the field of human rights, the Commission dedicated most of its early efforts to the drafting of international human rights standards, '[play- ing] a role akin to that of the International Law Commission, albeit with a restricted mandate.'<sup>92</sup>

Despite the fact that its terms of reference had been formulated in a sufficiently open-ended manner to allow for a broad interpretation of its mandate, notably to assume far-reaching monitoring competences in the field of human rights and fundamental freedoms, the Commission on Human Rights initially adopted a fairly passive stance in this respect.<sup>93</sup>

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90 Gross, AJIL 1947, pp. 553 and 554.

91 Preuss, Hague Recueil 1949, p. 577.

92 Alston 1992, pp. 129 and 130.

93 The Nuclear Commission on Human Rights, meeting from April to June 1946, did however envisage a more active role for the Commission on Human Rights. In its proposals to ECOSOC it recognised 'the need for an international agency of implementation entrusted with the task of watching over the general observance of human rights' and included, *inter alia*, the following references: 'it shall be considered that the purpose of the United Nations with regard to the promotion and observance of human rights, as defined in the Charter of the United Nations, could only be fulfilled if provisions were made for the implementation of the observance of human rights and an international bill of rights' and, 'pending the eventual establishment of an agency of implementation the Commission on Human Rights might be recognised as qualified to aid the appropriate organs of the United Nations in the task defined for the General Assembly and the Economic and Social Council in Articles 13, 15 and 62 of the Charter concerning the promotion and observance of human rights and fundamental freedoms for all, and to aid the Security Council in the task entrusted to it by Article 39 of the Charter, by pointing to cases where violations of human rights committed in one country may, by its gravity, its frequency, or its systematic nature, constitute a threat to the peace.' See Lauterpacht 1950, pp. 224 and 225. Original source: Journal of the Economic and Social Council, First Year, No. 14 (24 May, 1946). ECOSOC rejected these proposals, as well as a proposal for an independent (expert) membership of the Commis-

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In 1947 the Commission, at its first session, adopted a report prepared by a three-member Sub-Committee in which it stated 'that it has no power to take any action in regard to any complaints concerning human rights.'<sup>94</sup> The report did, however, include a proposal for a procedure for dealing with the communications received from individual applicants.<sup>95</sup>

The decision by the Commission on Human Rights was subsequently endorsed with some amendments, notably concerning the possibility to consult the original versions of communications, by ECOSOC in Resolution 75 (V) of 5 August 1947. This resolution read, as far as is relevant:

'The Economic and Social Council (...)

*Approves the statement that 'the Commission recognises that it has no power to take any action in regard to any complaints concerning human rights.'*

Requests the Secretary-General:

- a. to compile a confidential list of communications received concerning human rights before each session of the Commission, with a brief indication of the substance of each;
- b. to furnish this confidential list to the Commission, in private meeting, without divulging the identity of the authors of communications;
- c. to enable members of the Commission, upon request, to consult the *originals of communications dealing with the principles* involved in the promotion of universal respect for and observance of human rights;
- d. to inform the writers of all communications concerning human rights, however addressed, that their communications have been received and duly noted for consideration in accordance with the procedure laid down by the United Nations. Where necessary, the Secretary-General should indicate that the Commission has no power to take any action in regard to any complaints concerning human rights;
- e. to furnish each member State not represented on the Commission with a brief indication of the substance of any communication concerning human rights which refers explicitly to that State or to the territories under its jurisdiction without divulging the identity of the author;

Suggests to the Commission on Human Rights that it should at each session appoint an *ad hoc* committee to meet shortly before the next session of the Commission for the purpose of reviewing the confidential list of communications prepared by the Secretary-General under paragraph a. above and of recommending which of these communications, in original, should, in accordance with paragraph c. above, be made available to the members of the Commission on request.<sup>96</sup>

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sion in June 1946. On the other hand ECOSOC did agree to include a new paragraph (e) ['any other matter concerning human rights not covered by items (a), (b), (c) and (d).'] in the (full) Commission's terms of reference.

<sup>94</sup> C.H.R., Report of the First Session, U.N. Doc. E/259 (1947).

<sup>95</sup> *Ibid.*

<sup>96</sup> The Commission's initial proposal provided for a somewhat broader possibility for the Members of the Commission to consult the originals of communications than the version adopted in Resolution 75 (V) [emphasis added]. The Commission proposed in this respect 'to enable the members of the Commission, upon request, to consult the originals of these communications.'

Resolution 75 (V) was subsequently amended three times, relating to technical details only. The first

This 'no power' decision of the Commission, approved by ECOSOC, did not go unnoticed. Lauterpacht's Hague Lectures referred to earlier in this chapter stand out as the most prominent critique against the decision and furnished a comprehensive argument in favour of a broader interpretation of the tasks of the Commission on Human Rights.<sup>97</sup> From a general viewpoint, Lauterpacht believed the ultimate 'success' of the United Nations depended on the ability of the Organisation to break with 'the aberrations and excesses of State sovereignty' which, according to him, had twice led to the outbreak of a World War.

In the aftermath of the 'phase of retrogression' – as he characterised the *Inter Bellum* period<sup>98</sup> – Lauterpacht warned 'that the functions of the organs of the United Nations devoted to the cause of human rights are exercised in such a manner to leave room for developments in the direction of enhancing the effectiveness of the protective function of the United Nations.' The opposite would be 'contrary to the true purposes of the Charter.'<sup>99</sup> Lauterpacht's biggest fear was that an early negative decision by the Commission on Human Rights with respect to its competences to monitor the implementation of human rights by Member States would have an adverse impact on the 'tremendous potentialities' of the Commission in the (near) future. According to Lauterpacht:

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amendment occurred in 1948, inserting at the end of paragraph (b) the words 'except in those cases where the authors state that they have already divulged or intend to divulge their names or that they have no objection to their names being divulged' and adding to paragraph (e) the words 'except as provided in paragraph (b) above' [ECOSOC Res. 116 A (VI) of 1 March 1948]. The second amendment dated from 1949 and requested the Secretary-General to ask Governments sending replies to communications whether they wished their replies to be transmitted to the Commission on Human Rights in summary form or in full [ECOSOC Res. 192 A (VIII) of 9 February 1949]. The third amendment was adopted in 1950 and related to the distinction between petitions dealing with principles and petitions containing complaints and requests for action. The former would be included in a non-confidential list and the latter would be included in a confidential list. It was also decided that paragraph (e) of the original resolution would be amended to the effect that 'each Member State be furnished with a copy of any communication concerning human rights which referred explicitly to that State or the territories under its jurisdiction, without divulging the identity of the author, except where the authors stated that they had already divulged or intended to divulge their names and that they had no objection to their names being divulged' [ECOSOC Res. 275 B (X) of 17 February 1950]. See Lauterpacht 1950, p. 227; also Zuijdwijk 1982, pp. 6-9.

<sup>97</sup> Lauterpacht first expounded his criticism in his lectures before the Hague Academy of International Law in 1947. It is important to realise that the critique is based on the report of February 1947 adopted by the Commission. At that time ECOSOC had not yet confirmed that report and accepted most of its proposals. Large parts of the 1947 lectures can be found in Lauterpacht's book *International Law and Human Rights* published in 1950. By then, the question of the powers of the Commission had – for the time being – been settled. This might explain why the tone of that book is much more severe (the message it contained is the same, however), why Lauterpacht used much stronger terms such as 'a denial of the effective right to petition', 'an abdication of the crucial function of the United Nations' (pp. 225 and 226), 'the organs of the United Nations are entitled and bound by the Charter to take cognizance of violations of human rights and to initiate such action upon them as is not expressly excluded by the Charter' (p. 230). Other examples can be found.

<sup>98</sup> See Koskenniemi, *EJIL* 1997, pp. 215 ff.

<sup>99</sup> Lauterpacht, *Hague Recueil* 1947, pp. 72 and 73; see also p. 59.

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‘These potentialities ought not be prejudiced or jeopardised by attempts to fix and crystallise some fundamental aspects of the activities of the United Nations in the first stages of its existence.’<sup>100</sup>

From the postulate that the Charter of the United Nations recognised the individual as a subject of international law (as the bearer of rights) and on the basis of a restrictive interpretation of the term ‘intervention’ in Article 2 paragraph 7 of the Charter, Lauterpacht argued that nothing in the Charter would, in law, exclude any of the following actions to be undertaken by the Commission:

‘either a general recommendation arising out of an individual complaint or a series of analogous complaints; or a specific recommendation addressed to a named State; or a request for information or comments on the subject of petitions received; or, with the consent of the State concerned, an investigation undertaken in its territory and with its cooperation; or, without the consent of the State in question, an investigation conducted outside its territory and not requiring its cooperation; or the initiation of a study, in fact indistinguishable from investigation, of the conditions underlying the complaint either in relation to the State concerned or to the general problem involved in the complaint; or the publication of the results of an investigation; or discussion of the specific and general aspects of the complaint.’<sup>101</sup>

In addition to criticising the Commission on Human Rights for not contemplating any of the above-mentioned types of action, Lauterpacht also spoke out against the confidential nature of the ‘nominal’ procedure contained in paragraphs (a)-(e) of Resolution 75 (V). In his opinion, an effective procedure would have to enjoy the full benefits of publicity. In declining to establish a ‘public’ procedure, the Commission on Human Rights deprived itself of the power of public opinion as its most important means to induce Member States of the United Nations to comply with international norms.<sup>102</sup>

Finally, Lauterpacht’s criticism related to the governmental composition of the Commission on Human Rights. He feared that:

‘the Commission on Human Rights will not attain the full stature of moral authority and practical effectiveness until it includes, in addition to persons appointed by governments, private individuals of distinction, full independence, and experience, chosen irrespective

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100 Ibid., p. 71. While acknowledging that during the post-war period of transition, ‘an attempt (...) to define in detail the functions and the competence of the Commission on Human Rights (...) must encourage the tendency to take account of these conditions in terms of general limitations and checks upon the work of the Commission’, Lauterpacht argued that ‘it is not certain that, at the early stage of the work of the Commission and in the anomalous conditions of the post-war period, it was imperative for it to attempt the definition of its competence with respect to a crucial aspect of its duties.’ See pp. 71 and 72.

101 Ibid., pp. 62 and 63, also pp. 7-11.

102 Ibid., pp. 61-70.

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of nationality by a selective process which in itself would be a guarantee of the impartiality and high quality of its members.'<sup>103</sup>

At the political level, the Secretary-General of the United Nations, relying on Lauterpacht's arguments, requested the Commission on Human Rights and ECOSOC to reconsider their decision.<sup>104</sup> In his opinion the restrictive stance taken by the Commission and ECOSOC would undermine the prestige and authority of the United Nations as a whole, especially in the light of the fact that the Secretary-General – as the representative of the Organisation as a whole – had to inform 'writers of communications' that the Commission has no power to take any action.<sup>105</sup>

Neither Lauterpacht's academic brilliance, nor the political weight of the United Nations Secretariat, could however induce ECOSOC or the Commission to reconsider their 'no power' decision. On 30 July 1959 ECOSOC did adopt another resolution, Resolution 728F (XXVIII), consolidating Resolution 75 (V) and its amendments.<sup>106</sup> This resolution brought no significant changes. ECOSOC still confirmed the Commis-

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103 Ibid., p. 67. The consequences of a Commission made up of governmental representatives might further strengthen the element of secrecy in the handling of communications. Originals of communications could only be consulted at the explicit request of members of the Commission, *i.e.* at the request of their governments. Lauterpacht feared that this might require special steps on the part of the authors of communications to obtain the support of the member of the Commission or his government. Such steps would be 'difficult, costly, and, in their methods, out of harmony with the spirit of the protection of human rights by the United Nations'. Also, he added that 'as members of the Commission are representatives of governments, that procedure must result in throwing upon these governments a responsibility which, as the history of the protection of minorities under the system of the League of Nations has shown, they may be unwilling to incur for fear of offending the susceptibilities of the government concerned, or which they may be only too eager to undertake in order to create difficulties for another State.' See p. 68.

104 Humphrey, HRJ 1971, pp. 466 ff.

105 In 1949 the Secretary-General presented a report on the present situation with regard to communications concerning human rights to the Commission. In this report he stated the following: 'the blank statement in the Council resolution [ECOSOC Resolution 75 (V), JG] and, according to the Council resolution, also in the letters by which the Secretary-General is requested to acknowledge communications, that the Commission on Human Rights has no power to take any action with regard to complaints concerning human rights, is bound to lower the prestige and authority not only of the Commission on Human Rights but of the United Nations in the opinion of the general public. This statement, though technically correct as far as the present jurisdiction of the Commission on Human Rights is concerned as distinguished from the jurisdiction of the Economic and Social Council, of the Trusteeship Council and of the General Assembly, creates in the recipient of the Secretary-General's reply the impression that the United Nations *as an organisation* informs him that it has no power to take any action. This irritates the general public and brings disappointment and disillusionment to thousands of persons all over the world who, through the publicity activities of other organs of the United Nations, including the General Assembly itself [Resolution 217 (III) concerning the publicity to be given to the Universal Declaration of Human Rights] have led them to believe that one of the purposes of the United Nations is the achievement of cooperation in promoting and encouraging of universal respect for human rights and fundamental freedoms.' Report of the Secretary-General on the present situation with regard to communications concerning human rights, U.N. Doc. E/CN.4/165 of 2 may, 1949. See Zuijdwijk 1982, p. 6.

106 For the text of this resolution, see Sohn 1986, pp. 355 and 356.

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sion's initial position on the handling of communications.<sup>107</sup> In so doing, it also sanctioned the broad interpretation of the domestic jurisdiction clause originally intended by the drafters of the Charter.

While the resemblance between Resolution 75 (V) and Resolution 728F (XXVIII) is very significant, the political realities underlying the latter resolution had not remained the same. Other (general) developments in international relations and the involvement of the United Nations therein had set in motion processes which would eventually spill over to the Commission on Human Rights. These developments included, amongst others, the racial policies of the Government of South Africa and the decolonisation process. The latter development had the not unimportant effect of changing the majorities in the political organs of the United Nations as newly independent States joined the Organisation. Moreover, in connection with these developments, the dynamics of the ideological confrontation between socialist States and the liberal democracies of the West created (unexpected) openings to establish broader competences for the United Nations in the field of (the implementation and supervision of) human rights.<sup>108</sup>

In contradistinction to the Commission on Human Rights and ECOSOC, which stuck to a broad interpretation of the domestic jurisdiction clause, the General Assembly and also the Security Council, in the light of the general political developments and dynamics set out above, demonstrated a willingness to overrule claims of domestic jurisdiction in political questions put on its agenda, concerning, *inter alia*, human rights(-related) matters. Legal scholars identified and analysed, *inter alia*, the following instances as typical cases: (1) the question concerning the *Franco régime in Spain* in 1946;<sup>109</sup> (2) the question of the *treatment of persons of Indian origin in South Africa* in 1946; (3) the question of *Indonesia and the Netherlands*; (4) the question concerning *Russian wives of foreign nationals* in 1948; (5) the question concerning the *observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania* in 1949; (6) the whole problem of *race conflict in South Africa* – as of 1952; (7) the question of *Tibet* in 1959. The specific details of these cases can be found in the works of Preuss, Higgins, Ermacora and Zuijdwijk and need not to be restated here.<sup>110</sup> It is, however, important to restate some of the characteristics of these cases identified by the authors.

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107 Apparently, the Commission even decided to discontinue its practice of taking note of the list of communications, which the Secretary-General had prepared. The fact that the lists of communications had been distributed in the Commission was to be mentioned only in its report. Zuijdwijk 1982, p. 13.

108 On the doctrinal divide between Western States and socialist States (as well as Third World States), see Cassese 1986, pp. 297 ff., id. 2001, pp. 354 ff. On the politicisation of the doctrine of human rights in the Cold War period, see Baudet 2001, pp. 22 ff.

109 This case came first before the Security Council, see Lauterpacht, Hague Recueil 1947, pp. 38 ff.

110 See, in particular, Preuss, Hague Recueil 1949, pp. 605 ff.; Higgins 1963, pp. 58 ff.; Ermacora, Hague Recueil 1968, pp. 410 ff., also Simma (ed.) 1994, pp. 144-145 (Ermacora) for a complete overview of cases involving Article 2 paragraph 7 of the Charter as recorded in the Repertory of Practice of the UN Organs and Zuijdwijk 1982, pp. 82 ff.

Preuss' analysis, mentioning amongst others cases (1), (2), (3) and (5) was the first to show that the General Assembly and Security Council tended to justify their action, not by arguing that the action did not amount to 'intervention', but rather by constructing a link between the case at hand and issues of 'international concern,' in particular the impairment of friendly relations between States and/or the alleged adverse effects of the case for the maintenance of international peace and security. The practice of the General Assembly and the Security Council makes clear that once these organs had established their competence, they used exactly the tools and procedures suggested by US delegate Dulles in his report to the President: study, discussion, report, and recommendation.<sup>111</sup> Preuss also showed that the Security Council, occasionally, was willing to adopt quite a broad interpretation of the concept of 'international concern'. Thus, in the Spanish question, the Security Council justified its competence (and that of the General Assembly) on the existence of a 'potential threat' to the peace, thereby requiring 'only an extremely remote and tenuous connection with the maintenance of peace.'<sup>112</sup> Furthermore, Preuss showed that even in cases (2) and (5), involving the charge of violations of human rights, 'competence of the United Nations (...) has been based, not on the proposition that observance of those rights has become a legal obligation, but upon the fact that any flagrant, widespread and systematic disregard of human rights tends to impair the friendly relations among nations and to endanger the maintenance of international peace and security.'<sup>113</sup>

From Zuijdwijk's analysis of the case of *Tibet (7)*, it becomes clear that also in this particular instance, the General Assembly sought to link the matter to the maintenance of international peace and security as the principal ground for its competence.

A notable exception was perhaps the resolution adopted by the General Assembly in the case of the *Russian wives of foreign nationals (4)*, where that organ made a distinction between the Russian wives of ordinary citizens and the Russian wives of foreign diplomats. With respect to the former category of persons, it held that restrictions imposed on these women were contrary to Articles 1 paragraph 3 and 55 (c) of the Charter, thereby implying that these Charter provisions lifted the issue out of the domestic jurisdiction of the State. With respect to the latter category, no reference was made to the human rights provisions of the Charter, but rather the issue was again linked to the impairment of friendly relations between nations as well as being contrary to diplomatic practice.<sup>114</sup> In relation to this case, Kamminga remarked that the resolution was 'remarkable' as 'at that time the Soviet Union was not bound by any rule of international law obliging it to allow its citizens to leave the country.' According to him, '[t]he Soviet plea of domestic jurisdiction therefore had considerable merit and would probably have been accepted if submitted for an advisory opinion to the

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111 See Preuss, Hague Recueil 1949, p. 578 (supra note 42).

112 Ibid., pp. 630-636.

113 Ibid., pp. 641 and 642.

114 Zuijdwijk 1982, p. 83. Also Higgins 1963, p. 127.

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International Court of Justice.<sup>115</sup> According to the present author the case may be regarded as a typical example of the dynamics of politics, which can only be explained to a limited extent from the point of view of legal logic.

In this respect Ermacora's analysis should be mentioned. He concentrated specifically on cases brought before the General Assembly and the Security Council involving the charge of violations of human rights. The analysis is revealing inasmuch as he showed that, where possible, these two organs invoked *specific contractual obligations* entered into by the 'accused' State as the principal source of international obligations with respect to the treatment of the persons in question, rather than the *general and vague* human rights provisions of the Charter (which were still referred to, however). This happened in the case concerning the *treatment of persons of Indian origin in South Africa* (2), where the issue was put before the United Nations on the basis of an agreement dating from 1927 between India and South Africa, and also in the case concerning the *observance of human rights and fundamental freedoms in Bulgaria, Hungary and Romania* (5), where the General Assembly took the view that the human rights provisions incorporated in the peace treaties with these States had been violated.<sup>116</sup>

A case apart has been the *race conflict in South Africa* (7), to which Ermacora paid particular attention. This case proved to be an important catalyst for other (later) developments in the field of human rights in the United Nations. In 1952 the policy of *apartheid* as practised by the Government of South Africa was introduced as a permanent item on the General Assembly's agenda under the heading '*the question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa.*'<sup>117</sup> That year the General Assembly also established the United Commission on the Racial Situation in the Union of South Africa (UNCORS). The first report by this Commission dealt extensively with the objections of South Africa that the United Nations lacked the competence to deal with the question of *apartheid*. These objections were based on Articles 2 paragraph 7 and 55 (c) of the

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115 Kamminga labelled the resolution as 'remarkable': Kamminga 1992, p. 89.

116 Ermacora, Hague Recueil 1968, pp. 411-423. Ermacora mentioned another instance, the case of the *Austro-Italian dispute concerning the status of the German speaking minority of South Tyrol* in 1960 and 1961, in which the source of the obligation was a bilateral treaty between Italy and Austria. Moreover, he mentioned a case in which there were allegations by States of the Soviet bloc that political (communist) prisoners in Greece had been ill-treated. Here, however, both the General Assembly and the Security Council found the question to be within the domestic jurisdiction of the State and, apparently, were not prepared to rely on the human rights provisions of the Charter to reach the opposite conclusion.

117 As pointed out by Kamminga, the proposal to put the policy of *apartheid* on the agenda of the General Assembly was justified on the double ground that the policy was 'creating a dangerous and explosive situation, which constitutes both a threat to international peace and a flagrant violation of the basic principles of human rights and fundamental freedoms which are enshrined in the Charter of the United Nations.' Kamminga 1992, p. 90.

Charter.<sup>118</sup> The report is significant, not only because a United Nations Commission refuted the claim of domestic jurisdiction,<sup>119</sup> but also because it provided the basis for

‘a whole system of measures that *cannot be based on any special contractual obligations* incurred by South Africa apart from the Charter obligations. (...) All measures of the United Nations in this field can be characterised in short by the label: Condemnation of the policy of apartheid.’<sup>120</sup>

As a matter of fact, the intense and permanent involvement of the United Nations with the policy of *apartheid* in South Africa, especially after the Sharpeville killings of 21 March 1960, had been justified by some States as being so exceptional as to be *sui generis*. As a case *sui generis* the limitations imposed by Article 2 paragraph 7 were said not to apply.<sup>121</sup> Moreover, from the beginning of the 1960s the United Nations has sought to brand the policy of *apartheid* as a threat to international peace and security, clearly with the objective of bringing the sanctions and other types of action of Chapter VII of the Charter within the range of possibilities.<sup>122</sup>

The activities of the United Nations with respect to the situation in South Africa must also be placed against the background of general political developments in international relations, affecting, *inter alia*, the membership and majorities of the Organisation. First, the admission of a number of Eastern European States as new Members in 1955 meant a change in the balance of power in the political organs of the United Nations, notably the General Assembly; it led to a strengthening of the socialist group in the United Nations, undermining the until then dominant position of the group of Western States.<sup>123</sup> Socialist States would also take the lead of developing nations and with their support were able to pursue more effectively their own political agenda within the United Nations. In the field of human rights this agenda was translated into a clear preference for promoting the category of economic, social and cultural rights, the right of peoples to self-determination as well as the right to equality (including the prohibition of racial discrimination) on the basis of which the ‘quintessentially Western sins’ of colonialism and racial discrimination could be exposed and Western

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118 For these arguments, see Ermacora, Hague Recueil 1968, pp. 419-423.

119 Also here the Commission qualified the situation as ‘extremely dangerous to international peace and international relations.’ The report was subsequently adopted by the General Assembly, without however explicitly endorsing the findings of the Commission. Kamminga 1992, pp. 91 and 92.

120 Ermacora, Hague Recueil 1968, pp. 415 and 416. See Chapter II.4.2.

121 This justification was put forward, *inter alia*, by the British representative at the 15th Session of the General Assembly in 1961 in order to explain why his delegation felt ready to consider proposals on the question of the *merits*. United Nations and *Apartheid*, Chronology: <http://www.sahistory.org.za/pages/chronology/special-chrono/un-apartheid.html>

122 The Sharpeville killings triggered the involvement of the Security Council. See <http://www.sahistory.org.za/pages/chronology/special-chrono/un-apartheid.html>. See also Zuijdwijk 1982, p. 86.

123 New Member States included, *inter alia*, Hungary, Bulgaria, Romania and Albania. See Cassese 2001, p. 354 and in more detail id. 1986, pp. 297 ff.

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States put on the defensive.<sup>124</sup> Moreover, these developments were further reinforced by the decolonisation process, which led to the admission of a great number of newly independent (African) States to the United Nations.<sup>125</sup> The admission of these new Member States to the United Nations not only led to new and different majorities in the General Assembly, but also in the Commission on Human Rights. By the decision of ECOSOC, membership of the Commission was enlarged, first in 1962 from 18 to 21 Member States and later in 1967 from 21 to 32 Member States. Especially the latter enlargement may have been an important factor behind the changes that would take place in that year.<sup>126</sup>

The changing majorities in the political organs of the United Nations and their preoccupation with the struggle against racism and colonialism yielded concrete results. It led to the adoption of the Declaration on the Elimination of All Forms of Racial Discrimination in 1963, followed two years later by a convention on the same topic.<sup>127</sup> The Convention on the Elimination of All Forms of Racial Discrimination (CERD) was the first international human rights treaty containing an individual complaint procedure. Albeit of an optional nature, the broader significance of this procedure should not be underestimated. Alston put it as follows:

‘The adoption of the CERD complaints procedure cleared the way for an Optional Protocol to the Covenant on Civil and Political Rights to be adopted the following year. It too enabled complaints to be brought against States Parties. These two procedures, even though they were not to bear much fruit for another couple of decades and would in any event apply only to the small number of ratifying States, constituted very important breakthroughs in terms of the principles involved, particularly that of accountability.’<sup>128</sup>

Not satisfied with the adoption of CERD – the direct relevance of which depended on the willingness of States to sign and ratify the treaty and, separately, to accept the individual complaint procedure – ‘Third World States’, with the support of the socialist group, were still striving to further expose issues related to colonialism and *apartheid*. In particular, they aimed at finding ways and means for doing so, which would not be

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<sup>124</sup> Alston 1992, p. 143.

<sup>125</sup> In 1960 the following States joined the United Nations: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d’Ivoire, Cyprus, Democratic Republic of the Congo, Gabon, Madagascar, Mali, Niger, Nigeria, Senegal, Somalia and Togo. The adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* by the General Assembly in 1960 [G.A. Res. 1514 (XV) of 14 December 1960] further boosted the decolonisation process. In the period 1961-1970 another 28 States joined the United Nations.

<sup>126</sup> Alston 1992, pp. 143 and also pp. 193 ff.

<sup>127</sup> Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII) of 20 November 1963; Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 A (XX) of 21 December 1965, adopted by 106 votes in favour, none against and with one abstention (Mexico, later joining the majority).

<sup>128</sup> Alston 1992, p. 143. See also Cassese 1986, pp. 302-304 for the influence of socialist States and Third World States on the drafting of the two Covenants of 1966.

directly related to the acceptance of specific treaty obligations in the form of (individual) complaints procedures by States. Especially Third World States were ready to go very far in these endeavours, even at the expense of running the 'risk' that any procedures created might one day be applied against them. Humphrey described the ambiguous position in which States found themselves as follows:

'Behind all the rationalisations for the decisions taken in the Assembly, the Council and the Commission – [*i.e.*] the failure to include an article on the right to petition in the Universal Declaration on Human Rights, to give individuals any standing before the Human Rights Committee contemplated by the Covenant on Civil and Political Rights and to allow the Commission on Human Rights to examine and discuss communications alleging violations – was the fear of Governments that they might be exposed to criticism in an international forum. They were still afraid of exposure. But, by the late sixties, the political climate had changed and a number of them, including the governments of many new Member States, became so motivated by other factors, that they were ready in respect to certain situations at least to create precedents which would open up new possibilities for the international protection of human rights and the recognition of an international right of petition.'<sup>129</sup>

For a good understanding of the important developments which would take place in the second half of the 1960s and which would eventually lead to a reversal of policy of the Commission on Human Rights, it is worthwhile noting that the United Nations already had some experience in dealing with individual petitions. Certain specific United Nations (sub-)organs – other than the Commission on Human Rights – had been authorised to receive and examine petitions submitted by individuals and to take some form of action upon them.<sup>130</sup>

First, reference must be made to the system established under the authority of the Trusteeship Council pursuant to Article 87 paragraph (b) of the Charter.<sup>131</sup> As early as 1947, the Trusteeship Council established the basic features of a procedure dealing with petitions submitted by individuals. While the Trusteeship Council rarely took action upon individual cases, the procedure nevertheless seems to have had its merits. In 1979 Zuijdwijk wrote that the procedure established by the Trusteeship Council 'is the closest any of the political bodies of the United Nations has come to a judicial procedure to deal with petitions.' He added that:

'Although the resolutions of the Trusteeship Council have been criticised for their optimistic language and hesitation to criticise the Administering Authority, on a comparative scale of United Nations bodies, the Trusteeship Council's record is quite good. (...)

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<sup>129</sup> Humphrey, HRJ 1971, p. 470.

<sup>130</sup> For a more detailed description of the competences and activities of these (sub-)organs, see Zuijdwijk 1982, Chapters III-VIII. See also Carey 1970, pp. 146-151.

<sup>131</sup> This Article reads: 'The General Assembly and under its authority, the Trusteeship Council, in carrying out their functions, may: (...) accept petitions and examine them in consultation with the administering authority.'

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The strength of the Trusteeship Council's procedure lies in the acceptance by the Administering Powers of the procedure dealing with petitions as an *inherent part of the trusteeship system*. Therefore, the Administering Powers have sent in their observations in response to petitions. (...) The presence of a Special Representative of the Administering Power when a petition is discussed in the Council is also important. There is ample opportunity to clarify a certain situation or even to take remedial action so that a resolution critical of the Administering Power can be avoided.<sup>132</sup>

Secondly, the Committee on South West Africa (Namibia) must be mentioned. This Committee had been established by the General Assembly in 1953 in response to the unwillingness of South Africa, the Administering Power over South West Africa, to cooperate with the United Nations. It was to exercise in respect of South West Africa those functions that had previously been exercised by the Permanent Mandates Commission of the League of Nations. These functions included amongst others a quasi-judicial procedure for the examination of individual petitions, which could eventually lead to the adoption of a resolution by the General Assembly, either of a general nature, or of a specific nature referring to the particular case at hand.<sup>133</sup> Due to the refusal of the Government of South Africa to hand over the administration of South West Africa to the United Nations, the case of South West Africa gradually came to be seen as a colonial issue rather than a mandate territory under international supervision. As a result of the shifting political perception of the situation the number of individual petitions diminished and the debate took on a more (general) political nature.<sup>134</sup>

Thirdly, we have to point to the Fourth Committee of the General Assembly (*i.e.* the Committee dealing with dependent territories in general). This Committee had also established the practice of hearing petitioners and occasionally it circulated written documents as well. In practice, this sub-organ of the General Assembly was involved in three kinds of situations: the special case of South West Africa, non-strategic trust territories and other non-self-governing territories (allegedly on the basis of Article 10 and Chapter XI of the Charter). However, as the Fourth Committee was mainly

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132 Zuijdwijk 1982, p. 147 [emphasis added]. It must be said, however, that by 1966 the stream of petitions had already slowed down significantly due to the fact that only very few Trusteeships remained. On 1 November 1994, the Trustee Council would suspend its operation with the independence of Palau, the last remaining United Nations trust territory.

133 G.A. Res. 749 A (VIII) of 28 November 1953. The Committee was to 'examine as far as possible in accordance with the procedure of the former Mandates System, reports and petitions which may be submitted to the Committee or to the Secretary-General' and 'to prepare for the consideration of the General Assembly, a procedure for the examination of reports and petitions which should conform as far as possible to the procedure followed in this respect by the Assembly, the Council and the Permanent Mandates Commission of the League of Nations.' The Committee was succeeded in 1961 by the Special Committee on South West Africa. As of 1962 the situation in South West Africa was treated as a colonial situation and dealt with by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. See *infra* Chapter II.4.4.

134 Zuijdwijk 1982, pp. 155-179, especially pp. 177-179.

concerned with the overall situation in dependent territories, it did not deal with specific (individual) cases. In addition, the petitioners before the Committee tended to be representatives of political movements, rather than individual complainants.<sup>135</sup> In respect of non-self-governing territories other than trusteeships and the special case of South West Africa the possibility of receiving petitions and hearing petitioners was controversial. Portugal and the United Kingdom, for example, argued that the Charter only provided for the possibility of hearing petitioners in the case of trust territories and, therefore, such a feature could not be extended to apply to other non-self-governing territories as well.<sup>136</sup>

Finally, at the beginning of the 1960s a number of special committees were established by the General Assembly. These committees were: the Sub-Committee on the Situation in Angola (1961),<sup>137</sup> the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1961; *Decolonisation Committee*),<sup>138</sup> the Special Committee on Territories under Portuguese Administration (1961)<sup>139</sup> and the Special Committee on the Policies of *Apartheid* of the Government of South Africa (1962).<sup>140</sup> All committees mentioned above provided for the possibility of receiving and hearing information from individual petitioners, albeit not with the objective of providing individual relief, but rather with the objective of dealing with the general situation in the territories concerned. In the case of the Decolonisation Committee and the Special Committee on Portuguese Territories the possibility of individual petition had only been included after intense debates. Western States – on the defensive in this matter – questioned the legality of the decision of the General Assembly to explicitly authorise (Portuguese Territories)<sup>141</sup> or permit (Decolonisation Committee)<sup>142</sup> the receipt of individual petitions or the hearing of persons. Third World States supported by the Soviet Union took the opposite position.

135 Ibid., pp. 199-201.

136 Ibid., pp. 195-196 and 209.

137 G.A. Res. 1603 (XV) of 20 April 1961.

138 G.A. Res. 1654 (XVI) of 27 November 1961. Also called the Committee of Twenty-four (it originally counted 17 members, but in 1962 was enlarged to 24 members).

139 G.A. Res. 1699 (XVI) of 19 December 1961. In 1962 the Committee was dissolved and its tasks assigned to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

140 G.A. Res. 1761 (XVII) of 6 November 1962, renamed Special Committee on *Apartheid* in 1970. Representatives of the group of Western States refused to sit on this Committee.

141 See above the remarks on the Fourth Committee. The Special Committee on the Territories under Portuguese Administration had been authorised 'in order that information available to it be as up to date and authentic as possible, to receive petitions and hear petitioners concerning conditions prevailing in Portuguese Non-Self-Governing Territories.' See G.A. Res. 1699 (XVI) of 19 December 1961.

142 The Decolonisation Committee was 'to carry out its task by employment of all means which it will have at its disposal within the framework of the procedures and modalities which it shall adopt for the proper discharge of its functions.' See G.A. Res. 1654 (XVI) of 27 November 1961.

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The debate relating to the competence of the Decolonisation Committee to hear individual petitioners has been described in some detail by Zuijdwijk.<sup>143</sup> The most important arguments, showing the position of different groups of States, deserve to be restated here. The representative of the United States, for example, argued that petitioners could not be heard by any Committee of the United Nations against the wishes of an Administering Power, if this Power was cooperating with it. Similarly, the British representative said that the hearing of persons and the sending of visiting missions could only take place with the consent of the Administering Power. Mali, on the other hand, claimed that the hearing of petitioners had been a useful source in other United Nations (sub-)organs and, therefore, such a system should be established within the context of the Decolonisation Committee as well. As to the Soviet position, Zuijdwijk wrote that:

‘The representative of the USSR supported the idea of hearing petitioners on matters connected with the implementation of the Declaration [on the Granting of Independence to Colonial Countries and Peoples, JG]. He also said that while it was desirable to obtain the consent of the Administering Powers before hearing petitioners and sending out missions, it should be understood that such a procedure would not be tantamount to a right of veto.’<sup>144</sup>

As a ‘compromise’ the Decolonisation Committee did not adopt any specific rules with regard to the hearing of individual petitioners or the handling of written petitions. Rather, the Committee agreed with a statement by its Chairman that ‘as additional and supplementary means of acquiring information on territories, the Special Committee might hear petitioners and receive petitions. It was understood that petitioners would be heard at the discretion of the Committee and not as a matter of course and that the Committee would have the discretion to screen petitions.’<sup>145</sup>

In conclusion, it can be observed that all the above-mentioned instances of United Nations (sub-)organs dealing in one way or another with individual petitions must be placed in the context of trusteeships, non-self-governing territories and, again, the broader issues of self-determination, decolonisation, racial discrimination and the policy of *apartheid*. It is also clear that Western States found themselves in the dock on these issues, explaining the willingness of the Soviet Union not to adopt a too principled a position on the question of domestic jurisdiction regarding these specific topics.<sup>146</sup> Meanwhile, Western States complained about double standards being applied by the United Nations. In 1966 (US) Sub-Commissioner Carey drew attention to this fact, which he later described as follows:

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143 Zuijdwijk 1982, pp. 210-212.

144 Ibid., pp. 210-211.

145 G.A. OR, XVII, Addendum to Agenda item 25 (A/5238), para. 112 (c)

146 Also Cassese 1986, p. 302.

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‘Persons complaining about South Africa may petition the United Nations in writing, charging that government with denials of human rights, receive a hearing and have both written and oral testimony mimeographed and circulated to 127 Member States and nearly 200 libraries in various countries. All other persons complaining of human rights violations by their own government rather than by a foreign or colonial government are told the United Nations cannot help them.’<sup>147</sup>

However, it was precisely this ‘selective’ practice of the political organs of the United Nations, notably the Decolonisation Committee, which would trigger a cascade of events eventually leading to the formal recognition by these organs that the examination of large-scale violations of human rights occurring *anywhere in the world* fell within the competence of the Organisation.

#### II.4.4 Implementation Activities of the United Nations 1966-1980

The events leading to the adoption of the landmark ECOSOC Resolution 1235 in 1967 show how the political preoccupation of the organs of the United Nations with colonial questions spilled over to the topic of the promotion and protection of human rights and fundamental freedoms generally. The following chronological overview attempts to show this connection more clearly.<sup>148</sup>

In June 1965 the Decolonisation Committee brought before the Commission on Human Rights evidence which had been obtained from individual petitions concerning violations of human rights in Territories under Portuguese Administration, South West Africa and Southern Rhodesia. In response, on 4 March 1966 ECOSOC adopted Resolution 1102 (XL). In this resolution ECOSOC invited the Commission on Human Rights to consider the 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 territories. A crucial and, with hindsight, perhaps decisive step had been taken by having the phrase ‘in all countries’ inserted in the resolution. However, the original draft of this resolution, submitted by Algeria, Cameroon, the Soviet Union and Tanzania, did not include this phrase, the principal objective of these States being to link the question of decolonisation with the promotion and protection of human rights. Western States generally opposed this linkage, in particular in its implication of establishing a double standard by focussing solely on the human rights situation in certain specific States (South Africa, Rhodesia). Being outnumbered in the relevant United Nations organs and, therefore, unable to prevent the adoption of a resolution, these States nevertheless managed to obtain this important concession from the Third World and East-European block.<sup>149</sup>

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<sup>147</sup> Carey 1970, p. 144.

<sup>148</sup> This account is mainly based on the following sources: Zuijdwijk 1982, pp. 14-21; Carey 1970, pp. 84-86; Humphrey, HRJ 1971, pp. 470 and 471 and Alston 1992, pp. 144, 155 and 156.

<sup>149</sup> See Cassese 1986, p. 305. Also *supra*, Humphrey, HRJ 1971, p. 470.

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Also in March 1966, the Commission on Human Rights responded by adopting Resolution 2 (XXII), condemning violations of human rights wherever they occurred and informing ECOSOC that 'in order completely to deal with the question of violations of human rights and fundamental freedoms in all countries, it would be necessary for the Commission to consider the means by which it might be fully informed of violations with a view to devising recommendations for measures to halt them.' In addition, the Commission explicitly requested the Sub-Commission to make recommendations on this subject. In so doing, it laid the foundation for the participation of the Sub-Commission in the examination of individual communications. Again, the original draft resolution (of the Soviet Union) was confined to the colonial type of situations. And again, the proponents of a general, non-discriminatory approach managed to broaden the scope to 'all countries.'<sup>150</sup>

Next to move was again ECOSOC. In August 1966 it adopted Resolution 1164 (XLI), basically endorsing the decisions of the Commission contained in Resolution 2 (XXII). To be sure, ECOSOC sought the approval of the General Assembly and suggested the following proposition to that organ: 'Invites the Economic and Social Council and the Commission on Human Rights to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights *wherever they may occur*.'<sup>151</sup> In its landmark Resolution 2144 A (XXI) of 26 October 1966 the General Assembly gave its approval and endorsed the above proposition.

In January 1967 the Sub-Commission discussed the question of violations of human rights in all countries as the Commission had requested. This discussion opposed the 'experts' of the Soviet Union and the United States. The Russian expert introduced a draft resolution focussing on colonialism and racial discrimination. The American expert presented one with a broader scope covering human rights violations in all countries. Moreover, the draft resolution of the expert from the United States included a phrase, which would later return as the formal criterion triggering United Nations competence in human rights procedures, notably the handling of individual communications. He proposed the following:

'to utilise information in the lists of communications prepared for the Commission and Sub-Commission (...) under Resolution 728F (XXVIII) in the preparation of its annual report where it has reasonable cause to believe that such information, in conjunction with other material, reveals *any consistent pattern of violations of human rights and fundamental freedoms*, including policies of racial discrimination, segregation and *apartheid*, in any country, with particular reference to colonial and other dependent territories (...).'<sup>152</sup>

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150 For the debate opposing the Soviet Union [emphasising the origin of Resolution 1102 (XL), *i.e.* a resolution by the Decolonisation Committee] and the United States (pointing to the language of that resolution) see Zuidwijk 1982, pp. 16 and 17. Also Alston 1992, p. 144.

151 [Emphasis added].

152 See Zuidwijk 1982, p. 18 [emphasis added].

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While the Sub-Commission eventually adopted an amended version of the Russian expert's draft – broadening its scope to all countries – the proposal of the U.S. expert was appended 'as illustrative of a possible method.'<sup>153</sup>

The developments entered a crucial phase in March 1967 when the Commission on Human Rights dealt with the issue again. On 16 March 1967 it adopted Resolution 8 (XXIII) which not only provided the basis for a United Nations procedure to examine communications, but also for holding an annual public debate both in the Commission and the Sub-Commission on violations of human rights in all countries. The resolution contained the following important elements:

- (1) to give annual consideration to the item 'Question of violations 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';<sup>154</sup>
- (2) to ask the Sub-Commission 'to prepare, for the use of the Commission in its examination of this question, a report containing information on violations of human rights and fundamental freedoms *from all available sources* [emphasis added];'<sup>155</sup>
- (3) to request permission from ECOSOC for the Sub-Commission and itself 'to examine information relevant to gross violations of human rights and fundamental freedoms, such as *apartheid* in all its forms and manifestations, contained in the communications listed by the Secretary-General pursuant to Economic and Social Council Resolution 728F (XXVIII);'<sup>156</sup>
- (4) to invite the Sub-Commission 'to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and *apartheid*, with particular reference to colonial and dependent territories:'
- (5) to request permission from ECOSOC for itself 'in appropriate cases and after careful consideration of the information thus made available to it (...) to make a thorough study and investigation of situations which reveal a consistent pattern of violations of human rights, and to report with recommendations thereon to the Economic and Social Council.'

In a separate resolution ECOSOC was requested to 'confirm the inclusion in the terms of reference of this Commission of 'the power to recommend and adopt general and specific measures to deal with violations of human rights' without prejudice to the

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153 S.C. Res. 5 (XIX) (January 1967), adopted by 15 votes to none, with 2 abstentions.

154 As of today this item still appears on the agenda of the Commission and Sub-Commission.

155 [Emphasis added] Allowing the Sub-Commission to put the 'Question of violations of human rights and fundamental freedoms' on its agenda as a separate item.

156 This decision went a step beyond the one taken by the U.S. expert who proposed to examine the summaries listed by the Secretary-General. Resolution 8 (XXIII) gave it access to the petitions themselves. See also Carey 1970, pp. 85 and 86.

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functions and powers already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection on human rights and fundamental freedoms.<sup>157</sup>

On 6 June 1967 ECOSOC adopted Resolution 1235 (XLII) in which it endorsed, without any significant changes, the proposals of the Commission.<sup>158</sup> That resolution emphasised 'the policy of *apartheid* as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa and to racial discrimination as practised notably in Southern Rhodesia.'<sup>159</sup> Apparently it deleted the word 'investigation' from the original proposal of the Commission, but still allowed for a 'thorough study' under the same conditions as set out by the Commission in Resolution 8 (XXIII). Finally, in paragraph 4 of Resolution 1235 (XLII) ECOSOC decided 'to review the provisions of paragraphs 2 ['to examine information relevant to gross violations (...)', JG] and 3 ['in appropriate cases (...) to make a thorough study (...)', JG] of the present resolution after the entry into force of the International Covenants on Human Rights.'<sup>160</sup>

The competences attributed to the Commission and Sub-Commission pursuant to Resolution 1235 (XLII) would become known as the *1235 procedure*.

Notwithstanding its permissive language, providing the Commission on Human Rights (and its Sub-Commission) with an essential mandate to examine and discuss worldwide violations of human rights, ECOSOC Resolution 1235 (XLII) did not immediately lead to a fundamental change of the practice of the Commission.<sup>161</sup> At a political level, the Members of the Commission – broadly divided into two camps – continued to disagree on the resolution's interpretation and, therefore, on its practical application.

For some years to come the United Nations would still follow its 'selective' approach of focussing on colonial and *apartheid* situations only.<sup>162</sup> On 6 March 1967 the Commission on Human Rights instituted an Ad Hoc Working Group of Experts to examine (concrete) allegations that political prisoners in South African prisons or police stations were being ill-treated and to find out to what extent trade union rights of Africans were respected in South Africa.<sup>163</sup> In 1968, following the Six-Day War in the Middle East, the Commission adopted a resolution aimed at Israel.<sup>164</sup> However,

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157 C.H.R. Res. 9 (XXIII).

158 Adopted by 20 votes to 4, with 2 abstentions.

159 ECOSOC Res. 1235 (XLII), paras. 2 and 3.

160 See also Ermacora, HRJ 1974, p. 678.

161 Just as the powers attributed to the Security Council under Chapter VII of the Charter have not been used, except for some rare instances during the period of the Cold War.

162 Alston later characterised the period between 1967 and 1978 as one in which the Commission 'struggled to evolve procedures which were initially designed to respond only to problems associated with racism and colonialism.' Alston 1992, pp. 139 and 142 ff.

163 C.H.R. Res. 2 (XXIII).

164 C.H.R. Res. 6 (XXIV).

while some commentators regarded the unanimous adoption of this resolution as evidence confirming the United Nations' 'geographic capacity to take specific positions with respect to human rights violations was as broad as the whole world',<sup>165</sup> the case of Israel before the political organs of the United Nations is best treated as a situation *sui generis*.

The cases of Greece and Haiti, which the Sub-Commission brought to the attention of the Commission as 'situations revealing consistent patterns of violations of human rights and fundamental freedoms', probably provide a better image of the general political consensus existing with respect to the application of Resolution 1235 in 1968.<sup>166</sup> Within the Commission on Human Rights it proved to be not possible to mobilise a majority to effectively extend the scope of the new procedure beyond situations in southern Africa. Both targeted countries, Greece and Haiti, invoked Article 2 paragraph 7 of the Charter to oppose any action against them, in particular the institution of an inquiry procedure.<sup>167</sup> Other States, most notably the Soviet Union,<sup>168</sup> used the occasion to voice criticism against Greece (as well as Israel and the United States).<sup>169</sup> At the same time, there was an attempt led by Tanzania to curtail the jurisdiction of the Sub-Commission to situations of *apartheid* and similar (colonial) practices only.<sup>170</sup> In the end, however, action was undertaken neither against Greece, nor against Haiti and a draft resolution aimed at restricting the competences of the Sub-Commission was withdrawn. On the other hand, Tanzania managed to obtain support for the enlargement of membership of the Sub-Commission from 18 to 26, where Afro-Asian States were now practically assured of a majority.<sup>171</sup> Presumably, the enlargement was to ensure that, in the future, the Sub-Commission would no longer forward situations other than those concerning southern Africa to the Commission.

Commenting on the cases of Greece and Haiti, Zuijdwijk wrote that the Soviet criticism addressed at Greece should not be interpreted as sanctioning a broad interpretation of Resolution 1235, but rather as 'an inconsequential statement *pour besoin de la cause*.'<sup>172</sup> Nevertheless, as Cassese observed, these two cases caused 'considerable concern both among the Western nations allied to Greece and among the socialist countries which, in spite of the short-term benefits they might derive from the accusations of the Sub-Commission against a NATO member, saw the dangers of a precedent which could in the future be used against them.'<sup>173</sup>

This concern, then, together with a genuine need, felt particularly within the Sub-Commission, led to the adoption of ECOSOC Resolution 1503 (XLVIII) on 27 May

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165 Carey 1970, p. 90.

166 Ibid., pp. 86-90.

167 Zuijdwijk 1982, pp. 21 and 22.

168 But also the United Arab Republic (Egypt), see Carey 1970, pp. 88-90.

169 Zuijdwijk 1982, p. 22.

170 Humphrey, HRJ 1971, p. 472.

171 ECOSOC Res. 1334 (XLIV) of 31 May 1968, see Zuijdwijk 1982, p. 23.

172 Ibid., pp. 21-23. A contrary position was taken by Humphrey, HRJ 1971, p. 472.

173 Cassese 1986, p. 305.

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1970.<sup>174</sup> The resolution established a three-stage procedure to screen and examine communications concerning allegations of violations of human rights against States. In addition, the procedure provided for more adequate safeguards against intrusions in the domestic jurisdiction of States. This additional procedure has ever since been known as the *1503 procedure*.

In order to better understand the significance of the 1503 procedure from the point of view of the competences of the Commission on Human Rights to deal with human rights violations as well as its relationship with the 1235 procedure, it is necessary to set out the main features of the new procedure.<sup>175</sup>

As mentioned above, ECOSOC Resolution 1503 established a three-stage procedure to screen and examine communications concerning violations of human rights. In 1974 the Commission added another stage to the procedure with the establishment of a working group on communications.<sup>176</sup> The following (sub-)organs were involved: a working group of the Sub-Commission composed of five Sub-Commission members with due regard to geographical distribution; the full Sub-Commission; the working group on communications of the Commission composed of five Commission members with due regard to geographical distribution and the full Commission on Human Rights. The working group of the Sub-Commission as well as the working group of the Commission would just as their parent bodies meet only once a year. The working group of the Sub-Commission would meet 'for a period not exceeding ten days immediately before the sessions of the Sub-Commission.'<sup>177</sup> The working group of the Commission would meet 'one week before the next session of the Commission.'<sup>178</sup>

An essential characteristic of the 1503 procedure has been its confidential nature. The working group of the Sub-Commission was to consider communications in private meetings.<sup>179</sup> The confidentiality rule also applied to the meetings of the (full) Sub-Commission in relation to those communications forwarded to it by the working group as well as the meetings of the working group of the Commission and the Commission itself in the next stages of the procedure.<sup>180</sup> Pursuant to paragraph 8 of the ECOSOC Resolution 'all actions envisaged in the implementation of the present resolution by the Sub-Commission (...) or the Commission (...) shall remain confidential until such

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174 Ibid., pp. 305 and 306. Also, Alston 1992, p. 144. Humphrey, HRJ 1971, p. 473. Also Kamminga 1992, p. 84.

175 In 2000 the Commission on Human Rights revised the 1503 procedure and proposed a draft resolution to ECOSOC which it approved on 16 June 2000: ECOSOC Res. 2000/3. In the context of this historical overview these changes will not be mentioned. The focus in this chapter will be on the origins and development of the procedure during the 1970s.

176 The working group would continue to meet annually as from 1975; it was only in 1990 that it was given a permanent status by ECOSOC. See Newman and Weissbrodt 1996, p. 187.

177 ECOSOC Res. 1503 (XLVIII), para. 1.

178 C.H.R. Decision 3 (XXX), para. 2.

179 ECOSOC Res. 1503 (XLVIII), para. 1.

180 Ibid., para. 5.

time as the Commission may decide to make recommendations to the Economic and Social Council.<sup>181</sup>

The working group of the Sub-Commission was authorised 'to consider all communications, *including replies of Governments thereon*, received by the Secretary-General under Council Resolution 728F (XXVIII).<sup>182</sup> [Emphasis added]. To this end, the Secretary-General was 'to make available to the members of the working group at their meetings the originals of such communications listed as they may request, having due regard to the provisions of paragraph 2 (b) of Council Resolution 728F (XXVIII) concerning the divulging of the identity of the authors of communications.'<sup>183</sup>

On the basis of this information, the working group was:

'[to bring] to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which *appear to reveal* a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission.'<sup>184</sup>

From a substantive point of view the latter part of this phrase constituted the core of the new procedure. According to Ermacora it should be understood as follows:

'It is not the factual situation which is decisive in determining the competence of the Commission [and Sub-Commission, JG] but the appearance. From a procedural point of view it is the appearance of a violation which determines the competence of the Commission [and Sub-Commission, JG] to deal with a situation under ECOSOC Resolution 1503 (XLVIII). In other words *prima facie* evidence when it is reliably attested is sufficient to establish competence to deal with the matter.'<sup>185</sup>

The decision to bring communications before the Sub-Commission was to be taken by a majority vote.<sup>186</sup>

The next step in the 1503 procedure involved the full Sub-Commission, which was to screen the forwarded communications for '*situations* which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission.'<sup>187</sup> In contradistinction to the working group of the Sub-Commission, the Sub-Commission itself was not supposed to forward communi-

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181 Ibid., para. 8.

182 Ibid., para. 1.

183 Ibid., para. 4 (b).

184 Ibid., para. 1 [emphasis added].

185 Ermacora, HRJ 1974, p. 682.

186 ECOSOC Res. 1503 (XLVIII), para. 5.

187 Ibid. [emphasis added]. To this end the Secretary-General was requested to circulate to the members of the Sub-Commission, in the working languages, the originals of such communications as are referred to the Sub-Commission by the working group [para. 4 (c)].

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cations, but 'situations' of gross violations – meaning more than the sum of individual communications – to the attention of the Commission.<sup>188</sup>

Subsequently, pursuant to Resolution 1503, the Commission should examine the situations referred to it in order to determine what kind of action should be undertaken.<sup>189</sup> However, as already pointed out above, when the first situations were thus presented to it in 1974, the Commission decided to establish a working group on communications.<sup>190</sup> This working group had no power to reject any situations referred to it, but rather was charged to prepare a draft decision as to how a particular situation should be handled by the Commission.<sup>191</sup> Thereafter, the plenary Commission would take the (formal) decision on the action required. This 'action' could be:

- (1) a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council Resolution 1235 (XLII);<sup>192</sup>
- (2) 'an investigation by an *ad hoc* committee to be appointed by the Commission which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it';<sup>193</sup>
- (3) to remove a case from the agenda.

For an investigation to be permitted Resolution 1503 lays down two further conditions: (1) all *available means at the national level have been resorted to and exhausted* and (2) the situation does *not relate to a matter which is being dealt with under other procedures* prescribed in the constituent instruments of, or convention adopted by, the United Nations and the specialised agencies, or in regional conventions, or which the State concerned wishes to submit to other procedures in accordance with general or special international agreements to which it is a party.<sup>194</sup>

As to the composition of the *ad hoc* committee, the resolution prescribed that the members 'shall be independent persons whose competence and impartiality is beyond question', whose 'appointment shall be subject to the *consent* of the Government concerned.'<sup>195</sup> Under the condition that the investigation would be conducted in cooperation with the Government concerned, the committee had the authority to receive communications and to hear witnesses.<sup>196</sup> Furthermore, the committee would

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188 Ermacora, HRJ 1974, p. 682.

189 ECOSOC Res. 1503 (XLVIII), para. 6.

190 See Liskofsky, HRJ 1975, p. 893.

191 Newman and Weissbrodt 1996, pp. 188-189. Thus, so it has been said, the working group on situations had a major influence on decision-making. Van Banning 1992, p. 47.

192 ECOSOC Res. 1503 (XLVIII), para. 6 (a).

193 Ibid., para. 6 (b).

194 Ibid., para. 6 (b) (i) and (ii).

195 Ibid., para. 7 (a) [emphasis added].

196 Ibid., para. 7 (b).

strive for friendly solutions before, during and even after the investigation.<sup>197</sup> Confidentiality would also govern these proceedings in practically all their aspects.<sup>198</sup> In the end, the committee would report its observations and 'suggestions as it may deem appropriate' to the Commission.<sup>199</sup>

The Commission on Human Rights could also decide to forward a specific situation together with its recommendations to ECOSOC for further consideration. At this stage the procedure would lose its confidential character.<sup>200</sup>

The final paragraph of Resolution 1503 provided that 'the procedure set out in the present resolution for dealing with communications relating to violations of human rights and fundamental freedoms should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement.'<sup>201</sup>

After its adoption commentators welcomed Resolution 1503 as another step in undermining the relevance of the claim of domestic jurisdiction and further clarifying the competences of the United Nations in the field of human rights.<sup>202</sup> Ermacora, for example, argued that the types of action proposed in that resolution did not amount to 'intervention' as that term had been shaped by the practice of the political organs of the United Nations. He characterised the procedure as

'essentially information-gathering through studies, discussions, recommendations, appeals, expressions of political opinions, etc. which as such do not interfere with the domestic affairs of a State in regard to human rights.'<sup>203</sup>

He further pointed out that '[t]he only measure which may interfere in domestic affairs would be an investigation into a gross violation', but that 'ECOSOC Resolution 1503 (XLVIII) does not envisage investigation without the consent of the State concerned.'<sup>204</sup>

In his analysis on the compatibility of Resolution 1503 with Article 2 paragraph 7 of the Charter, Zuijdwijk approached the issue from the perspective of the scope of the sphere of domestic jurisdiction. He argued that 'consistent patterns of gross violations of human rights in the present state of development of international law probably are no longer considered to be essentially within domestic jurisdiction. If that is true, United Nations bodies can do anything *within their powers* once it has been decided

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197 Ibid., para. 7 (d).

198 Ibid., para. 7 (c) provided that '[t]he committee's procedure shall be confidential, its proceedings shall be conducted in private meetings and its communications shall not be publicised in any way.'

199 Ibid., para. 7 (e).

200 Ibid., para. 8.

201 Ibid., para. 10.

202 See, for example, Cassese, HRJ 1972, p. 375; Humphrey, HRJ 1971, pp. 474 and 475; also Carey 1970, pp. 91 and 92.

203 See, for example, Ermacora, HRJ 1974, p. 685; also Zuijdwijk 1982, pp. 76-90, especially pp. 88 and 89; and Alston 1992, p. 146.

204 Ermacora, HRJ 1974, p. 685.

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that such a consistent pattern exists.<sup>205</sup> According to Zuijdwijk, it would be within the powers of the United Nations to adopt a resolution censuring the State concerned as well as discussion, study and investigation (outside the borders of the State concerned) to decide on the existence of a consistent pattern of gross violations.<sup>206</sup>

Once again, however, it is important to place the adoption of Resolution 1503 in its political context and to emphasise that the practical interpretation and implementation of the procedure is carried out by political organs and escapes to some extent legal logic. In this respect, it must be also observed that as a result of the important tasks assigned to it under Resolution 1235 and especially Resolution 1503, the work of the formally independent Sub-Commission became increasingly politicised.<sup>207</sup>

Resolution 1503 was rather controversial and was adopted by fourteen votes to seven with five abstentions.<sup>208</sup> It was met with considerable resistance by some Governments, notably socialist States, which were still opposed to *institutionalising* a procedure for dealing with large-scale violations of human rights in any country.<sup>209</sup> Moreover, these States refused to recognise the individual as a subject of international law and, therefore, argued that the United Nations was not competent to handle communications submitted by them.<sup>210</sup> Even after the adoption of Resolution 1503 they continued to formally contest its legality (as well as the legality of Resolution 1235).<sup>211</sup> Meanwhile, as was also illustrated above in the case of Greece, socialist States did not hesitate to use these procedures in seemingly isolated instances to attack their political and ideological opponents. This particular aspect of the political process was noted by Ermacora who wrote in 1974:

‘It is surprising to note, (...) that the socialist countries, on matters such as *apartheid* and Chile, do not refuse to discuss, to study and even to investigate the situation. It seems that these countries do not accept the idea of dealing with violations of human rights through an institutionalised and systematic approach developing out of ECOSOC Resolution 1503 (XLVIII) but accept quite frankly studies and even investigations when

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205 Zuijdwijk 1982, p. 90 [emphasis added].

206 Ibid.

207 In 1971 Ruzié wrote: ‘[l]’augmentation du nombre des membres de la sous-commission en 1968 et la nouvelle répartition géo-politique, qui en est résultée, ont modifié l’orientation de cet organisme, qui semble avoir perdu son caractère d’indépendance et tend à devenir un organe politique.’ Ruzié, RDH 1971, p. 94. Also ACM 1996, pp. 4 and 5.

208 Some eight years elapsed from the first efforts in the Sub-Commission to set up a procedure to handle individual petitions in 1967 to the adoption of Resolution 1503 in 1970 and the first time the Commission actually dealt with a situation forwarded under the new procedure for the first time in 1974. For an overview of events, see Ermacora, HRJ 1974, pp. 670 ff., especially pp. 673-675 and Ruzié, RDH 1971, pp. 89 ff.

209 Still in 1970 the Soviet Union attempted to have the General Assembly reverse ECOSOC Resolution 1503, see Zuijdwijk 1982, p. 28. For the positions of Governments, see especially Ruzié, RDH 1971, pp. 94-96.

210 Daes 1992, pp. 53 and 54. See also Cassese 1986, pp. 300-302.

211 Kamminga 1992, pp. 103 ff.

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there is no real institutionalised procedure or if the Afro-Asian block is in favour of such procedure.<sup>212</sup>

Otherwise, the 1503 procedure would provide ample opportunity for States to deploy strategies not to be exposed to large-scale violations of human rights committed under their jurisdiction. To a large extent such strategies are inherent in political decision-making, in particular when it comes to deciding whether or not the conditions have been met for forwarding a particular human rights situation to the Sub-Commission or the Commission.<sup>213</sup> In addition, the emphasis on confidentiality during the entire process made the procedure even more vulnerable to abuse and political manipulation. Liskofsky described this particular problem as follows:

‘Accordingly, the confidentiality rule represents a genuine dilemma. In theory, it is a reasonable rule in that, until the Sub-Commission and Commission have convinced themselves that a *prima facie* case exists in a particular country of a consistent pattern of gross violations of human rights, that country should not have to bear the onus and the political consequences inevitably accompanying a public hearing. On the other hand, to leave NGOs and the public in the dark until that stage is reached, is to immunise the UN bodies from accountability, whatever their sins of omission or commission.’<sup>214</sup>

Consequently, as of the second half of the 1970s the 1503 procedure has become much criticised for its vulnerability to abuse and manipulation.<sup>215</sup> Not in the last place, also, because the procedure institutionalised slowness and delay. The Sub-Commission and Commission meeting only once a year, delaying a decision to forward a situation to the full Sub-Commission or Commission or a decision by the Commission to keep a situation under review postponed to the following year any form of action from which individual victims might benefit.<sup>216</sup>

At the same time, the disadvantages of the 1503 procedure, in conjunction with other developments under the 1235 procedure, also fuelled new initiatives, which would eventually lead to the adoption of new approaches for holding States accountable for violations of human rights by the Commission on Human Rights.

In the 1970s discussions in the Commission on Human Rights would concentrate precisely on the coexistence of the confidential 1503 procedure and the public 1235

212 Ermacora, HRJ 1974, p. 676. Similarly, Liskofsky, HRJ 1975, p. 902 and Guest 1990, p. 440.

213 See also Cassese, HRJ 1972, pp. 375 ff. and Zuijdwijk 1982, pp. 30 ff. on the rules of admissibility of communications drawn up by the Sub-Commission pursuant to paragraph 2 of Resolution 1503. It must also be pointed to the fact that given the important role of the UN Secretariat in the process of screening communications, political pressures on that (independent, Article 100 of the Charter) United Nations organ augmented. See also Guest 1990, p. 126.

214 Liskofsky, HRJ 1975, p. 902. See also Bossuyt, HRLJ 1985, p. 183, who seemed to be more positive about the confidentiality rule.

215 For an overview of the criticism see Alston 1992, pp. 152-153.

216 Zuijdwijk 1982, p. 39.

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procedure.<sup>217</sup> Initially, it had been contended that the mandate of the Sub-Commission and Commission under Commission Resolution 8 (XXIII) and ECOSOC Resolution 1235 (XLII) had been superseded by ECOSOC Resolution 1503. Proponents of this view held that an annual public debate on violations of human rights everywhere had become superfluous and that all discussions concerning violations of human rights should take place behind closed doors in accordance with the rules of the 1503 procedure. This position never obtained the support of a majority of United Nations Members.

On the contrary, the annual public debate on violations of human rights has continued to be on the agenda of the Sub-Commission and Commission separate from the confidential meetings. However, the establishment of country-specific investigations by the Commission under the 1235 procedure remained sporadic and *ad hoc* throughout the 1970s. When, in 1975, the Commission on Human Rights (and other political organs of the United Nations) reacted to the situation in Chile by establishing an *Ad Hoc* Working Group,<sup>218</sup> the specific political circumstances surrounding this situation played a decisive role in triggering United Nations action. Commenting on the case of Chile in 1976 Ermacora, for example, labelled it as 'typical' for the functioning of the United Nations insofar as it 'investigates such situations only when there are sufficient reports, and expressions of public opinion, around the world of alleged mass violations of human rights, and when the situation does not involve directly a permanent member of the Security Council.'<sup>219</sup> Moreover, the case of Chile was presented as being *sui generis*, as a special situation – in the same way as the cases of South Africa and Israel were presented as special situations – that could not be considered as permitting the Commission to deal with any other situation involving violations of human rights in a similar fashion.

With hindsight, commentators have argued that the case of Chile constituted an important precedent. Alston and Zuijdwijk stressed the case's political relevance as the first United Nations investigation involving neither colonialism or *apartheid* (South Africa, Namibia, Zimbabwe) nor a situation of 'illegal occupation' (Israel). According to Alston '*in principle at least*, the door had finally been opened *albeit to a fraction*, to permit the effective use of 1235 in virtually any situation, *provided only that the political will could be mustered*.'<sup>220</sup> Zuijdwijk, moreover, emphasised that the inquiry into the situation in Chile was brought about primarily by humanitarian concern since '[t]he Chilean investigation is concerned with a situation which is not considered in

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217 Ibid., pp. 28-29 and pp. 39-54.

218 C.H.R. Res. 8 (XXXI) of 27 September 1975 adopted without a vote, approved by ECOSOC Dec. 80 (LVIII) of 6 May 1975. See YUN 1975, pp. 622 ff.

219 Ermacora, HRR 1976, p. 145. See also Alston 1992, p. 158. The reasons for taking up the case of Chile were, *inter alia*, the country's long record of democracy, the particularly bloody circumstances of the military take-over, the status of the country as a member of the Group of Non-Aligned States and Socialist International, the involvement of the United States in the events, the establishment of a Commission of Inquiry by the ILO and an intensive international solidarity campaign.

220 Alston 1992, p. 158 [emphasis added].

itself a violation of human rights. Condemning a Government merely for acquiring power through a military coup would not be acceptable at the United Nations.<sup>221</sup> Kamminga equally considered the case of Chile to be a turning point inasmuch as 'the criterion for the establishment of an inquiry (...) was (...) the simple existence of a consistent pattern of violations of human rights' and no link was being made to the maintenance of international peace and security or the impairment of friendly relations between States.<sup>222</sup> He also pointed at the fact that from that period of time onwards United Nations action in the field of human rights tended to become concentrated in the Commission on Human Rights rather than the General Assembly. Finally, Kamminga noted the positive reaction of the Government of Chile, which not only recognised the competence of the General Assembly to take cognizance of situations of human rights in all countries, but also accepted the competence of the *Ad Hoc* Working Group. The Government of Chile did not claim that United Nations action *per se* constituted illegal intervention in its domestic affairs, but rather took the view that certain elements in the resolutions adopted and the reports produced were *ultra vires*. Kamminga held this attitude to be an important precedent in determining the legal scope of Article 2 paragraph 7 of the Charter.<sup>223</sup>

Where the military take-over by General Pinochet in Chile immediately led to a response by the United Nations, the Commission on Human Rights remained silent in respect of other States with probably even more horrifying human rights records. Examples include East Pakistan, Uganda, the Central African Empire and Democratic Kampuchea.<sup>224</sup> Again other States effectively managed to escape condemnation by the Commission on Human Rights by relying on the argument that a discussion or investigation of a particular human rights situation under the 1503 procedure pre-empted a public discussion of the same situation.

Thus, in 1977 a draft resolution concerning the human rights situation in Uganda was introduced in the public meeting, but never discussed on the ground that a confidential draft resolution concerning that country was already pending under 1503.<sup>225</sup> The following year, a slight move towards more openness was made when the Chairman of the Commission announced for the first time the names of the States considered under the 1503 procedure. The Members of the Commission had agreed, however, that the situations in those countries should not be dealt with in a public meeting.<sup>226</sup> This

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221 Zuijdwijk 1982, pp. 304 ff.

222 Kamminga also pointed at the fact that the resolution establishing the Ad Hoc Working Group relied in general terms on the Charter and the Universal Declaration of Human Rights. Kamminga 1992, pp. 93 ff.

223 *Ibid.*, pp. 95 and 96.

224 Also Alston 1992, p. 159.

225 Zuijdwijk 1982, p. 43. On the case of Uganda, see also Guest 1990, pp. 440 and 441.

226 It was again the case of Uganda which figured prominently on the agenda of the Commission that year. According to Guest 'there was no case to be argued' and, consequently, the Commission took action and sent an envoy to meet Amin. However, the African Chairman of the Commission was unwilling to single out the case of Uganda and therefore decided to make public the names of all countries considered under the 1503 procedure that year. Guest 1990, pp. 441 and 444. Also Zuijdwijk 1982, p. 44.

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practice was repeated in 1979, again preventing a public discussion of the situations under review. However, in the same year the Commission also transferred for the first time a human rights situation – the case of Equatorial Guinea – from the confidential 1503 procedure to the public procedure and a country-rapporteur was established to conduct a thorough study.<sup>227</sup> This was the first country-specific action taken outside the cases of South Africa, Israel and Chile and it marked the beginning of a relatively rapid expansion of country-specific mechanisms under the 1235 procedure. In the years that followed the Commission took action with respect to, *inter alia*, Bolivia (1981), El Salvador (1981), Guatemala (1982), Poland (1982) and Iran (1984).<sup>228</sup> As the 1235 procedure became to be more frequently used, the question of coexistence with the 1503 procedure no longer constituted a major topic of discussion.<sup>229</sup>

Another State which cleverly used (abused) the 1503 procedure to avoid public exposure was Argentina, where widespread disappearances had taken place following the military take-over in 1976.<sup>230</sup> The Government of that country deliberately chose to cooperate with the Sub-Commission and the Commission under the 1503 procedure in order to prevent these organs from taking action under the public 1235 procedure. Initially, the strategy of the Government of Argentina proved successful and any form of 'institutionalisation' or condemnation could be avoided. Eventually, however, the manipulation of the 1503 procedure, in conjunction with other developments, turned against Argentina and led to another breakthrough under the 1235 procedure in 1980: the establishment of the Working Group on Enforced or Involuntary Disappearances, the Commission's first so-called thematic procedure with a worldwide mandate.

The case of Argentina is again a typical example of how efforts to respond to a single case contributed to creating precedents clarifying the competences of the United Nations in the field of human rights. It also illustrates particularly well the fundamental weakness of the premise underlying the 1503 procedure, namely that confidentiality would induce Governments to cooperate with the United Nations.<sup>231</sup> At the same time, the story of Argentina reveals that it was precisely the flagrant abuse of the rule of confidentiality by the Government of that country which set in motion a process of change. Simply said, the attitude of the Government of Argentina left the Commission – which for a variety of reasons was determined to take some form of action against

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227 Equatorial Guinea had been dealt with under the 1503 procedure since 1975 and always failed to cooperate. Bossuyt, HRLJ 1985, pp. 188 and 189.

228 See also Alston 1992, pp. 159-161. In 1978 the Commission carefully moved to ask the Government of Democratic Kampuchea to respond to allegations. In 1979 it condemned the Somoza régime in Nicaragua and requested the Secretary-General to report, it also sent a telegram to the Government of Guatemala. Also in 1979, after having visited Chile and having presented its report to the General Assembly and the Commission on Human Rights, the *Ad Hoc* Working Group was disbanded and replaced by two new sub-organs: a Special Rapporteur on the Situation of Human Rights in Chile and two Experts to Study the Fate of Missing and Disappeared Persons in Chile.

229 Bossuyt, HRLJ 1985, pp. 184 and 202. Alston characterised the period from 1979 onwards as 'The Opening-up of the Procedure', see Alston 1992, p. 159 ff. and 173 ff.

230 See also *infra* Chapter III.3.1.1

231 See Ruzié, RDH 1971, pp. 94 and 95; Guest 1990, pp. 440 and 441.

it<sup>232</sup> – no other choice but to find other ways than the 1503 procedure for holding that Government accountable for the practice of ‘disappearances.’ Commenting on this development Guest wrote that:

‘[Argentinian] tactics backfired. They had won the Junta valuable breathing space, but they had also increased the chances of the United Nations deliberately ignoring the fact that disappearances almost stopped.’<sup>233</sup>

By 1980 a point of no return had indeed been passed and *some kind of United Nations response* to the practice of disappearances in, *inter alia*, Argentina would be forthcoming.<sup>234</sup> As a prelude to this response, the Director of the United Nations Division of Human Rights, in his opening speech to the 1980 Session of the Commission on Human Rights, referred precisely to the need to rethink the ‘adequacy of some recent approaches and assumptions’ under which the Commission had worked:

‘With some exceptions, the main approach has been to deal with such situations under confidential procedures in cooperation with the Governments concerned. Our experience so far leads me to ask however, whether some of the assumptions under which we have been working are still valid. Is it satisfactory to place so much emphasis on the consideration of situations in confidential procedures thereby shutting out the international community and the oppressed peoples? Are certain procedures in danger of becoming, in effect, screens of confidentiality to prevent cases discussed thereunder from being aired in public? While there is probably no alternative to trying to cooperate with the Government concerned, should we allow this to result in the passage of several years while the victims continue to suffer and nothing meaningful is really done? How can we deal with Governments which do not act in good faith or abuse the procedures of the Commission by pretending to cooperate while in fact violations of human rights continue to take place?’<sup>235</sup>

## II.5 ASSESSMENT AND CONCEPTUAL CONCLUSIONS

Before examining in the next Chapter, Chapter III, the Commission’s response to the challenge formulated by Van Boven, *i.e.* the practice of the Working Group on Enforced or Involuntary Disappearances and the two other selected thematic procedures, the major findings so far must be recapitulated.

This chapter has attempted to give a credible account of the developments in the field of human rights taking place within the context of the political organs of the United Nations, in particular the Commission on Human Rights, in the years 1945 to 1980. From the perspective of the *raison d’être* of the United Nations one could speak of the process described as ‘the process of implementation of human rights and

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232 See also *infra* Chapter III.3.1.1

233 Guest 1990, p. 189.

234 See Kramer and Weissbrodt, HRQ 1981, p. 19.

235 Van Boven 1982, p. 65.

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fundamental freedoms by the political organs of the United Nations.' Such a title would be misleading, however, to the extent that it suggests that the process has been the result of a deliberate and straightforward policy of the Organisation. Notwithstanding the profound significance of the innovation to bring the promotion and protection of human rights and fundamental freedoms within the ambit of the United Nations, the implementation of this objective so far, paradoxically, also owes much to political antagonisms such as the Cold War, the policy of *apartheid* in South Africa or the decolonisation process, to the practical need to respond to different concrete situations and to other general developments in international relations.

The latent contradiction between the purpose of promoting and encouraging respect for human rights and fundamental freedoms and the principle of non-intervention (in the domestic affairs of a State) as laid down in Article 2 paragraph 7 of the Charter has been placed at the centre of the present analysis. The structure of the Charter has been highlighted in order to better understand the predominantly political nature of the process and practice of the United Nations in the field of human rights. Thus, the Charter has conferred the main responsibility for the implementation of human rights and fundamental freedoms to the Organisation's political organs, instructing them to develop the rather vague and undefined concept of human rights contained in that document. These organs, moreover, cannot command performance by the individual Members States, but are to search for international consensus primarily by means of study, discussion, report and recommendation. Accordingly, the role of the International Court of Justice in this process has been restricted by the absence of a system of compulsory jurisdiction. Also, perhaps because of the omission of the reference to international law in Article 2 paragraph 7 of the Charter, its role has been hampered *de facto* by the practice of the political organs of the United Nations not to consult the Court for an advisory opinion on (constitutional) questions of competence.<sup>236</sup> Instead, the 'political approach to the question of competence' has tended to prevail within the United Nations, each organ deciding on its own competence when seized with a particular issue.<sup>237</sup>

While the political approach has not always contributed to creating legal certainty and has at times been criticised for inducing the political organs of the United Nations

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236 Higgins 1963, p. 3. A case illustrating the tendency of political organs to bypass the International Court of Justice has been the conflict between India and the Union of South Africa concerning the question of the treatment of persons of Indian origin in South Africa in 1946. See, *inter alia*, Preuss, Hague Recueil 1949, pp. 642-649.

237 As opposed to 'the legal approach to the problem of competence.' The term has been used by Preuss. *Ibid.*, p. 643. Also De Visscher 1968, pp. 232 and 233.

to take 'subjective'<sup>238</sup> or 'legally unjustified'<sup>239</sup> decisions or decisions subserving the political purposes of individual States, it has at the same time been the key to growth. The dynamics of the political process – evolving within broad legal margins – and a corresponding practical construction of the domestic jurisdiction clause has also contributed to the creation of precedents and the adoption of procedures by the political organs of the United Nations.

Even though in the period 1945-1980 precedents were not particularly abundant as to speak of fixed practices, they have nevertheless clarified and indicated the contours of the competences of the United Nations in the field of human rights and, thereby, the limits of the domestic jurisdiction of States. On the basis of the United Nations practice presented so far, the following conclusions may therefore be drawn:

- (1) In general, the practice of the political organs of the United Nations has indeed confirmed the relativity of the sphere of domestic jurisdiction;
- (2) The relativity of the concept is enhanced by the fact that the question of domestic jurisdiction is decided *prima facie* by the political organ of the United Nations seized with the matter.
- (3) The 'no power' decision of the Commission on Human Rights in 1947 never had the effect of completely paralysing the activities of the United Nations in the field of human rights; the General Assembly, in particular, has shown a tendency to assume jurisdiction in situations involving violations of human rights; however, competence has generally been justified on the ground that the situation in question constituted a threat or even a potential threat to the maintenance of international peace and security or that it impaired the friendly relations between States; a notable exception has been the case of South Africa, which the United Nations has considered a case *sui generis*.<sup>240</sup>
- (4) The steady emergence of human rights as a concept under positive international law through, *inter alia*, the legislative work of the political organs of the United Nations (and the Member States) has facilitated the development to consider the existence of gross violations of human rights as an *independent* ground for the United Nations to assume jurisdiction; the need to justify competence by referring

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<sup>238</sup> See, for example, Preuss' comment in relation to the refusal of the General Assembly to consult the Court in the question of the treatment of persons of Indian origin in South Africa. He wrote: 'The disparagement of international law, with which such appeals for action are ordinarily accompanied, not only has the effect of lowering the prestige of the Court, but of inviting disregard for the decisions of the political organs as well. The growing intransigence of the Union of South Africa in the face of the repeated refusal of the General Assembly to give any serious consideration to the question of its competence should provide an instructive example and a warning to those whose humanitarian sentiments may have consequences destructive of the ideals which they profess.' Preuss, Hague Recueil 1949, p. 648.

<sup>239</sup> De Visscher 1968, p. 233.

<sup>240</sup> Later attempts to bring that case within the ambit of the maintenance of international peace and security were also justified by the objective of allowing for the application of sanctions under Chapter VII of the Charter.

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to the maintenance of international peace and security or friendly relations between States has shifted to the background;

- (5) The adoption of ECOSOC Resolutions 1235 and 1503 – however controversial they were at the time of their adoption – further reinforced this development by: (a) formally endorsing the creation of an agenda item aimed at dealing with the ‘Question of violations of human rights and fundamental freedoms (...)’ for its own sake in public session (1235 procedure); (b) formally establishing a procedure for scrutinising (individual) communications concerning violations of human rights and fundamental freedoms in private session (1503 procedure); (c) formally establishing the criteria triggering United Nations competence, *i.e.* the phrases ‘gross violations’ and ‘situations which reveal a consistent pattern of violations of human rights’ in the case of the 1235 procedure and the phrase ‘situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights’ in the case of the 1503 procedure;
- (6) Notwithstanding the importance of the precedent set in the case of Chile – as the ‘first’ instance of United Nations action outside the context of self-determination, colonialism or *apartheid* – the sporadic instances in which the Commission actually made use of its competences under the 1235 procedure still give substance to the claim that each of these instances constituted a situation *sui generis*; the precedents have not yet reached the level of an ‘*appearance of a coherent practice*’, establishing beyond doubt the existence of a *generally applicable* system of human rights supervision;<sup>241</sup>
- (7) The text of ECOSOC Resolutions 1235 and 1503, referring only to *situations* of violations of human rights, leaves open the question of the competence of the United Nations to respond to individual cases of violations of human rights; the argument continues, therefore, as to whether this particular aspect of the international protection of human rights remains essentially within the domestic jurisdiction of States;
- (8) United Nations practice has not considered public discussion, study, recommendation and even investigation (outside the territory of the State concerned without consent and inside the territory with its consent) to be ‘intervention’ prohibited pursuant to Article 2 paragraph 7; however, the decisions to undertake any of the above-mentioned types of action have been taken on an *ad hoc* basis, according to the ‘political approach.’
- (9) The *institutionalisation* of certain methods and practices as permissible forms of United Nations intervention has been much more problematic. As the procedure established pursuant to ECOSOC Resolution 1503 shows, an institutionalised generally applicable approach to determining the existence of a consistent pattern of gross and reliably attested violations of human rights has been surrounded by numerous safeguards for State sovereignty: *i.e.* confidentiality of the procedure until it reaches ECOSOC; investigation only with the consent and in constant

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241 See I.3, definition of the term precedent and the legal significance of precedents [emphasis added].

cooperation with the State concerned and under conditions determined by agreement with it; investigation only after all available means at the national level have been *resorted to* and *exhausted*; appointment of committee members subject to State consent. Moreover, and notwithstanding the involvement of the 'independent' Sub-Commission, the 'political approach' to deciding the question of taking up or forwarding a particular situation has continued to prevail under the 1503 procedure.

- (10) The rule of confidentiality under the 1503 procedure has been particularly problematic not only for decreasing the transparency of the entire process, but also for depriving the United Nations – in the absence of legally binding decision-making powers – of the power of public opinion as its most important means to induce Member States of the United Nations to comply with international human rights standards.

With reference to the above conclusions, the evaluation of the practice of the three selected thematic procedures in the next chapter attempts to answer in particular the following questions:

- (1) the question whether the practice of the thematic procedures has effectively reached the level of an 'appearance of a coherent practice' so that one may truly speak of a generally applicable procedure;
- (2) the question concerning the competence of the United Nations to respond to individual cases of disappearances, torture or arbitrary detention;
- (3) the question of the institutionalisation of the specific methods available to the thematic procedures in their dealings with Governments;
- (4) the question of the conditions under which these methods may be employed, including the question of the entity or organ setting these conditions and deciding authoritatively on their applicability to a concrete case at hand;
- (5) the question of the extent to which thematic procedures have succeeded in increasing the transparency of the process of holding Governments accountable for human rights violations and mobilising international public opinion.



## **CHAPTER III**

### **HISTORY AND DEVELOPMENT OF THEMATIC PROCEDURES (PART I)**

#### **III.1 INTRODUCTION**

The present chapter contains the first part of an analysis on the development of the mandates of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and the Working Group on Arbitrary Detention respectively. This first part deals with the more general aspects and the background relating to the establishment and development of the three selected thematic procedures. For the sake of clarity it has been decided to include the study and discussion of the evolution of the working methods of the three selected thematic procedures in a separate chapter [Chapter IV], making up the second and final part of the entire analysis.

As already mentioned in Chapter I.2, developments taking place within the context of thematic procedures other than the three selected ones, will be considered whenever relevant for a good understanding of the origin and evolution of the mandates and, more generally, the competences of the United Nations in the field of human rights.

This chapter deals first with some basic characteristics concerning the legal basis for the establishment of thematic procedures as well as the nature of thematic procedures, which is necessary to understand the course and dynamics of the development of thematic procedures since 1980 [Chapter III.2]. Having clarified these characteristics, the chapter describes the historical background and political developments leading to the establishment of the three selected thematic procedures [Chapter III.3.1]. Subsequently, the next section begins the analysis of the development of several aspects of the mandates of the three selected thematic procedures relating to, *inter alia*, their structure, composition, independence, status as 'experts on missions for the United Nations', the question of competence *ratione personae* and, finally, the question of competence *ratione materiae* [Chapter III.3.2].

#### **III.2 GENERAL ASPECTS**

##### **III.2.1 Competence to Establish Thematic Procedures**

It is generally assumed that ECOSOC Resolution 1235 (XLII) constitutes the basis for the establishment of thematic procedures.<sup>1</sup> In particular, the necessary authority has been said to derive from the third paragraph of that resolution, which provides that the

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<sup>1</sup> Kamminga 1992, p. 108 and Alston 1992, p. 160.

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Commission may 'make a thorough study of situations which reveal a consistent pattern of violations of human rights.'

Lempinen, however, suggested that the competence to establish special procedures must have preceded the adoption of Resolution 1235 (XLII) and that that resolution merely reconfirmed pre-existing competence. According to him, it was not the authorisation which was lacking, 'but the political will and (...) it was not until 20 years later that this political will had grown sufficiently.'<sup>2</sup>

In support of his argument Lempinen mentions the fact that the *Ad Hoc* Working Group of Experts on Human Rights in South Africa was established even before the adoption of Resolution 1235.<sup>3</sup> He also suggests that the competence to prepare and initiate studies could already be inferred from ECOSOC Resolution 1102 (XL) of 4 March 1966, which invited the Commission to submit recommendations on measures to halt violations of human rights and fundamental freedoms in all countries to ECOSOC. Finally, he argues that the competence of the Commission is necessarily *implied* in Article 62 paragraph 2 of the Charter, which authorises ECOSOC to make recommendations for the purpose of promoting respect for human rights. According to Lempinen:

'Recommendations can be made with a view to preparing a study or report or they can presuppose a previous study or report. Since the Commission on Human Rights was established under Article 68 of the Charter to assist [ECOSOC] in the performance of its functions, the competence to initiate studies should equally belong to the Commission. Similarly, ECOSOC Resolution 9 (II) of 21 June 1946 authorised the Commission to call in *ad hoc* working groups of non-governmental or individual experts to carry out studies on particular questions of human rights.'<sup>4</sup>

The present author, however, would not share the opinion that the Commission on Human Rights has always possessed the competence to establish (special) thematic procedures and that it was only due to a lack of political will that this competence was not assumed at an earlier date. True, the exercise of competences by the political organs of the United Nations, including the Commission on Human Rights, must be in conformity with the provisions of the Charter and, therefore, the ultimate foundation for these competences must be found in that document, but the Charter nowhere *explicitly* provides authorisation for the political organs of the United Nations to assume monitoring competences in the field of human rights. The same can be said about the Commission's original mandate. The phrase contained in paragraph (e) of that mandate, 'any other matter concerning human rights not covered by items (a), (b), (c) and (d)', hardly constitutes an adequate legal basis for the assumption of monitoring competences.

2 Lempinen 2001, pp. 6-9. A similar position was taken by Humphrey with respect to the 1503 procedure. Humphrey, HRJ 1971, p. 475.

3 The *Ad Hoc* Working Group was established by the Commission on Human Rights on 6 March 1967 [Resolution 2 (XXIII)], ECOSOC Resolution 1235 was adopted on 6 June 1967.

4 Lempinen 2001, p. 8.

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As a matter of fact, as has been shown in Chapter II, the term 'protection', generally referring to monitoring competences, had been deliberately left out of the Charter, *inter alia*, on the ground that it 'would (...) raise hopes going beyond what the United Nations could successfully accomplish.'<sup>5</sup> Similarly, it has been shown that the term 'intervene' or intervention as contained in Article 2 paragraph 7 of the Charter was originally intended to be understood in a broad and popular sense to cover any form of action in matters found to be essentially within the domestic jurisdiction of a State.<sup>6</sup> Moreover, in the absence of a clear body of positive (international) human rights law, the promotion and protection of human rights was still considered to belong essentially to the domestic jurisdiction of a State. In the light of the intentions of the drafters of the Charter and given the embryonic stage of development of international human rights law at the time of the adoption of the Charter, the adoption of ECOSOC Resolution 75 (V) of 5 August 1947 in which that organ approved the so-called 'no power' doctrine of the Commission on Human Rights cannot be explained simply by referring to a lack of political will.

Such reasoning, according to the present author, ignores the essence of the political approach to human rights monitoring. This approach has been shaped through the resolutions and the practice of the political organs of the United Nations and it is intimately connected with general developments in international relations. Accordingly, the meaning and scope of the domestic jurisdiction clause, being essentially relative and, precisely, dependent on the development of international relations, has been revised and adjusted through the practice of the (political) organs of the United Nations in the light of the purposes and functions of the Organisation. This is not, however, the same as saying that the clause has always permitted the assumption of monitoring competences.

As time passed by and the political organs felt able to react to certain events and developments and to assume the necessary competences to do so, they could rely on the *general authority* of the Charter to justify their approach.<sup>7</sup> In law, with reference to the doctrine of implied powers, it could then be argued that

'the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent document *and developed in practice*' and, therefore, 'the Organisation must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'<sup>8</sup>

Drawing on the general authority of the Charter, the different resolutions adopted by the political organs of the United Nations and the ensuing practice of these organs in the period 1946-1980 (and after that date) have step by step clarified and refined their

5 Supra Chapter II.2. Also Lauterpacht, Hague Recueil 1947, p. 14.

6 Supra Chapter II.3. Preuss, Hague Recueil 1949, pp. 610 and 611.

7 Kamminga, NILR 1987, p. 322.

8 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 180 and 182 [emphasis added]. See generally, Brownlie 1998, pp. 687-689.

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competences and in particular those of the Commission on Human Rights, emerging as the *de facto* principal United Nations organ in the field of human rights.<sup>9</sup> Consequently, when considering the origin of the competence of the Commission to establish (special) thematic procedures, it is not only the Charter and its stated objectives, but the entire institutional practice of the Organisation, which has to be taken into account. It is this practice as a whole, building on, *inter alia*, ECOSOC Resolution 1235 and (widespread dissatisfaction with the manipulation of) Resolution 1503, from which the authority of the Commission to establish thematic procedures must be derived.

### III.2.2 General Remarks concerning the Nature of the Thematic Procedures

It has been said that, being established pursuant to 'strikingly vague' resolutions of the Commission on Human Rights, the foundations of the thematic procedures are rather 'shaky'.<sup>10</sup> This assertion needs some clarification, because it touches upon the very nature of thematic procedures. The remarks made here will be of a general nature and will be further elaborated upon when examining the mandates and practice of the three selected thematic procedures.

The 'shaky' foundations of thematic procedures pertain to three different aspects: (1) the legal basis for the establishment of thematic procedures; (2) the instrument of a resolution of the Commission on Human Rights as the means to establish thematic procedures; and (3) the contents of the resolutions establishing thematic procedures. All three aspects are inherent in the political approach.

On the first point, it suffices to refer to what has been said above. The Charter-based or political approach to human rights monitoring, lacking an explicit conventional basis for its establishment, relies on the general authority of the Charter as supported and developed by the practice of the political organs of the United Nations both in the field of standard-setting and implementation. In addition, the legal question of competence is decided *de facto* by the political organ seized with the matter. Here we touch upon a crucial point. The political approach to human rights monitoring advances through majority decision-making rather than the traditional consensual approach. As shown in Chapter II.3, in the absence of a unilateral right to prevent an organ of the United Nations from discussing the question of its own competence (and taking a decision with regard to that question), an individual Member State (or minority of States), raising the point that discussion constitutes intervention in its domestic affairs, can at the utmost decide not to participate in the discussion.<sup>11</sup>

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<sup>9</sup> From the perspective of the internal hierarchy of United Nations organs, resolutions and decisions of the Commission on Human Rights require the formal approval of ECOSOC. However, the importance and political weight of the latter organ vis-à-vis the Commission steadily diminished with the adoption of the 1235 and 1503 procedures. By the 1980s ECOSOC had become a mere rubber stamp for the Commission. See Alston 1992, p. 201 and Kamminga 1992, p. 88. *Supra* Chapter II.4.4.

<sup>10</sup> Kamminga, NILR 1987, p. 322.

<sup>11</sup> *Supra* Chapter II.3.

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Majority decision-making also holds the key to the second aspect. Since the political organs of the United Nations are able to decide by majority vote on the question of competence, they are also able to decide on concrete measures, which no single State (or minority of States) is able to veto. Thus, a positive decision of the Commission on Human Rights to establish a thematic procedure does not require subsequent State approval for the mechanism to become effective. Here, the formal limits of effectiveness lie in the non-legally binding nature of the resolution adopted. The Commission on Human Rights cannot legislate with binding force for the Member States of the United Nations. On the other hand, the Member States will have to 'tolerate' the existence of the thematic mechanism in question as well as the 'pressure of the public opinion of the world as expressed through th[is] channel.'<sup>12</sup> While, formally speaking, non-cooperation with the thematic mechanism in question remains available as an option for States, it is the factual situation which takes precedence over the strictly legal aspects underlying it: some pressure and consequently some degree of 'intervention' must be tolerated.

The third aspect, the 'strikingly vague' nature of the resolutions establishing thematic procedures, is also best understood from the perspective of political decision-making and the need to find the required majority to pass a resolution – or to negotiate a consensus to pass a resolution without a vote. Compromise formulas, characterised by vagueness and ambiguity, but satisfying the needs and fears of the parties, were the inevitable result of such negotiating processes. In essence, in the absence of clearly and unambiguously defining the terms of reference and working methods of thematic procedures, these formulas left it to the mechanism in question and the political forces animating it to shape the scope and contents of the mandate in practice.

These three aspects of the foundations of thematic procedures necessarily have their bearing on the nature of the mechanisms. As is so often the case, the picture has two sides: one side stands out as advantageous, in particular in comparison to the monitoring bodies established pursuant to the major United Nations human rights conventions;<sup>13</sup> the other side of the same picture, however, shows the vulnerability of the thematic procedures.

The Charter-based origin of thematic procedures, in conjunction with the vague and open formulation of their mandates, have given these mechanisms considerable freedom of action. First of all, in contrast to the treaty bodies, which only have

<sup>12</sup> Lauterpacht, *Hague Recueil* 1947, p. 20. *Supra* Chapter II.3, particularly note 63.

<sup>13</sup> *I.e.* the Committee on Racial Discrimination (CERD) established under the Convention on the Elimination of All Forms of Racial Discrimination; the Human Rights Committee (HRC) established under the International Covenant on Civil and Political Rights; the Committee on Economic, Social and Cultural Rights (CESCR) established by ECOSOC based on the authority of the International Covenant on Economic, Social and Cultural Rights; the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) established under the Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Rights of the Child (CROC) established under the Convention on the Rights of the Child; the Committee Against Torture (CAT) established under the Convention Against Torture and also the Committee on the Protection of the Rights of All Migrant Workers and Their Families (CMW) established under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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competence in respect of those States which have signed and ratified the human rights treaty in question (and accepted the complaint procedures), the thematic procedures can address the Governments of all the Member States of the United Nations, as well as those Governments or entities which have observer status with the Organisation.

Secondly, in the absence of significant substantive and procedural constraints, the thematic procedures should be able to implement their mandates in a more flexible and dynamic manner than the treaty bodies are able to do. This concerns in particular the ability of thematic procedures to respond to urgent situations and to provide some form of relief for individual victims of violations of human rights in such situations as well as their adaptability to changing political conditions and, more generally, to the dynamics of international relations. In this respect, De Frouville has rightly stressed the *empirical* nature of the thematic procedures, meaning that, in the absence of any significant procedural constraints set by the Commission, such as rules of admissibility of communications, thematic procedures should be able to explore the limits of the political consensus existing in the international community and perhaps even to break new ground from a legal point of view in response to allegations of violations of human rights and fundamental freedoms that come before them.<sup>14</sup>

However, the empirical nature of the thematic procedures may also work against them. The absence of a solid legal basis may make the thematic procedures more vulnerable to political pressures than their treaty-based counterparts whose tasks and competences have not only been clearly defined, but have also been explicitly accepted and ratified by States Parties and, therefore, are more difficult to undo.<sup>15</sup> Thematic procedures, not being able to rely on clearly defined terms of reference, will always have to ensure that their approaches enjoy sufficient political support and do not needlessly upset Governments. The volatility of the thematic procedures is further enhanced by the fact that their mandates have been established pursuant to resolutions of the Commission on Human Rights, which can be easily adjusted and/or withdrawn. Thus, the Commission is able to keep a significant measure of control over the activities of the thematic procedures. Perhaps the most obvious and concrete manifestation of such control relates to the temporal limitation of the mandates of thematic procedures, requiring each and every procedure to come up for renewal of the mandate at the end of its term.

More generally, in the light of the control exercised by the Commission, it should be borne in mind that where the existence and development of thematic procedures is so closely related to the overall development of international relations, thematic procedures are also more vulnerable to unforeseen incidents or processes than their treaty-based counterparts.

As a consequence, as a former member of the Working Group on Enforced or Involuntary Disappearances once pointed out, the success or failure of thematic procedures may depend to a great extent on two factors: (1) the quality and goodwill

<sup>14</sup> De Frouville 1996, pp. 18 and 48.

<sup>15</sup> Still, thematic procedures are said to be less vulnerable to political pressures from individual countries than their country-specific counterparts. Alston 1992, p. 180.

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of the individuals making up the thematic procedures (including their practical political experience, their international reputation and their *Fingerspitzengefühl*) as well as the quality and goodwill of the United Nations staff supporting them; and (2) the political latitude given to these individuals to implement the mandate.<sup>16</sup>

Finally, from a policy perspective, one may wonder whether it is appropriate, or even fair towards individual rapporteurs or working groups, to leave largely undefined the purposes and goals of their mandates. The vagueness and empirical nature of the mandates of thematic procedures do not necessarily make their job an easier one. For, what are thematic procedures? Are they fact-finders, whose principal task it is ‘to record the facts, to provide a reliable historical record, and to provide the necessary raw material against which the political organs can determine the best strategy under the circumstances?’ Are they prosecutors, whose principal task it is ‘to marshal as much evidence as possible to support a condemnation’ and to mobilise world public opinion? Or, are they to have a conciliatory function charged with the principal task of seeking solutions to improve or resolve a particular situation, emphasising dialogue and cooperation rather than accusation or condemnation?<sup>17</sup> Would it be possible for thematic procedures to effectively combine different functions? As Alston remarked: ‘[a]n exercise which purports to be engaged in fact-finding, but then denies or plays down the seriousness of the violations in order to maintain a conciliatory stance, insults the victims, misleads the public and the Commission, and discredits the United Nations.’<sup>18</sup> The following analyses of the three selected thematic procedures will try to establish to what extent they have assumed any of the three functions identified above.

### III.3 ANALYSIS OF THE DEVELOPMENT OF THE THREE SELECTED MECHANISMS

#### III.3.1 History

##### *III.3.1.1 Events leading to the Establishment of the Working Group on Enforced or Involuntary Disappearances*

In Chapter II.4 reference has already been made to the case of Argentina and how efforts to respond to the widespread disappearances taking place in that country culminated in the establishment of the Working Group on Enforced or Involuntary Disappearances in 1980. The specific details of the story of Argentina before the organs of the United Nations as well as the negotiations preceding the establishment of the Working Group have been well documented by various authors.<sup>19</sup> For this reason this overview will only refer to the context and political events as far as they are relevant in the light of the objectives of the present study.

<sup>16</sup> Van Dongen 1986, p. 475, also p. 477.

<sup>17</sup> These three different functions have been identified by Alston. See Alston 1992, pp. 167 and 168.

<sup>18</sup> *Ibid.*, pp. 168 and 169.

<sup>19</sup> In particular Guest 1990, Bartolomei 1994 and Kramer and Weissbrodt, HRQ 1981.

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For a good understanding of the significance of the establishment of the Working Group on Enforced or Involuntary Disappearances, it is worthwhile recalling some of the findings of Chapter II.4, in particular those concerning the broader issues at stake in the political debates in the Commission on Human Rights during the 1970s. In this decade the discussion concerning the monitoring competences of the Commission concentrated on three issues in particular.

In the first place, the establishment of the Working Group must be seen in the light of efforts to give practical effect to the opportunities offered pursuant to ECOSOC Resolution 1235 to hold accountable *any* State where gross violations of human rights have been reported to occur. This is the process aimed at undermining the credibility of the *sui generis* justification for taking up a particular country-situation and at establishing the appearance of a coherent practice, confirming the general competence of the Commission.<sup>20</sup>

Secondly, it must be placed against the background of the discussion concerning the coexistence of the 1235 and the 1503 procedure and, in particular, the debate concerning the adequacy of the fundamental assumption underlying the latter procedure that confidentiality would induce Governments to cooperate. The discussion concerning the adequacy of the rule of confidentiality had become particularly acute in the light of the practice of the Commission not to consider under the 1235 procedure those country-situations which were already the subject of discussion or investigation under the 1503 procedure.

The third broader topic of discussion within the Commission on Human Rights concerned the competence of the United Nations to take cognizance of individual communications concerning violations of human rights. The socialist States in particular continued to have objections of principle against such a competence. Their formal position on the topic was that 'the examination of communications or complaints relating to single cases of violations of individual rights of particular persons does not fall within the competence of United Nations bodies, but was entirely a domestic affair of each State' and, therefore, illegal if done outside the framework of a special global treaty. Moreover, they considered that the examination of individual communications would 'divert (...) attention from authentic patterns of gross violations of human rights outside the domestic jurisdiction, such as apartheid and racism, and depriving whole peoples, like the Palestinians, of the right to self-determination.'<sup>21</sup>

In the second half of the 1970s the phenomenon of disappearances of persons had become synonymous with the human rights situation in Chile and, especially, Argentina. However, where the *coup d'état* in Chile of September 1973 generated massive international protests resulting in United Nations action under the public 1235 proce-

<sup>20</sup> Supra II.5 conclusion (6).

<sup>21</sup> Statements by representatives of the Soviet Union, Byelorussia and Bulgaria in the public debate of the Commission's 1975 session. U.N. Doc. E/CN.4/SR. 1308, pp. 2-5, taken from: Liskofsky, HRJ 1975, pp. 895 and 896. Also Ermacora, HRJ 1974, p. 684. As has been shown in Chapter II.4.4, in practice these States adopted a less principled position, in particular with respect to situations involving their political and ideological adversaries.

ture, the human rights violations taking place in Argentina following the March 1976 military take-over – even though being more serious in quantitative terms<sup>22</sup> – did not immediately lead to comparable worldwide outrage followed by concrete (United Nations) actions.

One might argue that the military Government of Argentina had 'learnt' from the events taking place in Chile in the sense that the practice of disappearances had been part of a deliberate strategy to limit international publicity to a minimum and not to create any martyrs.<sup>23</sup> Still, the relatives of the 'disappeared' gradually found their way to the United Nations and other international organisations such as the Organisation of American States. By 1977 – when the practice of disappearances in Argentina reached its climax – the United Nations had received hundreds of communications concerning violations of human rights in Argentina, potentially to be dealt with under the 1503 procedure. Fully aware of the negative consequences this could have for the country's international reputation and bilateral relations with other States, the Government of Argentina instructed its diplomats at the United Nations 'to avoid the condemnation and institutionalisation of 'the case of Argentina' in the United Nations' as had happened previously with the situation in Chile.<sup>24</sup>

Concretely, the Government of Argentina pursued two broad aims in the Commission on Human Rights: (1) to prevent any public debate that could lead to criticism of the Junta by name; (2) to ensure that Argentina stayed off the United Nations' confidential blacklist of 'gross violators', *i.e.* the 1503 procedure.<sup>25</sup>

In practice, with the exception of August 1976 when the Sub-Commission, in public session, *i.e.* under its agenda item on Questions of violations of human rights in all countries, adopted a resolution on the human rights situation in Argentina,<sup>26</sup> Argentinian diplomacy effectively succeeded in keeping the country away from the 1503 procedure until 1979.<sup>27</sup> By that year the strategy of the Argentinian Government

22 In 1984, Argentina's National Commission on Disappeared People reported 8,960 cases of disappearances between 1976 and 1983. At the same time the Commission acknowledged that the total number of disappeared persons was higher. Argentina's National Commission on Disappeared People 1986, p. 447 (Part Six, Recommendations, Conclusions). On 15 December 1983 the elected president Alfonsín announced the establishment of a National Commission on Disappeared People [Comisión Nacional sobre la Desaparición de Personas] to investigate disappearances (to review the facts and send criminal cases to the courts). The Commission published its (original Spanish version) report in 1984. See also Guest 1990, pp. 381-389.

23 *Ibid.*, p. 22. Also Bartolomei 1994, p. 30.

24 Argentina's National Commission on Disappeared People 1986, p. xiv (foreword). As Guest showed, Argentinian diplomatic correspondence described the Commission on Human Rights as 'the anteroom to the tribunal of international public opinion' and warning that '[e]ven if the international organisations cannot in themselves impose concrete or binding sanctions (...) they can exert moral pressure which can have an indirect effect on bilateral relations with other countries.' Guest 1990, p. 101.

25 *Ibid.*, p. 109.

26 S.C. Res. 2 C (XXIX) of 30 August 1976.

27 Guest 1990, p. 109. The strategies used by Argentina included attacking the credibility of NGOs (pp. 111 ff.) and influencing the United Nations Sub-Commission (pp. 115-121). Also Zuijdwijk 1982, p. 51 and 44. In August 1977 three communications concerning violations of human rights in Argentina – selected from the hundreds of communications received by the United Nations as representative of

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to contain negative international publicity had lost much of its effectiveness.<sup>28</sup> In an ultimate attempt to escape a public debate on the issue of disappearances, the Government then chose 'to cooperate' with the United Nations under the 1503 procedure. As Argentina's Ambassador to the United Nations in Geneva put it:

'For obvious reasons I believe it is useful to ensure the confidential passage of the communications and not – this time – to interrupt the denunciations on disappearances. This will have the following result at the 1980 session of the Commission: First, the debate on Argentina will be closed. Second, it will preclude any other action to reopen the issue in a public debate. We should facilitate the passage of some communications in the Sub-Commission.'<sup>29</sup>

Visible United Nations action in response to the practice of disappearances had begun in 1978. In that year, the Ad Hoc Working Group on Human Rights in Chile presented its report of a visit to that country to the General Assembly. The report referred, *inter alia*, to the problem of missing persons in Chile.<sup>30</sup> But, as the United States representa-

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the situation in that country – were brought before the five-member Working Group of the Sub-Commission. They were not considered 'communications which appear to reveal a consistent pattern of gross and reliably attested violations of human rights' in the sense of paragraph 1 of Resolution 1503 to be brought before the full Sub-Commission. In March 1978, during the session of the Commission on Human Rights, Argentina succeeded in having one of its nationals elected as a member of the Sub-Commission, as well as securing that other members were voted off the group. In August of that year the Working Group of the Sub-Commission considered the same three communications as were submitted in 1977. This time they were passed on to the full Sub-Commission, but by 14 votes to 6 it was decided not to forward the communications to the Commission on Human Rights. See Guest 1990, pp. 118-121 and 484. Also, Bartolomei 1994, p. 88.

28 Guest's analysis gives a credible account of how Argentina gradually lost the information war. Pressures and publicity came from various sources: *inter alia*, through the Office of the High Commissioner for Refugees in Buenos Aires (as early as May 1976), the ILO and UNESCO; a visit by Amnesty International in November 1976 (report published in March 1977); the killing of foreign nationals (Dagmar Hagelin/Sweden and two nuns/France in 1977); the human rights policy of the Carter Administration in the United States of America (1976-1980); demonstrations inside Argentina by the Crazy Mothers of the Plaza de Mayo (as of 1977); involvement of the Organisation of American States, in particular the Inter-American Commission on Human Rights (as of 1977), which visited Argentina in September 1979 and published a report described by Guest as a 'massive (...) indictment' against the Junta (pp. 164-179). See also Bartolomei 1994.

29 Taken from: Guest 1990, p. 137 and also p. 489 (footnote 11) where Guest cited another cable from the Ambassador defending his decision to allow communications concerning disappearances to be considered under the 1503 procedure. The Ambassador: 'Weighing the adverse results of this session one can cite: – the institutionalisation of the Argentinian case under the 1503 procedure; and the setting in motion of further international action following on from the 1978 General Assembly resolution. On the other hand, there are mitigating circumstances, at least as far as concerns public, open action at the level of international organisations: – The fact that the 1503 procedure is confidential at the Sub-Commission level, and cannot be referred to officially at the forthcoming session of the Commission; that the decision does not recommend any of the various possible courses of action allowed for under 1503 [*i.e.* a mission of inquiry]; the fact that the disappearances are being discussed under the general rubric of 'serious situations' – something that applies to numerous countries of the world.'

30 The *Ad Hoc* Working Group visited Chile in July 1978 and presented its findings to the General Assembly in December 1978 (U.N. Doc. E/CN.4/1310).

tive to the 1978 General Assembly's Third Committee made clear, 'the problem of missing persons was not limited to Chile; it also existed in Cyprus and Argentina, and, in view of its magnitude, he felt that a *mechanism should be set up to examine the problem*.'<sup>31</sup> On 20 December 1978 the General Assembly adopted a first resolution on the topic of disappearances, in which it expressed its deep concern 'by reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organisations (...).' In the same resolution it requested the Commission on Human Rights 'to consider the question of disappeared persons with a view to making recommendations.'<sup>32</sup>

The February/March 1979 Session of the Commission did not yet result in concrete action on the part of the Commission, but it was precisely the events of this session, which spurred on the Ambassador of Argentina to make the strategic move to allow for the passage of communications under the 1503 procedure. The case of Argentina came close to being 'institutionalised'. A draft resolution introduced by Western States concerning the practice of disappearances mentioned Argentina by name and proposed the establishment of a mechanism with more or less similar competences as the *Ad Hoc* Working Group on Chile. 'Because of lack of time' and the low priority given to it in the Commission on Human Rights, a decision on the issue of disappearances was postponed for another year. No resolution had been adopted.<sup>33</sup>

However, the matter was not left there. On 10 May 1979 ECOSOC adopted a resolution on 'disappeared persons', noting the Commission's lack of time during its past session, but requesting it 'to consider *as a matter of priority* the question of disappeared persons, with a view to making appropriate recommendations' at its thirty-sixth (1980) session.<sup>34</sup> Furthermore, ECOSOC requested the Sub-Commission, at its coming 1979 session, to deal with the question 'with a view to making *general recommendations* to the Commission on Human Rights at its thirty-sixth session.'<sup>35</sup> It also requested the Sub-Commission 'to consider communications on disappeared persons in accordance with the relevant resolutions.'<sup>36</sup>

On 5 September 1979, after a discussion on the subject, the Sub-Commission adopted Resolution 5 B (XXXII). This resolution contained a number of important recommendations, drawing the contours of a possible United Nations mechanism to respond to disappearances:

- (1) pointing out that 'according to information brought to its notice, enforced or involuntary disappearances continued to occur as a result of excesses on the part of

31 See Rodley 1999, p. 249 (original source: U.N. Doc. A/C.3/33/SR.70, para. 6) [emphasis added].

32 G.A. Res. 33/173 of 20 December 1978, see YUN 1978, pp. 724 and 737.

33 Guest 1990, pp. 136 and 137. Also Kramer and Weissbrodt, HRQ 1981, p. 18.

34 ECOSOC Resolution 1979/38, para. 1 [emphasis added]. See also YUN 1979, pp. 844 and 847.

35 ECOSOC Resolution 1979/38, para. 2 [emphasis added].

36 Ibid., para. 3.

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- law enforcement or security authorities or similar organisations, *warranting urgent reaction by individuals, institutions and Governments;*'
- (2) proposing that '*the emergency action called for might be entrusted to a group of experts, which would be given all available information for locating such persons and would contact the Governments and families concerned;*'
  - (3) requesting the Commission '*to authorise members of the Sub-Commission designated by its Chairman to undertake the task;*'
  - (4) 'pending a decision by the Commission, the Sub-Commission transmitted to the Secretary-General, for whatever action he deemed possible as part of the good offices urged upon him by the General Assembly in 1978 [Resolution 33/173, JG], the lists of missing persons communicated to him by the Sub-Commission members;'
  - (5) suggesting that 'if this phenomenon continued, its extreme gravity would justify envisaging some form of *emergency remedy*, based on the notion of *habeas corpus* or other legal protection, designed to induce official organs to devote the necessary means to the search for missing and disappeared persons.'<sup>37</sup>

At its 1979 session the General Assembly dealt with the topic of disappearances again when the *Expert to Study the Fate of Missing and Disappeared Persons in Chile* presented his report.<sup>38</sup> In this report the Expert concluded that 'the Chilean Government is responsible under international law for the fate of at least 600 cases of missing persons whose basic rights as human beings have been infringed and violated in this report.'<sup>39</sup> More generally, he recommended that '[c]areful consideration should be given to *establishing particular measures at the United Nations level to respond rapidly and effectively to reports of large-scale disappearances of persons.*'<sup>40</sup> This

<sup>37</sup> [Emphasis added]. See YUN 1979, p. 844. Also Kramer and Weissbrodt, HRQ 1981, p. 19.

<sup>38</sup> The Expert (originally two experts) to Study the Fate of Missing and Disappeared Persons in Chile, together with a Special Rapporteur on the Situation of Human Rights in Chile, had been established by the Commission on Human Rights in March 1979. The mechanisms replaced the *Ad Hoc* Working Group, which was disbanded after its visit to Chile and the presentation of its report to the General Assembly in 1978. C.H.R. Res. 11 (XXXV) of 6 March 1979. See also G.A. Res. 33/175 of 20 December 1978 (recorded vote 96 to 7, with 38 abstentions). YUN 1978, pp. 707 and 708.

<sup>39</sup> U.N. Doc. A/34/583/Add.1, paras. 177 and 188-192. The report was well received by the General Assembly and led to the adoption of Resolution 34/179 on Human Rights in Chile. No general resolution concerning disappearances was adopted as had been done in 1978. However, reference to disappearances was made in General Assembly Resolution 34/178 of 17 December 1979 in relation to human rights in the administration of justice, in particular *amparo*, *habeas corpus* and similar legal remedies. The resolution stated, *inter alia*, '[t]he General Assembly expresses its conviction that the application within the legal system of States of *amparo*, *habeas corpus* or other legal remedies to the same effect is of fundamental importance for (...) (c) clarifying the whereabouts and fate of missing and disappeared persons.' See YUN 1979, pp. 822 ff. and pp. 843, 844, 847 and 848. Also Kramer and Weissbrodt, HRQ 1981, p. 19; and Alston 1992, p. 174.

<sup>40</sup> U.N. Doc. A/34/583/Add.1, para. 196 [emphasis added].

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particular recommendation of the Expert might have been inspired by Sub-Commission Resolution 5 B (XXXII) to which he referred in his report.<sup>41</sup>

Taken together, the above described steps taken since 1978 and involving virtually all human rights organs of the United Nations led to the situation which the commentators Kramer and Weissbrodt described as follows:

‘By the time of the 1980 session of the Human Rights Commission, disappearances had emerged from the netherworld of nonrecognition, but had not yet become crusted over with political or ideological affiliations that would make passage of a resolution impossible. The issue of disappearances was ripe for action by the Commission.’<sup>42</sup>

Another important political factor, which helped to shift the balance in favour of action, was the changing attitude of some Non-Aligned States. In general, it seemed that solidarity among the Non-Aligned States was declining towards the end of the 1970s. Moderate members were more willing to apply human rights principles to a broader category of States, notably the Soviet bloc [*inter alia* in reaction to the 1979 invasion of Afghanistan by the Soviet Union] and selected Third World States.<sup>43</sup> In the particular case of Argentina, support for that country on the part of the Non-Aligned States seemed to be decreasing, largely due to Argentina’s own attitude with respect to these States. As Guest wrote:

‘(...) the Junta viewed the Nonaligned Movement with considerable ambivalence. It despised the least developed nations, and often broke ranks with them. A comprehensive analysis produced by the Argentinian Foreign Ministry in 1980 would recall that the Junta had increased its commercial ties with hated South Africa and adopted an ‘ambiguous’ position on liberation movements and Palestinian rights. This was a snub to the Nonaligned.’<sup>44</sup>

Finally, as was the case in 1967, the enlargement of the Commission in 1980 from 32 to 43 Members institutionalised these new political majorities, which Tolley described as follows:

‘[e]nlarging the membership from 32 to 43 brought to Geneva new representatives with a broader substantive perspective and a commitment to improved procedures. The

41 Ibid., para. 193; reading, as far as relevant, ‘[t]he international community has a legal and moral obligation to take steps in connection with the phenomenon of disappearances of persons that is reported to occur in many parts of the world. The concerns expressed and the avenues of action proposed by the Sub-Commission (...) in its Resolution 5 B (XXXII) should be given careful consideration.’

42 Kramer and Weissbrodt, HRQ 1981, p. 19.

43 Tolley 1987, pp. 101 and 104.

44 Guest 1990, p. 136, and p. 196 ‘Argentina was a virtual pariah among the Nonaligned delegations’, also p. 25: in October 1976 Admiral Massera, a member of the Junta, proposed to send an ambassador to attend the independence ceremony of Transkei and ignored warnings that this would damage Argentina’s reputation with the Non Aligned Movement.

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Netherlands, Ghana, Costa Rica all began three year terms, and Jordan's Waleed Sadi presided as Chairman.<sup>45</sup>

The question at the 1980 session of the Commission on Human Rights thus became *what kind of action* the Commission would take. The developments of the past years suggested that United Nations action would need to be of a public nature, the 1503 procedure being abused to cover up the problem. Equally, the proposals of the Sub-Commission as well as the Expert on Missing Persons in Chile pointed in the direction of the creation of a mechanism, which would be competent to take emergency action in response to reports of disappearances. Such action would be aimed at inducing the organs and officials of a State to clarify the whereabouts of a person reported missing. Finally, the crucial issue on which the Commission had to take a decision was the question whether to establish a country-specific instrument, analogous to the Expert on Missing Persons in Chile, to examine the situation in Argentina alone or to establish a general mechanism with a mandate worldwide in scope.

The positions of the different groups of States were basically the following:<sup>46</sup>

- (1) Western States: Western States came prepared to create a strong mechanism to investigate disappearances in any part of the world. These States believed they had to take the initiative on the issue and to introduce a draft resolution. Among themselves, however, Western States could not reach agreement on the text of a resolution and they also disagreed on which States should sponsor it. Nevertheless, France introduced a draft resolution (*French draft*).<sup>47</sup> No other resolutions were introduced.
- (2) Non-Aligned/Third World States: Among the Non-Aligned States there existed considerable support for a resolution on the issue of disappearances. In general, these States were not prepared to deal as superficially with the problem of disappearances as an Argentinian draft (never formally introduced however) proposed, but neither were they prepared to accept a strong and open-ended mechanism for responding to disappearances of the type contained in the French draft.<sup>48</sup> Kramer and Weissbrodt reported that, at first, Western States seemed to have failed to take note of the Non-Aligned support in favour of 'action.'<sup>49</sup> Furthermore, according to Kramer and Weissbrodt, it became clear from the public debate on the matter that 'if the initiative surrounding the issue of disappearances was viewed as Western there was a significant danger that, for that reason alone, Third World countries

45 Tolley 1987, pp. 101 and 104. On the influence and role of Waleed Sadi, see also Guest 1990, pp. 196, 197 and 199 and Kramer and Weissbrodt, HRQ 1981, pp. 29 and 30.

46 See generally, Kramer and Weissbrodt, HRQ 1981, pp. 18 ff.

47 U.N. Doc. E/CN.4/L.1502.

48 Kramer and Weissbrodt, HRQ 1981, p. 25.

49 Ibid., pp. 22 and 23.

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might not support it. Clearly no resolution could pass the Commission without the support of a good number of Third World nations.<sup>50</sup>

- (3) Socialist States/Soviet Union: The position of socialist States was ambiguous, as it had been on previous occasions. On the one hand, these States continued to have doctrinal objections against the Commission's procedures.<sup>51</sup> On the other hand, they would not oppose a resolution when initiated and sponsored by the Non-Aligned/Third World States.

In effect, this is also what happened. Since the French draft resolution lacked even the full support of the Western group of States, some Western States approached the Third World to take the initiative, convinced as they were of the necessity to encourage the drafting of a text by Non-Aligned States even if this would weaken the draft.<sup>52</sup> A Non-Aligned/Third World initiative not only had the advantage of assuring the support of socialist States, but also of further isolating Argentina, the principal target and major opponent of a disappearances resolution. Under this scheme even Argentina, a Member of the Commission, might not want to risk voting against a resolution and it therefore opened up the possibility of adopting the resolution *by consensus*.

At the same time, the possibility (and desire<sup>53</sup>) to adopt a resolution by consensus provided an opportunity for the Government of Argentina to avoid being added to the small list of pariah States – in particular the 'unholy trinity' of South Africa, Israel and Chile – for which country-specific mechanisms had been established. Arguing that the creation of a country-specific mechanism would be discriminatory, the Government of Argentina effectively succeeded in channelling Commission action towards the adoption of a mechanism with a general mandate.<sup>54</sup> Moreover, it successfully lobbied for the deletion of express references to the types of action the proposed mechanism would be able to take.<sup>55</sup>

The ultimate result of the negotiations in the Commission was the adoption, without a vote, of Resolution 20 (XXVI) on 29 February 1980. The resolution provided:

'to establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances.'<sup>56</sup>

This phrase, together with such injunctions as 'bearing in mind the need to be able to respond effectively to information that comes before it and to carry out its work with

50 Ibid., pp. 24 and 25.

51 De Frouville reported that Socialist States rejected the French draft resolution as being contrary to Article 2 paragraph 7 of the Charter, De Frouville 1996, p. 24.

52 Kramer and Weissbrodt, HRQ 1981, p. 25. The States were Australia, Canada and the Netherlands.

53 Rodley, EHRLR 1997, p. 6.

54 Lempinen 2001, pp. 139-144.

55 Rodley, EHRLR 1997, p. 6.

56 Para. 1.

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discretion' or 'to perform [its] functions in an effective and expeditious manner', constituted the core of the mandate of the newly established Working Group.

*III.3.1.2 The Establishment of the Special Rapporteur on the Question of Torture*

The establishment of the Special Rapporteur on Torture in 1985 also has its roots in events and United Nations initiatives taking place in the 1970s.<sup>57</sup> Firstly, NGO campaigns launched at the beginning of the 1970s created the necessary context of awareness and interest in which political initiatives in relation to the phenomenon of torture could be successfully deployed. Secondly, the *coup d'état* in Chile in September 1973 provided the spark for concrete political action within the United Nations. During the period 1973-1977 the focal point of these political activities would be the General Assembly, resulting, *inter alia*, in the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (1975; *Declaration on Torture*)<sup>58</sup> and the decision to request the Commission on Human Rights to draft the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (*Convention against Torture*), which was finally adopted in 1984.<sup>59</sup>

At the same time, until 1980 the General Assembly would show restraint when it came to developing implementation mechanisms or procedures.<sup>60</sup> The use of the term 'implementation' had been carefully avoided in such documents as the 1975 Declaration on Torture or other resolutions adopted on the same topic. Nevertheless, according to Rodley, an embryonic mandate for the Commission on Human Rights to embark on implementation was still provided. In particular, General Assembly Resolution 3453 (XXX) of 9 December 1975 requested the Commission to 'study the question of torture and all necessary steps for (...) ensuring the effective observance of'<sup>61</sup> the Declaration on Torture. However, it would not be until after the successful completion of the Convention against Torture – which provided for (optional) mechanisms of implementation – that the Commission acted to create an extra-conventional implementation mechanism in the form of a Special Rapporteur on Torture.

Meanwhile, in 1974 the Commission on Human Rights had approved the decision of the Sub-Commission to have an agenda item entitled: 'Question of the human rights of persons subjected to any form of detention or imprisonment.'<sup>62</sup> This new agenda item had been instituted following the consideration of the confidential report of the working group on individual communications (under the 1503 procedure), which drew

57 For a more detailed description of events and initiatives, see Rodley 1999, *passim*.

58 G.A. Res. 3452 (XXX) of 9 December 1979.

59 G.A. Res. 39/46 of 10 December 1984.

60 In that year, the General Assembly requested the Commission to include in the draft Convention against Torture 'provisions for the effective implementation of the future convention.' These requests were renewed in 1981 and 1982 respectively. G.A. Res. 35/178 of 15 December 1980; 36/60 of 25 November 1981 and 37/193 of 18 December 1982.

61 [Emphasis added]. See Rodley 1999, p. 39.

62 C.H.R. Dec. 6 (XXX) of 6 March 1974.

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the Sub-Commission's attention to the situation of political prisoners, who were often tortured or maltreated. In particular, the initiative stemmed from concern regarding the apparent lack of action taken under the 1503 procedure.<sup>63</sup>

Under the agenda item the Sub-Commission proposed to annually review information regarding the treatment of prisoners in general and political prisoners in particular. The review would take into account information from Governments, intergovernmental organisations and NGOs in consultative status with ECOSOC.<sup>64</sup> As observed by Rodley, the stage seemed thus to be set for a non-confidential consideration by the Sub-Commission of information alleging torture and other violations of the human rights of prisoners. However, in practice the debate in the full Sub-Commission would still focus on general types of practices rather than specific countries engaged in them: in a synopsis prepared annually by the Secretariat 'anonymous non-governmental organisations made charges against anonymous Governments.'<sup>65</sup> In 1976 the Sub-Commission requested authorisation from the Commission to establish a so-called pre-sessional working group (authorisation was needed because the establishment would have financial implications) in the hope that discussions in this working group would be focusing more on concrete cases of violations of the rights of prisoners. From 1977 to 1980 the Commission would each year withhold its consent.

In 1981 the Sub-Commission circumvented the 'blockade' of the Commission by establishing a sessional working group, which did not require prior authorisation from the parent body. It thereby opened up new, albeit limited (one half-day session<sup>66</sup>) possibilities for country-specific denunciations concerning violations of the rights of prisoners, including torture. After being re-established in 1982 this working group formulated a number of recommendations to the full Sub-Commission that could bring closer the goal of dealing with concrete situations of torture. Some of these recommendations were subsequently adopted by the Sub-Commission in its Resolution 1982/10 of 7 September 1982. In this resolution the Sub-Commission, *inter alia*, envisaged that, unless the Commission on Human Rights were to assume the task, the sessional working group, at its next session (1983), would give special attention to hearing and receiving information concerning the extent of and facts relating to torture or other cruel, inhuman or degrading treatment or punishment. Also, it requested additional time for the working group to perform its functions.

As the Commission on Human Rights had started dealing with the themes of disappearances (1980) and arbitrary executions (1982), it was clear that the Sub-Commission hinted that similar action might be taken by that body in respect of torture

63 See Zuijdwijk 1982, p. 305. The initiative may be regarded as one of those developments contributing to the gradual opening up of the 1235 procedure towards the end of the 1970s. Also supra Chapter II.4.4.

64 S.C. Res. 7 (XXVII) of 20 August 1974.

65 See Rodley 1999, p. 142.

66 The working group had only four one-hour meetings, most of the last hour being taken up by the process of adopting the group's report. *Ibid.*, p. 144.

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or, alternatively, in the absence of Commission action, that the sessional working group of the Sub-Commission might assume this responsibility in its place.<sup>67</sup>

However, as it had done in previous years, the Commission on Human Rights showed reluctance in assuming or authorising others to assume monitoring competences on the topic of torture. It explicitly requested the Sub-Commission to defer the implementation of its Resolution 1982/10.<sup>68</sup> An important factor behind this request for deferral has certainly been the Commission's deep involvement in the drafting process of the Convention against Torture and the fear of many delegations that simultaneous discussions on extra-conventional monitoring mechanisms could be counterproductive to this process.<sup>69</sup>

As a matter of fact, once the Commission had finished drafting the Convention against Torture in 1984, the Assistant Secretary-General for Human Rights, Mr Herndl, in his closing statement to the Fortieth Session of the Commission on Human Rights, suggested the establishment of a thematic mechanism on torture:

'In the area of standard-setting, the Commission had forwarded to the Council, for transmission to the Assembly, the draft of a future convention against torture and other cruel, inhuman or degrading treatment or punishment. That must surely be considered one of the current session's prime achievements.'<sup>70</sup>

(...)

'There were certain other issues to which the Commission might wish to give attention in the future. (...) Of the three fundamental phenomena, hitherto identified within the Commission, affecting the right to life – namely, summary executions, disappearances and torture, *torture would seem to be in need of a fact-finding mechanism of its own, particularly since the Commission's work on a draft convention against torture had been completed.*'<sup>71</sup>

This suggestion was immediately picked at the Commission's next session in 1985 when the outgoing Chairman of the Commission, Mr Kooijmans (the Netherlands), used his traditional opening speech to bring up the topic of a fact-finding mechanism on torture. In his statement, he made clear that an instrument against torture in the form of a treaty, though commendable, would not be sufficient since 'some governments might choose not to become a party to it; but they would not thereby be released from the peremptory norm of international law which strictly forbade torture or similar degrading treatment under any circumstances.'<sup>72</sup> In particular, Kooijmans had in mind the situation in which non-signatory Governments of the Convention against Torture and/or Governments refusing to recognise the optional part of the implementation

<sup>67</sup> Ibid.

<sup>68</sup> C.H.R. Dec. 1983/104 of 4 March 1983.

<sup>69</sup> Rodley 1999, p. 144. Rodley mentions as additional factors a lack of time to discuss in depth the Sub-Commission's proposal and the fact that the Commission had just adopted a resolution on the proper role of the Sub-Commission.

<sup>70</sup> U.N. Doc. E/CN.4/1984/SR.63, para. 41.

<sup>71</sup> Ibid., paras. 47 and 48 [emphasis added].

<sup>72</sup> U.N. Doc. E/CN.4/1985/SR.1, para. 6.

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machinery it contains would still not be subjected to international monitoring procedures dealing with the phenomenon of torture. To fill the gap, he argued, that 'the Commission should consider the desirability of setting up monitoring machinery so as to be informed of the occurrence of torture and receive suggestions for dealing more effectively with that despicable practice.' At the same time, he appealed to the Commission that '[t]he existence of such machinery should never be used as an argument for not ratifying the Convention, as it was to be hoped that eventually the Convention's implementation machinery would be universally accepted.<sup>73</sup> Finally, repeating what Herndl had said the previous year, he suggested that the monitoring mechanism envisaged could be modelled after the existing procedures on involuntary disappearances, summary executions and extra-judicial killings.<sup>74</sup>

Kooijmans' considerations and arguments set the scene for the ensuing debate in the Commission, which would focus in particular on the desirability of having two different types of monitoring mechanisms, one conventional and the other extra-conventional, existing side by side.

A great number of (Western) Governments spoke out in favour of the establishment of a Special Rapporteur on Torture, their main argument being precisely to complement the monitoring machinery of the Convention, at least until the moment it had entered into force and would be functioning in an effective manner.<sup>75</sup> A draft resolution proposing the appointment of the Special Rapporteur on Torture was then introduced by Argentina.<sup>76</sup> The representative of that country motivated that initiative as follows:

'During the debate on agenda item 10, many delegations had stressed the need to adopt, as a matter of urgency, appropriate measures to put an end to the odious practice of torture, whose elimination constituted a real challenge to the international community. The sponsors of the draft resolution considered that, for the *purposes of consciousness-raising and strengthening the means of combating the scourge of torture*, it would be useful to appoint a special rapporteur.'<sup>77</sup>

The Governments which were critical of this proposal basically relied on the argument that the timing of the project was unfortunate now that the Convention against Torture had just been adopted and opened for signature/ratification. Interestingly, these Governments took great care to clothe their arguments in such a manner as to avoid creating the impression that they opposed United Nations action on torture.<sup>78</sup> Thus, the

<sup>73</sup> Ibid., para. 7.

<sup>74</sup> Ibid.

<sup>75</sup> U.N. Docs. E/CN.4/1985/SR.28, para. 6 (the Netherlands), para. 53 (Canada); E/CN.4/1985/SR.30, para. 2 (Bolivia), para. 28 (France), para. 42 (Federal Republic of Germany), para. 67 (Ireland), paras. 83 and 84 (Australia), para. 92 (Argentina), para. 103 (Spain); E/CN.4/1985/SR.31, para. 6 (Austria); E/CN.4/1985/SR.33, para. 2 (the United States); E/CN.4/1985/SR.46/Add.1, paras. 25-30 (Norway), para. 57 (Finland); E/CN.4/1985/SR.49, para. 98 (Denmark).

<sup>76</sup> U.N. Doc. E/CN.4/1985/L.44/Rev.1 and U.N. Doc. E/CN.4/1985/SR.55, para. 50.

<sup>77</sup> Ibid. [emphasis added].

<sup>78</sup> Similarly as the General Assembly began dealing with the topic of torture in 1973, delegations felt neither able to defend its use nor did they question its existence. See Rodley 1999, p. 21.

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Government of Tanzania stated that it '*supported the concept underlying the draft resolution*', but '*felt that it was too early to appoint a special rapporteur (...) the Convention against Torture must first be signed and enter into force. (...) In short, the idea of appointing a special rapporteur was a good one, but the time was not right.*'<sup>79</sup> In this connection the same Government questioned the relevance and the purpose of having a Special Rapporteur. So did the Government of Cameroon, which '*had no difficulty with the substance of the draft resolution*', but '*did not see the specific purpose of the proposed mandate. The Convention Against Torture already established machinery, which had been the subject of lengthy discussions; that machinery must first be put to the test.*'<sup>80</sup>

In contradistinction to the draft resolution providing for the establishment of the Working Group on Enforced or Involuntary Disappearances, which was adopted without a vote, no consensus could be achieved on the Argentine draft proposing the establishment of a Special Rapporteur on Torture. Tanzania requested a vote on the draft, which at the request of the representative of the Netherlands was taken by roll-call, thereby ensuring that the vote of each Member of the Commission would be inserted in the public record. As no Government wished to be associated with the practice of torture, this had the effect that those Governments opposing the mechanism chose to give expression to their objections by abstaining. The draft resolution was still adopted by 30 votes to none, with 12 abstentions, as Resolution 1985/33. Besides Tanzania and Cameroon, other States abstaining were China, Congo, Liberia, Mozambique, the Philippines and Syria as well as the Socialist States (Bulgaria, the German Democratic Republic, Ukraine and the Soviet Union).<sup>81</sup> On 30 May 1985 ECOSOC subsequently '*rubber-stamped*' the decision of the Commission without a vote.<sup>82</sup>

The mandate of the newly created Special Rapporteur on Torture was based on broadly similar injunctions as the mandate of the Working Group of Enforced or Involuntary Disappearances after which it had been modelled. Thus, the Special Rapporteur was '*to examine questions relevant to torture*'; he was '*to bear in mind the need to be able to respond effectively to credible and reliable information that comes before him and to carry out his work with discretion.*'<sup>83</sup> But there were also some differences, notably the emphasis on the credibility and reliability of the information coming before the Special Rapporteur and, in particular, the range of sources he would be allowed to consult. This was restricted to the named categories of '*Governments as well as specialised agencies, intergovernmental organisations and non-governmental organisations*' and did not include the remainder category of '*other reliable sources*' included in the mandate of the Working Group on Enforced or Involuntary Disappearances.<sup>84</sup> However, as will be seen in the relevant sections below, these more restrictive

79 U.N. Doc. E/CN.4/1985/SR.55, para. 57 [emphasis added].

80 Ibid., paras. 55 and 60 [emphasis added].

81 Ibid., paras. 61-64. See also De Frouville 1996, p. 26.

82 ECOSOC Dec. 1985/144.

83 C.H.R. Res. 1985/33, paras. 1 and 6.

84 Ibid., para. 3.

formulations do not seem to have negatively influenced the Special Rapporteur's capacity to take cognizance of and react upon information relating to (individual) cases of torture. During the first five years of the existence of the mandate, the Special Rapporteur's main priority might well have been to carve out a distinct identity for his mandate and to prove that it complements rather than duplicates the implementation activities of the Committee against Torture pursuant to the Convention against Torture. Throughout the analysis of the practice of the Special Rapporteur, in particular in respect of the implementation of the competences under his mandate, the 'coexistence' argument will be highlighted as a politically relevant factor to be taken into account.

### III.3.1.3 *The Establishment of the Working Group on Arbitrary Detention*

As explained above, during the 1970s different organs of the United Nations started to pay attention to the rights of prisoners, especially with regard to the prohibition of torture. In this context, it was believed that the drawing up of a set of principles containing safeguards against arbitrary arrest and detention might help to combat the occurrence of torture. Thus, after having adopted the Declaration on Torture in 1975, the General Assembly requested the Commission on Human Rights to prepare 'a body of principles for the protection of all persons under any form of detention or imprisonment on the basis of the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the draft principles on freedom from arbitrary arrest and detention contained therein.'<sup>85</sup> As was the case with the topic of torture, the question of the implementation of the envisaged principles would as yet remain unaddressed.<sup>86</sup> In 1976 the Commission dealt with the General Assembly's request and delegated the task of preparing a draft body of principles to the Sub-Commission. A draft text was then submitted to the Commission in 1978 and adopted by it in 1979 to be forwarded through ECOSOC to the General Assembly. However, it would require another nine years of discussion in the General Assembly before it finally adopted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment on 9 December 1988 (*1988 Body of Principles*).<sup>87</sup>

At the same time, the elaboration of the 1988 Body of Principles would decisively influence the course of the discussions in the Commission and Sub-Commission when these organs considered creating an extra-conventional monitoring mechanism on the topic of administrative detention in the middle of the 1980s.

On 11 March 1985 the Commission on Human Rights adopted Resolution 1985/16 in which it requested the Sub-Commission to analyse available information about the practice of administrative detention, *i.e.* detention in the absence of any kind of trial and to make recommendations on the subject. Subsequently, the Sub-Commission appointed Mr Louis Joinet (France) as its Special Rapporteur (*Special Rapporteur of*

<sup>85</sup> G.A. Res. 3453 (XXX) of 9 December 1975. The study referred to by the General Assembly had been prepared for the Commission as early as 1964.

<sup>86</sup> Rodley 1999, p. 39. *Supra* Chapter III.3.1.2.

<sup>87</sup> G.A. Res. 43/173. For more details Rodley 1999, pp.326 ff.

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the Sub-Commission) and requested him to prepare an explanatory paper suggesting how it might carry out its responsibilities under Commission Resolution 1985/16.<sup>88</sup> The process thus set in motion finally resulted in a *Report on the practice of administrative detention* submitted by Mr Joinet to the full Sub-Commission in 1990.<sup>89</sup> The Sub-Commission examined the report and its recommendations and adopted Resolution 1990/22 entitled *Question of human rights of persons subjected to any form of detention or imprisonment: report of Mr Louis Joinet*.<sup>90</sup> In this resolution the Sub-Commission invited the Commission to consider the different proposals contained in the recommendations made by the Special Rapporteur of the Sub-Commission. Furthermore, it invited the Commission to act upon one of them (if it so chooses), or to request the Sub-Commission to elaborate further on the proposal which it deemed the most appropriate. The proposals contained in Mr Joinet's report were in particular the following:

‘A strong need for suitable machinery is, however, evident on the practical level, to prevent and report violations, in law or in fact, of international standards concerning the *legality of all forms of detention*.

(...)

To deal with this lack of machinery, four recommendations are proposed as options:

- (a) Option I: Appointment of a Special Rapporteur with a mandate covering administrative detention alone
- (b) Option II: Appointment of a Special Rapporteur with a mandate covering detention both by an administrative authority and by a judicial authority
- (c) Option III: Appointment of a Special Rapporteur with a specific mandate for situations of *arbitrary* or *unauthorised* detention of any kind
- (d) Option IV (variant of Option III): Appointment of a five-person working group rather than a single Special Rapporteur (...)<sup>91</sup>

It might be noted that the Special Rapporteur of the Sub-Commission had expanded the scope of the study not only to cover the original subject of administrative detention, but to include all forms of detention.<sup>92</sup> In 1990 he gave two reasons for broadening the scope of the study: firstly, because in the course of the process the General Assembly had adopted Resolution 43/173 containing the 1988 Body of Principles, which made the drafting of specific guidelines on administrative detention inappropriate; and, secondly, since ‘in any case it would have been offensive to discriminate

<sup>88</sup> S.C. Dec. 1985/110 of 29 August 1985.

<sup>89</sup> U.N. Doc. E/CN.4/Sub.2/1990/29 and Add.1 Other (previous) reports of the Special Rapporteur of the Sub-Commission can be found in U.N. Docs. E/CN.4/Sub.2/1987/16, E/CN.4/Sub.2/1988/12 and E/CN.4/Sub.2/1989/27.

<sup>90</sup> S.C. Res. 1990/22.

<sup>91</sup> U.N. Doc. E/CN.4/Sub.2/1990/29/Add.1, paras. 86 and 89 [emphasis added].

<sup>92</sup> In a preliminary report submitted in 1987 it was still suggested to draw up specific guidelines on the treatment of persons subjected to administrative detention.

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according to the type of detention, as if there could be different degrees of the right to be properly treated.<sup>93</sup>

In line with this decision, the Special Rapporteur of the Sub-Commission commented on his first option that:

‘This was the original recommendation. Since the Commission’s Resolution 1985/16 essentially concerned administrative detention, this option has the merit of strictly fulfilling its request; but it no longer seems suitable for the situation as it stands, since as stated above the [1988] Body of Principles now applies to all forms of detention, which are subjected to identical international standards.’<sup>94</sup>

With respect to the second option he commented that that one would be in conformity with the decision of the General Assembly to cease to make any formal distinction between the two kinds of detention. Concerning the third option it was indicated that the task entrusted to one Special Rapporteur was so large that his mandate should be restricted to scrutinising serious violations only, leaving aside the general responsibility for places of detention. For this reason the Special Rapporteur of the Sub-Commission had included the notions *arbitrary* and *unauthorised* detention: the former would refer to detention which totally lacked any legal basis and the latter would apply to detention with a legal basis or under legal conditions more limited or restrictive than those allowed, under certain conditions, by international instruments. He also indicated that under this option the risk of abuse in cases of administrative detention would be covered.<sup>95</sup>

The fourth option, a variant of the third, was moulded after the example of the Working Group on Enforced or Involuntary Disappearances of the Commission ‘in the hope that it might be more effective, by being better able to deal with the variety of categories of detention (...).’ According to the Special Rapporteur of the Sub-Commission this option would make it possible not only to keep abreast of the total situation concerning arbitrary detention, but also for each individual member of the Group to be concerned with a particular category of detention. He proposed that each of the five experts could deal with one of the following categories: detention by a judicial authority, detention by an administrative authority, detention of juveniles (administrative or legal), administrative detention of asylum seekers and refugees and categories of detention not covered by the others.<sup>96</sup>

At its Forty-seventh Session in 1991 the Commission on Human Rights discussed the different proposals and recommendations made by Mr Joinet.<sup>97</sup> In the post-Cold War political setting the time seemed ripe for the further expansion of the thematic approach, notably in respect of situations of detention, the last remaining area of

93 U.N. Doc. E/CN.4/Sub.2/1990/29, para. 83.

94 U.N. Doc. E/CN.4/Sub.2/1990/29/Add.1, para. 89.

95 Ibid., para. 89.

96 Ibid., paras. 89 and 90.

97 See also U.N. Doc. E/CN.4/1991/SR.25, para. 89.

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individual rights subject to widespread abuse not yet covered by a monitoring mechanism of the Commission.

The recommendations of Mr Joinet largely survived the political discussions in the Commission, in particular his recommendation to deal with all forms of detention.<sup>98</sup> The adoption of the 1988 Body of Principles by the General Assembly proved an important catalyst in this process, providing the Commission with a justification for its broad approach. As the Commission would eventually put it:

‘Recognising, as Mr Joinet noted in his recommendations, that since his study was first initiated, the General Assembly has, in its Resolution 43/173, of 9 December 1988 adopted the Body of Principles (...), which also covers administrative detention and that, therefore, there is no longer a purpose in treating administrative detention independently, even if, in certain cases, the procedure of administrative detention gives rise to specific abuses.’<sup>99</sup>

During the discussions in the Commission the delegation of the United States strongly lobbied for the establishment of a mechanism dealing specifically with the situation of political prisoners.<sup>100</sup> But any proposition containing these words would render the establishment of a monitoring mechanism impossible. A more flexible approach, leaving undetermined the particular categories of prisoners or detained persons falling under the mandate, subsequently paved the way for a consensus.<sup>101</sup> As had already been suggested by Mr Joinet, such an approach would also make it possible, for example, to deal with the question of the detention of asylum seekers (in Western States).<sup>102</sup>

As North-South confrontations increasingly filled the political vacuum created by the disappearance of the ‘traditional’ East-West divide, developing nations insisted on the creation of a five-member working group rather than a single special rapporteur, which seemed to have the preference of Western delegations<sup>103</sup> Different reasons may have lain behind this preference for a five-member working group, especially the desire to limit the potential impact and flexibility of the mechanism by creating a heavier structure that would be more difficult to operate in organisational and bureaucratic (human and financial resources) terms. Also, some Governments might have hoped to keep a degree of political control over the group’s functioning knowing that the establishment of a five-member working group implied the applicability of the

98 As emphasised by several delegations, amongst others the United States of America, U.N. Doc. E/CN.4/1991/SR.26, paras. 9-12; Switzerland, U.N. Doc. E/CN.4/1991/SR.29, para. 51; Austria, U.N. Doc. E/CN.4/1991/SR.31, para. 18; Spain, U.N. Doc. E/CN.4/1991/SR.31, para. 56 and Germany, U.N. Doc. E/CN.4/1991/SR.52, para. 146.

99 C.H.R. Res. 1991/42 of 5 March 1991 (Preamble).

100 U.N. Doc. E/CN.4/1991/SR.26, paras. 9-12.

101 See also HRM, No. 12 (1991), p. 9.

102 See also Statement by the Minority Rights Group, U.N. Doc. E/CN.4/1991/SR.28, para. 99-104.

103 See, for example, U.N. Doc. E/CN.4/1991/SR.31, paras. 39-42 (Peru).

principle of equal geographical distribution and that their region would thus be 'represented' with one member in the group.<sup>104</sup>

Finally, a compromise could be reached on a proposal which aimed at creating 'for a three-year period, a working group composed of five independent experts, *with the task of investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards* set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the State concerned.' Moreover, the compromise provided that the working group 'in carrying out its mandate, *shall seek and receive information from Governments, inter-governmental and non-governmental organisations, and shall receive information from the individuals concerned, their families and their representatives.*'<sup>105</sup> The proposal was subsequently adopted without a vote as Resolution 1991/42 of 5 March 1991. Compared to the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture, there was both continuity and change in the injunctions making up the core of the mandate of the newly created Working Group on Arbitrary Detention. The most important novel elements being its capacity 'to investigate cases' and the explicit reference to individuals as a source of information. It will be seen below how the Working Group interpreted these injunctions in practice.

#### *III.3.1.4 Intermediate Assessment: Relevance of the Plea of Domestic Jurisdiction*

The above analysis of the establishment of the three selected thematic mechanisms reveals that the plea of domestic jurisdiction has not been the dominating factor during the discussions and negotiations. Clearly, the breakthrough came with the establishment of the Working Group on Enforced or Involuntary Disappearances from which other thematic procedures, including the Special Rapporteur on Torture and the Working Group on Arbitrary Detention, have benefited. In this respect, it is worthwhile recalling the following findings.

First, it has been shown that the Government of Argentina, rather than relying on the argument of domestic jurisdiction to prevent the United Nations from taking up the human rights situation in the country, chose to deploy a strategy aimed at manipulating and slowing down United Nations procedures, in particular the 1503 procedure. In this strategy, there was no place for the plea of domestic jurisdiction not even when the discussion concerning disappearances in Argentina was transferred from the confidential 1503 procedure to the public debate in the context of the 1235 procedure.

Secondly, as regards the 1235 procedure, the Government's main objective was to avoid the institutionalisation of Argentina in the United Nations and since, for the reasons spelled out above, United Nations action had become almost unavoidable, the strategy to achieve that objective was to play the discrimination or double standards card rather than the plea of domestic jurisdiction. As will be shown in more detail in

<sup>104</sup> On the preference for a working group, also *infra* Chapter III.3.2.2.

<sup>105</sup> Draft resolution U.N. Doc. E/CN.4/1991/L.77, see U.N. Doc. E/CN.4/1991/SR.52, para. 143 [emphasis added].

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Chapter IV.2.1, another part of that same strategy was aimed at limiting (rather than stopping) the scope of the mandate of the Working Group on Enforced or Involuntary Disappearances, in particular as regards the competence to take cognizance of individual cases of disappearances.

Thirdly, the establishment of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention further corroborate the process of the erosion of the plea of domestic jurisdiction as a bar to the jurisdiction of the political organs of the United Nations in respect of situations revealing a consistent pattern of violations of human rights. As was shown, the establishment of monitoring mechanisms on the ‘themes’ of torture and arbitrary detention was generally regarded as a logical step following the elaboration of international standards by the United Nations. The general revulsion against torture, a practice that no Government wanted to be openly associated with, certainly helped to obtain the necessary support to create a Special Rapporteur, even though monitoring machinery had been developed under the Convention against Torture. The supporters of a mechanism with respect to arbitrary detention benefited from changing political realities after the end of the Cold War.

### **III.3.2 Development of the Mandates of the Three Selected Mechanisms**

#### *III.3.2.1 Introduction*

It is evident that in the absence of specific references to the types of action or techniques the Working Group on Enforced and Involuntary Disappearances would be authorised to adopt, the concrete scope and contents of the mandate would be shaped first and foremost by the Working Group itself, through trial and error. While the vagueness of the formulations used in Resolution 20 (XXXVI) would not seem to place any significant restrictions on the Working Group’s potential for future growth, it is important to bear in mind that it may also be considered an indication of the absence of political consensus on the specific competences of United Nations organs. Therefore, as pointed out in more general terms in Chapter III.2.2, the evolution of the mandate of the Working Group would seem to depend primarily on the Group’s ability to ensure the necessary political support for its approaches.

In defining the mandate of the Special Rapporteur on Torture the Commission on Human Rights essentially relied on the same formulations it had used previously in the case of the Working Group on Enforced or Involuntary Disappearances. This obviously had the advantage for the Special Rapporteur that, in choosing his methods of operation, he could build on the precedents set by the Working Group during the first five years of its existence. On the other hand, there still seemed to be a need to operate politically carefully not only because the vague formulations continued to hide formal political and legal (ideologically-based) differences of opinion, but also because of the

sensitivity of the topic of torture and the fact that the single body of a Special Rapporteur might be politically more vulnerable than a five-member working group.<sup>106</sup>

The Working Group on Arbitrary Detention, established after the end of the Cold War, clearly benefited from the disappearance of the ideological confrontation between the East and the West. This manifested itself, *inter alia*, in the positions taken by Governments on such issues as the status of the individual in international law. For the Socialist States the formal and explicit recognition of the competence of thematic procedures to take cognizance of and to examine individual complaints concerning violations of human rights had always been unacceptable. However, by 1991 that opposition had apparently disappeared, resulting in the establishment of a procedure with a mandate 'to investigate cases' of arbitrary detention and to receive complaints from 'individuals'.<sup>107</sup>

In the present chapter, an attempt has been made to show the development of the more general aspects of the mandates of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. Particular emphasis has been placed on the practice of the Working Group on Enforced or Involuntary Disappearances and on the manner in which this mechanism has implemented and justified the implementation of the terms of Resolution 20 (XXXVI). These findings have been complemented with examples taken from the practice of the other two selected procedures in order to assess the degree of acceptance, in fact as well as in law, of the competences of the United Nations in the field of human rights. The following topics will be considered:

- (1) Structure, composition and independence of thematic procedures/status of thematic procedures as 'Experts on Missions for the United Nations' [Chapter III.3.2.2];
- (2) Duration of the mandate of thematic procedures [Chapter III.3.2.3];
- (3) Competence *ratione personae*: questions relating to the actor held responsible for violations by thematic procedures [Chapter III.3.2.4];
- (4) Competence *ratione materiae*: questions relating to the subject-matter of the mandates of thematic procedures, e.g. the definition of the term 'disappearance' or 'disappeared person' as well as the normative international framework prohibiting disappearances applied by the Working Group on Enforced or Involuntary Disappearances [Chapter III.3.2.5].

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<sup>106</sup> As experienced by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – the second thematic procedure established by the Commission in 1982 – in 1983. See Kooijmans 1983, p. 189.

<sup>107</sup> See also De Frouville 1996, p. 42.

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III.3.2.2 *Structure, Composition and Independence of Thematic Procedures/Status of Thematic Procedures as 'Experts on Missions for the United Nations'*

III.3.2.2.1 Structure, Composition and Independence of Thematic Procedures

The 1980 French draft resolution proposed to invite '*the Secretary-General to appoint, in consultation with its Chairman [of the Commission, JG] three experts of international standing in their individual capacities*' to review reports and information concerning disappearances.<sup>108</sup> This proposal was not maintained, however. Instead, it was agreed in Resolution 20 (XXXVI) '*to establish (...) a working group, consisting of five of its [the Commission's, JG] members, to serve as experts in their individual capacities (...)*'.<sup>109</sup> The Commission requested its Chairman to appoint the members of the Working Group.<sup>110</sup>

Over the years the Commission on Human Rights has established different types of human rights monitoring bodies. In an attempt to classify these different types of mechanisms Pastor Ridruejo proposed to make a triple distinction: (1) *ad hoc* bodies and pre-existing bodies; (2) collective bodies and individual bodies; and (3) bodies composed of independent experts and bodies composed of governmental representatives.<sup>111</sup> This classification applies to all special procedures of the Commission on Human Rights, *i.e.* to country-specific procedures as well as thematic procedures.

In practice, the preference for a particular type of mechanism and the composition of a mechanism is primarily a political question. Political factors rather than predetermined (rational) legal criteria determine the outcome of negotiations in the Commission. For example, when the Commission on Human Rights established the *Ad Hoc* Working Group on Chile in 1975, it had been agreed that Eastern European States would not be represented on the Working Group, even though, according to established United Nations practice, a body composed of five members implied the applicability of the principle of equitable geographical distribution.<sup>112</sup> This concession had been made to the Government of Chile in turn for its agreement to admit the Group to Chilean territory.<sup>113</sup> Another example was the mission consisting of governmental representatives sent to Cuba in 1988. By that time, the usual practice for the Commission on Human Rights to respond to country situations was to nominate an individual acting in his personal capacities as Special Rapporteur. In the case of Cuba, the Commission deviated from this practice in order to obtain a consensus, including the approval of the Government of Cuba, in an otherwise highly politicised climate.<sup>114</sup>

108 U.N. Doc. E/CN.4/L.1502, para. 1 [emphasis added].

109 C.H.R. Res. 20 (XXXVI), para. 1 [emphasis added].

110 *Ibid.*, para. 2.

111 Pastor Ridruejo, Hague Receuil 1991, p. 229.

112 The principle according to which all five regions of the United Nations should be represented equitably: *i.e.* the group of Western States and Others, the group of Eastern European States, the group of African States, the group of Asian States and the group of Latin-American States respectively.

113 See Zuijdwijk 1982, pp. 304 ff.

114 Pastor Ridruejo, Hague Receuil 1991, p. 230.

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However, although it is impossible to predict in advance what shape and composition a monitoring body of the Commission will have in a concrete case, if one looks at the general picture of human rights monitoring bodies established by the Commission (and the General Assembly) over a longer period of time, one might still identify a pattern.

Broadly speaking, one could distinguish two different phases: the period between 1963 and 1979/1980 and the period from 1979/1980 onwards.

During the first phase, the United Nations showed a clear preference for *ad hoc* bodies of a collective nature, normally composed of individuals with a governmental background and normally allowing for the principle of equitable geographical distribution to apply. The members of these bodies were appointed by the President or Chairman of the United Nations' organ involved. Thus, the mission sent to South Vietnam by the General Assembly in 1963, the first United Nations fact-finding mission ever, was composed of governmental representatives from Afghanistan, Brazil, Ceylon, Costa Rica, Dahomey, Morocco and Nepal appointed by the President of the General Assembly;<sup>115</sup> the *Ad Hoc* Working Group on Southern Africa established by the Commission on Human Rights in 1967 was originally composed of five 'experts' from States which were Members of the Commission at that time, these experts being appointed by the Chairman of the Commission;<sup>116</sup> the General Assembly Special Committee to investigate Israeli practices affecting the human rights of the population of the occupied territories established in 1968 was composed of three governmental representatives from Ceylon (Sri Lanka), Somalia and Yugoslavia appointed by the President of the General Assembly;<sup>117</sup> the *Ad Hoc* Working Group on Chile mentioned above was composed of five members of the Commission acting in their personal capacities appointed by the Chairman of the Commission and, finally, the 1980 Working Group of the Commission on Human Rights on Enforced or Involuntary Disappearances was again composed of five members of the Commission acting in their personal capacities appointed by the Chairman of the Commission. Moreover, the members of the Working Group on Enforced or Involuntary Disappearances were indeed recruited from the five regions of the United Nations.

One may already note that during this first phase the Commission on Human Rights decided to appoint the members of working groups in their personal or individual capacities, rather than as representatives of their States.

115 The mission was sent at the invitation of the Government of South Vietnam and took place in October 1963; the report was submitted to the General Assembly in December 1963, but never discussed. On 13 December 1963 the General Assembly decided to discontinue consideration of the matter, since the Government had in the meantime been overthrown. Zuijdwijk 1982, pp. 232 ff. Also Kamminga 1992, p. 92.

116 As Zuijdwijk reported, the number of experts was not specified in the resolution. The Working Group originally consisted of five members, who were chosen from the five regional groups. The Asian group renounced its seat on the Working Group in favour of a second member from the group of African States. In 1968 the Commission enlarged the membership to six persons, so as to give the group of Asian States one member (while maintaining two members from the group of African States). Zuijdwijk 1982, pp. 244 ff.

117 In fact, the Vice-President appointed the members, since the President died before any appointments could be made. See *Ibid.*, pp. 281 ff.

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The second phase, 1979/1980-onwards, may be characterised by a clear preference for *ad hoc* bodies of an individual nature and the requirement that the mandate holder be an individual of recognised international standing rather than an individual with a governmental background acting in his personal capacities. The task of appointing the mandate holders remained in the hands of the Chairman of the Commission on Human Rights. The principle of equitable geographical distribution – applying automatically to the composition of collective bodies – took on a different shape and became relevant in relation to guaranteeing a balance in the regional origin of the different individual mandate holders.

This second phase was heralded by the establishment of a Special Rapporteur on the situation of human rights in Chile and two experts to study the fate of missing persons in Chile replacing the 1975 *Ad Hoc* Working Group as well as the establishment of a Special Rapporteur on the situation of human rights in Equatorial Guinea in 1979.<sup>118</sup> These events correspond to the beginning of the period of the relatively rapid expansion of country-specific mechanisms under the 1235 procedure described in Chapter II.4.4 and the gradual emergence of the thematic approach at the beginning of the 1980s.<sup>119</sup> The second phase also includes the period after the end of the Cold War, *i.e.* from 1989 onwards, characterised by a less hostile attitude of the Soviet Union,<sup>120</sup> which marked the definite 'breakthrough' of the phenomenon of thematic procedures. The preferred type of mechanism throughout the second phase has been the Special Rapporteur.<sup>121</sup>

As stated above, the precise reasons lying behind a decision to establish an individual body rather than a collective one must first and foremost be sought in the circumstances surrounding a concrete case at hand, since such a decision is always the outcome of negotiations involving different political interests. Nevertheless, it is generally assumed that – besides the broader political context – a number of factors have induced the Commission to show an increasing preference for establishing individual bodies rather than collective ones.

Thus, Pastor Ridruejo suggested that the preference for individual bodies had been prompted by a wish to improve the efficacy of procedures. According to him, the 'heavier' structure of a working group, which is generally more costly and more complicated to operate, is potentially less effective than that of a Special Rapporteur.<sup>122</sup> In particular he pointed out that the efficacy of a collective body may be undermined

118 C.H.R. Res. 11 (XXXV) of 6 March 1979 (Chile) and C.H.R. Res. 15 (XXXV) of 13 March 1979 (Equatorial Guinea).

119 The period described by Alston as one in which 'the procedures developed earlier have been applied in an increasingly creative and tailored fashion to an ever-widening range of countries and types of violations.' Alston 1992, p. 139.

120 See HRM, No. 7 (1989).

121 But other types of individual organs have been established: special representative, special envoy and independent expert...

122 A collective body generally requires more bureaucratic support than an individual body. Moreover, the functioning of a collective body necessitates the organisation of sessions – usually three times a year, the election of a Chairman/Rapporteur, the need to clarify its working methods etc. See Pastor Ridruejo, Hague Recueil 1991, p. 231 and De Frouville 1996, pp. 32 and 33.

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by the prevalence of consensus decision-making, which inevitably entails negotiations and compromises.<sup>123</sup>

The preference for individual bodies may also be a result of efforts to strengthen the independence of the Commission's human rights monitoring bodies. These efforts must be seen in the light of the fact that the members of working groups, albeit acting in their personal capacities, normally have a governmental background. As Pastor Ridruejo remarked:

'L'on peut comprendre très bien la préférence de la Commission pour les organes *ad hoc* indépendants, car cela est de nature à renforcer l'indépendance de l'enquête et du rapport élaboré. Il y a là sans doute un signe favorable de dépolitisation de l'action de la Commission. L'expérience montre par ailleurs que les rapports de ces organes sont les plus engagés et les plus courageux quant au fond de la situation.'<sup>124</sup>

In any case, the establishment of individual bodies required the formulation of a new depoliticised criterion for eligibility as a mandate holder. From 1979/1980 onwards, the Commission on Human Rights has generally abandoned the requirement that mandate holders be recruited from amongst its Members. Instead it has formulated the criterion, found in most resolutions, including resolution 1985/33 establishing the Special Rapporteur on Torture, that they must be 'individuals of recognised international standing.'<sup>125</sup> This new criterion paved the way for individuals not directly affiliated to Governments to serve on the human rights monitoring bodies of the Commission. This development had the *effect* of reinforcing the independence of the human rights monitoring bodies.

From this perspective, it is not surprising that, occasionally, some States have attempted to turn back the practice of establishing Special Rapporteurs. For example, in a 1990 debate in the Commission on 'Enhancement of Procedures', the Non-Aligned Movement proposed to transform the four existing thematic Special Rapporteurs in five-member working groups, which should moreover be composed of diplomats only. The objective of this proposal had been precisely to slow down the procedures.<sup>126</sup>

The existence of a formal criterion for eligibility as a mandate holder should not make us lose sight of the fact that the selection of mandate holders remains an essentially political process. Mandate holders are normally appointed by the Chairman of the Commission after consultation with the other members of the Bureau of the

<sup>123</sup> Pastor Ridruejo, Hague Receuil 1991, p. 231; also Van Dongen 1986, p. 477.

<sup>124</sup> Pastor Ridruejo, Hague Receuil 1991, p. 230. 'One may very well understand the preference of the Commission to establish independent *ad hoc* bodies, because these will normally reinforce the independence of the inquiry and the report. This preference certainly constitutes a positive indication of the depoliticisation of the Commission's actions. Moreover, practice shows that the reports of these bodies are more engaged as well as more courageous in getting to the bottom of the problem' [author's translation].

<sup>125</sup> C.H.R. Res. 1985/33, para. 2. Also the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions established pursuant to Commission Resolution 1982/29 of 11 March 1982.

<sup>126</sup> HRM, No. 8 (1990), pp. 3-28 and Alston 1992, pp. 198 and 199.

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Commission. It may be reminded that the Bureau of the Commission consists of three Vice-Chairmen, a Rapporteur and the Chairman of the Commission himself, thus conforming to the principle of equitable geographical distribution. Practical considerations seem to have prevailed in the choice for this procedure. Since the Commission is composed of 53 Member States (41 until 1991), it would not be easy to agree on an appointment in plenary session. Moreover, discussions or controversies concerning the candidature of a certain individual in plenary session would diminish his authority from the outset.<sup>127</sup>

Towards the end of the 1990s the Commission on Human Rights further clarified and refined the normal procedure for the selection of mandate holders as well as the nomination process. In 1998 the Bureau of the Fifty-fourth Session of the Commission on Human Rights undertook a comprehensive review of the Commission's subsidiary mechanisms. In relation to the question of the selection and nomination of mandate holders, the Bureau reached three important conclusions. First, it observed that

'In selecting office-holders, and in setting and applying the basic terms and conditions governing the operation of special procedures, *the paramount considerations should be those of the personal and technical qualifications of the individuals concerned*, and of the *independence, objectivity and overall integrity of the mechanisms*. These qualities should at all times be demanded of the office-holders, *recognised and respected by all actors, governmental and non-governmental*, in their dealings with the mechanisms, and strenuously defended and protected by the Commission, which should at the same time, refrain from any action prejudicial to these principles.'<sup>128</sup>

Secondly, in terms of the hierarchy of organs the report of the Bureau clearly established that:

'Recognising that the *special procedures are subsidiary creations of the Commission, expected to report to and be otherwise exclusively accountable to it*, the Bureau recommends that, as a general rule, appointment to special procedures posts be made by the Chair of the Commission, following consultations with the Commission's Bureau.'<sup>129</sup>

Thirdly, the report proposed that the Office of the High Commissioner for Human Rights (*OHCHR*) should develop and maintain a roster of qualified persons and that 'Governments, NGOs and other appropriate parties should be invited to suggest names (...), which would be an important (*though not exclusive*) resource for the Commission and its Chair (...).'<sup>130</sup>

<sup>127</sup> See also Pastor Ridruejo, Hague Recueil 1991, pp. 232 and 233.

<sup>128</sup> U.N. Doc. E/CN.4/1999/104, para. 28 [emphasis added]. See also General Assembly Resolution 50/174 of 22 December 1995 in which it affirmed 'the importance of the objectivity, independence and discretion of the special rapporteurs and representatives on thematic issues, as well as of the members of the working groups, in carrying out their mandates.'

<sup>129</sup> U.N. Doc. E/CN.4/1999/104, para. 29 [emphasis added].

<sup>130</sup> Ibid., para. 30 [emphasis added].

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The essence of the above proposals was subsequently integrated in the 2000 report of the intersessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights, which the Commission approved and declared 'to implement comprehensively and in its entirety' in its decision 2000/109 of 26 April 2000. The report of the intersessional open-ended Working Group recommended that:

- (1) 'To assist in the selection of the most suitable individuals to hold mandates, a list of possible candidates should be maintained by the Office of the High Commissioner for Human Rights (...)',<sup>131</sup>
- (2) 'selection of mandate holders will continue to be the responsibility of the Chairperson following formal consultation with the Bureau and the regional groups through the regional coordinators. In appointing mandate holders, *the professional and personal qualities of the individual* – expertise and experience in the area of the mandate, integrity, independence and impartiality – *will be of paramount importance. Due regard should also be had to an overall geographical and gender balance among the mandate holders, as well as to ensuring familiarity with different legal systems.* The Chairpersons would give priority consideration to suitable names on the list; however, this should not exclude – exceptionally, if the requirements of a particular post justify it – consideration of additional nominations put forward for a specific vacancy. An individual should not hold more than one mandate at a given time.'<sup>132</sup>

Two further remarks may be made with respect to the current procedure for selecting and nominating mandate holders. First, it must be emphasised that, however imperfect the present procedure may be (arguably it should be possible to further depoliticise the procedure<sup>133</sup>), it nevertheless attempts to obtain the largest possible agreement among States before making a nomination. In addition, the procedure has also made it possible even for NGOs to put forward and lobby successfully for preferred candidatures.<sup>134</sup> Second, in an inherently political environment like the Commission on Human Rights tendencies aimed at regaining more political control over the selection and nomination

<sup>131</sup> U.N. Doc. E/CN.4/2000/112, para. 6. The list should moreover 'comprise the names and curricula vitae of highly qualified individuals who would be suitable and willing to serve as rapporteurs in particular areas. The list should be constantly updated and every effort made to ensure that it is representative of different geographical areas and different legal systems, as well as having a gender balance. To ensure as extensive a list as possible, contributions should be encouraged from States and from all appropriate sources including non-governmental organizations in consultative status with the Economic and Social Council; the Secretariat is also encouraged to contribute names of suitable persons. The list should be posted on the Web site of the Office of the High Commissioner for Human Rights (OHCHR), as well as being available at the Office.'

<sup>132</sup> Ibid., para. 7 [emphasis added].

<sup>133</sup> Alston 1992, pp. 166 and 167.

<sup>134</sup> See De Frouville 1996, p. 33, mentioning Baere Waly Ndiaye, Special Rapporteur on Summary or Arbitrary Executions (1992-1998); Nigel Rodley, Special Rapporteur on Torture (1993-2001); or René Degni-Segui, Special Rapporteur on Rwanda (1994-1997).

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of mandate holders continue to exist. For example, in 1993 a resolution was introduced by Iran and several other Asian States providing that more attention should be paid to ensuring a regional balance when appointing independent experts.<sup>135</sup> More recently, the Commission has on two occasions directly nominated a mandate holder in a resolution.<sup>136</sup> Some observers and governmental delegations have been critical of this development, which they fear has the effect of undermining the present consensus concerning nominations and could lead to the practice that certain groups of States impose their own 'experts'.<sup>137</sup>

The above-described 'evolution' of the nature and membership of United Nations human rights monitoring bodies enables us to better understand the structure and composition of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and, albeit to a lesser extent, the Working Group on Arbitrary Detention and to place it in its historical context. With hindsight, it could be said that the establishment of the Working Group in 1980 still falls within the first phase of development of United Nations human rights monitoring bodies. Its original structure and composition are a reminder of the fact that, at that time at least, States had not yet accepted the idea of an independent United Nations human rights monitoring body. This point is clearly illustrated by the rejection of the French proposal to establish three independent experts. The principal rationale behind a five-member working group seems indeed to have been a desire to keep some form of political control over the body via 'regional' representatives or at least to downplay its efficacy by anticipating that the natural tendency for a collective body to search for a consensus would end up at the level of the lowest common denominator. The representative of the Soviet Union probably had this idea in mind when he declared after the adoption of Resolution 20 (XXXVI) that the Working Group should work by strict consensus.<sup>138</sup>

The decision to establish 'an individual of recognised international standing' as Special Rapporteur on Torture confirmed the Commission's preference for this type of body, after having established a Special Rapporteur on Extrajudicial, Summary or

135 C.H.R. Res. 1993/94 of 11 March 1993, adopted without a vote. After the adoption of the resolution, the delegations from the United States of America and Canada declared that it should not be interpreted as establishing regional quotas for the nomination of mandate holders and that the paramount consideration should continue to be the personal qualifications of the nominee; the wish to ensure the participation of persons from all regions of the world should not be incompatible with that criterion. See De Frouville 1996, pp. 34 and 35; also HRM, No. 20 (1993), pp. 3 ff.

136 C.H.R. Res. 2000/82 of 26 April 2000 appointing Mr Fantu Cheru as Independent Expert on the effects of structural adjustment policies and foreign debt and the enjoyment of all human rights; C.H.R. Res. 2002/68 of 25 April 2002 appointing Mr Doudou Diène as Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. In the past the Commission had only once made a direct nomination: in 1979 it appointed Mr A. Diéyé, who had been a member of the *Ad Hoc* Working Group on Chile as Special Rapporteur on Chile.

137 See HRM, Nos. 49-50 (2000), pp. 2 ff. and No. 57-58 (2002), p. 29: mentioning the delegations of the Czech Republic and Spain.

138 An argument repeated by the Soviet Union in 1981. See Kramer and Weissbrodt, HRQ 1981, pp. 18 ff. at p. 31 and U.N. Doc. E/CN.4/SR.1617, paras. 81 ff.

Arbitrary Executions in 1982, as well as the trend towards appointing independent individuals acting in their personal capacities.

From a historical perspective, the establishment of a working group rather than a special rapporteur on arbitrary detention ten years later may be regarded as an exception to the normal practice of the Commission at that particular point in time. As explained above, the establishment of the Working Group on Arbitrary Detention coincided with the post-Cold War geopolitical changes and, particularly, with attempts of the Non-Aligned Movement to limit the impact of human rights monitoring procedures.<sup>139</sup> At the same time, Resolution 1991/42 establishing the Working Group on Arbitrary Detention provided that the group be composed of '*five independent experts*', a notable (formal) difference with the formulation used at the time of the establishment of the Working Group on Enforced or Involuntary Disappearances.

Over the years, however, the tendency of the Commission to strengthen the independence of the mandate holders of United Nations special procedures has also benefited the Working Group on Enforced or Involuntary Disappearances. In 1995 the Commission formally abandoned the criterion that the Working Group be composed of five members of the Commission. Following the example of the Working Group on Arbitrary Detention, it decided that the Working Group shall be made up of independent experts.<sup>140</sup> The principle of equitable geographical distribution continued to be applicable as before.<sup>141</sup>

Interestingly, one of the recommendations of the review process conducted by the Bureau of the Fifty-fourth Session of the Commission on Human Rights (1998) had been to transform the Working Group on Enforced or Involuntary Disappearances and the Working Group on Arbitrary Detention into a Special Rapporteur on Disappearances and a Special Rapporteur on Arbitrary detention respectively.<sup>142</sup> The recommendation was part of an overall effort to rationalise the Commission's existing thematic procedures in order to respond to concerns about the proliferation of these procedures and the strains this had placed on the secretariat support system.<sup>143</sup> It concealed different political interests. States supporting the proposal – surprisingly broadly the same group of States which proposed to transform special rapporteurs in working groups of diplomats in 1990 – regarded the transformation of the five-member Working Group into a single Special Rapporteur as an opportunity to reduce the working capacity of the procedure and to marginalise its existence.<sup>144</sup> Other States, as well as NGOs, opposed the proposal and defended the existence of the Working Group precisely by referring to its broad-based regional expertise.<sup>145</sup> It must be said, however,

139 Supra Chapter III.3.2.3 (Duration of the Mandate of Thematic Procedures).

140 C.H.R. Res. 1995/38 of 3 March 1995, para. 27.

141 See also the recommendations concerning the selection of mandate holders laid down in the report of the intersessional open-ended Working Group and adopted by the Commission in its decision 2000/109.

142 U.N. Doc. E/CN.4/1999/104, para. 20, recommendations 1 (c) and 1(d).

143 Ibid., paras. 9, 10 and 19.

144 See the observations and recommendations of the so-called *Like-Minded Group* of States, U.N. Doc. E/CN.4/1999/120.

145 See, for example, Amnesty International 1999, pp. 5 and 6.

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that opposition against the transformation of working groups into special rapporteurs was much more outspoken in the case of the Working Group on Arbitrary Detention than the Working Group on Enforced or Involuntary Disappearances. For one, the Working Group on Arbitrary Detention itself joined the discussion and through its Chairman it defended its existence precisely by referring to the advantage of having regional representation:

‘With respect to the choice between a working group or a special rapporteur, [the Chairman] recalled that the Commission had originally decided to establish a working group because only experts from different regions could take due account of the specific features of the legal systems in each of those regions. Experience had shown that the participation, in country missions, of the Working Group member from the region concerned was much appreciated.’<sup>146</sup>

The full Commission could not agree on the recommendation of the Bureau and left it for consideration by its intersessional open-ended Working Group. In 2000 that Group found that ‘there is benefit in having [disappearances and arbitrary detention, JG] dealt with by working groups (each comprising of five experts from different regions) rather than by individual rapporteurs.’<sup>147</sup> It did not further specify what precise benefits it had in mind.

However, the process of rationalisation of special (thematic) procedures set in motion by the report of the Bureau of the Fifty-fourth Session finally did have some consequences for the composition of the two Working Groups as well as the individuals appointed as Special Rapporteurs. In 1999, following consideration of the report of the Bureau, the Commission adopted a Statement by its Chairman, which provided, *inter alia*, that:

‘the following steps to be implemented immediately:

(...)

(ii) to help maintain appropriate detachment and objectivity on the part of individual office-holders, and to ensure a regular infusion of new expertise and perspectives, *any individual’s tenure in a given mandate, whether thematic or country-specific, will be no more than six years.*’<sup>148</sup>

The intersessional open-ended Working Group affirmed this step in its 2000 report and motivated the appropriateness of the measure by referring to the fact that three of the five members of the Working Group on Enforced or Involuntary Disappearances have served continuously since 1980/1 and that the two others joined in 1988 and 1993 respectively and that all five members of the Working Group on Arbitrary detention

<sup>146</sup> U.N. Doc. E/CN.4/1997/SR.31, para. 29. Also Lempinen 2001, pp. 261 ff. and also Amnesty International 1999, pp. 5 and 6.

<sup>147</sup> U.N. Doc. E/CN.4/2000/112, para. 16.

<sup>148</sup> Statement by the Chairperson on behalf of the Commission on Human Rights (55th session), Review of Mechanisms, adopted by consensus on 28 April 1999, para. 7 [emphasis added].

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had been in their post since the Group's establishment in 1991. While the measure would affect both working groups and special rapporteurs, the intersessional open-ended Working Group recognised that:

'in order to provide continuity transitional measures will be necessary in the case of the two working groups. It recommends that the turnover in both groups should be accomplished in incremental steps over a three-year transition period. A replacement of two members in year one, two in year two and one in year three would provide for continuity during the transitional period.'<sup>149</sup>

In the case of the Working Group on Enforced or Involuntary Disappearances this resulted in the resignation of two long-term members in 2000: Agha Hilaly from Pakistan and Jonas Foli from Ghana, both having been a member of the Working Group since 1981; they were replaced by Anuar Zainal Abidin (Malaysia)<sup>150</sup> and M'Bayo Adekanye (Nigeria). In 2001 Manfred Nowak from Austria, a member since 1993, resigned and was replaced by Stephen Toope (Canada). Two other members, Ivan Tosevski (Former Yugoslav Republic of Macedonia), a member of the Working Group since its inception in 1980, and Diego Garcia-Sayan (Peru), a member since 1988, continued to form part of the Working Group in 2003.<sup>151</sup>

The turnover in the membership of the Working Group on Arbitrary Detention took place as of 2000: the original members Roberto Garretón (Chile) and Peter Uhl (Slovakia) resigned in 2000 to be replaced by Soledad Villagra (Paraguay) and Tamás Ban (Hungary) respectively; the original members Laity Kama (Senegal) and Kapil Sibal (India) were replaced in 2001 by Leïla Zerragoui (Algeria) and Seyed Mohammed Hachemi (Iran) respectively; finally, the original member Louis Joinet (France) was replaced in 2003 by Manuela Carmena Castrillo (Spain).<sup>152</sup> In 2001 the Special Rapporteur on Torture, Sir Nigel Rodley (United Kingdom), resigned from what would have been his final three-year term to be replaced by Theo van Boven (the Netherlands).<sup>153</sup>

Finally, reference must be made to the so-called '*annual meetings of special procedures mandate holders*', a practice which has its roots in the preparatory process

<sup>149</sup> U.N. Doc. E/CN.4/2000/112, paras. 17-20. A fear expressed by some NGOs was that the imposition of term limits could threaten the continuity and efficiency of the thematic mechanisms as experienced members of Working Groups and Special Rapporteurs would be obliged to leave their posts. See HRM, Nos. 49-50 (2000), pp. 125-126.

<sup>150</sup> Who was again replaced in 2003 by Saied Rajaie Khorasani (Islamic Republic of Iran).

<sup>151</sup> See U.N. Doc. E/CN.4/2003/70, para. 12. Tosevski resigned in October 2003, U.N. Doc. E/CN.4/2004/58, para. 13. Also C.H.R. Res. 2004/40 of 19 April 2004 in which the Commission explicitly recalled its decision 2000/109 and in particular the recommendations concerning time limits (two terms of three years) that should apply to all special procedures (operative paragraph 2).

<sup>152</sup> See U.N. Doc. E/CN.4/2001/14, para. 2; U.N. Doc. E/CN.4/2002/77, paras. 4-6; U.N. Doc. E/CN.4/2003/8, paras. 4 and 5.

<sup>153</sup> Rodley had served in the post since April 1993 when the first appointed Special Rapporteur, Peter Kooijmans (the Netherlands), resigned. See C.H.R. 1993/40 (5 March 1993), para. 23. Also U.N. Doc. E/CN.4/2002/76, Annex II (letter of resignation dated 15 October 2001).

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of the 1993 World Conference on Human Rights.<sup>154</sup> At this occasion individual special procedures mandate holders/chairpersons of working groups first convened to discuss matters of common concern, which they believed should be taken up by the Conference. This was also an occasion for them to show that the Commission's special procedures had grown to become something more than a loosely affiliated group of *ad hoc* procedures. In a joint declaration presented to the World Conference on Human Rights, the different mandate holders, for the first time, presented themselves as a 'system of human rights protection':

'This broad range of procedures constitutes a unique and crucial element in the implementation of the body of specific standards that have been adopted by universal consensus through the United Nations General Assembly. *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.* Over the years, the area of concern has been enlarged step by step, techniques have been discovered and refined, and new methods of work have been adopted.'<sup>155</sup>

Subsequently, the World Conference on Human Rights used the same terminology as it '[underlined] the importance of preserving and strengthening the *system of special procedures, rapporteurs, representatives, experts and working groups of the Commission*' and gave its formal blessing to the institutionalisation of meetings of special procedures mandate holders:

'The procedures and mechanisms should be enabled to harmonise and rationalise their work through periodic meetings.'<sup>156</sup>

The first formal annual meeting of special procedures mandate holders was held in May 1995.<sup>157</sup>

However weak in terms of resources and competences, the value of the institutionalisation of cooperation between the different individual mandate holders/chairpersons of working groups should not to be underestimated. It not only provided a forum to discuss matters of common concern, to harmonise activities and to initiate joint-activities,<sup>158</sup> it also had an important symbolic value in raising the political profile and independence of the United Nations mechanisms as a whole. It is part of a larger development, which Ignatieff has adequately described as an advocacy

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154 The possibility to hold such meetings was already suggested in the course of the 1980s following the positive experiences of the persons chairing the human rights treaty bodies who had been holding annual meetings since 1984, but the matter was then left to be decided by the 1993 World Conference. On the annual meetings of the persons chairing the human rights treaty bodies, see Boerefijn 1999, pp. 159ff. Also Lempinen 2001, pp. 236ff.

155 U.N. Doc. A/CONF.157/9 [emphasis added].

156 Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, Part I, para. 95.

157 For the report of the first meeting of special procedures mandate holders, see U.N. Doc. E/CN.4/1995/5 annex.

158 On joint activities, see *infra* Chapters IV.5.2 (Urgent Appeals) and IV.6.2 (Country Visits).

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revolution.<sup>159</sup> This revolution not only refers to the work of NGOs pressuring States to practice what they preach, but also to the emergence of an independent international human rights bureaucracy, not in the last place as a result of the creation of the post of High Commissioner for Human Rights and the transformation of the relatively unknown United Nations Centre for Human Rights into the Office of the High Commissioner for Human Rights. According to Ignatieff, 'after 40 years [writing in 1999, JG] of deference to the sovereignty of States, *the United Nations system* itself is beginning to create its own cadre of human rights activists under the leadership of the High Commissioner for Human Rights.'<sup>160</sup>

This development has not gone unnoticed by Governments and it has become one of the underlying factors of the ongoing review process referred to earlier on in this chapter. Although nothing has yet been decided, it is important to understand the dynamics behind these review discussions, which have started in the 1990s and have gained in intensity following the 1993 World Conference on Human Rights. Basically, the situation may be characterised as one of saturation, a situation which the Bureau of the Fifty-Fourth Session of the Commission on Human Rights, in its report of December 1998, formulated as follows:

'the intricate network of special procedures which today plays such a central role in the work of the Commission is itself the product of a series of separate resolutions or decisions adopted over a period of some 30 years.

The Commission, and the cause of human rights, have been well served by this incremental approach which has enabled the United Nations to adapt continuously to emerging needs and problems. At the same time, the size and complexity of the system and the accelerating pace of its growth in response to constantly emerging new demands have given rise to increasing concerns about the coherence and overall effectiveness of the Commission's mechanisms, and have led to growing strains on the Secretariat support structure for the United Nations human rights programme. The Commission's decision to undertake this review reflected a recognition that such concerns could only be addressed by taking a careful look at its network of subsidiary mechanisms as a whole.'<sup>161</sup>

Although the review process takes place under the guise of 'rationalising' or 'enhancing the effectiveness of the Commission's special procedures', these headings mean different things to different groups of States. For some States the review process has been the occasion to attempt to place the Commission's subsidiary mechanisms increasingly under the control of Governments and to limit the influence of such autonomous processes as the annual meetings of special procedures mandate holders as a source of new initiatives.<sup>162</sup> Particularly prominent in this respect has been a group

<sup>159</sup> Ignatieff 1999, p. 10.

<sup>160</sup> Ibid., p. 10 [emphasis added].

<sup>161</sup> U.N. Doc. E/CN.4/1999/104, paras. 9 and 10.

<sup>162</sup> Lempinen 2001, pp. 236-238. Other efforts have been seeking to restrict the activities of NGOs, see also a position paper of the Like-Minded Group contained in U.N. Doc. E/CN.4/1999/120. *Infra* Chapter IV.6.1.2.

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of States loosely organised since the end of the 1990s and known as the Like-Minded Group of States (LMG). The Like-Minded Group includes States such as Algeria, China, Cuba, Egypt, Indonesia, Iran, Libya, Malaysia, Pakistan, the Philippines, Saudi Arabia and the Sudan.<sup>163</sup>

The current situation is probably best described as a stalemate. The further development of thematic procedures would seem to require important reforms, in particular as regards financial and personal resources, in order to make the mechanisms more effective. The need for reform has been recognised at the highest political levels, including the Secretary-General of the United Nations,<sup>164</sup> but the emergence of the increasingly independent 'caste' of special procedures as well as their increasing moral prestige as the custodians of human rights and fundamental freedoms has also made Governments more vigilant to change the current *status-quo*.

III.3.2.2.2 Status of Thematic Procedures as 'Experts on Missions for the United Nations'

It is a basic rule of international law that the State and its diplomatic representatives enjoy (a certain degree of) immunity from the jurisdiction of foreign States. In theoretical terms, the rule is grounded in the principle of the sovereign equality of States and the principle of reciprocity, but first and foremost the rule flows from the practical necessity of ensuring the efficient conduct of relations between States.<sup>165</sup> This practical necessity also explains why violations of the law concerning the immunities of States, particularly violations concerning the immunities of State representatives, are taken so seriously. As the International Court of Justice noted in the *US Diplomatic and Consular Staff in Tehran* case:

'There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed *reciprocal obligations* for that purpose.'<sup>166</sup>

Violations of this rule, according to the Court 'cannot fail to undermine the *edifice of law carefully constructed by mankind over a period of centuries*, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.'<sup>167</sup>

<sup>163</sup> See HRM, Nos. 49-50 (2000), p.127.

<sup>164</sup> See also U.N. Doc. A/57/387, Strengthening of the United Nations: an agenda for further change, Report of the Secretary-General, 9 September 2002, paras. 55-57.

<sup>165</sup> Shaw 1997, pp. 491 ff. and 923 ff.

<sup>166</sup> United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, para. 91 [emphasis added].

<sup>167</sup> Ibid., para. 92 [emphasis added].

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Under modern international law international organisations and their representatives may also enjoy certain privileges and immunities vis-à-vis States. Privileges and immunities of international organisations, however, must be distinguished from those of States, in particular as regards the basis on which they are normally granted. As Shaw observed, international organisations

‘are not in a position of ‘sovereign equality’ and (...) they are unable to grant immunities as a reciprocal gesture. (...) The true basis for the immunities accorded to international organisations is that they are necessitated by the effective exercise of their functions.’<sup>168</sup>

In other words, functionality rather reciprocity constitutes the basis for the recognition of privileges and immunities of international organisations. Moreover, the status of privileges and immunities of international organisations and their representatives under customary international law is far from clear. Usually, the matter is dealt with in the form of a treaty between the organisation and States. The treaty will thus determine the scope of the privileges and immunities in the light of functional necessity.

In the case of the United Nations Article 105 of the Charter constitutes the legal basis for the enjoyment of privileges and immunities by the Organisation and its representatives. That Article provides:

- ‘1. The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are *necessary for the independent exercise of their functions in connexion with the Organisation*.
3. The *General Assembly* may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose *conventions to the Members of the United Nations* for this purpose.’<sup>169</sup>

Acting in accordance with Article 105 paragraph 3 of the Charter the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (*Privileges Convention*) on 13 February 1946 and proposed it for accession by the Member States of the United Nations.<sup>170</sup> The Convention regulates, *inter alia*, the inviolability of the United Nations premises, archives and documents (Articles II and III), the privileges and immunities of representatives of Member States to the principal and subsidiary organs of the United Nations (Article IV), the privileges and immunities of United Nations Officials (Article V) and the privileges and immunities of so-called *Experts on Missions for the United Nations* (Article VI).

<sup>168</sup> Shaw 1997, p. 924.

<sup>169</sup> [Emphasis added]

<sup>170</sup> Final Article, section 31 of the Convention on the Privileges and Immunities of the United Nations. By 2003 147 States had become parties to the Convention. Note that this general convention has itself been supplemented by bilateral agreements, in particular headquarters agreements and host agreements. See Shaw 1997, pp. 924 ff.

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The thematic procedures of the Commission on Human Rights are generally considered to come under the category of 'Experts on missions for the United Nations.' Consequently, the individual members of the Working Group on Enforced or Involuntary Disappearances, acting in their personal capacities, as well as the members of the other two thematic procedures studied in this research, *i.e.* the Special Rapporteur on Torture and the members of the Working Group on Arbitrary Detention are entitled to the privileges and immunities laid down in Article VI section 22 of the Privileges Convention. That section provides:

'Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are *necessary for the independent exercise of their functions during the period of their missions*, including the time spent on journeys in connexion with their missions. In particular they shall be accorded:

- (a.) immunity from personal arrest or detention and from seizure of their personal baggage;
- (b.) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
- (c.) inviolability for all papers and documents;
- (d.) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (e.) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
- (f.) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.<sup>171</sup>

Article VI, section 23 provides for a waiver of privileges and immunities by the Secretary-General of the United Nations:

'Privileges and immunities are granted to experts *in the interests of the United Nations and not for the personal benefit of the individuals themselves*. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.'<sup>172</sup>

In two Advisory Opinions the International Court of Justice has confirmed and further clarified the status of United Nations Special Rapporteurs as 'experts on missions for the United Nations.' By analogy, these findings are also relevant in respect of the status of the individual members of United Nations working groups.

The first Advisory Opinion, delivered on 15 December 1989, concerned the case of Mr Dumitru Mazilu, a Romanian national, in his capacity as Special Rapporteur of

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171 [Emphasis added]

172 [Emphasis added]

the Sub-Commission.<sup>173</sup> The Court had been requested to examine the *applicability* of Article VI, section 22 of the Privileges Convention to Mr Mazilu as Special Rapporteur of the Sub-Commission.<sup>174</sup> In its unanimous opinion, the Court confirmed and clarified the following points:

(1) The question of the applicability of Article VI, section 22 of the Privileges Convention *ratione personae*, *i.e.* the meaning of the term 'experts performing missions for the United Nations' and the functional basis for granting privileges and immunities: 'the purpose of section 22 is (...) evident, namely to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organisation, and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions' (...) *The essence of the matter lies not in their administrative position but in the nature of their mission.*'

The Court noted that, in practice, the United Nations has had occasion to entrust missions – increasingly varied in nature – to persons not having the status of United Nations officials. In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity have been set up within the Organisation. In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of the committees and commissions, have been regarded as experts on missions within the meaning of section 22.

(2) The question of the applicability of Article VI, section 22 of the Privileges Convention *ratione loci*, *i.e.* the meaning of the phrase '*during the period of their missions, including the time spent on journeys*:' the word '*mission*' must be understood in its present-day meaning embracing in general the tasks entrusted to a person, whether or not those tasks involve travel; section 22 uses the word in a general sense; while some experts have necessarily to travel in order to perform their tasks, others can perform them without travel; in either case the intent of section 22 is to ensure the independence of such experts in the interests of the Organisation by according them the privileges and immunities necessary for the purpose; consequently, section 22 is applicable to every expert on mission, whether or not he travels.

(3) The opposability of the privileges and immunities contained in Article VI section 22 of the Privileges Convention to the State of which the expert is a national/or on the territory of which he resides: the Court found a distinction between Article IV on the one hand and the Articles V and VI on the other; the former article regulates the privileges and immunities of State representatives and is therefore not opposable to the State of which he is a national or of which he is or has been the representative; the latter two articles are *conferred with a view to ensuring the independence of interna-*

<sup>173</sup> Advisory Opinion on the Applicability of Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989.

<sup>174</sup> The Advisory Opinion had been requested by ECOSOC under Resolution 1989/75 of 24 May 1989.

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*tional officials and experts in the interests of the Organisation*; this independence must be observed by *all States*, including the State of nationality and the State of residence.

Interestingly, the Court also noted that some States Parties to the Privileges Convention had entered reservations to certain provisions of Articles V and VI as regards their nationals or persons habitually resident in their territory. According to the Court, this confirmed that in the absence of such reservations the privileges and immunities of experts on mission are opposable to all States, including the State of which they are nationals or where they reside. The Court concluded that the privileges and immunities may be invoked as against the State of nationality or of residence unless a reservation to section 22 of the Privileges Convention has been validly made by the State.

(4) The applicability of Article VI section 22 of the Privileges Convention to Special Rapporteurs of the Sub-Commission, including the question of the applicability of Article VI section 22 of the Privileges Convention *ratione temporis*: the Court emphasised that the situation of rapporteurs of the Sub-Commission is one which touches on the legal position of rapporteurs in general and is thus one of importance for the whole of the United Nations system; against this background the Court found that the status of members of the Sub-Commission is neither that of a representative of a Member State nor that of a United Nations official, and since they perform independently for the Sub-Commission functions contemplated in its remit, the members of the Sub-Commission must be regarded as experts on missions within the meaning of section 22; the Court further noted that in accordance with United Nations practice the Sub-Commission has from time to time appointed (special) rapporteurs and entrusted them with a research mission; these rapporteurs are normally recruited from among the members of the Sub-Commission, but occasionally there have been appointments from outside the Sub-Commission or special rapporteurs have only completed their task after the expiration of their membership; decisive, according to the Court, is the fact that the status of special rapporteurs is neither that of a representative of a Member State nor that of a United Nations official, and since they carry out research independency on behalf of the United Nations, they must be regarded as experts on missions, even in the event they are not or no longer members of the Sub-Commission.<sup>175</sup>

The second Advisory Opinion, delivered on 29 April 1999, concerned the case of Mr Dato' Param Cumaraswamy, a Malaysian national, in his capacity as Special Rapporteur on the Independence of Judges and Lawyers of the Commission on Human Rights.<sup>176</sup> This case is of particular relevance to the present study since it concerns the

<sup>175</sup> In the concrete case of Mr Mazilu, the Court concluded that he must be regarded as an expert on mission within the meaning of Article VI section 22 of the Privileges Convention and that section is accordingly applicable to him – *ratione temporis* aspect.

<sup>176</sup> Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999, pp. 62-91.

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legal status of a thematic mandate holder. The basic facts of the case were as follows:<sup>177</sup>

Pursuant to Commission Resolution 1994/41 of 4 March 1994 Mr Kumaraswamy had been appointed United Nations Special Rapporteur on the Independence of Judges and Lawyers for a period of three years. Pursuant to Commission Resolution 1997/23 of 11 April 1997 the Commission renewed his mandate for an additional period of three years.

In November 1995, *i.e.* during his first term of office as Special Rapporteur, Mr Kumaraswamy gave an interview to the magazine *International Commercial Litigation* in which he commented on certain litigations that had been carried out before Malaysian courts. As a result of an article published on the basis of that interview law suits were filed against him in Malaysian courts in 1996 and 1997 alleging that he had used defamatory language in the interview and seeking damages to a total amount of US \$112 million.

Thereupon, the Secretary-General of the United Nations asserted that Mr Kumaraswamy had given the interview in his official capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers and was, therefore, entitled to the privileges and immunities accorded to 'experts on missions for the United Nations' contained in Article VI, section 22 of the Privileges Convention, in particular to immunity from legal process of every kind 'in respect of words spoken or written and acts done by them in the course of the performance of their mission [section 22, paragraph b.]'

The Malaysian courts, however, found, *inter alia*, that the Secretary-General's assertion of immunity from legal process for Mr Kumaraswamy constituted merely an opinion with scant probative value and no binding force. Moreover, it was held that the certificate issued by the Minister of Foreign Affairs left room for interpretation. Later, the Malaysian courts effectively denied Mr Kumaraswamy immunity from legal process, since he was neither a sovereign nor a fully-fledged diplomat, but merely 'an unpaid, part-time provider of information'.

As the United Nations and the Government of Malaysia failed to reach an out-of-court settlement concerning Mr Kumaraswamy's immunity from legal process, the former decided to refer the matter to ECOSOC with a view to having the Council to request an Advisory Opinion from the International Court of Justice. On 5 August 1998 ECOSOC adopted decision 1998/297, requesting an Advisory Opinion from the International Court of Justice

'on the applicability of Article VI, section 22, of the [Privileges Convention] in the case of Dato' Param Kumaraswamy as Special Rapporteur of the Commission on Human

<sup>177</sup> See the Note by the Secretary-General concerning the Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, U.N. Doc. E/1998/94. Also the annual reports of the Special Rapporteur himself: U.N. Docs. E/CN.4/1997/32, paras. 122-128; E/CN.4/1998/39; E/CN.4/1999/60, paras. 115-120; E/CN.4/2000/61, paras. 196-207; E/CN.4/2001/65, paras. 144-150 and E/CN.4/2002/72, para. 122.

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Rights on the Independence of Judges and Lawyers, taking into account the circumstances set out in the paragraphs 1 to 15 of the Note of the Secretary-General,<sup>178</sup> and on the legal obligations of Malaysia in this case.<sup>179</sup>

Malaysia has been a Party to the Privileges Convention, without reservation, since 28 October 1957. Consequently, ECOSOC explicitly invoked Article VIII, section 30 of the Privileges Convention as the legal basis for its request.<sup>180</sup> This Article provides, as far as is relevant:

'(...) If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. *The opinion given by the Court shall be accepted as decisive by the parties.*'<sup>181</sup>

The Court understood the question submitted by ECOSOC as follows:

'The request of the Council therefore does not only pertain to the threshold question whether Mr Cumaraswamy was and is an expert on mission in the sense of Article VI section 22, of the [Privileges Convention] but, in the event of an affirmative answer to this question, to the consequences of that finding in the circumstances of the case.'<sup>182</sup>

In answering this question, the Court had occasion to shed its light on five important aspects of the enjoyment of privileges and immunities by experts on missions for the United Nations.

(1) The applicability of Article VI section 22 to Special Rapporteurs of the United Nations Commission on Human Rights *in general*:

The Court reaffirmed its Opinion in the *Mazilu* Case, in particular its findings concerning the applicability of section 22 *ratione personae, ratione temporis and ratione loci*. The Court also recalled its conclusion in the *Mazilu* Case that a Special Rapporteur appointed by the Sub-Commission and entrusted with a research mission must be regarded as an 'expert on mission' within the meaning of Article VI, section 22 of the Privileges Convention and argued that:

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178 U.N. Doc. E/1998/94. The reference in the request to the note of the Secretary-General was made in order to provide the Court with the basic facts to which to refer in making its decision. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, para. 39, p. 81.

179 ECOSOC Dec. 1998/297, para. 1.

180 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, paras. 22 ff., pp. 75-76.

181 [Emphasis added]

182 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, para. 39, p.81.

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‘The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the *task of monitoring human rights violations and reporting on them*. But what is *decisive is that they have been entrusted with a mission by the United Nations* and are therefore entitled to the privileges and immunities provided for in Article VI section 22 that safeguard the independent exercise of their functions.’<sup>183</sup>

Consequently, in the light of the ‘tasks’ entrusted to Mr Kumaraswamy as Special Rapporteur pursuant to Commission Resolutions 1994/41 and 1997/23 the Court found that he must be regarded as an expert on mission within the meaning of Article VI section 22 of the Privileges Convention and ‘that by virtue of this capacity the provisions of this section were applicable to him at the time of his statements at issue, and that they continue to be applicable.’<sup>184</sup>

(2) The applicability of Article VI section 22 of the Privileges Convention in the concrete case of Mr Kumaraswamy and the circumstances playing a role in making this determination:

The Court considered the question whether, *in concreto*, the words used by Mr Kumaraswamy in the interview were *spoken in the course of the performance of his mission*, and whether he was therefore immune from legal process with respect to these words. It held that the Secretary-General of the United Nations correctly found that this had indeed been the case.<sup>185</sup> The Court based its finding on several general considerations. First and foremost, it established that:

‘The determination whether an agent of the Organisation has acted in the course of the performance of his mission depends on the facts of a particular case.’

Secondly, the Court considered the fact that Mr Kumaraswamy was *explicitly referred to* in the article in International Commercial Litigation *as the Special Rapporteur on the Independence of Judges and Lawyers*. The Court also considered the Special Rapporteur’s *annual reports* in which he set out his *working methods* and in which he expressed *concern about the independence of the Malaysian judiciary* and referred to the *proceedings initiated against him*. Furthermore, the Court was of the opinion that the Secretary-General was able to find support for his findings in the *position of the Commission on Human Rights*, which, in its various annual resolutions, had endorsed the reports and working methods of the Special Rapporteur and extended his mandate in 1997.

<sup>183</sup> Ibid., paras. 42 and 43, pp. 83 [emphasis added].

<sup>184</sup> Ibid., para. 45, pp. 83-84.

<sup>185</sup> Ibid., paras. 47-56, pp. 84-86.

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Interestingly, the Court also considered that 'it has become standard practice of Special Rapporteurs of the Commission to have contact with the media' and it referred to a letter by the High Commissioner for Human Rights stating that: 'it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work.' This finding effectively confirmed that media contacts are without prejudice to the determination whether an expert on mission acted in the performance of his mission.

(3) The role of the Secretary-General of the United Nations 'in the process of determining whether a particular mission is entitled (...) to the immunity provided for in section 22' of the Privileges Convention:

The Court considered his role 'pivotal.' Referring to his status as *chief administrative officer of the Organisation*, the Court ruled that the Secretary-General has both the authority and the responsibility to exercise the necessary protection.

Obviously, the question of the *authority* of the Secretary-General to claim the immunity of 'experts on missions for the United Nations' touches upon the (objective) legal personality of the United Nations and its status as a subject of international law. Not surprisingly, therefore, the Court explicitly referred to its Advisory Opinion in the *Reparation for Injuries* Case in which it found that:

'Upon examination of the character of the functions entrusted to the Organisation and of the nature of the missions of its agents, it becomes clear that the capacity of the Organisation to exercise a measure of functional protection of its agents arises by necessary intentment out of the Charter.'<sup>186</sup>

The Court also determined that the Secretary-General, as the chief administrative officer of the Organisation, has the *primary responsibility* to protect the interests of the United Nations and its agents, including experts on mission. The Court referred to Article VI, section 23 of the Privileges Convention, which provides that the privileges and immunities are granted to experts '*in the interests of the United Nations and not for the personal benefit of the individual themselves.*' Consequently, in exercising protection of United Nations experts on missions, the Secretary-General is in fact protecting *the mission* with which the expert in question is entrusted:

'it is up to him to assess whether [United Nations] agents acted within the scope of their *functions* and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity.'<sup>187</sup>

At the same time, the Court made clear that:

<sup>186</sup> Ibid., para. 50, pp. 84-85; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184.

<sup>187</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, para. 60, p. 87 [emphasis added].

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‘In order to ensure that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organisation and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organisation itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organisation.’<sup>188</sup>

(4) The obligations of States in respect of a finding by the Secretary-General of the United Nations of the immunity of an expert on mission, in this case the legal obligations of Malaysia in respect of the immunity from legal process of every kind claimed in respect of Mr Cumaraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers.<sup>189</sup>

First, the authority and responsibility of the Secretary-General to safeguard the interests of the United Nations entails that he has the authority and responsibility ‘to inform the Government of a Member State of his finding [of immunity of United Nations agents or experts, JG] and, where appropriate, to request it to act accordingly and, in particular to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings’;

Secondly, when seized with a case in which the immunity of an United Nations agent or expert is at issue, national courts should immediately be notified of any finding by the Secretary-General concerning that immunity;

Thirdly, the finding of the Secretary-General of the immunity of a United Nations agent or expert ‘and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.’

In the light of these findings, the Court concluded that:

‘The Governmental authorities of a *party* to the [Privileges Convention] are therefore under an obligation to convey such information to the national courts concerned, since a *proper application of the Convention* by them is dependent on such information.’<sup>190</sup>

Since the Government of Malaysia had failed to do so, the Court found that State in breach of its international obligations under Article 105 of the Charter and the Privileges Convention.

(5) The distinction between the question of the immunity of experts on missions for the United Nations and the question of the responsibility of the United Nations as an organisation:

The Court emphasised that the question of immunity from legal process of experts on missions for the United Nations must be distinguished from ‘the issue of compensa-

<sup>188</sup> Ibid., para. 51, p. 85; quoting again from *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 183.

<sup>189</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, paras. 57 ff., p. 86.

<sup>190</sup> Ibid., para. 61, p. 87 [emphasis added].

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tion for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.'

The United Nations may still be required to bear responsibility for damage caused by the actions of its agents or experts on missions. However, pursuant to Article VIII section 29 of the Privileges Convention such claims shall not be dealt with before national courts, but 'in accordance with the appropriate modes of settlement that the United Nations shall make provision for.'

In this respect, the Court explicitly held that 'all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.'<sup>191</sup>

With the *Cumaraswamy* Case any doubts concerning the enjoyment of privileges and immunities by United Nations special procedures mandate holders seem to have been resolved. At the same time, it must be said that incidents such as the one concerning Mr Cumaraswamy have remained the exception. In the specific case of the Working Group on Enforced or Involuntary Disappearances only one serious incident has occurred that could possibly have been considered a violation of the privileges and immunities of United Nations experts on mission. The incident took place during the first months of existence of the Working Group (1980) when its Iraqi Chairman Ambassador Mohamed Redha Al-Jabiri was called back to Iraq and disappeared. But this incident was dealt with without invoking the Privileges Convention. The case ended with Al-Jabiri retiring from his Government function and giving up his position as Chairman of the Working Group.<sup>192</sup>

Both the *Mazilu* Case and the *Cumaraswamy* Case show that the question of the enjoyment of privileges and immunities by experts on missions for the United Nations has been particularly acute in the relationship between an United Nations expert and the State of which he is a national. However, especially in the latter case, much more was at stake than the particular dispute between the United Nations and Malaysia concerning the legal status of Mr Cumaraswamy.

The finding by the Malaysian courts that Mr Cumaraswamy was not entitled to immunity as an expert on mission for the United Nations could have serious consequences for the system of special procedures of the Commission on Human Rights as a whole. This has been repeatedly emphasised by the special procedures mandate holders in their annual meetings from 1997 onwards.<sup>193</sup> They feared that a dangerous precedent could be set if it were entirely at the discretion of domestic courts to deter-

<sup>191</sup> Ibid., para. 66, pp. 88-89.

<sup>192</sup> The Al-Jabiri incident has been described in some detail by Guest 1990, pp. 202 ff. See also Kramer and Weissbrodt, HRQ 1981, p. 31 (footnote 19).

<sup>193</sup> Their position has always been that 'Undermining the immunity accorded to one expert constitutes an attack on the entire system and institution of United Nations human rights special procedures and mechanisms.' See U.N. Doc. E/CN.4/1998/45, para. 25 and Appendix VI containing a letter from the Chairperson of the meeting of special procedures mandate holders to the Secretary-General of the United Nations.

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mine whether a person entrusted with a mission by the United Nations would be entitled to the privileges and immunities provided for under the Privileges Convention, *i.e.* if a finding by the Secretary-General of the United Nations of the immunity of an United Nations expert had no more value before domestic courts than that of an opinion with mere probative force.<sup>194</sup>

In fact, underlying the *Cumaraswamy* Case was the fundamental question of the status of the United Nations as a subject of international law. This was also recognised by the officer-in-charge of the office of the High Commissioner/Centre for Human Rights who assured the special procedures mandate holders 'of the seriousness with which the Secretariat viewed the case because it involved an important principle for the Organization.'<sup>195</sup>

Therefore, from the perspective of the United Nations, the Advisory Opinion of the International Court of Justice is important since it confirms and strengthens the Organisation's existence as a subject of international law, capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. It did so in particular by confirming the authority and primary responsibility of the Secretary-General of the United Nations, as the chief administrative officer of the Organisation, to assert the immunity of United Nations experts and by holding that his finding of immunity can only be set aside by domestic courts for the most compelling reasons.

Although the Court did not say anything in its Advisory Opinion about the status of the Privileges Convention and the authority of the Secretary-General under customary international law, it may be assumed that its findings, at least as regards the application of the substantive law and the position of the Secretary-General, would also be applicable in the case of a difference between the United Nations and a non-Party to the Privileges Convention. This is especially so in the light of the observation of the International Court of Justice in the *Reparations for Injuries* Case that 'the rights and duties of (...) the Organisation must depend upon its *purposes and functions* as specified or implied in its constituent documents and *developed in practice*.'<sup>196</sup> As the Court observed in the *Cumaraswamy* Case, 'special Rapporteurs of the Commission usually are entrusted not only with a research mission, but *also with the task of monitoring human rights violations and reporting on them*.'<sup>197</sup> This observation could

194 Ibid. and U.N. Doc. E/CN.4/1999/3, para. 28. See also the Note by the Secretary-General concerning the Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, U.N. Doc. E/1998/94, para. 16: 'The adjudication of United Nations privileges and immunities in the national courts would be certain to have a negative effect on the independence of officials and experts, who would then have to fear that at any time, whether they were still in office or after they had left it, they could be called to account in national courts, not necessarily their own, civilly or criminally, for their words spoken or written or acts performed as officials or experts.'

195 U.N. Doc. E/CN.4/1998/45, para. 25.

196 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 180 [emphasis added].

197 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, para. 42, pp. 82-83.

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be understood as support for the assertion that these tasks are indeed part of the present-day purposes and functions of the United Nations as developed in practice. Consequently, the United Nations must also possess the rights and duties to perform them, including the right to assert the immunity of its agents for the acts carried out in the course of the performance of the mission. Given the fact that the United Nations possesses objective international legal personality, it should be able to assert the rights and duties it possesses in respect of all States.<sup>198</sup> Moreover, it should not be forgotten that the basis for the privileges and immunities enjoyed by agents of the United Nations is Article 105 of the Charter and not the Privileges Convention. In accordance with Article 105 paragraph 3 of the Charter, the Privileges Convention merely sets out the details of the basic rights, which the Organisation and its agents already possess pursuant to the Charter.

Support for the objective (customary) nature of the privileges and immunities of United Nations experts on missions could also be derived from the report of the Bureau of the Fifty-fourth Session of the Commission on Human Rights, which paid considerable attention to the importance of recognising, respecting and protecting the privileges and immunities of special procedures mandate holders. It concluded that 'it is neither necessary nor appropriate to offer detailed suggestions on this question which is, after all, a matter of international law, governed by the terms of the [Privileges Convention] and any relevant jurisprudence of the International Court of Justice', but it still proposed the following general observation:

'With a view to protecting the independence of the special procedures mechanisms, States should ensure full respect for all privileges and immunities accorded to holders of such posts under international law.'<sup>199</sup>

It may be concluded, therefore, that the enjoyment of privileges and immunities by United Nations special procedures mandate holders has been effectively lifted from the political plane to the legal one, *i.e.* that the enjoyment of such privileges and immunities by special procedures mandate holders no longer constitutes a topic with regard to which major political controversies exist. This is of course not the same thing as saying that no disputes or differences will occur in the future. They may still occur, but precisely for this reason methods for settling disputes have been included in the Privileges Convention or are otherwise provided for, *inter alia*, pursuant to the general competence of the International Court of Justice to give an Advisory Opinion in accordance with the relevant provisions of the Charter and its Statute.<sup>200</sup> It is also not

198 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185.

199 U.N. Doc. E/CN.4/1999/104, para.34.

200 In the *Cumaraswamy* Case, the competence of the Court was based on section 30 of the Privileges Convention, Malaysia having acceded to it without reservation; in the *Mazilu* Case competence of the Court was based on the general competence to give Advisory Opinions in accordance with the Article 96, paragraph 2 of the Charter (and Article 65 paragraph 1 of the Statute of the Court), Romania having made a reservation in respect of section 30 of the Privileges Convention, see Opinion on the Applicability

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the same thing as saying that the enforcement of privileges and immunities causes no problems at all, but this is a practical reality flowing from the decentralised character of the international legal order with which international lawyers are confronted all the time.<sup>201</sup>

At the same time, the *Cumaraswamy* Advisory Opinion made clear that it may be expected from the agents of an organisation like the United Nations that they act responsibly and, especially, that they act within the terms and the limits of their mandates. In his Separate Opinion to the *Cumaraswamy* Case, Vice-President Weeramantry elaborated upon the correlative obligations of rapporteurs and stated that:

‘It is thus an important corollary to the propositions set out earlier in this opinion that, complementary to the United Nations’ duty of protection of its functionaries, a corresponding duty and responsibility lie on all United Nations personnel to ensure that whatever actions they take or statements they make are always within the limits of performance of their duties (...) Unless this precondition is satisfied, United Nations personnel would be travelling outside the area of protection accorded to them. In this way they protect both themselves and the United Nations, which owes a duty of protection to them. This duty applies especially in regard to public statements which their duties may oblige them to make from time to time.’<sup>202</sup>

The recognition of the responsibility of agents of the United Nations, including thematic mandate holders, to respect the terms and limits of their mandates is a sign of an organisation coming to maturity. As its prestige and influence in the world is growing, the United Nations and in particular the agents through which it acts might

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lity of Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989, paras. 28-36, pp. 187-190.

201 In the case of Mr Cumaraswamy, for example, on 18 October 1999 the Registrar of the High Court of Malaysia still denied the Special Rapporteur immunity from legal process (see U.N. Doc. E/CN.4/2000/61, paras 196-207) despite the Court’s Advisory Opinion of 29 April 1999 and despite Malaysia’s commitment to respect that Advisory Opinion as ‘decisive’ in accordance with section 30 of the Privileges Convention (I.C.J. Reports 1999, paras. 25, pp. 76-77 and para. 65, p. 88). The Registrar was subsequently overruled by a Judge of the High Court, who agreed that the Court was bound by the Advisory Opinion and struck down the suit. But that judge still ordered that ‘each party ought to bear its own costs.’ This again was in direct contravention of the ruling of the International Court of Justice that Mr Cumaraswamy be held ‘financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs’ (I.C.J. Reports 1999, para. 64, p. 88). The Secretary-General of the United Nations, in a letter dated 24 July 2000 to the President of the Economic and Social Council, described the findings of the judge of the Malaysian High Court as ‘grounds that the United Nations finds unacceptable’ (see U.N. Doc. E/CN.4/2001/65, para. 148). Moreover, three other suits were still pending against Mr Cumaraswamy to be withdrawn by the plaintiffs in June 2001, which led the Special Rapporteur to observe that ‘[t]his was five-and-a-half years after the suits were originally commenced and more than two years after the International Court of Justice delivered its opinion. It was also after the Special Rapporteur filed an application to the Federal Court to have the suits dismissed’ (see U.N. Doc. E/CN.4/2002/72, para. 122).

202 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999, Separate Opinion of Vice-President Weeramantry, pp. 92-98.

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be expected to bear a corresponding responsibility. This responsibility should also prevent individual mandate holders, in particular when they are appointed as an individual body in the form of a Special Rapporteur, to act as 'human rights oracles,' a criticism which is sometimes heard.

III.3.2.2.3 Intermediate Assessment: the Independent Category of Special Procedures

In the first part of this chapter an attempt has been made to retrace the developments explaining the tendency of the Commission to appoint the individual body of Special Rapporteur rather than the collective body of five-member Working Groups. Also, it has been shown how the preference for individual bodies led to a more depoliticised criterion for eligibility as a mandate holder, which, in turn, paved the way for candidates not having a governmental background to be appointed. Subsequently, it has been seen that towards the end of the 1990s the selection process for mandate holders has been further clarified and partly institutionalised into the United Nations human rights bureaucracy, in particular in developing and maintaining a roster of candidates. At the same time, it has been emphasised that where the choice between a Special Rapporteur or a Working Group as well as the (process leading to the) appointment of individual mandate holders ultimately remain questions to be decided by the Commission on Human Rights, one cannot be certain what the outcome will be in a specific case at hand. Similarly, tendencies seeking to regain political control over special procedures as well as the selection and nomination of individual mandate holders continue to exist in the Commission on Human Rights. It has been suggested that in the post-Cold War world order these tendencies may have been reinforced by the emergence of a more independent, self-confident and assertive United Nations human rights 'system', which manifested itself, *inter alia*, in the form of institutionalised annual meetings of special procedures mandate holders. To the extent that this is the case, it might be argued that the depoliticisation of the subsidiary mechanisms of the Commission has also been a source of renewed politicisation. Such renewed political tensions are also an indication that we might have reached the limits of the degree of autonomy that the international community of States is currently willing to concede to the United Nations system of special procedures.

The second part of this chapter has dealt with the privileges and immunities to which United Nations thematic procedures are entitled in their capacity as so-called 'experts on missions for the United Nations.' As has been shown in some detail, two Advisory Opinions of the International Court of Justice have importantly clarified the nature and scope of these privileges and immunities and, albeit perhaps indirectly, they have also said something about the tasks and competences entrusted to the United Nations. Of particular relevance in this respect is the Court's finding that 'special Rapporteurs (...) are entrusted not only with a research mission, but also with the task of monitoring human rights violations and reporting on them.' According to the present author, this phrase may also be interpreted as support for the view that monitoring and reporting on human rights violations effectively falls within the nature and

purposes of the United Nations 'implied in its constituent documents and developed in practice' and does not (or no longer does so) constitute an *ultra vires* act of the Organisation. This is all the more so in light of the fact that neither in the *Mazilu* Case, nor in the *Cumaraswamy* Case has the argument been put forward that the Special Rapporteurs were not entitled to the privileges and immunities of United Nations experts on missions, because the functions they performed, in particular monitoring and reporting on human rights *violations*, fell outside the (functional) competences of the United Nations.

### III.3.2.3 Duration of the Mandate of Thematic Procedures

The French draft resolution proposed to establish an open-ended group of experts dealing with the problem of disappearances.<sup>203</sup> As already stated above, such a proposal was not acceptable for the group of Non-Aligned States. The compromise was to establish a working group 'for the period of one year.'<sup>204</sup>

Clearly, some Governments hoped to keep a measure of political control over the activities of the Working Group on Enforced or Involuntary Disappearances, which – although primarily a reaction to the specific case of Argentina – potentially threatened all States where disappearances occurred. Presumably, they even hoped that the worldwide scope of the mandate in conjunction with the Group's one-year term would significantly reduce the Working Group's chances of survival.<sup>205</sup>

Thus, the temporal restriction imposed on the mandate of the Working Group on Enforced or Involuntary Disappearances constituted an important factor for the Group to take into account when developing and implementing its working methods. It would force the Working Group to operate carefully and always to ensure that its activities could count on the political support or acquiescence of a majority of the Members of the Commission. Only then would its mandate be eligible for extension.

At present the one-year term of the mandate has evolved to become a three-year term. The last time the Working Group's mandate has been extended was in 2004.<sup>206</sup> It will therefore come up for renewal again in 2007. Nowadays, the mandates of all other thematic procedures, including the Special Rapporteur on Torture and the Working Group on Arbitrary Detention are also normally accorded and/or renewed for a period of three years.

This chapter shows how the duration of the mandates of thematic procedures developed from a one-year term given to the Working Group on Enforced or Involuntary Disappearances in 1980 to a three-year term given to all thematic mandates in 2004/2005. The overview has a general character. The emphasis has been on developments relating to the mandate of the Working Group on Enforced or Involuntary Disappearances. Parallel developments relating to the other two selected thematic

203 U.N. Doc. E/CN.4/L.1502.

204 C.H.R. Res. 20 (XXXVI), para. 1.

205 Alston 1992, p. 174.

206 C.H.R. Res. 2004/40 of 19 April 2004.

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mandates have been mentioned whenever relevant. More specific references showing how the duration of the mandates might have influenced the approach adopted by the two Working Groups and Special Rapporteur, in particular during the early years of their existence, have been made in the relevant chapters, under Chapter IV, dealing with such issues as working methods, consultation of sources etc.

After the adoption of Resolution 20 (XXXVI) on 29 February 1980 several States, most notably the Soviet Union, repeatedly emphasised that the Working Group on Enforced or Involuntary Disappearances had been established for one year only.<sup>207</sup> Meanwhile, the General Assembly had welcomed the establishment of the Working Group and requested the Commission ‘to continue to study the question as a matter of priority and to take any step it may deem necessary to the pursuit of its work on the question of (...) disappearances when it considers the report to be submitted to it by the Working Group.’<sup>208</sup>

At the next session of the Commission the representative of the Soviet Union declared that the Working Group

‘had only created an illusion of activity without contributing to the real solution to the problem. The continued distortion of procedures for the investigation of mass and flagrant violations of human rights would be intolerable. His delegation was therefore opposed to an extension of the Group’s mandate.’<sup>209</sup>

The Soviet delegate referred in particular to the Working Group’s decision to interpret its mandate as giving it competence to take cognizance of and to respond to individual cases of disappearances.<sup>210</sup> While his appeal for the abolition of the Working Group was not endorsed by the Commission, the one-year extension to the Group’s mandate in 1981 was far from automatic and some concessions relating to its working methods had to be made.<sup>211</sup> Nevertheless, the resolution on the ‘Question of Enforced or Involuntary Disappearances’ was finally adopted without a vote and endorsed again by the General Assembly later that year.<sup>212</sup>

In 1982 and 1983 respectively, the extension of the Working Group’s mandate each time for the period of one year caused less problems.<sup>213</sup> While in 1982 the delegate of the Soviet Union still continued to formally oppose any extension of the Group’s mandate,<sup>214</sup> the attitude of that country seems to have changed in the following year when the delegate declared that it was ‘for the Commission to decide on the future of

207 Kramer and Weissbrodt, HRQ 1981, p. 31.

208 G.A. Res. 35/193 of 15 December 1980. See U.N. Doc. E/CN.4/1435, Annex VI.

209 U.N. Doc. E/CN.4/SR.1605, para. 14.

210 See *infra* Chapter IV.5.1.

211 See *infra* Chapter IV.3.1 Also Van Dongen 1986, p. 471.

212 C.H.R. Res. 10 (XXXVII) of 26 February 1981 and G.A. Res. 36/163 of 16 December 1981.

213 C.H.R. Res. 1982/24 of 10 March 1982 adopted without a vote, endorsed by G.A. Res. 37/180 of 17 December 1982 and C.H.R. Res. 1983/20 of 22 February 1983 adopted without a vote, endorsed by G.A. Res. 38/94 of 16 December 1984. Also Van Dongen 1986, p. 471.

214 The delegate stated that ‘two years of costly experiment were surely enough to conclude that the Group was unnecessary.’ See U.N. Doc. E/CN.4/1982/SR.38, para. 126

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the Working Group.<sup>215</sup> In addition, no significant changes were made to the mandate of the Group. In the conclusions of its fourth report presented to the Commission in 1984, the Working Group, very carefully stated that it 'believed' that 'the time may have arrived for the Commission to adopt a more active role than hitherto' and that '[w]hat may now be desirable is a firmer appeal by the Commission to the Governments concerned to increase their cooperation with the Group, including the encouragement of a positive response to the Group's suggestions for on-the-spot visits.'<sup>216</sup> As usual without a vote, the mandate was renewed again for another year.<sup>217</sup>

In its fifth report presented to the Commission in 1985 the Working Group, for the first time, pleaded for the extension of its mandate for a period of two years. It recommended the Commission:

'[to] consider the possibility of renewing the Working Group's mandate for a period of two years, while maintaining its obligation to report to the Commission on Human Rights annually (...).'<sup>218</sup>

The Working Group motivated this request by referring to the need to improve the services of the United Nations Secretariat.<sup>219</sup> While a great number of States supported the recommendation of the Working Group to extend the mandate for a period of two years, there was also some criticism.<sup>220</sup> The representative of Japan, for example, stated that her delegation 'was not entirely sure that that [extending the period for two years, JG] was the best way of meeting the Group's organisational and financial difficulties.'<sup>221</sup> But a principal source of tension during the Commission's session had been an attempt by NGOs to have the Working Group take up the case of the Russian dissident Sacharov. The representative of France introducing the draft resolution on the 'Question of enforced or involuntary disappearances' stated that, 'the purpose of the draft resolution under consideration was to extend the Working Group's mandate (...),' but for fear of destroying the consensus no concrete proposal for a two-year extension was added.<sup>222</sup> Instead a new operative paragraph 2 read:

'Decides to extend for one year the Working Group's mandate (...) and to study at its forty-second session [1986, JG] the possibility of extending the term of the Working Group's mandate for two years.'<sup>223</sup>

215 U.N. Doc. E/CN.4/1983/SR.24, para. 19.

216 U.N. Doc. E/CN.4/1984/21, para. 177.

217 C.H.R. Res. 1984/23 of 6 March 1984 adopted without a vote.

218 U.N. Doc. E/CN.4/1985/15, para. 302.

219 Ibid., para. 90. Also infra Chapter IV.7.1.

220 Support for the proposal was expressed by, *inter alia*, Canada, Federal Republic of Germany, Sri Lanka, India, Ireland, Australia, Syria, Austria. See U.N. Doc. E/CN.4/1985/SR.28 and SR.30.

221 U.N. Doc. E/CN.4/1985/SR.28, para. 21. Also the representative of the Ukrainian Soviet Socialist Republic indicated his delegation's opposition. U.N. Doc. E/CN.4/1985/SR.31, para. 47.

222 See Van Dongen 1986, p. 472.

223 See U.N. Doc. E/CN.4/1985/SR.51, para. 53 [emphasis added].

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The resolution was adopted without a vote on 11 March 1985.<sup>224</sup>

In 1986 the Working Group repeated its recommendation of considering a two-year extension of the mandate 'not only on the basis of a firm precedent elsewhere in the United Nations [*i.e.* the biannual mandate Ad Hoc Working Group of Experts on Southern Africa, JG], but also in view of the complexities involved in the performance of its essentially long term task.'<sup>225</sup> In the debate in the Commission the representative of Nicaragua, a country under scrutiny by the Working Group, sought to link this issue to the question of the rotation of the Group's membership.<sup>226</sup> Otherwise, there seemed to be substantial support for an extension of the Group's mandate for two years.<sup>227</sup> However, when the draft resolution was introduced the representative of the German Democratic Republic, supported by Bulgaria, proposed an amendment postponing the matter for another year. The Federal Republic of Germany replied that this was unacceptable since 'it concerned a matter which had been under consideration for some time, and the text reflected the Working Group's wishes.'<sup>228</sup> The informal consultations subsequently held resulted in the following compromise formula, which was adopted without a vote as Resolution 1986/55 of 13 March 1986:

'Decides to extend for two years, *on an experimental basis*, the Working Group's mandate, as laid down in Commission Resolution (XXXVI), in accordance with the recommendations of the Working Group, while maintaining its annual reporting cycle, and to reconsider the question at its forty-third session';<sup>229</sup>

As it had done in previous years, the General Assembly welcomed the now two-year extension of the Working Group.<sup>230</sup>

In 1988 the extension of the mandate of the Working Group for a period of two years was no longer opposed by any State. Noteworthy is the explicit support given to the Working Group by the Soviet Union as a sign of *glasnost*.<sup>231</sup> That year, the extension of the mandate was justified on the ground of the persistence of the phenomenon of disappearances as well as the large number of unclarified cases, a concern reflected in the phrase '*so as to enable the Group to take into consideration all information communicated to it on the cases brought to its attention*' contained in operative

224 C.H.R. Res. 1985/20. On 13 December 1985 the General Assembly adopted Resolution 40/147 in which it welcomed the extension of the Working Group's mandate, including the proposal to study a possible two-year extension.

225 U.N. Doc. E/CN.4/1986/18, paras. 292 and 293.

226 U.N. Doc. E/CN.4/1986/SR.52/Add.1, para. 82. On the position of Nicaragua, *infra* Chapter III.3.2.4.2 and Chapter IV.4.1.

227 Federal Republic of Germany, Great Britain, Senegal, Australia, Ireland, Yugoslavia, Portugal, Cyprus, Argentina (where the military Government had been replaced since 1983) and France spoke out in favour of such an extension. See U.N. Doc. E/CN.4/1986/SR.52/Add.1.

228 U.N. Doc. E/CN.4/1986/SR.55, paras. 1-5.

229 U.N. Doc. E/CN.4/1986/SR.56/Add.1, para. 2-6 [emphasis added].

230 G.A. Res. 41/145 of 4 December 1986.

231 U.N. Doc. E/CN.4/1988/SR.31, para. 16.

paragraph 3 of Commission Resolution 1988/34. Moreover, the phrase ‘on an experimental basis’ was notably absent from the resolution.<sup>232</sup>

During the same 1988 session the Commission on Human Rights decided for the first time also to extend the mandate of the Special Rapporteur on Torture for a period of two years.<sup>233</sup> The sponsors of the resolution motivated the two-year term on the ground that ‘the continuation of the mandate would have administrative and financial advantages; since it would make for improved management of the Commission’s assured resources; moreover, the Special Rapporteur would have more time for discussions with Governments since, as the report stated, on several occasions Governments had not had time to reply to requests for information transmitted to them.’<sup>234</sup>

Opposition against the extension of the mandate did not concentrate on the duration of the mandate, but brought to the fore the same topic that had dominated the debate at the time of the establishment of the Special Rapporteur on Torture three years earlier: the question of the coexistence of the mandate with the treaty machinery established under the Convention against Torture. This time the coexistence debate re-emerged as a result of the entry into force of the Convention against Torture on 26 June 1987. It was in particular the Eastern European States, reluctant to concede the further strengthening of the United Nations’ extra-conventional and non-consensual approach to human rights monitoring, which raised this question.<sup>235</sup> They criticised the view that the two approaches were complementary rather than competitive, basing themselves on the argument that ‘the activities of the Special Rapporteur and those of the Committee against Torture tended to duplicate the work, impaired a state freedom to undertake international obligations and tended to diminish the general value of the Convention.’<sup>236</sup> In the end these States indicated that they would not block the extension – even a two-year one – of the Special Rapporteur’s mandate provided ‘that the mandate of the Special Rapporteur should relate only to States which had not yet ratified or acceded to the Convention.’<sup>237</sup> However, no provision to that effect was included in the draft resolution that was eventually adopted without a vote, leaving Eastern European States no other option than to explain their interpretation of the mandate.<sup>238</sup>

232 Adopted without a vote on 8 March 1988 and welcomed, as usual, by G.A. Res. 43/159 of 8 December 1988. See also U.N. Doc. E/CN.4/1988/SR.52, para. 80.

233 C.H.R. Res. 1988/32 adopted on 8 March 1988. The previous year some Governments had already suggested a two-year extension of the mandate, see, for example, Austria, U.N. Doc. E/CN.4/1987/SR.34, para. 88.

234 U.N. Doc. E/CN.4/1988/SR.52, para. 78 [Belgium].

235 Byelorussian S.S.R., Bulgaria, German Democratic Republic and the Soviet Union (U.S.S.R.).

236 U.N. Doc. E/CN.4/1988/SR.30/Add.1, para. 39 [Bulgaria].

237 *Ibid.*, para. 40 [Bulgaria]. Later repeated by the German Democratic Republic

238 As exemplified by the statement of the representative of the German Democratic Republic, who ‘did not intend to request a vote on draft resolution L.42 but wished to point out, with regret, that its sponsors had not been prepared to take account of the position of all States in the text’ and ‘was compelled to repeat (...) that, following the entry into force of the Convention against Torture and the establishment of machinery to monitor the implementation of that Convention, the Special Rapporteur should concern himself only with those States that had not ratified the Convention. (...) the activities

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The two-year extension of the mandate of the Special Rapporteur on Torture also paved the way for the further 'harmonisation' of the rules pertaining to the general aspects of the mandates of thematic procedures. When introducing the draft resolution on torture, the representative of Belgium indicated that '[i]t was obvious that that decision [the decision to extend the mandate of the Special Rapporteur for a period of two years, JG] should be extended to the mandate of all special rapporteurs appointed by the Commission to study thematic issues, and the sponsors would be submitting a document along those lines in the very near future.'<sup>239</sup> Later that year, ECOSOC adopted Resolution 1988/129 in which it '(recommended) that the mandates of all thematic procedures should be for a period of two years.'<sup>240</sup>

In 1990 the Chairman of the Working Group on Enforced or Involuntary Disappearances suggested to the Commission that since '[t]he phenomenon of disappearances still persisted (...) the Commission might (...) consider the possibility of extending the Working Group's mandate to four years instead of two years.'<sup>241</sup> The Commission did not honour this suggestion and extended the mandate for another two-year period.<sup>242</sup> In accordance with ECOSOC Resolution 1988/129 the mandate of the Special Rapporteur on Torture was prolonged for a similar period of time.<sup>243</sup>

The suggestion of the Chairman of the Working Group on Enforced or Involuntary Disappearances came at the time when the United Nations was considering the question of enlarging the membership of the Commission. This question had again become acute as a result of the changing political context, *inter alia*, the policies of *perestroika* and *glasnost* in the Soviet Union, the disappearance of the 'traditional' East-West confrontation and the emergence of a tendency towards regionalisation and a North-South divide. It was the Non-Aligned States, in particular their Asian Members, which demanded additional representation in the Commission.<sup>244</sup> Western States, on the defensive in this issue, managed to link the topic of enlarging the membership to the question of 'enhancing' the effectiveness of the mechanisms of the Commission. This resulted in the adoption of General Assembly Resolution 44/167 in which ECOSOC was requested to take steps to enlarge the membership of the Commission and the Commission instructed 'to examine ways and means to make its work more effective.'<sup>245</sup> The ensuing discussions in the Commission on the topic of enhancing

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of the Special rapporteur were liable to diminish the overall scope of the Convention, constituted a serious impairment of States' freedom of contract, and duplicated the work of other bodies, something which more than ever should be avoided in view of the financial crisis faced by the United Nations.' U.N. Doc. E/CN.4/1988/SR.52, para. 97.

<sup>239</sup> Ibid., para. 78.

<sup>240</sup> ECOSOC Res. 1988/129 of 27 May 1988.

<sup>241</sup> U.N. Doc. E/CN.4/1990/SR.23, para. 72. The suggestion did not come out of the blue. European States had lobbied for a four or five-year extension of thematic mandates. See also Lempinen 2001, p. 145 (footnote 148).

<sup>242</sup> C.H.R. Res. 1990/30 of 2 March 1990 adopted without a vote. Also G.A. Res. 45/165 of 18 December 1990.

<sup>243</sup> C.H.R. Res. 1990/34 of 2 March 1990.

<sup>244</sup> HRM, No. 4 (1989), pp. 32-44 and No. 8 (1990), pp. 3-28.

<sup>245</sup> Adopted on 15 December 1989.

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mechanisms did not lead to concrete results: European proposals aimed at strengthening of thematic procedures and reinforcing the United Nations Secretariat servicing these procedures were countered by an Indian/Pakistani proposal aimed at slowing down the procedures.<sup>246</sup> The entire problem was then forwarded to ECOSOC and a package deal was the outcome of deliberations in that organ. On 25 May 1990 ECOSOC adopted Resolution 1990/48, which provided, *inter alia*, that the membership of the Commission be increased from 43 to 53 Members and, in return, 'that the mandates of the thematic rapporteurs and working groups established or to be established by the Commission shall, *unless otherwise decided*, be of three years duration.'<sup>247</sup> The measures would enter into force at the Forty-eighth Session of the Commission in February 1992.

The first thematic mechanism to benefit from the package deal was the Working Group on Arbitrary Detention, which had been given a three-year mandate from the very moment of its establishment in 1991.<sup>248</sup> Subsequently, in 1992 the mandate of the Working Group on Enforced or Involuntary Disappearances was also extended for an additional three-year period.<sup>249</sup>

That same year the renewal of the mandate of the Special Rapporteur on Torture was more problematic. The delegation of the Philippines supported by China and a number of other delegations reopened the debate on the question of the coexistence of the Special Rapporteur and the Committee against Torture.<sup>250</sup> In their view, the activities of the Special Rapporteur had reached a point where its work could be taken over by the Committee against Torture. For that reason they argued that the mandate of the Special Rapporteur should not be renewed for another three years, but only for a final one-year term in order to allow him to wind up his affairs. According to these Governments ECOSOC Resolution 1990/48 still gave the Commission some leeway to depart from the recommendation that the mandates of thematic rapporteurs or working groups should be of three years' duration.

246 HRM, No. 8 (1990), pp. 3-28. Also Egypt and Nigeria indicated that the mandate of thematic procedures should not exceed the period of two years. See also Lempinen 2001, p. 145 (footnote 478); and Alston 1992, pp. 198 and 199.

247 [Emphasis added]. The resolution was adopted on 25 May 1990 by 53 votes to 1 (the U.S.A. voted against) and stated that the ten additional seats be divided between Africa, Latin America, Asia and the Caribbean based on equal geographical distribution. New Members would be elected in 1991. See HRM, No. 9 (1990), pp. 3 and 4.

248 C.H.R. Res. 1991/42.

249 The Commission justified the extension, *inter alia*, on the ground that the experience and recommendations of the Working Group were of practical value '[a]t a time when many States were involved in a difficult process of national reconciliation.' C.H.R. Res. 1992/30 of 28 February 1992 adopted without a vote. G.A. Res. 47/132 of 18 December 1992. See also U.N. Doc. E/CN.4/1992/SR.47, para. 53,

250 *Ibid.*, paras. 66-70 (Philippines) and para. 76 (China), but also Indonesia, Iran, Cuba, India, Nigeria and Pakistan. Relying on injunctions contained in several resolutions that the 'overlapping' of United Nations activities in combating torture should be avoided. It essentially repeated the discussions held at the time of the establishment of the Special Rapporteur in 1985. See, *inter alia*, C.H.R. Res. 1991/38 and 1992/32.

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A large number of other delegations from different continents, notably Burundi, Peru, France, the United Kingdom and Russia countered the attack on the Special Rapporteur. They expressed their support for the 'the principle of a three year mandate' and defended the extension of all mandates in a 'uniform fashion' as a rational and economical measure.<sup>251</sup>

Realising that their attempt to phase out the Special Rapporteur on Torture could not count on the support of the Commission, the Philippines, China and others, withdrew their proposal. While retreating, they took care to emphasise that they had never regarded the topic of torture as a problem of minor importance.<sup>252</sup>

This episode is of some interest, because it shows that, as agreed in ECOSOC Resolution 1990/48, a majority of the Governments in the Commission effectively supported the principle of a three-year term for all (existing) thematic mandates. It also reveals that incidents such as the above, where the duration of the mandate is put into question, can never be excluded. In particular, Governments displeased with the working methods of a particular thematic procedure might be tempted to ask for a revision of these methods in conjunction with a shorter 'test-period' to see whether the mechanism behaves according to the wishes of the Commission.

Practice after 1992 seems to confirm this tendency. The renewal of the mandates of the two Working Groups and the Special Rapporteur on Torture on each occasion for a period of three years has not been a source of major controversy.<sup>253</sup> Discussions concerning the duration of individual mandates have indeed remained incidents.<sup>254</sup> The principle of a three-year term has not been challenged.<sup>255</sup> On several occasions the Member States of the Commission have confirmed their support for this general principle. For example, in the report of the Bureau of the Fifty-fourth Session of the

251 U.N. Doc. E/CN.4/1992/SR.48, paras. 1 ff.

252 Ibid., para. 16. Confirming once again the general condemnation of torture by all Governments, including those Governments accused of practising or condoning the practice thereof.

253 See for the Working Group on Enforced or Involuntary Disappearances: C.H.R. Res. 1995/38 of 3 March 1995, 1998/40 of 17 April 1998 (without further motivating the extension), 2001/46 of 23 April 2001 and 2004/40 of 19 April 2004. For the Working Group on Arbitrary Detention: C.H.R. Res. 1994/32 of 4 March 1994, 1997/50 of 15 April 1997, 2000/36 of 20 April 2000 and 2003/31 of 20 April 2003 and for the Special Rapporteur on Torture: C.H.R. Res. 1995/37 B of 5 March 1995, 1998/38 of 17 April 1998, 2001/62 of 25 April 2001 and 2004/41 of 19 April 2004. All resolutions were adopted without a vote.

254 Such was the case, for example, in 1997 when the Government of Cuba, one of the principal targets of the Working Group on Arbitrary Detention and the country leading the opposition against the Working Group, argued that the mandate should not be extended 'unless the Commission first requested it to confine itself strictly to the original terms of that mandate (...). In any case the mandate should not be extended for more than one year, in order to give the Commission time to assess the Working Group's adaptation of its methods.' U.N. Doc. E/CN.4/1997/SR.26, para. 57. The duration of the mandate was called into question in relation to the major political debate on the problem of the competence of the Working Group to deal both with cases of pre-trial detention and post-trial convictions. The outcome of this debate finally led to a reformulation of the Working Group's mandate, but had no consequences for the duration of the mandate, which was extended as usual for a period of three years. See *infra* Chapter III.3.2.5.3.

255 See also Lempinen 2001, pp. 145 and 148.

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Commission on Human Rights on the topic of the 'Rationalisation of the Work of the Commission', presented to the Commission in 1999, it was recommended that:

'The Commission's established practice of setting and renewing mandates for thematic mechanisms on the basis of a standard three-year term has proven valuable in ensuring continuity and permitting effective work-planning. The Bureau therefore recommends that this practice be maintained.'<sup>256</sup>

Furthermore, neither the report of the intersessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights, which the Commission approved on 26 April 2000 and promised 'to implement comprehensively and in its entirety', nor the 2002 report of the Secretary-General of the United Nations proposes to make any changes with respect to the duration of the mandates of thematic procedures.<sup>257</sup>

On the other hand, proposals for open-ended mandates, as the French draft resolution on disappearances of 1980 originally envisaged, enjoy as yet insufficient support from Government delegations in the Commission.<sup>258</sup> Let this be a reminder of the political forces and tendencies present in the Commission. While the temporal restriction on the mandates of thematic procedures has ceased to be the major political constraint on their activities as it once was, the present three-year term should not automatically be equated with broad support for more independent human rights monitoring mechanisms. It may be recalled that a package deal (a compromise) lay at the basis thereof. The following observation by De Frouville probably best summarises the current situation:

'Ce mandat de trois ans constitue certes un progrès, mais il n'en reste pas moins une solution de compromis entre deux tendances présentes à la Commission, la première cherchant à maintenir les organes thématiques sous contrôle et dans une situation précaire, la seconde cherchant au contraire à institutionnaliser ces organes jusqu'à en faire des mécanismes permanents.'<sup>259</sup>

<sup>256</sup> U.N. Doc. E/CN.4/1999/104 of 23 December 1998 (the so-called *Selebi Report* after the Commission's South African Chairman Selebi), para.32, recommendation 5.

<sup>257</sup> U.N. Doc. E/CN.4/2000/112 (Report of the intersessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights) approved by C.H.R. Dec. 2000/109 adopted without a vote; U.N. Doc. A/57/387 'strengthening of the United Nations: an agenda for further change', Report of the Secretary-General, paras. 55-57.

<sup>258</sup> Again Lempinen 2001, p. 148.

<sup>259</sup> De Frouville 1996, p. 39. 'The three-year mandate indeed constitutes progress, but it remains a compromise solution between two competing tendencies in the Commission, the first seeking to maintain political control over thematic procedures and to keep them in a vulnerable position, the second seeking to institutionalise thematic procedures to transform them into permanent mechanisms' [author's translation].

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III.3.2.4 *Competence Ratione Personae: Questions relating to the Actor Held Responsible for Human Rights Violations by Thematic Procedures*

III.3.2.4.1 Introduction

When the Commission discussed the issue of missing and disappeared persons in February 1980, several speakers linked the phenomenon directly to the activities of governmental authorities or paramilitary bodies working in collusion with public officials. The opinion was expressed that ‘the phenomenon of massive disappearances of persons represented in effect, an institutionalised practice of eliminating actual or potential opposition and constituted an aggression by the State against its citizens.’ It was also said that ‘under certain conditions, a State could be made responsible under international law for cases of disappearance (...) for example State responsibility could be incurred if Governments did not react promptly to reliable reports of disappearances.’<sup>260</sup> Other speakers pointed at the fact that disappearances could be the result of generalised violence and armed conflict and were often linked with the activities of clandestine terrorist and subversive groups (Non-State actors).

Essentially a response to the situation in Argentina (and Chile), it was clear that the principal addressees of a resolution would be Governments and that Governments would be called upon to account for disappearances taking place under their jurisdiction.<sup>261</sup> The French draft resolution directly requested Governments ‘at the request of the experts [working group]: (a) To inform the experts without delay of cases in which they are unable to locate immediately or following a brief investigation either a person whose abduction or arrest has been reported to them or a person who has been reported missing and may be presumed to have been a victim of such acts; (b) To inform the experts without delay of any facts established and any progress made and conclusions drawn in the course of the investigations opened in cases of enforced or involuntary disappearances.’<sup>262</sup>

Resolution 20 (XXXVI) did not explicitly mention the responsibility of Governments. It referred to Governments as one of the sources of information to be consulted by the Working Group and it requested Governments – through the Secretary-General of the United Nations – ‘to cooperate with and assist the working group in the perfor-

<sup>260</sup> Commission on Human Rights, Report on the Thirty-Sixth Session (1980), Economic and Social Council Official Records, 1980, Supplement, New York: United Nations, 1980, pp. 74 and 75. The report does not specify which Government or organisation the speaker represents; it only presents a very general summary of what has been said, which arguments have been used etc. On State responsibility for violations of human rights, disappearances in particular, see also the report of the United Nations Expert on the Question of the Fate of Missing and Disappeared Persons in Chile, U.N. Doc. A/34/583/Add.1, for a summary see YUN 1979, pp. 823 and 824.

<sup>261</sup> Rodley, EHRLR 1997, p. 8.

<sup>262</sup> U.N. Doc. E/CN.4/L.1502, para. 6; see also para. 7 which read ‘requests Governments, when they are presented with reliable reports of cases of enforced or involuntary disappearances, to undertake without delay impartial investigations into the whereabouts or fate of the missing or disappeared person and the identity of the abductors.’ The draft resolution has been reprinted in: Kramer and Weissbrodt, HRQ 1981, pp. 20 and 21.

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mance of its tasks and to furnish all information required.<sup>263</sup> In its preamble, Resolution 20 (XXXVI) referred back to General Assembly Resolution 33/173 of 20 December 1978. This resolution, which constituted the first United Nations response with respect to the practice of disappearances more explicitly linked this practice with the conduct of State officials. Three preambular paragraphs mentioned the involvement and responsibilities of national authorities in relation to disappearances of persons. These paragraphs read as follows:

‘Deeply concerned by reports from various parts of the world *relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organisations*, often while such persons are subject to detention or imprisonment, as well as unlawful actions or widespread violence; Concerned also at reports of *difficulties in obtaining reliable information from competent authorities* as to the circumstances of such persons, including reports of the *persistent refusal of such authorities or organisations* to acknowledge that they hold such persons in their custody or otherwise to account for them; Mindful of the danger to the life, liberty and physical security of such persons arising from the *persistent failure of these authorities or organisations to acknowledge that such persons are held in custody or otherwise to account for them*;’[emphasis added]<sup>264</sup>

Moreover, in the first operative paragraph of Resolution 33/173 the General Assembly explicitly called upon Governments:

- ‘(a) In the event of reports of enforced or involuntary disappearances, to devote appropriate resources to searching for such persons and to undertake speedy and impartial investigations;
- (b) To ensure that law enforcement and security authorities or organisations are fully accountable, especially in law, in the discharge of their duties, such accountability to include legal responsibility for unjustifiable excesses which might lead to enforced or involuntary disappearances and other violations of human rights;
- (c) To ensure that the human rights of all persons, including those subjected to any form of detention and imprisonment, are fully respected;
- (d) To cooperate with other Governments, relevant United Nations organs, specialised agencies, intergovernmental organisations and humanitarian bodies in a common effort to search for, locate or account for such persons in the event of reports of enforced or involuntary disappearances;’

While some delegations, notably Argentina,<sup>265</sup> linked the practice of disappearances with special circumstances existing in a country, such as a situation of generalised violence, armed conflict or the activities of terrorist organisations, neither Resolution 20 (XXXVI) nor General Assembly Resolution 33/173 mentioned by name any other actor, which could be held internationally accountable for disappearances. At the same

<sup>263</sup> C.H.R. Res. 20 (XXXVI), paras. 3 and 4.

<sup>264</sup> G.A. Res. 33/173 of 20 December 1978.

<sup>265</sup> See *infra* Chapter III.3.2.4.2.

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time, the terms of these resolutions would not exclude the accountability of actors other than States.

In the introduction to its first report the Working Group stated that it 'kept firmly in mind its terms of reference' and 'recalled the wording of General Assembly Resolution 33/173' referring to reports of disappearances involving law enforcement authorities or similar organisations. It confirmed that:

'The vast majority of cases which confronted the group involved persons who had been arrested, detained or abducted by personnel belonging to a body which was either established as or believed to be, an organ of Government; or controlled by Government; or operating with the overt or latent complicity of Government; and the Government concerned in these cases neither accepted responsibility for the arrest, detention or abduction, nor accounted for these actions. There was, however, a minority of cases in which persons had disappeared and were not accounted for, but where it was not clear where the responsibility lay; the Group has not necessarily excluded such cases from its consideration.'<sup>266</sup>

First and foremost, therefore, the Working Group would deal with Governments.

The Working Group immediately emphasised, however, that it sought the cooperation of Governments and stressed that 'no judgement whatsoever had been reached on the allegations made.'<sup>267</sup> In another paragraph of its report it further clarified its approach as follows:

'The Working Group has taken note of the fact that there is a considerable volume of opinion according to which Governments should assume responsibility for disappearances and discharge its responsibility. Equally numerous touching and eloquent requests for help in discovering what has happened to the disappeared have been received. In the present state of the Group's knowledge, it is this latter *humanitarian approach* which has assumed prominence. Accordingly, this report does not contain pronouncements or attributions of responsibility.'<sup>268</sup>

It must be immediately pointed out that the reasons for the Group's decision not to be judgmental with regard to Governments – while still addressing them – are wholly political. It is not a decision of principle against attributing responsibility to Governments, but a decision founded on the political realities of ensuring international cooperation of States and political support for the one-year mandate.<sup>269</sup>

<sup>266</sup> U.N. Doc. E/CN.4/1435, para. 3, p. 6.

<sup>267</sup> Ibid., para. 7, p.7. See also Van Boven's opening speech to the 1980 Session of the Commission on Human Rights, *supra* Chapter II.4.4.

<sup>268</sup> Ibid., para. 9, p. 8 [emphasis added] and para. 33, p. 17 where the Group reported that it decided 'to transmit the information, *without expressing any opinion on its reliability or validity* to the Government of the country concerned with a request that the Government transmit to the Group such information or views as it might wish.' [emphasis added] On the Group's so-called humanitarian approach, *infra* Chapter IV.2.1.

<sup>269</sup> See *infra*, Chapter III.3.2.6.2.1

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What the Working Group aimed to achieve was an exchange of information, which would constitute the basis for a *fruitful dialogue* between itself and the Government concerned.<sup>270</sup> It hoped that the humanitarian approach would encourage Governments to cooperate, especially those Governments which had not responded to information submitted to them in 1980.<sup>271</sup> At the same time, the Group made clear what it understood by cooperation as it recommended to the Commission:

‘that it call upon Governments to cooperate with the United Nations (...) to furnish all information required, to ensure the cessation of all disappearances and to undertake urgent and thorough investigation of such cases as have occurred. *There is no avoiding the fact that Governments have a responsibility for what happens within their borders.*’<sup>272</sup>

In this way, without being explicitly judgmental, the Working Group has adopted the principle that States bear primary responsibility for the human rights situation on their territories and it has considered the principle to be the point of departure for its actions.

However, the interactions between the Working Group and Governments as well as the discussions in the Commission on Human Rights show that the principle of the primary responsibility of States has been constantly put into question by Governments targeted by the Working Group. The most common defence for such Governments is to attribute responsibility for disappearances to terrorist groups or to argue that the disappeared persons themselves are part of such groups or are simply common criminals. However, one does well to bear in mind that as a (governmental) tactic for crushing insurgence or dissent, the practice of making people disappear and, thereby, placing them outside the protection of the law aims precisely at disclaiming any responsibility or knowledge of a particular case. Sometimes, however, there is a real dilemma, especially in situations of internal armed conflict, when the Government does not effectively control the territory and opposition groups do in fact commit ‘human rights violations’, including the practice of disappearances.

The present chapter reviews the attitude of the Working Group on Enforced or Involuntary Disappearances in respect of claims that actors other than State(-controlled) actors are responsible for disappearances and other human rights violations. For analytical purposes the review will make a distinction between the period before 1990 and the period after that date. As will be shown, the reason for making this distinction lies not so much in a fundamental change of opinion and practice of the Working Group on Enforced or Involuntary Disappearances or the two other selected thematic procedures, but rather in the different position taken by the Commission on Human Rights with respect to non-State actors involved in acts of violence in the territory of States. Namely, from 1990 onwards the Commission recognised through annually adopted resolutions that actors other than those directly or indirectly con-

270 U.N. Doc. E/CN.4/1435, para. 33, p. 17.

271 Ibid., para. 7, p. 7.

272 Ibid., para. 195 [emphasis added].

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nected to State organs may be involved in organised violence, including, *inter alia*, disappearances, torture and arbitrary detention. In this context, some attention has been given to the Special Process on missing persons in the territory of the former Yugoslavia instituted in 1994. As in other chapters, the findings with respect to the Working Group on Enforced or Involuntary Disappearances have been supplemented, where necessary, with examples taken from the practice of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. Finally, a brief reference has been made to coordination efforts on the topic of 'human rights violations' by non-State groups undertaken in the context of the annual meetings of special procedures mandate holders.

III.3.2.4.2 The Period 1980-1990

As stated above, denying responsibility for disappearances has been a common defence used by Governments – in particular by the Governments of those States where the phenomenon takes place on a massive and systematic scale – throughout the entire existence of the Working Group on Enforced or Involuntary Disappearances. The most obvious example during the early years of existence of the Working Group is again Argentina. In 1980 as well as 1981 the permanent representative of that country wrote long letters to the Working Group arguing that the phenomenon of disappearances arose out of internal unrest caused by terrorist aggression. Therefore, in respect of the great majority of cases his Government bore no responsibility whatsoever; the methods of the terrorists, such as falsifying documents, going underground etc. made it moreover difficult to clarify cases of disappearances.<sup>273</sup> Furthermore, the permanent representative held that:

'[W]hen the consequences of violence affect the life, liberty and property of individuals, responsibility is almost never attributed to the real perpetrators of the phenomenon: it is customarily imputed, either generically and in a self-seeking fashion, to Government involvement, action or inaction.'

Such a superficial method of examination of cases of disappearances, according to him, would attribute the phenomenon to society and not to alienated and disruptive groups.<sup>274</sup>

Other Governments also objected against the 'automatic' attribution of responsibility to Governments. In 1981, the Government of Mexico, for example, a State also mentioned in the Working Group's first report, explicitly and strongly objected to the sentence which referred to the responsibility of Governments for what happened within

<sup>273</sup> Letter dated 8 December 1980 by the Permanent Representative of Argentina to the United Nations to the Working Group, extracts of which have been reprinted in the group's first report: *Ibid.*, para. 74; also the statement delivered by the representative in the 1981 session of the Commission: U.N. Doc. E/CN.4/SR.1603, paras. 36 ff.

<sup>274</sup> Letter dated 8 September 1981 by the Permanent Representative of Argentina to the United Nations to the Working Group, see U.N. Doc. E/CN.4/1492, para. 51.

their borders.<sup>275</sup> The Government of the Philippines referred to the 'known strategy of the underground movement to report new recruits as 'missing persons' in order to mislead the authorities.'<sup>276</sup> A different line of argument came from the Government of Nicaragua, which claimed that acts of disappearances could not be attributed to the Government of National Reconstruction, 'which came into being on 19 July 1979 after a bloody war of liberation that put an end to one of the most sinister and most criminal dynasties in the history of mankind.'<sup>277</sup> In that light, the Government also asserted the impossibility of effectively controlling the country.<sup>278</sup>

In the years that followed the Working Group has repeatedly found itself confronted with claims of this nature. Obviously, within the context of the present study an exhaustive overview and analysis of all such instances cannot be given. However, for the purpose of illustrating the type of claims and the scope of the problem some other examples may be given.

In 1983, the Government of Indonesia communicated to the Working Group that it 'could not be expected to be in a position to find the alleged missing persons since circumstances relating to those persons were beyond the control of the Indonesian Government.'<sup>279</sup> In the same year, the Government of Cuba came to the support of the Government of Nicaragua (Sandinistas) pointing out that 'the report again included cases of presumed disappearances which could not be attributed to the Government presently in power in the countries concerned.'<sup>280</sup>

In 1984, the representative of the Government of Peru, a country appearing for the first time in the Working Group's annual report, explained 'in a large number of cases of disappearances, the actual existence of the individual was doubtful and never proven, and in other cases of disappearances the persons had joined the *Sendero Luminoso* terrorist group. In 1987 the representative of the Government of Peru argued that

'[i]t was true that disappearances had occurred in Peru, but the defenders of Peruvian democracy were not responsible therefor. His government had welcomed a visit by the Working Group mission because it had nothing to hide.<sup>281</sup> (...) [t]he Working Group's report showed the progress his country was making in establishing democracy in a difficult situation – with the *Sendero Luminoso* terrorists causing serious economic and social disturbances – a situation that was compounded by the ignorance and by threats of military *coup d'état*. Modern terrorist organisations throughout the world acted more indiscriminately than earlier ones (...) [the *Sendero Luminoso*] was a complex organisation, which had its roots in imperialism, as did many terrorist organisations in Europe.'<sup>282</sup>

275 See U.N. Doc. E/CN.4/SR.1605, para. 9.

276 U.N. Doc. E/CN.4/1492, paras. 131 ff.

277 Ibid., paras. 122 ff.

278 Also U.N. Doc. E/CN.4/1435, paras. 137 ff.

279 U.N. Doc. E/CN.4/1983/14, para. 71.

280 U.N. Doc. E/CN.4/1983/SR.24, para. 28.

281 U.N. Doc. E/CN.4/1987/SR.36, para. 50.

282 Ibid., para. 51.

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Against the background of that country's struggle against terrorist organisations such as *Sendero Luminoso* and the *Tupac Amaru* Revolutionary Movement, the Government of Peru would be one of the leading States in the Commission lobbying for recognition of the problems of (democratic) countries faced with violence by non-State actors.<sup>283</sup>

In 1985 Colombia made its entry as a 'client' of the Working Group. On 5 December of that year, the permanent representative of Colombia wrote a letter to the Working Group requesting 'recognition of the fact that there were no large-scale violations of human rights in Colombia, particularly disappearances carried out by government officials' since '[t]he violations (...) were due to other causes or were the work of other agents and the few cases of unlawful conduct or offences by government officials were isolated instances which had happened not independently of, but specifically against, the wish of a democratic government.' He did not deny that *acts* of violence had taken place, 'but he could confirm that *they occurred despite the government or against the government*.'<sup>284</sup> The Government of Colombia would make similar arguments in the years to come and joined ranks with Peru in trying to obtain recognition from the Commission in regard to the problems related to acts of violence committed by drug traffickers and guerilla groups.<sup>285</sup> In this respect, the representative of Colombia stated in 1987 that, in his view, 'it was necessary to consider not only the violations committed by a State, but also the violations that were committed in spite of a State and (...) against a State. (...) [I]t would be necessary to establish the right not to become a missing person as a result of an act perpetrated by a State, despite a State or against a State.'<sup>286</sup>

In 1986 the representative of the Federal Republic of Germany raised the issue of disappearances 'in countries where the Government had not had full control of its territory and where there were situations of internal armed conflict' and stated that '[i]n such cases the Commission had been accustomed to appeal for respect for human rights standards not just to governments but to all parties concerned.' He suggested that '[t]he Working Group might draw the Commission's attention to cases attributed to forces that were opposing the Government.'<sup>287</sup> This suggestion was immediately endorsed by the representative of Sri Lanka, a country the Working Group would deal with for a long time to come, who stated that 'the Working Group should establish means of obtaining information on disappeared persons from insurgent groups over whose activities Governments had no control.'<sup>288</sup>

283 See also U.N. Doc. E/CN.4/1992/18, para. 295 and *infra* Chapter III.3.2.4.3

284 U.N. Doc. E/CN.4/1986/18, para. 81 [emphasis added].

285 See U.N. Doc. E/CN.4/1987/15, para. 26, U.N. Doc. E/CN.4/1988/19, para. 71 ff.

286 U.N. Doc. E/CN.4/1987/SR.33, paras. 40 and 43.

287 U.N. Doc. E/CN.4/1986/SR.52/Add.1, para. 103.

288 U.N. Doc. E/CN.4/1986/SR.54, para. 74. In 2003 Sri Lanka was ranked as the country with the second highest number of cases of disappearances registered by the Working Group. The disappearances occurred in the context of two major sources of conflict in that country: the confrontation between Tamil separatist militants and Government forces in the north and north-east of the country and the confrontation between the People's Liberation Front (JVP) and the Government forces in the south. In the period 1987-1990 most cases were reported as occurring in the south. As of 1990 – with the resumption of hostilities with the Tamil Tigers – most cases have been reported in the (north)-east. See

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Notwithstanding the attempts by some Governments to deny responsibility for disappearances, the Working Group has consistently applied and further developed its policy of dealing exclusively with Governments, while continuing to be guided by its non-accusatory humanitarian approach.<sup>289</sup> As the Group noted in its second report, its intention was not to '[inquire] into the politics or the activities of the disappeared'. The Working Group reinforced its approach in its third report, considering that

'[i]t has always been convenient for a powerful Government to silence its opponents by removing them. Seldom is there any difficulty in finding someone who will execute the deed.'<sup>290</sup>

It has upheld the principle of the primary responsibility of States for the human rights violations committed on their territories even in situations of internal turmoil, insurgency or civil strife where non-State actors might be involved in human rights violations. In 1984, the Working Group referred directly to internal disturbances and noted that disappearances often took place in this context 'as the Government and other forces involved deliberately employed the technique of disappearances as a means of solving their political problems. (...) Once the technique is introduced in certain political situations, it is usually spread beyond Government agencies (...) *It is therefore evident that Governments are primarily responsible not only for their own policies, but also for the introduction of the practice within society as a whole.*'<sup>291</sup>

In the context of a revision of its working methods in 1985, the Working Group noted that Governments frequently stated that certain groups operating in their countries should be held responsible for cases of disappearances. This development, in conjunction with a concrete offer received from one such group to cooperate in investigating and clarifying cases of disappearances attributed to it, led the Working Group to adopt a more principled position on the matter. It declared:

'It is the position of the Working Group, as a matter of principle, that such groups cannot be approached by it, with a view to investigating or clarifying cases of disappearances, which, *in accordance with the rules of international law, remain the exclusive responsibility of Governments, irrespective of the alleged authorship in specific cases.*'<sup>292</sup>

This position was confirmed by the Working Group in a 1987 revision of its working methods and the rule adopted in that year has remained unchanged ever since. The rule reads as follows:

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also U.N. Doc. E/CN.4/2000/64/Add.1 containing the report by a visit of a member of the Working Group to Sri Lanka.

289 See, for example, U.N. Doc. E/CN.4/1987/15, para. 124 and also U.N. Doc. E/CN.4/1990/13, para. 347.

290 U.N. Doc. E/CN.4/1983/14, paras. 139 and 140.

291 U.N. Doc. E/CN.4/1985/15, paras. 292 and 293 [emphasis added]; also U.N. Doc. E/CN.4/1987/15, para. 121: 'Making people disappear seems to be a convenient tactic for any Government suppressing insurgence or espousing a policy for stifling dissent (...).'

292 U.N. Doc. E/CN.4/1986/18, para. 34 [emphasis added].

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'In transmitting cases of disappearance, the Working Group deals exclusively with Governments, basing itself on the principle that Governments must assume responsibility for any violation of human rights on their territory. If, however, disappearances have been attributed to *terrorist or insurgent movements fighting the Government on its own territory*, the Working Group has refrained from processing them. The Group considers that, as a matter of principle, such groups may not be approached with a view to investigating or clarifying disappearances for which they are held responsible.'<sup>293</sup>

The position taken by the Working Group does not mean, however, that it does not take into account situations of generalised violence, insurgency or terrorism, if they exist, when considering the *overall* human rights situation in specific countries. Thus, especially in the context of on-site visits where the Working Group is required to refer to the actual situation in the country concerned, references to acts of violence committed by non-State actors are normally included. For example, in the reports on on-site visits to Peru<sup>294</sup> (1985 and 1986) and Colombia<sup>295</sup> (1988) the Working Group took great care to describe the general context of the violence occurring in these countries, referring in detail to, *inter alia*, terrorist movements such as *Sendero Luminoso*, the Revolutionary Armed Forces of Colombia (*FARC*), the National Liberation Army (*NLA*), the April 19 Movement (*M-19*) and the activities of drug traffickers.<sup>296</sup> Moreover, in order to avoid facile or sterile conclusions, this general context was again taken into account by the Working Group in the concluding observations and recommendations contained in the respective reports.<sup>297</sup>

As Toine van Dongen, a member of the Working Group from 1985 to 1993, pointed out, the Working Group does not operate in a political vacuum and, especially in the case of country visits, it is to take due account of the effects of its findings and recommendations in the country concerned. Thus, when the Working Group is considering giving its account of the facts gathered, issues such as the stability of the political situation in the country concerned inevitably come within the purview its responsibilities.<sup>298</sup>

In his first report presented to the Commission in 1986, the Special Rapporteur on Torture summed up the different elements making up the international legal concept of torture as contained especially in the Declaration on Torture and the Convention against Torture.<sup>299</sup> He identified three elements: the 'material' element,<sup>300</sup> the 'inten-

293 U.N. Doc. E/CN.4/1988/19, para. 19 [emphasis added]; see also the Working Group's latest review of working methods in 2001, U.N. Doc. E/CN.4/2002/79, Annex I, para. 6.

294 U.N. Doc. E/CN.4/1986/18/Add.1 and U.N. Doc. E/CN.4/1987/15/Add.1.

295 U.N. Doc. E/CN.4/1989/18/Add.1.

296 U.N. Doc. E/CN.4/1986/18/Add.1, paras. 6-21 and U.N. Doc. E/CN.4/1989/18/Add.1, paras. 6-21.

297 U.N. Doc. E/CN.4/1986/18/Add.1, paras. 101-112 (Peru); U.N. Doc. E/CN.4/1987/15/Add.1, paras. 42-52 (Peru) and U.N. Doc. E/CN.4/1989/18/Add.1, paras. 123-139.

298 See Van Dongen 1986, p. 476.

299 Article 1, paragraph 1 of the Convention against Torture.

300 U.N. Doc. E/CN.4/1986/15, paras. 33-35: 'severe pain or suffering, whether physical or mental' is involved; see *infra* Chapter III.3.2.5.2 (Frame of Reference of the Special Rapporteur on Torture).

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tional' element<sup>301</sup> and the so-called 'qualified perpetrator'. As regards the third aspect, the qualified perpetrator, the Special Rapporteur restated the formulation of the Convention against Torture:

'(...) when such pain or suffering is *inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity*.'<sup>302</sup>

Commenting on this definition the Special Rapporteur explained that it meant that 'state responsibility is apparent even when the authorities resort to the use of private gangs or paramilitary groups (...)' He also indicated that 'private acts of brutality (...) should not imply State responsibility, since these would usually be criminal offences under national law.'<sup>303</sup> However, according to the Special Rapporteur, when the authorities remain passive regarding such acts, this inaction might be considered 'consent or acquiescence', triggering State responsibility.

Thus, the Special Rapporteur made clear that his mandate covered acts of torture actively or passively involving the State, its organs or officials and, by implication, that the practices of terrorists, insurgent groups or other non-State actors would fall outside the scope of his mandate.

Moreover, pre-empting the governmental defence – such as the one voiced by the Government of Colombia in 1986 and 1987 referred to above – that human rights violations are also committed by non-State actors or take place in a special context, such as a context of civil war, the Special Rapporteur emphasised that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any public emergency, may be invoked [by the State, JG] as a justification of torture.'<sup>304</sup>

In 1987 the Special Rapporteur dedicated an important part of his report to the legal concept of State responsibility in what was probably an attempt to provide doctrinal support for the argument that all States and the international community (*i.e.* the United Nations through, *inter alia*, the Special Rapporteur on Torture) have a legal interest in demanding the termination of a breach of the international prohibition of torture by another State (even when the victims of the breach are the offending States' own subjects).<sup>305</sup> While some States had requested the Special Rapporteur also to take

301 Ibid., paras. 36 and 37: 'intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind'.

302 Article 1, paragraph 1 of the Convention against Torture [emphasis added].

303 U.N. Doc. E/CN.4/1986/15, para. 38.

304 Ibid., para. 39.

305 The reasoning proposed by the Special Rapporteur was as follows: torture is a violation of an obligation *erga omnes*, *i.e.* an obligation *vis-à-vis* the international community as a whole and all States, therefore, have a legal interest in the termination of the violation. With this reasoning the Special Rapporteur might have wanted to pre-empt discussions concerning the question of the *locus standi* of States not immediately or (in)directly affected by the violation and also to provide a solution for the fact that

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into account acts of torture committed by non-State actors, there was no reference to these actors in the report.<sup>306</sup>

III.3.2.4.3 The Period from 1990 to the Present

In spite of the explicit decision of the Working Group on Enforced or Involuntary Disappearances, followed by the Special Rapporteur on Torture, not to consider cases of disappearances or acts of torture attributed to 'terrorist or insurgent movements fighting the Government on its own territory', the political discussions concerning the principle of the primary responsibility of States persisted within the Commission on Human Rights. States like Peru, Colombia, Sri Lanka and the Philippines continued to lobby for the condemnation of acts of violence committed by terrorist groups and their efforts paid off in 1990 when the Commission adopted Resolution 1990/75 on the '*Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights*'.<sup>307</sup> The resolution was adopted by a roll-call vote of 41 to none with two abstentions, namely Cuba and Sweden. In the resolution, the Commission expressed its deep concern 'at the adverse effects on the enjoyment of human rights of the crimes and atrocities committed in many countries by *irregular armed groups, regardless of their origin and drug traffickers*' and requested, *inter alia*, 'all Special Rapporteurs and Working Groups to pay particular attention to the activities of irregular armed groups and drug traffickers in their forthcoming reports.' Moreover, it was decided that the question of the use of violence by these groups would be considered 'as a matter of high priority' at the Commission's next session.

The sponsors of the resolution basically defended the resolution on two grounds. First, they wished the Commission to take into account 'the difficulties that democratic Governments (...) experienced in fulfilling their international obligations in the face of acts of violence committed by irregular armed groups and drug traffickers. Secondly, they argued that the Commission must look into this 'new and disturbing phenomenon (...) if it was to fulfil its monitoring duties in the field of human rights in a strict and impartial manner.'<sup>308</sup>

The Government of Cuba abstained in the vote on the resolution, in particular since it believed 'a very clear distinction should have been drawn in the resolution between

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individual victims have no standing at all to bring an international claim. The matter was later elaborated upon in detail by Kamminga in his doctoral thesis: Kamminga 1992. However, the issue of *locus standi* is a typical legal question and does not as such play a role in a political organ like the Commission on Human Rights (provided the subject-matter falls within the competence of the Commission). Or, as the Special Rapporteur himself put it in 1988: the instrument of thematic procedures has been developed by the Commission as a tool in the struggle against practices which have been outlawed by the international community and as a means to come to the rescue of potential or real victims of such outlawed practices.' See U.N. Doc. E/CN.4/1988/17, para. 11.

<sup>306</sup> Colombia in particular, see U.N. Doc. E/CN.4/1987/SR.33, para. 40. *Supra* Chapter III.3.2.4.2.

<sup>307</sup> Adopted on 7 March 1990.

<sup>308</sup> U.N. Doc. E/CN.4/1990/SR.54, paras. 1-4, see also the preamble to Resolution 1990/75.

*national liberation movements and armed groups and drug traffickers.*' The Government of Mexico had similar objections, but could still support the resolution, since it agreed with its substance. The Government of Sweden, on the other hand, shared the concern of the Commission, but abstained because it believed the primary task of special rapporteurs and working groups 'was to monitor compliance by States with their obligations under the Charter of the United Nations and the international standards on human rights by means, *inter alia*, of entering into dialogue with them.'<sup>309</sup>

Resolution 1990/75 institutionalised the debate on human rights and terrorism in the Commission. It marked the beginning of an era in which that debate would increasingly come to the fore, with States such as, *inter alia*, Turkey and India joining the traditional sponsors.<sup>310</sup> In the years that followed the Commission would adopt similar resolutions, changing the title to 'Human rights and terrorism' in 1994.<sup>311</sup> Obviously, these annual resolutions had the effect of making it politically more difficult to expose the human rights violations committed by States, especially when such violations occurred in the context of counter-insurgency campaigns. This effect was further exacerbated by the fact that the resolutions did not define the notion of terrorism, leaving considerable latitude for Governments to qualify armed political opponents as terrorists. The annual terrorism resolution also increased political pressures on the Working Group on Enforced or Involuntary Disappearances and other special (thematic) procedures to refer to the activities of terrorist groups and other non-State actors committing acts of violence in their annual reports. At a higher level of abstraction, the human rights and terrorism resolutions provoked a debate in the Commission on two fundamental questions: in the first place, whether that organ was the appropriate body to deal with the problems caused by violence by non-State actors; and secondly, since the Commission was *de facto* considered the appropriate body, the question whether terrorist activities could be considered 'violations of human rights'.

The latter question became particularly acute in 1994 when the sponsoring States managed not only to condemn acts of violence committed by non-State actors, but also to have these acts qualified as 'gross violations of human rights.'<sup>312</sup> Moreover, the 1994 resolution also ignored other (established) conceptual and juridical notions, in

<sup>309</sup> Ibid., paras. 8-15.

<sup>310</sup> See, for example, U.N. Doc. E/CN.4/1992/SR.21, paras. 82-92 (Turkey), and U.N. Doc. E/CN.4/1992/SR.24/Add.1, para. 24 (India). The representative of India 'welcomed the fact that the Commission (...) was *beginning to be aware of the massive violations of human rights (...) carried out by terrorist groups, drug traffickers and subversive elements*', but regretted 'that the amount of attention given to them was miniscule compared to that given to alleged violations by governments (...)' He therefore believed it 'necessary to bring massive and consistent pressure of world public opinion to bear on terrorists and subversives' and he believed that '[t]hat was where the special rapporteurs, working groups and members of the Commission (...) had a responsibility which, unfortunately, had not been carried out.' [emphasis added] See also the statements made by the representatives of India and Turkey in 1995 (U.N. Doc. E/CN.4/1995/SR.32, paras. 56 and 75).

<sup>311</sup> C.H.R. Res. 1991/29 (entitled *Consequences on the enjoyment of human rights of acts of violence committed by armed groups that spread terror among the population*, maintained until 1994), 1992/42, 1993/48, 1994/46, 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37.

<sup>312</sup> C.H.R. Res. 1994/46 adopted without a vote on 4 March 1994 and subsequent resolutions.

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particular the notion of 'act of aggression' as it condemned '*all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed, as acts of aggression* aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilising legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences on the economic and social development of States.'<sup>313</sup> Nevertheless, the 1994 resolution was adopted without a vote and so would the resolutions adopted in 1995 and 1996 respectively.<sup>314</sup>

In 1997 the consensus on the human rights and terrorism resolution broke down, but did not prevent the adoption of resolution 1997/42 by a roll-call vote of 28 votes to none, with 23 abstentions. The summary records of the 1997 session clearly reveal the opposing positions. On the one hand, there are the sponsors of the resolution such as Turkey, Pakistan, Algeria and the Russian Federation defining terrorist acts as 'gross violations of human rights'. On the other hand, there are the Latin American States and the Group of Western States and Others, especially the EU, the United States of America and Canada, defending the position that (1) to state that terrorist acts in themselves constituted violations of human rights amounted to a distortion of established concepts and could have a negative impact on the international system for human rights protection; (2) violations of human rights could be attributed only to States and governmental agents, not terrorist groups; (3) terrorist groups should not be given any special status under international law; (4) the actions of terrorist groups constituted criminal offences to be dealt with under the criminal legislation of States; (5) the Sixth Committee of the General Assembly was the forum best suited for consideration of the problem of terrorism; (6) terrorist acts should not be labelled as acts of aggression, a term used within the specific context of the activities of the Security Council under Chapter VII of the Charter.<sup>315</sup> These opposing opinions still reflect the positions held in 2003, whereby it is worthwhile noting that all annual resolutions, including Resolution 1997/42, recognise that 'all measures to counter terrorism must be in strict conformity with international law, including human rights standards.'<sup>316</sup> Moreover, reference to terrorist acts as acts of aggression has been notably absent from resolutions since 1998.<sup>317</sup>

<sup>313</sup> Ibid., para. 1 [emphasis added].

<sup>314</sup> In 1994 the representative of Finland joined the consensus, but did declare that it had certain reservations about the statement that acts of terrorism constituted violations of human rights, see U.N. Doc. U.N. Doc. E/CN.4/1994/SR.56, para. 10. Similar reservations were made by Mexico in 1996, see U.N. Doc. E/CN.4/1996/SR.52, para. 75.

<sup>315</sup> U.N. Doc. E/CN.4/1997/SR.57, paras. 73- 91.

<sup>316</sup> These references are included both in the preambular paragraphs and the operative paragraphs of the respective resolutions.

<sup>317</sup> U.N. Doc. E/CN.4/1998/SR.52, paras. 23-36; U.N. Doc. E/CN.4/2000/SR.60, paras. 5-24; U.N. Doc. E/CN.4/2001/SR.72, paras. 1-12; see for an account of the debate during the 59th session of the Commission (2003), International Service for Human Rights, Analytical report of the 59th session – Geneva, 17 March to 25 April 2003, 'Administration of Justice' under 'Human Rights and Terrorism', HRM 2003, pp. 47 ff.: internet document, see [www.ishr.ch](http://www.ishr.ch)

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Since the events of 11 September 2001 in the United States the human rights and terrorism discussion has further increased in intensity. While these events have not significantly changed the formal position of that country or of any other State belonging to the Western Group of States in respect of terrorist violence, they have led to a wave of anti-terrorist legislation with serious implications in the field of human rights.<sup>318</sup> However, in 2003 the Commission, without a vote, adopted Resolution 2003/68 entitled '*Protection of human rights and fundamental freedoms while countering terrorism*'.<sup>319</sup> Following the General Assembly Resolution 57/219, the resolution of the Commission provided, *inter alia*, that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law. In addition, it requested:

'all relevant special procedures and mechanisms of the Commission on Human Rights, as well as the United Nations human rights treaty bodies, to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism';<sup>320</sup>

While some observers and NGOs had wished the Commission to establish a Special Rapporteur or Working Group with a mandate to monitor national anti-terrorism measures in the light of international human rights norms, the resolution entrusts the High Commissioner for Human Rights with the task 'to examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources' and only 'to make *general recommendations* concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism'.<sup>321</sup> Furthermore, the High Commissioner and the Human Rights Committee are invited 'to continue the important dialogues they have established with the Counter-Terrorism Committee of the Security Council and to further their mutual cooperation'.<sup>322</sup>

How has the Working Group on Enforced or Involuntary Disappearances reacted to the changing political realities? In the first place, it is important to mention that the 'human rights and drug traffickers/irregular armed groups/terrorism' resolutions have not led the Working Group to change its working methods. It has continued, as before, to uphold the principle of the State's responsibility for the human rights violations committed within its territory and, therefore, still deals exclusively with Govern-

318 In 1998 and 1999 most countries belonging to the Group of Western States, most notably the EU countries and the United States of America, abstained in the vote on the human rights and terrorism resolution, in 2000 and 2001 they voted against it, in 2002 they abstained and in 2003 they again voted against. See also HRM, Nos. 57-58 (2002), p. 90 and Analytical report of the 59th session – Geneva, 17 March to 25 April 2003, 'Overview of the 59th Session' under 'Noteworthy Achievements', HRM 2003, pp. 1-2: internet document, see [www.ishr.ch](http://www.ishr.ch)

319 Adopted on 25 April 2003. A similar proposal had been unsuccessfully introduced in 2002. See HRM 2003 (Internet document: overview of the 59th Session under 'Human rights and terrorism').

320 C.H.R. Res. 2003/68, para. 5.

321 C.H.R. Res. 57/219, para. 7 (a) and (b).

322 *Ibid.*, para. 4.

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ments.<sup>323</sup> In its report over 1992 the Working Group referred for the first time, under the heading '*legal framework for the activities of the Working Group*', to the resolution on human rights and irregular armed groups and drug traffickers as it was still named at that date, but it did not elaborate how it would deal with the Commission's request 'to pay particular attention to the adverse effects on the enjoyment of human rights of such acts of violence committed by armed groups (...)'.<sup>324</sup> The next year, the Working Group indicated that it had 'reflected information received [concerning terrorism] in the relevant country subsections' of its annual reports.<sup>325</sup> Reference to acts of violence committed by non-State actors are notably absent in the Working Group's annual general conclusions and recommendations.<sup>326</sup> The Working Group's report on country visits, however, invariably take into consideration the general human rights situation in the country concerned, including violence committed by non-State actors, as evidenced, *inter alia*, by the Group's reports on visits to Turkey and Sri Lanka.<sup>327</sup>

A closer study of the country sections of the Working Group's annual reports reveals that Governments have submitted information concerning violence committed by terrorist groups, which the Working Group has indeed summarised under the heading 'information and views received from the Government.' Such countries include again Peru,<sup>328</sup> the Philippines,<sup>329</sup> Sri Lanka,<sup>330</sup> Colombia,<sup>331</sup> Turkey<sup>332</sup> and India.<sup>333</sup>

In 1994, on the occasion of a revision of its working methods, the Working Group further reinforced its basic position that States are responsible for disappearances occurring on their territories. This development was closely linked to the adoption of the Declaration on the Protection of All Persons from Enforced Disappearances by the General Assembly, and the Working Group's decision 'to consider it its task to make

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323 When introducing the Working Group's annual report to the Commission in 1992, the Chairman of the Group stated that 'Governments had the ultimately responsibility for what happened within a country's borders' and 'were primarily responsible not only for their own policies but also for the introduction of such practices as enforced disappearances into society as a whole.' See U.N. Doc. E/CN.4/1992/SR.21, para. 69.

324 U.N. Doc. E/CN.4/1993/25, para. 17.

325 U.N. Doc. E/CN.4/1994/26, para. 20.

326 With the exception, perhaps, of the Working Group's 2002 report in which it referred to the complex situation deriving from internal conflict or tensions engendering violence and human rights violations, which is 'the dramatic case of a country like Colombia today where the prevention of disappearances is closely linked to finding a solution to the internal conflict.' U.N. Doc. E/CN.4/2003/70, para. 325.

327 U.N. Doc. E/CN.4/1999/62/Add.2, paras. 7-12 (Turkey); U.N. Doc. E/CN.4/2000/64/Add.1, paras. 1-13 (Sri Lanka).

328 U.N. Doc. E/CN.4/1991/20, paras. 317 ff.; U.N. Doc. E/CN.4/1992/18, para. 298; U.N. Doc. E/CN.4/1993/25, para. 415; U.N. Doc. E/CN.4/1994/26, paras. 390-392.

329 U.N. Doc. E/CN.4/1991/20, para. 322; U.N. Doc. E/CN.4/1993/25, paras. 436 and 437; U.N. Doc. E/CN.4/1994/26, paras. 408-410.

330 U.N. Doc. E/CN.4/1991/20, para. 359 ff.

331 U.N. Doc. E/CN.4/1993/25, para. 185.

332 U.N. Doc. E/CN.4/1992/18, para. 341; U.N. Doc. E/CN.4/1993/25, para. 486; U.N. Doc. E/CN.4/1994/26, para. 491.

333 U.N. Doc. E/CN.4/1993/25, para. 277; U.N. Doc. E/CN.4/1994/26, para. 251

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the Declaration better known and to monitor States' compliance with its provisions.<sup>334</sup> As a reaction to the adoption of the Declaration the Working Group decided to adopt an increasingly judgmental posture, which was reflected also in the decision to include 'observations' on the situation of disappearances in countries with over 1,000 reported cases of disappearances, or with more than 50 cases which have allegedly occurred in the current year.<sup>335</sup> As the Working Group stated in its 1994 report:

'In order to make States better aware of *their various responsibilities under the Declaration*, a more effective and institutionalised monitoring procedure is essential. (...) As a first step, the Working Group introduces in the present report country specific observations [referring to the obligations under the Declaration, JG] to a limited number of Governments.'<sup>336</sup>

At the same time, references to the 'human rights and terrorism' resolutions of the Commission have been increasingly sporadic in the annual reports of the Working Group. However, in the light of the continuous general debate on terrorism and human rights in the Commission from 1990 onwards, it seems that this development must first of all be related to the Working Group's 1994 decision to change the format of its report. This change had as its primary objective a reduction in the number of pages of the annual report as repeatedly requested by the General Assembly and the Commission. Consequently, as the Working Group indicated itself, reducing the number of pages

'[makes] it impossible to give full or detailed information in the report concerning each and every major decision affecting the Group's work (...) to reproduce in full, or in great length, contributions received from Governments and NGOs.'<sup>337</sup>

#### III.3.2.4.4 Special Process on Missing Persons in the Territory of the Former Yugoslavia

At this point a few words must be said about the Special process on missing persons in the territory of the former Yugoslavia (*Special Process*) instituted in 1994. Before going into the relevant details concerning the mandate of the Special Process, some general remarks must be made. In the first place, the decision of the Working Group on Enforced or Involuntary Disappearances normally to deal only with Governments and not to consider allegations of disappearances for which non-State actors have been said to be responsible, is not simply (only) a normative position of principle, but also a decision embedded in the practical realities of a legal order made up of States (more or less) exercising effective control over their territories. The need for any normative position not to be too far ahead of the facts becomes clearly visible in the case of the

334 U.N. Doc. A/RES/47/133 of 18 December 1992.

335 U.N. Doc. E/CN.4/1995/36, paras. 6, 7 and 443; also infra Chapters III.3.2.5.1 and IV.7.1.

336 Ibid., para. 56 [emphasis added].

337 Ibid., para. 7; infra Chapter IV.7.1 (on page-limits and the quality of the annual report).

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former Yugoslavia, where the Working Group was confronted with large-scale violations of human of rights in a situation where clear Governmental control was absent.

Thus, in 1992, approximately 6,000 alleged cases of disappearances reported to have occurred on the territory of the former Yugoslavia were brought to the attention of the Working Group, which considered the question of what action it should take with regard to these cases.<sup>338</sup> For a number of reasons the Working Group sought the guidance of the Commission on the matter. These reasons included the question of the character of the conflict; the question of the resources needed to deal with such a large number of cases; but also the question of competence *ratione personae*. In that respect, the Working Group noted in 1992 that:

‘Incongruity exists between the *exigencies of the situation in the former Yugoslavia* and the Group’s existing methods of work. One issue, perhaps solvable in a pragmatic manner, is that, according to the Group’s *modus operandi*, cases of disappearance are addressed to the responsible Government, *i.e.* the Government on whose territory the disappearance occurred. Obviously, *in the reality of present-day Yugoslavia, large numbers of cases might fall between two stools*, as both Governments and territories have dramatically changed and are still in the process of doing so. Of course, the Working Group *could not be expected to devise special working methods to suit the requirements of one particular situation*, however important.’<sup>339</sup>

The following year one member of the Working Group, Mr van Dongen, undertook a mission to the former Yugoslavia ‘in order to determine which mechanisms might usefully be proposed with a view to elucidating the fate and whereabouts of the missing persons.’ The member proposed that a ‘Special Process’ be established, which must take a ‘pragmatic approach’, meaning that

‘All cases of missing persons in any part of the former Yugoslavia should be considered under the same procedure (...) regardless of whether the victim is a civilian (non-combatant) or a combatant and *regardless of whether the perpetrators are in effect connected to the Government or not*.’<sup>340</sup>

Pursuant to Commission Resolutions 1994/39 and especially 1994/72 the Special Process was established as a joint mandate of the Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia and one member of the Working Group, on the understanding that the expert from the Working Group would be entrusted with the task of carrying out the mandate.<sup>341</sup> The working methods of the

338 U.N. Doc. E/CN.4/1993/25, paras. 6 and 36- 44. In the next report the number of reported cases had reached more than 11,000. U.N. Doc. E/CN.4/1994/26, para. 37.

339 U.N. Doc. E/CN.4/1993/25, para. 42 [emphasis added].

340 U.N. Doc. E/CN.4/1994/26/Add.1, para. 114. For conceptual reasons, the target group being wider than the one covered by the Working Group, the Special Process uses the term ‘missing persons’ rather than ‘disappeared persons’.

341 The Special Process was changed into an independent mandate pursuant to C.H.R. Res. 1995/35.

Special Process indeed provided that, in principle, all cases of missing persons would be considered, regardless of whether the alleged perpetrators are in effect connected to Government authorities or not. The Special Process only excluded cases which were clearly the result of common crime.<sup>342</sup>

As the expert reported, the general approach of the Special Process entailed that individual cases of missing persons were submitted 'to both the Government and the *de facto* authorities involved at the national, regional and local levels.' In addition, the approach also applied in respect of field visits carried out by the expert. In accordance with the working methods of the Special Process, such field visits, 'as a matter of principle (...) are only carried out at the invitation of the Governments concerned and the *de facto* authorities.'<sup>343</sup>

However, while referring to Mr van Dongen's report, which described the application of the traditional method of the Working Group as a 'self-defeating approach', the expert made clear that '[c]ontacts with the *de facto* authorities are, of course, of a strictly humanitarian nature and must therefore not be interpreted as implying any kind of official recognition by the United Nations.'<sup>344</sup> As will be seen below, in 2002 the Special Rapporteur on Torture would adopt a similar reasoning to bring acts of non-State entities within the scope of his mandate.

The whole episode of the Special Process ended ignominiously with the resignation of the expert member of the Working Group in charge on 26 March 1997, 'because of lack of support by the international community for his efforts to clarify cases of disappearance by all available means, including exhumation of mortal remains.'<sup>345</sup>

Apart from the Special Process, another special case concerns the Palestinian Authority, which the Working Group addressed under its normal procedure as if it were a Government of a State. No special justification has been included in the reports and the cases related to the Palestinian Authority are usually presented under the heading 'Information concerning (...) disappearances (...) in various countries reviewed by the Working Group, and the Palestinian Authority.'<sup>346</sup> The Working Group on Arbitrary Detention and the Special Rapporteur on Torture basically adopted the same approach in respect of the Palestinian Authority. The standpoint of these two procedures in respect of other non-State actors will be briefly reviewed below.

#### III.3.2.4.5 Working Group on Arbitrary Detention and the Special Rapporteur on Torture

The Working Group on Arbitrary Detention, established in 1991, has on two occasions indicated its position in respect of acts of violence committed by non-State actors. First in 1994, in response to Commission Resolution 1993/48, the Group acknowledged the

342 U.N. Doc. E/CN.4/1995/37, para. 12 (e), Report of the Special Process.

343 Ibid., para. 12 (i).

344 Ibid., para. 12 (f) and U.N. Doc. E/CN.4/1994/26/Add.1, para. 74.

345 U.N. Doc. E/CN.4/1998/43, para. 21.

346 Ibid.

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negative consequences for the enjoyment of human rights of acts of violence committed by such groups. However, it also held that its 'mandate is (...) limited to cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards (...). With regard to the content of this mandate, the Working Group adopted its deliberations 02 and 03 (...), which (...) clearly show that the term detention refers to an act of State which deprives a person of his freedom.'<sup>347</sup> In another paragraph on this topic the Working Group stated that 'when acts depriving persons of their freedom are carried out by non-State or even private organised movements which use armed struggle in their political action, chiefly in circumstances governed by international humanitarian law, the Group will need to look into an appropriate procedure', but made it clear that 'in the present state of thinking, the Group considers that the mandate relates solely to detentions ordered or practised by the State.'<sup>348</sup>

In 1995 the Working Group stated that it still '[believed] that deprivation of liberty of individuals by terrorist groups does not fall within its mandate.' It justified this position on the ground that deprivation of liberty by private groups 'has *per se* no legal basis as it does not owe its genesis to either law or decree and its legal consequences, if any, are totally different from those resulting from arbitrary detention carried out by States. It is *de facto* deprivation of liberty and nothing more.'<sup>349</sup> From 1995 onwards the Working Group on Arbitrary Detention has always maintained the above standpoint as its formal position.<sup>350</sup>

In the early years of the 1990s the Special Rapporteur on Torture did not find it necessary to be more explicit about the manner in which he dealt (did not deal) with acts of violence committed by non-State actors. He simply maintained and repeated his earlier position that, while persistent acts of violence committed by armed groups and drug traffickers constituted a matter of deep concern, they can 'never serve as an excuse for similar acts on the part of the authorities.'<sup>351</sup>

In 1993 Sir Nigel Rodley took over the position of Special Rapporteur on Torture from Peter Kooijmans. The new Special Rapporteur chose to explain and justify his position on the question of acts of violence committed by non-State actors in a different manner than his predecessor. He noted that Commission Resolution 1993/48, covering the problem of terrorism, intentionally omitted to refer to acts of violence by such actors as human rights violations, believing 'that the Commission would not wish to dignify perpetrators of criminal violence by describing them as human rights violators or, even less, addressing them as though they had some sort of authority that falls within the régime of the international legal protection of human rights.'<sup>352</sup> Still, the new Special Rapporteur indicated that he could envisage that his mandate could extend to situations of armed conflict, whether of an international or non-international

347 U.N. Doc. E/CN.4/1994/27, para. 40. On 'deliberations', see also *infra* Chapter IV.2.3.

348 *Ibid.*, para. 41.

349 U.N. Doc. E/CN.4/1995/31, para. 25 (d).

350 See also U.N. Docs. E/CN.4/1996/40, Annex I; E/CN.4/1997/4, Annex I; E/CN.4/1998/44, Annex I; (revised methods of work).

351 U.N. Doc. E/CN.4/1992/17, para. 279.

352 U.N. Doc. E/CN.4/1994/31, paras. 12 and 13.

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character, since international law prohibited torture by any party to the conflict. To that end he asked the Commission for guidance.<sup>353</sup> He also assured the Commission that he would 'continue as appropriate to acknowledge the existence of persistent acts of violence committed by armed groups when these are brought to his attention, *within the context of acts falling under his mandate*.'<sup>354</sup>

In 1996 the Special Rapporteur summarised his working methods once again. This time, however, he was no longer able to rely on the reasoning that the Commission had intentionally omitted to refer to acts of violence committed by non-State actors as human rights violations. As described above, since 1994 the Commission had changed its position precisely on that issue. The new situation led the Special Rapporteur for the first time to formulate explicitly that 'in transmitting allegations of torture he deals exclusively with Governments, as the authorities bound by the régime for the international legal protection of human rights.'<sup>355</sup>

This standpoint was loosened somewhat with the appointment of Theo van Boven as Special Rapporteur in November 2001. In his second report presented to the Commission in 2003, Van Boven relativised the principle of dealing exclusively with Governments in the case of urgent appeals, which might exceptionally be sent to '*entities other than official de jure authorities in cases where the entities in question, as well as the channel of communication for reaching them, have been clearly identified*.'<sup>356</sup> This allowed him to address non-State actors, including the United Nations itself (in relation to peace-keeping operations for example).<sup>357</sup> Van Boven motivated his decision by referring to the immediate humanitarian purposes served by urgent appeals, but also stressed that the urgent appeals do not in any way determine the international legal status of the entities involved. In adopting this approach the Special Rapporteur essentially followed the suggestions made at the annual meeting of special procedures mandate holders in 1996. These suggestions will be briefly dealt with below.

#### III.3.2.4.6 Annual Meeting of Special Procedures Mandate Holders and Responsibility for Violations of Human Rights by Non-State Actors

At the annual meeting of special procedures mandate holders, in which the Chairmen of the Working Groups on Enforced or Involuntary Disappearances and Arbitrary Detention and the Special Rapporteur on Torture participated, special procedures mandate holders have attempted to see whether a common position could be reached in dealing with the topic of terrorist activities and human rights within the context of their mandates. During the third annual meeting in 1996 the topic was discussed at some length. The general opinion emerging from these discussions seemed to be the

353 Ibid., para. 13. *Infra* Chapter III.3.2.5.4.

354 Ibid., para. 13 [emphasis added]. For example, in reports of country visits.

355 U.N. Doc. E/CN.4/1997/7, para. 9.

356 U.N. Doc. E/CN.4/2003/68, para. 9.

357 See, for example, U.N. Doc. E/CN.4/2004/56/Add.1, paras. 1979 ff.

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following: (1) giving terrorist groups the quality of violators of human rights would be dangerous and could amount to a sort of justification of human rights violations committed by Governments; (2) States were responsible for human rights violations and were the addressees of the international human rights standards; a difference should be made between 'human rights violations' and 'crimes'; (3) neither recognition nor legitimatisation fell within the mandates of the experts; (4) reports should distinguish between international humanitarian law (Protocol II additional to the Geneva Conventions and Common Article 3 of the Conventions) and human rights law (recognizing that there are overlaps and gaps between the two); (5) reports *could describe* actions by non-State groups (such as killings and kidnapping) amounting to crimes, *in order to give an overall picture* of a given situation; however, that should not take away the responsibility of Governments concerning human rights violations.<sup>358</sup>

At the same time, the discussions made clear that in view of the complexity of the topic, the mandate holders ought to approach the matter in a *pragmatic* manner. Two considerations have come to the fore as particularly pertinent in this respect: (1) when dealing with the consequences of acts, methods and practices of terrorist groups in their reports to the Commission, the holders of human rights mandates should adopt a victim-oriented approach, and (2) the realisation that the weakening or breakdown of States and State structures could lead to an even worse situation of human rights violations and might render the problem much more complex.<sup>359</sup>

#### III.3.2.4.7 Intermediate Assessment: Primary Responsibility of Governments for Human Rights Violations

The present chapter has analysed how thematic procedures, exemplified in particular by the practice of the Working Group on Enforced or Involuntary Disappearances, have implemented the principle of the primary responsibility of States for violations of human rights and, in particular, how they have responded to and resisted pressures from Governments and since 1990 also from the Commission to take into account and to report, within the context of their mandates, on acts of violence committed by terrorist or insurgent groups.

It has been shown that the principle of the primary responsibility of States, which identifies (*de jure*) Governments as the exclusive addressees of human rights violations, has been firmly established in the practice of thematic procedures. Thematic procedures have made a sharp distinction between human rights violations, which are by definition committed by States only, and private acts of violence or brutality, which are usually criminal offences under national law and should be treated as such. The latter type of acts normally do not fall within their mandates and for that reason

<sup>358</sup> U.N. Doc. E/CN.4/1997/3, paras. 44-48, especially para. 47. See also HRM, Nos. 32-33 (1996), pp. 2-43 and U.N. Doc. E/CN.4/1996/50, para. 49 (Report of the Second Annual Meeting of Special Procedures Mandate Holders).

<sup>359</sup> U.N. Doc. E/CN.4/1997/3, para. 45.

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thematic procedures have refused to entertain allegations concerning, for example, disappearances, torture or arbitrary detention attributed to terrorist or insurgent groups or to any other non-State actor. The acts of private entities may, however, come within the purview of the mandates of thematic procedures if evidence reveals that the authorities or officials have consented or acquiesced to such acts. In addition, as the first Special Rapporteur on Torture once remarked, even passivity regarding (the investigation or prosecution of) private acts might under certain circumstances be considered consent or acquiescence.

This basic approach has also been applied with respect to the technique of on-site visits, although it has been seen that such visits also provided an opportunity for thematic procedures to take into account situations of generalised violence, insurgency, terrorism or drug trafficking in order to contextualise the visit and its findings and conclusions.

Finally, it has been shown that considerations of effectiveness have occasionally led thematic procedures to allow for an exception to the general rule of the primary responsibility of States. As exemplified in particular by the Special Process on missing persons in the territory of the former Yugoslavia and the practice initiated by the Special Rapporteur on Torture, there may be situations where the principle of the primary responsibility of States has lost much of its practical relevance, for example because the *de jure* Government no longer exercises control over (part of) the territory of the State or because an international organisation has taken over particular tasks (peace-keeping activities) on the territory of the State. In such circumstances thematic procedures have begun to recognise that humanitarian considerations may justify that entities other than the *de jure* Governments are approached with a view to clarifying alleged human rights violations. Whereas the establishment of a Special Process with a mandate to approach the *de facto* authorities on the territory of the former Yugoslavia could still be considered an *ad hoc* solution to an exceptional situation, the decision of the Special Rapporteur on Torture to incorporate in his working methods the fact that, under certain conditions, urgent appeals may be transmitted even to entities other than the *de jure* authorities, has given this exception a more structural character.

*III.3.2.5 Competence Ratione Materiae: Questions relating to the Subject-matter of the Mandates of Thematic Procedures*

*III.3.2.5.1 Frame of Reference of the Working Group on Enforced or Involuntary Disappearances*

At the time of the establishment of the Working Group neither the term 'disappearances', nor the specific Government obligations in respect of this phenomenon figured in any existing human rights instrument.

Resolution 20 (XXXVI) did not give a precise definition of the subject-matter within the competence of the Working Group either. The Working Group would deal with 'questions relating to *enforced or involuntary disappearances*.' The terms 'en-

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forced or involuntary disappearances' had been introduced following a discussion on the concept of disappearances as it originally appeared in the French draft resolution.

The French draft described the subject-matter as 'cases in which they [Governments, JG] are unable to locate immediately or following a brief investigation either a person whose abduction or arrest has been reported to them or a person who has been reported missing and may be presumed to have been a victim of such acts.' Some delegations, notably the United States, the Netherlands, Canada and Australia, could not agree with the French proposal. According to them the formulation proposed seemed to cover a wider category of persons than kidnapped persons. It would cover all *missing* persons, which includes persons who for some reason have disappeared voluntarily. In order to avoid any misunderstanding in this respect it was decided to add the words enforced and involuntary.<sup>360</sup>

One of the few documents which could give the Working Group some guidance on the matter was General Assembly Resolution 33/173, which in its preamble referred, *inter alia*, to articles 3 (life, liberty and security of person), 5 (no torture), 9 (no arbitrary arrest), 10 (fair trial) and 11 (presumption of innocence; no retroactive penal laws) of the Universal Declaration of Human Rights and the corresponding provisions of articles 6, 7, 9, 10 of the International Covenant on Civil and Political Rights. That resolution also called upon Governments to make sure that they take the necessary steps to prevent disappearances, to undertake speedy and impartial investigations in the case of disappearances and to hold the perpetrators of such acts fully accountable, including legal responsibility for unjustifiable excesses.<sup>361</sup>

However, especially in the early years of its existence the Working Group generally refrained from invoking the specific human rights standards violated by a particular Government in the relevant country sections of its report. In line with the Group's decision to adopt a 'humanitarian approach' in respect of cases of disappearances, which meant that it did not pass judgment on Governments, the Working Group merely sought to help to discover what had happened to the disappeared, or in the Working Group's own words 'determining the whereabouts and fate of the (...) disappeared persons.'<sup>362</sup> For this purpose, a practical and empirically-based description of disappearance sufficed.<sup>363</sup> The minimum elements, which the Working Group needed before it decided to take up a case included: the full name of the victim, the date and place of his/her disappearance, the parties presumed to have been involved

<sup>360</sup> See Kramer and Weissbrodt, HRQ 1981, pp. 21 and 22; also Guest 1990, p. 194.

<sup>361</sup> *Supra* Chapter III.3.2.4.1.

<sup>362</sup> U.N. Doc. E/CN.4/1435, paras. 9 and 190.

<sup>363</sup> See the Working Group's descriptions of a 'typical example of (...) disappearances' as 'a clearly identified person is detained against his will by officials of any branch or level of Government or by organised groups or private individuals allegedly acting on behalf or with the support, permission or acquiescence of the Government. These forces then conceal the whereabouts of that person or refuse to disclose his fate or to acknowledge that the person was detained.' U.N. Doc. E/CN.4/1988/19, para. 17. Also U.N. Doc. E/CN.4/1992/18, para. 2: 'the Working Group has sought to develop methods of work enabling it to deal in a practical manner with the sensitive information brought to its attention and to cover a maximum number of individual cases reported to it.'

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in the disappearance (Government involvement) and the steps taken (by the applicant or others) to determine the whereabouts of the disappeared person.<sup>364</sup>

In its second report, the Working Group stressed what it expected from Governments:

‘[i]t is simply asking Governments, so far as they can, to explain if a missing person is detained, where the place of detention is, or, if he is not detained, what happened to him after his arrest. If as a result an excess or abuse of authority is uncovered, (...) the national legal system is likely to contain adequate power to deal with any offender, and should be allowed to do so.’<sup>365</sup>

In the same report the Working Group also wrote that Member States of the United Nations had been responding to the Secretary-General’s request to inform him of the features of their constitutional, legislative and judicial systems which can be invoked by a relative or another interested person in the case of disappearance. On the basis of this information, it concluded that

‘[t]he resolution of the phenomenon (...) depends basically upon the proper implementation of *existing* national laws. There is no indication that Constitutions or laws need amendment, unless they fail to provide the minimal safeguards in the International Covenant on Civil and Political Rights. All that is required is that *practice should equate itself to precept*. To the extent that it fails to do so, it may be said that the Working Group has a role to play.’<sup>366</sup>

In its third report, the Working Group again concluded that ‘an insistence on the rule of law would make (...) disappearances extremely difficult. If the rule of law were universally effective, the Working Group’s mandate would not require renewal.’<sup>367</sup>

While the pragmatic humanitarian approach continued to be the basic premise underlying the Working Group’s main activities until the beginning of the 1990s, a slow but steady development towards a more juridical approach may be discerned at a higher level of abstraction, *i.e.* at the level of the Group’s activities in relation to the phenomenon of disappearances *per se*, its dynamics and dimensions.<sup>368</sup>

364 See, for example, U.N. Doc. E/CN.4/1988/19, para. 21. Also Kamminga, NILR 1987, pp. 302 and 303.

365 U.N. Doc. E/CN.4/1492, paras. 5 and 6, also U.N. Doc. E/CN.4/1990/13, para. 347.

366 U.N. Doc. E/CN.4/1492, paras. 182-185 [emphasis added].

367 U.N. Doc. E/CN.4/1983/14, para. 144.

368 The country visits undertaken by the Working Group in the period 1985-1993, although containing more specific recommendations, do not refer to specific international human rights obligations of the Government concerned. Also here, the approach is more practical. Occasional general references to international documents may still be found: *e.g.* in the 1988 country report on Guatemala the Working Group referred to General Assembly Resolution 33/173, which ‘calls upon all Governments in unequivocal terms to undertake such investigations in a speedy and impartial manner.’ U.N. Doc. E/CN.4/1988/19/Add.1, para 80; in the country-report on Sri Lanka the Working Group recommended that ‘the Government should seriously consider undertaking a general overhaul of its emergency legislation (...) with a view to ensuring that it conforms to Sri Lanka’s international obligations on the matter (...).’ U.N. Doc. E/CN.4/1993/25/Add.1, para. 146 (a). The Working Group did not say what

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First, the Working Group spent considerable time pointing out, *in abstracto*, which specific human rights are denied in cases of enforced or involuntary disappearances, whereby it referred in particular to the relevant articles and provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners<sup>369</sup> and Additional Protocol I to the Geneva Convention of 12 August 1949, recognising 'the right families to know the fate of their relatives' as reflected in the resolutions of United Nations bodies. It also referred to regional instruments such as the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights as well as the European Convention on Human Rights.<sup>370</sup>

Secondly, the Working Group started to formulate recommendations to the Commission, concerning the measures which Governments should take in order to prevent or investigate cases of disappearances, without however referring explicitly to any of the international or regional instruments stated above. Thus, in 1982 the Working Group recommended to the Commission that it should encourage States to initiate inquiries to solve specific cases of disappearances and to commend and support any reorganisation of domestic procedures to 'enable rapid response to be provided to any citizen's allegation that a disappearance has taken place.'<sup>371</sup> In 1983, the Working Group, while referring to '[t]he inhumanity and specific violations of accepted human rights arising out of disappearances (...) catalogued in previous reports', recommended the Commission to 'urge upon Governments the need to adopt measures, in dealing with internal tensions or disorders from any quarter, which will inform relatives of the detention and subsequent trial of any accused person.'<sup>372</sup> The political relevance of these recommendations and other similar kinds of recommendations adopted in the years that followed would increase significantly from 1984 onwards as the Working Group suggested that the Commission should 'consider drafting an international instrument on enforced or involuntary disappearances.'<sup>373</sup>

Thirdly, in 1983 the Working Group indicated that the time had arrived for the Commission to adopt a more active role, since 'experience shows that the *points made in General Assembly resolution 33/173 are still valid and provide a framework for the*

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these specific obligations were. In the country report on the visit to Colombia the Working Group underlined once again its humanitarian approach when it stated: 'Although as a matter of principle the Working Group never engages in the question of responsibility (...) it is, on a more general level, interested in the question whether, as a rule, those responsible are being prosecuted to the full extent of the law. That interest, incidentally, is fully in keeping with General Assembly Resolution 33/173 (...).' U.N. Doc. E/CN.4/1989/18/Add.1, para. 136.

369 Adopted by the First United Nations Congress on the Prevention on Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by ECOSOC in its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

370 U.N. Doc. E/CN.4/1435, paras. 184 ff.; U.N. Doc. E/CN.4/1492, paras. 164 ff.; U.N. Doc. E/CN.4/1983/14, paras. 133 ff. and U.N. Doc. E/CN.4/1984/21, paras. 147 ff.

371 U.N. Doc. E/CN.4/1983/14, para. 145.

372 U.N. Doc. E/CN.4/1984/21, para. 179.

373 U.N. Doc. E/CN.4/1985 15, para. 302 (d).

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*Group's activities and for an assessment of its achievements.*<sup>374</sup> Pursuant to its Resolution 1984/23 the Commission asked the Working Group to continue to promote the implementation of General Assembly Resolution 33/173 and to present all appropriate information deemed necessary and all concrete suggestions and recommendations regarding the fulfilment of its task to its next session. The Working Group interpreted this request as permission to address letters to a number of Governments requesting information on the steps they had taken to implement the provisions of General Assembly Resolution 33/173. The objective of the exercise being

‘to analyse the material available and to identify some of the main characteristics of the measures that have or could be taken in pursuance of Resolution 33/173 in all countries where cases of disappearances have been reported and to submit *general* recommendations on the matter to the Commission at a later date.’<sup>375</sup>

This was the first time that the Working Group had taken the initiative to assume more general monitoring competences, thus attempting to extend its mandate beyond the purely humanitarian action taken to clarify individual cases of disappearances. To that end, the 1985 annual report contained a chapter entitled ‘Information provided in relation to the implementation of General Assembly Resolution 33/173.’ Also in 1985, the Commission endorsed the Working Group’s monitoring initiative in its Resolution 1985/20 when it invited ‘Governments of countries in which there are numerous cases of disappearances (...) to answer requests for information addressed to them by the Working Group in connection with the measures they have taken in application of General Assembly Resolution 33/173.’ However, the initiative was not very successful. It lasted for only two years, because of very weak cooperation from the side of the Governments concerned, despite repeated appeals by the Working Group and the Commission.<sup>376</sup> In its 1986 report, the initiative came to an end with the simple observation by the Working Group that

‘with regard to information provided in relation to the implementation of General Assembly Resolution 33/173, no further replies have been received to the questionnaire circulated by the Working Group in 1985.’<sup>377</sup>

Meanwhile, the Working Group continued to recommend that the Commission should take action concerning the idea of an international instrument against disappearances.<sup>378</sup> These efforts set in motion a process, which resulted in the adoption of a *Draft Declaration on the Protection of All Persons from Enforced or Involuntary*

374 U.N. Doc. E/CN.4/1984/21, para. 177 [emphasis added].

375 U.N. Doc. E/CN.4/1985/15, paras. 43-45.

376 See C.H.R. Res. 1986/55, para. 7 and U.N. Doc. E/CN.4/1985/15, paras. 45 and 302 (b), also U.N. Doc. E/CN.4/1986/18, para. 293 (c).

377 U.N. Doc. E/CN.4/1987/15, para. 13.

378 See in particular the general recommendations with regard to this topic in the annual reports of 1984, 1985, 1987 and 1988.

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*Disappearances* by the Sub-Commission in 1990.<sup>379</sup> In its Resolution 1992/29 the Commission on Human Rights adopted the Draft Declaration and decided to transmit it to ECOSOC and the General Assembly for final adoption. Anticipating the adoption of the Declaration by the General Assembly, the Working Group requested the Commission to reconsider some aspects of its mandate, in particular

‘[t]he Commission might request the Working Group to integrate the Declaration in its methods of work and to devote a separate chapter in its future reports to the Commission to obstacles encountered in the implementation of the Declaration world-wide. Also, the Commission may wish to change the name of the Working Group in conformity with the title of the Declaration.’<sup>380</sup>

On 18 December 1992 the General Assembly formally adopted the Declaration on the Protection of All Persons from Enforced Disappearances (*Disappearances Declaration*), declaring, *inter alia*, that ‘the systematic practice of such acts is of the nature of a crime against humanity’, thereby bringing the topic of disappearances within the purview of international criminal law.<sup>381</sup> For the Working Group the adoption of the Disappearances Declaration marked the beginning of a series of new initiatives, persuading it to adopt not only a more juridical approach, but partly as a result of that also to become increasingly judgmental of Governments. As a matter of fact, in the case of the Working Group on Enforced or Involuntary Disappearances, it could be said that these two tendencies, *i.e.* the more juridical and judgmental approach, coincided with each other. The tendency towards a more judgmental approach will also be described in some detail in Chapter IV.2.1.

The following initiatives were taken. In the first place, the Working Group decided to take up once again its practice of sending letters to (all) Governments, containing a request for information on the measures they had taken to implement the provisions of the Declaration and the obstacles they had encountered.<sup>382</sup> Secondly, the Working Group recommended the establishment of an international mechanism to monitor States’ compliance with the Disappearances Declaration and proposed a system of periodic reporting applicable to all Member States of the United Nations broadly similar to the systems established under the major United Nations human rights conventions. More specifically, it recommended the Commission to entrust the Working Group with the task of examining State reports and of transmitting its observations and recommendations to the Governments concerned. These Governments, moreover, should be represented when the Working Group examines their reports.<sup>383</sup>

379 U.N. Doc. E/CN.4/1991/20, paras. 27- 29.

380 U.N. Doc. E/CN.4/1993/25, para. 520.

381 G.A. Res. 47/133, see U.N. Doc. A/RES/47/133.

382 U.N. Doc. E/CN.4/1994/26, paras. 78 and 79.

383 *Ibid.*, paras. 87 and 88.

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An important breakthrough came in 1994 when the Working Group seized the opportunity to change its working methods, in accordance with Commission Resolution 1994/39, which requested the Working Group

‘in the exercise of its mandate, to take into account the provisions of the [Disappearances Declaration], and to modify its working methods if necessary’; and ‘to identify the obstacles to the realisation of the provisions of the [Disappearances Declaration] and to recommend ways of overcoming these obstacles.’<sup>384</sup>

These changes in the working methods manifested themselves in three ways. Firstly, the inclusion of a chapter entitled ‘Implementation of the [Disappearances Declaration]’ in the Working Group’s annual reports as of 1994. Secondly, concrete general references to the provisions of the Disappearances Declaration in that chapter and country-specific *observations* referring to the provisions of the Disappearances Declaration in respect of those countries with over 1,000 reported cases of disappearances, or with more than 50 cases which have allegedly occurred in the current year.<sup>385</sup> The decision to adopt country-specific observations (recommendations), building on similar practices first introduced by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 1992/1993 and copied, *inter alia*, by the Special Rapporteur on Torture in 1993/1994, was justified as a first step towards ‘a more effective and institutionalised monitoring procedure.’<sup>386</sup> Thirdly, in its conclusions the Working Group explicitly asserted, at its own initiative, that it should be considered the competent body to verify States’ compliance with the Disappearances Declaration:

‘In addition to its traditional task of assisting families to trace their disappeared relatives, the Working Group considers it its task to make the Declaration better known and to monitor States’ compliance with its provisions.’<sup>387</sup>

In 1995 and 1996 the Working Group continued to assert its authority to monitor the Disappearances Declaration<sup>388</sup> and also tried to reinforce its more juridical approach towards Governments by taking again new initiatives. The language in the Working Group’s annual report is strikingly more legalistic; references to States’ *obligations* may be found both in the general parts of its report as well as the parts relating to the situation in specific countries, especially in the so-called observations. Thus, the Working Group wrote, for example, that it ‘is to monitor States’ compliance with *their obligations deriving from the [Disappearances Declaration]*’, which puts them ‘*under an obligation to take effective measures to prevent and terminate acts of (...) disap-*

384 C.H.R. res. 1994/39, paras. 17 and 18. An important reason for making these changes related to the calls of the General Assembly to reduce the excessive length of reports. *Infra* Chapter IV.7.1.

385 U.N. Doc. E/CN.4/1995/36, paras. 7 and 45 ff., especially para. 54.

386 *Ibid.*, para. 56 [emphasis added].

387 *Ibid.*, para. 443.

388 Implicitly endorsed by the Commission in its Resolutions 1995/38, extending the mandate for three years, and 1996/30 etc.

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pearance, by making them continuing offences under criminal law and establishing civil liability (...).<sup>389</sup> In country-specific observations it even started to use the term 'violation'. For example, in its observations with regard to Peru the Working Group noted:

'the Amnesty Law and the law of interpretation (...) are *in contradiction to* the Declaration, which establishes the *obligation* to prosecute perpetrators of acts of disappearances (art.17) before the ordinary courts (art. 16, para. 2). In enacting the above mentioned laws, the State of Peru has *failed to fulfil its international commitment* (...) Finally, threats or acts of reprisals against lawyers and witnesses not only make it difficult to carry out investigations, but are also in *violation* of Article 13, paragraph 3 of the Declaration.'<sup>390</sup>

Still, in 1995 the Working Group started the practice of adopting General Comments, similar to the General Comments issued by United Nations human rights treaty bodies, 'with a view to focusing the attention of Governments more effectively on the relevant *obligations* deriving from the Declaration.'<sup>391</sup> Another initiative was the decision to regularly transmit to Governments summaries of allegations of relatives of missing persons and NGOs with regard to obstacles encountered in the implementation of the provisions of the Disappearances Declaration. Governments were then '[invited] (...) to comment thereon if they wish.'<sup>392</sup>

Moreover, in 1996, the Working Group further tightened its criterion for the inclusion of country-specific observations. Such observations are now included for countries with more than 50 alleged cases of disappearances or when more than 5 cases were reported during the period under review.<sup>393</sup>

However, as of 1998 the Working Group found it increasingly difficult to continue to reflect its more juridical – one might say accusatory – approach in its annual reports due to serious bureaucratic constraints, in particular the lack of adequate resources and the limitations imposed on the lengths of reports. This development clearly undermines the authority and overall effectiveness of the work of the Working Group as the quality and reliability of the annual report – as also noted in respect of the question of competences *ratione personae* – seriously diminished from that year onwards.

The following developments clearly illustrate this problem. In 1998 the Working Group reported that

'owing to serious limitations in its resources, the Working Group has not been able to include in the present report some very important sections, such as comments on the

389 U.N. Doc. E/CN.4/1996/36, para. 3 [emphasis added].

390 Ibid., paras. 356 and 357 [emphasis added].

391 Ibid., paras. 47 ff [emphasis added]. In 1995 it adopted General Comments on Articles 3 and 4 of the Declaration; in 1996 on Article 10 (U.N. Doc. E/CN.4/1997/34, paras. 22 ff.); in 1997 on Article 19 (U.N. Doc. E/CN.4/1998/43, paras. 68 ff.) and in 2000 on Article 17 (U.N. Doc. E/CN.4/2001/68, paras. 26 ff.)

392 U.N. Doc. E/CN.4/1996/36, Annex II, para. 22.

393 U.N. Doc. E/CN.4/1997/34, para. 20. Also U.N. Doc. E/CN.4/1998/43, para. 2.

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draft international convention on the prevention and punishment of enforced disappearances and on the implementation of the [Disappearances Declaration]. *Neither has it been possible to include observations in the country chapter.*<sup>394</sup>

The omission of country-specific observations turns back the clock to the period before 1994. It was a particularly sad decision, if one considers that the inclusion of these observations had been welcomed by commentators as one of the most relevant developments of the past years.<sup>395</sup> In 1999 the Working Group again omitted to refer to the draft convention, the implementation of the Disappearances Declaration and to include country-specific observations.<sup>396</sup> In 2000 brief references to the convention and Declaration were again included. That year's report did not inform the reader what was and what was not omitted. It simply stated that 'the Working Group has not been able to include in the report some very important sections.' The reader will have to find out for himself that country-specific observations are again absent.<sup>397</sup> In the 2001 and 2002 reports the Working Group reinstated the practice of adopting country-specific observations, but it again changed the criterion for including them: they are included for countries with more than a hundred alleged cases of disappearances.<sup>398</sup>

### III.3.2.5.2 Frame of Reference of the Special Rapporteur on Torture

In contrast to the Working Group on Enforced or Involuntary Disappearances, which had no existing legal documents specifically dealing with disappearances to refer to, the Special Rapporteur on Torture could rely on several international instruments, adopted at the universal as well as the regional levels, in which the international community showed impressive unity in condemning and outlawing the practice of torture. Moreover, the adoption of the Declaration on Torture in 1975 and the Convention against Torture in 1985 carefully spelled out the international legal concept of torture.<sup>399</sup>

Certainly, the existence of an internationally agreed definition of torture was helpful in giving guidance to the Special Rapporteur in determining the scope of his mandate. On the other hand, the definition also seemed to impose restrictions on his ability to deal with borderline issues, in particular situations of 'cruel, inhuman or degrading treatment or punishment' that could in a further analysis constitute acts of torture.<sup>400</sup>

As a matter of fact, while the preambular paragraphs of Resolution 1985/33, establishing the mandate of the Special Rapporteur on Torture, referred to both 'tor-

394 U.N. Doc. E/CN.4/1999/62, para. 7 [emphasis added].

395 See Rodley, EHRLR 1997, p. 7; also Rodley 1999, p. 271.

396 U.N. Doc. E/CN.4/2000/64, para. 7.

397 U.N. Doc. E/CN.4/2001/68, para. 7.

398 U.N. Doc. E/CN.4/2003/70, para. 5.

399 Whereby the Convention developed and updated some elements of the definition of torture given in the Declaration. See U.N. Doc. E/CN.4/1986/15, para. 31.

400 Ibid., para. 23.

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ture' and 'cruel, inhuman or degrading treatment or punishment', the relevant operative paragraph of that resolution referred only to 'torture'. The omission of 'cruel, inhuman or degrading treatment or punishment' in that part of the resolution was no accident of drafting: an earlier version had contained it, but was subsequently again deleted.<sup>401</sup> The deletion of the term was also noted by the Special Rapporteur himself who wrote, in his first report, '[i]t would then appear quite clear that the intention of the Commission was to restrict the Special Rapporteur's mandate to the 'question of torture'.<sup>402</sup>

However, in the light of the internationally agreed definition of torture, made up of the three elements already referred to in Chapter III.3.2.4.2, *i.e.* the material element, the intentional element and the qualified perpetrator, and described as 'an *aggravated* and *deliberate* form of cruel, inhuman or degrading treatment or punishment', the Special Rapporteur decided that he should still take into account certain 'cruel, inhuman or degrading treatment or punishment' as 'there is a 'grey area' between 'torture' and 'other treatment or punishment'.<sup>403</sup>

Also in his first report, the Special Rapporteur addressed the question of 'lawful sanctions', *i.e.* '(...) pain or suffering arising from, inherent in or incidental to lawful sanctions', which were excluded from the scope of the Convention against Torture and also from the Declaration on Torture 'to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.'<sup>404</sup> Nevertheless, the Special Rapporteur concluded that 'lawful sanctions' under national law (*e.g.* mutilation or other corporal punishments) may not be lawful under international law, including the Convention, and may be considered as torture.<sup>405</sup>

In his third report presented to the Commission in 1988, the Special Rapporteur confirmed his position as regards the topic of 'lawful sanctions' and explicitly considered corporal punishment as one of the situations belonging to the grey area of his mandate.<sup>406</sup> Moreover, he considered a number of categories of the treatment of detainees to belong to that same area. In particular, he referred to the following situations: inhuman prison conditions, generally applied harsh treatment, prolonged stay on death row and detention of minors together with adults.<sup>407</sup> According to the Special Rapporteur:

'In some case this treatment [of detainees, JG] may constitute torture, especially since torture also includes the infliction of pain or suffering with the acquiescence of a public official. In other cases it may be appropriate to speak of cruel, inhuman or degrading

401 Original draft resolution U.N. Doc. E/CN.4/1985/L.44.

402 U.N. Doc. E/CN.4/1986/15, para. 22.

403 See Article 1 paragraph 2 of the Declaration on Torture [emphasis added]. Also U.N. Doc. E/CN.4/1986/15, paras. 23 and 33; *supra* note 300.

404 Article 1 paragraph 1 of the Convention against Torture and Article 1 paragraph 1 of the Declaration on Torture. On the Standard Minimum Rules for the Treatment of Prisoners, see *supra* Chapter III.3.2.5.1.

405 U.N. Doc. E/CN.4/1986/15, para. 37.

406 U.N. Doc. E/CN.4/1988/17, paras. 42-44.

407 *Ibid.*, paras. 45-49.

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treatment or punishment. For this reason the Special Rapporteur feels that, whenever he is provided with reliable information dealing with such treatment of detainees, he *is acting within the terms of his mandate if he brings such information to the attention of the Governments concerned* and asks for their comments.<sup>408</sup>

This clear conceptual approach based on a generally accepted legal definition of torture ensured the Special Rapporteur a firm groundwork – a groundwork not based exclusively on moral considerations of humanity – to fall back on in his dealings with Governments, whether in the course of his correspondence concerning transmissions of individual cases or in carrying out on-site visits.<sup>409</sup> This approach later also benefited Mr Kooijman's successors as mandate holders on torture.<sup>410</sup> Moreover, with this interpretation of his mandate, the Special Rapporteur was able to inform the Commission on Human Rights on a much wider range of situations and practices than originally envisaged, especially since his initial approach was one of not taking a stand on the well-foundedness of allegations, leaving such judgments or qualifications to (discussions in) the Commission.<sup>411</sup>

Over the years, the core of the mandate of the Special Rapporteur on Torture as originally defined by Mr Kooijmans has not changed. In 1997 his successor, Sir Nigel Rodley, confirmed that the mandate effectively compromised torture and the 'grey zone' between torture and other forms of cruel, inhuman or degrading treatment or punishment.<sup>412</sup> The reason for making this statement had been an attack by the Government of Saudi Arabia against the (by then firmly established) practice of the Special Rapporteur to take up cases of corporal punishment within the context of his mandate. This led him to address in more depth 'the conceptual issues raised by the relationship

408 Ibid., para. 49 [emphasis added].

409 For example by transmitting cases of corporal punishment to the Government of Saudi Arabia, U.N. Doc. E/CN.4/1993/26, paras. 391 ff.; with reference to his mandate, the Special Rapporteur has systematically visited places of detention in the context of on-site visits, see also De Frouville 1996, pp. 97 and 98; the conceptual approach has also served as the basis for his assessment of country-situations, for example, following his visit to Indonesia in 1991, U.N. Doc. E/CN.4/1992/17/Add.1, see also *infra* Chapter IV.6.2.

410 See, for example, the juridical assessment made by Sir Nigel Rodley, the second mandate holder on torture, of prison conditions in the Russian Federation following a visit to that country in 1994. He labelled them as 'cruel, inhuman and degrading' and even as 'torturous', the only thing missing was proof of the intentional element required to justify a characterisation of torture. In so doing he could also fall back on the description given by Mr Kooijmans in 1987: 'inhuman prison conditions may indeed lead to severe suffering in an aggravated form, especially when they are the consequence of a deliberate policy, and therefore constitute torture in the proper sense of the word.' See U.N. Doc. E/CN.4/1988/17, para. 45 and U.N. Doc. E/CN.4/1995/34/Add.1 (visit to the Russian Federation), also Rodley 1999, p. 293.

411 *Infra* Chapter IV.2.2.

412 U.N. Doc. E/CN.4/1997/7, para. 3. Sir Nigel Rodley's successor, Theo van Boven, indicated in his first report in 2001/2002 that he adhered to the principle of continuity in the discharge of the mandate. Moreover, in his 2003 description of working methods, Theo van Boven confirmed that, 'although monitoring conditions of detention are not specifically mentioned in the mandate, they may well be pertinent, especially when they constitute a grave risk to the life or health of detainees.' See U.N. Docs. E/CN.4/2002/137, para. 3 and E/CN.4/2003/68, para. 17.

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of the practice [of corporal punishment, JG] to the mandate of the Special Rapporteur.<sup>413</sup> In a resolution adopted without a vote, the Commission subsequently '[re-reminded] Governments that corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture', thereby upholding and strengthening the approach of the Special Rapporteur.<sup>414</sup> Elsewhere, the Special Rapporteur commented on the resolution that it '[appeared] to leave intact some forms of corporal punishment (...) explicable by a desire to leave open the matter of corporal punishment in schools.'<sup>415</sup> As of 1999, however, the Commission seems to have closed even this gap by including the phrase: 'reminds Governments that corporal punishment, *including of children*, can amount to cruel, inhuman or degrading punishment or even to torture.'<sup>416</sup>

Finally, a remark must be made concerning the posture adopted by the Special Rapporteur in regard to allegations of torture or other ill-treatment transmitted to Governments. Despite the fact that he could build on a clearer juridical framework for his activities than the Working Group on Enforced or Involuntary Disappearances, at least until the beginning of the 1990s he would generally maintain a non-judgmental posture. In this respect, his pragmatic approach still bore a resemblance to the entirely humanitarian approach adopted by the Working Group. After 1990, the tendency towards a more judgmental approach, which has been said to coincide with a tendency to adopt a more juridical approach in the case of the Working Group on Enforced or Involuntary Disappearances, could also be discerned in the practice of the Special Rapporteur on Torture. In 1993, one year earlier than the Working Group, the newly appointed mandate holder on torture, Sir Nigel Rodley, started the practice of including country-specific *observations*. Interestingly, he refrained from adopting an objective criterion for the inclusion of such observations, which he would add 'where applicable', thus leaving a wide measure of discretion for himself to decide whether or not the information disclosed required him to do so.<sup>417</sup>

413 U.N. Doc. E/CN.4/1997/7/Add.1., para. 435 and U.N. Doc. E/CN.4/1997/7, paras. 4-11.

414 C.H.R. Res. 1997/38 of 11 April 1997.

415 Rodley 1999, p. 314.

416 C.H.R. Res. 1999/32 of 26 April 1999 [emphasis added]. The phrase has been included ever since, see also C.H.R. Res. 2003/32 of 23 April 2003, adopted without a vote. Some States (Sierra Leone) indicated that they considered not all forms of corporal punishment to amount to torture, especially in the area of child education. See International Service for Human Rights, Analytical report of the 59th session – Geneva, 17 March to 25 April 2003, 'Administration of Justice' under 'Torture, and other cruel, inhuman or degrading treatment or punishment', HRM 2003, p. 24: internet document, see [www.ishr.ch](http://www.ishr.ch)

417 See also U.N. Doc. E/CN.4/1994/SR.26, para. 12. The 'criterion' was first included in the report presented to the Commission in 1996, see U.N. Doc. E/CN.4/1996/35, para. 19. See also Chapter IV.2.2. Transmissions/Special Rapporteur on Torture.

### III.3.2.5.3 Frame of Reference of the Working Group on Arbitrary Detention

The move towards a more judgmental posture has certainly also been strengthened by the establishment of the Working Group on Arbitrary Detention, which by virtue of its mandate was empowered to

‘[investigate] cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the *Universal Declaration of Human Rights* or in the relevant international legal instruments accepted by the States concerned.’<sup>418</sup>

This mandate, which has been interpreted as permitting the Working Group to present formal findings on individual cases, logically required the Working Group to establish a clear (normative) frame of reference as well as to formulate principles describing the different situations of arbitrary detention that it would deal with.<sup>419</sup> Thus, the nature of its mandate led the Working Group on Arbitrary Detention to adopt a juridical approach from the outset. Moreover, as in the case of the Special Rapporteur on Torture, the Working Group could rely on an established set of international standards dealing with the legality of situations of detention, the most recent one being the 1988 Body of Principles.

As will be seen next, in practice, it has precisely been the frame of reference and the situations of arbitrary detention as defined and considered by the Working Group that gave rise to considerable controversy in the Commission on Human Rights. In essence, the discussions in the Commission on these topics were politically inspired,<sup>420</sup> but they nevertheless raised some important questions of principle, in particular as regards the application of the International Covenant on Civil and Political Rights to States which are not parties to it. These discussions have also been one of the few occasions in which States have explicitly invoked the principle of State sovereignty and attempted to include references to that principle in the relevant resolutions.

In its first report the Working Group, while referring to Commission Resolution 1991/42, established that it would use as a frame of reference the Universal Declaration on Human Rights, in particular its Articles 3 (right to life, liberty and security of the person), 9 (prohibition of arbitrary arrest, detention or exile) and 10 (right to a fair and public hearing by an independent and impartial tribunal), the International Covenant on Civil and Political Rights as well as the 1988 Body of Principles.<sup>421</sup> According to the Working Group, the latter two instruments should be considered ‘*relevant international legal instruments accepted by the States concerned*’ as referred to in Resolution 1991/42.<sup>422</sup>

418 C.H.R. Res. 1991/42, para. 2 [emphasis added].

419 On the nature of the mandate, see *infra* Chapter IV.2.3.

420 The Government of Cuba has been the Working Group’s principal adversary in this context, incessantly pursuing strategies to weaken and slow down the activities of the Working Group, especially since the latter also dealt with the situation of political prisoners.

421 U.N. Doc. E/CN.4/1992/20,

422 See also U.N. Doc. E/CN.4/1992/SR.21, para. 26.

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Moreover, the Group made clear that apart from international standards, it might have to look into domestic legislation as well: in concrete cases, it would have to verify whether internal law had been respected, and if so, whether the internal laws were in conformity with the applicable international standards.<sup>423</sup>

Subsequently, with regard to the evaluation of these standards the Group indicated that it would deal with allegations of arbitrary detention – the Group speaks of deprivation of freedom – irrespective of their origin (administrative or judicial detention) or the phase of proceedings (pre-trial detention or post-trial imprisonment) as long as they fall within any of the following three categories:

- ‘ I. Cases in which the deprivation of freedom is arbitrary, as it manifestly cannot be linked to any legal basis (such as continued detention beyond the execution of the sentence or despite an amnesty act, etc.); or
- II. Cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of the rights and freedoms protected by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;<sup>424</sup>
- or
- III. Cases in which non-observance of all or part of the international provisions relating to the right to a fair trial is such that it confers on the deprivation of freedom, of whatever kind, an arbitrary character.’<sup>425</sup>

Particularly the second category of cases of arbitrary detention, *i.e.* detention in the exercise of certain (human) rights, is worth mentioning. It is this category which brings the situation of political prisoners or persecuted members of religious groups, amongst others, within the scope of the Group’s mandate.

Finally, there were a number of unforeseen legal situations, *inter alia*, restricted residence, rehabilitation through labour and grave and multiple violations of the right to a fair trial, which the Working Group still found difficult to classify.<sup>426</sup> Later, the Working Group would hold that house arrest and rehabilitation through labour might under certain circumstances be considered detention, the legality of which it would therefore be competent to evaluate.<sup>427</sup>

In the Commission the approach taken by the Working Group immediately gave rise to a discussion: not so much on the Group’s decision of principle to review

423 U.N. Doc. E/CN.4/1992/20, paras. 7 and 8; also U.N. Doc. E/CN.4/1992/SR.21, para. 22.

424 The articles of the two international instruments invoked correspond to the following rights: prohibition of discrimination (Article 7 UDHR, Article 26 ICCPR), freedom of movement (Article 13 UDHR, Article 12 ICCPR), right to asylum (Article 14 UDHR), freedom of thought and religion (Article 18 UDHR, Article 18 ICCPR), freedom of expression (Article 19 UDHR, Article 19 ICCPR), freedom of assembly and association (Article 20 UDHR, Articles 21 and 22 ICCPR), the right to take part in government (Article 21 UDHR, Article 25 ICCPR), the right of persons belonging to a minority (Article 27 ICCPR).

425 U.N. Doc. E/CN.4/1992/20, Annex I, see for the latest version U.N. Doc. E/CN.4/1998/44, Annex I.

426 U.N. Doc. E/CN.4/1992/20, para. 23.

427 See U.N. Doc. E/CN.4/1993/24, deliberation 01 and 04. On ‘deliberations’, see also *infra* Chapter IV.2.3.

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domestic law as to its compatibility with international standards,<sup>428</sup> but rather on the applicability of such standards to States which have not accepted them. The point was raised by the Government of Chile, which had in mind in particular the application of the International Covenant on Civil and Political Rights to non-Party States and especially by the Government of Cuba, which challenged a reference to both the International Covenant and the 1988 Body of Principles.

According to Cuba the Working Group 'was forgetting that certain Member States of the United Nations, including Cuba, were not parties to that instrument [the International Covenant on Civil and Political Rights, JG] and could therefore not be required to discharge obligations to which they had not committed themselves.' Moreover, it argued that '[i]t could not be overstressed that the resolutions of the General Assembly [*i.e.* the 1988 Body of Principles, JG] were incontrovertibly in the nature of recommendations and that it would be an error to claim that they would possess binding force for States.'<sup>429</sup>

In 1992 these criticisms did not lead to any revision of the Working Group's mandate.<sup>430</sup> However, in a letter dated 24 December 1991 the Government of Cuba had requested the Working Group to 'publicly communicate to Member States for their comments' on questions related to its working methods, including the applicable international standards.<sup>431</sup>

The Working Group chose to do so in the form of a so-called 'deliberation', an opinion 'of a general nature involving a position of principle in order to develop a consistent set of precedents', which was presented to the Commission in 1993.<sup>432</sup> In formulating its answer to the Commission the Working Group again referred to the phrase 'the (...) international legal instruments accepted by the States concerned' as contained in Resolution 1991/42. It then held that the term 'legal instruments' covered all legal texts, whether conventional or forms of agreement such as resolutions and that it had not been the intention of the Commission to confine the reference standards to treaties alone. Subsequently, it argued that the 1988 Body of Principles could be considered an instrument 'declaratory of pre-existing rights inasmuch as the main purpose of many of its provisions is to set forth, and sometimes develop, principles already recognised under customary law.'

Next, the Working Group transposed this reasoning to the International Covenant on Civil and Political Rights:

'(...) according to legal writers, in the case of a non-party State, the same applies to any convention, since it is (...) an instrument which lays down principles (such as the

428 See, for example, Switzerland, Chile and even Cuba, see U.N. Doc. E/CN.4/1992/SR.26, paras. 9 and 32 and U.N. Doc. E/CN.4/1992/SR.21, para. 73.

429 U.N. Doc. E/CN.4/1992/SR.26, para. 9.

430 However, the preambular paragraphs of that year's resolution on arbitrary detention (C.H.R. Res. 1993/36) explicitly recalled the relevant articles of the International Covenant on Civil and Political Rights.

431 U.N. Doc. E/CN.4/1993/24, para. 20, deliberation 02.

432 *Ibid.*, para. 19.

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Covenant)' and 'has a binding effect with respect to State parties and a *declaratory effect with respect to non-party States*.'<sup>433</sup>

In light of this finding the Working Group concluded that in '[taking] a decision on an individual case, it is justified in referring, in categories I, II and III (...) both to the International Covenant on Civil and Political Rights, *even if the Working Group has before it a case concerning a non-party State, in view of the tenacity of the declaratory effect of the quasi-totality of its provisions* and the Body of Principles, again on account of the declaratory effect of its provisions.'<sup>434</sup>

Finally, the Working Group argued that the 1988 Body of Principles could moreover be considered an 'accepted' legal instrument in view of its declaratory nature and the fact that it had been adopted by consensus in the General Assembly.<sup>435</sup>

However, this reasoning did little to silence the debate on the Working Group's legal frame of reference. On the contrary, the Government of Cuba continued and intensified its efforts to have the Working Group's decision reversed.<sup>436</sup> In the years after 1993 that Government proved particularly effective in further increasing the pressure on the Working Group, whereby it also pursued a second strategy aimed at undermining the Group's interpretation of the term 'detention'.

As shown above, the Working Group had interpreted that term as comprising both situations of pre-trial detention and post-trial imprisonment. In another deliberation also adopted in 1992 – written precisely in response to a Cuban complaint – it had moreover defended this approach. According to the Working Group neither Resolution 1991/42 nor the discussions in the Commission preceding the adoption of that resolution would justify the view that communications relating to the arbitrariness or otherwise of deprivation of freedom when it was subsequent to a conviction should be declared inadmissible. It further noted that Resolution 1991/42 did not deal with detention *stricto sensu*, *i.e.* as opposed to imprisonment, but detention 'imposed arbitrarily or otherwise inconsistently with the relevant international standards.' It also showed that the use of terminology in other international instruments, in particular the International Covenant on Civil and Political Rights, was very consistent: 'arrest' and 'detention' being used indiscriminately in respect of persons standing trial and persons who have already been convicted. Finally, the Working Group argued that a restrictive reading would have led it to declare itself incompetent to deal with cases, such as continued deprivation of freedom after an amnesty or the expiry of the sentence handed down, which it found contrary to the letter and spirit of its mandate.<sup>437</sup>

It was in reaction to this interpretation of the Working Group that the Government of Cuba explicitly referred to its sovereignty. According to Cuba, by not making a

433 Ibid., para. 20 [emphasis added].

434 Ibid., para. 20 [emphasis added].

435 For a different reasoning, see the statement of the International Commission of Jurists, U.N. Doc. E/CN.4/1993/SR.31, para. 82, *infra* Chapter III.3.2.5.3.

436 See U.N. Doc. E/CN.4/1993/SR.33, para. 25, U.N. Doc. E/CN.4/1994/SR.34, para. 15, U.N. Doc. E/CN.4/1995/SR.32, paras. 23-25 and U.N. Doc. E/CN.4/1996/SR.29, para. 3.

437 U.N. Doc. E/CN.4/1993/24, para. 20.

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distinction between 'detention' and 'imprisonment' the Working Group had unilaterally exceeded its mandate and was encroaching upon the sovereignty of States: 'it was inadmissible for the sovereignty of States that a body of the United Nations could question sentences imposed in the administration of justice in a Member State.'<sup>438</sup> The practical objective behind the move was to prevent the Working Group from taking up the cases of political prisoners falling under the second category of alleged cases of arbitrary detention which the Group would deal with (*i.e.* cases of persons detained for exercising their right to freedom of expression, for example.). This objection remained a permanent feature of Cuba's argumentation throughout the 1990s.<sup>439</sup> In 1995 Cuba was joined in its criticism by China, which accused the Working Group of 'reviewing and evaluating political institutions of sovereign States' by citing in its report 'the existence of ideologically inspired courts (...) such as 'peoples courts' or 'supreme courts of State security' which failed to meet the criteria of the ICCPR and were therefore not independent and impartial. [The Chinese delegation] failed to see on what basis it had done so. It seemed to have overlooked article 1 of the International Covenant on Economic, Social and Cultural Rights according to which all peoples had the right freely to determine their political status and pursue their economic, social and cultural development.'<sup>440</sup>

As a result of these developments political pressures on the Working Group reached a point where a reaction from the Commission became inevitable.<sup>441</sup> Thus, in 1996 and 1997 the Commission would make important mandate revisions. First, in 1996, as Cuba felt strong enough to threaten to leave the consensus on the question of arbitrary detention<sup>442</sup>, the Commission decided to make two concessions.

In operative paragraph 5 of Resolution 1996/28 the Commission explicitly '[requested] the Working Group, in discharging its mandate, to apply the treaties relevant to the case under consideration *only to the States which are parties to them.*'<sup>443</sup>

In operative paragraph 4 of the same resolution, the Commission '[requested] the Working Group which, in conformity with Resolution 1991/42, has a mandate to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned, to take duly into consideration the distinction between detention and imprisonment made, *inter alia*, by General Assembly Resolution 43/173 of 9 December 1988 [the 1988 Body of Principles, JG], and to submit to the Commission, at its fifty-third Session, its conclusions and recommendations on this question.'

438 U.N. Doc. E/CN.4/1993/SR.33, paras. 24 and 25.

439 U.N. Doc. E/CN.4/1994/SR.34, para. 15, U.N. Doc. E/CN.4/1995/SR.32, para. 22, U.N. Doc. E/CN.4/1996/SR.29, para. 2 and U.N. Doc. E/CN.4/1997/SR.25, paras. 52-57.

440 U.N. Doc. E/CN.4/1995/SR.27, paras. 41 and 42.

441 As a clear indication of this pressure, the Working Group could no longer ignore the criticism and dealt in much detail with the allegations voiced by Cuba and China in its fifth report presented to the Commission in 1996, see U.N. Doc. E/CN.4/1996/40, paras. 82-105.

442 See U.N. Doc. E/CN.4/1996/SR.29, para. 4, also U.N. Doc. E/CN.4/1996/SR.51, paras. 83-90.

443 Adopted without a vote on 19 April 1996 [emphasis added].

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The former provision effectively ended the debate on the applicability of the International Covenant on Civil and Political Rights to non-Party States. While making a final plea for the so-called 'declaratory effect' theory described above, the Chairman of the Working Group confirmed that it would comply with the instruction of the Commission and '[to restrict] itself to the Universal Declaration of Human Rights, as that did have a declaratory effect.'<sup>444</sup> From 1996 onwards the Working Group would indicate, in the evaluation of individual cases submitted to it, whether or not the State in question was a party to the International Covenant.

As regards the request to take duly into account the distinction between 'detention' and 'imprisonment', the Working Group provided the Commission with an extensive argument as to why no distinction between these two situations should be made.<sup>445</sup> Briefly, these arguments were the following: (1) 'because practically all relevant international instruments accepted by Member States of the United Nations, as well as regional instruments (...) and in many cases the domestic legislation of States, fail to make any substantive distinction between the terms 'detention' and 'imprisonment';'<sup>446</sup> (2) General Assembly Resolution 43/173 seeks to make a terminological distinction between detention and imprisonment only as an aid to construction, solely for the Body of Principles adopted therein. The text of that resolution neither seeks nor can alter the meaning of detention in relevant international instruments;<sup>447</sup> (3) 'Without a vote and for the past five years, the Commission on Human Rights has accepted this approach, as set out in the five successive reports of the Group.'<sup>448</sup>

Moreover, anticipating the strong sentiments against this interpretation, the Chairman of the Working Group reassured the Commission that it

'had no intention of taking the place of the judicial authorities of the Member States or assuming the role of a form of supranational jurisdiction. (...) when it considered a communication, it endeavoured *not to query the facts and the evidence*, and in its decisions it directed its attention neither to judges nor to the courts, its sole concern being the compatibility of national legislation with the relevant international instruments.'<sup>449</sup>

444 U.N. Doc. E/CN.4/1997/4, paras. 49 and 96; U.N. Doc. E/CN.4/1997/SR.25, para. 20. See also the explanation for the vote by the representative of the United States – endorsed by Canada – which considered 'that the Commission should resist unduly restricting the Working Group's mandate or methods of work, in particular as it related to the Group's ability to investigate treatment of individuals in countries without an independent judiciary.' U.N. Doc. E/CN.4/1996/SR.51, paras. 87 and 88 (USA) and para. 89 (Canada). Also *infra* in its 1998 revised working methods the Working Group also included as relevant standards the following (non-treaty) instruments: the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), U.N. Doc. E/CN.4/1998/4, Annex I, para. 7.

445 U.N. Doc. E/CN.4/1997/4, paras. 50-97.

446 *Ibid.*, para. 96 (1).

447 *Ibid.*, para. 96 (2).

448 *Ibid.*, para. 96 (3).

449 U.N. Doc. E/CN.4/1997/SR.25, para. 20 [emphasis added].

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As another concession to the Commission, the Chairman informed it of the Group's decision no longer to term its conclusions in individual cases 'decisions', but to replace it with the term 'opinion'. Also, he promised that the Group would 'give a more balanced consideration to communications on cases in which a final sentence of imprisonment had been pronounced.'<sup>450</sup>

In the ensuing debate, there was support for the Working Group's interpretation from the Western Group of States as well as the Eastern European States, which believed that 'only a broad understanding of the term 'arbitrary' could make its work useful.'<sup>451</sup> Cuba supported by Egypt and Sri Lanka, on the other hand, sought to have a preambular paragraph inserted in the resolution which asserted the precedence of national legislation over international obligations.<sup>452</sup> A number of other Governments, amongst others Mexico, Algeria, Pakistan and India, managed to persuade Cuba to withdraw that proposal. The Government of India did indicate, however, that

'the Working Group (...) should *restrict itself* to the examination of cases of persons *held without trial* or following a *rigged or unfair trial*. The Working Group did not have the authority to go into the substance of national legislation or the functioning of different judicial systems. It could not question a judgment after a trial had taken place in which the rights of the defence had been respected. The question of arbitrariness *arose only if the due process of law had not been followed*. The Commission must therefore clarify the mandate of the Working Group. It must also decide whether, as the Chairman of the Working Group had asserted, 'detention' included 'imprisonment', bearing in mind that the original intention had been to make a distinction between the two. (...)'<sup>453</sup>

Many of the points raised by India were subsequently incorporated in Resolution 1997/50.<sup>454</sup> Firstly, in its preamble, the resolution explicitly referred to the principle of the independence of the judiciary. Secondly, the dispute concerning the terms 'detention' and 'imprisonment' had been solved by introducing the new generic term of 'arbitrary deprivation of liberty', which is a much wider concept covering both pre-trial detention and post-trial imprisonment. In the light of this new term the Commission entrusted the Working Group 'with the task of investigating cases of deprivation of liberty imposed arbitrarily, provided that *no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant interna-*

450 U.N. Doc. E/CN.4/1997/SR.31, para. 31. On the decision to rename the conclusions in individual cases, see *infra* Chapter IV.2.3.

451 See, for example, U.N. Doc. E/CN.4/1997/SR.26, paras. 58 and 59 (the Netherlands on behalf of the EU and others).

452 'Bearing in mind that the determination of criteria to establish the respective competence and jurisdiction of the national courts in each country, as well as the specific provisions of national legislation corresponding to the international legal obligations entered into by each State is a matter pertaining to the domestic sphere of State sovereignty.' See U.N. Docs. E/CN.4/1997/SR.57, SR.63 and SR.64. Also HRM, No. 37 (1997), pp. 2-95.

453 U.N. Doc. E/CN.4/1997/SR.30, para. 54 [emphasis added]. See also the statement by the Government of Brazil, U.N. Doc. E/CN.4/1997/SR.29, para. 19.

454 Adopted without a vote on 15 April 1997.

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*tional standards* set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.<sup>455</sup>

With the latter phrase – which in fact changed little to what the Working Group had been doing over the past years – the Commission apparently tried to appease those Governments, which regarded the activities of the Working Group as an intrusion in their domestic affairs. Above all, it was clear that the impression had to be avoided that the Working Group was acting as some sort of supranational jurisdiction.

Resolution 1997/50 basically put an end to the discussions concerning the frame of reference and the scope of the mandate of the Working Group. Thus, in 1998 the Commission '[welcomed] the efforts of the Working Group (...) to revise its methods of work in accordance with Commission Resolution 1997/50' and invited it 'to ensure their implementation in accordance with the relevant provisions of Commission Resolutions 1996/28 (...) and 1997/50.'<sup>456</sup>

As Cuba tried to challenge the pre-eminence of the Universal Declaration of Human Rights over national legislation in 1998, the Working Group was able to refute the argument with reference to its revised mandate:

'the question of the pre-eminence of the Universal Declaration of Human Rights over domestic legislation is not relevant to an interpretation of the mandate of the Working Group' (...) 'in principle every form of deprivation of liberty falls within the mandate of the Working Group. The exception to the competence of the Working Group is stated in clear and precise terms and applies only in cases where the following three circumstances coincide: (a) a 'final decision' has been taken in the case; (b) that final decision was taken by 'domestic courts'; and (c) the 'final decision' taken by 'domestic courts' is consistent with domestic legislation and the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.'<sup>457</sup>

It was subsequently able to avoid the question of the precedence of the Universal Declaration, simply by arguing that for a case of deprivation of liberty to be arbitrary, 'it is only necessary for it to be *inconsistent with one of those criteria* [the criteria (a), (b) or (c) above, JG] *for the exception contained in resolution 1997/50, paragraph 15 to be inapplicable*.'<sup>458</sup>

Finally, a remark must be made regarding the Working Group's competence to evaluate the legality of the detention of immigrants and asylum seekers. As shown above, in 1990 the Special Rapporteur of the Sub-Commission, Mr Joinet, had already proposed that machinery dealing with the legality of situations of detention might also include this category of persons.<sup>459</sup> In the early years of its existence, the Working

455 Operative paragraph 15 [emphasis added].

456 C.H.R. res. 1998/41 adopted without a vote on 17 April 1998.

457 U.N. Doc. E/CN.4/1999/63, paras. 56-60.

458 Ibid., para. 60 [emphasis added].

459 Supra Chapter III.3.1.3. Also a number of NGOs raised the question of detention of asylum seekers, especially in European States. See, for example, the Minority Rights Group, U.N. Doc. E/CN.4/1991/SR.28, para. 51.

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Group had effectively dealt with situations of detention of asylum seekers, albeit on a rather incidental basis.<sup>460</sup> Occasionally also, some Governments had brought up the theme in the Commission. In 1995, for example, the Government of Australia remarked that 'cases of arbitrary detention were not exclusive to repressive régimes (...). Arbitrary detention also occurred (...) under democratic régimes, especially in connection with procedures for the admission or expulsion of aliens.'<sup>461</sup> However, it was Resolution 1997/50, which provided the Working Group with a clear mandate 'to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are *allegedly held in prolonged administrative custody without the possibility of administrative or judicial remedy*' and 'to include observations on this question in its report.'<sup>462</sup> Eventually, this injunction led the Working Group to adopt a 'deliberation' on the 'situation regarding immigrants and asylum seekers' in 1999.<sup>463</sup> The deliberation developed criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants may be arbitrary and was based on the Group's experiences obtained during country visits to the United Kingdom and Romania in 1998.<sup>464</sup> The Commission subsequently sanctioned the 'deliberation' in its Resolution 2000/36 and, from that year onwards, has annually reminded States of its relevance for the prevention of arbitrary detention of asylum seekers and immigrants.<sup>465</sup> More recently, however, following a mission to Australia, the Working Group has been strongly criticised by the Government of that country for its focus on immigration detention.<sup>466</sup> The Government questioned, in particular, whether the visit 'was the most appropriate use of scarce resources' and claimed that 'not only has a flawed report been produced, but focus on this issue must mean that attention has been diverted from egregious detention practices that should be, and are, of greater concern to the international community.'<sup>467</sup>

At this point, it may be useful to provide a brief assessment of the mandate revisions of the Working Group on Arbitrary Detention. De Frouville commented that these revisions, in particular the decision no longer to apply the International Covenant

460 For example, in 1995 the Working Group noted its particular concern about asylum seekers in foreign countries deprived of their liberty while their application is being processed, as in the case of Vietnamese exiles in Hong Kong and Haitian and Cuban refugees in Guantanamo Bay. It also held a working meeting with representatives of UNHCHR on this issue; U.N. Doc. E/CN.4/1996/40, paras. 62 and 70. Also U.N. Doc. E/CN.4/1994/27, para. 15 (concerning the situation of asylum seekers held in detention at Guantánamo Bay Naval Base, Cuba).

461 U.N. Doc. E/CN.4/1995/SR.32, para. 12.

462 Operative paragraph 4 [emphasis added].

463 Deliberation 05, U.N. Doc. E/CN.4/2000/4, Annex II.

464 U.N. Doc. E/CN.4/1999/63/Add.3 (United Kingdom) and Add.4 (Romania).

465 Adopted without a vote on 20 April 2000. See also Resolution 2003/34 adopted without a vote on 23 April 2003.

466 U.N. Doc. E/CN.4/2003/8/Add.2.

467 International Service for Human Rights, Analytical report of the 59th session – Geneva, 17 March to 25 April 2003, 'Administration of Justice' under 'Arbitrary Detention', HRM, 2003, p. 30: internet document and U.N. Doc. E/CN.4/2003/G/22 (Letter from the Permanent Representative of Australia to the United Nations Office at Geneva). *Infra* Chapter IV.7.3.

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on Civil and Political Rights to non-Party States, were 'very regrettable', because they came down to satisfying the *desiderata* of a small number of Governments (e.g. Cuba, China) who have in common that they are often cited in the reports of thematic procedures. Moreover, he argued that the revisions contradicted the 'logic' of the thematic approach as flexible and pragmatic Charter-based organs:

'Demander aux organes thématiques de n'appliquer les conventions qu'aux États qui les ont ratifiées, c'est aussi ignorer leur caractère essentiellement souple et pragmatique: ces organes ne sont pas des juridictions mais des mécanismes hybrides, mi-politiques, mi-juridiques. (...) Ce serait les priver d'une grande part de leur utilité, que de leur interdire d'agir comme des catalyseurs auprès des États en explicitant les principes communs d'une communauté internationale en formation.'<sup>468</sup>

The present author does not share De Frouville's reasoning, especially not where he suggests that the mandate restrictions were entirely the result of the destructive strategies of a small number of States. The Working Group itself also bears a responsibility for what eventually happened during the Commission's 1996 session. In contrast to other thematic procedures, which have usually tried to avoid confrontations with the Commission as much as possible, the Working Group on Arbitrary Detention originally adopted a rather assertive approach on a number of critical issues, such as the application of the International Covenant on Civil and Political Rights to non-Party States, which inevitably would be taken up by its opponents in the Commission. What is more, the Working Group's decision to apply the International Covenant to non-Party States and the 'declaratory effect' theory advanced as a justification for this, unnecessarily provided these opponents with a legitimate ground to attack the mandate. This particular decision, it is held here, is precisely the opposite of the flexible, pragmatic and incremental approach hitherto adopted by the Commission's thematic procedures. Notwithstanding the otherwise innovative nature of its mandate, it is as if the Working Group had forgotten that it functioned in a political environment where small advances are always hard-fought, but easily undone or amended through a resolution of the Commission. Consequently, where the mandate broke new ground in authorising the Working Group to make formal findings in individual cases of alleged arbitrary detention and thus to evaluate the functioning of the organs of a State, in this case the functioning of a State's administrative and judicial authorities, one might have expected the Group more carefully to consolidate the competences accorded to it. In particular, it would have been wiser not to depart too radically from the

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<sup>468</sup> De Frouville 1996, pp. 59 and 60. 'to request thematic organs to apply international conventions only to States, which have ratified them, is to ignore their essentially flexible and pragmatic character: these are not jurisdictional organs, but hybrid mechanisms, partly political, partly legal. (...) It would seriously compromise their usefulness if they were forbidden to function as a catalyst vis-à-vis States by clarifying the common principles of an emerging international community' [author's translation].

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expectations of international law, in this case the fundamental principle of *pacta tertiis nec nocent nec prosunt*.<sup>469</sup>

Moreover, the Working Group's practice after the 1996 mandate revision seems to suggest that the restrictions imposed by the Commission have not significantly diminished the Group's ability to investigate cases of arbitrary deprivation of liberty. In other words, it may be doubted whether there really was a practical need to adopt as bold an approach as the Working Group had originally done. By comparison, at the time when the Working Group defended its 'declaratory effect' theory other States and also NGOs did not adopt the same reasoning. The United States, for example, declared that 'all States were bound by the obligations included in the international human rights conventions to which they were parties, as well as by the human rights standards of customary international law reflected in the Universal Declaration of Human Rights and elsewhere.'<sup>470</sup> Similarly, the International Commission of Jurists argued that 'the legal principles on fair trial must be regarded as constituting customary international law binding on every State, whether or not it was party to a particular convention.'<sup>471</sup>

From 1996 onwards the Working Group seems to have been more aware of the sensitivities existing in the Commission and the potential negative effects they could have on its mandate. An example of this awareness was the manner in which the Working Group dealt with the question of the pre-eminence of the Universal Declaration over domestic legislation. As will be shown in some detail in Chapter IV.2.3, this greater awareness also manifested itself in relation to other aspects of the Group's working methods, notably its decision to give 'views' rather than 'decisions'.

#### III.3.2.5.4 Situations of (International) Armed Conflict

Finally, some remarks must be made with regard to the competence of the three selected thematic procedures to deal with situations of international armed conflict.

The Working Group on Enforced or Involuntary Disappearances was first confronted with such a situation in 1982 when the Government of Iran addressed the Group concerning Iranian military personnel and civilians who had reportedly disappeared during the conflict with Iraq in September 1980. It asked the Working Group to undertake a study of those disappeared persons. Having ascertained from the International Committee of the Red Cross (*ICRC*) that 'persons, civilian or military, who are reported missing during *any* international armed conflict fall within [its] mandate (...) pursuant to the Third and Fourth Geneva Conventions of 1949' and that the *ICRC* was in contact with the Governments concerned with a view to carrying out this mandate, the Working Group decided to seek the guidance of the Commission on

<sup>469</sup> See Brownlie 1998, pp. 628 and 629. Also Higgins 1963, p. 8: 'It is equally in the interest of an international organisation such as the United Nations not to ignore the legal process. (...) If the Secretary-General [or any other UN organ, JG] departs too radically in his actions from the expectations of international law he will lose the confidence of the member States.'

<sup>470</sup> U.N. Doc. E/CN.4/1996/SR.51, para. 88.

<sup>471</sup> U.N. Doc. E/CN.4/1993/SR.31, para. 82.

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the question whether or not it should take up cases of disappearances in situations of international armed conflict.<sup>472</sup>

In view of the fact that it continued to receive requests to take up alleged cases of disappearances occurring in situations of international armed conflict the Working Group discussed 'the question of its involvement with victims of international armed conflicts in view of the existing jurisdiction of the ICRC in such cases' again in 1983. In the absence of explicit guidance from the Commission, it then decided to adopt the following position:

'it was not within its competence under its present mandate to inquire into disappearances arising in [situations of international armed conflict] unless it was expressly directed to do so by the Commission.'<sup>473</sup>

Apart from the jurisdiction of the ICRC an important consideration for the Working Group not to deal with disappearances in situations of international armed conflict and in particular those which had allegedly occurred during the war between Iran and Iraq, was that taking up all these cases, including the disappearance of combatants, would be a task far surpassing the Group's resources.<sup>474</sup>

In 1987 the Working Group gave a detailed description of its working methods, which included the general rule that it does not deal with situations of international armed conflict 'in view of the competence of the ICRC in such situations as established by the Geneva Conventions of 12 August 1949 and the Protocols additional thereto.'<sup>475</sup> However, the question came to the fore again in relation to the conflict in the former Yugoslavia concerning the Special Process on missing persons in the territory of the former Yugoslavia.<sup>476</sup> Mostly for *practical reasons and reasons of the credibility* of the United Nations, the Working Group recommended to the Commission that it should establish a Special Process for the former Yugoslavia, whereby the character of the conflict and the distinction between combatants and non-combatants would be irrelevant. These considerations had the effect of confirming the Group's decision of principle normally not to deal with situations of international armed conflict for which, moreover, it held the ICRC to be the competent organisation.

It may be useful to present some of the Group's considerations in order to illustrate the connection between 'practice' and 'principle'. In 1992 the Working Group received some 6,000 alleged cases of disappearances occurring in the former Yugoslavia (11,000 in 1994). At the same time, it was still dealing with a backlog of over 8,000 other alleged cases of disappearances waiting for transmission to the Governments concerned. It was therefore obvious that, in view of the overwhelming dimensions of the situation in the former Yugoslavia, the additional task of clarifying disappearances

472 U.N. Doc. E/CN.4/1983/14, paras. 118-120 [emphasis added].

473 U.N. Doc. E/CN.4/1984/21, para. 21.

474 U.N. Doc. E/CN.4/1993/25, para. 38.

475 U.N. Doc. E/CN.4/1988/19, para. 18.

476 Supra Chapter III.3.2.4.4.

in that country would impose too heavy a burden on the Working Group's resources and its capacity to deal with other 'normal' cases of disappearances.<sup>477</sup> Added to this came the legal question of the character of the conflict in the former Yugoslavia and the incongruity between the exigencies of the situation and the Working Group's working methods. First, the Working Group could not rely on an authoritative United Nations position on the character of the conflict as well as the date from which it assumed a particular character and the geographical area covered by it.<sup>478</sup> Moreover, it argued that upholding the distinction between an international and a non-international armed conflict would lead to the unacceptable and arbitrary situation from the victim's point of view that the United Nations would take up only cases prior or after a certain date, or occurring in a certain area prior or after that date only.<sup>479</sup> Second, the possibility of having the Working Group to investigate the 'normal' cases of disappearances and the Special Process to investigate disappearances which had allegedly occurred in combat zones would lead to an unworkable situation in practice: it would be difficult to establish whether a case could be classified as 'normal' or not; it would also be a confusing situation for the local authorities, having to deal with two different procedures operating on the basis of different working methods.<sup>480</sup> Third, the distinction between non-combatants and combatants normally upheld by the Working Group would be self-defeating in the case of the Former Yugoslavia, since cooperation from the military in the investigations would only be extended if they also covered the clarification of military personnel missing in action.<sup>481</sup> Taken together, all these considerations led the Working Group to recommend one Special Process, existing separately from the Group itself, for all missing persons in the territory of the former Yugoslavia and, thus, to continue to support the rule of not dealing with cases of disappearances in situations of international armed conflict under its 'normal' mandate. This rule can still be found in the Working Group's latest revision of its working methods.<sup>482</sup>

The situation is different in the case of the Special Rapporteur on Torture, who has always underlined that the general standards of international humanitarian law applicable to situations of armed conflict, whether of an international or non-international character, prohibit torture by any party to the conflict at any time and in any place whatsoever.<sup>483</sup> Moreover, in the context of determining the scope of his mandate the

477 U.N. Doc. E/CN.4/1993/25, para. 40.

478 *Ibid.*, para. 39.

479 U.N. Doc. E/CN.4/1994/26/Add.1, paras. 38-41 ['Report on the visit to former Yugoslavia by a member of the Working Group (...) at the request of the Special Rapporteur on the situation of human rights in the former Yugoslavia].

480 *Ibid.*, paras. 42-48.

481 *Ibid.*, paras. 49-53; for example, the Working Group declined to entertain cases of disappeared members of the Tamil Tigers in Sri Lanka. Also *infra* Chapter IV.4.1.

482 U.N. Doc. E/CN.4/2002/79, Annex I, para. 5.

483 See U.N. Doc. E/CN.4/1986/15, para. 27 (first report by Peter Kooijmans); U.N. Doc. E/CN.4/1994/31, para. 13 (first report by Sir Nigel Rodley), U.N. Doc. E/CN.4/2002/137, para. 12 (first report by Theo van Boven dealing explicitly with the non-derogable nature of the prohibition against torture also under international humanitarian law) and U.N. Doc. E/CN.4/2003/68, para. 9.

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Special Rapporteur has never made (or had to make) made a distinction between different *types* of legal situations, *i.e.* situations of armed conflict of an international character, situations of armed conflict of a non-international character and 'normal peacetime' situations. As shown in Chapter III.3.2.4.5 a more acute issue on which the Special Rapporteur sought the guidance of the Commission in 1993 concerned the question whether he should apply his mandate to any party to an armed conflict, *i.e.* the question of competence *ratione personae*.

The Working Group on Arbitrary Detention has from the very beginning adopted the rule that it 'will *not* deal with *situations of international armed conflict* in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, *particularly when the International Committee of the Red Cross (ICRC) has competence*.'<sup>484</sup> Reformulated in 1997, the rule presently reads: 'situations of *armed conflict*, covered by the Geneva Conventions of 12 August 1949 and their additional protocols, do not fall within the competence of the Group.'<sup>485</sup>

Recently, however, the Working Group has not considered this rule to constitute an obstacle for it to entertain communications relating to persons detained by the United States at Guantánamo Bay Naval Base, Cuba, in particular concerning persons captured during the US-led military intervention in Afghanistan (2001/2002).

The Working Group first dealt with the problem of persons detained at Guantánamo Bay in 2002.<sup>486</sup> In December of that year it delivered what it called a 'legal opinion' for the purpose of determining the relevant legal framework on the basis of which it would assess whether or not the detentions were arbitrary. In that opinion the Working Group first noted that the United States Government refused to grant the prisoners the status of prisoners of war, but considered them to belong to the *sui generis* category of 'enemy combatants' not covered by the Geneva Conventions. Having said that, it identified two relevant international instruments, namely the Third Geneva Convention (relative to the treatment of prisoners of war) *and* the International Covenant on Civil and Political Rights [to which the United States is a party, JG]. With respect to the Third Geneva Convention, it argued that so long as a 'competent tribunal' – within the meaning of the Convention – had not taken a decision on the legal status of the persons held at Guantánamo Bay, these persons provisionally enjoyed the guarantees of that Convention (in particular those concerning the right to a fair trial).<sup>487</sup> Subsequently, with respect to the International Covenant on Civil on Political Rights, the Working Group found that

'while (...) not competent to comment on whether the status of prisoner-of-war applies to the persons currently detained in Guantánamo Bay, *it does remain within its mandate in considering whether the absence of minimum guarantees provided under the articles 9 and 14 of the Covenant may confer on the detention an arbitrary character*, all the

484 U.N. Doc. E/CN.4/1992/20, para. 13 [emphasis added].

485 U.N. Doc. E/CN.4/1998/44, Annex 1, para. 14 [emphasis added].

486 U.N. Doc. E/CN.4/2003/8, paras. 61-64 and 74.

487 *Ibid.*, para. 64.

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more so if the Government concerned has failed to provide the information called for in article 4 paragraph 3 [concerning a public emergency threatening the life of the nation, JG], of the Covenant.<sup>488</sup>

Finally, the Working Group foresaw two possibilities if a 'competent tribunal' should deliver a ruling on the status of the prisoners: either the court would rule in favour of the prisoner-of-war status and the persons concerned are definitely entitled to the guarantees of the Third Geneva Convention; or, it would invalidate that status in which case, according to the Working Group, 'the above mentioned guarantees of the Covenant (...) *take over from those of the (...) Third Geneva Convention*, which no longer apply.'<sup>489</sup>

Strikingly, the 'legal opinion' lacked any reference to the Working Group's own working methods, in particular the rule excluding (international) armed conflict situations from the purview of its mandate and the competence of the ICRC in such situations. What is more, in January 2003 the Working Group effectively dealt with a communication concerning four persons captured during the US military operations in Afghanistan and detained at Guantánamo Bay. On that occasion it adopted an opinion in which it held the detention of these persons to be in breach of Article 9 of the Universal Declaration on Human Rights as well as Article 9 of the International Covenant on Civil and Political Rights and, therefore, it requested the Government of the United States to bring the situation into conformity with the relevant international standards. Again, the Working Group did not touch upon the question of its competence in armed conflict situations. Instead, it considered decisive for assuming competence the fact that the source of the communication '[believed] that international human rights law should be applied given that the Government has denied prisoner-of-war status and the application of the Geneva Conventions of 12 August 1949 to the persons captured during the intervention in Afghanistan and detained at Guantánamo Bay.'<sup>490</sup>

In response to the Working Group's opinions, the United States Government held, amongst other things, that the persons held at Guantánamo Bay were 'enemy combatants detained in the course of an armed conflict under the laws and customs of war' and that therefore the Working Group lacked competence to deal with armed conflict situations. It also stated that 'the consequences of conflating human rights law and the law of war/international humanitarian law would be dramatic and unprecedented.'<sup>491</sup>

Whatever the merits of the United States argument relating to the category of 'enemy combatants' and the legality of the detentions at Guantánamo Bay, the present

488 Ibid. [emphasis added].

489 Ibid. [emphasis added].

490 U.N. Doc. E/CN.4/2004/3/Add.1, Opinion No.5/2003. As a matter of fact, it only included the assertion of the source of the communication as a ground for assuming competence. No other (direct) considerations were put forward.

491 See U.N. Doc. E/CN.4/2004/3, paras. 16-20. Also U.N. Doc. E/CN.4/2003/G/73 (Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights).

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author believes that the Working Group may indeed be criticised for exceeding its mandate, in particular in the light of its own working methods. Moreover, the present author finds particularly unhelpful – to say the least – the decision of the Working Group to effectively apply the International Covenant on Civil and Political Rights to situations of (international) armed conflict; a decision, which is not only open to debate, but also further increases the controversy surrounding the United States concerning the applicable legal régime to the prisoners of Guantánamo Bay.

On the question of competence, there is ample evidence that the US military intervention in Afghanistan may be characterised as an international armed conflict.<sup>492</sup> Authoritative sources such as the ICRC have in fact confirmed this characterisation, at least until June 2002 as a new Government was established in Afghanistan.<sup>493</sup> Moreover, since January 2002 the ICRC has been visiting persons detained at Guantánamo Bay Naval Base precisely with the aim being to ensure that their treatment and the conditions of detention are in conformity with international legal requirements as well as to facilitate the exchange of messages with relatives.<sup>494</sup> Taken together, these facts should at least have led the Working Group to raise the question of competence in the light of its own rule not to deal with situations of armed conflict covered by the Geneva Conventions and Additional Protocols.<sup>495</sup> However, as shown above, neither the 2002 ‘legal opinion’, nor the 2003 opinion in the four individual cases included a reference to this rule. In the interest of ensuring its objectivity and independence, especially in the exercise of its quasi-jurisdictional task of investigating individual cases of deprivation of liberty, the approach adopted by the Working Group is regrettable and easily raises doubts as regards its real motivations.

Apparently, the Working Group sought to evade the question of competence in situations of international armed conflict by reasoning that in any case it would be within its mandate to consider the legality of the detentions against the International Covenant on Civil and Political Rights, especially since the United States refuses to accord the detainees the status of prisoner-of-war and to apply the Geneva Conventions to their situation. In itself the position taken by the Working Group is not a novel one. Already in January 2002 the United Nations High Commissioner for Human

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<sup>492</sup> Relevant in this respect are the US characterisation of the events of 11 September 2001 as an ‘armed attack’ justifying self-defence, the endorsement of this position by the Security Council in various resolutions as well as the factual elements regarding the scale and intensity of the military operations. See Gill, *NJB* 2002, pp. 407 and 408; also Gill 2002, pp. 14 ff.

<sup>493</sup> According to the ICRC: ‘specific aspects of the so-called ‘war on terrorism’ launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL. The war waged by the US-led coalition in Afghanistan that started in October 2001 is an example. The 1949 Geneva Conventions and the rules of customary international law were fully applicable to that international armed conflict, which involved the US-led coalition, on the one side, and Afghanistan, on the other side.’ ICRC, *International humanitarian law and terrorism: questions and answers*, 5 May 2004 (document produced for information purposes only).

<sup>494</sup> ICRC, *Operational update* 14 May 2004, US detention related to the events of 11 September 2001 and its aftermath.

<sup>495</sup> Whereby it may be remarked that the reformulated seems to exclude even more situations than the original one, mentioning only ‘international armed conflict’ and the competence of the ICRC.

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Rights, Mary Robinson, had argued that 'all persons detained in this context [following the military operations in Afghanistan, JG] are entitled to the protection of international human rights law *and* humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.'<sup>496</sup>

However, the mere fact that the United States takes the position that the Guantánamo prisoners are not prisoners of war and the Geneva Conventions do not apply to their situation, does not mean that these Conventions no longer apply. As the Working Group itself stated in its 'legal opinion', pending the determination of their status by a 'competent tribunal', the prisoners provisionally enjoy the guarantees of the Geneva Convention, including the right to a fair trial. Even less should the United States' position be a ground for the Working Group to apply without any reservations and further motivation the International Covenant on Civil and Political Rights to individual prisoners held at Guantánamo Bay. The Working Group should have shown greater awareness of the broader consequences of its approach, including the question of the appropriateness of pre-empting the discussion on the coexistence of the branches of international humanitarian law and international human rights law solely for the purpose of establishing its own competence. Rather than clarifying legal questions, the Working Group has brought to the fore many new ones and has further fuelled an already highly politicised debate.

According to the present author, there were other options available to the Working Group to express its concern over the situation of the prisoners of Guantánamo Bay, while at the same time respecting the limitations of its mandate. For example, the Working Group could have followed an approach similar to the one adopted by the Working Group on Enforced or Involuntary Disappearances in relation to the humanitarian crisis in the former Yugoslavia in 1993. As shown above, in that situation the Working Group on Enforced or Involuntary Disappearances admitted, *inter alia*, that incongruity existed between the exigencies of the situation in the former Yugoslavia and its existing methods of work. Against that background it then reported to the Commission that it

'has considered the question of what action it should take with regard to these cases. *In view of the complexity of the matter*, the Working Group, before taking a decision, wishes to seek the guidance of the Commission on Human Rights, its parent body. More precisely, the Group would appreciate clear instructions (...) on how to proceed with

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<sup>496</sup> Statement of High Commissioner for Human Rights on detention of Taliban and Al Qaida prisoners at US Base in Guantánamo Bay at Cuba, 16 January 2002 [emphasis added]. Also ICRC, International humanitarian law and human rights, June 2004 (website): 'International humanitarian law and international human rights law are complementary. Both seek to protect the individual, though they do so in different circumstances and in different ways. Humanitarian law applies in situations of armed conflict, whereas human rights, or at least some of them, protect the individual at all times, in war and peace alike. While the purpose of humanitarian law is to protect victims by endeavouring to limit the suffering caused by war, human rights seek to protect the individual and further his development.'

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these cases (...) Pending the Commission's consideration of the matter, the Group will keep the case concerning the former Yugoslavia in abeyance.<sup>497</sup>

Thus, the Working Group on Arbitrary Detention should also have sought the guidance of the Commission, whereby it could still have submitted its comments 'in order to provide the Commission with an adequate basis for reflecting on the matter.'<sup>498</sup> In these comments it could then have expressed different concerns, including the difficulties involved in differentiating between different types of legal situations such as the need to make individual status determinations and the risk of appearing to act in an arbitrary manner by taking up some cases, while declining to entertain others (armed conflict detentions). At the same time this would have been the occasion to restate that, irrespective of the Group's competence, no prisoner should be placed beyond the law. More thoroughly than it had done in its legal opinion, the Group could also have stated the protection offered to the prisoners under conventional as well as customary international humanitarian law and conclude that there exists no legal vacuum.<sup>499</sup> Pragmatically, it would certainly be better to address and confront the United States with its obligations under the Geneva Conventions (to which it is a party) as well as customary international humanitarian law, which unconditionally applies in the case of (international) armed conflicts. In this way, the controversy regarding the applicability of the International Covenant on Civil and Political Rights could have been avoided.<sup>500</sup> Meanwhile, the Working Group could suggest that the Commission should undertake a study on the coexistence of the branches of international humanitarian law and international human rights law with a view to clarifying any (legal) consequences this might have for States. Similarly, while declining to entertain individual cases until the Commission has provided clarity on its mandate, the Group could continue to keep an eye on the situation and appeal to the Government of the United States, 'in a spirit of cooperation', to establish a dialogue.<sup>501</sup> In this respect, it is worth reminding that the situation of the prisoners of Guantánamo Bay continues to be monitored by the ICRC and also by the Special Rapporteur on Torture, whose mandate does not distinguish between different types of legal situations.<sup>502</sup>

Finally, one could say that the Working Group on Arbitrary Detention, because of the nature of its mandate, in particular its quasi-jurisdictional competence, lacks the

497 U.N. Doc. E/CN.4/1993/25, paras. 36 ff [emphasis added]. *Supra* Chapter III.3.2.4.4.

498 *Ibid.*, para. 37.

499 For such an analysis, see Gill, NJB 2002, pp. 407 and 408.

500 See also the comments made in relation to the Working Group's decision to apply the International Covenant on Civil and Political Rights to non-Party States and the advantage of having a firm foothold in established legal principles, *supra* Chapter III.3.2.5.3.

501 Just as the Government of the United States offered the Working Group a response to its 'legal opinion' 'in a spirit of cooperation.' See U.N. Doc. E/CN.4/2003/G/73 (Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights).

502 See for the Special Rapporteur on Torture, U.N. Doc. E/CN.4/2004/56/Add.1, para. 1819. In fact the Special Rapporteur sent urgent appeals on behalf of the same four prisoners that the Working Group dealt with in its Opinion No.5/2003.

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kind of flexibility that the other more politically-oriented mandate holders have been able to maintain. This has led to the paradoxical situation that while the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture have benefited from the establishment of the Working Group on Arbitrary Detention to move away from a purely humanitarian approach to a more juridical and judgmental posture, the latter has increasingly felt the need to relax its working methods and, in some respects, to adopt a less judgmental approach. This tendency will be described and illustrated in the following chapter, Chapter IV, dealing with the (evolution of the) working methods of the three selected thematic procedures.

#### III.3.2.5.5 Intermediate Assessment

In the present chapter a description has been given of the normative frame of reference applied by the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and the Working Group on Arbitrary Detention respectively.

Firstly, it has been shown that the Working Group on Enforced or Involuntary Disappearances initially developed its own practical and empirically-based definition of a disappearance. Although workable in respect of the transmission of individual cases of disappearances, that definition could hardly be used as a basis for formulating (general and country-specific) recommendations aimed at preventing the practice of disappearances in the first place. In the absence of a clear normative framework, the Working Group had long relied on the rather general provisions of General Assembly Resolution 33/173 before that organ, in 1992, adopted the Disappearances Declaration. Subsequently, it has been asserted here that the adoption of the Disappearances Declaration was instrumental to a series of new initiatives, such as the Group's decision to assume competence to verify States' compliance with the Declaration, persuading the Working Group to become more juridical as well as judgmental in its approach towards Governments. These initiatives have never been contested by Governments. However, in terms of resources, the Working Group has clearly not been prepared to take on these new tasks, which, it must be stated here, only added to the already existing difficulties the Group experienced in trying to reduce the enormous backlog of individual cases of disappearances.<sup>503</sup> As a result, especially towards the end of the 1990s, the reporting on the implementation of the Disappearances Declaration both through general observations and through country-specific observations had virtually come to a standstill. At the beginning of the new millennium the situation may have slightly improved, but as will be seen in more detail in Chapter IV.7.1, it has not taken away the Group's concern that its functioning continues to be seriously jeopardised.

The Special Rapporteur on Torture, by contrast, has always been able to rely on a relatively well-developed normative framework, in particular an internationally agreed definition of 'torture' as the basis for his activities. There was, however, a 'grey area'

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<sup>503</sup> *Infra* Chapter IV.7.1.

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between ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’, which, the Special Rapporteur believed, justified it being brought within the scope of his mandate. This approach has never been challenged by the Commission on Human Rights, which has accepted and recognised that even practices such as corporal punishment fall within the mandate of the Special Rapporteur.

Similarly, there was no lack of normative instruments to which the Working Group on Arbitrary Detention could refer in the implementation of its mandate. What is more the Commission on Human Rights explicitly spurred on the Working Group to work on the basis of the Universal Declaration on Human Rights as well as other ‘relevant international legal instruments by the States concerned.’ Subsequently, it has been seen that the Working Group believed that the phrase justified the application of the International Covenant on Civil and Political Rights even in respect of non-Party States. The present author has criticised the Working Group for this too assertive an approach, which he believes needlessly provided its opponents in the Commission with a legitimate argument to attack the mandate, especially since it had already been targeted on other grounds as well, notably for dealing not only with cases of pre-trial detention, but also with cases of post-trial imprisonment and for naming its findings in individual cases ‘decisions’ rather than ‘views’ or ‘opinions’.<sup>504</sup> According to the present author the Working Group has probably underestimated the impact of its mandate, at least when seen through the eyes of certain Governments, and failed to anticipate their negative reactions. Where certain Governments already regarded the Working Group’s mandate as a significant intrusion in their domestic affairs, in particular when declaring arbitrary the decisions of domestic courts, a more pragmatic approach aimed at consolidating the different aspects of the mandate, including its normative frame of reference, would certainly have been more appropriate.

Finally, attention has been paid to the question of the competence of the three selected procedures to deal with situations of international armed conflict governed by international humanitarian law. It has been seen that the two Working Groups have hitherto excluded such situations from the purview of their mandates. The Special Rapporteur on Torture has been more pragmatic. He has simply taken the position that the prohibition of torture applies in peacetime situations as well as situations of armed conflict whether international or non-international in character, thereby leaving open the possibility of taking up cases or situations of torture in armed conflict situations. More recently, the Working Group on Arbitrary Detention decided to take up the situation of the persons detained by the United States at Guantánamo Bay Naval Base, Cuba, notwithstanding the fact that these persons had been captured during the United States intervention in Afghanistan characterised as an international armed conflict. According to the Working Group, the rule that situations of armed conflict covered by the Geneva Convention of 1949 do not fall within its competence, did not apply, since the United States had denied these persons prisoner of war status as well as the application of the 1949 Geneva Conventions and that, therefore, international human

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<sup>504</sup> The topic will be dealt with in more detail in Chapter IV.2.3.

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rights law, in particular the International Covenant on Civil and Political Rights, should be applied. In this respect the present author has argued that the Working Group exceeded its own mandate and unnecessarily pre-empted a discussion on the applicability of international human rights law to situations of (international) armed conflict. Certainly, this topic will remain at the forefront of the political debates in the United Nations in the years to come.



## CHAPTER IV

### DEVELOPMENT OF THEMATIC PROCEDURES (PART 2): WORKING METHODS

#### IV.1 INTRODUCTION

This chapter deals with the various aspects of the working methods of the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and the Working Group on Arbitrary Detention, respectively, as laid down in the relevant resolutions of the Commission on Human Rights and further developed in practice by these three thematic procedures. As before, the basis for the analysis has been the evolution of the working methods of the Working Group on Enforced or Involuntary Disappearances supplemented by developments relating to the Special Rapporteur on Torture and the Working Group on Arbitrary Detention.

The analysis focuses on the different techniques available to the thematic procedures to implement their mandate. These techniques, which have been briefly mentioned in the introduction to this study, include the following: (1) transmissions of alleged cases of disappearances (torture or arbitrary detention) to Governments, whereby two different procedures may be distinguished: 'routine' requests for information from Governments and 'urgent' requests for information from Governments; (2) on-site visits to particular countries; and (3) the preparation of an annual report for the Commission on Human Rights, including, *inter alia*, information concerning the activities of the thematic procedures, analyses of particular situations in different countries, analyses of the underlying causes of violations of human rights within the mandate of the special procedure concerned as contained in the relevant international instruments and general recommendations concerning (the implementation of) the topic of their mandate.

The initial informal<sup>1</sup> or empirical<sup>2</sup> character of the Working Group on Enforced or Involuntary Disappearances' mandate has been much acclaimed as allowing the Group to develop its working methods in a flexible manner, using the political latitude that is given thereto. Still, it is worth reminding the reader that the vague and informal nature of the mandate of the Working Group was the outcome of a negotiating process in the Commission on Human Rights, where considerable differences of opinion concerning certain matters of principle had to be overcome, notably the competence to deal with individual cases of disappearances. Also, the Working Group had an interest in keeping its working methods as vague *as possible* in order to ensure

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1 Kamminga, NILR 1987, p. 322.

2 De Frouville 1996, pp. 18, 46, 59.

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sufficient political support for its activities and, in particular, in order to overcome any remaining resistance against the institutionalisation of a generally applicable procedure to verify States' compliance with human rights standards, as concluded at the end of Chapter II.<sup>3</sup>

In this chapter, however, an attempt is made to show that over the years a process of 'formalisation' and 'institutionalisation' of the mandate and the working methods of the Working Group on Enforced or Involuntary Disappearances has taken place. To a large extent, this is the result of a natural tendency and a practical need for any mechanism, (wishing to be seen as) operating in an objective and predictable manner, to establish the rules of the game: to make known to all parties, whether they be Governments or individuals and NGOs, what the Group expected from them and what they could expect from the Working Group. It has also been the result of the dynamics of the political process, where Governments under scrutiny by the Working Group have formulated different (politically- inspired) arguments, often clothed in legal language, in defence of their respective positions. Subsequently, the Working Group and its supporters in the Commission have been obliged to answer to such arguments or defences. The practical effect of this antagonist process has been the clarification of certain rules. This process was further reinforced as the Working Group – and the thematic approach in general – gradually became embedded in the United Nations system, *inter alia*, as a result of the extension of the duration of the mandate from one year to three years. A similar process may be identified in the case of the Special Rapporteur on Torture, especially in the period after the establishment of the Working Group on Arbitrary Detention. As briefly noted at the end of the previous chapter,<sup>4</sup> in the case of the Working Group on Arbitrary Detention, the inverse process, *i.e.* a move towards less formality and more flexibility, may be discerned, in particular in the context of the 1996 and 1997 mandate revisions.

The topics reviewed in this chapter include Transmissions [Chapter IV.2]; Sources of information and the admissibility of communications [Chapter IV.3]; Competence *Ratione Temporis*: *i.e.* the question of a time-limit for the admissibility of communications and the discontinuation of cases [Chapter IV.4]; Urgent actions [Chapter IV.5]; Country Visits [Chapter IV.6]; and Annual Reports [Chapter IV.7].

## IV.2 TRANSMISSIONS

### IV.2.1 Competence to Take up Individual Cases of Disappearances: the Humanitarian Approach

The successful outcome of the negotiations concerning the establishment of the Working Group on Enforced or Involuntary Disappearances in 1980 hinged upon the possibility of finding an acceptable compromise formula regarding the question of

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<sup>3</sup> Supra Chapter II.5.

<sup>4</sup> Chapter III.3.2.5.4.

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whether the proposed mechanism would be empowered to respond to individual cases of disappearances (on an urgent basis) or whether its scope of action would be limited to studying the phenomenon of disappearances in general.<sup>5</sup>

The propositions circulating in the Commission varied from empowering the Working Group to examine 'situations of disappearances' or 'the question of disappearances' to empowering it to examine 'cases of disappearances.' The first two formulations could be interpreted as excluding individual cases from the purview of the Working Group's mandate; the last one obviously would not.<sup>6</sup>

Despite the fact that it was not very consistent in its use of terminology, the intention behind the original French draft<sup>7</sup> would seem to have been to allow the proposed group of experts to deal with individual cases of disappearances.<sup>8</sup> In its first operative paragraph that proposal provided for '(...) experts (...) *to study and examine all reports and information (...) concerning disappearances*' [emphasis added]. Pursuant to the third paragraph, these experts 'should choose their working methods as to ensure the necessary speed and flexibility in responding to *urgent situations*.'<sup>9</sup> Paragraphs 6, 7 and 8 of the French draft explicitly mentioned the word 'cases.' Paragraph 6 contained a request to Governments to inform the group of experts, at its request, without delay on 'cases' of disappearances and also on the facts established, the progress made and the conclusions drawn in the course of investigations into such cases. Paragraph 7 requested Governments, 'when (...) presented with reliable reports on cases of (...) disappearances, to undertake without delay impartial investigations into the whereabouts (...).' Paragraph 8, finally, 'urge[d] the Secretary-General to continue to use his good offices in cases of (...) disappearances.'

In the ensuing negotiations, the delegation of the United States in particular tried to persuade the Members of the Commission to agree that the Working Group's mandate should include the competence to deal with individual 'cases' of disappearances and lobbied to have that term included in the final resolution. Amongst the Non-Aligned States opinions on this issue were divided and in search of consensus the term 'cases' was dropped from subsequent drafts. Instead, the term 'situations' was introduced, as well as the phrase 'to examine *the question of* enforced or involuntary disappearances.' This new formulation, in turn, was unacceptable to the delegation of the United States, since it could be interpreted as precluding the Working Group from dealing with individual cases. As a result that delegation came up with yet another proposal. In this proposal the term 'situations' no longer appeared and the phrase 'to examine the question of enforced or involuntary disappearances' had been slightly changed to read 'to examine *questions relevant to* enforced or involuntary disappearances.'<sup>10</sup> This phrase proved vague enough to be acceptable to most delegations and

5 Kramer and Weissbrodt, HRQ 1981, pp. 18 ff. at p. 20. Also, Guest 1990, p. 198.

6 Kramer and Weissbrodt, HRQ 1981, p. 26; also Guest 1990, p. 198.

7 U.N. Doc. E/CN.4/L.1502.

8 See also Rodley 1999, p. 252.

9 [Emphasis added].

10 C.H.R. Res. 20 (XXXVI), para. 1 [emphasis added].

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was subsequently incorporated in paragraph 1 of Resolution 20 (XXXVI). It seemed to leave open the possibility for the Working Group to take up individual cases of disappearances, especially if read in conjunction with paragraphs 5 and 6 of Resolution 20 (XXXVI).<sup>11</sup> These important paragraphs, which find their origin in Sub-Commission Resolution 5B (XXXII) of 5 September 1979<sup>12</sup> provided:

‘The Commission on Human Rights,  
(...)

5. Further requests the Secretary-General to provide the Working Group with all necessary assistance, in particular staff and resources they require in order *to perform their functions in an effective and expeditious manner*;

6. Invites the Working Group, in establishing its working methods, to bear in mind the need to be able *to respond effectively to information* that comes before it and to carry out its work with discretion;<sup>13</sup>

Although a compromise formula had thus been found, it was clear that the adoption of Resolution 20 (XXXVI) had not removed the fundamental differences of opinion that existed between Governments. The terms of the resolution could only temporarily hide these differences. Immediately after the adoption of Resolution 20 (XXXVI) several States indicated how they believed the mandate of the Working Group should be interpreted. States like Argentina insisted that the Working Group did not have the authority to deal with individual cases of disappearances. This view was based on the argument that individual cases should be dealt with in accordance with the procedure laid down in ECOSOC Resolution 1503 (XLVII) of 27 May 1970.<sup>14</sup> The Soviet Union and Ethiopia were also reported to have urged for a restrictive interpretation of the Working Group’s mandate. Other states, the United States, Australia, Cyprus, The Netherlands and Canada, explicitly recognised the competence of the Working Group to review individual cases of disappearances.<sup>15</sup>

For the Working Group the political context entailed that it had to approach its tasks in a prudent manner. If the Working Group were to decide to take action in response to individual cases of disappearances, *i.e.* without applying the threshold policy of the 1503 procedure requiring the existence of a consistent pattern of gross and reliably attested violations of human rights, this would immediately place it in an accusatory role against Governments. In order to avoid such a direct and overt confrontation with Governments – and risking its political survival – the Working Group, in effectively interpreting its mandate as authorisation to respond to individual cases of disappearances, adopted the so-called ‘humanitarian approach’.

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11 Kramer and Weissbrodt, HRQ 1981, p. 27; also Guest 1990, p. 199.

12 S.C. Res. 5B (XXXII) of 5 September 1979, paras. 3 and 5. Supra Chapter III.3.1.1.

13 [Emphasis added].

14 Guest 1990, p. 203.

15 Kramer and Weissbrodt, HRQ 1981, p. 31.

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In its first report, the Working Group took great care to describe the essence of this approach, which would serve as the outward justification for all of its activities.<sup>16</sup> In short, the humanitarian approach stood for a non-judgmental or non-accusatory approach,<sup>17</sup> which meant that the Group would not utter any pronouncements or attributions of responsibility. In other words, the objective of the humanitarian approach has not been the application of law to specific situations, but more pragmatically to help in discovering what has happened to the disappeared.<sup>18</sup> Consequently, the Working Group's role would end 'when the fate and whereabouts of the missing person has been clearly established as a result of investigations by the Government or the search by the family, irrespective of whether that person is alive or dead.'<sup>19</sup> With this objective in mind, the Working Group also regarded the humanitarian approach as instrumental to inducing Governments to cooperate with it. In fact, in the absence of any enforcement powers the Working Group had no other choice than to find the right tone and to enter into 'a fruitful dialogue' with Governments.<sup>20</sup> As the Working Group noted, 'the critical fact is that only a Government has the resources which can help to solve cases.'<sup>21</sup>

In 1981 the Commission endorsed the humanitarian approach in its Resolution 10 (XXXVII), when it noted that the Working Group had not always obtained full cooperation from Governments 'warranted by its strictly humanitarian objectives and its working methods based on discretion.'

In the years that followed the Working Group would continue to emphasise the humanitarian non-accusatory nature of its activities as well as the wish to establish a dialogue.<sup>22</sup> The humanitarian approach became the hallmark of its activities. As the Group noted in its fourth report:

'the policy has been borne out in practice. Reactions in the Commission's debates and governmental responses show that this strict and consistent approach is being increasingly recognised and relied upon. It [the humanitarian approach] is at present the Working Group's main source of strength, backed as it is by successive consensus approval of its actions over nearly four years in all United Nations forums.'<sup>23</sup>

In 1987, the Working Group, for the first time, included a concise and comprehensive description of its methods of work in its annual report.<sup>24</sup> In this description the humanitarian approach figured prominently:

16 U.N. Doc. E/CN.4/1435, paras. 1-12 and 29-39.

17 The Working Group has used both the term non-judgmental and non-accusatory, see, for example, U.N. Doc. E/CN.4/1985/15, para. 2.

18 Strongly emphasising the relatives' 'right to know.' See, for example, U.N. Doc. E/CN.4/1492, para. 5.

19 U.N. Doc. E/CN.4/1985/15, para. 28, also U.N. Doc. E/CN.4/1988/19, para. 16.

20 See also Rodley 1999, p. 271.

21 U.N. Doc. E/CN.4/1984/21, para. 176.

22 U.N. Doc. E/CN.4/1492, paras. 5 and 181. Also U.N. Doc. E/CN.4/1983/14, paras. 6-8.

23 U.N. Doc. E/CN.4/1984/21, para. 176.

24 U.N. Doc. E/CN.4/1988/19, para. 2 and paras. 16-30.

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'The Working Group's methods of work (...) are geared to its main objective. That objective is to assist families in determining the fate and whereabouts of their missing relatives (...). To this end, the Working Group endeavours to *establish a channel of communication* between the families and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases which the families, directly or indirectly, have brought to the Group's attention, are investigated and the whereabouts of the missing person clarified. (...) The Group's approach is strictly *non-accusatory*. It does not concern itself with the question of determining responsibility for specific cases of disappearance or for other human rights violations which may have occurred in the course of disappearances. In sum, the Group's activity is *humanitarian in nature*.'<sup>25</sup>

At the same time, this 'codification' of working methods marked the beginning of a period in which the reports of the Working Group would put less emphasis on the humanitarian approach as the ultimate justification for its activities.<sup>26</sup> This development coincided with the gradual consolidation of the mandate of the Working Group which manifested itself, *inter alia*, through the extension of its duration to two years in 1986 and three years from 1992 onwards; it coincided with the efforts in the United Nations to draw up the Disappearances Declaration resulting in the adoption of a Sub-Commission Draft Declaration in 1990 and culminating with the adoption of the Disappearances Declaration by the General Assembly in 1992;<sup>27</sup> finally, it coincided with geopolitical changes and the fading away of significant doctrinal objections of principle against the competence of the United Nations to take cognizance of individual cases of violations of human rights.

Thus, while the Working Group still held in 1989 that the 'humanitarian approach, perhaps imperfect, is the only real option available to it, and that only through cooperation and dialogue with States can its primary objective be achieved',<sup>28</sup> the 1990 and 1991 reports only contained an indirect reference to the humanitarian nature of the mandate as accepted in successive Commission resolutions.<sup>29</sup> In its 1992 report, the Working Group explicitly described its 'primary role' as 'a channel of communication between families of the missing persons and the Governments concerned' without referring to the humanitarian nature of the mandate.<sup>30</sup> Another move away from the purely humanitarian approach came in 1993, as the Working Group assumed the competence to monitor the Disappearances Declaration and to include country-specific observations in its report.<sup>31</sup> As of 1995 the Working Group dropped any reference to the humanitarian approach in its working methods. In addition, it formulated the rule that it would remind Governments of their obligations under the Disappearances

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25 Ibid., para. 16 [emphasis added].

26 See also, Rodley 1999, p. 271 and De Frouville 1996, pp. 70 and 71.

27 Supra Chapter III.3.2.5.1.

28 U.N. Doc. E/CN.4/1990/13, para. 349.

29 U.N. Docs. E/CN.4/1991/20, para. 8 and E/CN.4/1992/18, paras. 2 and 9 ff.

30 U.N. Doc. E/CN.4/1993/25, para. 2.

31 U.N. Doc. E/CN.4/1995/36, supra Chapter III.3.2.5.1.

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Declaration 'in the context of clarifying individual cases'.<sup>32</sup> This has remained the formal position of the Working Group ever since.<sup>33</sup>

However, some relativising remarks must still be made. In the first place, as already mentioned above, the basic rationale behind the humanitarian approach has been twofold: it served the political purpose of giving legitimacy to the activities of the Working Group, thereby securing the Group's (political) survival in times in which its working methods were still the object of controversy and discussion; but it also served a more pragmatic purpose of securing the indispensable cooperation of Governments. One could say that the former purpose has lost much of its importance now that the mandate has been clearly established and that, therefore, the Working Group no longer finds it necessary to couch its activities exclusively in terms of humanitarian action. The latter purpose, however, has probably retained its validity; in practice, the Working Group has remained heavily dependent on the cooperation of Governments. As Van Dongen put it elsewhere: '[a]ny attempt to ascribe responsibility would be unmanageable and perhaps even counter-productive. Unmanageable because, given the size of its workload, it is (...) difficult enough for the Group to follow up on a disappearance as such. Attempting in addition to identify the perpetrators would require capabilities far surpassing realistic expectations. Counter-productive because soliciting the cooperation of Governments in tracking down people who have disappeared is indispensable; and Government authorities are likely to be less willing to share information with the Working Group if their cooperation could also lead to the incrimination of individual government officers.'<sup>34</sup> Thus, the Working Group still refrains from making case-specific judgments and, in this sense, *in practice* its activities in respect of individual cases of disappearances are still essentially humanitarian in nature. Moreover, the Commission on Human Rights, in its annual resolutions regarding the Question of Enforced or Involuntary Disappearances, has continued to refer to the Working Group's task as a humanitarian one, in particular in the context of handling communications and the consideration of Government replies.<sup>35</sup>

Secondly, the Working Group has not always found it easy to adequately reflect the more juridical approach in its annual reports, in particular in the light of the reduction in the number of pages and the lack of resources.<sup>36</sup> In addition, it is questionable to what extent the shift in tone has really succeeded in increasing pressure on Governments to act in conformity with the Disappearances Declaration.<sup>37</sup>

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32 U.N. Doc. E/CN.4/1996/38, Annex I, paras. 3 and 4 [emphasis added].

33 See the Working Group's latest review of working methods in 2001: U.N. Doc. E/CN.4/2002/79, Annex I, paras. 3 and 4.

34 U.N. Doc. E/CN.4/1994/26/Add.1, para. 34.

35 C.H.R. Res. 2003/38, para. 2(b).

36 *Supra* Chapter III.3.2.5.1. Country-specific observations were omitted in the period 1998-2000. Also *infra* Chapter IV.7.1.

37 On the difficult topic of effectiveness, see *infra* Chapters IV.4, IV.5 and V.2.2.

## IV.2.2 Special Rapporteur on Torture

Through its 'humanitarian approach' the Working Group on Enforced or Involuntary Disappearances had given a clear sense of direction to the phrases 'to examine questions relevant to (...)' and 'to bear in mind the need to be able to respond effectively to information'. The Special Rapporteur on Torture's mandate being based on essentially the same injunctions, it was clear that the Commission would not reject a similar interpretation by the Special Rapporteur provided he followed the non-judgmental approach of the Working Group.<sup>38</sup>

In practice this was also what happened. The Special Rapporteur on Torture clearly benefited from the important groundwork laid by the Working Group on Enforced or Involuntary Disappearances. In particular, he did not find it necessary to explicitly adopt an overall justification for his activities in terms of a 'humanitarian approach' and pragmatic considerations therefore seem to have prevailed in his strategy.

Thus, in his first report, the Special Rapporteur assumed competence to bring allegations of torture before the Government concerned. As he put it: 'whenever the Special Rapporteur, on the basis of all available information came to the conclusion that the allegation was reasonably reliable, which could also be deduced from repeated allegations, he approached the Government concerned with a request for further information.'<sup>39</sup>

Realising that the cooperation of Governments would be vital in carrying out his mandate, the Special Rapporteur added that 'Governments should see these requests for further information as a means to suppress and prevent the occurrence of torture' and 'for this reason, the letters (...) also contain a request to provide information on measures to be taken if the allegations are found to be correct to punish the perpetrators and to prevent a reoccurrence.'<sup>40</sup> Interestingly, in what was probably an attempt to gain the confidence of Governments the Special Rapporteur wrote in his first report that 'in view of the fact that some of the letters (...) contained somewhat detailed allegations, he does not consider it appropriate to name those countries which have already replied and those which have not yet seen fit to do so.'<sup>41</sup>

All in all, the Special Rapporteur indicated that he felt justified in his approach 'as he has come to the conclusion on the basis of the available material, that no society, whatever its political system or ideological colour, is wholly immune to torture.'<sup>42</sup>

However, in respect of the technique of 'urgent appeals', the Special Rapporteur indicated that the justification for this particular type of action continued to be 'humanitarian concern', *i.e.* without taking a position with regard to the content of the appeal,

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38 The Special Rapporteur was 'to examine questions relevant to torture' and 'to respond effectively to credible and reliable information that comes before him and to carry out his work with discretion.' C.H.R. Res. 1985/33, paras. 1 and 6 [emphasis added].

39 U.N. Doc. E/CN.4/1986/15, para. 14.

40 *Ibid.*, para. 19.

41 *Ibid.*, para. 60. This would no longer be the case from 1987 onwards.

42 *Ibid.*, para. 14.

the Special Rapporteur sought to secure that 'everything will be done *to guarantee the physical and mental integrity of the person or persons concerned*.'<sup>43</sup>

In his third report presented to the Commission in 1988, the Special Rapporteur seized the occasion of the entry into force of the Convention against Torture (26 June 1987) and the monitoring functions entrusted by that Convention to the Committee against Torture to clearly establish the *raison d'être* of his own mandate and to show that his functions and those of the Committee against Torture were complementary rather than competitive.<sup>44</sup> In this context he emphasised in particular the non-jurisdictional nature of his mandate and four practical consequences deriving therefrom.

Firstly, he mentioned his competence to bring credible information concerning specific cases occurring in individual countries to the attention of the Government concerned and to ask for its comments: 'in so doing he does *not take a stand on the well-foundedness of each and every allegation*; the information received together with the comments by Governments enable him *to draw for the Commission a picture of the occurrence and the extent of the practice of torture in the world*.' Moreover, 'in the light of those comments and any consultations which may take place, *conclusions of a general nature* are included in the report.' By contrast, according to the Special Rapporteur, the Committee against Torture has to determine whether a complaint is well-founded.<sup>45</sup>

Secondly, the Special Rapporteur justified his *raison d'être* by stressing the proactive nature of his mandate as compared to the essentially passive Committee against Torture. In this respect, he referred in particular to the provision that led to the urgent action procedure, a provision 'which underlines the essentially humanitarian character of the mechanisms established by the Commission, which make it possible to avert potential violation of human rights by *drawing the attention of the Government concerned to a specific case*.'<sup>46</sup>

Thirdly, he argued that the Commission had developed the instrument of thematic procedures 'as a tool in the struggle against practices which have been outlawed by the international community and as a means to come to the rescue of potential or real victims of such outlawed practices. Hence the emphasis is laid on *the element of 'effectiveness' and on the adoption of preventive measures*.' In contrast to thematic procedures, according to the Special Rapporteur, the Committee against Torture 'must determine whether a State which has accepted specific obligations under a treaty complies with those obligations (...) a matter of the establishment of State responsibility and, in the case of an individual complaint, the classic rule of the exhaustion of domestic remedies must be applied.'<sup>47</sup>

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43 Ibid., paras. 18 [emphasis added] and 62-68. The countries to which urgent appeals had been sent in 1985 were mentioned by name in the report. *Infra* Chapter IV.5.2.

44 U.N. Doc. E/CN.4/1988/17, para. 12.

45 Ibid., para. 9 [emphasis added].

46 Ibid., para. 10 [emphasis added].

47 Ibid., para. 11 [emphasis added]. On the prior exhaustion of local remedies, see *infra* Chapter IV.3.

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Finally, the Special Rapporteur identified a difference in the manner in which information is used by the two mechanisms. The Committee uses it to establish whether a State has complied with its treaty-obligations, whereas the Special Rapporteur uses the information 'to draw a general pattern of the existence of preventive measures and, on this basis, to make recommendations of a general nature.'<sup>48</sup>

With the above clarifications and justifications for his mandate, the Special Rapporteur hoped to pre-empt the recurrence of a debate on the question of the coexistence of the mandate with the Committee against Torture. By stressing the non-jurisdictional nature of his mandate, the Special Rapporteur intended not so much to achieve acceptance of his working methods (which was the reason for the Working Group on Enforced or Involuntary Disappearances to adopt the humanitarian approach), but to paint for the Commission the distinct identity of the Charter-based thematic procedures as opposed to treaty-based monitoring mechanisms.<sup>49</sup> This is also evidenced by the fact that the Special Rapporteur apparently did not find it appropriate to further formalise or 'codify' his working methods as the Working Group on Enforced or Involuntary Disappearances had endeavoured to do during the same year. As described in Chapter III.3.2.3, the coexistence debate eventually did take place, but the opposition in the Commission did not prove strong enough to prevent the (two-)year extension to the mandate of the Special Rapporteur, let alone to limit the mandate's scope of application to States which had not ratified the Convention only.

Informality and pragmatism continued to be the hallmark of the Special Rapporteur on Torture. Occasionally, clarifications were given, but never in the form of hard and fast rules that could impede the flexibility of the mechanism. For example, in his report on 1991 the Special Rapporteur revealed some of the factors which he had taken into account before deciding to transmit information concerning torture to a particular Government.<sup>50</sup> Meanwhile, until the end of his tenure in 1993, Peter Kooijmans would continue to emphasise that in bringing information concerning specific cases of alleged torture as well as when reporting his correspondence with the Commission 'he does not take a stand on whether such allegations are well-founded. He merely requests the Government to look into the matter and to see to it that, if the allegation is true, the perpetrators will be punished and the victims will be compensated.'<sup>51</sup>

With the appointment of Sir Nigel Rodley in 1993 a sharper tone may be discerned. For the first time, the Special Rapporteur summarised the basic elements of his working methods. Particularly noteworthy is the passage in which the new Special Rapporteur asserted his own role:

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48 Ibid., para. 12 [emphasis added].

49 See also Kamminga, NILR 1987, p. 307.

50 U.N. Doc. E/CN.4/1992/17, para. 7. On the question of the reliability of information, *infra* Chapter IV.3.2.

51 See U.N. Doc. E/CN.4/1993/26, para. 14 and for the formulation used in the latest version of his working methods U.N. Doc. E/CN.4/2003/68, para. 10.

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‘The Special Rapporteur believes that it is in the interest of both victims and Governments that he be in a position (a) to transmit to Governments summaries of all credible and reliable information addressed to him alleging cases and practices of torture; (b) to analyse responses from Governments; (c) to consult sources of allegations on such responses as appropriate; (d) to pursue the dialogue with Governments when warranted; and (e) to draw any conclusions and make any recommendations to Governments that such a systematic exchange would indicate. To the extent that the present report fails to reflect this ambition, it is (...) the result of limited resources. Nevertheless the Special Rapporteur believes that, unless the Commission (...) expresses a different view, he should seek as far as possible to work in a manner consistent with the above approach.’<sup>52</sup>

Also, for the first time, the Special Rapporteur included country-specific observations in his report whenever he deemed that to be necessary in the light of his mandate.<sup>53</sup>

The reasons for this changing posture on the part of the Special Rapporteur might be sought in the background of the newly appointed mandate holder<sup>54</sup> – a question that will not be further elaborated here –, but it might also be the case that irrespective of the person’s background, the change of mandate holder provided an opportunity for new initiatives. Most likely, however, the establishment of the Working Group on Arbitrary Detention in 1991 and its mandate to make case-specific findings spurred on the other thematic procedures to become more judgmental as well.<sup>55</sup> While still refraining from making case-specific findings, the formal approach adopted by the Special Rapporteur indeed reveals similarities to the one of the Working Group on Arbitrary Detention. As De Frouville observed, Sir Nigel Rodley’s ideal interpretation of the mandate came close to exercising a genuine supervisory function: conclusions regarding the veracity of the allegations would be given after having established the facts in an adversarial process.<sup>56</sup>

The third mandate holder on torture, Theo van Boven, exercising the function since November 2001, has essentially followed the approach of his predecessor. At the same time, it may be noted that Van Boven has again placed more emphasis on the non-judgmental nature of his mandate than his predecessor. Thus, in the latest version of his working methods, the Special Rapporteur explicitly provided that:

‘The Special Rapporteur wishes to make it clear communications regarding individual cases – urgent appeals and allegations – do not constitute any judgment on his part concerning the merits of the cases. In transmitting those communications, the Special Rapporteur does not associate himself with or condone in any way acts or activities of

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52 U.N. Doc. E/CN.4/1994/31, para. 11. The working methods were subsequently approved by the Commission in its Resolution 1994/37 adopted without a vote on 4 March 1994. See also De Frouville 1996, pp. 74 and 75.

53 *Supra* Chapter III.3.2.5.2.

54 Rodley having a non-governmental background (Amnesty International), Kooijmans a governmental one (Netherlands Ministry for Foreign Affairs).

55 As Rodley himself wrote elsewhere. See Rodley, EHRLR 1997, p. 7.

56 De Frouville 1996, p. 75.

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the persons on whose behalf he intervenes. No matter how wrongly, dangerously, or even criminally a person may act, every human being is legally and morally entitled to the protection on the basis of internationally recognised human rights (...) *a fortiori* (...) a non-derogable right (...).' (...) no conclusions as to individual cases are drawn.<sup>57</sup>

This repositioning may be explained by the more tense (polarised) political climate since the end of the 1990s and pressures in the Commission to adopt a less confrontational approach towards Governments and to pay more attention to the activities of non-State actors, in particular terrorist movements.<sup>58</sup> The events of 11 September 2001 in the United States and the ensuing need to combat international terrorism have further strengthened these pressures. Thus, Government representatives have sometimes intimated that, by taking up cases of persons who are terrorists, criminals or linked with terrorist organisations and criminal gangs, the Special Rapporteur is making a common cause with them.<sup>59</sup>

Under the present political circumstances, the position of the Special Rapporteur on Torture as the custodian of the prohibition against torture has not become easier. For the time being, therefore, the Special Rapporteur might be primarily concerned with consolidating the *'acquis'* of his predecessors rather than seeking to assume competence to present formal findings on individual cases of apparent torture. Moreover, in the light of the formulation used to define the mandate of the Working Group on Arbitrary Detention, it would seem that that final step could only be taken with the prior authorisation of the Commission on Human Rights.

### IV.2.3 Working Group on Arbitrary Detention

In Resolution 1991/42 the Commission on Human Rights decided to create a Working Group on Arbitrary Detention 'with the task of *investigating cases of detention* (...).' Authorisation to present formal findings on individual cases of alleged arbitrary detention has been said to be implied in this phrase, which apparently goes a step further than the formulation 'to examine questions relevant to (...)' which is used to define the mandates of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture respectively. In any case, the Working Group on Arbitrary Detention interpreted its mandate as comprising such quasi-jurisdictional competence. In its first report, the Working Group explicitly emphasised that 'it paid due regard to the specific features of its own terms of reference, especially the duty of informing the Commission by means of a comprehensive report and investigating cases of arbitrary detention.'<sup>60</sup> Consequently, while benefiting in some respects from the 11-year experience of the Working Group on Enforced or Involuntary Disappear-

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<sup>57</sup> U.N. Doc. E/CN.4/2003/68, paras. 13 and 19.

<sup>58</sup> *Supra* Chapter III.3.2.4.

<sup>59</sup> Van Boven 2004, p. 1650.

<sup>60</sup> U.N. Doc. E/CN.4/1992/20.

ances, the approach adopted by the Working Group on Arbitrary Detention differs from that of other thematic procedures on a number of points and probably bears more resemblance to those of the treaty-based monitoring mechanisms under individual complaint procedures.

With reference to the specific aspects of its mandate, the Working Group adopted a quasi-jurisdictional approach from the outset, reflected in particular in its working methods. As a point of departure, it decided that the '*investigation* should be of an *adversarial nature*.' According to the Working Group, the aim of this adversarial process was 'to assist it in obtaining the cooperation of the State concerned by the case considered.'<sup>61</sup> To a large extent the adversarial process follows the practices of other thematic procedures. Individual communications alleging arbitrary detention are transmitted to the Government concerned with the request 'to reply after having carried out the appropriate inquiries so as to provide the Group with the fullest possible information.' Subsequently, after having received the reply from the Government that information will be transmitted to the original source of the communication with the request to comment on the reply or to furnish additional information.<sup>62</sup> Furthermore, as part of the process, the Working Group decided to authorise its Chairman either personally, or by delegating any of the members of the Group, to request an interview with the permanent representative to the United Nations of the country in question 'in order to facilitate mutual cooperation.'<sup>63</sup>

A first notable difference with the other thematic procedures was the decision of the Working Group to adopt a 90-day deadline (from the date of transmitting a communication) for a Government to send a reply. Upon a failure to send such a reply, the Group assumed competence 'on the basis of all data compiled [to] take a decision.'<sup>64</sup>

This brings us to the second important difference, namely the competence to take decisions on individual cases. In its working methods the Working Group described this competence as follows:

'In the light of the information examined during its investigation, the Working Group shall take one of the following decisions:

(a) If the person has been released, for whatever reason, since the Working Group took up the case, the case is filed;<sup>65</sup>

61 Ibid., para. 13 (para. 2 of the working methods).

62 Ibid. (paras. 9, and 13 of the working methods).

63 Ibid. (para. 12 of the working methods).

64 Ibid. (para. 10 of the working methods).

65 In 1993 the Working Group added that it 'reserves the right to decide, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person.' This phrase was added after a debate with, *inter alia*, NGOs like the International Commission of Jurists. That organisation believed the Working Group had adopted an unnecessarily restrictive interpretation of its mandate by providing that if the person whose case had been submitted had been released, *for whatever reason*, the case was closed. According to the International Commission of Jurists, 'that decision, by preventing the Working Group from reaching conclusions on such cases, essentially prevented cases

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- (b) If the Working Group determines that it is established that the case is not one of arbitrary detention, the case is also filed;
- (c) If the Working Group decides that it does not have enough information to take a decision, the case remains pending for further investigation;
- (d) If the Working Group decides that the arbitrary nature of the detention is established, it shall make recommendations to the Government concerned. The recommendations shall also be brought to the attention of the Commission on Human Rights in the Working Group's annual report to the Commission.<sup>66</sup>

However, in the vocabulary adopted by the Working Group the term 'decision' was not reserved exclusively to describe the internal decision-making process. It was the official term used to describe the outcome of that process. By contrast, under the individual complaints procedure of the Optional Protocol to the International Covenant on Civil and Political Rights the Human Rights Committee adopts 'views' rather than 'decisions'.

Another difference between the approach of the Working Group on Arbitrary Detention and other thematic procedures was the decision of the former to adopt so-called 'deliberations.'<sup>67</sup> Within the context of the activities of the Working Group deliberations are decisions on questions of principle 'not in the abstract, but in connection with the consideration of individual cases submitted to it.' As the Working Group put it itself: '[b]y adopting those deliberations the Working Group takes a position on a number of pertinent questions which may arise in other countries, thus laying the ground for its own jurisprudence and facilitating the consideration of future cases.'<sup>68</sup> The 'deliberation procedure' bears a certain resemblance to the practice of the treaty bodies to adopt General Comments. So far the Working Group has adopted six such deliberations. The latest deliberation was adopted in 2000 and concerned an opinion regarding allegations against the International Criminal Tribunal for the Former Yugoslavia.<sup>69</sup> In the light of the fact that this particular aspect of the Working Group's activities has not given rise to major controversies and has been relatively little used, it will not be dealt with in further detail.<sup>70</sup>

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and even patterns of short-term arbitrary detention from coming before the Working Group.' See U.N. Doc. E/CN.4/1992/SR.21, para. 97 and U.N. Doc. E/CN.4/1993/24, Annex IV, para. 14 (a). On the same topic see the Netherlands, U.N. Doc. E/CN.4/1992/SR.24, para. 29.

66 U.N. Doc. E/CN.4/1992/20, para. 13 (para. 14 of the working methods). For the latest version see U.N. Doc. E/CN.4/1998/44, Annex I, paras. 17 ff. Here the Working Group added that 'If the Group considers that it is unable to obtain sufficient information on the case, it may file the case provisionally or definitively.'

67 See also Chapter III.3.2.5.3

68 U.N. Doc. E/CN.4/1993/24, para. 19.

69 See U.N. Doc. E/CN.4/2001/14, paras. 12-33. Four 'deliberations' were adopted in 1992, concerning the consideration of cases in Myanmar, in particular restricted residence or house arrest (deliberation 01), questions put forward by the Government of Cuba (deliberations 02 and 03) and the topic of re-education through labour (deliberation 04). One 'deliberation' was adopted in 1999 concerning asylum seekers (deliberation 05).

70 The procedure was sanctioned in C.H.R. Res. 1993/36, para. 6.

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However, as already referred to in Chapter III.3.2.5.3, there were other aspects of the Working Group's quasi-jurisdictional approach with regard to individual cases of alleged arbitrary detention that did give rise to such controversies. Concerning the discussions on, *inter alia*, the Working Group's frame of reference, in particular the application of the International Covenant on Civil and Political Rights to non-Party States, the distinction between 'detention' and 'imprisonment' may be recalled here. An argument that was particularly often heard in that context was that the Working Group, by judging the arbitrary nature of a sentence of imprisonment, was acting like a supranational organ.<sup>71</sup>

A factor which contributed to the escalation of these discussions in 1997 was probably the assertive manner in which the Working Group had presented its mandate from 1991 onwards, not in the last place by having adopted the term 'decisions' to designate the outcome of its investigations on individual communications.

Yet, the Working Group had been warned about the use of this term. In 1994, for example, the American Association of Jurists, a non-governmental organisation having a consultative status with ECOSOC, issued a written statement, in which it argued that the formula adopted by the Working Group was not the most suitable, since

*'the Group's opinions have no binding legal force; it can only request States to take the necessary steps to remedy the situation. It is up to the good will of the Government concerned to respect such a request or not.'*<sup>72</sup>

According to the American Association of Jurists the use of terms such as 'decide' or 'declare' did not correspond to the Group's mandate, but rather to a jurisdictional mandate (which it did not have). It therefore suggested that the Working Group 'should use terms of a more neutral nature, such as 'opinions' or 'views', and confine itself to 'considering' or 'believing' that a detention is or is not arbitrary.'<sup>73</sup>

It was only in 1997 that the Working Group, through its Chairman, was willing to concede that 'the use of the word 'decision' to describe its assessment of the communications submitted to it might give the impression that it was calling into question the force of *res judicata*' and that, therefore, 'it would be advisable to replace it with a word such as view, opinion, recommendation or observation.'<sup>74</sup> Also, the Chairman announced that the Working Group had adopted a *consultative* rather than an adversarial procedure.<sup>75</sup> By this time, however, it was already too late to prevent the adoption of the mandate restrictions. From the debate in the Commission, it clearly emerged that many States believed that the Working Group had gone too far in

71 U.N. Doc. E/CN.4/1996/SR.29, para. 3 (Cuba).

72 U.N. Doc. E/CN.4/1994/NGO/18, para. 15 [emphasis added].

73 Ibid.

74 U.N. Doc. E/CN.4/1997/SR.25, para. 20. The Working Group adopted the term 'opinion'.

75 Ibid. The term 'adversarial nature' or 'adversarial procedure' has been notably absent from the latest version of the Group's working methods. See U.N. Doc. E/CN.4/1998/44, Annex 1.

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attempting to act like a semi-judicial body.<sup>76</sup> For example, the Government of Brazil, a country which has been said to have played a positive role in that debate,<sup>77</sup> stated that:

‘[it] shared the concern expressed by other delegations with regard to the way in which the Working Group’s mandate was being interpreted. The Working Group must be allowed a certain flexibility, but it was *neither a supranational jurisdiction nor a treaty body* and [it] hoped that, in the future, it would avoid the use of language that might be misinterpreted.’<sup>78</sup>

Apart from requesting it to use different language, the Commission also instructed the Working Group to show flexibility in the application of the 90-day deadline for replies.<sup>79</sup> Thus, the Working Group was forced to loosen its quasi-judicial approach and to adopt the more political and informal posture that is the hallmark of the other thematic procedures.

### IV.3 SOURCES OF INFORMATION AND THE ADMISSIBILITY OF COMMUNICATIONS

The question of the sources of information to be consulted by United Nations human rights monitoring procedures goes to the very heart of the process of holding States accountable for the human rights violations committed on their territories. Until 1980, (targeted) Governments were generally able to keep a significant measure of control over the public dissemination of information concerning violations of human rights and the handling of such information in the official United Nations process. In the context of the public 1235 debate (Question of violations of human rights and fundamental freedoms) NGOs with a consultative status had to show proper discretion in their oral or written statements and, in particular, they had to refrain from abusing their consultative status by systematically engaging in unsubstantiated and politically-motivated acts against United Nations Member States contrary to the principles of the Charter.<sup>80</sup> In practice, this meant, above all, that NGOs found to be engaged in such activities, for example by referring by name to the States violating human rights in public session, could be punished through suspension or withdrawal of their consulta-

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<sup>76</sup> See also Kamminga, NILR 1987, p. 305.

<sup>77</sup> See HRM, No. 37 May 1997, pp. 2-95.

<sup>78</sup> U.N. Doc. E/CN.4/1997/SR.29, para. 19 [emphasis added].

<sup>79</sup> C.H.R. Res. 1997/50, para. 2. The Working Group responded to this request by providing that it would indicate to Governments to which it addresses individual cases that if they desire an extension to the 90-day deadline for providing a reply, ‘they should inform the Working Group of the reasons for such a request so that it may be able, if necessary, to grant a further period of a maximum of two months for providing their reply.’ U.N. Doc. E/CN.4/1998/44, para. 25.

<sup>80</sup> ECOSOC Res. 1296 (XLIV) of 23 May 1968 and 1919 (XLVIII) of 5 May 1975.

tive status.<sup>81</sup> Individual or NGO 'communications' concerning violations of human rights were to be considered under the 1503 procedure. Under this procedure the principal features restricting the dissemination of damaging information were of course the rule of confidentiality and the conditions of admissibility of communications laid down in Sub-Commission Resolution I (XXIV). As described in Chapter II.4.4, communications not only had to meet the threshold requirement of providing 'reasonable grounds to believe that they may reveal the existence of a consistent pattern of gross and reliably attested violations of human rights', but should also be free of 'manifestly political motivations (...) contrary to the Charter of the United Nations' and 'not inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of other applicable instruments in the field of human rights.' Similarly, NGOs submitting communications should '[act] in good faith in accordance with recognised principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations' and inadmissible are those communications which contain essentially abusive language or those which are based exclusively on reports disseminated by mass media. The rules also prescribed that communications had to fulfil the usual requirement of the exhaustion of domestic remedies 'unless it appears that such remedies would be ineffective or unreasonably prolonged' and 'any failure to exhaust remedies should be satisfactorily established.'<sup>82</sup>

#### IV.3.1 Working Group on Enforced or Involuntary Disappearances

Commission Resolution 20 (XXXVI) virtually allowed the Working Group on Enforced or Involuntary Disappearances to consult any source it wanted. Paragraph 3 of that resolution provided that 'the working group, in carrying out its mandate, shall seek and receive information from Governments, intergovernmental organisations, humanitarian organisations and other reliable sources.' The important element being, of course, the inclusion of the phrase '(...) *and other reliable sources*'<sup>83</sup>, which would make it possible for the Working Group to seek and receive information from individuals, family members of disappeared persons and NGOs, including NGOs which do not enjoy consultative status with the United Nations.<sup>84</sup>

81 The naming of States in public session remained problematic (for NGOs and Government delegations) throughout the 1970s, especially if the State in question was also being dealt with under the 1503 procedure. Towards the end of that decade, the practice gradually eroded. See Flinterman 2000, pp. 23 and 24. *Supra* Chapter II.4.4.

82 For details, see Zuidwijk 1982, pp. 30 ff.

83 Kramer and Weissbrodt reported that it was the United States delegation which succeeded in adding the phrase 'humanitarian organisations and others' to the list of sources that the mechanism should be allowed to consult. Kramer and Weissbrodt, HRQ 1981, p. 26; also Guest 1990, p. 198.

84 A more or less similar proposal had also been included in the French draft, which 'request[ed] the experts to seek all available information concerning enforced or involuntary disappearances from the Governments and families concerned' and which 'request[ed] all Governments, specialised agencies, regional intergovernmental organisations and non-governmental organisations to cooperate with and

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The only explicit condition which Resolution 20 (XXXVI) attached to the admissibility of information or communications before the Working Group was the reliability of the source. In processing the information before it, the resolution further requested the Working Group 'to carry out its work with discretion.'<sup>85</sup>

The Working Group's first report shows that it considered itself competent to receive information from a wide range of sources.<sup>86</sup> These sources of information included Governments, intergovernmental organisations in consultative status with ECOSOC, private organisations and the relatives of missing persons, persons who report witnessing the arrest or abduction of a missing person, persons who state that they were detained with missing persons and persons who report having been members of, or having collaborated with, security or other police forces involved in disappearances.<sup>87</sup> The first report did not mention or formulate any specific rules concerning the admissibility and handling of reports of disappearances before any of them could be transmitted to Governments. The Working Group only made clear that it

'began its work by asking the Secretariat to check with the original sources of information, where this was thought necessary, as regards the reliability of the reports submitted. It also contacted the relevant organisations and associations, as appropriate, for that same purpose. This was done with due regard to the paragraph in the resolution (...) which underlines the need for discretion.'<sup>88</sup>

It had charged the Secretariat with the task of organising and making a preliminary analysis of information submitted to the Group and, also, 'as appropriate, verification and completion of such information.'<sup>89</sup> In other words, the Working Group would not rule out in advance information that was incomplete, but would normally communicate with the source in order to seek further details before transmitting any of it to the Government concerned.<sup>90</sup> It is in this sense that the Working Group interpreted the

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assist the experts in the performance of their task.' U.N. Doc. E/CN.4/L.1502, paras. 2 and 5.

85 C.H.R. Res. 20 (XXXVI), para. 6.

86 As of 1985 the Working Group would list in its report those NGOs with which it has been in contact: see U.N. Doc. E/CN.4/1985/15, para. 37, see also the Annexes published in 1990 (U.N. Doc. E/CN.4/1990/13, Annex I), 1992 (U.N. Doc. E/CN.4/1992/18, Annex I) and 1994 (U.N. Doc. E/CN.4/1994/26, Annex I).

87 U.N. Doc. E/CN.4/1435, para. 44. See also the relevant country sections of the annual reports where the Working Group states for each country the principal sources of information received.

88 Ibid., para. 6.

89 Ibid., para. 30.

90 See U.N. Doc. E/CN.4/1983/14, para. 15 ('it instructed the Secretariat to seek additional information when sufficient details were not received'). Obviously, there were good practical grounds for the Working Group not to transmit incomplete information: in order to carry out meaningful investigations to clarify cases, a Government will need a minimum amount of information; in addition, incomplete information would only give targeted Governments another reason not to communicate with the Working Group. See De Frouville 1996, p. 62.

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term 'to seek information.' As it noted: 'the Group has no inherent investigative capacity in terms of time, persons or resources to search out further cases.'<sup>91</sup>

It would seem, therefore, that the Working Group silently adopted the principle of *actio popularis*: anyone or any organisation possessing reliable information concerning disappearances could move the Working Group into action. However, it will be seen below that when the Working Group began to formalise its methods of work, it seemed to have formally rejected the principle of *actio popularis* by requiring a link between the source of information and the relatives of the disappeared person. As for the requirement to show discretion, the Working Group did not interpret this as a demand for total 'secrecy' or 'confidentiality' as it existed under the 1503 procedure. Thus, the Working Group decided to include, *inter alia*, in annexes to its first report letters or statements made by representatives of Governments as well as associations or organisations concerned with reports of enforced or involuntary disappearances.<sup>92</sup>

Not surprisingly, (potentially) targeted Governments have tried to challenge, especially in the first years of its existence, the Working Group's interpretation of the mandate concerning the sources of information and the processing of such information. The discussions in the Commission show that Governments derived their arguments precisely from ECOSOC Resolutions 728F and 1503 and the rules of admissibility of communications contained in Sub-Commission Resolution I (XXIV) as well as the rules to be observed by NGOs in consultative status. As mentioned above, the result of the political confrontations between the Working Group and Governments has been the steady clarification and formalisation of the rules of the game. Similarly, although (quasi-)legal arguments play a more limited role in a political body like the Commission on Human Rights, they nevertheless provide the framework within which the political debate takes place and (quasi-)legal rules are shaped. For this reason, it makes sense to refer in some detail to the discussions and the exchange of arguments concerning questions of principle relating to the competences of the Working Group and, more generally, the United Nations.

In 1980, the Government of Argentina contested the validity of the approach taken by the Working Group. In a letter dated 10 September 1980 to the Chairman of the Working Group, it asserted that the Group did not possess competence to receive and handle information relating to disappeared persons submitted by or concerning individuals on the ground that

'since what was involved consisted of *individual communications* on alleged violations of human rights, they had to respect the requirements and procedures established by Economic and Social Council Resolution 1503 (XLVIII) and other relevant resolutions.'<sup>93</sup>

91 U.N. Doc. E/CN.4/1435, para. 5, also U.N. Doc. E/CN.4/1983/14, para. 2 ('it has no inherent investigatory powers nor resources').

92 U.N. Doc. E/CN.4/1435, Annexes XII ff.

93 *Ibid.*, para. 75 (letter dated 10 September 1980 from the Permanent Representative of Argentina to the United Nations Office at Geneva to the Chairman of the Working Group, no. 218/80) [emphasis added].

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In another letter, dated 10 December 1980, the Government further explained its position. According to the Government only Resolution 1503 '[incorporated] the elements which afford Member States the guarantees that are indispensable for considering such communications, namely confidentiality and admissibility'. Moreover, the Government argued that it was precisely because of these guarantees that that resolution, which it otherwise considered to be in contravention of the provision of Article 2 paragraph 7 of the Charter and other existing norms of international law concerning the international legal personality of the individual and the principle of State-consent, had been implemented in practice.<sup>94</sup> It was also on the basis of these guarantees as well as the fact that the 1503 procedure started out by selecting communications which 'appear to reveal a consistent pattern of reliably attested violations' that the Government of Argentina had consented to that procedure and had repeatedly entered formal reservations against any attempt to circumvent it. In support of its view, the Government quoted a statement made in the discussions in ECOSOC in 1979:

'The distinguished representative of the United Kingdom, speaking on behalf of the sponsors, has indicated that, as regards the special question which we are considering, *resolution 1503 (XLVIII) applies to the case of disappeared persons* and does not cover other special cases for which a different criterion could have been adopted. This must be made quite clear. *If difficulties arise in the future as a result of different interpretations, we would like it known that our consent is given on the basis that resolution 1503 is the basis for this understanding.*'<sup>95</sup>

It also referred to a similar statement made after the adoption of Resolution 20 (XXXVI), establishing the Working Group:

'(...) the method of work which the group adopts *must not be superimposed on* or affect the proper operation of the *existing procedures* for allegations by individuals as laid down in ECOSOC Resolution 1503 and related resolutions (...). It is in the same spirit that we interpret the notion of 'discretion' in the text that has been adopted (...) my delegation also understands that the information submitted to the Working Group is governed by (...) Resolution I (XXIV) of the Sub-Commission.'<sup>96</sup>

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<sup>94</sup> 'Their practical application has been governed by two concepts which the Argentine Republic regards as fundamental:

(i) the principle of confidentiality (...) laid down in paragraph 8 of ECOSOC Resolution 1503. In our view, this principle is of basic importance if the rights of States are to be protected against attempts at politicisation and abuse in matters of human rights. (...)

(ii) the rules which lay down the procedure (...) expressly regulated by Resolution I (XXIV) of the Sub-Commission (...) [stipulating] the standards and criteria which communications must meet, from whom communications may originate, what their contents must be, the features which may render them inadmissible and the time-limit for submitting them.' U.N. Doc. E/CN.4/1435, Annex IX (letter dated 8 December 1980 from the Permanent Representative of Argentina to the United Nations Office at Geneva to the Chairman of the Working Group letter of 8 December 1980), para. 4.

<sup>95</sup> U.N. Doc. E/CN.4/1435, Annex IX, para. 5 [emphasis added].

<sup>96</sup> Ibid. [emphasis added].

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Finally, the Government of Argentina indicated – in the light of the arguments presented above – that it interpreted the phrase ‘(...) in establishing its working methods, to bear in mind the need to be able to respond effectively to information that comes before it (...)’, contained in Resolution 20 (XXXVI), as

‘[empowering the Working Group] to agree on its own internal arrangements, that is, to decide *among its members* on the way in which it is going to work (...) but it does *not imply – nor does the text so state* – that such a power is tantamount to authorisation to establish a new procedure for considering communications submitted by individuals – a power, which, moreover, the Commission on Human Rights does not have.

(...)

‘If the *intention* had been to adopt a new procedure, rules of a kind similar to those laid down in the resolutions invoked by the Argentine Republic should have been *expressly* specified, particularly in the case of those relating to the ‘admissibility’ of communications. Otherwise, if the Working group’s interpretation were followed solely because information was submitted, admissibility would be automatic even when, for example, it was *politically motivated*.’<sup>97</sup>

The Working Group subsequently responded to the arguments of the Government of Argentina through the Director of the UN Division on Human Rights. The Director argued that

‘[i]n pursuit of the goal of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur, various *coexisting procedures* have been established in order *to deal with different problems or situations*.’

As examples he cited, *inter alia*, regular consideration by both the Commission and its Sub-Commission of violations of human rights, the procedure for undertaking thorough studies under ECOSOC Resolution 1235, the procedure for handling communications under ECOSOC Resolutions 728F and 1503, the appointment [under ECOSOC Resolution 1235, JG] of *ad hoc* working groups and special [country, JG] rapporteurs, the carrying out of direct contacts and on a wider scope the procedures established to deal with decolonisation and *apartheid*.

According to the Director, the above-mentioned procedures were all of equal weight and status, because they had been established by, upon the request of, or with the consent or approval of, superior organs such as the General Assembly and ECOSOC. Moreover, there was nothing in resolutions 728F or 1503 to the effect that procedures adopted subsequently should be governed by their provisions. This situation was no different in the specific case of the Working Group on Enforced or Involuntary Disappearances. In the words of the Director:

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97 Ibid., para. 6 [emphasis added].

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'(...) it is clear that the General Assembly [Resolution 33/173, JG] and the Economic and Social Council [Resolution 1979/38, JG] and the Commission on Human Rights intended to establish a specialised procedure for dealing with the problems of missing and disappeared persons, which would be complementary to other existing procedures and which would not be subordinated to any pre-existing procedure. Therefore, the contention that the Working Group (...) should be subordinated to the procedure laid down by Council Resolutions 728 F and 1503 cannot be sustained.'<sup>98</sup>

Having established the independent nature of the Working Group, the Director asserted that, on the basis of paragraph 3 of Resolution 20 (XXXVI), 'it is quite proper for the Working Group to receive and handle in accordance with resolution 20 (XXXVI) of the Commission and decision 1980/128 of the Council information concerning disappearances submitted by or concerning individuals. It should, moreover, be pointed out that the information which is being handled by the Group was particularly addressed to the Group in light of the terms of reference and that it is up to the Group to decide on its methods of work in accordance with Commission Resolution 20 (XXXVI) as approved by decision 1980/128 of the Economic and Social Council.'<sup>99</sup>

Deliberations in the Commission on Human Rights, following the introduction of the Working Group's first report, which reproduced, *inter alia*, the above argument with the Government of Argentina, revealed that the question of the sources of information and the handling of this information by the Group had not yet been settled. In the debate the representative of Argentina again adduced a lengthy argument, essentially restating the above, challenging the Working Group's methods of work.<sup>100</sup> In addition, he added that his Government considered it inadmissible that a United Nations document reproduced information transmitted by NGOs which did not have consultative status and, therefore, could not be held accountable for politically-motivated attacks against Member States.<sup>101</sup> In the debate there was support for the position of Argentina from various other States mentioned in the report of the Working Group as well as States fearing that the Working Group and the Commission might be setting precedents, which could be used against them at a later time. Hence, the representative of the Soviet Union questioned the Working Group's dubious method of testing the reliability of information and considered it 'inadmissible to give greater credence to the assertions of NGOs than to those of Governments [referring] in that connection to the case of Ethiopia.'<sup>102</sup> The representative of Brazil 'believed the Working Group could have worked in a more confidential manner' and 'less publicity would perhaps have resulted in a greater number of replies.' He also believed that the Working Group 'would have done more effective work if it had adopted methods more in line with the machinery established by ECOSOC resolution 1503 (XLVIII)' and stated that '[i]n

98 Ibid., Annex X [emphasis added].

99 Ibid. [emphasis added].

100 U.N. Doc. E/CN.4/SR.1603, paras. 27-60.

101 Ibid., para. 56.

102 U.N. Doc. E/CN.4/SR.1605, paras. 12 and 13.

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dealing with matters affecting the internal competence of states, confidentiality and respect for well-established procedures were prerequisites to full cooperation between the governments concerned and the international community.<sup>103</sup> Ethiopia felt the Working Group ‘in three sessions totalling 19 days, could not have dealt fairly with such a vast subject.’<sup>104</sup> The representative of Mexico, finally, stated that his Government had reservations concerning the question of publicity and stressed ‘the need not for secrecy, but for discretion in regard to the dissemination of information concerning sensitive matters which were still being clarified’<sup>105</sup>

On the other side, there were the supporters of the approach of the Working Group, such as the delegation of the Netherlands, which stated that it was unable to agree with the views of the Government of Argentina on the applicability of ECOSOC Resolution 1503: ‘the requirements of confidentiality and admissibility (...) were not applicable to the humanitarian functions of the Working Group.’ It hoped that the Government would be prepared to review its position in this respect.<sup>106</sup> Similarly, the representative of Canada considered it premature to change the nature of the mandate of the Working Group, since it had only been functioning for six months. It did not believe that confidentiality had to be maintained, ‘because the Group’s precise objective was to reveal the information it was able to obtain on cases of disappearances.’ The Working Group should, according to his delegation, ‘simply maintain the discretion as it had always shown in its cooperation with Governments of States where such cases existed.’ The representative further stated that the Commission must act, one of the means being ‘ultimate recourse to international public opinion which excluded constraining the Group to confidentiality (...) it was fair and logical for Governments who had publicly contracted obligations to answer publicly for their acts when they systematically disregarded those obligations.’<sup>107</sup>

The representative of Australia pointed at the fact that Resolution 20 (XXXVI) establishing the Working Group had been adopted by consensus, which ‘confirmed that no Member State had regarded its sovereignty as being infringed (...) or had been opposed to the humanitarian goals pursued.’ At the same time, while rejecting the applicability of the provisions of ECOSOC Resolution 1503 to the case of the Working Group, the representative acknowledged that ‘[i]n sifting evidence, the Working Group had to make due allowance for the fact that some information was politically motivated.’<sup>108</sup>

The outcome of this debate and the subsequent negotiations was not a total reversal of the working methods of the Group, but nevertheless important concessions had to

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103 Ibid., para. 41.

104 U.N. Doc. E/CN.4/SR.1606, para. 25.

105 U.N. Doc. E/CN.4/SR.1605, para. 9.

106 U.N. Doc. E/CN.4/SR.1604, para. 12.

107 Ibid., paras. 14-16. Also Denmark, U.N. Doc. E/CN.4/SR.1605, paras. 1-5 and Norway U.N. Doc. E/CN.4/SR.1606, paras. 29 ff.

108 U.N. Doc. E/CN.4/SR.1605, paras. 25 ff.

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be made in order to obtain a consensus in favour of extending the mandate for another year.<sup>109</sup> These concessions were:

- (1) the inclusion of a new (fifth) preambular paragraph reading: 'considering the need to observe United Nations standards and practice regarding the receipt of communications, their transmittal to the Governments concerned, and their evaluation'
- (2) the inclusion in operative paragraph 4 of the phrase: '(...) to discharge its mandate with discretion, so as *inter alia* to protect persons providing information *or to limit the dissemination of information provided by Governments*.'<sup>110</sup>

Both phrases clearly reflect the difficulties which a great number of United Nations Member States still had with dealing publicly with violations of human rights. It is also clear that an attempt was made to refer to the rules of ECOSOC Resolution 1503, but in the absence of an explicit reference to that resolution, the phrases first and foremost should be considered a political signal to the Working Group, reminding it of the need to ensure sufficient political support for its activities and to show in its reports that it had paid due regard to the exhortations.

The strategy of the Working Group has indeed been to reassure Governments that it had taken the comments into account, without, however, changing anything in its initial approach. In practice the Working Group has continued to apply its own procedure as the applicable 'United Nations standards and practice', *i.e.* it has continued to receive information from all sources and sought further information when it was incomplete and it has not applied the threshold criterion of the existence of a consistent pattern of disappearances before any information concerning disappearances could be transmitted to the Government concerned.<sup>111</sup>

In its second report, submitted to the Commission in 1982, the Working Group simply wrote that 'the debate in the Commission on last year's report provides the Working Group with its starting point. Every endeavour has been made to take into account the valuable comments (...) On procedural matters, the Group considered its methods of work so as to ensure that they accord with the mandate and with procedures previously applied within the United Nations structure. The reports received (...) have been checked for conformity with United Nations standards in the matter.'<sup>112</sup> It did not specify these standards, at least not in so far as it could be used in the political process to limit its competences.

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<sup>109</sup> For more details see Guest 1990.

<sup>110</sup> C.H.R. Res. 10 (XXXVII) of 26 February 1981 [emphasis added]. Also U.N. Doc. E/CN.4/SR.1617, para. 59. The crystallisation of the term discretion in the sense of limiting the dissemination of information provided by Governments was the direct consequence of the decision of the Working Group to publish the letter by the representative of Argentina in full in its first report. See also Weissbrodt, AJIL 1986, p. 686.

<sup>111</sup> See also Kamminga, NILR 1987, pp. 306 and 307.

<sup>112</sup> U.N. Doc. E/CN.4/1492, para. 4.

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On the other hand, further on in the report the Working Group wrote that '[i]n accordance with its mandate the Group received and, where appropriate, sought information from [NGOs] in consultative status (...), from organisations or associations directly concerned with (...) disappearances and from relatives of persons reported missing.' In addition, it also reported to have arranged meetings with the above organisations.<sup>113</sup> In its concluding observations, the Working Group again reassured Governments that it '[had] been learning to be selective, and has attempted only to transmit those cases where there is sufficient detail and the case bears the mark of an abduction.' Moreover, it '[detected] a certain willingness to solve cases', which '[had] certainly [been] assisted by the mandate given to the Working Group to use discretion.'<sup>114</sup> At the same time, it also made clear that discretion did not mean confidentiality:

'In general terms there is a clear *duty laid on the Working Group to give public account of all the activities*, but on occasions, for example when the personal safety may be in danger, certain confidences can be properly respected and valuable information thereby acquired which would otherwise be inaccessible.'<sup>115</sup>

In the course of 1981 and when the second report was discussed by the Commission in 1982, several Governments continued to raise objections against the Working Group's use and handling of sources of information.<sup>116</sup> Most prominent this time was the criticism of the Soviet Union.<sup>117</sup> However, the annual debate in the Commission

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113 Ibid., para. 17.

114 Ibid., paras. 179 and 180.

115 Ibid., para. 180.

116 The Government of Argentina, for example, held that previous year's statement regarding the question 'was so full and well-documented that it was not necessary to stress once again the fundamental features.' Also, it considered 'extremely important the statement [by the Chairman of the Working Group] in which [he] confirmed [the] criteria [concerning the receipt, transmittal and evaluation of information laid down in the preamble of Commission Resolution XXXVII of 1981, JG].' It was 'in this spirit of mutual understanding and cooperation that the Argentine government [had] approached the matter of dealing with the communications received on situations relating to the phenomenon of missing persons (...)' U.N. Doc. E/CN.4/1492, para. 51 (letter dated 8 September 1981 from the Permanent Representative of Argentina to the United Nations Office at Geneva to the Chairman of the Working Group).

117 The representative of the Soviet Union stated that his delegation could not ignore 'the substantial negative aspects of the [activities of the Working Group]. It considered unjustified (...) the establishment of yet another procedure for the examination of human rights communications (...) divergent from the principles recognised within the United Nations, and, more particularly, from the principle according to which the United Nations bodies could study communications relating to violations of human rights only in the case of reliably established patterns of gross violations. It was evident from the report that one of the Group's principal sources of information were communications from NGOs. (...) A paradoxical situation had resulted, in which it was sufficient for an individual or an NGO to send a letter alleging that an individual was thought to have disappeared for the Group to demand explanations from the government concerned, to put it in the position of an accused party, and to ignore or disbelieve the explanations it supplied. The sections of the report dealing with Ethiopia and Nicaragua, in particular, bore witness to striking tendentiousness and lack of objectivity. (...) The United Nations

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lacked the intensity of the year previously and, consequently, it did not lead to any significant changes in the mandate. The injunctions introduced in 1981 were maintained in Resolution 1982/24 and it could be argued, therefore, that the Commission (implicitly) endorsed the interpretation given to them by the Working Group. A further indication that this might indeed be the case could be deduced from the attitude of the Government of Argentina, whose main line of defence shifted to accusing the Working Group of a partial and selective approach by focusing almost exclusively on Latin American countries and arguing that the Group should focus more on current situations than past ones [the occurrence of disappearances in Argentina belonging largely to the past, JG].<sup>118</sup>

However, by 1984 the situation had again become tense, as reflected also in the Working Group's report presented to the Commission in that year. In that report the Working Group appealed to the international community that it 'should attempt to check the allegations it receives, since regrettably, the motivations of its informants are not always purely humanitarian.'<sup>119</sup> The issue was picked up during the Commission's session by the Soviet Union, which found itself under increasing pressure concerning the case of Sacharov. The representative of that State warned against '[t]he possibility of abuse of the Working Group by dishonest elements' and therefore welcomed the fact that 'the Group had already concluded that more thorough checking of allegations was necessary, since the motivation of its informants was not always purely humanitarian.'<sup>120</sup> Furthermore, he found that '[t]he Commission and Group should adopt a more business-like approach, taking care to refrain from any interference in the internal affairs of states.'<sup>121</sup>

These renewed discussions concerning the use and handling of sources of information by the Working Group resulted in the upgrading of the reminder 'to observe (...) United Nations standards and practices regarding the receipt of communications, their consideration, their transmittal to Governments and their evaluation' from the preambular paragraphs of the annual resolution to the operative paragraphs thereof. Moreover, in the preamble to the 1984 resolution, the Commission expressed awareness 'of the need for the Working Group to develop further its methodology in the light of the discussions held during the present session.'<sup>122</sup>

Consequently, the Working Group returned (as it had to) to the issue in its report over 1984. That report indeed referred literally to the argument raised by the Soviet Union:

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had rules against casting unjustified doubt upon the legitimacy of the actions of sovereign states.' U.N. Doc. E/CN.4/1982/SR.38, para. 126. Similar criticism came from the (targeted) Governments of Ethiopia and El Salvador, U.N. Doc. E/CN.4/1982/SR.38, paras. 142 ff. (Ethiopia) and U.N. Doc. E/CN.4/1982/SR.39, paras. 11 ff. (El Salvador).

<sup>118</sup> U.N. Doc. E/CN.4/1982/SR.38, paras. 77 and 89.

<sup>119</sup> U.N. Doc. E/CN.4/1984/21, para. 174.

<sup>120</sup> U.N. Doc. E/CN.4/1984/SR.20, para. 66, p. 13; and also E/CN.4/1984/21, para. 174, p. 63.

<sup>121</sup> U.N. Doc. E/CN.4/1984/SR.20, para. 66, p. 13.

<sup>122</sup> C.H.R. Res. 1984/23, para. 5.

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‘Several Governments said that the Working Group should be aware of attempts by dishonest elements to use the Group for political purposes by submitting unfounded allegations; such action could lead to interference in the internal affairs of States. The failure to exhaust national legal remedies could be a sign that the cases submitted had political motives.’<sup>123</sup>

As was the case in previous confrontations, arguments such as the above did not lead the Working Group to adopt a different approach. The Working Group answered the Commission that it ‘*examined its handling of communications in particular and found it to be in harmony with established United Nations practices.*’<sup>124</sup> But it also addressed NGOs and, while recognising that ‘the information they send and the testimonies they provide are very important for the functioning of the Group’, appealed to them that ‘they have a *responsibility* with respect to the accuracy of the information they present.’<sup>125</sup>

In addition the Working Group further clarified the following three points: (1) ‘its determination not to deal with reports which were *manifestly politically motivated* or were *based exclusively on mass media*’; (2) ‘the *need to exhaust local remedies*, which was a prerequisite in related United Nations procedures, keeping in mind, however, that such remedies were sometimes non-existent or ineffective’; (3) ‘in applying the above principles to information from a particular organisation or source, the Group considered it important *to ensure that it was able to remain in contact with the relatives of missing persons.*’<sup>126</sup>

What makes these clarifications worth noting is the fact that they reveal that the Working Group did indeed take into account some of the conditions of admissibility of communications as contained in ECOSOC Resolution 1503 and Sub-Commission Resolution I (XXIV) without, however, referring to these resolutions.

As to the second point, at first sight the explicit reference to the principle of the exhaustion of local remedies as a condition of admissibility of communications might not surprise the reader. This rule of general international law has found its way into the different international and regional human rights treaties as well as the (political) 1503 procedure and this could indeed be considered ‘a strong indication that it still accords with the attitude of Governments to international petitions and claims.’<sup>127</sup> However, the rule might be of dubious application especially in respect of the phenomenon of disappearances as was implicitly recognised by the Working Group in previous reports:

‘[i]f political opponents can be erased, without statements, trial or martyrdom, the repercussions are minimised. (...) Respect for life and freedom has created the remedies

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123 U.N. Doc. E/CN.4/1985/15, para. 77.

124 Ibid., para. 78 [emphasis added].

125 Ibid., para. 299 [emphasis added].

126 Ibid., para. 78 [emphasis added].

127 See Brownlie 1998, pp. 496-506.

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of *habeas corpus*, *amparo* and other similar procedures. (...) *The evil lies in the inability to enforce these remedies.*<sup>128</sup>

However, it might also be that explicit reference to the rule was made in order to reassure Governments, in particular as a sign that the Working Group respected their sovereignty. At the same time this facilitated the use of the argument by them in the political process. As will be seen below, the objection would indeed be frequently invoked by Governments in the years after 1985.

As regards the third point raised by the Working Group, this could be interpreted as a formal rejection of the principle of *actio popularis*. The issue would come more clearly to the fore as the Working Group presented a detailed description of its working methods in 1987. There it stated that

‘reports on disappearances are admissible (...) when they originate from the family or friends of the missing person. Such reports *may be channelled to the Working Group through* the representatives of the family, Governments, intergovernmental organisations, humanitarian organisations *and other reliable sources.*’<sup>129</sup>

On the occasion of the revision of the working methods in 1995 the formal criteria for admissibility seemed to have been tightened even further. The rule now read, as far as relevant: ‘reports on disappearances are considered admissible by the Working Group when they originate from the family or friends of the missing person. Such reports may, *however*, be channelled (...) through (...) non-governmental organizations and other reliable sources. (...) [i]f the source is other than a family member, it *must be* in a position to follow up with the relatives of the disappeared person concerning his or her fate.’<sup>130</sup>

The development towards (formally) requiring a link between the relatives of the missing person and the source of information, detectable since 1985, probably had its roots in the Working Group’s overall policy of the humanitarian, non-judgmental approach. Nevertheless, the development has been sharply criticised by Rodley as an arbitrary mandate restriction constructed and maintained without any textual support or demonstrated conceptual need. According to him, ‘there is nothing (...) placing the families in such a privileged position or the other sources in such a subordinate position. Nor, in the difficult situation in which disappearances typically occur, is the flow of information, even at the national level, likely to be as simple as the Group’s

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128 U.N. Doc. E/CN.4/1983/14, para. 141 (conclusions) [emphasis added].

129 U.N. Doc. E/CN.4/1988/19, para. 20 [emphasis added]. Note that the Working Group still used the original formulation ‘humanitarian organisations and other reliable sources’ as contained in Resolution 20 (XXXVI).

130 U.N. Doc. E/CN.4/1996/38, Annex I, para. 7 [emphasis added]. Note that the rules now refer directly to NGOs. The rule has remained unaltered ever since. See U.N. Doc. E/CN.4/2002, Annex I, para. 7, *infra*.

stated position seems to expect.<sup>131</sup> However, Rodley also had to acknowledge that in practice the Working Group interpreted the requirement in a flexible manner.<sup>132</sup>

With the clarifications given by the Working Group in 1985, the political debate concerning the *reliability* of the sources of information and the requirement of the prior exhaustion of local remedies was far from over. Governments approached by the Working Group continued to challenge the credibility and trustworthiness of the sources, urging it to formalise and strictly apply the conditions of admissibility. The debate is well-illustrated by the case of Colombia, but not limited to that country alone.<sup>133</sup> First in 1985, as the country made its appearance in the reports of the Working Group, the Government of Colombia argued that the Working Group should 'investigate the capacity of complainants and ascertain whether they were reliable' and, in particular, 'whether they had exhausted domestic remedies before proceeding with their complaints.'<sup>134</sup> In what might have been a hidden reference to the rules of admissibility contained in Sub-Commission Resolution I (XXIV), the Government argued that

'[i]n view of the high number of cases the complainants should be required to assume the appropriate burden of proof in conformity with traditional legal practice and with the precedents of the United Nations.' His Government could not be expected to provide

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131 Rodley 1999, pp. 272 and 273.

132 Also De Frouville 1996, p. 48.

133 Also the Soviet Union (and Ukraine) [the case of Sacharov, JG] continued to follow the practice of the Working Group with suspicion. The representative of the Ukraine, for example, stated '[t]hat the Working group had not always fulfilled its primary task of deciding on the credibility of the information submitted to it', especially referring to the case of Nicaragua. He considered it essential that 'the issue of disappearances should not be used as an excuse for political blackmail and intervention in the internal affairs of a state, [i]t was to be hoped that the Working Group's determination not to deal with reports which were manifestly politically motivated or based exclusively on the mass media, (...) would be reflected in practice.' U.N. Doc. E/CN.4/1985/SR.31, para. 47 [emphasis added]; for the statement of the Soviet representative see U.N. Doc. E/CN.4/1985/SR.28, para. 34 and, in 1986, U.N. Doc. E/CN.4/1986/SR.54, para. 14. See also Kamminga, NILR 1987, p. 316. Another country raising objections against the Group's handling of information was Nicaragua: that country's representative stated that: 'communications sent to her Government tended to be based on *automatic acceptance of information* (...) (...) 'the failure to verify many such communications and the lack of sufficient evidence to justify an investigation revealed that the requirements which a complaint must fulfil in order to be admissible were not being properly satisfied (...) The source (...) had *neither exhausted local remedies nor verified the information it had transmitted*', see U.N. Doc. E/CN.4/1985/15, para. 200 and, in particular, U.N. Doc. E/CN.4/1985/SR.31, paras. 12 and 13 [emphasis added]. Reference could also be made to Mexico: U.N. Doc. E/CN.4/1987/SR.34, paras. 23- 25 and U.N. Doc. E/CN.4/1988/19, para. 155 and, finally, Sri Lanka U.N. Doc. E/CN.4/1987/SR.33, para. 1 ff.

134 U.N. Doc. E/CN.4/1986/18, para. 82. A year later it would, however, reformulate its argument concerning the prior exhaustion of local remedies: 'the Government had not asked that domestic remedies be exhausted, but felt strongly that cases of disappearances should at least be filed with national authorities before being admitted to the Working Group.' U.N. Doc. E/CN.4/1988/19, para. 70.

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evidence on these cases, 'the complainants should therefore be asked to provide evidence concerning the alleged disappearances.'<sup>135</sup>

The following year, the Colombian Government introduced a novel argument in the discussions. It asserted that complaints which failed to comply with the requirements concerning admissibility established by the Optional Protocol to the International Covenant on Civil and Political Rights, 'which (...) were applicable by analogy', should be considered inadmissible.<sup>136</sup> In this respect the Government also raised the question of overlapping and duplicated procedures, which it believed should be avoided. The arguments would become louder in 1987 when the Government of Colombia – supported by Mexico – moreover accused the Working Group of applying double standards with regard to Latin America.<sup>137</sup> The Government made it known to the Working Group that:

'procedures of special rapporteurs or working groups had been developed on an *ad hoc* basis. It was, therefore, *high time for the parameters constituting international practice in this area to be clearly spelled out*. Colombia did not want to conceal human rights violations or impunity, but would like to see *unambiguous procedural rules applied* which would enhance the credibility of the Working Group.'<sup>138</sup>

The Working Group's first concrete response to the renewed challenges – as exemplified by the arguments of Colombia – came in 1986 when it adopted the following decision relating to its working methods:

'To renew its efforts to request non-governmental organisations and family associations submitting reports on disappearances to present specific cases in a *sufficiently detailed and well-documented manner*, in particular with regard to *information on the identity of persons and the legal remedies taken internally* by the relatives of missing persons.'<sup>139</sup>

In its correspondence with particular Governments, *inter alia*, Peru and Colombia, the Working Group made clear that, while making every effort to supply the information requested by the Government concerned it 'would *continue to transmit cases* for which some of these details were not available, *as long as they met the general criteria* it had established for the transmittal of cases to governments.'<sup>140</sup> Moreover, it categorically rejected the applicability of the Optional Protocol's criteria of admissibility, since 'its procedure was in no way linked to the criteria of admissibility under the Optional

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135 U.N. Doc. E/CN.4/1986/18, para. 82. In particular the rule which provided that any failure to exhaust remedies should be satisfactorily established. *Supra* Chapters II.4.4 and IV.3.

136 U.N. Doc. E/CN.4/1987/15, para. 26.

137 U.N. Doc. E/CN.4/1987/SR.33, para. 45 (Colombia) and U.N. Doc. E/CN.4/1987/SR.34, para. 23 (Mexico).

138 U.N. Doc. E/CN.4/1988/19, para. 69 [emphasis added].

139 U.N. Doc. E/CN.4/1986/18, para. 33 (f) [emphasis added].

140 *Ibid.*, para. 170 (Peru), also U.N. Doc. E/CN.4/1987/15, para. 29 (Colombia).

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Protocol and that the Group's *purely humanitarian efforts (...) differed considerably from the objectives, scope and applicability of the Optional Protocol* and thus necessitated a much less formal approach.<sup>141</sup>

Meanwhile, in the debate in the Commission, it expressed 'regret that organisations had not fully respected the need for confidentiality regarding the Working Group's communications to them' and '[a]lthough it had little control over the matter, it would continue to remind all those concerned of the need for discretion and for strict observance of the United Nations standards and practices concerning human rights communications.'<sup>142</sup>

Despite the above adjustments, clarifications and assurances given by the Working Group, the Government of Colombia – again supported by Mexico – was not satisfied and stated that it 'understood operative paragraph 2 of the draft resolution to mean that the Working Group's report for consideration by the Commission at its Forty-fourth Session should include reference to its methods of work.'<sup>143</sup> As issues to be clarified, Colombia referred in particular to the question of the admissibility of allegations and the application of the criteria of the Optional Protocol to the International Covenant on Civil and Political Rights.

This resulted in a comprehensive and detailed overhaul of its working methods by the Working Group in 1987.<sup>144</sup> The reformulated working methods clarified in particular the minimum data the Working Group required before it could examine a report concerning disappearances: the clear identity of the sender of the written communication, the full name of the missing person, the date of disappearance, the place of arrest or abduction or where the person was last seen, the parties presumed to have carried out the arrest or the abduction or holding the person in unacknowledged detention and the 'steps taken to determine the fate or whereabouts of the missing person or at least an indication that efforts to resort to domestic remedies were frustrated or have otherwise been inconclusive.'<sup>145</sup> However, the Working Group would 'constantly [urge] the sources of the reports to furnish as many details as possible on the identity of the missing person and the circumstances of the disappearance.'

Three aspects are particularly noteworthy in this respect. First, the revised working methods no longer used the earlier language of 'the need to exhaust local remedies'. The formulation adopted seems to be more in line with the Group's humanitarian

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141 U.N. Doc. E/CN.4/1987/15, para. 26 [emphasis added].

142 U.N. Doc. E/CN.4/1986/SR.52/Add.1, para. 54.

143 U.N. Doc. E/CN.4/1987/SR.38, para. 92. See also C.H.R. Res. 1987/27.

144 As the Chairman of the Working Group stated at the Commission's Forty-fourth session (1988): '[n]ew questions of principle had (...) arisen, and the methods used by the Working Group had seemed less and less comprehensible, particularly for governments with which the Working Group had been dealing for the first time. As a result, there had been some misgivings about the process by which the Working Group's decisions were adopted. (...) The Working Group had none the less made an effort to review its methods of work in a comprehensive and systematic manner.' U.N. Doc. E/CN.4/1988/SR.30, para. 103.

145 U.N. Doc. E/CN.4/1988/19, paras. 20 and 21.

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objectives and the recognition of the fact that the impossibility to resort to domestic procedures to find out the whereabouts of the disappeared person constitutes precisely one of the characteristics of the phenomenon. After 1988 the position of the Working Group with respect to the applicability of the rule of prior exhaustion of local remedies as a condition for the admissibility of communications has no longer been seriously challenged. Some Governments have occasionally invoked the rule, but the Working Group explicitly dismissed their claims, thereby further strengthening its standpoint. For example, in 1991 it answered the Government of the Philippines that

‘in accordance with its methods of work endorsed by the Commission on Human Rights, *it did not require, for the admissibility of cases, that internal remedies be exhausted* but only that some steps be taken at the domestic level to determine the fate or the whereabouts of the missing person or that there be an indication that efforts to resort to domestic remedies had been frustrated or had otherwise been inconclusive.’<sup>146</sup>

Moreover, the rule has not been changed in subsequent revisions of the Group’s working methods.<sup>147</sup>

Secondly, although the working methods as formulated in 1988 required that some minimum information be submitted to the Group before it would examine and transmit it to the Government concerned, this did not mean that failure to provide this information automatically led to the inadmissibility and rejection of a communication. Also after the formalisation of its working methods, the Working Group, in line with its humanitarian, victim-oriented posture, has continued to assert its competence ‘to seek information’ by communicating with the sources in order to obtain the necessary data, if it found this to be justified.<sup>148</sup> In 2001 the Working Group formally adopted the rule that:

‘[i]f a case is not admitted, the Working Group sends a response to the source indicating that the information received did not fulfil the requirements established, *in order to permit the source to provide all relevant information.*’

In other words, the Working Group in principle allows the sources of information a second chance. They do not lose their right to file communications on cases of disappearances which have come to their knowledge.

Thirdly, as regards the evaluation of the reliability of information submitted to it – an issue which remains entirely within its discretion – the Working Group has taken the formal position that ‘it is not a court of law and that therefore the standards of due process to be met by prosecutors and judges in criminal procedures do not come into

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<sup>146</sup> U.N. Doc. E/CN.4/1992/18, para. 316 [emphasis added]. See also U.N. Doc. E/CN.4/1995/36, para. 77 (Argentina).

<sup>147</sup> See U.N. Doc. E/CN.4/1996/38, Annex I, para. 8 (e) and U.N. Doc. E/CN.4/2002/79, Annex I, para. 8 (e).

<sup>148</sup> See, for example, U.N. Doc. E/CN.4/1994/26, para. 30.

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play.' In practical terms this means that the Working Group, while urging the sources to give as many details as possible, will transmit cases of disappearances to the Governments concerned once it finds that a communication fulfils the minimum elements required, *i.e.* once it considers the information to be sufficiently reliable enough, even though the evidence might not have reached the level which would normally be required to reach formal conclusions.<sup>149</sup> On the other hand, the Working Group has acknowledged that there are basic standards of equity, such as equality of opportunity, 'below which no human rights machinery should descend' and which 'should be appropriately heeded' in hearing Governments and NGOs.<sup>150</sup>

This position has also been borne out in the practice of the Working Group after 1988. Thus, when Governments complained in 1989 that, in the light of the principle of 'equality of arms', they should be given an opportunity to comment on allegations from non-governmental sources reflected in the annual report, the Working Group decided to retransmit to Governments all allegations received and to invite them to comment thereon if they so wished. However, when Governments complained that the Working Group placed too much trust in the veracity of reports from non-governmental sources, thereby encouraging irresponsibility on their part and undermining its own credibility, an argument that would still be frequently invoked after 1988, the Group's usual response has been that:

'in accordance with its methods of work endorsed by the Commission on Human Rights, (...) it transmitted to the Governments concerned reports containing all the required elements, but *it did not have means to verify the accuracy or veracity of the information it received*. Thus, by providing replies to cases, Governments had the opportunity to clarify questions such as those raised by the Government of the Philippines in relation to certain cases.'<sup>151</sup>

Interestingly, while the above counter-argument is still couched in the almost apologetic language of the humanitarian approach, the same argument would be formulated in much stronger legal language – in line with the tendency of the Working Group to adopt a more juridical approach – towards the end of the 1990s. For example, in 1998 the Government of Indonesia argued that 'the Working Group should be more selective when considering and transmitting information emanating from dubious sources, since such baseless and tendentious allegations will undoubtedly undermine the work of the Working Group.'<sup>152</sup> The Working Group countered the argument as follows:

'With respect to the *Government's suggestion* that the Working Group be more selective in choosing its sources, the Group wishes to point out that in accordance with its

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149 U.N. Doc. E/CN.4/1988/19, para. 244 and U.N. Doc. E/CN.4/1989, para. 22. See also Rodley 1999, p. 273.

150 U.N. Doc. E/CN.4/1988/19, para. 244.

151 U.N. Doc. E/CN.4/1992/18, para. 316 [emphasis added].

152 U.N. Doc. E/CN.4/1998/43, para. 222.

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mandate and methods of work, it *functions primarily as a channel of communication*. It therefore has an *obligation to transmit* all alleged cases of disappearance which fulfil the Working Group's criteria for admissibility to the government concerned. *It is the responsibility of the Government to investigate these allegations and repudiate* them in cases in which the information is found to be inaccurate.<sup>153</sup>

As the above examples already make clear, also after 1988 Governments would continue to challenge the reliability of the Working Group's sources of information.<sup>154</sup> However, while Governments have occasionally invoked the argument that the Working Group should observe the criteria of ECOSOC Resolution 1503 or those of the Optional Protocol to the International Covenant on Civil and Political Rights, the debate on these kinds of objections has been settled in favour of the Working Group and generally belongs to the past.<sup>155</sup> This is also evidenced by the fact that since 1988 the Working Group's working methods concerning the admissibility of communications have essentially remained the same. One notable textual revision took place in 1995 as the Working Group upgraded NGOs from the category of 'other reliable sources' (where it still appeared in 1988) to an independent category of sources of information. It thus formalised what it had always been practising.<sup>156</sup>

During the 1990s the United Nations on various occasions recognised the importance of non-governmental input, mostly through NGOs but also through private individuals, for the proper functioning of its human rights monitoring procedures, including the Working Group. Such recognition has sometimes been indirect and negative, in the sense that United Nations organs have urged Governments to refrain from obstructing non-governmental sources of information, including individual complainants, in their efforts to approach or cooperate with United Nations human rights monitoring procedures. On other occasions recognition has been more direct and explicit.

For the first time in 1990 and subsequently on an annual basis, the Commission on Human Rights has adopted a resolution on the topic of 'Cooperation with representatives of United Nations human rights bodies.'<sup>157</sup> In these resolutions the Commission expresses its concern at reports of intimidation and reprisal against 'private individuals and groups who seek to cooperate with the United Nations and representatives of its human rights bodies.' It further urges Governments to refrain from such acts, 'in any

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153 Ibid., para. 225.

154 Governments challenging the reliability of the sources of information of the Working Group included, *inter alia*, Turkey and India in 1992, U.N. Doc. E/CN.4/1992/SR.21, paras. 88-92 and U.N. Doc. E/CN.4/1992/SR.24/Add.1, para. 85; Turkey and Morocco in 1998, U.N. Doc. E/CN.4/1998/43, para. 222 and U.N. Doc. E/CN.4/1998/SR.29, para. 53.

155 For example, in the 1990 debate on 'Enhancement of Procedures of the Commission on Human Rights', Non-Aligned States at the initiative of Pakistan and India brought up the 1503 argument once again. See also Alston 1992, p. 199.

156 See U.N. Doc. E/CN.4/1988/19, para. 20, U.N. Doc. E/CN.4/1996/38, Annex I, para. 7 and U.N. Doc. E/CN.4/2002, Annex I, para. 7.

157 C.H.R. Res. 1990/76, 1991/70, 1992/59 (...) 2003/9.

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form, against private individuals and groups who seek to cooperate with the United Nations (...) or who have sought to avail themselves of procedures established under United Nations auspices for the protection of human rights and fundamental freedoms. Representatives of United Nations human rights bodies are requested 'to take urgent steps, in conformity with their mandates, to help prevent the occurrence of intimidation or reprisal as well as that access to United Nations human rights procedures be hampered in any way.'<sup>158</sup> They are also to report on allegations of intimidation or reprisal and of hampering access to United Nations human rights procedures as well as to account for any action taken by them in this regard.

The Working Group, which has always been reporting acts of intimidation and reprisal against people having knowledge of disappearances,<sup>159</sup> has interpreted the resolution as permitting it to establish a so-called *prompt intervention procedure*. This procedure, broadly similar to the urgent action procedure dealt with in Chapter IV.5.1 below, provides that the Working Group will transmit 'cases of intimidation, persecution or reprisals against relatives of missing persons, witnesses to disappearances or their families, members of organisations of relatives and other non-governmental organisations or individuals concerned with disappearances' directly to the respective Ministers for Foreign Affairs of the Governments concerned with the appeal that they take immediate steps to protect the fundamental human rights of the persons affected.<sup>160</sup> For this purpose, the Working Group has authorised its Chairman to transmit such cases in between its sessions. The procedure has been endorsed by the Commission in Resolution 1991/41 and has remained a feature of the Working Group's mandate ever since.<sup>161</sup> The other thematic procedures, including the Special Rapporteur on Torture and the Working Group on Arbitrary Detention have not followed the example of the Working Group on Enforced or Involuntary Disappear-

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<sup>158</sup> C.H.R. Res. 1991/70 [emphasis added].

<sup>159</sup> See, for example, the first report, U.N. Doc. E/CN.4/1435, para. 45. The problem of intimidation and reprisals (in relation to disappearances) was first recognised by the Commission in its Resolution 1986/55 (preamble) and 1987/27 (operative paragraph 6, urging Governments to take steps to protect the families of disappeared persons against acts of intimidation or ill-treatment).

<sup>160</sup> U.N. Doc. E/CN.4/1991/20, para. 26, also U.N. Doc. E/CN.4/1992/18, para. 34: 'The Working Group will take action when there is a request from the individual concerned or from a non-governmental organisation having a working relationship with the Working Group or having made a responsible judgment as to whether action by the Working Group would be in the interest of the victim.'

<sup>161</sup> See also C.H.R. Res. 1992/30 and 1993/35. As of 1998 the annual resolutions on the 'Question of Enforced or Involuntary Disappearances' specifically request the Working Group 'to pay particular attention to cases transmitted to it that refer to ill-treatment, serious threatening or intimidation of witnesses of enforced or involuntary disappearances or relatives of disappeared persons' as well as 'to pay particular attention to cases of disappearance of persons working for the promotion and protection of human rights.' See C.H.R. Res. 1998/40. Before 1998 these resolutions only addressed Governments, urging them to protect witnesses, lawyers and families of enforced or involuntary disappearances against any intimidation or ill-treatment to which they might be subjected. The prompt intervention procedure can be found in the Group's revised working methods published in 1996 and 2002 respectively, U.N. Doc. E/CN.4/1996/38, Annex I, para. 25 and U.N. Doc. E/CN.4/2002/79, Annex I, para. 26.

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ances to establish a separate technique for dealing with cases of intimidation and reprisals. They usually deal with such cases through urgent appeals.<sup>162</sup>

Non-governmental input in the United Nations process has been recognised in a general and more positive manner by the 1993 World Conference on Human Rights, declaring, *inter alia*, that '[n]on-governmental organisations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights.'<sup>163</sup> More concretely, as of 1995 the Commission on Human Rights, in its annual resolutions on the 'Question of Enforced or Involuntary Disappearances', has adopted the practice of '[taking] note of the cooperation provided to the Working Group by non-governmental organisations' and '[inviting them] to continue their cooperation.'<sup>164</sup>

The importance of non-governmental actors and the dependence of special procedures on these actors was also emphasised in the report of the Bureau of the Fifty-fourth Session of the Commission on Human Rights, which stated:

'More often than not it is the information originating in non-governmental circles – media, NGOs, individuals, alleged victims of human rights violations – that provides the initial point of departure for the work of special procedures. Clearly, the operation of the system of special procedures requires the existence of effective and efficient channels and procedures affording the mechanisms access to, and the opportunity to assess the reliability of, relevant information from all potential sources.'<sup>165</sup>

The same report also acknowledged that 'it is incumbent on the special procedures to take every possible step and observe all appropriate principles and practices to verify the reliability of all information brought to their attention.'

Notwithstanding the seemingly positive tendencies of (negatively) recognising the individual's right to unhampered access to United Nations special procedures and the importance of non-governmental actors for the proper functioning of these procedures, one does well to bear in mind the continuing existence of tendencies or forces seeking to limit international interference and to maintain a significant degree of political control over the United Nations human rights monitoring procedures.<sup>166</sup> While it is generally true that many of the (quasi-)legal – but in fact political – arguments raised in the past have lost their validity (if they ever had any at all) and that from the political process formal rules of procedure have emerged or are crystallising, in a highly volatile environment such as the Commission on Human Rights, which more-

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162 See for the Special Rapporteur on Torture, U.N. Doc. E/CN.4/1992/17, para. 23 and for the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1999/63, paras. 21-25 and U.N. Doc. E/CN.4/1998/SR.30, para. 49, the incident concerned inmates of Drapchi prison, Lhasa, Tibet and was linked to a previous on-site visit by the Working Group to China (October 1997). *Infra* Chapter IV.6.2.

163 Declaration of Vienna, June 1993, para. 38.

164 C.H.R. res. 1995/38 and 1998/40.

165 U.N. Doc. E/CN.4/1999/104, para. 39.

166 See *supra* Chapter III.3.2.2.1

over does not exist in a vacuum, there is nothing which guarantees that the advances made have been safely acquired.

### IV.3.2 Special Rapporteur on Torture

In the case of the Special Rapporteur on Torture there was some initial uncertainty about the sources of information he could use. Resolution 1985/33 provided that 'the Special Rapporteur shall seek and receive credible and reliable information from *Governments*, as well as *specialised agencies, intergovernmental organisations and non-governmental organisations*'.<sup>167</sup> Since the Commission omitted to refer to other sources as it had done previously in the case of the Working Group on Enforced or Involuntary disappearances, this could be interpreted as excluding information from individuals. On the other hand, the term 'non-governmental organisations' was still very broad; it could include national as well as international NGOs without requiring them to have consultative status with ECOSOC.<sup>168</sup>

In practice, however, the first Special Rapporteur did not interpret this as an exhaustive list of sources he would be authorised to use. As with other aspects of the mandates of thematic procedures the important breakthrough in this respect seemed already to have been made by the Working Group on Enforced or Involuntary Disappearances and the absence of a reference to other sources must probably be seen in the light of the unpredictable outcome of the negotiating process in the Commission on Human Rights, rather than a deliberate attempt by that organ to tie the hands of the Special Rapporteur.<sup>169</sup>

In any case the Special Rapporteur interpreted the political context of 1985/1986 as favourable to a liberal approach. Following his characteristic informal and pragmatic approach, he simply reported to the Commission that the documentation studied referred to information submitted by Governments, intergovernmental organisations and non-governmental organisations in consultative status with ECOSOC and that 'in addition (...) [he had] considered materials provided by private organisations and individuals'.<sup>170</sup> Interestingly, he provided neither an explanation nor a theoretical foundation for this course of action.<sup>171</sup>

In 1986 the Commission implicitly endorsed this practice without however making any changes to the original formula adopted the previous year.<sup>172</sup> As was the case with the Working Group on Enforced or Involuntary Disappearances, the political debate focused not so much on the types of sources used by the Special Rapporteur, but more

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<sup>167</sup> [Emphasis added].

<sup>168</sup> See also Rodley 1999, pp. 147 and 148.

<sup>169</sup> Also Kamminga, NILR 1987, p. 308.

<sup>170</sup> U.N. Doc. E/CN.4/1986/15, paras. 95 and 61.

<sup>171</sup> See also U.N. Doc. E/CN.4/1988/17, para. 9; as the Special Rapporteur presented a comparison between his mandate and the competences of the Committee against Torture, he stuck to the formal description of his mandate given by the Commission in Resolution 1985/33.

<sup>172</sup> C.H.R. Res. 1986/50, para. 3. The Commission would continue to use this formula until 1995.

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on the reliability of the information considered. Targeted Governments would not challenge his competence to take cognizance of information from NGOs and individuals in the abstract, but argued that, in their particular case, the source of information was politically motivated.

Consequently, ascertaining and dispelling doubts as to the credibility and reliability of the information received has become the Special Rapporteur's main practical concern. This was clearly stated by the Special Rapporteur in 1987 as he answered requests by Governments to disclose the identity of his sources. Firstly, he argued that 'first-hand information about torture (...) in many cases inevitably comes from groups whose political ideas are at variance with those of the incumbent régime', but that information concerning allegations of torture 'from politically motivated sources does not imply (...) that the allegations themselves are politically motivated too.'<sup>173</sup> Therefore, according to the Special Rapporteur,

'the *identity and character* of the source which provides the information is *not* the only criterion for ascertaining its reliability; other factors, such as its consonance with information from other sources and the general human rights situation in the country concerned, are also taken into account.'<sup>174</sup>

At this point the Special Rapporteur explicitly asserted that it was 'his responsibility to determine which information is reliable and which is not' and that 'it would be wrong to shift that responsibility to the organisation which provided the information.' For that reason he would not disclose the identity of the source.<sup>175</sup>

It was this approach, focusing on the quality of the information rather than its author, that the first Special Rapporteur would maintain throughout his tenure and that would later be continued by his successors.<sup>176</sup> Meanwhile, the assertion of exclusive responsibility to evaluate the credibility and reliability of information by the Special Rapporteur has gone hand in hand with a trend towards more transparency. As cited above, in 1987 the Special Rapporteur for the first time indicated some of the factors relevant to evaluating the information received. Again in 1992 he explained the two principal considerations he would take into account. Those were the following: (1) 'does the alleged case fit into the general pattern of the human rights situation in the country concerned, as documented in human rights reports which have been published by governmental and non-governmental organisations?' and (2) 'is the information provided sufficiently precise and detailed to enable the Government concerned to carry out an investigation?'<sup>177</sup>

The trend persisted also after 1993 as the mandate was handed over to Sir Nigel Rodley. Thus, in his first report the new Special Rapporteur responded to a request

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173 U.N. Doc. E/CN.4/1987/13, para. 5.

174 Ibid., para. 7 [emphasis added].

175 Ibid., para. 5.

176 See also Rodley 1999, p. 148.

177 U.N. Doc. E/CN.4/1992/17, para. 7.

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from the Government of Turkey to clarify the criteria used in deciding to make an urgent appeal. In this context, he presented a non-exhaustive list of the factors which were relevant for making his assessment, any one of which he considered sufficient:

- ‘(a) the previous reliability of the source of information;
- (b) the internal consistency of the information;
- (c) the consistency of the information with information on other cases from the country in question that has come to the Special Rapporteur’s attention;
- (d) the existence of authoritative reports of torture practices from national sources, such as official commissions of inquiry;
- (e) the findings of other international bodies, such as United Nations country rapporteurs and representatives, the Human Rights Committee, the Committee against Torture and regional human rights bodies, in particular the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- (f) the existence of national legislation, such as that permitting prolonged incommunicado detention, that can have the effect of facilitating torture; and
- (g) the threat of extradition or deportation, directly or indirectly, to a State or territory where one or more of the above elements are present.’<sup>178</sup>

While some of these factors relate specifically to the technique of urgent appeals, they nevertheless provide an insight into the Special Rapporteur’s overall assessment of information. Indeed, in 2003 the third Special Rapporteur, Van Boven, included them [*i.e.* factors (a), (b), (c) and (d)] in his revised working methods under the heading ‘sources of information.’ In addition, Van Boven mentioned two other factors, which he would take into account when assessing the credibility and reliability of information: the ‘precision of factual details included in the formation’ and ‘assessments made by professionals of the Office of the High Commissioner for Human Rights as well as other United Nations agencies.’<sup>179</sup>

Finally, a remark must be made regarding the (non-)applicability of the rule of the prior exhaustion of domestic remedies. As shown above, the Working Group on Enforced or Involuntary Disappearances initially acknowledged the relevance of this rule, but rapidly relativised its applicability to requiring that at least some steps be taken at the national level or that there be an indication that efforts to do so had been frustrated or non-conclusive. The Special Rapporteur on Torture took a different approach. He argued that the character of his mandate did not require him to apply the classic rule of the exhaustion of domestic remedies. This rule, according to the Special Rapporteur, applied only in the case of a quasi-judicial procedure such as the individual complaint procedure under the Convention against Torture, where the object was the establishment of State responsibility, in particular the question of whether the State

<sup>178</sup> U.N. Doc. E/CN.4/1994/31, paras. 6-8. Also U.N. Doc. E/CN.4/1997/7, Annex, para. 3. On the other hand, Rodley also asserted that the principle of safeguarding human dignity and the integrity of persons dictates that he err on the side of protecting potential victims and his mandate rather than on the side of avoiding administrative inconvenience for Governments.

<sup>179</sup> U.N. Doc. E/CN.4/2003/68, para. 5.

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concerned is under an obligation to pay compensation. In such proceedings the rule was justified by the fact that the State is not responsible as long as it is in a position to redress a wrongful act committed by its organs.<sup>180</sup> By contrast, the Special Rapporteur held that his mandate emphasised the element of 'effectiveness' and the 'adoption of preventive measures' and his role was merely to bring information to the attention of Governments and ask for their comments, *i.e.* to ask them to look into the matter and to see to it that, if the outcome of the inquiry confirms that the allegations are true, the perpetrators will be punished and the victims will be compensated.<sup>181</sup> This position has never been challenged in the Commission.<sup>182</sup>

### IV.3.3 Working Group on Arbitrary Detention

Resolution 1991/42 establishing the Working Group on Arbitrary Detention provided that the Group 'shall *seek and receive* information from Governments and intergovernmental and non-governmental organisations, and shall *receive* information from the individuals concerned, their families and their representatives.'<sup>183</sup> Thus, for the first time the Commission on Human Rights explicitly authorised a thematic procedure to use information from private individuals. Still one might interpret the omission of the term 'to seek' in the case of private individuals as a limitation of the Working Group's mandate, especially since it has been used with respect to the other sources. In practice, however, this omission does not seem to have prevented the Working Group from verifying and completing information received, as evidenced, *inter alia*, by the inclusion in its working methods of a rule providing that 'failure to comply with all formalities concerning the information a communication should contain would not directly or indirectly result in the inadmissibility of the information.'<sup>184</sup> Moreover, by its very nature the adversarial process established by the Working Group implies an exchange of information between the source, the Working Group and the Government concerned. It is quite natural in this process that information is both received and sought.

The omission of the term 'to seek' may be explained against the background of a discussion concerning the question whether the Working Group would be given a mandate to examine cases on its own initiative. Initially, there was some opposition against such a mandate. Consequently, the Commission decided to expressly rule out this possibility, hence the absence of the term 'to seek'.<sup>185</sup> In 1993 the discussion on the topic would be reopened again as some Governments, notably Cuba and China,

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180 U.N. Doc. E/CN.4/1988/17, para. 11 and especially U.N. Doc. E/CN.4/1993/26, paras. 12-14.

181 U.N. Doc. E/CN.4/1993/26, para. 14.

182 In the model questionnaire to be filled in by persons alleging torture or their representatives, the Special Rapporteur does ask for information concerning any remedial action taken at the national level.

183 C.H.R. Res. 1991/42, para. 3 [emphasis added].

184 U.N. Doc. E/CN.4/1992/20, para. 13 (para. 8 of the working methods).

185 U.N. Doc. E/CN.4/1993/24, paras. 27-30.

accused the Working Group of having failed to respect the principle of non-selectivity laid down in Resolution 1991/42.

In response, the Working Group acknowledged that the list of countries concerned by its decisions 'might (...) convey the impression of a selective approach', but argued that this situation was beyond its control since it had not been given the competence to consider situations on its own initiative.<sup>186</sup> During the debate in the Commission the Chairman of the Working Group asserted that the only effective means of restoring the geopolitical balance was to grant it such competence.<sup>187</sup> In an unprecedented move the Commission subsequently honoured this request and provided that 'the Working Group could take up cases on its own initiative.'<sup>188</sup> So far, however, the Working Group has only once made use of this unique competence, the significance of which therefore remains – at least for the time being – more symbolic than practical.<sup>189</sup>

Another development of some interest relates to the Working Group's approach towards the question of the admissibility of communications. In essence, this approach does not fundamentally differ from those of the other thematic procedures, *i.e.* formal conditions of admissibility are lacking.<sup>190</sup> In particular, the Working Group has followed the practice of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture not to require domestic remedies to be exhausted before it may declare an individual communication to be admissible.

This practice was nevertheless put into question by the Government of Cuba, which criticised the Working Group for not explaining why the rule of the prior exhaustion of domestic remedies did not feature among the criteria determining the admissibility of communications as was the case with other mechanisms examining communications, such as the 1503 procedure or individual complaint procedures under human rights treaties.<sup>191</sup> Other States, Chile for example, argued that it was 'in view of the nature of the mandate' of the Working Group that the exhaustion of domestic remedies was not a condition for the admissibility of communications.<sup>192</sup>

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186 *Ibid.*, para. 28 and U.N. Doc. E/CN.4/1993/SR.30, paras. 49 and 57.

187 U.N. Doc. E/CN.4/1993/SR.30, paras. 49 and 57. In what was probably an attempt to obtain the support of the Commission the Chairman mentioned as an example the situation of arbitrary detention in the occupied territories.

188 C.H.R. Res. 1993/36, para. 4. See also U.N. Doc. E/CN.4/1994/27, para. 48 and Annex 1.

189 In 1995 it had requested the Special Rapporteur on the situation of human rights in Rwanda to provide it with information on the question of detention in the country. U.N. Doc. E/CN.4/1996/40, paras. 9 and 15.

190 Like the other thematic procedures, the Working Group requests the sources of information to provide it with precise and complete factual data concerning, *inter alia*, the identity of the person detained, the date, place and circumstances of the deprivation of liberty, the reasons given by the authorities for the arrest and deprivation of liberty, the domestic legislation applied in the case, any remedial action taken and the results of such action and an account of the reasons why the deprivation of liberty is deemed arbitrary. See U.N. Doc. E/CN.4/1998/44, Annex I, paras. 9-11. On the basis of this data, the Group then makes its own assessment as to whether or not to take action.

191 U.N. Doc. E/CN.4/1992/SR.26, para. 9.

192 U.N. Doc. E/CN.4/1992/SR.21, para. 71.

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The Working Group itself held that if an admissibility procedure requires the prior exhaustion of domestic remedies, that condition is usually expressly provided for in the instrument concerned. Consequently, since Commission Resolution 1991/42 remained silent on the issue, the Working Group considered that it was not within its mandate to require domestic remedies to be exhausted in order for a communication to be declared admissible.<sup>193</sup> Whatever the merit of the argument – the rule of the prior exhaustion of domestic remedies might well belong to customary international law – it has not been a reason for the Commission to modify or correct the mandate of the Working Group.<sup>194</sup>

The development is all the more remarkable in the light of the quasi-jurisdictional nature of the competences attributed to the Working Group. While the Special Rapporteur on Torture still justified the non-applicability of the rule of the prior exhaustion of domestic remedies to his mandate on the ground that, *inter alia*, he did not have competence to evaluate the well-foundedness of allegations, the Working Group has not considered the possession of this competence to be a reason to apply that rule. Apparently, the non-applicability of the rule is considered a feature which applies to all thematic procedures. It is probably best understood as a consequence of the political origin of these procedures, which allows them to maintain a certain flexibility even when exercising quasi-jurisdictional competences.

#### IV.4 COMPETENCE *RATIONE TEMPORIS*: A TIME-LIMIT FOR THE ADMISSIBILITY OF COMMUNICATIONS AND THE DISCONTINUATION OF CASES

##### IV.4.1 Working Group on Enforced or Involuntary Disappearances

The 'time' factor manifested itself in three different forms in the work of the Working Group on Enforced or Involuntary Disappearances: firstly, as a potential condition for the admissibility or the discontinuation of communications concerning individual cases of disappearances; secondly, as an argument precluding (Government/State) responsibility in the case of a change of régime or State succession and, thirdly, as a decisive factor in the investigation process that should lead to the clarification of cases of

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193 See U.N. Doc. E/CN.4/1993/24, para. 19, 'deliberation 02', paras. 3-8.

194 See Brownlie 1998, pp. 496-506. Meanwhile, the Commission did invite the Working Group to take a position on the issue of the admissibility of cases when they are (also) under consideration by other bodies; C.H.R. Res. 1993/36, para. 7, see also para. 6 in which the Commission took note of the Working Group's 'deliberation.' In 1997 the Working Group decided to adopt the following rules with regard to communications that have already been referred to other bodies: '(1) if the function of the body (...) is to deal with the general development of human rights within its area of competence (e.g. most of the special rapporteurs, representatives of the Secretary-General, independent experts), the Working Group shall retain competence to deal with the matter. (2) However, if the body (...) has the function of dealing with individual cases (Human Rights Committee and other treaty bodies), the Working Group shall transmit the case to that other body if the persons and the facts involved are the same.' U.N. Doc. E/CN.4/1998/44, Annex I, para. 25 (d).

disappearances, eventually also raising the question whether the consideration of older cases should at some point be discontinued.

Being essentially a reaction to the practice of disappearances in Argentina, which was at its height in the years 1976 and 1977, it was only natural for the Working Group to take cognizance of information dealing with that particular period of time, notwithstanding the fact that several years had already passed and the practice had declined significantly. Moreover, there was nothing in Resolution 20 (XXXVI) which imposed temporal restrictions on the mandate of the Working Group.

Nevertheless, in the mid 1980s there was considerable pressure on the Working Group to establish a time-limit both as a condition for the admissibility of communications concerning individual cases of disappearances and as a ground to stop actively considering them.<sup>195</sup> Two countries in particular, Colombia and Mexico, both figuring on the Group's 'A' list of countries with more than 20 outstanding cases of disappearances, challenged the Working Group's practice. Thus, in 1986 the Government of Colombia officially complained to the Working Group that it 'considered inadmissible the transmission of cases which had occurred as far back as 1976 and requested an official decision by the Group establishing a time-limit for the receipt of complaints.'<sup>196</sup> Similarly, in the same year the Government of Mexico communicated to the Group that it refused to entertain cases that had already been submitted to it in 1981 and 1982 and for which it had already provided a reply.<sup>197</sup> During the Commission's 1987 session it joined Colombia in its plea for a time-limit 'because otherwise there would be an accumulation of accusations that unduly distorted the image of the government and people concerned.'<sup>198</sup>

The Working Group, for its part, initially attempted to gain time. It replied to the objectors that 'it had since its inception desisted from applying a time-limit' and that 'it was unable to take a decision on a possible reversal of that practice since it considered that the issue deserved further examination.' In the Commission no consensus could be reached on the topic either. A number of Governments, such as Sweden and the Philippines, supported the Working Group in not applying a time-limit, either as a ground for admissibility or as a reason to discontinue cases concerning disappearances.<sup>199</sup> Nonetheless, in the light of Colombia's insistence that the Group should review its working methods, the Working Group promised that it would 'continue with the gradual development of its procedures in respect of such questions as the establishment of a time-limit for the receipt of complaints.'<sup>200</sup>

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195 At the beginning of the 1980s, the Government of Argentina had also argued that the Working Group should focus first and foremost on current cases rather than past ones. U.N. Doc. E/CN.4/1982/SR.38, para. 89. *Supra* Chapter IV.3.1.

196 U.N. Doc. E/CN.4/1987/15, para. 28.

197 *Ibid.*, para. 68.

198 U.N. Doc. E/CN.4/1987/SR.34, para. 24.

199 See U.N. Doc. E/CN.4/1987/SR.33, para. 59 (Sweden) and U.N. Doc. E/CN.4/1987/SR.34 (Philippines).

200 U.N. Doc. E/CN.4/1987/SR.32, para. 114. Also *supra* Chapter III.3.2.4.2.

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In 1988 the Working Group then reported to the Commission that the issue of time-limits had ‘occupied [it] at great length, but no common position could be adopted owing to different points of view held by its members’ and, therefore, it felt ‘duty bound to bring the matter to the Commission for consideration.’<sup>201</sup> In the debate which followed, the prevailing argument was that the imposition of a time-limit for the admissibility or the discontinuation of communications would be unjust and dangerous for the victims and their relatives or friends, since a very long time was often required to make certain that the person in question had disappeared. Moreover, families often experienced great difficulties in even establishing the existence of the Working Group and finding the opportunity to transmit the necessary information, not in the last place because in trying to make contact with the Group they had sometimes been subjected to harassments and threats.<sup>202</sup> Consequently, it was concluded that the establishment of time-limits should be rejected as being contrary to the victim-oriented humanitarian approach of the Working Group.<sup>203</sup> After 1988 the Working Group’s practice of not applying a time-limit for the admissibility or discontinuation of communications was not challenged again.

Another objection with which the Working Group was sometimes confronted, especially during the first decade of its existence, was the argument that a new Government could not be held responsible for cases of disappearances which allegedly occurred prior to its accession to power. For example, in the early 1980s the Sandinista Government of Nicaragua refused to entertain or assume responsibility for disappearances allegedly committed under the former Somoza Government.<sup>204</sup>

The Working Group has never accepted this type of objection and has always held the view that a change of Government neither affects the admissibility of cases of disappearances allegedly committed under the responsibility of the former (overthrown) Government, nor leads to the discontinuation of such cases. As a justification for its view the Group again invoked its humanitarian victim-oriented approach rather than considerations of legal continuity or considerations concerning the nature of the political approach to human rights monitoring. The object of its mandate being ‘to assist families in determining the fate and whereabouts of their missing relatives’, the Working Group emphasised the practical need to continue to entertain the dossiers of cases of disappearances allegedly committed by the (overthrown) previous Government. As it reported to the Commission in 1987:

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201 U.N. Doc. E/CN.4/1988/19, para. 14.

202 See, for example, U.N. Doc. E/CN.4/1988/SR.32, para. 55 (Ireland), also U.N. Doc. E/CN.4/1988/SR.31, paras. 57 and 58 (Portugal).

203 U.N. Doc. E/CN.4/1988/SR.32/Add.1, para. 3.

204 See the Working Group’s first report, U.N. Doc. E/CN.4/1435, para. 141, the second report, U.N. Doc. E/CN.4/1492, para. 126 and still in the fourth report, U.N. Doc. E/CN.4/1984/21, para. 86. See also the reaction of Cuba in 1983, U.N. Doc. E/CN.4/1983/SR.24, para. 28: ‘the report again included cases of presumed disappearances which could not be attributed to the Government presently in power in the countries concerned (...) locating the victims of the Somoza dictatorship was an internal matter and did not call for intervention by the international community.’

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'The Working Group retains cases on its files *as long as the exact whereabouts of missing persons have not been determined.* (...) This principle is not affected by changes of Government in a given country.'<sup>205</sup>

The contrast between the Group's pragmatic approach based on humanitarian considerations and the purely legal (normative) approach to the question of State responsibility in the case of a change of Government clearly came to the fore in the Working Group's tenth report presented to the Commission in 1990. In that report the Working Group referred to a 1988 judgment of the Inter-American Court of Human Rights and cited the Court's main findings:

'for the first time in history, an international judicial body rendered a judgment on cases of disappearances (...) [making] a detailed analysis of the State's responsibility for the human rights violations within its territory (...) [declaring] that such responsibility continued to exist, irrespective of changes of Government (...) [submitting] that the obligation of the State to investigate disappearances continued to exist for as long as uncertainty remained concerning the ultimate fate of the disappeared person.'<sup>206</sup>

Logically, the Working Group welcomed the ruling of the Court, which it considered an important reinforcement of 'the positions it has consistently taken (...) *in its dialogue* with certain Governments.'<sup>207</sup> At the same time, however, the Group maintained its own pragmatic justification:

'The Working Group, *for its part*, has always taken the view that a situation of disappearance does not come to an end once no new cases have been reported over a certain period of time. *Under its terms of reference*, the Group will continue to deal with cases *as long as they have not been clarified*. It believes that the *need to insist on investigation* of all cases of disappearances lies at the *heart of its mandate*. It does so *bearing in mind the interest of those who will suffer anguish and bitterness* as long as they cannot be assured of the fate or whereabouts of their loved ones.'<sup>208</sup>

Ten years later, in 2001, the Working Group drew the final consequence from this victim-oriented approach as it included in its working methods the rule that also the event of State succession did not constitute a ground to declare inadmissible or to discontinue cases of disappearances.<sup>209</sup>

205 U.N. Doc. E/CN.4/1988/19, para. 30.

206 U.N. Doc. E/CN.4/1990/13, para. 360.

207 Ibid., para. 361 [emphasis added]. The Working Group also found its position reinforced by the views of the Human Rights Committee expressed in cases brought to it under the Optional Protocol.

208 Ibid., para. 362 [emphasis added].

209 U.N. Doc. E/CN.4/2002/79, Annex 1, para. 22. This decision cannot be separated from opinions expressed elsewhere in the United Nations, notably within the context of the Human Rights Committee, which claim that State succession does not deprive a population living on the territory of the extinguished State of the protection of the rights formerly accorded to them under an international human rights treaty. See General Comment No. 26, Continuity of Obligations, CCPR/C/21/Rev.1/Add.8/Rev.1.

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However, having successfully resisted any attempt to impose temporal restrictions on its mandate, in practical terms the active consideration of older cases of disappearances has become an enormous challenge for the Working Group. In fact, as early as 1983 the Working Group recognised the essence of the problem:

‘Older cases suffer from the problem of the passage of time which makes investigation increasingly difficult.’<sup>210</sup>

In the light of this reality there is a real risk that due to a lack of results the Working Group’s practice of annually sending reminders to Governments with outstanding cases of disappearances turns into a bureaucratic ritual.<sup>211</sup>

Some figures relating to the States with the highest number of disappearances may illustrate the magnitude of the problem. The figures taken are those reported to the Commission in 1998, the reason for this being that the Working Group started to undertake a review its working methods in that year. Also in 1998, in the light of the 50th anniversary of the Universal Declaration of Human Rights, the Working Group seized the opportunity to ‘critically assess the present situation of human rights’ and ‘to include some reflections on the phenomenon of enforced or involuntary disappearances and *its own role* in combating this gross violation of human rights and in relieving the suffering of the victims and their families.’<sup>212</sup>

Firstly, the Working Group provided the following overall statistics:

‘Since its establishment in 1980, the Working Group has transmitted a total of 47,758 cases to 76 Governments. Out of these, only 2,801 cases could be clarified (1,822 by Governments and 979 by non-governmental sources); 17 cases have been discontinued. At the date of clarification, 1,681 persons were at liberty, 442 were in detention, and 678 were dead. Although every individual clarification must be seen as a success, the fact that 44,940 of a total of 47,758 cases are still outstanding is not a very encouraging result.’<sup>213</sup>

If one relates these general figures to the respective country situations concerning the 9 States with the largest number of reported cases of disappearances, the following picture is obtained:

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Moreover, the Commission on Human Rights has on various occasions called upon successor States ‘to confirm to appropriate depositories that they continue to be bound by obligations under international human rights treaties.’ As a justification for this appeal, it ‘[emphasised] the special nature of human rights treaties aimed at the protection of human rights and fundamental freedoms.’ See, *inter alia*, C.H.R. Res. 1994/16 adopted on 25 February 1994 and 1995/18 adopted on 24 February 1995. For an overview of developments, see Shaw 1997, pp. 695- 698.

210 U.N. Doc. E/CN.4/1984/21, para. 176.

211 See U.N. Doc. E/CN.4/1988/19, paras. 24 and 30 and U.N. Doc. E/CN.4/2002/79, Annex 1, paras. 14 and 22 on the topic of ‘reminders’ and ‘outstanding cases.’ Also U.N. Doc. E/CN.4/2004/58, Summary, p. 3, where the Working Group speaks about ‘standard reminders’.

212 U.N. Doc. E/CN.4/1998/43, para. 408 ff. [emphasis added].

213 *Ibid.*, para. 410.

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Table 1: Clarification rates of the 9 States with the highest number of reported cases of disappearances in 1998

<i>Country</i>	<i>Number of Cases Transmitted by 1998</i>	<i>Outstanding Cases by 1998</i>	<i>Percentage Clarified (%)</i>	<i>Height of Disappearances (approximate)<sup>1</sup></i>
Argentina	3,453	3,375	2.3	1976-1977
Chile	912	847	7.1	1973-1976
Colombia	1,006	782	17.4	1980s
El Salvador	2,661	2,270	14.7	1979-1984
Guatemala	3,151	2,990	5.1	1979-1987
Iraq	16,496	16,366	0.8	1983/1988 <sup>2</sup>
Nicaragua	234	103	55.9	1979-1983
Peru	3,004	2,369	21.1	1983-1992
Sri Lanka	12,208	12,144	0.5	1989-1990

1 See also the graphs included in the Working Group's report over 2002, U.N. Doc. E/CN.4/2003/70, Annex III.

2 The case of Iraq may be considered a special case. The Working Group wrote in 1998 that '[t]he Government of Iraq, which is responsible for the highest number of cases of enforced disappearance reported to the Working Group, has not taken any meaningful measures to prevent, terminate and investigate acts of enforced disappearance and to bring the perpetrators to justice. The number of outstanding cases is, therefore, steadily increasing and amounts at present to not less than 16,366.' U.N. Doc. E/CN.4/1998/43, para. 417.

Table 2: Comparison of the 9 States mentioned in Table 1 with the other States contained in the Working Group's 1998 report

	<i>Number of States</i>	<i>Total number of transmitted cases since 1980</i>	<i>Total number of clarifications since 1980</i>
<i>All States to which cases have been submitted</i>	76	47,758	2,801
<i>The States mentioned in Table 1</i>	9	43,125	1,879
<i>All States omitting the States mentioned in Table 1</i>	67	4,633	922

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As an important reason for the discouraging results the Working Group pointed precisely at the fact that many of the unresolved cases of disappearances 'particularly in Latin America, date back to the 1970s or the early 1980s.' It also brought to the fore the conflict between its working methods, requiring it to establish beyond a reasonable doubt the exact fate and whereabouts of the victims, and practical realities especially in older cases where this requirement often cannot be met.<sup>214</sup> Another reason for the low clarification rate, though not explicitly mentioned by the Working Group in this context, has certainly been the fact that the Group is constantly fighting against an important backlog of cases still to be processed.<sup>215</sup> This backlog, which is caused by, *inter alia*, the Group's lack of financial and human resources, not only inhibits clarifications – as time passes the chances of discovering the whereabouts diminish –, but also affects the Working Group's ability to adequately inform the Commission on annual developments falling within its mandate. This problem, including some figures illustrating the past and current backlog of cases, will be dealt with in some detail in Chapter IV.7.1 in relation to the Working Group's annual reports.

In the Commission, the topic of solving older cases of disappearances became especially acute in the course of the 1990s. For example, in 1994, the Government of Nicaragua, a country with a relatively high clarification rate (over 50% in 1998), made the following comment on the question of outstanding cases of disappearances:

'[t]he current Government of Nicaragua was trying to determine the whereabouts and circumstances of the disappearance of missing persons', but '[i]n that task (...) the Government was facing several problems, most of them common to developing countries, such as the absence of civil registry offices, (...) the custom of some indigenous people of changing their names whenever they moved to another locality [etc...].'<sup>216</sup>

The Government, therefore, requested the Working Group to 'adopt a more realistic approach for the clarification of the outstanding cases.' It also believed that '[t]he requirement of submitting death certificates or judicial certificates of presumption of death was considered (...) not to be appropriate to the circumstances of the developing countries.'<sup>217</sup>

In 1994 the Working Group acknowledged the problems involved in solving older cases and decided to approach the Governments concerned in order to decide 'what to do with such cases, taking into account, of course, the legitimate concerns of the families.'<sup>218</sup> However, no concrete results were reported. The next year, one member of the Working Group visited El Salvador specifically for the purpose of '[continuing]

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214 Ibid., para. 411.

215 The backlog includes both new reports of disappearances and Government replies to past transmissions. See also Van Dongen, Bulletin 1991, pp. 25 and 26.

216 U.N. Doc. E/CN.4/1995/36, para. 305.

217 Ibid., para. 305.

218 Ibid., para. 37. The Governments approached included Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, Lebanon, Morocco, Nicaragua, Paraguay, Peru, Philippines, South Africa and Uruguay.

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a process, begun last year, of examining with the Government concerned, what to do with the very large number of old cases (...).’ Again, no concrete results from the ‘process’ were reported. In 1998, the Working Group made clear that solutions for older cases must first and foremost be sought in terms of compensation for the relatives of the disappeared and the development of comprehensive programmes of forensic activities.<sup>219</sup> At the same time, in view of the practical difficulties encountered in pursuing older cases, the Working Group made the following revision of its working methods:

‘[c]ases in which *it considers that it can no longer play any useful role in trying to elucidate them*, to discontinue consideration of such cases, in particular, if the *source is no longer in existence*, or in cases in which *the families no longer have an interest in pursuing the matter*.’<sup>220</sup>

This new rule brought the Working Group into conflict with the NGO community. NGOs were particularly disturbed by the phrase ‘if the source is no longer in existence’, which could be interpreted by repressive régimes to eliminate the source. Equally, the phrase that families were no longer interested could motivate authorities to pressurise families to communicate that they are no longer interested. The result was an NGO effort to request the main countries interested in the draft resolution to modify the draft and request the Working Group to continue to examine its working methods, rather than to have them ratified.<sup>221</sup> The process of the re-examination of working methods would take several years; NGOs pleading for tighter restrictions on decisions to discontinue cases, in particular the need to investigate the reasons behind the action or inaction of the source or the family concerned.<sup>222</sup> In 2001, the following rule finally emerged:

‘In exceptional circumstances, the Working Group may decide to discontinue the consideration of cases where the families have manifested, *freely and indisputably*, their desire not to pursue the case any further, or when the source is no longer in existence or is unable to follow up the case *and steps taken by the Working Group to establish communication with other sources have proven unsuccessful*.’<sup>223</sup>

In practice the Working Group has rarely made use of the possibility to discontinue cases of disappearances. Even before the stricter formulation of the rule, a decision to discontinue cases had only been taken in 16 instances. By 2002, the total number of discontinued cases was 22 (out of a total of 49,855 cases transmitted).<sup>224</sup> At the same

219 See U.N. Doc. E/CN.4/1998/43, paras. 65 and 412-416.

220 U.N. Doc. E/CN.4/1998/43, para. 17.

221 U.N. Doc. E/CN.4/1999/62, para. 20. See also HRM, Nos. 41-42 May 1998, pp. 10-115. C.H.R. Res. 1998/40, para. 2(i).

222 U.N. Doc. E/CN.4/2001, para. 23.

223 U.N. Doc. E/CN.4/2002/79, Annex I, para. 21 [emphasis added].

224 U.N. Doc. E/CN.4/1998/43, Annex II and U.N. Doc. E/CN.4/2002/79, Annex III.

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time, the problem of the discontinuation of cases highlights the persisting difficulties encountered by the Working Group in improving its record of clarifications, especially with respect to those countries where the phenomenon has been systematically practised in the past. Thus, in 2001, the Working Group still had to report that the process of clarifying cases, ‘especially those transmitted more than 10 years ago’, was slowing down.<sup>225</sup>

Occasionally, however, the Working Group’s approach of inviting Governments with large numbers of unresolved older cases has yielded some results. For example, in the case of Sri Lanka, the country with the second largest number of transmitted cases of disappearances, a concerted effort involving the Government, the families of the disappeared and civil society, with the assistance of the Working Group, has apparently succeeded in reducing the large number of outstanding cases. In 2001, the Working Group was able to declare ‘clarified’ 4,390 cases of disappearances on the basis of information provided by the Government, which was not objected to by the source.<sup>226</sup> In 2002, the Working Group decided to apply the so-called six months rule<sup>227</sup> to another 1,234 cases on which the Government of Sri Lanka had provided information.<sup>228</sup>

The following comments must be made, however. First, the vast majority of Sri Lankan cases have been clarified as a result of the issuance of death certificates – with the concurrence of relatives and other interested parties – and/or the granting of compensation.<sup>229</sup> Second, the case of Sri Lanka accounts for almost all the cases declared ‘clarified’ by the Working Group in the period 1998-2002. As the Working Group reported to the Commission in 2003, between 1998 and 2002 it declared ‘clarified’ a total number of 5,255 cases. Approximately 4,950 of these cases related to Sri Lanka; another 198 other cases related to Sudan and concerned cases which allegedly occurred in 1995 and were clarified in 2002.<sup>230</sup> In other words, with respect to the other States with large past records of disappearances, a process similar to the one established in Sri Lanka still has to be initiated. The latest figures illustrate the

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225 U.N. Doc. E/CN.4/2001/68, Executive summary.

226 U.N. Doc. E/CN.4/2002/79, para. 287.

227 The six months rule provides: ‘Any reply of the Government containing detailed information on the fate and whereabouts of the disappeared person is transmitted to the source. If the source does not respond within six months of the date on which the Government’s reply was communicated to it, or if it contests the Government’s information on grounds which are considered unreasonable by the Working Group, the case is considered clarified and is accordingly listed under the heading ‘Cases clarified by the Government’s response’ in the statistical summary of the annual report. If the source contests the Government’s information on reasonable grounds, the Government is so informed and invited to comment.’ See *Ibid.*, Executive summary.

228 U.N. Doc. E/CN.4/2003/70, para. 252.

229 In 2002 the Working Group reported that ‘of the total number of 7,921 cases that the Working Group considers as clarified since the beginning of its activities in 1980, only 2,398 persons were still alive, which is a very small number when compared with the total of 41,859 outstanding cases on its files.’ U.N. Doc. E/CN.4/2002/79, Executive summary.

230 U.N. Doc. E/CN.4/2003/70, paras. 6 and 256-259.

Herculean task ahead of the Working Group. In 2004 the Working Group reported to the Commission that it had since its inception transmitted 50,135 cases of disappearances, 41,934 of which are still being actively considered (*i.e.* are not clarified).<sup>231</sup>

#### **IV.4.2 Special Rapporteur on Torture and the Working Group on Arbitrary Detention**

The outcome of the debate on the question of time-limits for the admissibility or the discontinuation of cases of disappearances effectively removed any doubts that might still have existed concerning the non-applicability of temporal restrictions to thematic procedures. Consequently, discussions on this topic have not re-emerged in the case of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention.<sup>232</sup> Where these two procedures ask the source to indicate, as a basic requirement, the date of the incident that it reports, they do so in order to be able to make their own assessment of the credibility and reliability of the information before deciding to pursue the case any further and transmitting it to the Government concerned.<sup>233</sup>

In terms of effectiveness, the practical impact of the 'time' factor on the activities of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention has at first sight probably been less dramatic than it has been in the case of the Working Group on Enforced or Involuntary Disappearances. This is certainly due to the fact that, in contrast to the Working Group on Enforced or Involuntary Disappearances, the former two procedures have not formulated a clear objective that must have been achieved before they stop considering individual cases of torture or arbitrary detention.<sup>234</sup> Thus, where unresolved 'older' cases of disappearances continue to negatively figure on the Working Group's balance sheet, one will not be able to find comparable information in the reports of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention respectively.

In his transmissions the Special Rapporteur on Torture essentially asks the Governments concerned to clarify the substance of the allegations and urges them to see to it that, if the allegations are true, the perpetrators will be prosecuted, the victims will be compensated and further measures will be taken to prevent recurrence of the acts.<sup>235</sup> As correctly remarked by De Frouville, to the extent that the Special Rapporteur would effectively pursue each and every case until the moment he has received satisfactory replies in respect of all the steps (investigation, prosecution, compensation etc.) that

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231 U.N. Doc. E/CN.4/2004/58, summary.

232 Perhaps also the reason why the working methods of these two procedures remain silent on such issues as changes of Government or State succession.

233 See also U.N. Doc. E/CN.4/2003/68, para. 5 (Special Rapporteur on Torture) and U.N. Doc. E/CN.4/1998/44, Annex 1, para. 10 (a).

234 Hence, the argument of a time-limit has not played any (significant) role in the discussions concerning the admissibility or the discontinuation of cases dealt with by the Special Rapporteur on Torture or the Working Group on Arbitrary Detention.

235 See also U.N. Doc. E/CN.4/1993/26, para. 22 and U.N. Doc. E/CN.4/2003/68, para. 10.

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should be taken at the national level to ‘normalise’ the situation, his task might be said to be even more ambitious than the one of the Working Group on Enforced or Involuntary Disappearances.<sup>236</sup> Investigations, prosecutions and legal proceedings to obtain compensation may be complicated and may take many years before they finally lead to a satisfactory result (if at all). Consequently, in practice the Special Rapporteur’s endeavours in terms of following up individual cases of alleged torture have remained much more modest, not in the last place also because of the limited human and financial resources at his disposal in carrying out his mandate.

In many cases, the Special Rapporteur has already found it difficult enough to solicit any reply at all from the Governments concerned. Some figures concerning the number of governmental replies received in relation to the number of communications transmitted to different Governments and the number of individual cases or groups of individuals contained in these communications may be retrieved, in particular, from the reports of the first two mandate holders, Peter Kooijmans and Sir Nigel Rodley.<sup>237</sup> However, these figures are not easily interpreted, especially in the light of the fact that since the 1990s the Special Rapporteur no longer differentiates between replies received in relation to communications sent under the ‘normal’ procedure and those sent under the ‘urgent action’ procedure. Nevertheless, the present author believes that the available figures might still be useful to illustrate the discrepancy between, first of all, the number of Governments approached and the number of replies received<sup>238</sup> and, secondly, the number of individual cases to which the replies refer in relation to the total number of individual cases transmitted.

Consequently, Table 3 (below) indicates the total number of Governments to which communications have been transmitted under the ‘normal’ procedure as well as the total number of Governments to which communications have been sent under the ‘urgent action’ procedure. Also, it indicates for each procedure the total number of individual cases or groups of individuals contained in the relevant communications or ‘urgent appeals’. Then, table 4 (below) indicates the aggregate number of Governments replying to communications and ‘urgent appeals’ transmitted during the year under consideration. It also indicates the number of individual cases to which these replies referred and relates this to the total number of individual cases transmitted during the year under consideration. Finally, it includes the aggregate number of replies received during that year concerning communications and ‘urgent appeals’

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<sup>236</sup> De Frouville 1996, p. 71.

<sup>237</sup> Sir Nigel Rodley has systematically included these figures in his reports. The third Special Rapporteur, Theo van Boven, has so far not provided similar statistics, but his last report confirms the trend that ever more communications (allegation letters) and ‘urgent appeals’ are sent to an increasing number of Governments. In 2003, for example, he sent 154 communications (the total number of cases included therein is not indicated) to 76 Governments and 369 ‘urgent appeals’ to 80 Governments. U.N. Doc. E/CN.4/2004/56, para. 19. See also Van Boven 2004.

<sup>238</sup> It must be noted, however, that the same country may be included in the list of countries approached under the ‘normal’ procedures as well as the list of countries approached under the ‘urgent action’ procedure.

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transmitted in previous<sup>239</sup> years as well as the number of individual cases to which these replies referred.

Table 3: Number of Governments to which communications have been transmitted under the 'normal' procedure as well as the 'urgent action procedure' and the number of individual cases or groups of individuals contained in these communications and 'urgent appeals' (period 1993-2001)

Year	'Normal' procedure		'Urgent action' procedure	
	Number of Governments to which communications (allegation letters) were transmitted	Total number of individual cases contained in the communications <sup>1</sup>	Number of Governments to which 'urgent appeals' were transmitted	Total number of individual cases contained in the 'urgent appeals' <sup>1</sup>
1993	- not indicated	500 (42)	31	400 (84)
1994	- not indicated	658 (53)	45	716 (144)
1995	48	750 (55)	43	410 (113)
1996	61	669 (68)	45	490 (130)
1997	45	380 + 24 groups involving 655 individuals (48)	45	563 + 22 groups involving 1780 individuals (119)
1998	59	400 + 10 groups involving 250 individuals (64)	41	380 + 20 groups involving 1500 individuals (122)
1999	56	700 + 32 groups involving 3000 individuals (60)	51	430 + 15 groups involving 1500 individuals (144)
2000	60	650 + 28 groups involving 2250 individuals (66)	56	470 + 11 groups involving 1000 individuals (164)
2001	73	1990 + 33 groups involving 6000 individuals (114)	58	581 + 13 groups involving 1500 individuals (186)

1 The total number of communications sent during that year is placed in brackets.

2 The total number of 'urgent appeals' sent during that year is placed in brackets.

239 For these replies the Special Rapporteur has not indicated in which year the communication or 'urgent appeal' had originally been sent.

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Table 4: Aggregate number of Governments replying to communications and 'urgent appeals' transmitted during the year under consideration or transmitted in previous years (period 1993-2001)

<i>Year</i>	<i>Number of Governments replying to communications/ 'urgent appeals' transmitted during the current year</i>	<i>Number of individual cases to which the replies referred</i>	<i>Total number of individual cases included in communications/ 'urgent appeals' (excluding groups) transmitted during the current year</i>	<i>Number of Governments replying to communications transmitted during previous years</i>	<i>Number of individual cases to which the replies referred</i>
1993	20	250	900	17	130
1994	34	239	1374	18	193
1995	41	330	1160	26	330
1996	42	459	1159	24	363
1997	28	345	943	19	290
1998	35	450	780	17	300
1999	26	155	1130	24	350
2000	37	300	1120	25	400
2001	37	800	2571	37	- not indicated

As the tables reveal, not only has a considerable number of Governments failed to reply at all to the transmissions of the Special Rapporteur, if they have sent a reply, then they have often done so in a selective manner, reacting to some individual cases and omitting to mention others. Moreover, many of the replies received contain a mere denial of the facts, a denial of torture or simply provide a different version of the facts than the one submitted by the source.<sup>240</sup> Obviously, for the Special Rapporteur these practices present a real dilemma. Although he has repeatedly indicated that he does not consider satisfactory those replies that, for example, contain a mere denial of the alleged facts, he is not in a position to systematically follow up each and every case that is transmitted to Governments.<sup>241</sup>

Instead, the Special Rapporteur has had to content himself with reproducing in his annual report a country-by-country summary of the allegations transmitted together with Government responses, leaving it to the Commission to draw any further conclusions. In many cases the process ends here, unless, of course, either the source or the

<sup>240</sup> See also U.N. Doc. E/CN.4/2004/56, para. 26.

<sup>241</sup> U.N. Doc. E/CN.4/1993/26, para. 23 and also Van Boven 2004, pp. 1651 and 1652.

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Government concerned brings up the case(s) again.<sup>242</sup> Normally, letters reminding Governments of allegations of torture are only sent out in respect of those cases for which no reply has ever been received.<sup>243</sup> In some other cases, mainly those where the facts appear to be contradicted, the Special Rapporteur, after having analysed the responses from the Governments concerned, forwards the contents to the source for comment. If required, he may subsequently decide to further pursue his 'dialogue' with the Governments concerned.<sup>244</sup> All in all, it may therefore be concluded that the ideal scheme of interaction between victims, Governments and the Special Rapporteur as described by Sir Nigel Rodley at the beginning of his tenure in 1993 for the time being still surpasses the Special Rapporteur's practical potential.<sup>245</sup> It is also against this background that the third mandate holder, Theo van Boven, has indicated his intention to seek ways to enhance the quality of his follow-up activities, notably in respect of the 'urgent action' procedure, which he considers an essential requirement of his mandate.<sup>246</sup>

The Working Group on Arbitrary Detention, finally, has experienced essentially the same difficulties as the Special Rapporteur on Torture in securing the cooperation of the Governments concerned. Thus, Governments have often failed to respond to the Group's communications and, in many cases, the replies that have been received did not contain the information requested. Especially during the first years of its existence, the Working Group repeatedly informed the Commission of this lack of response. For example, in 1995 the Working Group reported to the Commission:

'The Group is concerned by the failure of Governments to respond to its requests for information. Out of the 293 individual cases transmitted, it received information from Governments regarding 90 persons, or approximately 31 per cent of the total. The Group also regrets that, in many cases, Governments limit their replies to providing general information or merely affirming the non-existence of arbitrary detention in the country or referring to the constitutional measures preventing it from occurring, without making any direct reference to the case transmitted.'<sup>247</sup>

The Working Group has not systematically provided information concerning the number of cases transmitted and the number of cases replied to. It has, on the other hand, included information on the number of Governments to which cases have been transmitted and the number of Governments responding to all or some of the cases included in these transmissions. As the following table (Table 5) shows, throughout

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242 Also De Frouville 1996, p. 72.

243 In his report presented to the Commission in 2003 the Special Rapporteur expressed special concern about the fact that a number of Governments have so far failed to provide any reply to cases originally transmitted in 1997 and 1998. U.N. Doc. E/CN.4/2004/56, para. 12.

244 U.N. Doc. E/CN.4/2004/56, para. 12.

245 Supra Chapter IV.2.2.

246 U.N. Doc. E/CN.4/2003/68, para. 21. Also infra Chapter IV.5.2.

247 U.N. Doc. E/CN.4/1995/31, para. 47; also U.N. Doc. E/CN.4/1994/27, para. 57 and U.N. Doc. E/CN.4/1993/24, para. 37.

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the 1990s on average about half of the Governments approached also sent a response. Since 2001 the response rates seem to have improved significantly, as the Working Group also concluded in its two latest reports.<sup>248</sup> However, one must still be cautious in interpreting these figures, since they say nothing about, for example, the quality of the responses (the number of cases referred to etc.). Otherwise the Working Group's report also remains silent on this topic.

Table 5: Reply-rate concerning communications transmitted by the Working Group

<i>Year</i>	<i>Number of Governments to which communications were transmitted</i>	<i>Number of Governments replying to communications transmitted during the current year</i>	<i>Total number of individual cases contained in the communications<sup>1</sup></i>
1993	31	15	183 (45)
1994	29	16	293 (36)
1995	28	14	829 (37)
1996	24	12	205 (30)
1997	20	9	119 (26)
1998	19	12	135 (32)
1999	19	10	116 (30)
2000	20	9	94 (31)
2001	25	22	167 (36)
2002	18	17	125
2003	12	11	151

1 The total number of communications sent during that year is placed in brackets.

In any case, the transmission of communications and the receipt of replies thereto constitute only the first stage of the Working Group's adversarial process. Whether or not a (selective) reply has been received, the Working Group may proceed, in accordance with its 90-day deadline for replies, to adopt an opinion on the basis of the data compiled.<sup>249</sup> It is only at this stage, *i.e.* at the time of the adoption of an opinion

<sup>248</sup> Since 2002 the Working Group has stopped indicating the number of communications transmitted. Instead the report indicates the number of opinions adopted during the year under consideration and the number of Governments which have sent in their replies before the adoption of these opinions. In practical terms this is the same as saying that these Governments have sent in replies to communications. The only difference is that from a temporal perspective the date (year) when a reply was received does not necessarily correspond to the date (year) when the opinion was adopted. See for the Group's latest reports U.N. Doc. E/CN.4/2003/8, para. 71 and U.N. Doc. E/CN.4/2004/3, para. 79.

<sup>249</sup> U.N. Doc. E/CN.4/1992/20, para. 13, (para. 10 of the working methods).

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declaring a particular case of detention to be arbitrary, that the process involving the victim, the Working Group and the Government concerned enters a crucial stage. Here, the question really arises how to further pursue the dialogue with the Government concerned and at what point to end that dialogue.

In its second report, presented to the Commission in 1993, the Working Group announced that, in its third year, it would give priority to the question of ensuring a follow-up to the recommendations made in its opinions (decisions). Meanwhile, the Working Group proposed to the Commission that

‘wishing to follow-up cases in which it has requested a Government to take the necessary measures *to rectify a case of arbitrary detention*, (...) the Commission should recommend to the Government that it report those measures to the Working Group *within a period of four months* following notification of the decision [opinion, JG].’<sup>250</sup>

The Commission reacted to this suggestion in its Resolution 1993/36. Firstly, it ‘[called] upon the Governments concerned to pay due heed to the Working Group’s decisions [opinions, JG] and, where necessary, to take appropriate steps and inform the Working Group, *within a reasonable period of time*, of the follow-up to the Group’s recommendations so that it can report thereon to the Commission.’<sup>251</sup> Secondly, the Working Group was requested to submit a report to the Commission, at its next session, and to make all suggestions and recommendations for the better fulfilment of its task ‘particularly in regard to ways and means of ensuring the follow-up to its decisions [opinions, JG].’<sup>252</sup>

In 1993 the Working Group lacked the time to heed the request of the Commission, but the practical dimension of the problem of follow-up had clearly come to the fore. In the conclusions of its annual report, the Working Group drew the Commission’s attention to the failure of some Governments to release the persons whose cases it had declared arbitrary and who had been deprived of their freedom for several years. In the absence of a follow-up procedure of its own, it recommended that the Commission should take appropriate measures for the Governments involved.<sup>253</sup> Thus, it seemed that the Working Group intended to involve more actively the Commission in the follow-up process.

This became especially clear during the 1995 session of the Commission as the Working Group, after having analysed observations from several Governments, introduced the following proposal for a follow-up mechanism to its opinions:

‘The Working Group suggests that a Government which has been the subject of a Working Group decision deeming a detention to be arbitrary should be requested *to inform the Working Group, within four months* from the date of transmittal of the

250 U.N. Doc. E/CN.4/1993/24, paras. 42 (b) and 43 (d) [emphasis added].

251 C.H.R. Res. 1993/36, para. 10, adopted without a vote on 5 March 1993 [emphasis added].

252 Ibid., para. 18.

253 U.N. Doc. E/CN.4/1994/27, paras. 62 and 76.

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decision, of the measures adopted in compliance with the Group's recommendations. For the time being, it is suggested that this procedure should be applied only in cases in which the prisoner has not been released. Should the Government fail to abide by the Group's recommendations, the Group might proceed to recommend the Commission on Human Rights that it should request that Government to report to the Commission on the matter, in accordance with the modalities deemed most appropriate by the Commission.<sup>254</sup>

This innovative and ambitious proposal – ambitious because the Working Group seemed to suggest that, in the future, the follow-up mechanism could also apply to such issues as the prosecution of the perpetrators, compensation of the victims etc.<sup>255</sup> – received a rather hostile response in the Commission. This was already evident at the time the Working Group requested Governments to send in their observations. Only 13 Governments responded to the appeal; some mainly positively (Argentina, Bahrain, Mauritius, Morocco, the Netherlands, Norway), others vehemently negatively (Turkey, Venezuela, Viet Nam, Egypt and Syria).

Some of the criticism was of a formal nature: Viet Nam, for example, argued that such a follow-up mechanism could only be established with the consent of all States; Syria considered the proposal to fall outside the scope of the Group's mandate. Other objections touched upon the practical effects of the proposal: Venezuela held that the possibility of allowing the Commission to adopt decisions would inevitably lead to a selective approach; Egypt believed that dialogue and cooperation should be strengthened instead of the adoption of counter-productive measures; Syria, again, considered the proposal to contain an unacceptable ultimatum.<sup>256</sup> Of course, behind all the objections lay the deeper fear of these Governments that one day they might be singled out within the context of a follow-up mechanism such as the one proposed by the Working Group.

Not surprisingly, the Group's proposal was not endorsed by the Commission and a year later, in its report over 1995, the Working Group had to renounce its endeavours to establish a follow-up procedure of its own. In the light of the statement of the High Commissioner for Human Rights that he considered the follow-up to the recommendations of the thematic procedures an essential part of his mandate, the Working Group expressed the hope that an effective procedure would be established to that effect within the context of the annual meetings of special procedures mandate holders.<sup>257</sup> As

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254 U.N. Doc. E/CN.4/1995/31, para. 56 (c). Also U.N. Doc. E/CN.4/1995/SR.27, para. 21 (Statement of the Chairman before the Commission) [emphasis added].

255 Also De Frouville 1996, pp. 85 and 86.

256 U.N. Doc. E/CN.4/1995/31, paras. 32-37.

257 U.N. Doc. E/CN.4/1996/40, para. 52. In the context of these meetings a uniform procedure was never adopted; the efforts of the mandate holders concentrated in particular on increasing coordination (also with treaty bodies) and exchanging 'best practices'. See, for example, U.N. Doc. E/CN.4/2000/5, paras. 11 and 12 (Report of the Sixth Annual Meeting of Special Procedures Mandate Holders 1999) and U.N. Doc. E/CN.4/2001/6, paras. 22 and 75 (Report of the Seventh Annual Meeting of Special Procedures Mandate Holders 2000).

will be shown below, in practice, it would transpire that the Working Group adopted a policy of prioritising follow-up in respect of the implementation of recommendations adopted in the context of on-site visits rather than opinions on individual cases.<sup>258</sup>

Consequently, while it has always considered the release of the persons whose detention it has declared to be of an arbitrary nature to constitute a positive response<sup>259</sup> to its recommendations, the Working Group has not formally adopted a process similar to the Working Group on Enforced or Involuntary Disappearances, for example, to annually remind Governments of cases of arbitrary detention for as long as the persons involved have not been released, let alone until some other steps have been taken. Formally speaking, the process ends with the adoption of the opinion and its transmission to the Government concerned. In addressing its opinions to Governments, the Working Group would draw their attention to the relevant resolutions of the Commission on Human Rights requesting them 'to take account of the Working Group's view and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they have taken.'<sup>260</sup> Three weeks after the transmission to the Government, the opinion would also be communicated to the source and at the end of the year all opinions would be brought to the attention of the Commission through the Group's annual report.<sup>261</sup>

In that same annual report the Working Group would also mention the Government replies to opinions (and the names of these Governments) received during that year<sup>262</sup> as well as the cases in which it had been informed (either by the Government or the source) of the release of the persons concerned, but it would not systematically update the Commission on how many Governments should have replied, or how many Governments still have to reply to some or all of the cases contained in opinions transmitted to them in the past or how many persons whose detention it has declared to be arbitrary in the past are still being detained etc.<sup>263</sup> It is up to the reader of the report (in particular the Commission) to link up the different bits of information given

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258 As was explicitly recognised by the Working Group's Vice-Chairman in 1999: 'The Working Group (...) attached more importance to following up visits than to following up opinions.' See U.N. Doc. E/CN.4/1999/SR.29, paras. 50 and 51.

259 Up to 1996 the Working Group used this formulation, after that date it simply 'welcomed the release'. See U.N. Doc. E/CN.4/1996/40, para. 77.

260 See, for example, U.N. Doc. E/CN.4/1996/40, para. 74 and U.N. Doc. E/CN.4/2004/3, para. 9. The relevant resolutions include, *inter alia*, C.H.R. Res. 1995/59, para. 9, 1997/50, para. 8, 2000/36, para. 3 and 2003/31, para. 2.

261 U.N. Doc. E/CN.4/1998/44, Annex 1, paras. 18 and 19 of the Group's working methods.

262 But not necessarily relating to opinions adopted during the year under consideration; these replies may also relate to opinions adopted in previous years.

263 In its report over 1993 presented to the Commission in 1994, the Working Group had still made an effort to inform the Commission of the number of governmental replies received. Under the headings 'Replies received to decisions [opinions, JG] adopted in 1992' and 'Replies received to decisions [opinions, JG] adopted in 1993' it reported reply-rates of 7 out of 18 Governments for 1992 and 8 out of 15 Governments for 1993. From 1994 onwards, this practice was not repeated.

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by the Working Group. The present author has endeavoured to do so in respect of governmental replies (reactions) to opinions received in the period 2001-2003, in particular with the objective of verifying whether the trend towards increased cooperation noted by the Working Group in respect of Government replies to communications has also become visible in the case of replies to opinions.

In 2001, the Working Group reported that it had adopted 31 opinions relating to 22 different States and the Palestinian Authority. With respect to 15 States (including the Palestinian Authority) it had found one or more cases of arbitrary deprivation of liberty. However, only six Governments were mentioned in the report as having sent replies to opinions during 2001. Amongst these six Governments, one Government had replied (Turkey) to an opinion adopted in 2000 and another (Colombia) had also replied to opinions adopted as far back as 1993.<sup>264</sup> Next, for the year 2002, the Working Group reported 21 opinions relating to 17 States. For 12 of these States the Group had found one or more cases of arbitrary deprivation of liberty. The report mentioned five Governments as having sent replies to opinions during 2002. Two of these Governments (Algeria, Morocco) replied to opinions adopted in 2001; one other Government (Mexico) replied to an opinion adopted in 1998.<sup>265</sup> Finally, for the year 2003, the Working Group reported 26 opinions relating to 12 States. With respect to 11 of these States it had found one or more cases of arbitrary deprivation of liberty. The report mentioned six Governments as having sent replies to opinions during 2003. One of these Governments (Peru) replied to an opinion adopted in 2002, another one (United States of America) replied to an opinion adopted in 2002 as well as 2003.<sup>266</sup>

On the basis of the above information, as contained in the Working Group's annual reports, there does not seem to be a notable increase in Government replies to opinions adopted by the Working Group during the period 2001-2003. At best, 50 per cent of the Governments concerned sent a reply (reacted). Moreover, it must be said that, while some replies announced the release of the person(s) concerned, many others either challenged the Working Group's opinion or requested it to reconsider its opinion.

In conclusion, therefore, it might be said that the Working Group's initial ambitious approach to an effective follow-up to opinions found its political limits in the unwillingness of the Commission to single out individual countries failing to comply with its recommendations and, subsequently, in much the same way as the Special Rapporteur on Torture, the Working Group has found it practically neither possible nor perhaps appropriate to endlessly remind Governments of past cases until some desired objective (release, compensation etc.) has been achieved.

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264 U.N. Doc. E/CN.4/2002/77, paras. 14-23.

265 U.N. Doc. E/CN.4/2003/8, paras. 10-26.

266 U.N. Doc. E/CN.4/2004/3, paras. 9-22.

## IV.5 URGENT ACTION

### IV.5.1 Working Group on Enforced or Involuntary Disappearances

Based on the idea that rapid action may help to save lives, the Working Group, at its first session in 1980, developed the technique of the 'urgent action procedure'.<sup>267</sup> The potential relevance of such an emergency procedure had already been suggested by the Sub-Commission in its Resolution 5 B (XXXII) of 5 September 1979 as well as the 1979 report to the General Assembly of the *Expert to Study the Fate of Missing and Disappeared Persons in Chile*.<sup>268</sup> The method itself finds its roots in similar practices used by NGOs such as Amnesty International.

In some respects, the method of urgent action may also be compared to the competences of judicial or quasi-judicial bodies, such as those established under the major United Nations and regional human rights treaties, to issue interim or provisional measures. This is particularly true as regards the underlying rationale of these otherwise different types of emergency procedures. (Quasi-)judicial bodies issue interim or provisional measures, pending the outcome of legal proceedings, in order to prevent the infliction of irreparable damage, usually an imminent violation of the right to life or a violation of the prohibition of torture, to the person(s) claiming or on whose behalf it is claimed that his (their) human rights have been violated. The Working Group sends *urgent appeals* – as the acts are called in practice – to Governments concerning individual cases of disappearances where the life or the fate of the person in question is believed to be in immediate danger (hoping that it may increase the chances of finding the person alive). In short, both types of emergency procedures are based on the requirement of urgency or imminence and are essentially geared at providing (short-term) relief for the alleged victim(s).

Meanwhile, the major differences between the (quasi-)judicial interim measures and the political urgent action procedure should also be kept in mind. The former type of measures are part of a legal procedure, with legal implications in terms of legally binding orders, the attribution of State responsibility for the wrongs done or criminal responsibility for the offences committed. The latter type of action evolves in a political setting and, while still guided by internationally recognised human rights norms, seeks to establish neither the responsibility of States nor the criminal responsibility of individuals.<sup>269</sup> The urgent appeals are essentially humanitarian in nature. As has been shown above, in the case of the Working Group this humanitarian character coincides with the Group's overall approach.

As the basis for its decision to establish the urgent action procedure the Working Group again relied on the phrases 'to bear in mind the need to be able to respond effectively to information that comes before it' and 'to perform their functions in an

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<sup>267</sup> U.N. Doc. E/CN.4/1435, para. 10.

<sup>268</sup> *Supra* Chapter III.3.1.1.

<sup>269</sup> Van Boven 2004, p. 1641.

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effective and expeditious manner' contained in the operative paragraphs 5 and 6 of Commission Resolution 20 (XXXVI) as endorsed by ECOSOC decision 1980/128. It also derived authority for this particular procedure from 'the debates leading to the adoption of Commission Resolution 20 (XXXVI).'<sup>270</sup> The 'urgent appeal' is dispatched by the most direct and rapid means (cable/fax) to the Government of the country concerned, usually directly to the Minister for Foreign Affairs. By comparison, 'normal' cases of disappearances are transmitted by letter from the Working Group's Chairman to the Government concerned through the Permanent Representative to the United Nations. More specifically, the Working Group has authorised its Chairman to transmit urgent appeals 'received between sessions of the Group and *requiring immediate action* (...) together with a request that the Government transmit to the Group such information *as it might wish*.'<sup>271</sup>

As the Working Group presented its first report to the Commission in 1981, the urgent action procedure was heavily opposed by, *inter alia*, the Governments of Argentina and the Soviet Union. The debate between the permanent representative of Argentina to the United Nations Office in Geneva and the Working Group represented by the Director of the United Nations Division on Human Rights concerning the competence of the Group to handle and to take action on individual cases of disappearances has been dealt with in detail in Chapter IV.3.1 and will not be repeated here. Suffice it to be restated that, according to the representative of Argentina, if it had been the intention of the Commission to establish a new procedure, this should have been expressly provided for in the resolution. This not being the case, he considered the action of the Working Group to be *ultra vires*.<sup>272</sup> The Government of the Soviet Union raised similar objections. According to its representative, 'some of the Group's actions were in fact cause to serious concern, including various procedural innovations for which it had not had the Commission's approval. For example, the Chairman had sent 'urgent telegrams' to States on matters involving the fate of individuals rather than mass, systematic and flagrant violations of human rights. Some of those telegrams had even been sent on the Group's behalf by the Director of the Division on Human Rights.'<sup>273</sup> Notwithstanding these objections<sup>274</sup> the Working Group has always continued to handle communications under its urgent action procedure and over the years this procedure has become an established part of its mandate. The Working Group's practice subsequently paved the way for similar action by other thematic procedures, including the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. The existence of the urgent action procedure and its gradual acceptance as standard practice for thematic procedures is perhaps the clearest example of the

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<sup>270</sup> U.N. Doc. E/CN.4/1435, paras. 10 and 30.

<sup>271</sup> *Ibid.*, paras. 30 and 43 [emphasis added].

<sup>272</sup> *Ibid.*, Annex IX, para. 6.

<sup>273</sup> U.N. Doc. E/CN.4/SR.1605, para. 12. See also the Soviet Union's objections to the sources consulted by the Working Group, *supra* Chapter IV.3.1.

<sup>274</sup> There was also support for the procedure, see, for example, U.N. Doc. E/CN.4/SR.1604, para. 13 (The Netherlands).

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emergence of an individual right to petition the United Nations concerning individual violations of human rights. In practical terms, however, this right is dependent on the existence of appropriate United Nations monitoring machinery and must also fall within the substantive mandate of the mechanism concerned. As the Working Group noted in 1985 it 'also received information on cases concerning assassinations, torture, arbitrary detentions, harassment, etc., *which do not fall within the terms of its mandate.*'<sup>275</sup>

As with other aspects of its mandate, the Working Group at first refrained from adopting formal rules or conditions on when to apply the urgent action procedure. Initially, the application of the procedure hinged upon the Working Group's or its Chairman's interpretation of the phrase '*urgent reports (...) requiring immediate action.*' This allowed the Working Group/its Chairman to transmit reports of an urgent nature 'even though on occasion they did not necessarily contain all the factual elements desirable (...) in the hope that rapid action would quickly clarify the cases.'<sup>276</sup> In many instances – apparently those where no immediate result could be obtained – the details initially lacking were subsequently supplied in follow-up correspondence. The Working Group contrasted this specific approach, necessitated by the circumstances, with its normal approach: 'with regard to those reports not falling within the immediate action category, the Working Group carefully reviewed the information provided. (...) and instructed the Secretariat to seek additional information when sufficient details were not received.'<sup>277</sup>

However, with the passing of time a degree of formalisation of the urgent action procedure has taken place. It has increasingly taken on the character of a systematic and routine process, not in the last place because some objective elements have been introduced.<sup>278</sup> One such element has been the time which has elapsed between the date on which the disappearance occurred and the receipt of the information by the Working Group. Thus, in 1985 the Working Group reported to the Commission that:

'The application of this procedure [urgent action procedure, JG] has been improved over the years and the Group has accepted the *principle* that *all reports* received between sessions and which provide *reliable information* on disappearances that *occurred within the three months preceding receipt* by the Group, *should* be transmitted to the Government by means of a cable from the Chairman of the Working Group.'<sup>279</sup>

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275 U.N. Doc. E/CN.4/1985/15, para. 35 [emphasis added]. The Working Group did not report what it did with such cases; for example, whether it referred them, when appropriate, to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions established in 1982. The following year, the Working Group would provide clarity by adopting the formal rule to forward information to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on Torture in cases falling under their respective mandates. Also infra Chapter IV.5.2 concerning joint urgent appeals.

276 U.N. Doc. E/CN.4/1983/14, para. 15.

277 Ibid., para. 15.

278 See also Rodley 1999, p. 275 and Van Boven 2004, p. 1640.

279 U.N. Doc. E/CN.4/1985/15, para. 82.

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Moreover, the Chairman had been instructed, 'under the discretionary power conferred upon him (...) in approving such urgent action cables, [to keep] in mind that the reports thus transmitted must contain sufficient elements for meaningful investigations.'<sup>280</sup> The requirement to make sure that sufficient information is available before a report may be transmitted, should not necessarily be seen as a factor inhibiting the Chairman's discretionary powers. It is also a requirement embedded in practical considerations: the more precise and detailed the transmissions, the better the chances that a Government will submit information or start investigations. In any case, it may (help to) disqualify the governmental argument that too little information has been given to take up the case.<sup>281</sup>

Also in 1985, the Working Group reported that it had increased its capacity to act in between sessions by authorising its Chairman 'to transmit by letter any case received between sessions and which had occurred prior to the three-month limit but no more than one year before the date of receipt by the group, provided that they had some connection with a case falling under the urgent action procedure.'<sup>282</sup>

After 1985 no significant procedural changes have been made to the urgent action procedure. In 1990 the rule had been added to send reminders (by letter) to Governments twice a year of all urgent action cases transmitted during the preceding six months for which no clarification had been received.<sup>283</sup>

Meanwhile, during the 1990s other thematic procedures further refined the urgent action procedure, notably by adopting the practice (as of 1995) of issuing so-called *joint urgent appeals*, i.e. urgent appeals sent on behalf of two or more thematic procedures in the light of (imminent) violations falling within their mandates. This initiative, which must be viewed within the broader context of efforts to achieve better coordination and to avoid duplication between the various United Nations human rights mechanisms,<sup>284</sup> has not been followed by the Working Group on Enforced or Involuntary Disappearances. However, as will be illustrated below, in the case of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention, the vast majority of the cases transmitted under the urgent action procedure are nowadays sent as *joint urgent appeals*.<sup>285</sup>

Having described the procedural framework of the urgent action procedure, the crucial question is of course what impact it has had in practice. A very clear answer to that question is not easily obtained from the Working Group's annual reports, since

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280 Ibid., para. 82.

281 See also Kamminga, NILR 1987, p. 310.

282 U.N. Doc. E/CN.4/1985/15, para. 83.

283 U.N. Doc. E/CN.4/1990/13, para. 26. See the Working Group's latest review of working methods, U.N. Doc. E/CN.4/2002/79, Annex 1, para. 14.

284 *Infra* Chapter IV.5.2.

285 See also *supra* Chapter III.3.2.2.1 (Annual Meetings of Special Procedures Mandate Holders).

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the Working Group has not consistently maintained statistics concerning the number of cases declared 'clarified' under the urgent action procedure.<sup>286</sup>

Nevertheless, some remarks may still be made, in particular concerning the manner in which the Working Group has initially tried to show the relevance of the urgent action procedure. Until the beginning of the 1990s the Working Group compared the respective clarification rates of the urgent action procedure (*i.e.* cases more recent than three months sent per fax to the Minister for Foreign Affairs) and the routine procedure (*i.e.* cases older than three months, sent per letter through the country's permanent mission). Thus, in 1985 the Working Group reported to the Commission that since its establishment in 1980 it had been able to clarify 216 out of a total of 1,121 cases submitted under the urgent action procedure, 'a considerably higher percentage than the clarifications obtained on transmissions under the ordinary procedure.'<sup>287</sup> Subsequently, in 1990 the Working Group wrote that

'Even though the overall clarification rate against all outstanding cases is not considerable – it hovers around 7 per cent – clarifications under the urgent action procedure are *as high as* 25 per cent. This suggests that when acting swiftly, the Group may in effect help to prevent irreparable damage.'<sup>288</sup>

The question is of course whether these kinds of comparative statistics are really helpful in evaluating the effectiveness of the urgent action procedure. From a political perspective, it is understandable that the Working Group wants to show the Commis-

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286 For example, in 1988 the Working Group informed the Commission of the number of cases reported to have occurred in 1987 (261 cases) and how many of them were transmitted under the urgent action procedure (215). No figures were given on how many of them were clarified during the same year. The next year, in 1989, the Working Group again informed the Commission of the number of cases reported to have occurred during the year under consideration, *i.e.* 1988 (392 cases), but did not say how many of them were sent under the urgent action procedure. It did however indicate how many of them were clarified during the same year (60, whereby 50 of which were under the urgent appeal procedure). Then, from 1990 to 1996, the Working Group reported to the Commission how many urgent appeals were transmitted during the year under consideration and how many of them could be clarified during the same year. These figures are as follows: for 1989 515 urgent appeals transmitted, 112 of which were clarified during the same year; for 1990 447 urgent appeals transmitted, 101 of which were clarified during the same year; for 1991 197 urgent appeals transmitted, 34 of which were clarified during the same year; for 1992 348 urgent appeals transmitted, 53 of which were clarified during the same year; for 1993 151 urgent appeals transmitted, 18 of which were clarified during the same year; for 1994 174 urgent appeals transmitted, 53 of which were clarified during the same year; and, finally, for 1995 163 urgent appeals transmitted, 39 of which were clarified during the same year. From 1997 onwards, the Working Group has only provided the number of urgent appeals transmitted during the period under consideration and the *total* number of clarifications obtained during the year under consideration, *i.e.* clarifications under the urgent action procedure and the routine procedure. No specification for these two types of procedures is now given.

287 U.N. Doc. E/CN.4/1985/15, para. 84.

288 U.N. Doc. E/CN.4/1990/13, para. 351 [emphasis added]. Note that the term 'clarification' has a specific meaning under the working methods of the Working Group, namely the establishment of the fate or whereabouts of the missing person, whether dead or alive. The use of the term 'irreparable damage' is therefore rather unfortunate.

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sion that it has obtained some results, not in the last place because some Governments, in what was in fact a hidden reference to their sovereignty, occasionally demanded the abolition of the Working Group on the ground of its presumed ineffectiveness. From a more rational perspective, the figures given by the Working Group and the way in which they are presented need to be relativised. For one thing, it cannot be said with certainty that had the above urgent cases been sent under the routine procedure during one of the sessions of the Working Group the outcome would have been different.

More fundamentally, the comparative figures are deceptive to the extent that they raise expectations that do not correspond to the reality on the ground. Namely, they could suggest that if only cases were brought rapidly before the Working Group, the clarification rate would be higher. Practice shows, however, that the very large majority of cases only reach the Working Group after three months. It may be reminded here that, precisely, the late receipt of communications had been an important reason for the Working Group not to apply a time-limit for their admissibility.<sup>289</sup> In practice the urgent appeals make up not even ten per cent of the total number of cases transmitted.<sup>290</sup> Furthermore, in situations of large-scale disappearances, especially in situations of political instability, civil unrest or (internal) armed conflicts (*e.g.* Sri Lanka, Peru, Colombia or the former Yugoslavia) or in situations related to outcast régimes (*e.g.* Iraq), there is very little the Working Group can do at all to save lives, let alone in terms of urgent action. In the light of these practical realities, it is unfortunate that some commentators, in evaluating the impact of the urgent action procedure, have sometimes restated the comparative statistics of the Working Group. In the literature, these statistics have started to lead a life of their own.<sup>291</sup>

According to the present author, the *raison d'être* of the Working Group's urgent action procedure does not (as yet) lie in its presumed effectiveness. Statistics do not really speak in favour of the Working Group and this is true for both the urgent action procedure and the routine procedure; the Working Group's capacity to make a structural contribution to the clarification of disappearances, let alone to their prevention or elimination, is at present only minimal.<sup>292</sup> This fact should not be disguised.

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289 Supra Chapter IV.4.1. Similarly, the graphs showing the development of cases of disappearances in individual countries included in its annual reports did not include the year under consideration 'based on the fact that many cases occurring during the year are generally received by the Working Group only the following year.' See, for example, U.N. Doc. E/CN.4/1992/18, para. 7.

290 Since its inception the Working Group has transmitted 50,135 cases to Governments, approximately 4,100 of these cases being sent under the urgent action procedure (8.3%). For the year 2003 the figures are as follows: 234 new cases, 43 of which were sent under the urgent action procedure (18.3%). The number of urgent action cases is an estimate; the Working Group has not provided any overall figures after 1984; it only indicated for each year (but not for 1985 and 1986) the number of urgent appeals transmitted.

291 See Kamminga, NILR 1987, p. 318; Van Dongen, Bulletin 1991, p. 29; Alston 1992, p. 178 and Rodley 1999, p. 276.

292 See also C.H.R. Res. 1984/23, para.4, requesting the Working Group to help eliminate the practice of disappearances.

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It may have been for this reason also that commentators have sometimes referred to the question of the effectiveness of the activities of the Working Group as a 'question of conscience'.<sup>293</sup> While they recognise that at the end of the day it is effectiveness and impact that count, their discussion of this topic more often than not ends up by giving other grounds for justifying the actions undertaken by the Working Group.<sup>294</sup> For example, reference is made to the fact that the international community has at least created the mechanisms and procedures to react to the phenomenon of disappearances; at least something is done and some lives have been saved. Also the activities have been justified by referring to the boost in morale which the victims and their relatives are said to derive from the Working Group's existence.<sup>295</sup>

However, in the light of the objective of the present study, the functioning of the Working Group must be seen first and foremost in the context of the broader development of holding States politically accountable for violations of human rights. From this perspective, the added-value of the urgent action procedure lies first of all in the fact that it permits the Working Group, in principle, to discharge its mandate on a permanent basis and not only when it is in session. As such, the technique of sending urgent appeals complements the method of routine transmissions as well as the other methods available to the Working Group to bring violations of human rights to the attention of the Government concerned and to call it to account publicly for these violations. Secondly, for a period of more than twenty years now, the Member States of the United Nations have endorsed the principle that the Working Group has competence to take action with respect to individual cases of disappearances. From the perspective of the victims and their relatives, this abstract competence may be insufficient,<sup>296</sup> but in the present state of development of international relations, as also reflected in the functioning and the role of the Commission on Human Rights, it would ask too much to expect the Working Group to make a more structural contribution to the clarification

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293 See, for example, Van Dongen, Bulletin 1991, p. 29.

294 See, for example, Van Boven 2004, p. 1651.

295 See, for example, Van Dongen 1986, p. 475; also Kooijmans 1983, p. 190.

296 In the past relatives of victims have occasionally expressed their disappointment with the results obtained by the Working Group. This happened, for example, in 1984 as FEDEFAM (Latin American Federation of Associations for Relatives of the Detained-Disappeared) protested against the lack of progress achieved in solving individual cases of disappearances. It issued the following statement: 'The debate in the Commission was very poor and very few ideas were incorporated in the Group's mandate, resulting in very little progress. (...) In order to ensure that the matter was given further consideration (...) the FEDEFAM delegation carried out a protest which consisted of two measures:

1. silent protest at the doors of the room in which the Commission was meeting and a 24-hour fast as a way of communicating our concern to the Members of the Commission;
2. *A decision not to submit new cases* to the United Nations until some kind of solution was found to the cases already presented. (...) This second measure *shows the depth of the families' disillusionment* with the United Nations on the matter.' FEDEFAM 1984 statement, annexed to the Working Group's report, U.N. Doc. E/CN.4/1985/15, Annex II [emphasis added]. See also U.N. Doc. E/CN.4/1985/15, para. 74, in which the Working Group reported that '[e]mphasis was placed on the need for the Working Group to obtain more concrete results, the lack of which had led to a tendency for relatives to shift their resentment against Governments to disappointment with the Working Group.'

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and elimination of the practice of disappearances worldwide. This point will be further elaborated in the final chapter, Chapter V, since it touches upon the essence of the present study.

#### **IV.5.2 Special Rapporteur on Torture and the Working Group on Arbitrary Detention**

Introduced and developed by the Working Group on Enforced or Involuntary Disappearances the method of sending urgent appeals subsequently spilled over to become an established part of the mandates of other thematic procedures as well. In 1985, the Commission on Human Rights invited the newly established Special Rapporteur on Torture 'in carrying out his mandate, to bear in mind the need to be able to respond effectively to credible and reliable information that comes before him.'<sup>297</sup> By including this provision, which in the case of the Working Group on Enforced or Involuntary Disappearances had been the basis for establishing the urgent action procedure, it was clear that the Commission intended to grant similar competences to the Special Rapporteur on Torture. Interestingly, Resolution 1991/42 establishing the Working Group on Arbitrary Detention did not contain any instruction or request to respond effectively to information concerning arbitrary detention. Still, the Working Group decided to establish an urgent action procedure, which must therefore have been based precisely on the precedents and established practice of other thematic procedures.<sup>298</sup>

While the Special Rapporteur on Torture and the Working Group on Arbitrary Detention have basically followed the approach of the Working Group on Enforced or Involuntary Disappearances, in particular as regards the purely humanitarian nature of the urgent appeals, there are nevertheless some differences – most of them related to the subject-matter of the two mandates – that are worth noting.<sup>299</sup>

Firstly, in contrast to the Working Group on Enforced or Involuntary Disappearances, which by the very nature of its mandate always reacts to an ongoing violation, *i.e.* a case of disappearance, the Special Rapporteur on Torture and the Working Group on Arbitrary Detention do not have to wait until a violation, mostly a threat to the person's life or physical or mental integrity, has concretised.

Most clearly the preventive function of the urgent appeals has come to the fore in the case of the Special Rapporteur on Torture. Thus, in 1992 the first Special Rapporteur, Peter Kooijmans, reported to the Commission that

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<sup>297</sup> C.H.R. Res. 1985/33, para. 6.

<sup>298</sup> See also C.H.R. Res. 1992/28, para. 1 in which the Commission 'expresses its satisfaction to the Working Group at the diligence with which it has devised its methods of work and at having pointed out the importance that it attaches to seeking the cooperation of all those concerned by the cases submitted to it for consideration.'

<sup>299</sup> For the humanitarian nature of the urgent action procedure, see U.N. Docs. E/CN.4/1986/15, para. 62, E/CN.4/1994/31, para. 6 and E/CN.4/2003/68, para. 7 (Special Rapporteur on Torture) and U.N. Docs. E/CN.4/1992/20, para. 13 and E/CN.4/1998/44, Annex 1, para. 23 (Working Group on Arbitrary Detention).

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‘an urgent appeal is made whenever the Special Rapporteur receives information that a person has been arrested and *fear* is expressed that that person may be subjected to torture.’<sup>300</sup>

In 1994, his successor, Sir Nigel Rodley, explicitly referred to this statement in his first report to the Commission in which he was requested to clarify the criteria he used in deciding to make an urgent appeal.<sup>301</sup> According to Rodley:

‘the essence of the [urgent action, JG] procedure is not *per se* accusatory. It is essentially preventive in nature and purpose. (...) Accordingly, the Special Rapporteur does not, indeed must not, wait until he has received evidence that torture has taken or is taking place before making an urgent appeal. (...) The question can only be whether there are reasonable grounds to believe (...) that there is an identifiable risk of torture’<sup>302</sup>

He even went as far as asserting that ‘the principle of safeguarding human dignity and the integrity of the person dictates that he *err on the side of protection of potential victims* under his mandate *rather than on the side of avoiding administrative inconvenience for Governments*.’<sup>303</sup>

Wishing to preserve continuity in the discharge of his mandate, the third Special Rapporteur, Theo van Boven, has also adhered to the criterion of the existence of ‘an identifiable risk of torture’ as the basis for his assessment whether or not to send an urgent appeal.<sup>304</sup>

Over the years, the Special Rapporteur has identified different circumstances, which – if supported by credible and reliable information<sup>305</sup> – could lead to urgent appeals. A particular notorious circumstance that has always been a ground for sending urgent appeals is the situation in which prisoners are kept incommunicado.<sup>306</sup> Furthermore, as early as 1987, the Special Rapporteur indicated that he would also act in cases in which there existed the risk of extradition or expulsion contrary to the principle of *non-refoulement*.<sup>307</sup> Other circumstances include, for example, prolonged solitary

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300 U.N. Doc. E/CN.4/1992/17, para. 14 [emphasis added].

301 See also the description given by the Special Rapporteur of his main types of activity, which included, *inter alia*, ‘making urgent appeals to Governments to clarify the situation of individuals whose circumstances give *grounds to fear that treatment falling within the Special Rapporteur’s mandate might occur or be occurring*.’ U.N. Doc. E/CN.4/1994/31, para. 5 (b) and U.N. Doc. E/CN.4/2003/68, para. 3 (b) for the latest version of the working methods [emphasis added].

302 U.N. Doc. E/CN.4/1994/31, para. 6.

303 *Ibid.*, para. 8 [emphasis added].

304 U.N. Doc. E/CN.4/2003/68, paras. 7 and 8. As emphasised by the Special Rapporteur in a recent article, see Van Boven 2004, pp. 1643-1645.

305 The factors taken into account by the Special Rapporteur in assessing the credibility and reliability of information have been mentioned in Chapter IV.3.2.

306 U.N. Doc. E/CN.4/1986/15, para. 62, U.N. Doc. E/CN.4/1992/17, para. 14 and U.N. Doc. E/CN.4/2003/68, para. 8.

307 U.N. Doc. E/CN.4/1987/13, para. 11 and U.N. Doc. E/CN.4/2003/68, para. 8.

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confinement, the use of physical constraints contrary to international standards, the lack of essential medical care and treatment and imminent corporal punishment.<sup>308</sup>

When transmitting an urgent appeal the Special Rapporteur essentially requests the Government concerned to ensure that the physical and mental integrity of the individual is protected. Still, while the physical and mental health of the individual has always been the Special Rapporteur's prime concern, it may be noted that he has also made it clear that this humanitarian objective has its roots in legal considerations.<sup>309</sup> Reference may again be made to the Special Rapporteur's 1992 report in which he wrote: 'the appeal provides the Government concerned with the opportunity to look into the matter and to uphold its obligations under international law.'<sup>310</sup> This statement has survived almost unchanged in the current Special Rapporteur's working methods and reads as follows: 'The Government concerned is requested to look into the matter and to take steps at protecting the right to physical and mental integrity of the person concerned, in accordance with the international human rights standards.'<sup>311</sup> For this reason also, the Special Rapporteur invokes and includes in the letter containing the urgent appeal the relevant international standards to be taken into account by the Government.<sup>312</sup>

In this context, another potentially significant development must be mentioned. In the latest version of his working methods published in 2003 the Special Rapporteur asserted that 'he may also address the enactment of legislation or other measures that may undermine the prohibition of torture.'<sup>313</sup> The assumption of this competence is clearly remarkable, since it opens up the opportunity for the Special Rapporteur to interfere directly in the legislative processes of States, without there being a direct link to concrete individual cases brought before him. This also means a departure from the principle that urgent appeals are exclusively humanitarian in nature, albeit one might hold that they still serve a preventive purpose. For, as yet, it remains to be seen how Governments will react in cases where the Special Rapporteur effectively makes use of this power.

Strictly speaking, the question of the physical or mental integrity or even the life of the individual does not fall within the subject-matter of the mandate of the Working Group on Arbitrary Detention, whose main task it is to assess the legality (rather than the conditions) of a situation of detention.<sup>314</sup> The urgent action procedure makes an

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308 See also the Special Rapporteur 2004 report: U.N. Doc. E/CN.4/2004/56, para. 23.

309 See also U.N. Doc. E/CN.4/1987/13, para. 18 in which the Special Rapporteur reported to the Commission that he would also request the Government concerned to give 'information on remedial measures, including those taken by the judiciary, in the case the allegation proved correct.'

310 U.N. Doc. E/CN.4/1992/17, para. 14 [emphasis added].

311 U.N. Doc. E/CN.4/2003/68, para. 7.

312 See Van Boven 2004, p. 1645.

313 U.N. Doc. E/CN.4/2003/68, para. 8.

314 As also observed by the International Commission of Jurists at the time of the establishment of the Working Group. Conditions of detention are within the competence of, *inter alia*, the Special Rapporteur on Torture. See UN Doc. E/CN.4/1991/SR.26, paras. 62 and 63.

exception to this rule. The assessment of the Working Group involves two stages. Firstly, it analyses whether there are '*sufficiently reliable allegations that a person is being detained arbitrarily.*'<sup>315</sup> Secondly, if this seems to be the case, it will assess whether '*the continuation of the detention constitutes a serious danger to that person's health or even life.*'<sup>316</sup> If this second condition is also fulfilled the Chairman of the Working Group or, in his absence, the Vice-Chairman, will transmit an urgent appeal to the Minister for Foreign Affairs of the country concerned.<sup>317</sup> The appeal will usually request the Government 'to take the necessary measures to ensure that the detained person's right to life and to physical integrity are respected.' However, when the appeal makes reference to the critical state of health of the person, the Government concerned will be requested 'to take all necessary measures to have the person released.'<sup>318</sup>

However, the Working Group on Arbitrary Detention has also extended the scope of its urgent action procedure to a second type of situation, which seems to be more closely related to the subject-matter of its mandate. These are cases 'where the detention may not constitute a danger to a person's health or life, but *where the particular circumstances of the situation warrant urgent action.*'<sup>319</sup> Most often these particular circumstances refer to cases in which the national authorities have failed to execute a court order for release. Other examples of such circumstances could include the arrest of civic leaders, politicians, parliamentarians or human rights defenders.<sup>320</sup> Until 1997 this type of urgent appeal could only be sent by the Chairman or the Vice-Chairman in consultation with two other members of the Working Group.<sup>321</sup> Although the Working Group had not indicated the reasons behind the adoption of this heavier procedural structure, one might speculate that the potentially open-ended nature of this category of urgent appeals had been a relevant consideration. Be that as it may, nowadays all urgent appeals are sent either by the Chairman or the Vice-Chairman without any formal need to consult any of the other members of the Group.

At this point a remark must be made regarding the method of transmitting *joint urgent appeals*, to which both the Special Rapporteur on Torture and the Working Group on Arbitrary Detention have frequently resorted since the first introduction of

315 See U.N. Doc. E/CN.4/1992/20, para. 13 and for the latest version of the working methods U.N. Doc. E/CN.4/1998/44, Annex 1, para. 23: 'Such appeals in no way prejudice any opinion the Working Group may render if it later has to determine whether the deprivation of liberty was arbitrary or not, except in cases where the Working Group has already determined the arbitrary character of such deprivation of liberty.'

316 U.N. Doc. E/CN.4/1992/20, para. 13 (paragraph 11 a. of the working methods) [emphasis added] and U.N. Doc. E/CN.4/1998/44, Annex 1, para. 22 (a).

317 U.N. Doc. E/CN.4/1998/44, Annex 1, para. 24.

318 See, for example, U.N. Doc. E/CN.4/1994/27, para. 13 and U.N. Doc. E/CN.4/2003/8, para. 27.

319 U.N. Doc. E/CN.4/1992/20, para. 13 (paragraph 11 b. of the working methods) [emphasis added], and also U.N. Doc. E/CN.4/1998/44, Annex 1, para. 22 (b).

320 See especially De Frouville 1996, p. 66.

321 See U.N. Doc. E/CN.4/1992/20, para. 13 (paragraph 11 b. of the working methods) and U.N. Doc. E/CN.4/1998/44, Annex 1, para. 24.

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that practice in 1995. As a matter of fact, over the years an ever-growing proportion of the urgent appeals they sign have been transmitted jointly with other thematic or sometimes even country-specific procedures. This development has been greatly facilitated by the creation, in 2000, of a ‘Quick Response Desk’ within the Office of the High Commissioner for Human Rights (the Secretariat servicing the thematic procedures) staffed by a small group of lawyers and charged with the task of handling and coordinating all urgent appeals.<sup>322</sup> In 2003 the Working Group on Arbitrary Detention reported that out of a total of 157 urgent appeals transmitted, 147 had been issued jointly with other thematic or country-specific mechanisms.<sup>323</sup> Similarly, the Special Rapporteur on Torture reported for that same year that two thirds of a total of 369 urgent appeals had been transmitted as joint urgent appeals.<sup>324</sup> In the light of the clear overlap between the subject-matter of the urgent appeals of the Working Group on Arbitrary Detention and the Special Rapporteur on Torture – torture may occur following arbitrary arrest or detention – it may not come as a surprise that many joint appeals concerning situations of detention bear precisely the signatures of these two mechanisms.<sup>325</sup> The practice of issuing joint urgent appeals and the bureaucratic arrangements made for that purpose are not only an indication of the improved coordination of the activities of thematic (and country-specific) procedures, they are also evidence of the further institutionalisation of the competences of these mechanisms in the United Nations bureaucracy.<sup>326</sup>

Finally, some observations must be made concerning the practical effects of the urgent appeals sent by the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. A first indication of the impact of the urgent appeals may be obtained from governmental reply-rates. Although the Special Rapporteur on Torture has never kept any statistics concerning the reply-rates for his urgent appeals, in a recently published article he wrote that it was ‘fair to say that around 60 percent of the Governments who have received urgent appeals responded at least to one or more urgent appeals.’<sup>327</sup> In the case of the Working Group on Arbitrary Detention some statistical information could be retrieved from the Group’s annual reports, especially since 1999. From that year onwards, it has namely indicated the percentage of urgent

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322 The idea for the establishment of a Quick Response Desk within the Secretariat had been formulated in a report prepared for the High Commissioner of Human Rights on the topic of strengthening the special procedures mechanisms of the Commission. See also, U.N. Doc. E/CN.4/2001/6, para. 18 (Report of the Seventh Annual Meeting of Special Procedures Mandate Holders).

323 U.N. Doc. E/CN.4/2004/3, para. 25.

324 U.N. Doc. E/CN.4/2004/56, para. 24.

325 Ibid.

326 See *infra* Chapter V.2.1.4.

327 Van Boven 2004, p. 1649. Unfortunately, in the case of the Special Rapporteur on Torture it is not possible to retrieve such statistics from his annual reports. As was shown in Tables 3 and 4 above, the statistics included in the reports of Sir Nigel Rodley made no distinction between the number of Governments replying to normal communications (allegation letters) and the number of Governments replying to urgent appeals. The reports of Theo van Boven (since 2002) have so far not included any information concerning reply rates at all.

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appeals that were replied to by Governments. In addition, on the basis of other raw data contained in the relevant annual reports the governmental reply-rates could also be obtained.<sup>328</sup> The following table summarises the information for the period 1999-2003:

Table 6: Overall reply-rate for urgent appeals sent by the Working Group and governmental reply-rate for urgent appeals during the period 1999-2003

<i>Year</i>	<i>Total number of urgent appeals transmitted</i>	<i>Total number of urgent appeals replied to (percentage in brackets)</i>	<i>Total number of Governments to which urgent appeals were sent</i>	<i>Total number of Governments sending replies to urgent appeals (percentage in brackets)</i>
1999	101	28 (28%)	40	18 (45%)
2000	107	29 (27.5%)	46	25 (54%)
2001	79	18 (22.6%)	39	13 (33%)
2002	87	33 (38%)	47	21 (44%)
2003	157	68 (43.2%)	47	30 (63%)

The figures included in the above table suggest that over the years an increasing number of urgent appeals have been replied to. At the same time, the hard fact remains that more 50 percent of the urgent appeals are not replied to. Similarly, the figures suggest that an increasing number of Governments have apparently been willing to communicate with the Working Group, especially over the past two years. However, in the light of the fact that there have been fluctuations in the past – certainly due to the volatility of international politics – it would perhaps be too early to speak of a trend.

A further indication of the impact of the urgent appeals may be obtained from the quality of the replies received. In the case of the Special Rapporteur, the best source of information is again the opinion of the present mandate holder. In the same article that was referred to above, Theo van Boven explained that amongst the Governments which responded many did so selectively by reacting to some appeals and not to others. In addition, he pointed out that the answers he received from Governments, ranging from, *inter alia*, a denial of facts, a denial of torture, statements that the allegations were false or that the persons concerned were criminals or terrorists to the announcement of the release of the persons concerned, needed to be verified, but that

<sup>328</sup> Indeed, the overall reply-rate does not say what proportion of the total number of Governments approached replied to at least one or more urgent appeals.

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‘as yet resources and means are lacking to carry out a coherent and effective follow-up control as regards urgent appeals sent to Governments.’<sup>329</sup>

Against the background of the (non-judgmental) humanitarian nature of urgent appeals, this statement is also an implicit way of saying that many of the responses received cannot be deemed satisfactory. In the light of these practical realities the Special Rapporteur formulated the following very modest conclusion:

‘While there are many reasons for assuming that the positive effects of the urgent appeal procedure are limited, *I nourish myself* with the thought, and in some cases with the knowledge, that some victims have been spared from suffering or further suffering. Further the very existence and functioning of international human rights mechanisms invested with the authority to monitor, to appeal, to lend good humanitarian offices, to advise and to assist may *ipso facto* have a preventive and beneficial meaning and effect.’<sup>330</sup>

In the case of the Working Group on Arbitrary Detention the replies to urgent appeals are briefly summarised in the Group’s main report under the heading ‘communications giving rise to urgent appeals.’<sup>331</sup> These summaries frequently reveal that the persons concerned had been released or released on bail awaiting trial. In the light of the subject-matter of the Group’s mandate this must of course be considered a satisfactory response, although it cannot be said with certainty to what extent the release was the result of the urgent appeal. Where the replies indicated that the persons had not been released, the Working Group had usually obtained assurances from the Government that these persons would receive fair trial guarantees. To the extent that the Working Group considers these kinds of answers to be a satisfactory response to its urgent appeals, it might be said that its principal concern nowadays remains precisely the problem of non-response or selective response to some urgent appeals and not to others, rather than the quality of the responses it has received.<sup>332</sup>

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329 Van Boven 2004, p. 1651.

330 *Ibid.*, p. 1652 [emphasis added]. See also U.N. Doc. E/CN.4/2004/56, para. 26.

331 In the case of the Special Rapporteur on Torture they are included in a separate addendum containing the summaries of all communications (urgent appeals and allegation letters) and the Government replies thereto, if any.

332 This seems to be confirmed by the Working Group’s latest report in which it expresses its concern about the decrease in the response rate of its urgent appeals. U.N. Doc. E/CN.4/2005/6, para. 71.

## IV.6 COUNTRY VISITS

### IV.6.1 Working Group on Enforced or Involuntary Disappearances

#### IV.6.1.1 Origin and Development

As early as 1980 the Working Group on Enforced or Involuntary Disappearances announced its intention to carry out on-site visits to particular countries as part of its mandate.<sup>333</sup> It considered such visits to be 'one of the means by which it might best deal with allegations of (...) disappearances and gain an understanding of the circumstances surrounding such allegations.'<sup>334</sup> More specifically, the Working Group hoped to obtain first-hand information from different sources, including governmental authorities at different levels, family members of the disappeared, witnesses and (local) NGOs; also, it hoped that the working relationships established during the visits would continue afterwards.<sup>335</sup>

The idea of country visits was not a new one. Previously, the United Nations had sent fact-finding missions to South Vietnam in 1963 and, most notably, to Chile in 1978.<sup>336</sup> However, in the light of its worldwide mandate, the decision of the Working Group to engage in on-site fact-finding missions opened up unprecedented possibilities for further popularising and institutionalising the method of country visits as an instrument available to the United Nations to expose human rights violations.

Still in 1980, the Working Group took a first step towards concretising its intention of visiting States. Since on-site visits can only take place with the consent of the Government concerned, the Working Group sent letters to all countries about which it had received information relating to disappearances, asking their Governments whether:

'[they, JG] would in principle be favourably disposed towards issuing an invitation to the Group to establish (...) direct contacts through a visit (...) should the information before the Group *in the future* make such direct contacts desirable'<sup>337</sup>

From the same letter, it could be deduced that the Working Group based its competence to carry out such visits on the provision contained in paragraph 5 of Resolution 20 (XXXVI) requesting the Working Group to perform its functions 'in an effective and expeditious manner.' At the same time, the Group emphasised that, as requested by the Commission, it would use discretion in carrying out its activities.

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333 For a description of the different phases of country visits, from their preparation to the final report, see De Frouville 1996, pp. 89 ff.

334 U.N. Doc. E/CN.4/1435, paras. 8 and 31.

335 See also U.N. Doc. E/CN.4/1990/13, para. 352.

336 *Supra* Chapters II.4.3 and II.4.4.

337 U.N. Doc. E/CN.4/1435, Annex VIII [emphasis added].

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These initial steps, in particular the very diplomatic formulation of the letter (the Working Group uses the term ‘direct contacts’), must still be seen in the context of consolidating the mandate and the need to ensure the political support of Governments. Of course, what made the topic especially delicate was the fact that it had the potential of reintroducing the country-specific approach through the backdoor. Thus, when introducing the draft resolution on disappearances in 1980, the representative of France had to reassure Governments that the Commission ‘was acting to promote humanitarian ends without the intention of singling out any particular country.’<sup>338</sup>

Meanwhile, the reactions of Governments to the Working Group’s request for on-site visits were quite diverse. The Working Group itself reported that the request ‘met with some positive response’, but explained that it had not been ‘practicable’ to arrange a visit during the first six months of its existence.<sup>339</sup> A closer look at the country situations shows that some thirteen Governments had been approached to consider a country visit. Three of them, Mexico, Nicaragua and the Government of Cyprus, indicated that they would be ready to receive the Working Group in their country.<sup>340</sup> The Government of Nicaragua did remark, however, that since the period for a visit proposed by the Working Group coincided with already scheduled visits to Nicaragua by representatives of other international organisations, it would not be able to provide the needed support for such a visit by the Group.<sup>341</sup>

A second group of States seemed to leave open the possibility for a visit, but could not as yet react positively. For example, the Government of El Salvador pointed out that it had been engaged in studying reports and cases known to the Inter-American Commission on Human Rights and that, consequently, a lack of time limited the possibilities of the Government to extend the Working Group an invitation to visit.<sup>342</sup> Similarly, the Government of the Philippines [the Marcos régime, JG] requested detailed accounts and specific data ‘to enable [it] to make an appropriate decision on the request [for a visit].’<sup>343</sup>

The remaining Governments all had their own reasons for rejecting (for the time being) the possibility of visiting their countries. One country, Peru, simply had not been able to react yet.<sup>344</sup> Two other countries, Ethiopia and Indonesia, did not react to the specific issue of establishing direct contacts. The former argued that biased and politically motivated sources of information had spread false rumours about the human rights situation in the country and for that reason deserved no further elaboration. The latter emphasised that ‘as a matter of principle’ it had decided to use the limited resources available for other purposes.<sup>345</sup> Yet another country, Guatemala, had not

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338 U.N. Doc. E/CN.4/SR.1617, para. 59.

339 U.N. Doc. E/CN.4/1435, para. 8.

340 *Ibid.*, paras. 81 (Cyprus), 125 and 129 (Mexico) and 142 (Nicaragua).

341 *Ibid.*, para. 142.

342 *Ibid.*, para. 99.

343 *Ibid.*, para. 148.

344 *Ibid.*, para. 109.

345 *Ibid.*, paras. 106 (Ethiopia) and 120 (Indonesia).

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communicated with the Working Group at all.<sup>346</sup> Some Governments gave very brief justifications for turning down the request: the Government of Uruguay communicated that it was not in a position at that time to receive the Working Group; the Brazilian Government deemed a visit not to be necessary.<sup>347</sup>

The case of Chile was somewhat special since the United Nations had also appointed a Special Rapporteur to deal with the human rights situation in that country. The Government of Chile rejected this country rapporteur as *ad casum*, discriminatory and contrary to the legal equality of States and said that it would only cooperate with 'the generally applied and accepted procedures of the United Nations' if that situation changed.<sup>348</sup>

A more sophisticated response had been received from the Government of Argentina. The representative of that country apparently gave his own interpretation to the term 'direct contact', writing to the Working Group that 'he had been instructed by his Government to establish direct contacts in all matters of interest to the Working Group connected with Argentina. (...) to that end, and for any information requested of the Argentine Government, he would act as the channel for all matters falling within the competence of the Working Group.'<sup>349</sup>

An outright rejection of the method of country visits as an instrument available to the Working Group came from the Soviet Union, which declared that '[it was *not*] within the competence of the Group or its Chairman to request a State to invite one or two of its members to visit it in order to establish direct contacts with relevant bodies and individuals.'<sup>350</sup> This argument was essentially repeated by the Government of Ethiopia in 1982, expressing the opinion that the Working Group, by insisting on visiting a country, had encroached upon responsibilities which belonged exclusively to the Commission.<sup>351</sup>

It was against the background of the above reactions of Governments that the Working Group had to further implement its intention of carrying out on-site visits. In January 1982 an invitation by the Government of Mexico materialised in the Working Group's first on-site visit ever.<sup>352</sup> The visit was important, because it had the effect of undermining objections such as those formulated by the Soviet Union and Ethiopia.

At the same time, in carrying out the mission to Mexico the Working Group had to operate carefully, bearing in mind that some Member States of the Commission

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346 Ibid., para. 115.

347 Ibid., paras. 158 (Uruguay) and 165 (Brazil).

348 Ibid., para. 41.

349 Ibid., para. 72.

350 Ibid., para. 12 [emphasis added].

351 U.N. Doc. E/CN.4/1982/SR.38, para. 143.

352 Also *infra* Chapter IV.6.1.3 and IV.6.1.5. Also in 1982 two members of the Working Group visited Cyprus; this trip had only a 'preparatory nature' and at the end of it the Working Group concluded that 'it had formed the view that the Committee of Missing Persons in Cyprus provided not only adequate but also appropriate machinery for resolving the outstanding cases of disappearances from both communities.' See U.N. Doc. E/CN.4/1983/14, paras. 19 and 43 ff.

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were still opposed to the method and that other potential candidates for a visit were closely watching the outcome of the mission. In fact, by engaging in on-site visits the Working Group, more than when using other methods such as (urgent action) transmissions, put its own credibility at stake. On the one hand, it had to ensure the acceptance and the consolidation of the *method* of on-site visits as part of its mandate. This meant, amongst other things, that it had to carefully weigh the impact of the country report both internally (in the country visited) and externally. Too critical an approach risked not only provoking a sharp reaction from the Government concerned (which had voluntarily invited the Working Group) but, more seriously, it could have repercussions in the Commission with respect to the (extension of the) mandate. It might also frighten off other Governments to extend an invitation to the Working Group in the near future.<sup>353</sup> What further aggravated the dilemma was the fact that some Governments probably anticipated that the Working Group might give them 'soft' treatment in return for an invitation.<sup>354</sup> At the other end of the spectrum, the victims, their relatives and NGOs expected the Working Group to clearly document and establish the responsibility of the Government for the human rights violations committed in the country. As Rodley put it, 'it is in the nature of such missions that the report will need to give an overall assessment of the situation. This makes it difficult to credibly maintain a non-judgmental posture.'<sup>355</sup>

In its visit to Mexico the Working Group clearly gave preference to the governmental perspective, rather than the perspective of the victims. In the first place, it made clear that the visit was carried out

'within the terms of reference of *its strictly humanitarian mandate*, which provides for a public action by the Group which is carried out with discretion. The Working Group was primarily concerned *to acquire* a balanced account of reports on enforced or involuntary disappearances which have reportedly occurred in Mexico.'<sup>356</sup>

In other words, also in respect of on-site visits the Working Group applied its non-judgmental or non-accusatory approach. That approach was much reflected in the nature of the report drawn up after the completion of the mission. This report was extremely brief covering only two pages. It was not presented to the Commission as a separate document, but woven into the Group's main report. Furthermore, the report did not contain an assessment of the situation in the country and, therefore, hardly provided the Commission with any valuable input to take further action.<sup>357</sup> Finally, the Government of Mexico was 'rewarded' for its cooperative behaviour: in return for the promise to inform the relatives of disappeared persons and the Working Group of the

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353 Van Dongen 1986, pp. 476 and 477.

354 Kamminga, NILR 1987, p. 314.

355 Rodley 1999, p. 274.

356 U.N. Doc. E/CN.4/1492/Add.1, para. 2.

357 Ibid., paras. 1-8.

results of investigations, the Group decided not to take any further action concerning the remaining cases of disappearances.<sup>358</sup>

Not surprisingly, commentators criticised the Working Group for being too 'easy' on the Government. For example, Kamminga described the Group's first on-site visit as 'an embarrassing failure' and spoke about the 'Mexican deal.' According to him, 'although the delegates met both senior government representatives and domestic human rights groups, in reality it appears that they were 'taken for a ride' by the Government.'<sup>359</sup> Be that as it may, with hindsight, the event is best explained in the light of the consolidation of political support for its working methods or even inexperience, rather than a fundamental lack of independence and impartiality on the part of the (individual members of the) Working Group *vis-à-vis* Governments.<sup>360</sup>

The need to reconcile different interests placed the Working Group in a dilemma that could not be instantly solved in a satisfactory manner. It was only through an incremental approach that the Working Group could hope to achieve a better balance between the legitimate demands of the victims and their relatives, on the one hand, and the need to secure the cooperation of Governments as well as to ensure the long-term survival of the mandate on the other; and, to move increasingly away from its purely non-judgmental posture.

Such a move was first visible in 1984 when the Working Group recommended that '[w]hat may now be desirable is a firmer appeal by the Commission to the Governments concerned to increase their cooperation with the group, including a positive response to the Group's suggestions for on the spot visits.'<sup>361</sup> Several governmental delegations shared this view<sup>362</sup> and were able to move the Commission to include the following paragraph in that year's resolution concerning disappearances:

'encourages the Governments concerned to consider with special attention *the wish of the Working Group to visit their countries, when such wish is expressed*, thus enabling the Group to fulfil its mandate more effectively.'<sup>363</sup>

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358 U.N. Doc. E/CN.4/1982/SR.38, para. 69 and U.N. Doc. E/CN.4/1983/14, para. 80. The 1983 statistics for Mexico were: 100 cases received by the Working Group, 73 transmitted to the Government and 1 solved (the person was found dead). As the Government did not send the information that had been promised, the Working Group reopened the Mexican file in 1986 (U.N. Doc. E/CN.4/1987/15, paras. 64-68). This provoked resistance by the Government, which, together with Colombia, charged the Working Group with applying double standards and demanding a re-evaluation of the Group's working methods. *Supra* Chapter IV.3.1.

359 Kamminga, NILR 1987, p. 312.

360 Also De Frouville 1996, p. 33.

361 U.N. Doc. E/CN.4/1984/21, para. 177.

362 U.N. Doc. E/CN.4/1984/SR.20, para. 2 (The Netherlands); paras. 57 and 58 (France); para. 62 (Finland); para. 69 (Canada).

363 C.H.R. Res. 1984/23, para. 7 [emphasis added]; adopted without a vote on 6 March 1984.

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It was this kind of political support that the Working Group needed to further develop the method of on-site visits.<sup>364</sup> In its report over 1984, the Group explicitly referred to the Commission's resolution to justify the adoption of the following working method:

'to approach *certain* Governments with regard to paragraph 7 of Commission on Human Rights resolution 1984/23 (...)'<sup>365</sup>

This new rule shows that the Working Group was becoming more selective. It no longer consulted all Governments over which it had received information, hoping that one of them might react positively, but approached only those where it believed a visit would make sense, without, however, indicating a criterion for selection.<sup>366</sup> Implicitly the Group thus assumed the competence to approach Governments *at its own initiative*. However, it would not be until 1995 that the Working Group formalised this practice in its revised working methods.<sup>367</sup> Again, the Group probably first sought to consolidate its working methods before formalising them to the full.

In 1984 the Working Group approached the Governments of Argentina, Bolivia, El Salvador, Guatemala, Peru and the Philippines.<sup>368</sup> It received a concrete invitation for a visit from the Government of Peru, which materialised in two missions: the first visit took place in June 1985 (consent given on 12 November 1984) and the second visit took place in October 1986 (consent given on 17 September 1985).

These missions marked a turning point in the Working Group's approach towards on-site visits. The first report concerning Peru amounted to no less than 32 pages and the conclusions alone cover two and a half pages; the second report, updating the first, added another 14 pages to the total.<sup>369</sup> Formally, the Working Group underlined that the two visits should be viewed in the light of the humanitarian, non-accusatory nature

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<sup>364</sup> Meanwhile in 1984 the Working Group undertook its second on-site visit to Bolivia 'at the express invitation of the Government.' This visit still followed more or less the pattern set in the case of Mexico: the non-judgmental approach prevailed, no assessment of the situation in the country, the country report was included in the Working Group's general report and was rather short (4 pages). Moreover, the visit took place in a turbulent political context (general strike) leading to the cancellation of several meetings. In its conclusions the Working Group focused in particular on the need to provide technical assistance to the country, as previously agreed with the (new) Government: 'In the mission's view, the United Nations should try to accommodate the genuine needs of countries in the type of situation in which Bolivia finds itself, if United Nations human rights assistance is to benefit the victims of human rights abuse; such an attempt would be much more useful than (...) to (...) offer (...) the kind of assistance it may have become an invariable tradition for the United Nations to provide and which is not really what is required.' U.N. Doc. E/CN.4/1985/15, paras. 51-67, especially 66 and 124.

<sup>365</sup> Ibid., para. 79 (f.) [emphasis added], see also para. 76.

<sup>366</sup> In 1995 the Working Group adopted the rule that it would approach Governments with a 'sizeable number of cases of disappearances,' U.N. Doc. E/CN.4/1996/38, Annex I, para. 23. However, in 2001 the phrase has been replaced by 'when considered appropriate,' U.N. Doc. E/CN.4/2002/79, Annex I, para. 24.

<sup>367</sup> U.N. Doc. E/CN.4/1996/38, Annex I, para. 23.

<sup>368</sup> U.N. Doc. E/CN.4/1985/15, para. 29.

<sup>369</sup> See U.N. Doc. E/CN.4/1986/18/Add.1 and U.N. Doc. E/CN.4/1987/15/Add.1.

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of its mandate.<sup>370</sup> In reality, however, the Working Group somewhat distanced itself from the humanitarian approach in as much as it no longer hesitated to state the facts and even to include some value judgments of its own.<sup>371</sup> It also included for the first time a number of short-term and long-term recommendations in the reports. These different steps were justified as follows:

‘The Working Group is not a court of law and hence is not called upon to establish the guilt or innocence of individuals in relation to specific allegations. Instead, in addition to clarifying cases, it is called upon, at a higher level of abstraction, *to establish what the mechanics are and who is involved* in a given question of enforced or involuntary disappearances, with a view to informing the Commission accordingly. Therefore, the standards of evidence to be met by prosecutors and judges in criminal procedures do not come into play. Nonetheless, the group is *bound to evaluate any situation of disappearances in the light of all material and testimonies available to it* after carefully weighing their veracity.’<sup>372</sup>

The two reports contained, *inter alia*, an assessment of the context of the violence (including the economic and social consequences thereof), an analysis of the legal and institutional framework in Peru, detailed information on disappearances received from different non-governmental sources, the steps undertaken by the relatives of missing persons before the national authorities and the position of the Government and other official sources. In the first report, the Working Group acknowledged that the situation of missing persons in Peru must be viewed against the overall context of violence existing in the country, but also established that ‘the largest proportion of disappearances occurred in the course of the counter-insurgency campaign undertaken by the various branches of the armed forces and the police since 1982.’ Moreover, it reported on the ‘institutional paralysis in matters pertaining to the protection of human rights (...) [a]s a result (...) there are no known cases of those thought responsible having been convicted.’<sup>373</sup>

These conclusions were repeated in the second report, where the Working Group wrote that ‘disappearances still continue to occur in Peru on an appreciable scale, and *other forms of violence at the hands of Government forces* appear to have increased.’ On the issue of institutional paralysis, it concluded that ‘[I]ittle progress can be reported (...) In the majority of cases prosecutors are still obstructed (...) [t]he judiciary seems ill at ease with habeas corpus proceedings (...)’<sup>374</sup>

From a political perspective, the reports on Peru also broke new ground in the way they were presented to the Commission. For the first time, these thematic country

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370 U.N. Doc. E/CN.4/1986/18/Add.1, para. 5.

371 See also Van Dongen 1986, pp. 475 and 476.

372 U.N. Doc. E/CN.4/1986/18/Add.1, para. 102 [emphasis added].

373 *Ibid.*, paras. 106 and 108. On the considerations behind the formulations used in the report, see Van Dongen 1986, pp. 476 and 477.

374 U.N. Doc. E/CN.4/1987/15/Add.1, paras. 48 [emphasis added] and 49.

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reports were circulated as separate addenda to the Working Group's general report, hoping that this would draw attention and publicity to them. Fully aware of the impact this move could have on potential target States, the decision to include the country-report in a separate addendum had been justified as follows:

'Since the report on the mission had to take account of material of an unprecedented scale and, furthermore, describes the situation at the time of the visit, it could not be included in the traditional country subsection but has been issued as addendum 1 to the present report.'<sup>375</sup>

A limit which the Working Group continued to respect in carrying out on-site visits was the thematic nature of the object of its mandate. It clearly established the formal limit of the mandate in the first report on Peru:

'As the Working Group's mandate is limited to the examination of questions relevant to enforced or involuntary disappearances (...) *allegations of summary or arbitrary executions and torture*, that were brought to the attention of the two members of the Working Group *could not be dealt with on the merits in the framework of this report*.'<sup>376</sup>

For this reason, the Working Group only referred to '*other forms of violence at the hands of Government forces*' and did not specify these forms of violence in terms of concrete violations of human rights.

The reports on Peru became a model for subsequent visits to Guatemala (1987)<sup>377</sup> and Colombia (1988).<sup>378</sup> Generally speaking, the mission reports drawn up after each of these visits confirmed the more assertive stance adopted by the Working Group. At the same time, the Working Group maintained a certain mild stance towards the Government in power at that time. In particular, it refrained from attributing responsibility for disappearances directly to any of them; rather, it tended to channel such responsibility through documenting the involvement of the army (or groups linked thereto). Thus, in the case of Guatemala, the Working Group clearly identified the armed forces as the main party responsible for the continuing practice of disappearances and, logically, as an obstacle to investigating and solving individual cases. According to the Working Group:

'Disappearances still occur in substantial numbers, *generally attributed to continued repressive action on the part of the military and groups acting in connivance with them* (...) in areas where the situation is fully controlled by the armed forces, disappearances cannot be credibly attributed to the members of the guerilla (...) *habeas corpus* proceedings come to a *stop at the barracks gate, military authorities being unwilling to cooper-*

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375 U.N. Doc. E/CN.4/1986/18, para. 5. Also Van Dongen 1986, p. 470.

376 U.N. Doc. E/CN.4/1986/18/Add.1, para. 3.

377 U.N. Doc. E/CN.4/1988/19/Add.1.

378 U.N. Doc. E/CN.4/1989/18/Add.1.

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*ate beyond that point* and the judiciary not being strong enough to pursue its aims with the necessary vigour; proceedings are further hampered by the fact that witnesses fail to give testimony for fear of reprisals, if not out of despondency.<sup>379</sup>

Also in the case of Colombia the Working Group established the involvement of the armed forces in the practice of disappearances.

‘All in all, having carefully weighed the material available, the Working Group is of the view that, in the majority of the cases it has transmitted, circumstantial evidence strongly suggests or precise information clearly demonstrates involvement of units of armed forces or security services in enforced or involuntary disappearances.’<sup>380</sup>

In situations such as those relating to Guatemala or Colombia, where violence was (is) so widespread, the Working Group clearly had no alternative but to try to strengthen the position of the civilian Government vis-à-vis the army.<sup>381</sup> Therefore, in both situations, it recognised the ‘Herculean task’ of the Government in the light of ‘the heritage of protracted military rule’ (Guatemala) and the ‘magnitude of Colombia’s predicament.’<sup>382</sup>

The next step in the development of the method of on-site visits came in 1990 as the Working Group travelled to the Philippines.<sup>383</sup> Earlier that year, the Working Group had seized the opportunity of the presentation of its tenth report to the Commission to highlight some aspects of its approach towards disappearances. On that occasion, it not only emphasised the method of on-site visits as a ‘preferred option for assessing the overall situation of disappearances in a given country’, but also made the following remark concerning ‘the manner in which [it] expresses a position’:

‘As a rule, the Group never submits an evaluation of any given situation of disappearances. Under the various country sections of its general reports, the Group *describes* to the Commission what action it has taken, and gives a brief summary of the viewpoints submitted (...) The conclusions and recommendations in its 10 general reports do *not* pertain to the situation in any country in particular, at least not explicitly so. In the four reports on its visits to various countries, however, the Group felt it was in a *better position to offer its own analysis* of the situation and provide *specific* recommendations.’<sup>384</sup>

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379 U.N. Doc. E/CN.4/1988/19/Add.1, paras. 78 and 79 [emphasis added].

380 U.N. Doc. E/CN.4/1989/18/Add.1, para. 126, also para. 136.

381 The situation in Guatemala had also been the object of a country-specific mandate from 1982 to 1998 (as of 1987 under the agenda item of ‘advisory services’).

382 See U.N. Doc. E/CN.4/1988/19/Add.1, para. 86 (Guatemala) and U.N. Doc. E/CN.4/1989/18/Add.1, para. 129 (Colombia).

383 U.N. Doc. E/CN.4/1991/20/Add.1.

384 U.N. Doc. E/CN.4/1990/13, paras. 352 and 353 [emphasis added].

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It was this approach that was subsequently applied with even more rigour in the case of the on-site visit to the Philippines. The report of the mission to that country was the first one not to contain a reference to the Group's humanitarian approach.<sup>385</sup> More importantly, as regards the practice of the previous Government of President Marcos [brought down in 1986, JG], the Working Group established that '[t]he Marcos régime evidently used disappearances as one of its preferred techniques of combating social upheaval, armed or unarmed.'<sup>386</sup> However, it did not spare the Government in power at that moment either:

'Disappearances are continuing under the present Government, despite a comprehensive policy towards promotion and protection of human rights.

(...)

The Government is in a position to take decisive action to redress the influence of some of these factors [identified as contributing to the persistence of the phenomenon, JG]. Although it was widely acknowledged (...) that the Government had indeed taken important steps, the prevailing view was that it had not done enough (...) and that more assertive efforts were required to improve the overall human rights climate. The Government's policy was perceived as decidedly leaning towards law and order (...) and that consequently its human rights policy needed to be reoriented. *The Working Group feels comfortable with that view.*<sup>387</sup>

Finally, the mission report on the Philippines contained a significant number of recommendations, which the Working Group justified as '[intending] to assist the Government.'<sup>388</sup> These recommendations related to, *inter alia*, the need to review (specific pieces of) legislation, the separation of powers (severance of national police from the army), the disbanding of civil defence forces, the abolition of certain administrative practices and specific policies, the role of the national parliament etc. In comparison to the recommendations contained in the earlier mission reports concerning Peru, Guatemala and Colombia, those formulated with respect to the situation in the Philippines were presented in a more visible manner, separately from the conclusions. More importantly, the recommendations had generally become more specific and had been formulated in a less open-ended manner than before.

Albeit all country situations have their own characteristics and dynamics and are difficult to compare *inter se*, a few examples may illustrate the point. In 1988 the Working Group recommended the following to the Government of Colombia:

'Pertinent legal and institutional measures should restore *habeas corpus* to its proper place (...) The Government might give further consideration to enhancing the physical protection of members of the courts and to strengthening their resources (...) The attitude of the armed forces high command towards disappearances allegedly caused by

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385 To reappear again in the Working Group's mission report on Sri Lanka in, *infra*.

386 U.N. Doc. E/CN.4/1991/20/Add.1, para. 159.

387 *Ibid.*, paras. 161 and 168 [emphasis added].

388 *Ibid.*, paras. 168 (a)-(j) and 169-170.

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its subordinates would gain in clarity through a publicly stated resolve to prosecute human rights violations with all necessary rigour. (...) The Office [of the Attorney-General] deserves to be strengthened with a view to its independent and effective functioning.<sup>389</sup>

By contrast, the mission report concerning the Philippines contained, *inter alia*, the following recommendations:

‘in the case the Supreme Court has no immediate occasion to review its recent rulings on warrantless arrest and so-called saturation drives, the Government should introduce legislation to narrow powers of arrest by strictly circumscribing which category of public official may arrest civilians for which category of offences’; or, ‘in order to facilitate the search for missing persons, regional and central registers of arrest should be established and be accessible to interested parties, including NGOs. All military camps and headquarters should be asked to provide periodically updated listing of all detainees under their custody. The Departments of National Defence and of Justice must investigate reports on suspected safehouses and take appropriate action. The Philippine Commission on Human Rights may be empowered to make unannounced spot-checks into places of detention.’<sup>390</sup>

As the Working Group visited Sri Lanka in 1991<sup>391</sup> and 1992,<sup>392</sup> the tendency to formulate more detailed country-specific recommendations had evolved to the point where the Group virtually showed no restraint in recommending to the Government not only what type of measures it deemed necessary to improve the situation, but also what minimum requirements such measures should meet. As a typical example the following recommendation concerning civil defence units may be cited:

‘Civil defence units should only be formed on a purely voluntary basis, under the control of civil authorities. They should come under stricter control in terms of command structure, operations and supply of arms and ammunition. Care should be taken that only properly trained personnel in uniform are allowed to carry officially issued arms and use official vehicles in carrying out operations. This may prevent the present practice of civilian defence units in plain clothes arresting people at will (...).’<sup>393</sup>

Significantly, the (incremental) practice of adopting increasingly detailed country-specific recommendations has been systematically – albeit indirectly<sup>394</sup> – endorsed by the Commission on Human Rights, which from 1989 onwards has been asking the

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389 U.N. Doc. E/CN.4/1989/18/Add.1, paras. 134- 137.

390 U.N. Doc. E/CN.4/1991/20/Add.1, para. 168 (c) and (g).

391 U.N. Doc. E/CN.4/1992/18/Add.1.

392 U.N. Doc. E/CN.4/1993/25/Add.1.

393 U.N. Doc. E/CN.4/1992/18/Add.1, para. 204 (m).

394 *Infra* Chapter IV.6.1.5.

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Governments which had invited the Working Group 'to give all necessary attention to its recommendations.'<sup>395</sup>

Furthermore, since December 1992 the Working Group has been able to draw support for its recommendations from the Disappearances Declaration adopted by the General Assembly. This instrument, dealing specifically with the phenomenon of disappearances and listing concrete steps and measures to be taken by Governments, has certainly benefited the legitimacy of the Group's (country-specific) recommendations. From that perspective, it is not surprising that many of the recommendations in the mission reports concerning Yemen (1998),<sup>396</sup> Turkey (1998)<sup>397</sup> and Sri Lanka (1999)<sup>398</sup> have been based directly on the relevant articles of the Disappearances Declaration.

All in all, one could conclude that already by the early 1990s the method of on-site visits, including the practice of formulating country-specific recommendations, had been clearly established as an inherent part of the Working Group's mandate. Moreover, as will be illustrated below in the case-studies concerning the Special Rapporteur on Torture and the Working Group on Arbitrary Detention, the method had also evolved under other thematic procedures. In any case, by 1993 special procedures mandate holders felt strong enough to issue the following joint declaration at the occasion of the Vienna World Conference on Human Rights:

'In dealing with such serious matters, one cannot but emphasize the importance of field missions which enable us to acquaint ourselves with the objective reality of situations. The clarity gained in the process is vital to accurate assessments and reporting, which also serve the best interests of the Governments concerned. Consequently, field missions should be seen by Governments as a natural component of every mandate.'<sup>399</sup>

*IV.6.1.2 State Consent as a Precondition for an On-site Visit*

However, albeit the Commission has sanctioned both the method of on-site visits as well as the Working Group's practice not to wait passively for an invitation to come (but to approach Governments at its own initiative), it has never gone so far as to adopt formulations prejudging the competence of States to decide freely whether or not to invite the Working Group on its territory.<sup>400</sup> As reflected in the pertinent resolutions adopted since 1984, the great majority of States still regard this decision as their sovereign prerogative.

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<sup>395</sup> C.H.R. Res. 1989/27, para. 11 and C.H.R. Res. 2003/38, para. 6 (a), also *infra* Chapter IV.6.1.5.

<sup>396</sup> U.N. Doc. E/CN.4/1999/62/Add.1.

<sup>397</sup> U.N. Doc. E/CN.4/1999/62/Add.2.

<sup>398</sup> U.N. Doc. E/CN.4/2000/64/Add.1.

<sup>399</sup> U.N. Doc. A/CONF.157/9 [emphasis added].

<sup>400</sup> For this reason perhaps, the Working Group waited until 1995 before formally asserting competence '[to take] the initiative of approaching Governments with a view to carrying out on-site visits.' See U.N. Doc. E/CN.4/1996/36, Annex I, para. 23 [emphasis added].

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Thus, Commission Resolution 1984/23 only '[*encouraged*] the Governments concerned to consider with special attention the wish of the Working Group to visit their countries, when such wish is expressed.'<sup>401</sup> From 1988 onwards, the Commission dropped any reference to a wish for a visit expressed by the Working Group and simply '[*encouraged*] the Governments concerned to give serious consideration to inviting the Working Group to visit their country.'<sup>402</sup>

The 1991 initiative to reinforce the existing thematic mandates by adopting a resolution entitled 'Human rights and thematic procedures' has not been able to make a difference either.<sup>403</sup> That resolution appealed to the Governments concerned to increase their cooperation with thematic procedures in all aspects of their work, *inter alia*, by

'[*encouraging*] Governments encountering problems in the field of human rights to cooperate more closely with the Commission through the pertinent thematic procedures, in particular by inviting a Special Rapporteur or the Working Group on Enforced or Involuntary Disappearances to visit their country.'

In 1995, the Commission reformulated this phrase in a softer manner, '[*encouraging*] all Governments to cooperate more closely with the Commission through the pertinent thematic procedures and, where appropriate, by inviting a thematic special rapporteur or working group to visit their countries.'<sup>404</sup> Since 1998 the formulation seems to have become even weaker with the Commission '[*encouraging*] all Governments to cooperate with the Commission through the pertinent thematic procedures by considering inviting thematic special rapporteurs, representatives, experts and working groups to visit their countries.'<sup>405</sup>

The strongest formulation adopted thus far has been the 1997 annual disappearances resolution, which '[*urged*] the Governments concerned to invite the Working Group to visit their countries.'<sup>406</sup> The resolution was a reaction to the very poor results obtained by the Working Group in 1995 and 1996. In those years the Working Group's request for an invitation from the Government of India had been turned down and it had received no reply to similar requests addressed to the Governments of Turkey and Iraq.<sup>407</sup> However, aware of the wider implications that such a strong appeal could have, the Government of Cuba, amongst others, requested 'to be reassured that the decision

401 C.H.R. Res. 1984/23, para. 7 [emphasis added].

402 C.H.R. Res. 1988/34, para. 10 [emphasis added].

403 C.H.R. Res. 1991/31, adopted without a vote on 5 March 1991. See also U.N. Doc. E/CN.4/1991/SR.52, paras. 85-90.

404 C.H.R. Res. 1995/87, para. 4 [emphasis added].

405 C.H.R. Res. 1998/74, para. 2(b) [emphasis added]; the formulation has been maintained in the latest version of the 'Human rights and thematic procedures' resolution, C.H.R. Res. 2002/84, para. 2(b).

406 C.H.R. Res. 1997/26, para. 4(d) [emphasis added].

407 Turkey would eventually reply in 1997 and the visit would take place in September 1998, see U.N. Doc. E/CN.4/1998/43, para. 9 and U.N. Doc. E/CN.4/1999/62/Add. 2. Iraq (under Saddam Hussein) never replied at all.

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by a country not to invite the Working Group, (...) or to postpone such an invitation, would *not be held against the country in question*.<sup>408</sup> The Government of France, the sponsor of the resolution, replied that 'the subparagraph in question contained *no elements tending to any derogatory conclusion* if a country did not issue an invitation.'<sup>409</sup>

The next year, in 1998, the Commission then adopted the following somewhat ambiguous formula, which has been maintained ever since:

'*Urges* the Governments concerned: (a) to cooperate with the Working Group and help it to carry out its mandate effectively, in particular by inviting it *freely* to visit their countries.'<sup>410</sup>

Particularly the use of the term 'freely' could be interpreted both as an exhortation to Governments to react positively to a request for an invitation by allowing thematic procedures to freely visit their countries, *i.e.* without any obstacles and as a reminder of the fact that Governments should be able to decide freely, *i.e.* without outside interference, whether or not to extend an invitation to a thematic procedure requesting one.

It follows from the above that there exists, as yet, insufficient political support in the Commission to formulate unambiguously and as a general rule that Governments should react positively to a request for an on-site visit by one of the special procedures; let alone that (political) sanctions might be applied in the case of a refusal. The annual 'Human rights and thematic procedures' resolutions are in fact a good example of the current stalemate. For one group of States (the traditional sponsors thereof) the resolution embodies 'the obligation of Governments to cooperate with the thematic procedures.'<sup>411</sup> Another group of States, exemplified by Cuba and other members of the so-called Like-Minded Group,<sup>412</sup> only accept this resolution to the extent that it '[stresses] that the Commission should instruct the special procedures as to how resolutions were to be implemented rather than to leave the procedures to take the initiative.'<sup>413</sup>

The latest attempt to break the deadlock was the 1999 initiative of the Government of Norway to issue a so-called standing invitation. In this invitation, which bears a certain resemblance to the compulsory jurisdiction clause contained in Article 36 paragraph 2 of the Statute of the International Court of Justice, the Government

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408 U.N. Doc. E/CN.4/1997/SR.57, para. 3 [emphasis added].

409 Ibid., para. 4 [emphasis added].

410 C.H.R. Res. 1998/40, para. 4(a) [emphasis added]. See also C.H.R. Res. 2003/38, para. 4(a).

411 See U.N. Doc. E/CN.4/2002/SR.57, para. 33 (Czech Republic).

412 The Like Minded Group (LMG) is loosely made up of States such as Algeria, China, Cuba, Egypt, Indonesia, Iran, Libya, Malaysia, Pakistan, the Philippines, Saudi Arabia, Sudan, among others. Generally speaking, what unites these States is their efforts to slow down the special procedures of the Commission.

413 See U.N. Doc. E/CN.4/1998/SR.58, para. 23 (Cuba). See also *supra* Chapter III.3.2.2.1 (Annual Meetings of Special Procedures Mandate Holders).

indicated in advance its willingness to receive any thematic procedure expressing the wish to carry out an on-site visit to Norway. The initiative has so far been followed by 49 States: 37 from Western and Eastern Europe, including Turkey, Canada and New Zealand; 9 from Latin America (amongst others Colombia, Peru, Guatemala); 1 from Asia (Iran) and 2 from Africa (Sierra Leone and South Africa).<sup>414</sup> It is too early to conclude whether the strategy of standing invitations will actually pay off and whether it will result in inducing the Commission to adopt a different attitude in respect of the freedom of States to accept or refuse on-site visits. For the moment, therefore, the Norwegian initiative, rather than establishing a new rule, still confirms that the decision to extend an invitation for an on-site visit remains one which is within the exclusive competence of the State in question.

The standpoint of the Commission has had important practical consequences. In particular, it explains why a discrepancy has always existed between the countries which ought to have been visited if objective criteria were applied and those which have actually been visited. Under the present scheme political circumstances determine whether a request for an invitation materialises in a concrete case at hand: much depends on the willingness of the State concerned or, in the absence thereof, on the willingness of the (Member States of the) Commission to 'persuade' that *individual* State to extend an invitation to the Working Group. However, even in the latter type of situation a Government may still withhold its consent. At this point the Commission has also reached the absolute limits of its competences under the Charter.

#### *IV.6.1.3 State Consent in Practice*

In the case of the Working Group, the Governments of the countries visited by it have all had their own reasons for extending an invitation. A majority of them have probably acted out of sheer political calculation and estimated that the acceptance of an on-site visit would be rewarded by the Commission. Some Governments (Mexico, first visit to Peru) might have gambled that, in return for an on-site visit, the Commission would give them 'soft' treatment or even close their dossier in its entirety. Other (newly elected) Governments of countries finding themselves in a phase of transition to democracy or otherwise (Bolivia, second visit to Peru, Guatemala, Colombia, the Philippines) might have hoped that an invitation could help to strengthen their own position inside the country as well as the democratic image of the country abroad.

In 1992 the Commission overtly pressured Sri Lanka to accept a second on-site visit by the Working Group. The threat to adopt a country-specific resolution – still regarded politically more harmful – induced the Government of that country to agree to a so-called Chairman's statement read out on behalf of the Commission. In this statement the Chairman expressed the Commission's serious concern about, *inter alia*,

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<sup>414</sup> The Office of the High Commissioner for Human Rights maintains a list of these countries on its website (latest update 3 February 2004, no changes since that date at the time of writing, *i.e.* August 2004).

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the large number of disappearances reported in the past years in Sri Lanka and *requested* the Government of that country *to extend an invitation* to the Working Group to carry out a return visit. The request for an invitation was merely a formality, outwardly upholding the principle that a decision to extend such an invitation fell within the sovereignty of Sri Lanka, since the acceptance of a return visit by the Working Group had been part of the 'deal'.<sup>415</sup> The (follow-up) visit took place in the same year.<sup>416</sup>

In 1995 the Government of Colombia addressed an invitation to the Working Group to visit the country after the Commission had exerted similar political pressure as in the case of Sri Lanka.<sup>417</sup> Interestingly, this invitation has until now (2004) not resulted in an actual visit.<sup>418</sup>

A small number of Governments approached by the Working Group have never invited it for an official on-site visit. For example, in 1995, the Government of India declined to invite the Working Group. This refusal did not have any political consequences for that country.<sup>419</sup> Similarly, the Government of Algeria has so far not been 'punished' for not replying to a request first formulated in 2000.<sup>420</sup> An exceptional situation has been the case of Iraq. On two occasions, in 1988 and 1995 respectively, the Working Group sought an invitation from the Government of that country. Despite maximum political pressure, the Commission established a country rapporteur in 1991, but the Government never even bothered to reply.<sup>421</sup> In one instance, the Working Group has itself declined to honour an invitation for an on-site visit. In 1991, it turned down an invitation by the Government of Ecuador, which it had not requested, on the ground of 'previous engagements'.<sup>422</sup>

Finally, the voluntary nature of on-site visits may also be illustrated in another way by the case of Argentina. As far back as 1984 the Working Group had indicated its willingness to visit the country, to which the (newly-elected democratic) Government reacted in 1985 by allowing the Working Group to hold one of its annual sessions in Buenos Aires. Although the session on Argentine territory offered plenty of opportunities to speak with the national authorities as well as sectors of civil society and thus to obtain first-hand information on the situation in the country, it never had the character

415 See also U.N. Doc. E/CN.4/1993/25, para. 20. *Infra* Chapter IV.6.1.5.

416 The report of the second visit is contained in U.N. Doc. E/CN.4/1993/25/Add.1.

417 See De Frouville 1996, pp. 92 and 93. Also U.N. Doc. E/CN.4/1996/38, para. 30.

418 The visit had originally been planned for 1996, but was postponed for financial reasons. Another ground for postponement was apparently that thematic procedures wanted to know, first, what steps had been taken to implement earlier recommendations. HRM, Nos. 32-33 September 1996, pp. 2-43. The Working Group only reported that the visit had been postponed, U.N. Doc. E/CN.4/1997/34, para. 11; the other reasons can be found, *inter alia*, in the report of the Special Rapporteur on Torture who had also been invited, U.N. Doc. E/CN.4/1996/35, para. 51. *Infra* Chapter IV.6.2.

419 U.N. Doc. E/CN.4/1996/38, paras. 31 and 249.

420 U.N. Doc. E/CN.4/2001/68, para. 14 and U.N. Doc. E/CN.4/2003/70, para. 16.

421 U.N. Doc. E/CN.4/2003/70, para. 16 and U.N. Doc. E/CN.4/2004/58, para. 18.

422 U.N. Doc. E/CN.4/1992/18, para. 17.

of an official on-site visit.<sup>423</sup> After that year, the Working Group has never actively sought to visit the country again. It was not until very recently, in September 2003, that the Government of Argentina itself extended the Working Group an invitation for an official on-site visit '*with a view to assisting in the clarification of past cases*', the majority of which occurred as far back as 1975-1978.<sup>424</sup>

#### *IV.6.1.4 Negotiations on the Modalities of an On-site Visit*

When the Working Group has obtained an invitation, the process leading to the eventual on-site visit enters a new phase: the phase of negotiating the terms or the modalities of the visit. It is at this stage that questions such as the date of the visit, the length of the visit and other conditions relating the visit must be settled. Here, we enter an extremely empirical field.<sup>425</sup> The negotiating process largely takes place behind closed doors; it is usually not accounted for in the reports of the Working Group and is one in which relatively few official rules have been established. In the light of the interests at stake for both parties, negotiations can be difficult and protracted and offer ample opportunity for political manipulation, delaying strategies or other attempts to limit the potential impact of the visit.

The Working Group itself has never defined any formal rules concerning the minimum conditions to be satisfied before it accepts a visit; it has long preferred to work on the basis of informal principles, more easily adaptable to the circumstances of the case. Other thematic procedures, for example the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, have occasionally published the minimum conditions for a visit.<sup>426</sup> In 1997 the United Nations published general guidelines valid for all the Commission's special procedures engaged in fact-finding missions. This document, entitled '*Terms of reference for fact-finding missions by Special Rapporteurs/Representatives of the Commission on Human Rights*', contains a number of minimum guarantees and facilities to be given by the Government which has invited one of the Commission's special procedures:

- '(a) Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;
- (b) Freedom of inquiry, in particular as regards:
  - (i) Access to all prisons, detention centres and places of interrogation;
  - (ii) Contacts with central and local authorities of all branches of government;
  - (iii) Contacts with representatives of non-governmental organizations, other private institutions and the media;

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423 See U.N. Doc. E/CN.4/1986/18, paras. 10 and 11.

424 U.N. Doc. E/CN.4/2004/58, para. 44 [emphasis added].

425 De Frouville 1996, pp. 93 and 94.

426 U.N. Doc. E/CN.4/1988/22, Annex, para. 10.

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- (iv) Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the special rapporteur; and
- (v) Full access to all documentary material relevant to the mandate;
- (c) Assurance by the Government that no persons, official or private individuals who have been in contact with the special rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings;
- (d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above;
- (e) Extension of the same guarantees and facilities mentioned above to the appropriate United Nations staff who will assist the special rapporteur/representative before, during and after the visit.<sup>427</sup>

In the majority of cases of countries that had extended an invitation for an on-site visit to the Working Group, the ensuing negotiations concerning the modalities of that visit have not posed insurmountable obstacles. On average about a year elapses between the issuing of an invitation and the actual carrying out of the on-site visit. On one occasion, in the case of the Philippines, the Working Group decided to postpone a visit originally planned for January 1990 on the ground that 'conditions during the (...) period would limit the Group's possibilities to travel freely to all places it wanted to visit and to contact all authorities and witnesses relevant to its mandate.'<sup>428</sup> It therefore proposed to the Government to suggest new dates for the visit. The visit eventually took place in August/September 1990 without any limitations being placed on the Group's freedom of movement and inquiry.<sup>429</sup>

More recently, however, the Working Group has received and accepted invitations from the Governments of Colombia (1995)<sup>430</sup> and Iran (1997), but has so far not succeeded in concretising them in actual visits. Though not necessarily a result of the intransigence of the Governments concerned, until 2003 the annual reports remained essentially silent on that topic; it is of course detrimental to the Working Group's credibility to have to inform the Commission year in year out that 'a mutually convenient date for a visit is being sought.'<sup>431</sup> In 2004 the Working Group reported to the Commission that the visit to Iran originally due for June 2003 had been cancelled due to the sudden illness of its Chairman.<sup>432</sup> In the same year the Group reported to the

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427 See U.N. Doc. E/CN.4/1998/45, Appendix V. The 'Terms of reference' have been included in the Manual for Special Rapporteurs adopted by consensus by the annual meeting of special procedures mandate holders in 1999, see U.N. Doc. E/CN.4/2000/5, para. 55.

428 U.N. Doc. E/CN.4/1990/13, para. 10.

429 U.N. Doc. E/CN.4/1991/20/Add.1, paras. 1-6.

430 *Supra* Chapter IV.6.1.3.

431 See U.N. Doc. E/CN.4/2003/70, paras. 14 and 15.

432 U.N. Doc. E/CN.4/2004/58, para. 16. On 27 July 2004 it was announced that the mission to Iran, which should have taken place from 25 to 28 July 2004, was again postponed, this time at the request of the Government. The authorities proposed that it should now take place in October 2004 at the latest. Negotiations to that end are ongoing.

Commission that in November 2002 it had been informed by the Government of Colombia that 'owing to a change of Government, there was a need to initiate new steps with a view to such a visit taking place.' Subsequently, on two occasions (November 2002/April 2003) the Group reiterated its interest in visiting the country and is currently awaiting a response from the Government.<sup>433</sup>

#### *IV.6.1.5 The Visit itself and its Follow-up*

Next, after the modalities of a visit have been agreed upon and a date has been set, the actual visit may finally take place. It is at this point that the agreement between the Working Group and the Government concerned will be tested in practice. In the case of a breach of that agreement by the Government, for example by denying access to a prison or a military compound previously agreed upon, there is not much the Working Group can do apart from protesting and reporting (or threatening to report) the event to the Commission. Normally this will have little direct impact, but it may have consequences for the Government's international reputation.

Generally speaking, the Governments of the countries visited by the Working Group have not been un-cooperative.<sup>434</sup> Restrictions imposed on the Group's freedom of movement, for example, have been relatively few and date back to the 1980s. Thus, during its first visit to Mexico (1982) the Working Group reported that it was not able to receive permission to enter a military compound allegedly connected with disappearances.<sup>435</sup> Similarly, access to military compounds had also been denied during the Group's two visits to Peru (1985 and 1986) and was subsequently reported to the Commission.<sup>436</sup> During the visit to Bolivia (1984) the Working Group saw its freedom of movement and freedom of inquiry restricted due to a situation of general unrest in the country.<sup>437</sup> Finally, in the case of the Philippines (1990) the members of the mission reported that they regretted that the President of the Supreme Court 'whom they had repeatedly contacted during the visit' was not able to meet with them.<sup>438</sup> None of the above incidents reported to the Commission have had political implications for the country concerned.<sup>439</sup>

However important a technique available to the Working Group may be, the added value of on-site visits to selected countries may nevertheless remain limited if no

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433 U.N. Doc. E/CN.4/2004/58, para. 17.

434 In the introduction to the respective country reports the Group usually mentions the degree of cooperation received from the Government concerned (of course it might be a tactical error to provoke a Government already at this stage of the report). For the latest three reports see U.N. Doc. E/CN.4/1999/62/Add.1, para. 6 (Yemen), U.N. Doc. E/CN.4/1999/62/Add.2, para. 6 (Turkey) and U.N. Doc. E/CN.4/2000/64/Add.1, para. 6 (Sri Lanka).

435 U.N. Doc. E/CN.4/1492/Add.1, para. 4.

436 U.N. Doc. E/CN.4/1986/18/Add.1, para. 2 and U.N. Doc. E/CN.4/1987/15/Add.1, para. 2.

437 U.N. Doc. E/CN.4/1985/15, para. 54.

438 U.N. Doc. E/CN.4/1991/20/Add.1, para. 6.

439 *Infra*.

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follow-up is given to the Group's recommendations or the visit does not otherwise succeed in establishing a 'dialogue' with the Government concerned.

The Working Group first raised the problem of following up country-specific recommendations in its 1989 report, presented to the Commission in 1990. In that report the Group noted that, despite the Commission's call to the Governments concerned to give all necessary attention to the Working Group's recommendations, it had 'no information to present on the extent to which any follow-up is indeed being given to those recommendations.' Consequently, it asked the Commission to 'take a more critical look at this matter and accord it due priority at its [next] session.'<sup>440</sup> During the debate some Governments referred to the matter, and as a first step the Commission '[urged] the Governments concerned to intensify their cooperation with the Working Group in regard to any measure taken in pursuance of recommendations addressed to them by the Group.'<sup>441</sup>

Unless effective follow-up and publicity is given to recommendations, there is a real risk that Governments will start regarding the method of on-site visits as a convenient means to show their good intentions to the Commission, anticipating that the dossier will be subsequently closed afterwards.<sup>442</sup> In 1991, the Working Group hinted at this problem when it again expressed its concern about the lack of any follow-up given to its recommendations. It mentioned by name the Governments of Peru, Guatemala and Colombia to which it had sent letters requesting them to report on 'the consideration given (...) to the observations and recommendations, as well as the steps taken to implement the latter or the constraints which might have prevented their implementation.'<sup>443</sup> Except for Colombia, none of the Governments provided the information requested. Thus, the Working Group reported to the Commission that:

'The Commission's call for information (...) has not in any way been heeded by the Governments *named*. The Group is of the view that the Commission should follow the matter closely, *lest mission reports receive only a passing reference during the session concerned and are forgotten about soon afterwards, including the Government addressed*.'<sup>444</sup>

However, just as the Commission cannot force a Government to accept an on-site visit against its will, so it cannot force a Government to give effect to any recommendations formulated by the Working Group. Albeit Governments have accepted the competence of the Working Group to formulate country-specific recommendations, there is clearly nothing in the Charter which would allow the Commission or one of its subsidiary

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440 U.N. Doc. E/CN.4/1990/13, para. 354.

441 See, for example, U.N. Doc. E/CN.4/1990/SR.23, para. 107 (Sweden) and C.H.R. Res. 1990/30, para. 11; the phrase was still included in the Commission's latest resolution on disappearances, C.H.R. Res. 2003/38, para. 4 (b).

442 Also De Frouville 1996, pp. 111 ff.

443 U.N. Doc. E/CN.4/1991/20, para. 17.

444 *Ibid.*, para. 413 [emphasis added].

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organs to legislate, with binding force, for any Government. It is exclusively through political persuasion – the power of international public opinion – that the Commission or a subsidiary organ may spur on a Government to implement recommendations.<sup>445</sup> There is no direct legal sanction which the Commission could apply for non-cooperative behaviour. There may be a political sanction in the form of (a threat of) condemnation, but thus far the thematic resolutions adopted by the Commission have never mentioned by name any Government at all, let alone the Governments visited by the Working Group. For example, in 1989 France (traditionally the sponsor of the disappearances resolution) did not include a reference to Colombia in that year's resolution for fear that a reference to a country which had invited the Working Group might be considered a condemnation and deter other States from doing so in the future.<sup>446</sup>

Within the limits of what is legally permitted and politically feasible, different initiatives have been taken to address the problem of following up to country-specific recommendations. In the first place, the Working Group itself has made it standard practice to send follow-up letters to Governments visited in the past, as it had done for the first time in respect of Peru, Guatemala and Colombia.<sup>447</sup> As stated above, in such letters the Working Group would request the Governments concerned to inform it on the measures taken and the obstacles encountered in the implementation of recommendations.<sup>448</sup> The Commission subsequently sanctioned the practice of sending follow-up letters in its Resolution 1991/41, which included the following paragraph:

‘Also expresses its profound thanks to the Governments which have invited the Working Group to visit their country, asks them to give all necessary attention to its recommendations and *invites them to inform the Working Group of any action they take on the recommendations.*’<sup>449</sup>

This phrase has remained a permanent feature of all subsequent annual disappearance resolutions.<sup>450</sup>

Secondly, at the level of the Commission, the ‘Human rights and thematic procedures’<sup>451</sup> resolutions ‘[invited] the Governments concerned to study carefully the

445 Supra Chapter II.3. What is said here is of course equally true for any failure to reply to transmissions. On this topic, infra Chapter IV.7 (annual report). See also Cassese 2001, p. 374.

446 See HRM, No. 4 May 1989, pp. 32-44.

447 U.N. Doc. E/CN.4/1991/20, para. 25 and the latest version of the working methods, U.N. Doc. E/CN.4/2002/79, Annex I, para. 25.

448 Since its 1995 revision of its working methods, the Working Group has asserted that follow-up letters are sent ‘periodically’, without however giving an indication of the period of time which normally elapses between two letters. See U.N. Doc. E/CN.4/1996/38, Annex I, para. 24.

449 C.H.R. Res. 1991/41, para. 15.

450 See C.H.R. Res. 2003/38, para. 6 (a): ‘Expresses its thanks (...) to the Governments that have invited the Working Group to visit their countries, asks them to give all necessary attention to its recommendations and invites them to inform the Working Group of any action they take on the recommendations.’

451 C.H.R. Res. 1991/31, adopted without a vote on 5 March 1991. See also U.N. Doc. E/CN.4/1991/SR.52, paras. 85-90.

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recommendations addressed to them under thematic procedures and to keep the relevant mechanisms informed on the progress made towards their implementation.' A year later, several new elements were added to this resolution.<sup>452</sup> Firstly, Governments were invited to *promptly* inform thematic mechanisms on the progress made towards the implementation of recommendations. Secondly, Governments which had invited thematic procedures were recommended 'to consider follow-up visits designed to assist them with effective implementation of recommendations.'<sup>453</sup> Thirdly, the resolution authorised the thematic special rapporteurs and working groups 'to include in their annual reports information provided by Governments on follow-up action, as well as their observations thereon.'<sup>454</sup>

As yet, none of the above measures have been able to force a real breakthrough in terms of securing effective follow-up to the country-specific recommendations formulated by the Working Group. While legitimising the different follow-up actions undertaken by the Group, exhortations of a general nature such as those contained in the 'Human rights and thematic procedures' resolutions have been insufficient to persuade the Governments concerned to extend their full cooperation.<sup>455</sup>

The method of sending follow-up letters to the Governments visited in the past may simply be too weak in its own right to yield any meaningful structural effects. Moreover, the follow-up information submitted by Governments – if any at all – is presented in the Working Group's main report under the relevant country subsection, rather than in a separately circulated document (similar to reports of country visits) so as to potentially attract more attention in the Commission.<sup>456</sup> From 1994 onwards, the annual report no longer mentioned the Governments approached in the context of the follow-up process. The interested reader will him/herself have to consult himself the relevant country-subsections on States visited in the past in order to find out whether follow-up information has been submitted and whether the Working Group has felt fit to include any observations. As correctly observed by De Frouville, the possibilities for securing a structural follow-up of country-specific recommendations from a distance, *i.e.* through the method of sending follow-up letters, remain extremely limited, especially if this process is not followed by concrete [publicly verifiable, JG]

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452 C.H.R. Res. 1992/41.

453 *Ibid.*, para. 1 [emphasis added].

454 *Ibid.*, para. 5 [emphasis added]. Other textual adjustments have been made in the course of the 1990s. For example, in 1996 the Commission specified that the observations of thematic procedures on follow-up action should refer to 'both problems and improvements as appropriate,' C.H.R. Res. 1996/46, para. 6; from 1998 onwards Governments have been encouraged to divulge thematic procedures 'without undue delay' rather than 'promptly' concerning the progress made on the implementation of recommendations, see C.H.R. Res. 1998/74, para. 3.

455 For example, since 2001 the Working Group's working methods provide that the Group 'may also take the initiative to carry out follow-up visits'. See U.N. Doc. E/CN.4/2002/79, Annex I, para. 25.

456 See, for example, the Working Group's 1991 (U.N. Doc. E/CN.4/1992/18, paras. 20 and 21), 1992 (U.N. Doc. E/CN.4/1993/25, para. 28) and 1993 (U.N. Doc. E/CN.4/1994/26, para. 34) reports.

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observations, new recommendations and, eventually, a new visit to the country concerned.<sup>457</sup>

The method of follow-up visits potentially offers better opportunities for monitoring the progress made by Governments in implementing the Working Group's recommendations. However, in the case of the Working Group only two Governments have so far accepted a second visit to their country. The first such visit – a follow-up visit *avant la lettre* – was undertaken to Peru in 1986. Ironically, it was precisely the lack of progress achieved in respect of the recommendations formulated after this visit that led the Working Group to bring the matter of a follow-up before the Commission in 1990 and 1991. The other country which invited the Working Group for a (second) follow-up visit was Sri Lanka in 1991/1992. As described above, it needed heavy political pressure on the part of the Commission before the Government accepted that second visit.

Moreover, the case of Peru shows that the acceptance of a second visit in itself is not a guarantee for effective follow-up. More than a method, the follow-up should be seen as a process. The advantages of a follow-up visit (first-hand information, public exposure of the Government, support for domestic NGOs etc.) are easily undone, if the process is not continued afterwards.<sup>458</sup> In the case of Sri Lanka a dialogue seems to have been established, as evidenced, *inter alia*, by a third visit to that country in 1999 (this time at the request of the Working Group)<sup>459</sup> and also in the light of recent 'clarifications'. At the same time, even in this 'relationship', the Working Group's recommendations have not always been followed. Furthermore, given the high number of persons still reported missing and the fact the majority of the cases declared 'clarified' concern persons who have died the Working Group rightly adopts a very modest stance in this respect.<sup>460</sup>

The question whether, in fact, a 'dialogue' will be established between the Working Group and a particular Government depends more on politics than on legal considerations. To the extent that this is still the case, the voluntarist presumption might be said to prevail.

Finally, the continuous budgetary, personal and reporting<sup>461</sup> constraints under which the Working Group and other thematic procedures have to operate also have implications for the quality of the follow-up process. Clearly, the process could be more effective if the Working Group disposed of more financial and personal resources. On the other hand, the present author would like to emphasise that however

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457 De Frouville speaks about the 'soft method'. De Frouville 1996, p. 112.

458 Also Lempinen 2001, pp. 27-30.

459 The report of the third visit is contained in U.N. Doc. E/CN.4/2000/64/Add.1. The Working Group approached the Government for a third visit in December 1997, see U.N. Doc. E/CN.4/1999/62, para. 12.

460 *Supra* Chapter IV.2.1 and IV.4.1. The Working Group speaks of 'a concerted effort involving the Government, the families of the disappeared and civil society, *with the assistance of the Working Group*.'

461 On reporting constraints, in particular page limits, *infra* Chapter IV.7.

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real and urgent the financial and staffing worries of the Working Group and other thematic procedures are, it would be wrong to regard these problems as purely technical issues that should be separated from the political debates on rules and procedures. These problems are part and parcel of the political process in the United Nations and as such a reflection of political realities and priorities accorded by the international community. In this context, care must also be taken not to suggest more than there actually is. While the Commission has confirmed that follow-up activities are a legitimate part of the Working Group's mandate, it has as yet not taken this development a step further in the sense that a refusal or failure to give effect to the Group's recommendations (automatically) entails sanctions for the Government concerned.<sup>462</sup>

#### IV.6.2 Special Rapporteur on Torture and the Working Group on Arbitrary Detention

The main trends and obstacles in respect of the implementation of the method of on-site visits have been spelled out above. It is proposed here to highlight some aspects from the practice of the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. Some incidents will also be reported, in particular incidents occurring during visits and after visits had been carried out.

In 1987 the first Special Rapporteur on Torture, Peter Kooijmans, first announced 'his readiness to travel to the territory of any member State *with the consent or at the invitation of the Government concerned* for the purpose of carrying out on-site observations.'<sup>463</sup> Although the possibility of undertaking on-site visits had not been explicitly provided for in the original resolution establishing his mandate, the Special Rapporteur could of course rely on the precedents set by the Working Group on Enforced or Involuntary Disappearances (and to a lesser extent the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions).<sup>464</sup>

According to the Special Rapporteur on-site visits would not only be relevant 'on account of allegations of torture he has received, but also *on any other occasion for which such a visit may be deemed useful by the Government concerned*, for instance, when a power has been transferred to a new Government which wishes to take effec-

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462 For more than a decade NGOs such as the International Service for Human Rights have signalled the tendency of Governments with a bad human rights record to lobby for and become Members of the Commission. HRM, No. 8 April 1990, pp. 3-24. Proposals have been formulated to establish criteria for membership of the Commission, so far without any effect. The importance of follow-up activities has been generally recognised as a priority matter for the Commission by the 1993 World Conference on Human Rights: Vienna Declaration and Programme of Action, Part II, para. 15.

463 U.N. Doc. E/CN.4/1987/13, para. 22 [emphasis added].

464 The Commission first referred to on-site visits in 1989 as it '[encouraged] the Governments concerned to give serious consideration to inviting the Special Rapporteur to visit their country, so as to enable him to carry out his mandate even more effectively' (C.H.R. Res. 1989/33, para. 14).

tive measures to eradicate torture practices which *occurred under the previous régime*.<sup>465</sup>

To facilitate the acceptance of an on-site-visit, the first Special Rapporteur on Torture introduced the theoretical distinction between 'investigatory visits' and 'consultative visits'. Whereas the former type of visit – which by the label given to it suggests that serious allegations of torture have been reported and presupposes a more accusatory or even judicial attitude on the part of the Special Rapporteur – might scare off Governments from extending the Special Rapporteur an invitation, it was hoped that the contrasting more friendly and cooperative label 'consultative visits' might lower the threshold for them.

In 1990 the Special Rapporteur formulated the distinction between the two different types of visits as follows:

'an invitation extended to him by a Government should not be seen as an admission that torture is practised in the country concerned. Since the main purpose of such a visit is the prevention of torture in the future and since torture can happen in any society, this type of visit, which is of a *consultative character*, is mainly future-oriented. The Special Rapporteur can also be invited to visit a country to investigate alleged cases of torture, but *up to now no invitations for such investigatory visits have reached him*.'<sup>466</sup>

In 1992, the Special Rapporteur further elaborated upon his philosophy by even introducing a procedure for investigatory visits:

'As a formula for such investigative visits, he has proposed that the Government and the Special Rapporteur choose an equal number of cases from the list of allegations transmitted. The Special Rapporteur would then hold consultations with the alleged victims, their lawyers, the medical officers who examined them, the officials who conducted the interrogations, the officials in charge of the places of detention where they were held etc.'<sup>467</sup>

However, he again noted that '*so far, however, no Government has reacted positively to such suggestions*'.<sup>468</sup> Of course, why should Governments react positively to this stricter type of visit, if another 'more friendly' – at least so it was presented by the Special Rapporteur – variant was also available?<sup>469</sup>

Finally, in 1992/1993, during the last year of his tenure Peter Kooijmans contrasted his consultative visits with the inquiry procedure available under the Convention

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465 U.N. Doc. E/CN.4/1987/13, para. 87 [emphasis added].

466 U.N. Doc. E/CN.4/1990/17, para. 13 [emphasis added], see also U.N. Doc. E/CN.4/1992/17, para. 12.

467 U.N. Doc. E/CN.4/1992/17, para. 11.

468 Ibid. [emphasis added].

469 With one exception: on 10 June 1991 the Government of Djibouti invited the Special Rapporteur to visit the country to carry out an objective and independent inquiry into a number of alleged cases of torture. The visit which was originally scheduled for October 1991 was postponed and finally never took place at all. See U.N. Doc. E/CN.4/1993/26, para. 29.

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against Torture. According to the Special Rapporteur, the inquiry procedure must be considered an *ultimum remedium* only to be applied when there is overwhelming evidence of torture on a massive scale and leading to the determination of State responsibility. The visits he undertakes, on the other hand, are

‘commendable in all those cases, where on the basis of the information received, the situation in the country seems to be problematical and where consultations with the authorities and with non-governmental groups might lead to a clearer picture and to improvements by taking measures. Such a visit for consultative purposes *should be seen more as falling in the category of advisory services* than an investigative mission provided for in the Convention against Torture.’<sup>470</sup>

However, in his practice the Special Rapporteur has gradually distanced himself from the purely consultative nature of on-site visits, which have usually combined elements of investigation and advice. After a very cautious start, characterised by short missions aimed first and foremost at establishing the method of on-site visits as an inherent part of his mandate, the Special Rapporteur left behind any initial restraints that might have existed to mention in his mission report concrete situations or cases of torture occurring in the country visited.<sup>471</sup> Indeed, where Peter Kooijmans’ first mission reports had sometimes been criticised for being too complaisant with Governments,<sup>472</sup> his last (consultative) visit as Special Rapporteur to Indonesia and East-Timor in November 1991 marked a definitive turning point in this respect. Thus, the Special Rapporteur did not retreat from giving a short account of the Dili massacre of 12 November 1991 – at the time of the incident the Special Rapporteur was on the island –, including his ‘feelings of astonishment and disappointment at not having been informed promptly by the military authorities of East Timor about the incidents’ as well as the refusal of the authorities to allow him to see the wounded on the ground because such a visit ‘would be interpreted as a United Nations endorsement of anti-government forces and could lead to more rioting.’<sup>473</sup> As for the original reason to visit Indonesia and East Timor, his conclusion was also clear and unambiguous: ‘torture occurs in Indonesia, in particular in cases which are considered to endanger the security of the State.’<sup>474</sup>

Whatever the merits of the initial criticism voiced against the first Special Rapporteur – the present author believes good reasons can be given to justify his cautious course of action such as the sensitivity of the issue of torture, the ongoing debate on the coexistence of political and treaty-based human rights monitoring procedures and, more generally, the need to consolidate the mandate – he nevertheless managed to lay

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470 *ibid.*, para. 16.

471 In 1987 Peter Kooijmans carried out his first ‘regional’ visit to Argentina, Colombia and Uruguay. Other short visits brought the Special Rapporteur to Peru, Turkey and the Republic of Korea in 1988, to Guatemala and Honduras in 1989 and to Zaire and the Philippines in 1990.

472 Especially De Frouville has been highly critical of Kooijmans’ approach. De Frouville 1996, pp. 90 ff.

473 U.N. Doc. E/CN.4/1992/17/Add.1, paras. 46-65.

474 *Ibid.*, para. 73.

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a firm foundation for the further development and formalisation of on-site visits as an inherent part of the Special Rapporteur's mandate.

When Sir Nigel Rodley took over the post of Special Rapporteur on Torture in 1993, he no longer upheld the distinction between investigatory visits and consultative visits.<sup>475</sup> In his first report as the mandate holder he spelled out that 'exploring the possibility of visits to States' belonged to his core activities and served the objective of 'gaining more direct knowledge of cases and situations falling within his mandate and identifying measures to prevent the recurrence of such cases and to improve situations.'<sup>476</sup> With this statement the Special Rapporteur on Torture said nothing new, but simply brought the basic philosophy behind on-site visits into line not only with the actual practice of his predecessor, but also with that of other thematic procedures.

Furthermore, the new mandate holder would demonstrate increasing activism in approaching Governments with a view to soliciting an invitation from them. He would also publicly report on the progress made in respect of such approaches, in particular mentioning, by name, the Governments concerned.<sup>477</sup> This development was already visible during the last year of Peter Kooijman's tenure, but Sir Nigel Rodley seemed to have taken an additional step by adopting a more business-like tone, omitting from his reporting the reassuring language of his predecessor.<sup>478</sup>

In 1996, the Special Rapporteur formalised his practice by incorporating in his working methods the rule that he 'also takes *the initiative of approaching Governments* with a view to carrying out visits to countries on which he has received information *indicating the existence of a significant incidence of torture*.'<sup>479</sup> In addition, he formalised the fact that on-site visits 'allow [him, JG] to address detailed recommendations to Governments. Subsequently, the Commission on Human Rights, in its Resolution 1997/38, explicitly approved the Special Rapporteur's revised working methods.<sup>480</sup>

The third mandate holder on torture, Theo van Boven, finally confirmed the approach of his predecessor in his 2003 description of his working methods. This occasion was also used once again to formalise elements from his practice (and the

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475 Although the Special Rapporteur did seem to make a final reference to investigatory visits as he approached the Government of Indonesia and drew its attention to Commission Resolution 1993/97 in which it urged the Government of Indonesia to invite the Special Rapporteur, *inter alia*, to visit East Timor. U.N. Doc. E/CN.4/1994/31, para. 15.

476 *Ibid.*, para. 5(d).

477 *Ibid.*, para. 16.

478 For example, in his last report as mandate holder, Peter Kooijmans wrote that he had approached Governments 'when the situation in the country concerned *appeared to make such a visit advisable*' and because he felt that 'too many Governments still see such an invitation as an admission that torture is wilfully condoned in the country concerned', he 'wished to reiterate what he has said before: nobody knows better than he how difficult it is to eradicate torture. He therefore feels that he would perform his function in a half-hearted way if he confined himself to transmitting allegations to Governments without offering advice to them on how they might fight effectively the phenomenon of torture.' U.N. Doc. 1993/26, para. 26.

479 U.N. Doc. E/CN.4/1997/7, Annex, para. 12.

480 C.H.R. Res. 1997/38, para. 23 adopted without a vote on 11 April 1997.

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practice of his predecessor). These were, first of all, the considerations upon which the Special Rapporteur decides whether or not to request an invitation for an on-site visit. These considerations are, *inter alia*, the number, quality and gravity/nature of the allegations received and the potential impact that a mission to the country concerned may have on the overall human rights situation. Furthermore, the Special Rapporteur explicitly provided that 'in the mission report [he, JG] may give an account of individual allegations received.'<sup>481</sup> In so doing the Special Rapporteur definitively removed any doubts that might still have existed as regards the nature and purpose of on-site visits, in particular the fact-finding and investigatory aspects of such visits.

With the exception of 2002, the Special Rapporteur on Torture has visited at least one country every year since 1994.<sup>482</sup> In the case of the Russian Federation (1994) this even happened at the initiative of the Government.<sup>483</sup> In the cases of the other countries visited, invitations from Governments had been obtained on the basis of a specific request formulated by the Special Rapporteur. With a few exceptions,<sup>484</sup> State-consent or a first positive reaction has usually been obtained approximately within a year from the first request. However, there have also been Governments which have never responded (positively) to the requests of the Special Rapporteur. Each year the Special Rapporteur has mentioned these Governments in his annual reports, but in some cases even such public exposure could not persuade them to extend him an invitation. In 2004 he clearly ran out of patience with respect to India and Indonesia<sup>485</sup> writing that 'ten years [since 1993, JG] have now passed without satisfactory responses to his repeated requests', but he could do little more than to draw attention to Commission Resolution 2002/84 [human rights and thematic procedures] 'with its emphasis on cooperation with the Commission through pertinent thematic procedures.'<sup>486</sup>

Generally speaking, the Special Rapporteur has not experienced unreasonable delays in negotiating the modalities of a visit once the first consent has been obtained. As in the case of the Working Group on Enforced or Involuntary Disappearances on average approximately one year elapses between the first invitation and the actual visit

481 U.N. Doc. E/CN.4/2003/68, paras. 14-17.

482 The following countries have been visited: Russian Federation, U.N. Doc. E/CN.4/1995/34/Add.1; Chile, U.N. Doc. E/CN.4/1996/35/Add.2; Pakistan and Venezuela, U.N. Doc. E/CN.4/1997/7/Add.2 and 3; Mexico, U.N. Doc. E/CN.4/1998/38/Add.2; Turkey, U.N. Doc. E/CN.4/1999/61/Add.1; Cameroon, Romania and Kenya, U.N. Doc. E/CN.4/2000/9/Add. 2, 3 and 4; Azerbaijan and Brazil, U.N. Doc. E/CN.4/2001/66/Add. 1 and 2; Uzbekistan, U.N. Doc. E/CN.4/2003/68/Add.2; and Spain, U.N. Doc. E/CN.4/2004/56/Add.2.

483 See also Rodley 1999, p. 292.

484 For example Turkey (two years elapsed between the request and consent), Cameroon (more than three years), Kenya (two years) and China (some four years elapsed between the first request and consent); on China see also *infra*.

485 The 1993 request was backed by Commission on Human Rights Resolution 1993/97 which urged the Government of Indonesia to invite the Special Rapporteur, but even this political pressure proved insufficient to obtain the invitation. See U.N. Doc. E/CN.4/1994/31, para. 15.

486 See U.N. Doc. E/CN.4/2004/56, para. 5. Other States mentioned include: Egypt (1996), Algeria (1997), Tunisia (1998), the Russian Federation with respect to Chechnya (2000) and Israel (2002).

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of the Special Rapporteur. One particularly noteworthy exception to this practice has been China with which the Special Rapporteur has been in contact since 1995. An official invitation for an on-site visit was first obtained in February 1999. The invitation envisaged a visit in the second half of 1999 or the first half of 2000.<sup>487</sup> These dates proved not realistic as considerable differences concerning the modalities of the visit continued to separate the Government and the Special Rapporteur. Whereas the former had in mind a so-called 'friendly visit', a non-existing term of art apparently implying a milder treatment for having shown a willingness to cooperate, the latter considered a standard visit with the usual methodology to be the most appropriate.<sup>488</sup> Even in 2001 the two parties could not agree on a date despite the Special Rapporteur's acceptance of a friendly visit 'on the basis of modalities that would have ensured that the visit would have provided information capable of permitting him to make recommendations responding to the factual, institutional and legal obstacles to guaranteeing full respect for the prohibition of torture and other forms of all treatment falling within his mandate.'<sup>489</sup> In 2002/2003 the third mandate holder on torture, Theo van Boven, expressed the hope that he could successfully conclude negotiations with the Government of China, but disagreement concerning, *inter alia*, the length of the visit persisted. Finally, it was agreed that the visit would take place at the end of June 2004, but on 16 June 2004 the authorities postponed the visit until later that year. The need for additional time to prepare for the two-week visit, especially given the different authorities, departments, and provinces involved, was cited by the Government as a reason for the postponement.<sup>490</sup> Although the Special Rapporteur was assured that the need for further preparation indicated the importance which the Government attached to the visit, no visit has as yet taken place. Again, in the case of China the Special Rapporteur seemed to have reached the limits of his powers to induce a Government to agree to an on-site visit. Interestingly, in September 2004, the Working Group on Arbitrary Detention succeeded in quickly arranging a follow-up visit to that same country.<sup>491</sup>

Although the terms of reference of on-site visits, as agreed between the Special Rapporteur on Torture and the Governments concerned, have been respected in the majority of the visits undertaken by the Special Rapporteur over the past 16 years, there have also been a number of incidents, some of which have been more serious than others. In the event of such incidents, the Special Rapporteur often found himself placed before a *fait accompli*, lacking the means to redress the situation or to demand full compliance with the terms of reference of the visit as originally agreed upon. His options ranged from filing an official complaint with the authorities, refusing to carry

487 U.N. Doc. E/CN.4/2000/9, paras. 6 and 239.

488 U.N. Doc. E/CN.4/2001/66, para. 14, *infra* Working Group on Arbitrary Detention and China.

489 U.N. Doc. E/CN.4/2002/76, para. 6.

490 See Statement by the Special Rapporteur on Torture of 16 June 2004 and an interview with Theo van Boven on [www.oneworld2.nl](http://www.oneworld2.nl) of 9 September 2004.

491 At the time of writing the report of this visit was still subject to an embargo. It will therefore not be dealt with in this research. *Infra*

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out a prison visit under the revised conditions and reporting the entire incident in detail to the Commission on Human Rights. Not surprisingly, the direct consequences for the Governments concerned often remained rather limited, albeit only for the fact that thematic resolutions do not mention individual Governments by name. Most incidents related to a refusal to enter places of detention.<sup>492</sup> On other occasions the Special Rapporteur was refused interviews with Government ministers or other high-level officials.<sup>493</sup> Sometimes, also, the Special Rapporteur was informed that private individuals with whom he wished to speak had been told not to complain or that individuals with whom he had spoken had been harassed<sup>494</sup> or questioned by the authorities about the nature of their conversation.<sup>495</sup>

At a very early stage the first Special Rapporteur on Torture recognised the need to follow-up country visits in order to optimise their relevance and to establish effective cooperation with the Government concerned, especially as regards the implementation of his recommendations.<sup>496</sup> The Special Rapporteur uses the same method as the Working Group on Enforced or Involuntary Disappearance and sends out follow-up letters to the Governments visited in the past. The first Special Rapporteur always presented information received in the context of the follow-up process in a separate chapter of his annual report rather than under the general chapter on country information, thus making it easily accessible for the reader.<sup>497</sup> However, he did not comment publicly on any of the follow-up information provided by Governments. This would change in 1993 as the second Special Rapporteur, Sir Nigel Rodley, introduced the practice of including country-specific observations in his report whenever he found that to be applicable.<sup>498</sup> In this way he was able to publicly comment on the follow-up information provided by Governments, making it easier for the reader to evaluate any progress made.<sup>499</sup> On the other hand, follow-up information was not presented in a

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492 See, for example, U.N. Doc. E/CN.4/1997/7/Add.2, para. 92 (visit to Pakistan); U.N. Doc. E/CN.4/2000/9/Add.2, para. 65 (visit to Cameroon – refusal to visit anti-gang unit); U.N. Doc. E/CN.4/2000/9/Add.4, para. 82 (visit to Kenya) and U.N. Doc. E/CN.4/2003/68/Add.2, paras. 49-52 (visit to Uzbekistan).

493 See, for example, U.N. Doc. E/CN.4/1992/17/Add.1, para. 4 (visit to Indonesia – the East-Timor incident has been mentioned above); U.N. Doc. E/CN.4/1998/38/Add.2, para. 71 (visit to Mexico – the Minister of Defence refused to meet him) and U.N. Doc. E/CN.4/2000/9/Add.2, para. 65 (visit to Cameroon – the Minister of State for Defence declined an interview with the Special Rapporteur).

494 For example, U.N. Doc. E/CN.4/2000/SR.27, para. 62 (visit to Cameroon; alleged harassment of members of an NGO with whom the Special Rapporteur had spoken about the anti-gang unit).

495 See, for example, U.N. Doc. E/CN.4/1997/7/Add.2, para. 6 (visit to Pakistan) and U.N. Doc. E/CN.4/2003/68/Add.2, para. 54 (visit to Uzbekistan).

496 See U.N. Doc. E/CN.4/1990/17, para. 11 and U.N. Doc. E/CN.4/1992/17, para. 17.

497 For example, U.N. Doc. E/CN.4/1990/17, Chapter IV (C).

498 On country-specific observations, *supra* Chapters III.3.2.5.1. and III.3.2.5.2.

499 See, for example, the relevant country subsections of the Russian Federation visited in 1994, U.N. Doc. E/CN.4/1996/35, paras. 142-150, U.N. Doc. E/CN.4/1997/7, Chapter III under Russian Federation and U.N. Doc. E/CN.4/1998/38, paras. 161-163; and Chile visited in 1995, U.N. Doc. E/CN.4/1997/7, Chapter III under Chile and U.N. Doc. E/CN.4/1998/38, paras. 45-47.

separate chapter, but again in the general chapter on country information.<sup>500</sup> In 1996 the Special Rapporteur formalised his follow-up activities in his working methods, declaring that he would 'periodically remind Governments concerned visited in the past of the observations and recommendations formulated in the respective reports, requesting information on the consideration given to them and the steps taken for their implementation, or the constraints which might have prevented their implementation.'<sup>501</sup>

However, in practice the follow-up process had not been as effective as the Special Rapporteur had hoped it to be. In particular, he pointed to the absence of sufficient resources – which had prevented him from including, *inter alia*, Government replies in his annual reports – as the principal ground for the lack of progress made in his efforts to follow-up on-site visits.<sup>502</sup> As Theo van Boven took over the post of Special Rapporteur in 2001, he announced that he would pay particular attention to follow-up activities, but recognised that a lot would depend on the availability of resources and not in the last place the active cooperation of the Governments concerned.<sup>503</sup> Van Boven's efforts seemed to have concentrated on further formalising and institutionalising dialogue with the Governments of countries visited in the past. Amongst other things, he added to his working methods that, in addition to Government information, he would 'welcome information from non-governmental organisations and other interested parties regarding measures taken in follow-up to his recommendations.'<sup>504</sup> Furthermore, in July 2004 the Special Rapporteur published guidelines for the submission of information on the follow-up to his on-site visits, in particular as regards the length of NGO submissions and deadlines for both NGO and Government submissions. At present, it may be difficult to evaluate the effects of the recent efforts by the Special Rapporteur. Clearly no miracles can be expected, not in the last place because the Special Rapporteur only has very little influence on such factors as the resources and cooperation of Governments. In an addendum to his latest report (2004), the Special Rapporteur informed the Commission that 13 Governments had been approached to comment on recommendations formulated after on-site visits, six of which had also responded during that year. In respect of two countries, he had also received comments from NGOs. He 'expressed the wish' that the remaining Governments would also inform him of any follow-up measures undertaken or envisaged.<sup>505</sup>

Another development that must be mentioned in this context is the possibility of carrying out joint-visits, *i.e.* visits to individual countries carried out under more than one thematic procedure whose mandates might be affected by the situation in the

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500 With the exception of 2000 as the information was again included in a separate addendum, see U.N. Doc. E/CN.4/2000/9/Add.1.

501 U.N. Doc. E/CN.4/1997/7, Annex, para. 13.

502 See also U.N. Doc. E/CN.4/2000/9/Add.1, para. 1.

503 U.N. Doc. E/CN.4/2002/137, para. 6.

504 U.N. Doc. E/CN.4/2003/68, para. 18.

505 See U.N. Doc. E/CN.4/2004/56/Add.3.

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country concerned.<sup>506</sup> Sir Nigel Rodley was among the pioneers of this approach, which he justified by referring to the wishes of the Commission and the 1993 World Conference on Human Rights to enhance cooperation and to avoid unnecessary duplication among United Nations human rights procedures.<sup>507</sup>

Initially, conditions seemed to be favourable for the implementation of this type of on-site visit. In 1994 the Special Rapporteur on Torture carried out his first joint-visit together with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to Colombia.<sup>508</sup> However, already the following year, the Special Rapporteur reported that his endeavours to seek joint-visits received negative replies from certain Governments.<sup>509</sup> Elsewhere he commented this development and the potential reason behind the rejections as follows:

‘Interestingly, despite their concerns to avoid administrative inconvenience from overlapping mandates and requests, some Governments have already showed themselves less enthusiastic when they receive requests for joint missions by more than one mechanism. Perhaps, they suspect that the political weight behind such a mission is sufficient to outweigh the benefits of administrative inconvenience they are otherwise so unhappy about.’<sup>510</sup>

This negative trend would not be reversed in the years after 1995.<sup>511</sup> At least on three occasions, in the case of Bahrain, the Russian Federation with respect to the Republic of Chechnya and Uzbekistan, Sir Nigel Rodley suggested the possibility of joint-visits. None of these three countries reacted positively to this suggestion. In 1998, the representative of Bahrain indicated that an invitation should await the planned visit of the Working Group on Arbitrary Detention and ‘that a joint visit, as tentatively suggested by the Special Rapporteur, risked complicating the decision-making regard-

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506 Occasionally country-specific rapporteurs had already invited thematic mechanisms (Special Rapporteur or Chairman of a Working Group) to join them on their country missions, for example in the case of the Former Yugoslavia (Mr Tadeus Mazowiecki, country rapporteur and Mr Peter Kooijmans, Special Rapporteur on Torture; U.N. Doc. E/CN.4/1993/26, paras. 551 ff.) and Rwanda (Mr René Degni-Segui, country-rapporteur, Sir Nigel Rodley, Special Rapporteur on Torture and Mr Bacre Ndiaye, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; U.N. Doc. E/CN.4/1995/7). As a rule, thematic procedures do not seek to visit countries in respect of which the United Nations has established a county-specific procedure, unless the rapporteur or person responsible requests them to do so. See, *inter alia*, U.N. Docs. E/CN.4/1994/31, para. 17 and E/CN.4/2003/68, para. 15 (Special Rapporteur on Torture) and U.N. Doc. E/CN.4/1998/44, Annex 1, para. 26 (Working Group on Arbitrary Detention).

507 U.N. Doc. E/CN.4/1994/31, para. 17.

508 U.N. Doc. E/CN.4/1995/34, para. 8 and U.N. Doc. E/CN.4/1995/111 (report visit).

509 U.N. Doc. E/CN.4/1996/35, para. 4.

510 Rodley, EHRLR 1997, p. 8.

511 The only joint-visit undertaken since the first visit to Colombia was a mission to East-Timor together with the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions and on Violence against Women, its Causes and Consequences. This was, however, an exceptional situation following a Special Session of the Commission on Human Rights. See C.H.R. Res. S/4/1 of 27 September 1999 and U.N. Docs. A/54/660 and E/CN.4/2000/115.

ing cooperation with the Commission's mechanisms.<sup>512</sup> In the case of the Russian Federation the Special Rapporteurs on Torture and on Violence against Women, its Causes and Consequences requested a joint-visit in April 2000. By September 2000 an invitation had been extended only to the Special Rapporteur on Violence against Women, its Causes and Consequences, whereupon the two Rapporteurs again requested a joint-visit. In 2001 the Government did not agree to such a visit for that year, but the Special Rapporteur was given the hope by the country's Permanent Mission that 'such a visit could be envisaged at a later stage, once the security situation permitted.'<sup>513</sup> By 2004 this hope still had not led to a concrete invitation by the Government.<sup>514</sup> In the case of Uzbekistan, a joint-visit by the Special Rapporteur on Torture and the Working Group on Arbitrary Detention as originally envisaged by these two mechanisms in 2000 did not materialise, but in 2002 the Government of that country did invite the Special Rapporteur on Torture to visit the country alone.<sup>515</sup>

As for the third mandate holder on torture, his first two reports would seem to indicate that while his working methods still provide for the possibility of joint-visits, he has put less emphasis on this type of visit in his consultations with Governments.

The third thematic mechanism studied in this research, the Working Group on Arbitrary Detention, first announced its intention to carry out on-site visits in 1993.<sup>516</sup> Clearly, by that time, the possibility of undertaking such visits was already implied in the very nature of thematic mechanisms and the announcement only came months before the explicit assertion of that competence 'as a natural component of every mandate' in the joint declaration of special procedures mandate holders on the occasion of the Vienna World Conference on Human Rights.<sup>517</sup>

In essence, the Working Group followed the same approach as its counterparts and made clear that the on-site visits would be mainly preventive and future-oriented in nature. In fact, the contents and the tone of the statements issued by the Working Group showed much resemblance to those of the first Special Rapporteur on Torture. Thus, the Working Group emphasised that '*human rights promotion* (taking stock of current progress, encouraging improvements, bringing practice more into line with the rules, training needs, and so on) *is given at least as much prominence as protection of human rights*, so as to foster an effective spirit of cooperation between the country concerned and the Working Group.'<sup>518</sup> Moreover, it reassured Governments that they 'must perceive these visits as opportunities to explain their point of view with reference to ground realities. This spirit of cooperation will enable the Group to perform

512 U.N. Doc. E/CN.4/1999/61, para. 7. The Working Group on Arbitrary Detention visited Bahrain in 2001 (U.N. Doc. E/CN.4/2002/77/Add.2).

513 U.N. Docs. E/CN.4/2001/66, para. 14 and E/CN.4/2002/76, para.6.

514 U.N. Doc. E/CN.4/2004/56, para. 5.

515 U.N. Doc. E/CN.4/2002/76, para. 8 and U.N. Doc. E/CN.4/2003/68/Add.2 (mission report).

516 'In the third year [of the operation of the Working Group, JG], consideration should be given to the possibility of carrying out the first mission *in situ* (...)' U.N. Doc. E/CN.4/1993/24, para. 42 (c).

517 *Supra* Chapter IV.6.1.1.

518 U.N. Doc. E/CN.4/1993/24, para. 42 (c) [emphasis added].

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its task with discretion and objectivity.<sup>519</sup> A similar type of language was used by the Commission on Human Rights as it endorsed the Working Group's initiative during its 1993 session:

'Encourages Governments to consider inviting the Working Group to their countries so as to enable the Group to discharge its protection mandate even more effectively and also to make concrete recommendations concerning the promotion of human rights, in the spirit of the advisory or technical assistance services, that may be of help to the countries concerned';<sup>520</sup>

In the course of 1993 the Working Group undertook its first concrete attempts to obtain invitations for on-site visits from the Governments of Viet Nam, the United States of America with respect to asylum seekers held at Guantánamo Bay Naval Base (Cuba) and China. Early in 1994 three other countries, Indonesia, Cuba and Zaire had been mentioned by the Chairman of the Working Group as potential candidates for on-site visits.<sup>521</sup> In February 1995, the Government of Colombia invited, *inter alia*, the Working Group to visit the country following a Chairman's statement in the Commission on Human Rights.<sup>522</sup>

The results of these different attempts are illustrative of the dynamics within the United Nations and the interaction between thematic procedures and Governments and underline once again the ambiguous and sometimes unpredictable nature of the practice of thematic procedures. Furthermore, the practice makes visible how on different occasions States have been trying to play off one mechanism against another, but also how this strategy has spurred on better coordination amongst special procedures, including the High Commissioner for Human Rights.

In the case of Viet Nam an invitation could be obtained rapidly and a visit was arranged for October 1994.<sup>523</sup> With respect to the asylum seekers held by the United States at Guantánamo Bay Naval Base, Cuba, an on-site visit seemed at first to have lost its relevance since the asylum seekers had been transferred to the United States. As the Working Group found out that asylum seekers had again been held at the Naval Base in 1994, it re-issued its request for an invitation. That request was finally honoured and a visit was planned for October 1995. However, as the Working Group reported to the Commission in 1996, 'on account of the *financial crisis* affecting the United Nations and the *temporary freeze of missions*, the Working Group was unable,

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519 U.N. Doc. E/CN.4/1994/27, para. 14.

520 C.H.R. Res. 1993/36, para. 11.

521 U.N. Doc. E/CN.4/1994/SR.26, para. 22.

522 As mentioned above, the offer was also made to other thematic procedures, amongst others the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture. See also *supra* Chapter IV.6.1.3.

523 This was not the Working Group's first on-site visit. In August 1994 it had received an invitation from the Government of Bhutan and that country was visited first, whereafter the Working Group travelled to Viet Nam. See U.N. Doc. E/CN.4/1995/31/Add.3 (visit to Bhutan) and U.N. Doc. E/CN.4/1995/31/Add.4 (visit to Viet Nam).

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to its regret, to carry out the mission at the time planned.<sup>524</sup> Eventually, the mission never took place at all. As referred to earlier in this study, the situation at Guantánamo Bay Naval Base, Cuba would become of renewed interest to the Working Group in the context of the detention of persons captured during the U.S.-led intervention in Afghanistan in 2001/2002 and its aftermath.<sup>525</sup>

The Working Group's contacts with the Government of China spread out over a period of four years before it finally succeeded, as the first United Nations thematic procedure, to visit the country in October 1997. Negotiations had been delicate and went through a number of different phases involving different strategies – threats, promises and even a 'preparatory visit' – before the real 'full-scale' visit could finally take place. The negotiations also had their moments of crisis.

At first, in 1993, the Working Group hoped to increase its chances of obtaining an invitation from the Government of China by taking the decision not to communicate (*i.e.* to make public) to the Government 'decisions' concerning alleged cases of arbitrary detention in China. As a justification for its decision the Working Group referred to 'the spirit of cooperation in its functioning' and the 'immense value if the Government agreed to its request for a visit in order to understand better the concerns and viewpoint of China.'<sup>526</sup> However, the Working Group also set a deadline (February 1994) for a favourable response to its request, and failing that, it would forthwith communicate its decisions to the Government. That deadline, so it seemed, had not been met, but 'decisions' concerning China first appeared in the 1996 annual report. Clearly, it took more to obtain an invitation from China.<sup>527</sup> As referred to in Chapter III.3.2.5.3 above, during the 1995 session of the Commission on Human Rights the Working Group collided head-on with the Government of China, which accused the Working Group of '[politicising] human rights issues and [making] arbitrary attacks against sovereign States.'<sup>528</sup> The Government threatened to break off negotiations concerning a possible on-site visit stating that 'The Working Group had expressed its desire to be invited to visit China. Yet, the lack of goodwill and impartiality on its part towards his country and its disregard for his Government's explanations made it difficult to envisage a visit in an atmosphere of cooperation.'<sup>529</sup> The matter was left until September 1995 as the Chairman of the Working Group again took up the matter with the Chinese authorities, which expressed the intention to invite the Group to visit China in 1996.<sup>530</sup> Notwithstanding renewed tensions during the 1996 session of the Commission, the two parties could agree that as a next step towards a full-scale on-site

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524 See U.N. Doc. E/CN.4/1994/27, para. 15, U.N. Doc. E/CN.4/1995/31, para. 17 and U.N. Doc. E/CN.4/1996/40, para. 40 [emphasis added].

525 *Supra* Chapter III.3.2.5.4.

526 U.N. Doc. E/CN.4/1994/27, para. 50.

527 See also U.N. Doc. E/CN.4/1995/31, para. 18: 'contacts with the Government of China with a view to receiving an invitation to visit the country, have so far not obtained any concrete results.'

528 U.N. Doc. E/CN.4/1995/SR.27, para. 40.

529 *Ibid.*, para. 46.

530 U.N. Doc. E/CN.4/1996/40, para. 41.

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visit, the Chairman of the Working Group was to make a 'preparatory visit' to the country in July 1996.<sup>531</sup> The aim of that visit was twofold: 'firstly, the Group could more easily take cognizance of certain constraints, political or technical (for example, the problem of distances), facing such a visit and to have a better understanding of Chinese law, in particular with regard to the difficulties entailed in bringing it into conformity with the international instruments on human rights' and 'secondly, the Chinese authorities and experts would thereby be better able to appreciate the constraints to which the Working Group is subject, by the nature of its mandate, when it undertakes such visits.'<sup>532</sup> After this visit – intended to foster mutual trust and credibility – the Working Group announced that a full-scale visit to China was being negotiated and was scheduled to take place in July 1997. Still awaiting formal confirmation by the Government of China, however, the Working Group was keen to make sure that such confirmation would be rapidly forthcoming. Therefore, it once again promised the Government that 'pending formal confirmation of the projected visit (...) *before* the end of the fifty-third session of the Commission [1997, JG], (...) it would (...) *defer all deliberations regarding communications* (...) until after the visit, during which more information could be gathered through contacts and consultations.'<sup>533</sup> As stated above, the visit finally took place in October 1997.<sup>534</sup>

Indonesia was another candidate high on the list of countries to be visited by the Working Group, in particular in connection with the human rights situation in East Timor and the specific case of the detained opposition leader Xanana Gusmao. However, the Government of that country was not readily persuaded to issue such an invitation. Contacts between the Working Group and the Government of Indonesia had been spread out over a period of some four years (1994-1998) and it required considerable additional pressure from the Commission in the form of Chairman's statements before the Government was finally willing to invite the Working Group. Part of the discussions concerned the basis upon which the Working Group had founded its competence to seek an invitation for an on-site visit from the Government of Indonesia. The Working Group had referred to Commission Resolution 1993/97 concerning the situation in East Timor, which urged, *inter alia* 'the Government of Indonesia to invite the Special Rapporteur on the question of torture, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances to visit East Timor and to facilitate the discharge of their mandates.'<sup>535</sup> The Government of Indonesia, on the other hand, rejected that resolution as a valid basis for soliciting an invitation from a sovereign State. It referred to its recent decision to invite the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to visit the country,

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531 On the tensions, see U.N. Doc. E/CN.4/1996/SR.24, para. 69. The visit is included in the main report, U.N. Doc. E/CN.4/1997/4, paras. 23-35.

532 U.N. Doc. E/CN.4/1997/4, para. 24.

533 *Ibid.*, para. 35 [emphasis added].

534 See U.N. Doc. E/CN.4/1998/44/Add.2.

535 U.N. Doc. E/CN.4/1995/31, para. 19.

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which was extended on the basis of the consensus Chairperson's Statement of the Fiftieth Session (1994) rather than of Resolution 1993/97 of the Forty-ninth Session by which it considered itself not bound, since it 'was not achieved by consensus [adopted by 22 votes to 12 with 15 abstentions, JG] and went against the will of a substantial number of sovereign countries.'<sup>536</sup> As for the request of the Working Group to visit Indonesia and East Timor the Government stated that:

'The consensus Chairman's statement also mentioned 'the intention of the Government of Indonesia to continue to cooperate with other relevant thematic special rapporteurs and/or working groups, and to invite them to East Timor when necessary for the fulfilment of their duties'. In the endeavours to fulfil this commitment, the Government of Indonesia has not only demonstrated its willingness to cooperate (...) but also to give careful and genuine consideration to inviting relevant thematic special rapporteurs and/or working groups to visit East Timor province, Indonesia.'<sup>537</sup>

In spite of this statement, which the Working Group initially welcomed as 'an encouraging sign on the part of the Government',<sup>538</sup> no invitation from the Government of Indonesia had been received during 1995. Consequently, the Working Group pointed once again at the general and specific commitments of Indonesia in respect of the Commission's thematic procedures, including the Working Group itself, on the basis of which it had been seeking the invitation: first, at a general level, it invoked the (consensus) resolutions concerning arbitrary detention and those concerning thematic procedures adopted by the Commission which, *inter alia*, 'urged Governments to invite those responsible for the special procedures of the Commission';<sup>539</sup> secondly, it reinvoked the above mentioned Resolution 1993/97 as well as three Chairman's statements (1992, 1994 and 1995), which all relate to the situation in East Timor and urge the Government to invite Special Rapporteurs and Working Groups so that they could discharge their mandates.<sup>540</sup>

However, the Government of Indonesia chose to cooperate with the United Nations not by inviting the Working Group, but by inviting Mr José Ayala-Lasso, the first United Nations High Commissioner for Human Rights, to visit Indonesia, including the province of East Timor, 'within the framework of the consensus statement of the fifty-first [1995, JG] session of the Commission.' This clearly was an attempt to play off the Commission's special procedures with their stronger emphasis on human rights monitoring and reporting in public against the newly created and still undeveloped post of High Commissioner for Human Rights, which (certainly in those early years)

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536 Ibid., para. 20.

537 Ibid.

538 Ibid., para. 21.

539 Interestingly, the Working Group used the term 'urged', whereas the resolutions in question used the term 'encourages'. See U.N. Doc. E/CN.4/1996/40, para. 25 [emphasis added].

540 Ibid., para. 26. The Working Group also rementioned the specific case of Xanana Gusmao as a ground for seeking an invitation (para. 27).

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operated more on the less visible diplomatic level. The Working Group, therefore, requested the High Commissioner, during the visit he would make to Indonesia, ‘to stress the need for an invitation to be extended to the Working Group.’<sup>541</sup> When no positive result came out of the visit of the High Commissioner, the Chairman of the Working Group sought to further expose Indonesia during the 1996 session of the Commission. In his public statement he stated that he alluded to the fact that the Government had still not lived up to the appeals of the Commission and its own commitments: ‘the Commission had on several occasions urged the Government of Indonesia to invite special rapporteurs and working groups and, in response to a letter in which that Government reaffirmed its desire to cooperate with United Nations mechanisms, the Group had asked the High Commissioner (...) to use his influence to secure it an invitation. His intervention had, apparently, not been successful since there had been no response thus far from that Government concerned.’<sup>542</sup> Clearly, the Government was not pleased about being singled out in this way and its representative in the Commission held that ‘those in charge of United Nations special procedures for human rights monitoring were vulnerable to double standards, while their mandates were susceptible to politicisation.’ In particular, according to the representative, the fact that his country (and Cuba) ‘had been singled out as having refused to invite the Working Group to visit their countries (...) contradicted the principles of non-selectivity and impartiality and would ultimately undermine the Group’s credibility.’<sup>543</sup>

A change of attitude would not be forthcoming until 1998. In that year the Indonesian economy collapsed and the political unrest that it triggered eventually led to the end of President Soeharto’s three-decade rule of the country. The new leadership, headed by President Habibie, attempted to distance itself from the policies of its predecessor, notably by releasing political prisoners, lifting political controls and promising elections.<sup>544</sup> At the level of the Commission on Human Rights, the (new) Government decided to extend an invitation to the Working Group to visit Indonesia in 1999, in accordance with its commitment expressed in a renewed Chairman’s statement delivered on 24 April 1998.<sup>545</sup> The visit took place from 31 January to 12 February 1999.<sup>546</sup>

Unsuccessful, on the other hand, were the Working Group’s attempts to obtain an invitation from the Government of Cuba, which showed itself particularly intransigent in respect of the question of on-site visits. It was the Commission on Human Rights, in its Resolution 1993/63 on the situation of human rights in Cuba, which first suggested that the Working Group might want to carry out an on-site visit to the

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541 *Ibid.*, para. 30.

542 U.N. Doc. E/CN.4/1996/SR.24, para. 64.

543 U.N. Doc. E/CN.4/1996/SR.28, paras. 70-72. As for the case of Xanana Gusmao, the representative held that since he had been duly tried and sentenced, a visit to Indonesia was therefore not warranted.

544 See Human Rights Watch, *World Report 1999, Indonesia and East Timor*.

545 U.N. Doc. E/CN.4/1999/63, para. 20.

546 The official version of the report is contained in U.N. Doc. E/CN.4/2000/4/Add.2.

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country.<sup>547</sup> In the same resolution the Commission also expressed its 'particular concern that the Government of Cuba has failed to carry out its *commitment*, common to all Member States, to cooperate with the Commission on Human Rights, *in conformity with Articles 55 and 56 of the Charter of the United Nations*', in particular its refusal to cooperate with the Special (country) Rapporteur, *inter alia*, by allowing him to visit the country.<sup>548</sup> Cuba countered the suggestion of an on-site visit by arguing that 'no one had the right to ask a State to invite anyone to come to its territory because that decision was incumbent on that sovereign State and no one else.'<sup>549</sup>

The next year the Commission adopted Resolution 1994/71, essentially similar to the 1993 resolution, but this time the Working Group appeared to take a more reserved attitude as to the possibility of visiting Cuba, at least insofar as the country rapporteur on Cuba had still not given up his efforts to visit the country.<sup>550</sup> However, faced with the Government's continued lack of cooperation, the Special Rapporteur on the situation of human rights in Cuba explicitly requested the Working Group to approach the Government with a view to soliciting an invitation to visit the country.<sup>551</sup> The Working Group then took up the matter with the High Commissioner for Human Rights and requested him to intervene so that a mission could be undertaken to the country.<sup>552</sup> In 1996 the Chairman of the Working Group stated before the Commission that during his own visit to Cuba, the High Commissioner for Human Rights had obtained an agreement that the Working Group would in principle be invited during a high-level interview. However, a concrete invitation from the Government of Cuba would not be forthcoming.<sup>553</sup> Instead, its representative in the Commission explained once again that his Government

'did not feel bound in any way by Commission Resolution 1994/71 (...) adopted by a vote, since it clearly demonstrated the selective manner in which the Commission's work with respect to country situations was carried out. That was why it had not invited the Working Group (...), since cooperation with any United Nations mechanism was subject to the sovereign will of the individual State.'

Moreover, he stated that his Government did not appreciate reference to talks between Cuban authorities and the High Commissioner, without knowing the details thereof.<sup>554</sup>

Another example worth mentioning in this respect is Colombia. As stated above, following a 1995 Chairman's statement, the Government of that country had invited

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547 Resolution 1993/63, adopted by a roll-call vote of 27 to 10 with 15 abstentions on 10 March 1993. See operative paragraph 8. Also U.N. Doc. E/CN.4/1994/SR.26, para. 27.

548 Third operative paragraph, see also the fifth preambular paragraph, [emphasis added].

549 U.N. Doc. E/CN.4/1994/SR.29, para. 61.

550 U.N. Doc. E/CN.4/1996/40, para. 31.

551 A similar request was made to the Special Rapporteur on the Independence of Judges and Lawyers and the Special Rapporteur on Freedom of Opinion respectively. *Ibid.*, para. 32.

552 *Ibid.*, para. 33.

553 U.N. Doc. E/CN.4/1996/SR.24, para. 65.

554 *Ibid.*, para. 71.

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the Working Group for an on-site visit. This time, however, it was the Working Group which refused to accept that invitation, *inter alia*, 'in view of the multiple violations of human rights in that country [Colombia, JG], arbitrary detention was not a priority issue there and because it would be appropriate for the Commission to appoint a country-rapporteur.'<sup>555</sup> Moreover, the special procedures mandate holders, at their 1995 annual meeting had already decided that before any on-site visit to Colombia might become relevant once again, the Government should first follow up the recommendations made following the 1994 joint visit by the Special Rapporteurs on Torture and Extra-judicial, Summary and Arbitrary Executions.<sup>556</sup>

Experiences with countries such as Indonesia, Cuba and Colombia highlighted the increasing importance of better coordination and, in general, the need for a more centralised approach. As the Working Group acknowledged in its report over 1994, such an approach was necessary not only to prevent duplication of efforts, but also to avoid Governments 'either to take advantage (...) by playing on the contradictions that always exist (...) or to relinquish any initiative on the ground that it is the subject of harassment or the victim of selectivity.'<sup>557</sup> The Working Group would play an important part in these coordination efforts, *inter alia*, by formulating the following guidelines: (1) thematic special rapporteurs and working groups should not make visits to countries for which a special rapporteur or other similar mechanism has been designated, *other than at the request, or at any rate with the consent of the latter*; (2) a central contact be established within the United Nations bureaucracy to ensure coordination of possible on-site visits, including the missions undertaken by the High Commissioner for Human Rights.<sup>558</sup> Subsequently, it actively promoted these guidelines within the context of the annual meeting of special procedures mandate holders, where there existed broad consensus that the different mandate holders, including the High Commissioner for Human Rights should be informed of each other's plans.<sup>559</sup>

555 Ibid., para. 66, p. 13.

556 See U.N. Doc. E/CN.4/1996/40, para. 22 and also U.N. Doc. E/CN.4/1996/35, para. 51 (Special Rapporteur on Torture).

557 U.N. Doc. E/CN.4/1995/31, para. 22 (b).

558 Ibid., paras. 22.

559 Ibid., para. 23. For the relevant Mandate-Holders Meetings, see, *inter alia*, U.N. Doc. E/CN.4/1996/50, paras. 30 and 35 (Second Annual Meeting) and in particular U.N. Doc. E/CN.4/1997/3, para. 14 (Third Annual Meeting): 'It was suggested that it might be better for the participants to have informal contacts with a staff member of the Centre who would coordinate the activities of the participants and the High Commissioner. There was consensus that it was important that the participants should be aware of each other's plans. In that regard, the participants expressed the hope that the new structure would help to improve coordination by placing all mechanisms of the special procedures and advisory services programme in one management unit. The High Commissioner said that under the new structure it was envisaged that one staff member would be responsible for the coordination of all activities, thereby ensuring that information was made available to all those concerned'; and para. 38: 'The meeting also addressed the issue of coordination between the Commission on Human Rights and the High Commissioner for Human Rights as far as *in situ* visits were concerned. The participants were of the firm opinion that international scrutiny should not be undermined by manipulation on the part of a given

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Better coordination could of course not solve all the problems with intransigent States, but the fact that United Nations special procedures and the High Commissioner for Human Rights were making efforts to speak increasingly with one voice, did make it more difficult for such States to play off one mechanism against another. From that perspective, it is not totally surprising that the Government of Cuba, for example, precisely attacked the Working Group for having assumed a coordinating role with other mechanisms of the Commission.<sup>560</sup> In response, the Working Group stated that it was doing no more than giving effect to the spirit of the Vienna Declaration and the relevant resolutions of the Commission on Human Rights, including those on thematic procedures.<sup>561</sup> Moreover, it referred to Resolution 1995/59 in which the Commission '[took] note of the importance that the Working Group attaches to coordination with other mechanisms (...) and encourages the Working Group to avoid unnecessary duplication.'<sup>562</sup> It was the understanding of the Working Group that its proposals have therefore been accepted by the Commission.<sup>563</sup> Two years later, the Working Group formalised the proposals by incorporating them in its working methods which the Commission subsequently sanctioned in its Resolution 1998/41.<sup>563</sup>

Apart from the persistent refusal of the Government of Cuba, the Working Group seems to have been relatively successful in obtaining invitations from Governments throughout the second half of the 1990s as well as the first years this new century. Most notable perhaps, was the decision of the Government of Iran to issue a standing invitation to all United Nations special thematic procedures on 24 July 2002 and the concretisation of that commitment in October 2002 as it invited the Working Group for an on-site visit, which eventually took place in February 2003.<sup>564</sup> Three more States have been approached on the basis of a standing invitation: Latvia in January 2002,<sup>565</sup> Canada in November 2002<sup>566</sup> and South Africa in July 2003.<sup>567</sup> The visit to Latvia took place in February 2004,<sup>568</sup> the visits to the other two States were scheduled for June 2005 and September 2005 respectively.<sup>569</sup>

However, since 2002 the Working Group again seems to have encountered some difficulties in soliciting a positive answer – let alone any response at all – to its

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Government leading to the invitation of one special rapporteur at the expense of the visit of another or others.'

<sup>560</sup> U.N. Doc. E/CN.4/1996/40, para. 98.

<sup>561</sup> Also *ibid.*, para. 99. See also C.H.R. Res. 1993/36 (Arbitrary Detention).

<sup>562</sup> See U.N. Doc. E/CN.4/1996/40, para. 46. C.H.R. Res. 1995/59, para. 5 (Arbitrary Detention) adopted without a vote on 7 March 1995.

<sup>563</sup> See U.N. Doc. E/CN.4/1998/44, Annex I, para. 26. C.H.R. Res. 1998/41, para. 3 (Arbitrary Detention) adopted without a vote on 17 April 1998.

<sup>564</sup> See U.N. Doc. E/CN.4/2003/8, para. 37(d) and U.N. Doc. E/CN.4/2004/3/Add.2 for the mission report.

<sup>565</sup> U.N. Doc. E/CN.4/2003/8, para. 37(e).

<sup>566</sup> U.N. Doc. E/CN.4/2004/3, para. 34(b).

<sup>567</sup> *Ibid.*, para. 34(g). The visit was scheduled for September 2005, see also U.N. Doc. E/CN.4/2005/3, para. 30.

<sup>568</sup> For the mission report, see U.N. Doc. E/CN.4/2005/6/Add.2.

<sup>569</sup> See also U.N. Doc. E/CN.4/2005/3, paras. 29 and 30.

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requests for an invitation, precisely from States which have not issued a standing invitation. By December 2004 the Working Group reported that it had not received any response at all from the Governments of Nauru, Papua New Guinea, Angola, Guinea-Bissau, Equatorial Guinea, Turkmenistan and Libya. In respect of Libya, the Working Group had hoped that that country's forthcoming chairmanship of the 2003 session of the Commission might be a good occasion for requesting an invitation for an on-site visit. The request for an invitation was first made in January 2003. A month later, the Government, through its permanent representative in Geneva, reacted that it was considering attentively the possibilities of extending an official invitation for such a visit, but no progress has been made since that statement and the Working Group may therefore have missed the opportunity.<sup>570</sup>

Finally, in January 2002 the Working Group requested the Government of the United States of America to visit Guantánamo Bay Naval Base, Cuba in order 'to examine *in situ* the legal aspects of the detention' of persons captured during the U.S.-led intervention in Afghanistan in 2001/2002 and its aftermath. In December 2002, the Government of the United States declined that request on the ground that the Working Group lacked the competence to address what it considered 'law of armed conflict' issues, not international human rights matters.<sup>571</sup> Moreover, the Government added that representatives of the International Committee of the Red Cross (ICRC), which it considered to be the organization vested with the competence to conduct such visits, did have access.<sup>572</sup> Meanwhile, at their June 2004 meeting the special procedures mandate holders of the Commission on Human Rights again expressed the desire that the Chairman of the Working Group together with the Special Rapporteurs on Torture, Health and the Independence of Judges and Lawyers respectively, be allowed to visit the detainees held at Guantánamo Naval Base, Afghanistan, Iraq and elsewhere 'with a view to ascertaining that international human rights standards are properly upheld with regard to these persons, and also to make themselves available to the authorities concerned for consultation and advice.'<sup>573</sup> Although the Government of the United States again turned down the request, it did indicate a willingness to provide a briefing in Washington D.C. to discuss the matters raised relating to detention practices. The three mandate holders, in a November 2004 joint letter, welcomed the Government's initiative which they considered the '[beginning] of a dialogue on the matter' and 'a preliminary step that would assist them in the preparation of the requested country visits'. At the same time, they added that, following regular practice, the briefing should take place in Geneva.<sup>574</sup> At the time of writing no progress can be reported on this matter.

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570 U.N. Doc. E/CN.4/2004/3, para. 34(f) and U.N. Doc. E/CN.4/2005/3, para. 31. No (positive) response was received in 2004 either.

571 U.N. Doc. E/CN.4/2004/3, para. 35.

572 *Supra* Chapter III.3.2.5.4.

573 U.N. Doc. E/CN.4/2005/6, para. 32.

574 *Ibid.*, para. 33.

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Once obtained, the Working Group has always managed to successfully negotiate an invitation into a concrete visit. Negotiations concerning the modalities of an on-site visit have generally not taken more than one or two years, but there have been some noteworthy exceptions.

For example, in the case of Bahrain, the Working Group received an invitation from the Government in 1998 and a visit was originally planned for the course of 1999. However, due to 'scheduling difficulties' the Government suggested postponing the visit until 2001, much to the dismay of the Working Group, which threatened to cancel the visit completely. As the Working Group reported to the Commission in 2000: 'the Government's position had already caused the cancellation of one visit by the Working Group in 1999 and (...) further deferral would jeopardise the credibility of the Group's activities.'<sup>575</sup> Nevertheless, the Group remained in contact with the Government. The two parties reached an agreement for a visit in February/March 2001, but even this visit had to be postponed once more, because of the unavailability of some of the members of the Working Group. The visit finally took place in October 2001.<sup>576</sup> Also in respect of Australia (visited in May/June 2002) and Belarus (visited in August 2004), the search for a mutually convenient date for an on-site visit proved more difficult than might initially have been expected.<sup>577</sup>

Furthermore, in the preparations for its first on-site visits, the Working Group, due to a lack of experience and precedents, experienced some difficulties in negotiating full agreement concerning the arrangements of a visit.

Thus, the Working Group's visit to Viet Nam, which was intended to be its first on-site visit ever, had to be postponed from April to October 1994 precisely for that

<sup>575</sup> See U.N. Doc. E/CN.4/2000/4, para. 40(a); also U.N. Doc. E/CN.4/1999/63, para. 20.

<sup>576</sup> U.N. Doc. E/CN.4/2001/14, para. 60(a) and U.N. Doc. E/CN.4/2002/77/Add.2, para. 1.

<sup>577</sup> In the case of Australia the Working Group had requested an invitation in 1999 and, after having obtained an agreement in principle, had planned a visit for the second half of 2000. However, on 2 May 2000 the Government informed the Working Group that the date was not convenient and negotiations were postponed until further notice. At the initiative of the Working Group consultations were resumed in December 2000 and would continue throughout 2001, resulting, in January 2002, in a renewed invitation for a visit which would finally take place in May/June of the same year. See U.N. Doc. E/CN.4/2001/14, para. 60(c), U.N. Doc. E/CN.4/2002/77, para. 29(b) and U.N. Doc. E/CN.4/2003/8/Add.2, para. 1. The Government of Belarus committed itself to inviting the Working Group on Arbitrary Detention as well as the Special Rapporteur on the Independence of the Judiciary following a Chairman's statement by the Sub-Commission issued on 20 August 1999. It was also agreed that at least one of these visits should take place within a year of the statement. Thus, the Special Rapporteur visited Belarus in June 2000 and the Working Group would be invited in 2001. Initially, the Working Group envisaged a visit for late spring, but in December of that year the permanent representative of Belarus informed the Working Group that the competent authorities were considering a visit during the first half of October 2002. However, by the end of 2002 the visit was still under consideration and a breakthrough was only reached another year later as the parties agreed to a visit in May/June 2004 or September/October 2004. Finally, the visit took place in October 2004. See U.N. Doc. E/CN.4/2000/4, para. 40(b); U.N. Doc. E/CN.4/2001/14, para. 60(b); U.N. Doc. E/CN.4/2002/77, para. 29(a) and U.N. Doc. E/CN.4/2004/3, para. 34(a). For the mission report see U.N. Doc. E/CN.4/2005/6/Add.3.

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reason.<sup>578</sup> On the other hand, under the circumstances the Working Group realised that this first visit not only served the purpose of inquiring into the legal situation of persons deprived of their liberty, but 'also to draw conclusions from this initial experience in order to add to its methods of work, which have so far been defined only for the handling of communications giving rise to decisions or discussions.'<sup>579</sup> Against that background, the Working Group agreed with the general framework of the invitation by the Government of Viet Nam, on the condition that certain unresolved constraints such as the choice of interpreters and national regulations applicable to visits with prisoners requiring, *inter alia*, the presence of a representative of the administration, would be given on-site consideration by both sides 'with a view to finding solutions on a case by case basis taking account of the general framework both of the Working Group's mandate and of the Vietnamese context of the situation.'<sup>580</sup>

The Working Group demonstrated a similar flexible and pragmatic attitude in respect of China. After having carried out a preparatory visit to that country – which, as mentioned above, had been intended to foster mutual trust and understanding<sup>581</sup> – the Working Group indicated to the Chinese authorities that it would like to visit a broad range of detention facilities, including a pre-trial detention centre, a centre for 're-education through labour' and a prison in Tibet. Soon, however, it became clear that there would be difficulties in getting advance clearances from the Chinese authorities, so that it was not possible to prepare an agenda for the visit.<sup>582</sup> Despite the absence of an arranged or agreed detailed programme, the Working Group decided to travel to China and finalise its planning on the spot as the visit progressed in a spirit of 'flexibility (...) on both sides.'<sup>583</sup> Certainly, the fact that the Government had invited the Working Group in the first place must have been an important consideration behind that decision.

With a few exceptions, the arrangements made with the Governments concerned have been reasonably well respected in practice, at least during the missions themselves. One such exception was the Working Group's visit to Viet Nam, which the Group characterised as lacking 'the necessary atmosphere of transparency essential to make the visit entirely satisfactory.'<sup>584</sup> However, in light of what has been said above on the terms of that visit as well as the fact that the Group lacked the necessary experience and precedents to handle difficult situations, it was hardly surprising that conflict situations with the Vietnamese (local prison) authorities would arise. Conflicts included, amongst others, a refusal to consult prison records (not even for statistical purposes), occasional difficulties in getting access to the detainees as well as a refusal to enter pre-trial detention centres on the ground that domestic law prohibited such

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578 U.N. Doc. E/CN.4/1995/31/Add.4, paras. 1-9.

579 Ibid., para. 7.

580 Ibid., para. 9.

581 Supra.

582 See U.N. Doc. E/CN.4/1998/44/Add.2, para. 6.

583 Ibid., para. 11.

584 U.N. Doc. E/CN.4/1995/31/Add.4, paras. 43-45 and 52.

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visits and for fear of setting a precedent that could be used in other situations.<sup>585</sup> Notwithstanding the many shortcomings of the visit, the Working Group also underlined its ‘historic significance (...) the importance of which lies in the willingness of the Vietnamese people to look at themselves through the eyes of others.’<sup>586</sup> Moreover, the Group appreciated the wealth of information that could be gathered as well as the exchange of that information with the authorities, thereby facilitating understanding of the other’s position. More importantly, it characterised the interviews with the detainees, which it considered to lie at the heart of the visit, as candid and marked by non-interference. All in all, therefore, the Group’s visit to Viet Nam is probably best appreciated for its symbolic value as well as its significance from an evolutionary perspective. For one thing, because the Working Group would probably no longer accept any invitation for an on-site visit under such terms as those agreed to in the case of Viet Nam. This also seemed to be the underlying message of the Group’s conclusions and recommendations on the Viet Nam visit, where it emphasised that it ‘considered it essential, in discharging its mandate, to visit pretrial detention centres, since its main concern is the period of detention preceding trial’ and it recommended the Government to invite it for a follow-up visit precisely ‘to visit pre-trial detention centres, in view of the importance attached by the Commission to this aspect of [its] mandate.’<sup>587</sup>

Notwithstanding the absence of fully negotiated arrangements, the Working Group’s visit to China had been relatively successful. The Working Group praised the Chinese authorities for their positive attitude and the spirit of openness which had characterised the visit, which it regarded ‘as a precedent and an example of the growing awareness of and cooperation with the special procedures mechanisms of the Commission on Human Rights.’<sup>588</sup> As examples of the positive attitude, the Working Group mentioned the waiver of the objection to visit a pre-trial detention centre, despite the fact that the authorities had emphasised time and again that under Chinese law no one could be permitted to visit such detention centres. Having learnt from its experiences in respect of Viet Nam, the Working Group, for its part, had insisted throughout the visit that it regarded the visit of pre-trial detention centres as falling within its mandate. Other unprecedented positive developments included visits to other detention centres, which had never been visited by any outside agency, the visit to Drapchi prison in Lhasa, Tibet as well as the possibility of interviewing prisoners in private ‘without witnesses, in locations chosen at the last moment by the delegation.’<sup>589</sup> ‘Occasional bottlenecks’, as the Working Group described it, were attributed to ‘the

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585 *Ibid.*, paras. 11, 43-47 and 49-52. Before the Commission the Working Group also expressed its surprise at the fact that its mandate precluded visits while visiting the re-education camps in Viet Nam, to such areas as the kitchens, which the staff had been waiting to show off, since the mandate had been restricted to interviewing detainees. See U.N. Doc. E/CN.4/1995/SR.27, para. 24.

586 U.N. Doc. E/CN.4/1995/31/Add.4, para. 46.

587 *Ibid.*, paras. 69 and 82.

588 U.N. Doc. E/CN.4/1998/44/Add.2, para. 8, see also para. 100.

589 *Ibid.*, paras. 8-10 and 100-102.

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lack of flexibility on the part of either subordinate or autonomous regions' officials or authorities who found it difficult to adapt to the culture of cooperation which was experienced (...) throughout the visit.<sup>590</sup>

As far as the other on-site visits undertaken by the Working Group since 1994 are concerned, incidents have usually been limited to the cancellation of a planned visit due to such factors as bad weather or other logistical reasons beyond the Group's control.<sup>591</sup> In another case (Romania) a meeting with an immigration judge had to be cancelled.<sup>592</sup> More recently, during its visit to Belarus, the Working Group was refused access to inmates and detention facilities under the control of the KGB.<sup>593</sup> Otherwise, the visits to such countries as the United Kingdom (1998)<sup>594</sup>, Australia (2003),<sup>595</sup> but also to Peru (1998),<sup>596</sup> Indonesia (1999)<sup>597</sup> and Bahrain (2001)<sup>598</sup> were all described as exemplary. Even the visit to Iran (2003) had been carried out in a spirit of full cooperation.<sup>599</sup>

With respect to at least three countries the Working Group has received reports concerning incidents taking place after the visit had been carried out. Mostly, these incidents related to reprisals against persons (detainees) whom the Working Group had spoken to or interviewed during the mission. One such incident concerned the case of a Buddhist monk whom the Working Group had met at the end of its visit to Viet Nam. On that occasion, the monk handed a document to the Group concerning human rights violations against Buddhism in the country. Because of this meeting and in particular for having transmitted the document to the Working Group he was later arrested and imprisoned by the Vietnamese authorities, despite appeals by the Working Group not to subject him to any reprisals. Remarkably, the incident was not mentioned in the Working Group's mission report of January 1995, but was only brought before the Commission in 1999, as attempts to have the monk freed through an urgent appeal (1996) as well as the adoption of an opinion (1998) had failed.<sup>600</sup>

A similar type of incident occurred in the aftermath of the Group's 1997 visit to China. Inmates at Drapchi prison in Lhasa, Tibet who had been interviewed by the

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590 Ibid., para. 9. See also the statement of the Vice-Chairman of the Working Group before the Fifty-fourth Session of the Commission on Human Rights: 'The difficulties experienced during the visit itself had come from local rather than central authorities. The directors of some places of detention had clearly not been expecting the visit, and the Working Group had had to be accompanied by a very senior functionary of the central administration whose task was to convince the local authorities to respect the undertaking which had been entered into.' U.N. Doc. E/CN.4/1998/SR.30, para. 47.

591 U.N. Doc. E/CN.4/1997/4/Add.2, para. 8 (Nepal) and U.N. Doc. E/CN.4/2004/3/Add.3, para. 4 (Argentina).

592 U.N. Doc. E/CN.4/1999/63/Add.4, para. 2.

593 U.N. Doc. E/CN.4/2005/6/Add.3, para. 34.

594 U.N. Doc. E/CN.4/1999/63/Add.3, para. 5.

595 U.N. Doc. E/CN.4/2003/8/Add.2, para. 5.

596 U.N. Doc. E/CN.4/1999/63/Add.2, para. 3.

597 U.N. Doc. E/CN.4/2000/4/Add.2, para. 4.

598 U.N. Doc. E/CN.4/2002/77/Add.2, para. 112.

599 U.N. Doc. E/CN.4/2004/3/Add.2, para. 6.

600 See U.N. Doc. E/CN.4/1999/63, paras. 26-34.

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Working Group had allegedly suffered reprisals and had received extended prison sentences, despite assurances obtained during the visit that such measures would not be taken. As the Working Group sought clarifications from the Chinese authorities (April 1998), the response was that no reprisals had been taken against the prisoners with whom the Working Group had met during its visit and that the prison terms had been extended in relation to new offences committed by the persons in question. Subsequently, a request to provide additional information on these new offences (18 September 1998) was not answered by the Chinese authorities. The Working Group interpreted this non-response as 'a consequence of the difficulty that the Chinese authorities have in persuading the Working Group in a credible manner that there was no causal relationship between the incident in question and the heavier prison sentences imposed on the three inmates' and therefore reported the matter to the Commission at its 1999 session. It believed it had all the more reason to do so, since it was not the first time that such incidents had occurred following a visit by foreign delegations to Drapchi prison.<sup>601</sup> The Commission, however, has never taken any action in response to the incidents, notwithstanding the fact that the Working Group again referred to them in its 2000 and 2001 reports.<sup>602</sup>

More recently, the Working Group has run into a conflict with the Government of Iran. The conflict concerned a number of events subsequent to its visit to Iran in February 2003, involving, amongst other things, reprisals against persons with whom it had spoken during the mission, the persecution of the press as well as the appointment of a controversial Attorney-General. In the conclusions to its mission report the Working Group made clear that the Government's recent increase in cooperation should not be evaluated solely on the basis of the simple fact that the Government had invited the Working Group or the fact that the visit had been conducted in a relatively transparent and open manner, but it should also take into account the immediate follow-up given to the visit. According to the Working Group, 'visits are a means, not an end, a beginning and not the culmination of a process.' Against this background, the Working Group held that the record of the Government was more 'nuanced' and it therefore wished to inform the Commission.<sup>603</sup> Furthermore, the Working Group added that by inviting the Working Group Iran had now 'joined those States which accept the risk of being criticised, because they have taken the initiative of cooperating, rather than those which are open to severe criticism because they refuse to cooperate.'<sup>604</sup>

As regards the broader question of follow-up, it has already been noted in Chapter IV.4.2 that the Working Group initially set very ambitious goals. This was also true for the follow-up of on-site visits. In 1995, after having absolved the on-site visits to

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601 See U.N. Doc. E/CN.4/1999/63, paras. 21-25. Similar incidents had occurred during a visit by a Swiss delegation in 1991 and an EU delegation in 1998.

602 See U.N. Doc. E/CN.4/1998/SR.30, para. 49, U.N. Doc. E/CN.4/1999/63, paras. 21-25 and U.N. Doc. E/CN.4/2001/14, paras. 61 and 62.

603 See U.N. Doc. E/CN.4/2004/3/Add.2, paras. 63 and 64.

604 *Ibid.*, para. 68.

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Bhutan and Viet Nam, the Working Group first took up the matter<sup>605</sup> and proposed 'the establishment of a *system of visits* to follow-up the recommendations made in the reports of missions carried out under special procedures.'<sup>606</sup> Support for the proposal was derived from Resolution 1995/87 concerning 'Human rights and thematic procedures' in which the Commission on Human Rights '[recommended] that Governments consider follow-up visits designed to assist them with the effective implementation of recommendations (...)'.<sup>607</sup> Thus, in 1995 the Working Group had approached the Governments of Bhutan and Viet Nam as to whether they would be willing to invite the Working Group for a follow-up visit as well as to allow it to visit places of detention which it had been unable to visit in the course of its first visit.<sup>608</sup> In the case of Bhutan an invitation could be obtained rapidly with a follow-up visit being planned for May 1996.<sup>609</sup> In the case of Viet Nam, a follow-up visit proved much more difficult to arrange. Although it was 'in principle favourable to another visit by the Working Group to Viet Nam', the Government held that owing to several important events (elections) planned for 1996 in Viet Nam, that visit might have to take place at a later date.<sup>610</sup>

However, while in 1996 the Working Group still held that 'the system of follow-up visits was an important part of the Group's task and should be developed', there is no evidence in the annual report that this aspect of the Group's activities was actively promoted in the years that followed.<sup>611</sup> For one thing, the Working Group did not mention the possibility of carrying out a follow-up visit to Viet Nam after its initial 1995 attempt. It was only in 2004 that the Working Group undertook its second follow-up visit ever.

From 1998 onwards, as the Group's record of countries visited was growing larger with recent visits to China, Peru, the United Kingdom and Romania, the topic of following up on-site visits received renewed attention. However, rather than focusing on follow-up visits, the Working Group adopted the approach of other thematic procedures and concentrated its follow-up activities in the form of follow-up letters. Its intention was thereby to 'systematically request the Governments of countries visited (...) to inform it of initiatives (...) taken pursuant to [its] recommendations.'<sup>612</sup> In implementing the method in practice, the Working Group seems to have succeeded relatively well in soliciting responses to its follow-up letters from the Governments concerned. Very few Governments have failed to respond to requests or reminders of

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605 U.N. Doc. E/CN.4/1995/31, para. 23.

606 U.N. Doc. E/CN.4/1996/40, para. 45 (c).

607 Ibid., para. 46 and C.H.R. Res. 1995/87, para. 2.

608 U.N. Doc. E/CN.4/1996/40, para. 36.

609 U.N. Doc. E/CN.4/1996/SR.24, para. 67.

610 U.N. Doc. E/CN.4/1996/40, para. 38.

611 U.N. Doc. E/CN.4/1996/SR.24, para. 67, p. 13.

612 U.N. Doc. E/CN.4/1999/63, para. 36 and U.N. Doc. E/CN.4/2000/4, para. 42.

requests to inform the Group of any action taken pursuant to its recommendations.<sup>613</sup> On the other hand, numerous constraints continue to stand in the way of developing the follow-up procedure into a more effective part of the Working Group's mandate. In essence, these are the same constraints that have been identified in the case of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture: difficulties inherent in the 'weak' method of follow-up letters, including difficulties related to the possibilities of exposing the Governments concerned in the annual reports and their addenda as well as resource-related difficulties.<sup>614</sup> For the time being, it is these practical and political difficulties rather than any theoretical obstacles that will probably continue to inhibit the Working Group in its efforts to reach its stated objective of '[engaging] in continuous dialogue with the countries (...) visited.'<sup>615</sup>

#### IV.7 ANNUAL REPORT

Once a year the thematic procedures are expected to prepare and present to the Commission a report on their activities together with their conclusions and recommendations.<sup>616</sup> The annual report is the most important source of information concerning their work and also the principal means through which they communicate with the Commission. It should provide the Commission with the necessary input to discuss not only the functioning and competences of the different thematic procedures, but also any possibilities for taking further action in relation to the subject-matter of the mandates. For thematic procedures, therefore, the annual report constitutes another means by which they can apply pressure on (individual) Governments. The presentation of the annual report to the Commission should be the occasion *par excellence* to exploit its 'nuisance value' or 'embarrassment value'.

However, it is precisely this aspect of human rights reporting – in the absence of competence to take legally binding decisions – that represents the weak side of the

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613 Out of the 14 countries visited between 1994 and 2003, only one (Nepal) has not responded to the Working Group's requests for information. All the others have in one way or another sent replies, including references to action taken.

614 For example, in the years 1999-2001 the Working Group had to stagger its activities and prioritise its follow-up on recommendations contained in the reports of its first on-site visits, while taking up the other visits at a later stage. See, for example, U.N. Doc. E/CN.4/2000/4, para. 43. Also, U.N. Doc. E/CN.4/1999/63, para. 41 where the Working Group welcomed the Commission's request to the Secretary-General 'to ensure that the Working Group receives all necessary assistance, particularly in regard to staffing and resources needed to discharge its mandate and notably with respect to field missions.' At the same time, it reported that its 'work cannot be accomplished with only one assistant (...) it requires at least one other full-time assistant and the help of two interns.' Also *infra* Chapter IV.7.1.

615 U.N. Doc. E/CN.4/2000/4 (executive summary); also U.N. Doc. E/CN.4/2001/SR.36, paras. 19 and 20.

616 The extension of the duration of the different thematic mandates from one year to two years and later to three years has not affected this annual reporting cycle. See for the Working Group on Enforced or Involuntary Disappearances: C.H.R. Res. 20 (XXXVI), para. 7; C.H.R. Res. 1986/55, para. 2 and C.H.R. Res. 1992/30, para. 3.

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thematic approach.<sup>617</sup> As explained in Chapter III.3.1.1, the thematic approach finds its origins in the Argentine attempt to minimise the nuisance value of United Nations action concerning disappearances. Subsequently, the first thematic mechanism, the Working Group on Enforced or Involuntary Disappearances, decided that the best way for it to secure the cooperation of Governments as well as its own political survival would be to adopt a non-judgmental posture and only to include in its main report conclusions and recommendations of a general character.<sup>618</sup> Furthermore, the practice of the Commission never to include country-references in thematic resolutions also minimised the ‘mobilisation of shame’ inherent in the approach. The decision of thematic procedures, at the beginning of the 1990s, to include country-specific observations in their annual reports has not changed this practice.

#### IV.7.1 Working Group on Enforced or Involuntary Disappearances

Within the constraints inherent in the thematic approach the different mechanisms have explored other ways of exposing individual countries in their annual reports. Logically, the Working Group on Enforced or Involuntary Disappearances has again played a pioneering role in this respect. In particular, it has incrementally developed a format of its annual report that would more easily permit the reader to identify those countries where the phenomenon of disappearances required special attention. Having rejected the accusatory approach, the Group had to rely on the ‘rational’ presentation of the information received, including statistical references, to attract the necessary attention and publicity that might induce the Governments concerned to change their policy.

It is proposed here to give an overview of the different initiatives undertaken by the Working Group with regard to the structure and format of its annual report. Particular emphasis will be placed on the delicate financial situation of the United Nations and how this has over the years affected the quality of the work of the Working Group as reflected in its annual reports. For analytical purposes, three different phases could be distinguished: (1) the period 1980-1990 in which the Working Group incrementally developed an adequate format for its annual reports; (2) the period 1990-1994 in which the development stagnated and in which the Working Group found it increasingly difficult to uphold the initial high quality of the reports and (3) the period from 1994 to the present which may be characterised as a phase of regression in particular as regards the quality of the reports.

The first phase, from 1980 to 1990, covers a period in which the Working Group – in its own words – ‘had to find its way through uncharted territory.’<sup>619</sup> It marks a period of apparent progress, in particular as regards the consolidation and the steady strengthening of the procedural features of the mandate. During this period the Working Group developed a format for its report that would easily allow the reader to gain

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<sup>617</sup> See also Van Dongen, *Bulletin* 1991, pp. 24 and 25.

<sup>618</sup> U.N. Doc. E/CN.4/1990/13, para. 353.

<sup>619</sup> *Ibid.*, para. 364.

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an understanding of the situation in particular countries, without being explicitly judgmental on any them.<sup>620</sup>

In its first report, the Working Group expressed its opinion that '*the task of the Commission (...) regarding (...) disappearances would be facilitated* if the Group were to provide the Commission with an analytical summary showing the principal characteristics of that information.'<sup>621</sup> Accordingly, for each country mentioned in the section of the annual report dealing with different country situations, the information was presented under the following headings: (1) 'source and character of the information'; (2) 'analytical summary of reports (of disappearances)'; (3) 'survey of the information transmitted to the Government and the question of establishing direct contacts'; (4) 'information and views transmitted by the Government' and (5) 'statements made by representatives of associations or organisations concerned with reports of enforced or involuntary disappearances.'<sup>622</sup>

In 1982 the Working Group introduced two new elements to the format of its report. In the first place, it had decided to give statistics for the country situations reviewed. For each individual country, these statistics indicated the number of cases received by the Working Group, the number of cases considered as admissible and transmitted to the Government concerned and the answers received from that Government relating specifically to the cases transmitted.<sup>623</sup> Secondly, the Working Group wrote a more compact report by attempting to summarise the situation for each country, 'rather than to set out at length the texts of speeches and other communications.'<sup>624</sup> In this respect, it introduced, *inter alia*, uniform headings for presenting the information on each country. These headings were the following: (1) information reviewed and transmitted to the Government; (2) information and views received from organisations representing relatives of missing persons and (3) information and views received from the Government. The Working Group also distinguished between country situations in which more than twenty reports of disappearances have been transmitted to the Governments and other situations. Each category was dealt with in a separate chapter of the report.<sup>625</sup>

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620 For the sake of completeness it should be mentioned that especially in the first four reports the Working Group also provided analyses of the specific human rights standards violated in the case of disappearances. *Supra* Chapter III.3.2.5.1.

621 Detailed analyses on which the summaries contained in the report are based were on file in the Secretariat and available to the Members of the Commission for consultation. U.N. Doc. E/CN.4/1435, para. 46 [emphasis added]; presuming that the Commission acted upon the information provided.

622 More or less the same form was used in the second report, U.N. Doc. E/CN.4/1492.

623 U.N. Doc. E/CN.4/1983/14, para. 1.

624 *Ibid.* The Working Group added that reference was made in this third report to the two previous reports 'so that the background to the problem in each country may be recollected.' See also U.N. Doc. E/CN.4/1983/SR.20, para. 75.

625 U.N. Doc. E/CN.4/1983/14, p. ii. A third chapter dealt specifically with the problem of disappearances in South Africa and Namibia. These countries had been dealt with separately right from the beginning in 1980. The reason for this had probably more to do with the 'special' position of these States in the United Nations rather than the seriousness of the incidents reported from these countries.

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This more assertive way of presenting country information was also noted in the Commission. Some States welcomed the new approach. The representative of Finland, for example, stated that the fact that the Working Group had included statistics in its report and had summarised information showed 'the solid basis of confidence created between all the parties concerned' and 'attested to the fact that the Working Group had been able to develop effective working methods and strengthen its possibilities for action within the framework of its mandate.'<sup>626</sup> However, the States most exposed by the new method found the presentation of the information to be misleading. The representative of El Salvador, for example, stated that:

'[w]hile he appreciated the report (...) he had noted certain points in it that could be misleading. For each situation the Working Group had given the total number of complaints received including those it had itself decided not to communicate to Governments as they were not sufficiently well-founded. Similarly, complaints relating to earlier periods were presented without any distinction being made between them and others. Persons who had been detained continued to number among the disappeared, even though their situation had been clarified. Persons who reappeared or who had been found likewise continued to figure in lists and global statistics.'<sup>627</sup>

In reaction to this criticism the Working Group again adopted a new formulation in 1983, which it hoped would be clearer. It would now indicate for each country mentioned 'how many cases had been transmitted, on how many the Government has given a response, and how many have been resolved (that is to say, solved to the satisfaction of the Group's judgement) from either Governmental or other sources.'<sup>628</sup> The next year the Working Group decided to combine the two categories of countries, *i.e.* countries with more than twenty cases and other situations, 'in a single chapter under two different sections, since it was felt that the purely numerical, and perhaps somewhat arbitrary, distinction between Governments to whom more than 20 or less than 20 cases had been transmitted did not need stronger emphasis.'<sup>629</sup> These changes were justified in order 'to give the report *a more logical structure* and to convey more clearly the Group's conviction that the Commission should be informed of its activities over the past year *in the most objective and factual fashion and to the fullest extent possible*.' At the same time, the Working Group explicitly emphasised that the changes indicated neither a departure from its basic philosophy nor from its methods of work.<sup>630</sup>

In its sixth report presented to the Commission in 1986, the Working Group generally followed the structure of the previous report. It explained that '*by maintaining what was construed in 1984 as the most logical structure of reporting, a better understanding of the long-term nature of the Group's humanitarian endeavours would*

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626 U.N. Doc. E/CN.4/1983/SR.24, para. 7, also para. 9 (Japan) and para. 28 (Cuba).

627 *Ibid.*, para. 62.

628 U.N. Doc. E/CN.4/1984/21, para. 3.

629 U.N. Doc. E/CN.4/1985/15, para. 5.

630 *Ibid.*, para. 3.

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*be facilitated.*<sup>631</sup> Some smaller changes in the presentation of statistics were made, however. The Working Group added 'as *the initial figure the number of cases outstanding* after subtracting the clarifications received from the total number of cases transmitted to the respective Government.'<sup>632</sup> In addition, it introduced a new feature, namely the inclusion of a graph for countries with more than 100 cases transmitted to the respective Government. These graphs showed the development of disappearances reported to the Group based on the date of their occurrence. According to the Working Group,

'[i]t was thus attempted, though perhaps arbitrarily, to provide the Commission with a more telling picture of the development of disappearances in countries where the problem appears to be assuming considerable proportions.'<sup>633</sup>

Still in 1986 the Working Group revised the format of the graphs 'so as to render them more precise and to permit easier comparison with other countries.' The graphs were moved from the relevant country subsection to the Annex of the report.<sup>634</sup> In 1987 new changes were added to the format. Graphs would now be included for all countries with more than 50 transmitted cases. At the same time, in the chapter dealing with country situations the Working Group abandoned the distinction between countries with more or less than twenty submitted cases on the ground that it had been 'somewhat arbitrary' and that 'any categorisation should be avoided.' Countries would now be listed in alphabetical order. More importantly, for each country the Working Group would indicate the number of cases reported to have occurred during the period under review. It hoped that this presentation

'would improve understanding of the *recent situation* or the *development of the phenomenon in each country*, especially in those in which many cases were still being reported years after their actual occurrence.'<sup>635</sup>

The format of reporting as it stood in 1987/1988 would be maintained until 1994. In 1990 the Working Group evaluated and justified the format as follows:

'As to the format of its reports, the Group soon found a form of presentation which *seemed to command the approval of the Commission*. The introduction of statistical summaries, further refined in successive reports, as well as graphs, not only provided

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631 U.N. Doc. E/CN.4/1986/18, para. 2 [emphasis added].

632 Ibid., para. 3 [emphasis added]. It was keen to observe that the statistics needed to be examined together with the explanations contained in the respective country subsection of the present report as well as previous reports.

633 Ibid., para. 4.

634 U.N. Doc. E/CN.4/1987/15, para. 4.

635 U.N. Doc. E/CN.4/1988/19, paras. 2 and 4. Also U.N. Doc. E/CN.4/1989/18, para. 2.

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possibilities for easy reference but also constituted *unique features* of human rights reporting.<sup>636</sup>

Interestingly, however, it relativised the importance of the graphs, in particular when used to compare different country situations. According to the Working Group:

‘Of course these cannot take away a basic drawback, namely that the figures presented by the Group are based entirely on submissions from external sources, processed according to the Group’s criteria. Consequently, they do not necessarily reflect the true dimensions of a given situation of disappearances, which in many cases may be considerably larger; nor do they allow for any comparison between countries or geographical regions.’<sup>637</sup>

Commentators have generally been positive about the quality of the annual reports until 1990. Kamminga, for example, described them as ‘detailed and [containing] a large amount of carefully digested information under each country-heading (...) and it is easy to see what action the Working Group has taken on a particular country.’<sup>638</sup> Similarly, Alston qualified the annual reports as ‘at least by United Nations standards (...) frank and incisive (...) [placing on public record] an enormous amount of authoritative primary material.’<sup>639</sup> Criticism during this first period focused in particular on the fact that the Commission did so little with the information provided to it by the Working Group. At the same time, especially in the second half of the 1980s, the negative effects of the financial crisis of the United Nations for the Working Group’s functioning first became visible.

Thus, in 1985 the Working Group reported that the overall work-load during the last year had increased and that this had led to a considerable backlog of cases still to be analysed in the first months of that year. At that time, however, the principal ground for the backlog seemed to have been recruitment problems directly related to the one-year term of the mandate. This one-year term only made it possible to hire temporary staff. Consequently, the Working Group requested the Commission to consider a two-year extension to the mandate in order to allow it to hire (more) permanent staff.<sup>640</sup> However, notwithstanding a positive decision by the Commission on the Working Group’s request, its support staff was still reduced in 1986 as a measure to deal with the financial crisis of the United Nations. That development not only resulted in a backlog of cases still to be processed, but also affected the quality of the annual report. In 1987 the Working Group reported for the first time that ‘due to the financial crisis of the United Nations, the length of the report had to be drastically reduced, resulting

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636 U.N. Doc. E/CN.4/1990/13, para. 355.

637 Ibid.

638 Kamminga, NILR 1987, p. 314.

639 Alston 1992, p. 179.

640 U.N. Doc. E/CN.4/1985/15, paras. 88-90. Supra Chapter III.3.2.3.

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in a very condensed presentation in which every reported detail could not be included.<sup>641</sup>

By 1990 a critical point seemed to have been reached as the Working Group explicitly drew the Commission's attention to the chronic shortage in the financial and human resources of the Secretariat (Centre for Human Rights):

'[i]f immediate remedies are not applied, the level of service to the Working Group will no longer be sustainable. (...) The Commission would be well-advised to give this question its most serious consideration.'<sup>642</sup>

The period 1990-1994, the second phase, may be characterised as a period of stagnation. No significant changes were added to the format of the annual report.<sup>643</sup> More seriously, the quality of the reports would increasingly come under pressure as a result of developments which were mostly beyond the control of the Working Group.

In the first place, the workload of the (already reduced) staff servicing the Working Group would further increase at the beginning of the 1990s. This increase was not only the result of an ever growing number of communications concerning individual cases of disappearances reaching the Working Group, but also of additional tasks assigned to it by the Commission or assumed on its own initiative.<sup>644</sup> These additional tasks included requests to report on, *inter alia*, civil defence units,<sup>645</sup> armed groups,<sup>646</sup> reprisals,<sup>647</sup> forensic sciences,<sup>648</sup> indigenous peoples,<sup>649</sup> minorities<sup>650</sup> and women.<sup>651</sup>

Secondly, the beginning of the 1990s marked the definite breakthrough of the thematic approach. Between 1990 and 1994 the Commission created 7 new thematic mandates.<sup>652</sup> In addition, in the same period it created no less than 11 new country-specific procedures.<sup>653</sup> This increase in mandates – some would even speak about proliferation – was not followed by a proportional increase in the staff servicing them.

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641 U.N. Doc. E/CN.4/1987/15, paras. 2 and 125.

642 U.N. Doc. E/CN.4/1990/13, para. 364.

643 At least not in the manner in which it sought to expose Governments. As of 1994 the Working Group has included in its report a chapter on the implementation of the Disappearances Declaration. See U.N. Doc. E/CN.4/1995/36, para. 6. Also *supra* Chapter III.3.2.5.1.

644 See U.N. Doc. E/CN.4/1993/25, para. 522.

645 See U.N. Doc. E/CN.4/1992/18, paras. 378 ff and U.N. Doc. E/CN.4/1992/18/Add.1, paras. 79, 80, 110-114, 204 (m). Also C.H.R. Res. 1993/54.

646 From 1990 onwards, C.H.R. Res. 1990/75, *supra* Chapter III.3.2.4.3.

647 From 1991 onwards, C.H.R. Res. 1991/70, *supra* Chapter IV.3.1.

648 From 1992 onwards, C.H.R. Res. 1992/24 and 1993/33, see also U.N. Doc. E/CN.4/1993/25, paras. 50-55.

649 From 1993 onwards, C.H.R. Res. 1993/30.

650 From 1993 onwards, C.H.R. Res. 1993/24.

651 From 1994 onwards, C.H.R. Res. 1994/45.

652 The following thematic procedure mandates have been established as of 1990: sale of children (1990), arbitrary detention (1991), internally displaced persons (1992), freedom of opinion and expression (1993), racial discrimination (1993), independence of judges and lawyers (1994) and violence against women (1994).

653 See also Lempinen 2001, p. 165.

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Already in 1991 the Working Group referred to the negative effects of this development in its annual report. In the same year, Van Dongen warned against what he called 'system-overload of the United Nations special procedures':

'One cannot add more and better human rights mechanisms every year without ensuring that a minimum of servicing is available. There is a clear and present danger of *'arrosage général'*: you water all the plants, but each plant gets just too little water and they all die.'<sup>654</sup>

By the beginning of 1993 the Working Group had to report to the Commission that it still had to process a backlog of some 8,000 cases and that for that reason the graphs for 1990 and 1991 appearing at the end of the report '[did] not often reflect the number of disappearances reported.'<sup>655</sup> The graph for 1992 had not been included, because 'in the Group's experience' many cases are received only the following year.<sup>656</sup> The next year the backlog of cases remained equally high. Consequently, once again the Working Group could not give accurate and up to date statistics, especially not with regard to the most serious situations under review at that moment, *i.e.* the cases of Iraq and Sri Lanka.<sup>657</sup>

Despite repeated calls to the Commission on Human Rights that its credibility was at stake, the Working Group could not prevent the further deterioration of its financial and staffing difficulties.<sup>658</sup> The year 1994 may be said to constitute a turning point in this development, marking the beginning of what could be characterised as a phase of regression. In that year the Working Group again changed the format of its report. On the 'positive' side the decision to include observations on the situation of disappearances in specific countries does stand out. Also, the Working Group decided to assume competence to monitor States' compliance with the Disappearances Declaration, thus adding another task to its mandate.<sup>659</sup> However, these developments have been overshadowed by other negative tendencies.

To begin with, the proliferation of thematic mandates has continued unabated without a corresponding increase in Secretariat staff supporting them. From 1994 onwards another 17 additional mandates have been established.<sup>660</sup> By 1998 the redistri-

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654 Intervention by Toine van Dongen, HRLJ 1991, pp. 130 and 131. See also U.N. Doc. E/CN.4/1992/18, para. 386.

655 U.N. Doc. E/CN.4/1993/25, para. 10.

656 *Ibid.* As of 1992 the Working Group decided not to include a graph for the year under consideration. It believed the statistical summaries in the country subsections would give an accurate picture of the pattern of disappearances in the world. U.N. Doc. E/CN.4/1992/18, para. 7.

657 U.N. Doc. E/CN.4/1994/26, para. 6.

658 See U.N. Doc. E/CN.4/1993/25, para. 523 and U.N. Doc. E/CN.4/1994/26, para. 540.

659 See U.N. Doc. E/CN.4/1995/36, para. 6, *supra* Chapters III.3.2.4.3 and III.3.2.5.1.

660 The following thematic procedure mandates have been established from 1995 onwards: toxic wastes (1995), structural adjustment (1997), children in armed conflict (1997), right to development (1998), right to education (1998), extreme poverty (1998), restitution, compensation (1998, discontinued in 2000), foreign debt (1998, merger with structural adjustment in 2000), migrants (1999), food (2000), adequate housing (2000), human rights defenders (2000), indigenous peoples (2001), optional protocol

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bution of tasks in the Secretariat that resulted from this development had led to the situation that 'staff members could handle only 65% of the Group's total workload.'<sup>661</sup> In 2000 the meeting of special procedures mandate holders also discussed the fundamental dilemma of the continuous increase in the number of special procedures mandates vis-à-vis the requirement that they be serviced 'from within existing resources.' On that occasion the mandate holders explicitly noted that the development 'had the deplorable effect of *diluting the work of the existing mandates* by *reducing* the availability of support services and *the quality of outputs*. The Commission either had to reduce the number of special procedures mandates, or agree to a substantial increase in the services available to them.'<sup>662</sup>

A 'novel' factor directly inhibiting the quality of the reports had been the decision of the Commission that all reports submitted to it should follow the standards and guidelines established by the General Assembly, in particular that they should, as much as possible, not exceed the desirable 32-page limit.<sup>663</sup> To this end, the Working Group decided no longer to reflect its correspondence with Governments and NGOs in the relevant country subsections of the report, but rather to group the information received from all Governments and NGOs in two separate chapters. Furthermore, the statistical summaries for all countries would be grouped together in an annex to the report, instead of the country subsections. More significantly, the Working Group reported that it was

'impossible to give full or detailed information in the report concerning each and every major decision affecting the Group's work. It [was] also not possible to reproduce in full, or in great length, contributions received from Governments and non-governmental organisations.'<sup>664</sup>

Although the Working Group indicated that the main arguments would still be reflected in the report and that the full texts of communications of a general nature would be available for consultation in the Secretariat, it is obvious that these measures diminished the quality and, therefore, the potential nuisance-value of the annual report. But the situation would still become worse.

In 1995/1996 the financial crisis of the United Nations forced the Working Group to reduce the length of one of its annual sessions and even to postpone a visit to Colombia planned for 1995. In addition, the decision had been taken that the 32-page limit for annual reports of thematic procedures could now be enforced. The Working

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to the International Covenant on Economic, Social and Cultural Rights (2001, discontinued in 2003), disappearances (2001, discontinued in 2002), problems of racial discrimination faced by people of African descent (2002), Durban Declaration and Programme of Action (2002).

<sup>661</sup> Introductory statement by the Chairman of the Working Group before the Commission. U.N. Doc. E/CN.4/1998/SR.26, para. 45.

<sup>662</sup> U.N. Doc. E/CN.4/2001/6, para. 94 [emphasis added].

<sup>663</sup> C.H.R. Res. 1993/94, para. 1. Also G.A. Res. 37/4 C of 22 November 1982 and especially G.A. Res. 47/202 B of 22 December 1992.

<sup>664</sup> U.N. Doc. E/CN.4/1995/36, para. 7.

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Group expressed its dismay at this decision, which was communicated to it only a few days before the adoption of the annual report:

‘While 32 pages may be a reasonable limit for certain reports, it is certainly not the case for this Working Group, which deals with almost 70 countries. (...) guidelines should be brought to the attention of the respective entities before they start drafting their reports to the Commission.’<sup>665</sup>

The report was cut down to some 100 pages, but with this reduction the Working Group indicated that the limit had been reached: ‘[a]ny further reduction would have been irreconcilable with its duty to carry out its mandate and *to report to the Commission in a responsible manner*.’<sup>666</sup> The topic was also discussed at the 1996 annual meeting of special procedures mandate holders, where it was pointed out by the Secretariat that the rule concerning the 32-page limit had thus far been interpreted in a flexible manner.<sup>667</sup> This would remain the case until 1999.

In that year, the High Commissioner for Human Rights explicitly requested the Chairman of the Working Group not to exceed the 32-page limit. As had also been the case in 1994, the request to reduce the length of the report obliged the Working Group to revise its format. It would now distinguish between three categories of States: (1) countries in which there were new cases of disappearances or clarifications; (2) countries on which the Working Group received comments from Governments and NGOs; (3) countries from which the Working Group received no information or comments.<sup>668</sup> Moreover, as has been shown in Chapter III.3.2.5.1, important sections on, *inter alia*, the implementation of the Disappearances Declaration and, more importantly, country observations could not be included in the report.<sup>669</sup>

Apparently, these decisions divided the five members of the Working Group. Notwithstanding the fact that the report was adopted by consensus, for the first time in the history of the Working Group, two of its members insisted on expressing a separate opinion in which they strongly objected to the 32-page limit. The members García-Sayán (Peru) and Nowak (Austria) protested in particular against the restructuring of country sections and the arbitrary distinction that thus had to be drawn between ‘new’ cases, *i.e.* cases reported in the past year or on which new information had been received and ‘old’ cases, *i.e.* cases on which no new information had been forthcoming, but which remained unclarified. They also pointed at the fact that even with regard to ‘new’ cases the ‘information was reduced to an extent which *made it*

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<sup>665</sup> U.N. Doc. E/CN.4/1996/38, paras. 9-11.

<sup>666</sup> *Ibid.*, para. 11. The same comments were made in 1996/1997, see U.N. Doc. E/CN.4/1997/34, para. 6.

<sup>667</sup> U.N. Doc. E/CN.4/1997/3, paras. 20 ff.

<sup>668</sup> U.N. Doc. E/CN.4/2000/64, para. 23.

<sup>669</sup> *Ibid.*, para. 7. These sections were first omitted in 1999, then as a result of acute financial and staffing limitations, see U.N. Doc. E/CN.4/1999/62, para. 7. *Supra* Chapter III.3.2.5.1.

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*difficult for the reader to understand the situation in different countries.*<sup>670</sup> In their opinion:

‘[t]he present report neither adequately reflects the situation of enforced disappearances throughout the world nor the efforts of the Working Group to clarify the fate and whereabouts of some 50,000 disappeared persons in more than 70 countries.’<sup>671</sup>

In 2000 Nowak appended the same separate opinion.<sup>672</sup> By 2001 not much may have remained of the credibility of the Working Group. It was heavily criticised for the unacceptable ‘bureaucratic’ nature of its annual reports, which no longer made any difference in terms of revealing violations of human rights.<sup>673</sup> This criticism has at least had some effect. Still, in 2001, the Working Group decided to return to the earlier format consisting of brief sections on the situation of disappearances in countries with outstanding cases, country-specific observations on those with over 100 cases of disappearances or a high number of recent cases, and relevant annexes containing statistical data and graphs. However, this decision could not restore the unity of the Group. This time, member Tosevski (former Yugoslav Republic of Macedonia), the last remaining original member of the Working Group, indicated his disapproval. Both in 2001 and 2002, he would append the following separate opinion to the report:

‘I strongly object to the present report, which is not in conformity with the request of the General Assembly, contained in its Resolutions 37/4C of 22 November 1982 and 47/202B of 22 December 1992.’<sup>674</sup>

Moreover, the effects of the decision to return to the earlier format may only have been cosmetic. Clearly, it could do nothing to tackle such structural factors as the shortage in staff and finance and the backlog of cases resulting therefrom. Thus, despite the return to the old format, the backlog of cases still to be processed in January 2003 was more than 15,000 and the Working Group had to acknowledge that this ‘has an inhibiting effect on the accurate representation and evaluation of the number of cases in the Working Group’s files.’<sup>675</sup> In fact, there was little room for optimism. As the Working Group concluded:

‘If no solution is found to the staffing crisis, the Working Group is deeply concerned that it will cease to function as an effective instrument of the Commission on Human Rights.’<sup>676</sup>

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670 U.N. Doc. E/CN.4/2000/64, para. 144 [emphasis added].

671 Ibid.

672 U.N. Doc. E/CN.4/2001/68, para. 128. Member García-Sayán was absent at the time of the adoption of the report.

673 See HRM, Nos. 53-54 (2001), pp. 126-127.

674 U.N. Doc. E/CN.4/2002/79, para. 368 and U.N. Doc. E/CN.4/2003/70, para. 332.

675 U.N. Doc. E/CN.4/2003/70, para. 9.

676 Ibid., para. 330.

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#### IV.7.2 Special Rapporteur on Torture and the Working Group on Arbitrary Detention

Perhaps the most striking difference between the annual reports of the Working Group on Enforced or Involuntary Disappearances and those of the Special Rapporteur on Torture is the inclusion of the names of the alleged victims in the reports of the latter procedure. The Special Rapporteur on Torture first introduced this practice in his 1988/1989 report, after that the Commission, for the first time, extended his mandate for a period of two years.<sup>677</sup> This development went hand in hand with a transformation of the format, contents and size of his annual reports, in which the emphasis would be increasingly placed on the monitoring aspects of the mandate rather than the study aspects. Thus, after having spent considerable time establishing and clarifying the theoretical and conceptual aspects of torture during the first years of his mandate, the first Special Rapporteur incrementally developed the section on 'activities of the Special Rapporteur', which included, in particular, information reviewed with respect to various countries, to make up the core of his reports.<sup>678</sup> From three pages in 1987/1988<sup>679</sup> this particular section grew to 27 pages the next year, *i.e.* the period 1988/1989, the year in which he first mentioned the names of the alleged victims.<sup>680</sup> By the end of Peter Kooijmans' tenure as mandate holder in 1993, the section covered some 110 pages. With the appointment of Sir Nigel Rodley in 1993 the country-related section of the annual report would further increase in size from 120 pages in 1994 to some 160 pages in 1995. In 2001, the final year of Sir Nigel Rodley's tenure, the amount of country-specific information available through an addendum to the Special Rapporteur's annual report had reached the impressive volume of 361 pages.<sup>681</sup> In 2004, the last year that Theo van Boven held the post of Special Rapporteur, that addendum had grown to 420 pages.<sup>682</sup>

A significant development for the mandate of the Special Rapporteur on Torture took place in 1998 when the Commission invited him to present an oral interim report to the General Assembly 'on the overall trends and developments with respect to his mandate.'<sup>683</sup> This invitation has been renewed in the years thereafter so as to become

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<sup>677</sup> See U.N. Doc. E/CN.4/1989/15, paras. 11 ff.

<sup>678</sup> As of 1993 the Special Rapporteur included his correspondence with Governments under the heading 'Information reviewed by the Special Rapporteur with respect to visits to various countries.' See U.N. Doc. E/CN.4/1993/26.

<sup>679</sup> U.N. Doc. E/CN.4/1988/17, pp. 5-7.

<sup>680</sup> U.N. Doc. E/CN.4/1989/15, pp. 4-31. The remainder of the report was mainly dedicated to the Special Rapporteur's on-site visits to Peru, the Republic of Korea and Turkey.

<sup>681</sup> U.N. Doc. E/CN.4/2002/76/Add.1.

<sup>682</sup> U.N. Doc. E/CN.4/2004/56/Add.1.

<sup>683</sup> C.H.R. Res. 1998/38, para. 30. See U.N. Doc. E/CN.4/1999/61, para. 5. Already in 1996 the Commission had invited the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions to present such an interim report. C.H.R. Res. 1996/74 of 24 April 1996. See Rodley 1999, p. 202.

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an established part of the Special Rapporteur.<sup>684</sup> Clearly, this development may be seen as an expression of support for the mandate and, more practically, a (further) occasion for the Special Rapporteur to present his work before one of the principal organs of the Organisation. However, since the Special Rapporteur's interim report is restricted to giving an 'outline' of overall trends and developments relating to his mandate, the immediate impact in terms of monitoring the performances of individual countries remains rather limited. For that reason, it will not be further elaborated upon in the context of this study.

The annual reports of the Working Group on Arbitrary Detention have not undergone significant changes since the establishment of the mandate in 1991. The report has traditionally had a strong focus on the concrete activities of the Working Group, including its decisions/opinions in individual cases and its correspondence with Governments.<sup>685</sup> The decisions/opinions had at first been included in annexes to the Working Group's main report, but were later, as from 1994/1995, included in a separate addendum to its main report.<sup>686</sup> Instead, the main report would include a list of the Group's decisions/opinions adopted during that year, mentioning the names of the individuals and the countries concerned as well as the kind of decision taken in each individual case.<sup>687</sup> If it was found that the person in question had been arbitrarily deprived of his freedom, the Working Group would also indicate the category of arbitrary detention.<sup>688</sup> Over the years, the size of the Working Group's reports has remained rather stable with the main report covering some twenty to forty pages and the annexes and addenda containing the decisions/opinions generally not exceeding 100 pages.

Such factors as an enforceable 32-page limit, backlogs due to a shortage of staff and resources etc. have been a general problem for all United Nations special procedures, including the Special Rapporteur on Torture and the Working Group on Arbitrary Detention. However, the impact of these factors on the quality of the reports of these two procedures as well as the unity of the group members (in the case of the Working Group on Arbitrary Detention) seems to have been less dramatic than it has

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684 In 1999, pursuant to G.A. Res. 53/139 of 8 December 1998, the Special Rapporteur submitted his first *written* interim report to the General Assembly, a practice which has been repeated ever since. See also U.N. Doc. E/CN.4/2003/68, para. 19.

685 In the light of the fact that the theoretical and conceptual aspects of the topic of arbitrary detention had already been studied extensively by both the Sub-Commission and the Commission in the years preceding the Group's establishment, the annual reports have not paid much attention to these issues. Moreover, since it had been the intention of the Commission to establish a mandate empowered to present formal findings in individual cases of arbitrary detention, there was also no direct need for the Working Group to display particular caution in presenting information relating to such cases. For these reasons, amongst others, there has been no such thing as an 'incremental approach' as far as the format of the Working Group's report is concerned.

686 U.N. Doc. E/CN.4/1995/31/Add.1 and Add.2.

687 See U.N. Doc. E/CN.4/1993/24, Annexes.

688 U.N. Doc. E/CN.4/1995/31, para. 27, *supra* Chapter III.3.2.5.3.

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been in the case of the Working Group on Enforced or Involuntary Disappearances. A few events are nevertheless worth noting.

Firstly, in 1996 the page reductions imposed by the United Nations Secretariat forced the Special Rapporteur on Torture to restructure the section of its main report entitled 'information reviewed by the Special Rapporteur with respect to various countries.' As the Special Rapporteur pointed out, in the past that section contained 'increasingly succinct' summaries of information transmitted to Governments, urgent appeals, Government responses as well as country-specific observations, but that year he was only able to give a brief summary of general allegations, some statistical information regarding the cases transmitted and the responses received and, as far as relevant, country-specific observations.<sup>689</sup> To some extent, the Special Rapporteur was able to mitigate the adverse effects of this page reduction by making available to the Commission more complete summaries of the allegations of torture that had reached him through a separate addendum to his main report. At the same time, a lack of resources prevented him from providing a translation of the addendum in the official languages of the United Nations. The result was a multilingual document with information available only in the language in which the dialogue with the Government concerned had taken place.<sup>690</sup> In the years which followed the Special Rapporteur clearly struggled to establish an adequate format for his report. Thus, in 1997 and 1998 page limits again prevented the Special Rapporteur from including all information in his main report and although on this occasion the addenda could be reproduced in the official languages of the organisation, page limitations were also imposed on them.<sup>691</sup> During the years 1999 to 2001 more elaborate summaries in different languages reappeared in the Special Rapporteur's main report, much to the dismay of some Governments, notably Cuba, which wondered why the Special Rapporteur was allowed an exception to the general page limits imposed on the reports of special procedures.<sup>692</sup> Since 2001 the Special Rapporteur has again returned to the old format in which information with respect to various countries has again been included in a separate addendum to the main report. This time, however, all information concerning transmissions, urgent appeals, Government responses and country-specific observations has been included in that addendum. The main report, which has become much smaller in size, some 20 pages in 2004, essentially serves as an introduction to his activities and otherwise deals with more theoretical or conceptual issues.<sup>693</sup>

As mentioned earlier, the Working Group on Arbitrary Detention has managed to maintain a uniform format for its annual reports throughout its existence. Occasionally, however, the Working Group has also complained that a lack of resources have influenced the contents and presentation of its annual reports, including

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689 U.N. Doc. E/CN.4/1996/35, para. 8.

690 *Ibid.*; information in English, French and Spanish.

691 U.N. Doc. E/CN.4/1997/7, para. 17.

692 See, for example, U.N. Doc. E/CN.4/2001/66.

693 See, for example, U.N. Doc. E/CN.4/2004/56. Theoretical and conceptual issues, if any, continue to be dealt with in the main report (*e.g.* HIV/AIDS and torture).

the addenda containing on-site visits. For example, in 1999 the Working Group reported to the Commission that numerous communications concerning China, deliberately kept pending during the Group's visit to that country, remained in abeyance.<sup>694</sup> Similarly, three years later, during the Commission's 2002 session – a particular turbulent session as will be seen below – the Chairman of the Working Group was to introduce his mission report to Bahrain, but to his regret he had to discover that four months after the report had been submitted it was still not available in the English language.<sup>695</sup> This was all the more disappointing, according to the Chairman, since the mission had been carried out 'in an atmosphere of unprecedented cooperation with NGOs and with the Government of the country.'<sup>696</sup>

#### **IV.7.3 Interactive Dialogue as a Means to Revitalise Discussions in the Commission**

As noted in the introduction to this Chapter, the annual reports of thematic procedures have had a very limited effect on the actions of the Commission, especially not in terms of singling out countries where the existence of a consistent pattern of gross violations had been identified by the mandate holders. Over the years, the prospects of improvement have not increased. On the contrary, towards the end of the 1990s there seems to have been a clear tendency in the Commission to move increasingly away from a confrontational approach.<sup>697</sup>

For example, for the first time in 1998 the Working Group on Enforced or Involuntary Disappearances adopted the practice of mentioning, by name, in the conclusions of its main report, the countries which had failed to cooperate, in particular those which had never replied to transmissions. More significantly, it explicitly requested the Commission to take action in respect of these countries.<sup>698</sup> So far, however, these appeals have never spurred on the Commission to address any of those Governments.

Similarly, special procedures mandate holders have frequently expressed their dissatisfaction with the procedure surrounding the oral presentation of their reports. They have complained about the absence of a real debate – they deliver a monologue before the Commission –, unstructured interventions, a lack of feedback and, more fundamentally a lack of speaking time.<sup>699</sup>

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694 U.N. Doc. E/CN.4/1999/63, para. 41.

695 The same was true for the addenda to the report of the Special Rapporteur on Torture, which were as yet not even available.

696 U.N. Doc. E/CN.4/2002/SR.31, paras. 58-60.

697 See also International Service for Human Rights, Analytical report of the 59th session – Geneva, 17 March to 25 April 2003, 'Overview of the 59th Session' under 'Negative trends and developments', HRM 2003, p. 5: internet document, see [www.ishr.ch](http://www.ishr.ch)

698 U.N. Doc. E/CN.4/1998/43, para. 417.

699 See also the 1999 annual meeting of special procedures mandate holders, where it was stated that 'Rapporteurs and experts were allowed wholly insufficient time to present their reports in the plenary (this was particularly true for thematic rapporteurs), debates tended to be ritualistic and stereotyped, and replies of delegations were often out of tune with the tenor of the rapporteurs' and experts'

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Against that background, special procedures mandate holders in 1996 came up with the idea to institutionalise some sort of dialogue between the experts and the Commission.<sup>700</sup> At the 1999 annual meeting of special procedures mandate holders, it was then suggested that the Commission on Human Rights might want to follow the example of the Third Committee of the General Assembly which, in the autumn of 1998, had facilitated a spontaneous dialogue between rapporteurs and delegations immediately after the presentation of the rapporteurs' report(s).<sup>701</sup>

Developments accelerated after the particular negative experience of the 2002 session of the Commission, characterised, amongst other things, by drastically reduced speaking times for special procedures.<sup>702</sup> During that session special procedures mandate holders were allowed five minutes instead of the usual 15 minutes to introduce their reports before the Commission. In protest many of them refused to present their reports to the Commission. Others only delivered a brief statement. For example, the Chairman of the Working Group on Arbitrary Detention stated that 'it was impossible to introduce a year's work and two and a half year's negotiations leading up to his visit to Bahrain in such a short time, he would submit the report as it stood.' He appealed to the Members 'to read it or, at the very least, to look at the recommendations and the summary.'<sup>703</sup>

The next year, in 2003, the Commission finally took concrete action and established a so-called 'interactive dialogue', in which special procedures mandate holders, Governments and NGOs participate and exchange views concerning the annual reports and addenda of the mandate holders.

While it may still be too early to evaluate the precise practical impact of this innovation on the actions of the Commission, it has, in a number of situations, already given rise to heated discussions between special procedures mandate holders and the Governments concerned.<sup>704</sup> These confrontations have involved, amongst others, the Working Group on Arbitrary Detention and the Special Rapporteur on Torture. A case in point was the debate concerning the Working Group on Arbitrary Detention's 2003 mission report to Australia referred to earlier on in this study, which the Government of that country not only rejected on the basis of the contents of the report, but which it also considered a waste of the scarce resources available to the mandate.<sup>705</sup> The following year there was a similar confrontation between the Government of Spain and the Special Rapporteur on Torture concerning the latter's 2003 on-site visit to the

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conclusions and recommendations.' U.N. Doc. E/CN.4/2000/5, para. 72.

700 U.N. Doc. E/CN.4/1997/3, paras. 20 ff.

701 U.N. Doc. E/CN.4/2000/5, para. 74.

702 See also HRM, Nos. 57-58, July 2002, pp. 151 ff.

703 U.N. Doc. E/CN.4/2002/SR.31, paras. 58-60.

704 The International Service for Human Rights, for example, emphasised that the interactive dialogue 'needs to be further developed (...) to become a true dialogue and less an exchange of a set of speeches'. See International Service for Human Rights, Analytical report of the 60th session – Geneva, 15 March to 23 April 2004, 'Civil and Political Rights' under 'Torture and Arbitrary Detention', HRM 2004, pp. 22 ff.: internet document, see [www.ishr.ch](http://www.ishr.ch)

705 *Supra* Chapter III.3.2.5.3.

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country. In his mission report, the Special Rapporteur concluded, *inter alia*, that torture or ill-treatment is not systematic in Spain, but that the system as it is practised allows torture or ill-treatment to occur, particularly with regard to persons detained *incommunicado* in connection with terrorist-related activities.<sup>706</sup> In the debate, which took place only weeks after the 11 March 2004 bombings in Madrid, the Government of Spain severely criticised both the mission report and the Special Rapporteur himself, *inter alia*, for showing insensitivity to the demands of counter-terrorism and '[drafting] a report in a vacuum' and for not showing impartiality and relying on sources that were not credible. The Special Rapporteur nevertheless stood by his findings, which he found corroborated, *inter alia*, by the Committee against Torture and the Council of Europe's Committee against Terrorism.<sup>707</sup> Despite the bitterness on the side of the Government of Spain, the criticism finally did not have any consequences for the mandate of the Special Rapporteur, which was renewed for another three years.<sup>708</sup>

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706 U.N. Doc. E/CN.4/2004/56/Add.2 (mission report) and International Service for Human Rights, Analytical report of the 60th session – Geneva, 15 March to 23 April 2004, 'Civil and Political Rights' under 'Torture and Arbitrary Detention', HRM 2004, pp. 22 ff.: internet document, see [www.ishr.ch](http://www.ishr.ch)

707 International Service for Human Rights, Analytical report of the 60th session – Geneva, 15 March to 23 April 2004, 'Civil and Political Rights' under 'Torture and Arbitrary Detention', HRM 2004, pp. 26 and 27: internet document, see [www.ishr.ch](http://www.ishr.ch).

708 C.H.R. Res. 2004/41, paras. 27ff, adopted 19 April 2004.



## CHAPTER V CONCLUSIONS

### V.1 INTRODUCTION

The first objective of the present study has been to clarify the meaning and scope of the concept of domestic jurisdiction as contained in Article 2 paragraph 7 of the Charter of the United Nations against the background of the establishment and practice of United Nations thematic procedures, exemplified first and foremost by the Working Group on Enforced or Involuntary Disappearances and supplemented by the Special Rapporteur on Torture and the Working Group on Arbitrary Detentions respectively.

In the second chapter, Chapter II, of this research, which dealt with the development of the concept of domestic jurisdiction in the theory and practice of the United Nations until 1980, the above objective has been redefined and reformulated in a number of concrete questions. In particular, the question has been posed whether the practice of thematic procedures, as exemplified by the three selected mechanisms, could be said to have reached the level of an 'appearance of a coherent practice' so that one may truly speak of a generally applicable procedure. Moreover, four additional questions have been extracted from the findings in Chapter II, each of these questions pertaining to particular aspects of the mandates of the three selected thematic procedures: (1) the question of the competence to respond to individual cases of violations of human rights; (2) the question of the institutionalisation of the different working methods available to thematic procedures; (3) the question of the 'conditions of use' of these different working methods; and (4) the question whether thematic procedures have succeeded in increasing the transparency of the process of holding Governments accountable for human rights violations and mobilising international public opinion.

In this chapter an attempt will be made to answer these questions in the light of the findings concerning the establishment and practice of the three selected thematic procedures. This will be done under three different headings. Firstly, under the heading 'Establishing and Institutionalising the Rules of the Game' [Chapter V.2.1] the contribution of thematic procedures to the formalisation, juridification and institutionalisation of particular techniques to scrutinise human rights situations, as well as their conditions of use, and which are available to the United Nations, will be highlighted. Similarly, attention will be paid to the impact of the practice of thematic procedures on the rules of general international law. Secondly, under the heading 'Effectiveness of the Commission's Thematic Procedures' [Chapter V.2.2] the impact of thematic procedures in terms of making a structural contribution to the improvement of human rights situations will be evaluated. Thirdly, under the heading 'Emergence of an Actor: the United Nations' [Chapter V.2.3], it will be argued that the establish-

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ment and practice of thematic procedures have contributed to – and are part of – a broader process, which has led to the increasing moral prestige of the United Nations as an actor on the international plane.

On the basis of these conclusions, the more difficult and speculative objective of this research will be addressed, *i.e.* a tentative re-evaluation of the nature of the international legal order [Chapter V.3].

## V.2 THEMATIC PROCEDURES AS A 'GENERALLY APPLICABLE PROCEDURE'

### V.2.1 Establishing and Institutionalising the Rules of the Game

Before elaborating in more detail on the contribution of thematic procedures to the establishment and clarification of the methods and rules applicable to human rights monitoring by the political organs of the United Nations, it is important to bring to the fore the finding in Chapter III.3.1.4 regarding the relevance of the plea of domestic jurisdiction at the time of the establishment of the three selected thematic procedures. Indeed, anything that will be said below on the formalisation, juridification and institutionalisation of the rules of the game is ultimately based on the simple, but crucial fact that the plea of domestic jurisdiction was neither raised, nor otherwise found to be applicable (by the Commission) at the time of the establishment of the Working Group on Enforced or Involuntary Disappearances. To put it somewhat negatively, the establishment of the Working Group effectively implied that the Commission considered this type of decision, *i.e.* the decision to *establish* a thematic procedure with a worldwide mandate, not to be contrary to Article 2 paragraph 7 of the Charter. More positively, that decision, subsequently endorsed by the Commission's parent organ ECOSOC, may be regarded as sanctioning the extension of the Commission's monitoring competences under the 1235 procedure beyond the *sui generis* situations of the 1970s.

#### V.2.1.1 Formalisation

Thematic procedures have been described as informal, flexible and pragmatic mechanisms. Mostly, these qualifications refer to the manner in which thematic procedures, exemplified in particular by the Working Group on Enforced or Involuntary Disappearances, have implemented the original vague terms of their mandates. As has been shown, the vagueness of the original mandate of the Working Group was not an accident of drafting, but a compromise solution between two opposing views regarding the nature of the competences of the proposed mechanism against disappearances. The debate concerned, in particular, the question whether the proposed mechanism would be able to take cognizance of individual cases of disappearances *per se*, *i.e.* without applying the threshold policy of the 1503 procedure requiring the existence of a consistent pattern of gross and reliably attested violations of human rights. Insisting

on the humanitarian nature of its mandate, the Working Group found a way around the delicate legal questions concerning its competences and methods of work.

Indeed, the humanitarian approach stood for a non-judgmental, victim-oriented posture emphasising effectiveness rather than procedure. It was that approach which enabled the Working Group to secure its own political survival, to consolidate the object of its mandate, to reach out to the victims, while attempting to be as effective as possible given the formal limits of its powers and the reigning (geo-)political circumstances.

However, this research has shown how thematic procedures have increasingly moved away from a strictly humanitarian approach towards a more judgmental style. This changing posture has been largely the result of what may be called a process of formalisation, a (natural) tendency to establish and concretise the rules of the game in a process of interaction between thematic procedures, Governments, the Commission and other actors.

While the Working group's initial approach may have appeared to be particularly informal, *i.e.* a practice apparently lacking any hard and concrete rules in the form of codified working methods, underneath the surface even this informal and pragmatic practice has established patterns of interaction and exchanging information with Governments. The formation of such patterns marked the beginning of a still largely invisible process of formalisation. Sometimes it has been possible to retrace parts of these interactions and discussions in the Working Group's annual report, such as the discussions on the (il)legality of taking cognizance of individual communications, the non-applicability of the conditions of admissibility of the 1503 procedure or the exclusion of situations of (international) armed conflict from the purview of its mandate. However, in the early years the Working Group refrained from drawing up a systematic overview of its working methods and the principles guiding their application.

As has been shown, this situation did not change until the mid-1980s. Two developments probably facilitated the move towards a formalisation of working methods. Firstly, by 1985 the legitimacy of and support for the mandate of the Working Group had grown sufficiently for the Commission to express its willingness to consider renewing the mandate of the Group for a period of more than one year at a time. Subsequently, this intention became a reality in the following year as the mandate was renewed for a period of two years. Secondly, given the fact that information concerning discussions opposing the Working Group and individual Governments was scattered over different annual reports, it became increasingly difficult for outsiders, but also for Governments with which the Working Group was dealing for the first time, to find out precisely how and according to which rules the Working Group operated. The informal strategy that had helped the Working Group to survive the crucial first years of its existence now seemed to be turning against it.

Thus, the time seemed ripe for the Group to consolidate its achievements up to that point in the form of a formal 'codification' of its working methods and the basic principles guiding their application. The breaking-point came in 1987 as the Govern-

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ment of Colombia demanded that the Working Group should refer to its working methods in its next report. Consequently, in 1988 the Working Group presented its first comprehensive and systematic overview of its working methods, clarifying and consolidating the informal practices on the following issues: (1) the range of actors from which information may be received or sought, including in particular NGOs and individuals; (2) the conditions of admissibility of that information or rather the inapplicability of the admissibility requirements of the 1503 procedure and the Optional Protocol to the International Covenant on Civil and Political Rights; (3) the irrelevance of a time-limit as a condition for the admissibility of information; and (4) last but not least, four distinct techniques available to thematic procedures to bring information to the attention of Governments, to obtain first-hand information from Governments and to report that information to the Commission on Human Rights: routine transmissions, urgent action transmissions, country visits and annual reports.

What followed in the years after 1987 has been a process of informal expansion, consolidation and subsequent incorporation of rules and practices in revised versions of the Group's working methods published in 1996 and 2002. Particularly noteworthy have been the Working Group's actions to further develop the implementation of the technique of on-site visits, a process set in motion in the second half of the 1980s characterised by a more judgmental posture, which manifested itself through practices such as the inclusion of reports of on-site visits in a separate addendum to the main report as well as the practice of adopting increasingly detailed country-specific recommendations. These practices were all incorporated in the Group's 1996 revised working methods.

Other important aspects from the Working Group's practice that were formalised during the 1990s included, *inter alia*: (1) the practice of including country-specific observations in its main report (first introduced in 1994 and incorporated in the working methods in 1996); (2) the assumption of competence to monitor States' compliance with the Disappearances Declaration (first assumed in 1994/1995 and incorporated in 1996) as well as the decision to adopt General Comments on the different articles contained in the Declaration. The last time the Working Group finished a review process, in November 2001, its description of working methods covered no less than 7 pages and regrouped all the different principles determining the application of its four major techniques (routine and urgent action transmissions, on-site visits and reports).

The same trend towards a more judgmental style under the influence of a process of formalisation and codification has also been discerned in respect of the practice of the Special Rapporteur on Torture. However, although the Special Rapporteur clearly benefited from the precedents set by the Working Group on Enforced or Involuntary Disappearances, the development took place in a dephased manner. The first Special Rapporteur, Peter Kooijmans, in particular, throughout his tenure gave preference to maintaining a considerable degree of informality in the implementation of his mandate. A first comprehensive overview of the Special Rapporteur's working methods was first given as Sir Nigel Rodley took over the post in 1993. But as in the case of the Working

Group, underneath the surface, the first Special Rapporteur had already established clear patterns of interaction with Governments and was developing others to become more judgmental. A typical example was the first Special Rapporteur's strategy to implement the technique of on-site visits. As has been shown, for this purpose he had introduced the (fictive) distinction between consultative and investigatory visits, which he hoped would induce Governments to invite him. At the same time, the distinction left open the possibility to move on to a more judgmental (investigatory) posture in the future.

A factor that may have influenced the somewhat slower development towards the formalisation and codification of the working methods of the Special Rapporteur on Torture has been the discussion concerning the coexistence of the mandate of the Special Rapporteur and the treaty-based Committee against Torture, which required the former, in the exercise of its mandate, to constantly reflect on his position vis-à-vis the Committee. It was only after this argument had been definitively defeated by the Commission in 1992 and a final argument in favour of the complementarity of the two bodies had been included in the Special Rapporteur's 1993 report that all obstacles inhibiting a formal approach seemed to have been removed. Four years later, in 1997, the Commission on Human Rights, through its Resolution 1997/38, explicitly approved the Special Rapporteur's revised working methods systematically compiled in an Annex to his annual report. This act may be said to conclude the process of the formalisation of the Special Rapporteur's basic working methods.

The Working Group on Arbitrary Detention occupies an exceptional position in the family of thematic procedures. Instructed 'to investigate cases of arbitrary detention', which has been understood as authorisation to present formal findings concerning individual cases of arbitrary detention, the Working Group's mandate has been described as quasi-jurisdictional rather than purely political. This exceptional mandate has also affected the Working Group's approach towards Governments. From the outset, the Group adopted a more formal approach than its counterparts on disappearances and torture. Already in its first year of operation the Group submitted to the Commission a detailed description of its working methods, in particular with regard to the handling of individual cases of arbitrary detention. This seemed a logical approach. Being able to rely on the precedents and groundwork established by the thematic procedures of the 1980s, the Working Group did not have to invest as much time and effort in securing the acceptance of its working methods in an incremental manner as was the case with these earlier procedures.

However, the Working Group on Arbitrary Detention initially took its competences too much for granted. There certainly is a difference between copying the generally accepted working methods of other thematic procedures, fine-tuning them in the light of the exceptional nature of its own mandate and believing that that mandate gives it *carte blanche* to approach Governments as if it were a fully-fledged judicial body, competent to take legally binding decisions, ignoring the political setting in which it operates. With its self-confident approach the Working Group defied the tolerance of the Commission, in particular concerning the following three topics: the use of the

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term 'decision' for its opinions in individual cases; applying the International Covenant on Civil and Political Rights to non-Party States; and the question of competence with regard to cases of post-trial imprisonment. The debates on these three topics eventually led the Commission to make some adjustments to the mandate of the Working Group. Through these adjustments – some would say restrictions – the Commission made clear that it was not ready to sanction and formalise some of the far-reaching practices of the Working Group.

The restrictions imposed on the Working Group have been criticised, as exemplified by the comments of De Frouville, on the grounds that they came down to satisfying the *desiderata* of a small number of rogue Governments and that they were contrary to the logic of the thematic approach as informal, flexible and pragmatic Charter-based organs. The present author believes that De Frouville's criticism tends to turn reality on its head. Whereas other thematic procedures, particularly the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture, have wisely managed to avoid what Kamminga has called 'the trap of attempting to act like a semi-judicial body',<sup>1</sup> the Working Group on Arbitrary Detentions has virtually showed no restraint in its use of terminology and in imposing its interpretations on Governments. Thus, as will be highlighted in more detail in the next section, the controversies concerning the use of the term 'decision' as well as the applicability of the International Covenant on Civil and Political Rights to non-Party States could easily have been avoided. Regarding the third topic of controversy, *i.e.* the question whether the Group had competence to review cases of post-trial imprisonment, the situation is more complicated, but even this dispute must be seen in conjunction with the Group's assertive use of terminology. While the underlying objective of the (Cuban) argument had been to prevent the Working Group from taking up cases of convicted political prisoners, it became clear from the discussions that a significant number of States could not accept the Working Group reviewing final decisions taken by national courts. This has been one of the very rare instances identified in this research in which the argument of State sovereignty was invoked. A truly regressive resolution, asserting the precedence of national legislation over international obligations could be avoided, but the final resolution was nevertheless ambiguous. The (from the viewpoint of international law) irrelevant reference to the independence of the judiciary figured side by side with the phrase authorising the Working Group to investigate cases of arbitrary detention 'provided that *no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards* set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.' On the other hand, the resolution clearly conveyed that, at least at that moment, the Commission was not ready to unconditionally accept the Working Group's interventions; a signal also for the Working Group to take into account in the implementation of and justification for its actions.

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<sup>1</sup> Kamminga, NILR 1987, p. 305.

The so-called informal, flexible and pragmatic logic of the thematic approach referred to by De Frouville would have required the Working Group to have shown more awareness of the sensitivities (still) existing in the Commission. By comparison, the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture have always acted flexibly and pragmatically where they believed their actions broke new ground or otherwise felt that they could not yet count on the full support of a majority in the Commission. In such instances, these two mechanisms have given priority to gradually building up a practice – giving prominence to effectiveness rather than formality or procedure –, estimating that, in the long run, this might breed a stable theoretical foundation for their actions in accordance with international law. From this perspective the informal, flexible and pragmatic approach stands for the initiation of innovative practices in accordance with the (human rights) norms and standards adopted by Governments, but leaves it to the political process, *i.e.* the process of interaction involving Governments, the Commission and other actors such as NGOs, to determine how the rules governing these practices will be shaped. This is the process that has generated the necessary legitimacy, which has eventually led to the formalisation of the rules of the game.

The formalisation and 'codification' of working methods and the rules which are relevant to their implementation have not unnecessarily burdened thematic procedures in further developing their mandates in order to respond to new political developments. As a matter of fact, practice shows that the process of the formalisation of working methods has neither prevented thematic procedures from taking new initiatives, nor has it prevented them from studying or taking up situations which, according to the letter of their (formalised) working methods, would seem to fall outside their competences.

Two examples of new practices that have been identified in this study include the 2003 initiative of the Special Rapporteur on Torture to strengthen his preventive capacity by assuming competence to address, through urgent appeals, the enactment of legislation or other measures that may undermine the prohibition of torture as well as his initiative, introduced in the same year, to widen the scope of his capacity to send urgent appeals by providing that, under certain conditions, entities other than *de jure* authorities may be addressed. Particularly the latter initiative is a perfect illustration of the continued ability of thematic procedures to react to new situations in a flexible and pragmatic manner without pre-empting discussions on the status of the entities concerned or on other relevant legal aspects pertaining to the practice.

As regards situations which thematic procedures had at first defined and formalised as falling outside the scope of their mandates, but nevertheless decided to study or take up, the cases of the Working Group on Enforced or Involuntary Disappearances with respect to the problem of the missing persons in the territory of the former Yugoslavia and the Working Group on Arbitrary Detention regarding the prisoners of Guantánamo Bay Naval Base may be mentioned. Both cases revealed that the initial self-inflicted mandate restriction not to deal with situations of (international) armed conflict did not constitute a major impediment for either Working Groups to study or to assume

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competence in these situations. The Working Group on Enforced or Involuntary Disappearances has again followed the more pragmatic approach of the two. As has been shown, the Group explicitly noted the incongruity existing between the exigencies of the situation in the territory of the former Yugoslavia and its own working methods and therefore proposed to the Commission that a Special Process, which would have to take a pragmatic, strictly humanitarian and non-accusatory approach aimed at clarifying the cases of disappearances, would be the most appropriate response to the problem. The Working Group on Arbitrary Detention, on the other hand, has sought a more confrontational approach towards the Government of the United States regarding the latter's practices at Guantánamo Bay Naval Base. According to the present author, in adopting this confrontational approach the Working Group has again attempted to act too much as a semi-judicial organ. He believes that the Working Group's actions may be criticised for neglecting the jurisdictional aspects of the mandate not in the last place because it otherwise approached the problem in such a technical juridical manner. Neither in its general legal opinion, nor in its opinion concerning the concrete situation of four detainees, has the Working Group referred to its own rule not to deal with situations of (international) armed conflict, particularly when the ICRC has competence. Moreover, as the Working Group subsequently held in its opinion that the detention of the four persons constituted a violation of Articles 9 of the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, this only added to the dispute with the Government of the United States, which now not only contested the Group's jurisdiction, but also reproached it for conflating human rights law and the laws of war. The present author believes that the Working Group should (and could) have approached the matter in a more pragmatic and informal manner, leaving some room for political discussion. Given the fact that the Working Group is simply not in a position to impose its views on the Government of the United States, it should have followed the example of the Special Rapporteur on Torture<sup>2</sup> and emphasised in particular the humanitarian aspects of its intervention. That approach would still have allowed the Group to question the policies of the Government of the United States, but would also have provided a more constructive foundation for discussions concerning the applicability of international norms and standards in different situations, a topic which the present author believes can only be satisfactorily dealt with in a spirit of mutual understanding and cooperation. In the long run, this might breed the new consensus that can subsequently be formalised. More recently, however, the Working Group indeed seems to have adopted this more flexible and constructive attitude. Thus, in its latest report, the Working Group indicated its serious concern regarding the uncertainty of the legal status of detainees subjected to interrogation by occupying forces in Iraq and wrote to the Governments of the United Kingdom, the United States, to the Iraqi Governing Council and to the Coalition Provisional Authority (CPA) '[requesting them] to

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2 Presentation by the Special Rapporteur on Torture, Theo van Boven, Utrecht 12 June 2003. Notes in the possession of the author.

provide information on the legal status of persons detained in Iraq, and on the application of the rules and norms entailed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the principles of international humanitarian law under the Geneva Conventions of 1949.<sup>3</sup> The way in which this request has been formulated clearly leaves room for the Governments concerned to express and explain their views on the matter.

#### V.2.1.2 *Juridification*

While formalisation tells us something about the acceptance of the procedural aspects of thematic procedures, *i.e.* the different modes of interaction between thematic procedures and Governments, juridification goes more to the substance of the different mandates and gives us an indication as to how and to what extent thematic procedures make use of legal and quasi-legal instruments in the exercise of their mandates.

As the Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances as an *ad hoc* response to the human rights situation in Argentina in 1980, there was no normative instrument specifically covering the problem of disappearances. This has certainly been another ground for the dominance of the humanitarian approach during the first decade of the Group's existence. The possibilities for the Working Group to find a justification for its actions – particularly recommendations aimed at the prevention of the phenomenon – other than in the points made in General Assembly Resolution 33/173, certain specific violations of accepted human rights and, more generally, on considerations of humanity were extremely limited. From this perspective, it is hardly surprising that at a very early stage (1983/1984) the Working Group called upon the Commission to consider drafting an international instrument on enforced or involuntary disappearances. The adoption of the Disappearances Declaration in 1992 marked a turning point in the functioning of the Working Group. As this research has shown, the Declaration has been an important catalyst in transforming the Group's humanitarian approach into a more juridical approach and, as a corollary, a more judgmental approach. Thus, even before the Disappearances Declaration was officially adopted, the Working Group already anticipated that it might assume the function of its custodian. Concretely, the Working

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3 U.N. Doc. E/CN.4/2005/6, para. 5. See also para. 6 containing the reaction of the Government of the United Kingdom: 'By letter dated 20 July 2004, the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva submitted a response explaining the three distinct categories of persons detained by United Kingdom troops in Iraq: prisoners of war (POWs) held under the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention); security internees held under the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and criminal detainees. The Government stated that, although the provisions of the Universal Declaration of Human Rights did apply to all three groups, the ICCPR did not apply to prisoners of war and security internees since these were, respectively, under the protection of the Third and Fourth Geneva Conventions, which provided parallel, though not identical, protections to those enshrined in articles 9 and 14 of ICCPR.'

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Group foresaw a task of monitoring the implementation of the provisions of the Declaration by States, identifying obstacles in the implementation of the provisions of the Declaration and clarifying, through General Comments, the provisions of the Declaration. Last but not least, after that the Commission had explicitly requested the Working Group, in the exercise of its mandate, to take into account the provisions of the Declaration, the time had come for the Working Group to follow the example of the Special Rapporteur on Torture and to include country-specific observations (based precisely on the provisions of the Declaration) in its main report.

In contrast to the topic of disappearances, the establishment of monitoring mechanisms on the themes of torture and arbitrary detention has been preceded by a process of standard-setting. In addition to the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, both the Special Rapporteur on Torture and the Working Group on Arbitrary Detention were able to rely on freshly adopted documents, including, *inter alia*, the 1984 Convention against Torture (based on the Declaration against Torture) and the 1988 Body of Principles. Consequently, these two mechanisms did not have to clothe their entire approach in humanitarian terms, but were able to confront Governments with the concepts, norms and standards they had accepted themselves.

At the same time, this research has also shown that there were clear limits to the extent to which States accepted a juridical approach. Obviously, these limits have everything to do with the political rather than the jurisdictional nature of the mandates of thematic procedures, in particular the fact that their interventions and recommendations are of a non-legally binding nature. Firstly, as long as thematic procedures respected the formal limits of their mandates and kept a clear political, non-judicial profile, Governments seem to have accepted that, in addition to international political instruments, their policies may be based on treaty concepts as well. For example, the Special Rapporteur on Torture was able to make use of the definition of the international legal concept of torture as contained in the Declaration on Torture and, especially, the Convention against Torture. Also, these documents helped the Special Rapporteur in identifying and defining what has been called the 'grey-zone' between torture and other forms of cruel, inhuman or degrading treatment or punishment and which might include practices such as corporal punishment. Similarly, the Working Group on Arbitrary Detention, in a general manner, was able to identify several provisions of the International Covenant on Civil and Political Rights as relevant for the implementation of its mandate.

However, once thematic procedures move down from the conceptual level to become more concrete, either in directing general recommendations towards all States or in dealing with specific cases or specific country situations, precision and *Fingerspitzengefühl* is required. At this point it becomes more important for them to take into account the formal limits of their mandates as well as the inherently political setting in which they operate. Language and tone are important. Examples identified in this research include the Special Rapporteur on Torture's practice in relation to urgent appeals. In this respect, the Special Rapporteur, while invoking and including

in the letter containing the urgent appeal the relevant international standards to be taken into account by the Government, has consistently positioned himself as an intermediary of these international norms and standards (accepted by the Government concerned) rather than as a jurisdictional body taking a position on the specific norms and standards. According to the basic philosophy of the Special Rapporteur, the urgent appeal 'provides the Government concerned with the opportunity to look into the matter and to uphold its obligations under international law.' Formally speaking, the powers of the Special Rapporteur end here. The final say on the matter remains with the Government concerned, which may, on the basis of the relevant standards of international law, come to the conclusion that the urgent appeal should not be honoured.

In the case of the Working Group on Arbitrary Detention the importance of finding the right language and tone has been even more important. In the previous section it has already been argued that the Working Group has not always paid due regard to the formal limits of its mandate, the expectations of Governments as regards the application of rules and principles of international law as well as the political setting in which it operates. Thus, while Governments generally approved the Group's quasi-jurisdictional competence to present formal findings in individual cases of arbitrary detention based on the norms and standards contained in documents such as the Universal Declaration on Human Rights and the 1988 Body of Principles, they strongly objected to any suggestion that the Working Group had the power to impose these standards on them. The use of the term 'decision' as well as the designation of the process as adversarial rather than consultative suggested precisely this. Similarly, with its decision to unconditionally apply the norms and standards of the International Covenant on Civil and Political Rights – through the so-called 'declaratory-effect' theory – to non-Party States, the Working Group not only deviated from the fundamental principle of *pacta tertiis nec nocent nec prosunt*, but also failed to acknowledge that it could just as easily find authoritative support for its views in the political instruments agreed upon by the Member States of the United Nations.

### V.2.1.3 *Changing the Rules of International Law*

The episode concerning the applicability of the provisions of the International Covenant on Civil and Political Rights to non-Party States clearly illustrates how important it is for thematic procedures to ensure that their policies broadly conform to general rules of international law. Approaches that depart too radically from the expectations of Governments as regards the application of international law are not only counter-productive in terms of triggering a procedural argument rather than a discussion on the substance of the case at hand, but may also backfire concerning the natural development of the mandate itself, in particular since that mandate rests on an easily amendable resolution of the Commission.

Having said this, the present study has revealed that the practice of thematic procedures might still influence the development of rules of general international law.

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This has particularly been the case in regard to the rule of the prior exhaustion of domestic remedies. What is important to understand, however, is the subtle manner in which thematic procedures, particularly the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on Torture, have succeeded in modifying – and justifying the modification of – the general rule. Both mechanisms have not sought to impose a highly legalistic reasoning on States. The Working Group on Enforced or Involuntary Disappearances has mainly advanced practical and – once again – humanitarian reasons to relativise the relevance of the rule, for example, by arguing that the evil of a case of disappearance lies precisely in the inability to enforce domestic remedies. The argument of the first Special Rapporteur on Torture, Peter Kooijmans, was slightly more sophisticated as he managed to draw a sharp conceptual distinction between the political nature of his mandate, emphasising effectiveness and the nature of (quasi-)jurisdictional mandates ‘where the object was the establishment of State-responsibility’ and where ‘the classic rule of the exhaustion of domestic remedies was justified by the fact that the State is not responsible as long as it is in a position to redress a wrongful act committed by its organs.’<sup>4</sup>

The approaches of these two mechanisms again sharply contrasted with the argumentation used by the Working Group on Arbitrary Detention. In defence of its decision not to apply the rule of exhaustion of local remedies the Working Group, unconvincingly according to the present author, relied on the formalistic argument that if an admissibility procedure required the application of the rule, that condition was usually expressly provided for in the instrument concerned and that since the Commission had remained silent on the matter, the rule correspondingly did not apply. Much more convincing and certainly decisive in refuting an attack by the Government of Cuba was the justification based on the line of argumentation of the Special Rapporteur on Torture that it was in the nature of the thematic approach – not seeking to establish State responsibility – that the rule should not be applied as a condition for admissibility. Hence, with hindsight it may be said that by separating the pairs of political/effectiveness versus jurisdictional/responsibility, the Special Rapporteur on Torture was able to create the space necessary to circumvent the rule of the exhaustion of domestic remedies not only for his own sake, but as it proved to be for the thematic approach as a whole.

Once again, this experience suggests that a successful and sustainable transformation or modification of rules of general international law or other established practices follows the line of the political approach. It seems to be precisely the non-jurisdictional nature of their mandates – and a consistent awareness of that nature – that gives thematic procedures the necessary political leverage to propose a preferred manner of dealing with cases or situations both procedurally and substantively. This preferred course of action, then, is not to be considered directly as an adjustment or modification of existing rules of general international law, but as the most practicable solution in the light of agreed policy goals or legal commitments. The alternative approach, *i.e.* the

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4 U.N. Doc. E/CN.4/1988/17, para. 11.

approach which takes a more formalistic or legalistic tone in seeking to justify deviations from rules of general international law or other established practices, runs a greater risk of being met with a negative reaction from Governments (concerned), anxious as they are not to create any (unnecessary) precedents. A case in point has been the confrontation, already mentioned above, between the Working Group on Arbitrary Detention and the Government of the United States concerning the legal régime applicable to the prisoners held at Guantánamo Bay Naval Base, particularly concerning the manner in which the Working Group dealt with the broader question of the coexistence and overlap of the norms and standards of international humanitarian law and those belonging to international human rights law. As was also mentioned then, the present author believes that a humanitarian and practical approach along political lines is to be preferred over the quasi-legal approach adopted by the Working Group.

#### V.2.1.4 Institutionalisation

The 1993 World Conference on Human Rights marked an important point in the development of United Nations special procedures. On that occasion the different special procedures mandate holders/chairpersons of Working Groups presented themselves for the first time as a collectivity: 'a system of human rights protection'. The use of the term 'system', which stands for, *inter alia*, 'a regularly interacting or interdependent group (...) forming a unified whole',<sup>5</sup> was no coincidence.

Towards the end of the 1980s the Commission had indeed started to perceive its special procedures as one big family (divided into the two subgroups of country-specific and thematic mechanisms). In practice, this had already led to the harmonisation of certain aspects of the thematic approach, such as, for example, the extension of the duration of all thematic mandates from one to two years in 1988 and, as part of the broader debate on the enhancement and enlargement of the Commission, from two to three years in 1990. Similarly, with an ever-growing number of special procedures, the need for coordination, for example with regard to the planning of on-site visits or preventing being played off against another mechanism, had also increased. Moreover, the establishment of additional special procedures had a direct effect on the functioning of the already existing ones inasmuch as the creation of new mandates was not followed by a proportional increase in the staff servicing (all of) them. In this respect, it is worth mentioning that the perception of a system of special procedures also created new demands; for example, the demand that the underrepresentation of themes relating to economic, social and cultural rights should be addressed.

In its final declaration and programme of action the World Conference subsequently sanctioned the characterisation of the Commission's special procedures as a 'system' that needed to be both preserved and strengthened. That recognition has been important for at least three reasons. Firstly, it consolidated the institutional progress,

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5 See Merriam-Webster Dictionary Online: <http://www.m-w.com>

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in particular the success of the thematic approach, which developed from an *ad hoc* response to one particular phenomenon of human rights violations in one particular country to a model for tackling the human rights phenomena defined in the internationally agreed instruments. Secondly, as a corollary of that success, it effectively lifted the perception of a family of special procedures to a higher level, institutionalising a collection of individual mandates as part a comprehensive United Nations approach towards the promotion and protection of human rights and fundamental freedoms. Thirdly, this recognition has not been without practical consequences, particularly as a result of the institutionalisation of annual meetings of special procedures mandate holders in accordance with paragraph 95 of the Vienna Declaration and Programme of Action. These meetings have been an important forum for discussing and taking a common position on matters affecting the functioning of special procedures as a whole. Initiatives that deserve to be rementioned are the problem concerning the immunities and privileges enjoyed by special procedures mandate holders as so-called experts on mission for the United Nations as well as the issue of 'human rights and terrorism', in particular the question whether actors other than States could be held responsible for violations of human rights. As regards the latter topic, for example, the annual meeting had advised individual mandate holders to approach the matter in a pragmatic manner: recognising or legitimising a special status for non-State groups did not fall within the mandates of special procedures, but a victim-oriented posture might nevertheless justify an intervention. This standpoint is all the more remarkable, since it is not founded on any particular resolution, but perhaps more an attempt to formulate a response to practical realities encountered by individual mandate holders in certain situations. Other significant or potentially significant practices initiated or further developed and coordinated within the context of the annual meetings include joint practices with regard to on-site visits and, particularly, the issuing of so-called joint urgent appeals. The latter practice has expanded enormously over the past ten years and, as illustrated by the case of the Working Group on Arbitrary Detention and the Special Rapporteur on Torture, nowadays the vast majority of urgent appeals are transmitted jointly with other thematic or sometimes even country-specific procedures. The development that made an important contribution to the rapid growth of the practice of joint urgent appeals has been the creation of a 'Quick Response Desk' within the Office of the High Commissioner for Human Rights in 2000. That development also testified to the tendency to further institutionalise the competences of special (thematic) procedures – not only as regards urgent appeals, but also in respect of the planning and coordination of on-site visits – in the United Nations human rights bureaucracy. A final practical development, which has emerged from the discussions in the annual meeting has been the institution of the so-called interactive dialogue as a means of intensifying the discussions between Governments and special procedures.

In the context of the ongoing efforts since the end of the 1990s to reform the Commission and its subsidiary monitoring bodies, the different proposals drawn up by the Bureau of the Commission, the Secretary-General of the United Nations and others have continued to emphasise the importance of special procedures as

'one of the Commission's *major achievements* (...) an *essential cornerstone* of United Nations efforts to promote and protect human rights [which] should accordingly be preserved, strengthened, and provided all necessary support and cooperation.'<sup>6</sup>

With such statements the drafters of different UN reports have again attempted to consolidate the quantitative and especially the qualitative growth of the Commission's special procedures so as to make sure that any reform effort would leave its essential characteristics intact.<sup>7</sup> This raises the question whether it would indeed be possible to revoke the mandates of the Commission's system of independent (*i.e.* not representing any Government) special procedures without replacing it with a system possessing comparable competences and characteristics. In other words would it be possible to consider the accumulated competences of the different thematic procedures as constituting 'objective' core competences of the United Nations in the field of human rights? Before formulating an answer to these questions, an attempt will be made to draw some conclusions as to the effectiveness of the practice of thematic procedures, *i.e.* the extent to which they have succeeded in making a structural contribution to the promotion (prevention) and protection of human rights and fundamental freedoms.

### V.2.2 Effectiveness of the Commission's Thematic Procedures

*'The greatest disorder of the mind is to believe things because one wants them to be so and not because one has seen that they are so.'*<sup>8</sup>

Commentators often find it difficult to formulate a clear and unambiguous answer to the question of the effectiveness of the activities of thematic procedures. One referred to it as a 'question of conscience';<sup>9</sup> others pointed at the difficulties involved in such an exercise and argued that it would not be possible to evaluate the impact of the thematic approach as a whole. According to them, only on the basis of a case by case analysis could something be said about the impact of different thematic procedures and even such an approach presented many loopholes, which made an objective evaluation of their impact a remote ideal.<sup>10</sup> The difficulties identified by different commentators include, *inter alia*, the availability of clear and unambiguous statistical information presented in a uniform manner as well as the problems involved in relating statistical

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6 Report of the Bureau of the Fifty-Fourth Session of the Commission on Human Rights (Selebi report), U.N. Doc. E/CN.4/1999/104, para. 17 ff.

7 See for the latest reform proposal: 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, U.N. Doc. A/59/2005. This proposal, in particular the idea of replacing the Commission with a Human Rights Council, will not be dealt with in detail in this research.

8 J. B. Bossuet, quoted in De Visscher 1968, p. 70.

9 Van Dongen, Bulletin 1991, p. 29.

10 De Frouville 1996, pp. 115-118.

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information to such notions as ‘success’ or ‘impact’, if one succeeds in defining these notions in the first place.<sup>11</sup>

For example, the Working Group on Enforced or Involuntary Disappearances has always worked on the basis of the notion of ‘clarified cases’. Having set this target, the available statistical information indeed tells us how many cases have been solved, but it does not tell us whether or not this has been the result of the interventions by the Working Group. Similarly, the notion of ‘clarified cases’ covers persons found alive or dead, including as a result of the issuing of death certificates.

By contrast, the statistical information provided by the Special Rapporteur on Torture tells us something about the total number of Governments approached under the ‘routine’ procedure, the total number of communications submitted under the ‘routine’ procedure as well as the number of individual cases contained in these communications. The same type of information is also given for communications transmitted as urgent appeals. Subsequently, the Special Rapporteur gives us some information on the number of replies and the number of individual cases referred to in these replies, without however making a distinction as to whether the communication was originally sent as a ‘routine’ transmission or as an urgent appeal. Furthermore, the Special Rapporteur has neither formally defined the moment at which his interventions may be considered to have ended, nor has he indicated in his report when or whether or not he is satisfied with Government responses. In practice, the Special Rapporteur’s limited capacity to ensure a systematic follow-up of all cases appears to be the decisive criterion concerning whether or not a case will be pursued any further.

The annual reports of the Working Group on Arbitrary Detention, finally, provide statistical information on the number of Governments to which communications have been submitted in the context of the ‘adversarial’ procedure adopted by the Working Group, the number of individual cases contained in these communications and the number of replies received. Similarly, information may be retrieved concerning the number of urgent appeals transmitted during the year, the number of replies received in response to those urgent appeals, the number of Governments to which urgent appeals have been sent as well as the number of Governments which have sent in replies. After a failed attempt to set up a process to follow up the recommendations contained in its opinions, the Working Group’s involvement with individual cases formally ends with the publication and presentation of these opinions in its annual report to the Commission. Subsequently, the Working Group’s reports do not systematically inform and present figures regarding the action taken by Governments in response to its opinions. The reader of the report will have to put together the bits of information submitted by Governments to find out whether or not a detained person has been released – an action which the Working Group considers a positive response to its opinions –, but then again it cannot be said with certainty that the release was a direct result of the opinion.

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<sup>11</sup> See, for example, Kamminga, NILR 1987, p. 317.

Against the background of the difficulties in relating and comparing ambiguous and incomplete statistical figures, commentators usually have no other option than to use the available statistical information as ‘indicators’, which in combination with other factors should provide the reader with an idea as to the effectiveness or impact of thematic procedures.<sup>12</sup>

The reference to the question of the effectiveness or the impact of thematic procedures as ‘a question of conscience’ perfectly symbolises the mind-set of many commentators or Special Rapporteurs reflecting on their work. While the crucial importance of the issue is often recognised,<sup>13</sup> there also seems to be a certain hesitation in answering the question, which has often been reserved for the closing paragraphs of the analysis.<sup>14</sup> An important ground for this apparent hesitation, other than the problems encountered in interpreting the available statistical information, might have to do with the fact that one does not wish to disqualify in advance or downplay the relevance of a mechanism from which one assumes that doing something is still better than doing nothing at all. Not infrequently, this is indeed what analyses end up saying. Thus, commentators seem to face the dilemma of giving an as honest an account as possible of the real impact of the practice of thematic procedures, which they know from their own experiences with the realities of international relations must be deemed rather limited, but at the same time, on a more forward-looking note, they do not want to undermine or put into question that the mechanisms serve a legitimate purpose and might still achieve (or contribute towards achieving) the purposes of the United Nations. Consequently, the results of such analyses are often ambiguous and the focus tends to shift from the concrete to the abstract and the present to the future. For example, Cassese writes that thematic procedures ‘may be considered reasonably effective in (a) focusing on countries or problems that deserve to be carefully scrutinised; (b) drawing the attention of States, international organisations, NGOs and public opinion at large to some pivotal issues concerning human rights; (c) exerting pressure upon States with a view to inducing them gradually to improve their human rights record; (d) contributing to the creation of an international ethos requiring respect for at least some core human rights; (e) serving as a catalyst to the gradual elaboration of new international conventions or the adoption of general resolutions.’ At the same time, he considers the thematic approach to have two major drawbacks: (1) ‘they tend to be so conditioned, in their unfolding, by political and diplomatic considerations, that often their final result is rather weak, being couched in terms that are too general or too diplomatic’ and (2) ‘the reports of the various working groups or individuals often fail to trickle down from the body of specialists or specialist organisations to public

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12 De Frouville 1996, pp. 115-118 and Kamminga, NILR 1987, pp. 317-320.

13 See, for example, Kamminga, NILR 1987, p. 317: ‘This is all very well, but what good does it do? What is the real effectiveness of these procedures?’ or Van Boven 2004, p. 1651: ‘Last but not least, attention must be paid to the question of effects of the urgent appeal procedure. It is at the end of the day effectiveness and impact that count.’

14 For example, De Frouville 1996, pp. 115-118 and again Van Boven 2004, p. 1651: ‘Unfortunately I am not able to give a clear answer to this crucial question.’

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opinion at large. Consequently, a wealth of monitoring, information and expertise is eventually little used outside some restricted circles within the United Nations.<sup>15</sup>

The present author has also struggled with the question of analysing the effectiveness of mechanisms, from which we assume, on the one hand, that they contribute to enhancing the accountability of States on the international plane, but from which we know, on the other, that their ultimate purpose can only be achieved somewhere in the future if, indeed, it can be achieved at all. Nevertheless, it is important to say something about the real practical impact of thematic procedures, however tentative or indicative those conclusions may be, in order to better understand the factors that are usually identified as inhibiting them from becoming fully effective. These factors include, *inter alia*, better coordination, the lack of resources, but also, at the level of thematic procedures' parent body, the Commission on Human Rights: political will, politicisation and double standards/selectivity.

As a starting point, it may be useful to clarify the meaning of the notion of 'effectivity', especially in order to keep the analysis as focused as possible. According to the present author, this key-notion should be understood first and foremost in its ordinary meaning, in which it has been defined as 'producing or capable of producing a desired effect', stressing in particular 'the actual production of or the power to produce the effect?'<sup>16</sup>

Furthermore, it must be underlined that questions of competence, such as the competence to deal with large-scale violations of human rights in any country, should not be mixed up with questions relating to the effectiveness of the procedure. Thus, while it may be tempting to argue that the assumption – and approval by the Commission – of competences by thematic procedures, because of the practical opportunities they seem to offer to them, also increases the effectiveness of the approach, care should be taken not to automatically link these two aspects. For the question of competence first and foremost concerns the legality of the methods and actions undertaken by thematic procedures; the question of effectiveness concerns the adequacy of the methods and actions undertaken by thematic procedures to achieve the objectives set by the Commission and, more generally, to achieve the objectives of the United Nations in the field of human rights.

Similarly, sometimes, the notion of effectiveness is used in a comparative manner: 'compared to previous practice, the present practice is more effective, because etc.' Although such a comparative analysis may be useful in some cases, especially in terms of placing the development of, for example, human rights monitoring procedures in a broader historical context or – once again – to justify their existence, it does not necessarily help to critically assess the real impact of thematic procedures.

Against the background of these preliminary remarks, the conclusion of the present research must be that the practical impact of thematic procedures, in the light of the definition of 'effectiveness' as referred to above, remains extremely modest. In

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15 Cassese 2001, pp. 365 and 366 [emphasis added].

16 See Merriam-Webster Dictionary Online: <http://www.m-w.com>

particular, on the basis of an *overall* assessment of the findings of this research in respect of the four techniques available to thematic procedures, it cannot be concluded that the three selected thematic procedures are able to make a *structural* contribution to the elimination and prevention of the practice of disappearances, as well as the suppression and prevention of torture and arbitrary detention.

Firstly, as regards the methods of routine transmissions as well as urgent appeals, it must be remarked that these techniques appear wholly unsuited to achieving structural progress in terms of eliminating and preventing the above-mentioned human rights abuses. By their very nature, the techniques are usually (but not always) employed in response to concrete information that an abuse has already occurred (particularly in the case of the Working Group on Enforced or Involuntary Disappearances). On the other hand, these methods may still be considered an indicator of the responsiveness of Governments towards allegations of (imminent) human rights violations as well as an indicator of the capacity of thematic procedures – in the words of Cassese – ‘[to exert] pressure upon States with a view to inducing them gradually to improve their human rights record.’ The available statistical information presented in this study gives a rather mixed picture. In the case of the Working Group on Enforced or Involuntary Disappearances, it has revealed, first and foremost, the almost insurmountable difficulties which the Group experiences in achieving its basic objective of clarifying cases of disappearances and how the ‘time’ factor negatively influences this process.<sup>17</sup> With respect to some situations, Sri Lanka for example, the Working Group seems to have succeeded in establishing a working relationship with the Government concerned, but it rightly adopts a very modest stance as to its contribution to the clarification of cases of disappearances. As far as the Special Rapporteur on Torture is concerned, the situation is perhaps even more complex, in the absence of a clearly defined objective that must have been achieved before the Special Rapporteur decides to rest an individual case. Here, the figures have given us a general idea about the responsiveness of Governments and they suggest that, over the past ten years, on average around 50% of the communications and urgent appeals by the Special Rapporteur have solicited a reply. However, as has been shown, this figure must be relativised for a number of reasons. For one thing, annual fluctuations have occurred, making it impossible to draw any further conclusions from these figures. More importantly, the quality of the replies leaves much to be desired: Governments react to some cases contained in the communications or urgent appeals, but omit to mention others; Government reactions often contain a denial of facts, a denial of torture or a different version of the facts etc. Furthermore, the Special Rapporteur is not in a position to systematically follow up each and every response, which decreases even further the chances of a satisfactory outcome in each individual case. The available figures relating to the practice of the Working Group on Arbitrary Detention, finally, suggested that response rates to both communications and urgent appeals appear to be on

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<sup>17</sup> In 2004 the overall clarification rate was approximately 16% (50,135 cases, 41,936 under active consideration).

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the increase, especially since 2001. Yet again, precisely because there have been fluctuations in the past, it would perhaps be premature to speak of a trend. In addition, it must be added that the transmission of a communication is only the first step in the Group's adversarial procedure eventually leading to the adoption of an opinion. Unfortunately, the Working Group's reports are less clear about the percentage of Governments responding after the adoption of an (for them negative) opinion, but the available information suggests that the positive reply rate found before the adoption of an opinion cannot be matched. In addition, after a failed attempt to set up a 'follow-up' scheme, the Working Group also decided to prioritise following up on-site visits rather than its opinions. Moreover, specifically with regard to urgent appeals, the problem of non-responses or selective response (referring to some cases but not to others) seems to remain a matter of concern.

Secondly, in theory the method of on-site visits seems to offer better opportunities to address the structural causes underlying the human rights phenomena studied and investigated by thematic procedures. In practice, however, the effective implementation of this method still leaves much to be desired. For one thing, thematic procedures continue to be dependent on the willingness of Governments to extend them an invitation for an on-site visit. While in many cases this has not been an insurmountable obstacle – thematic procedures have indeed been invited by many Governments –, it is also true that Governments have not automatically responded positively to a request for an invitation. In some cases additional pressure from the Commission or otherwise was needed to induce a Government to extend an invitation; in others an invitation could only be obtained after a lengthy process of negotiations, involving threats, promises and even preparatory visits. In still other instances, Governments have attempted to play off different thematic procedures against each other, inviting some (usually procedures with a mandate considered less harmful to the country's reputation) and refusing to invite others. Some Governments initially reacted positively to the idea of an on-site visit or even agreed to invite thematic procedures, but for different reasons these visits have (as yet) not materialised or have been postponed over and over again. Sometimes the momentum for pressing a Government to extend an invitation has been missed, without a clear prospect of what the future will bring. Finally, there have also been Governments which have (so far) succeeded in rejecting any request for an invitation either because they enjoy virtual immunity in the Commission or precisely because they have been targeted so often by the Commission that they have become virtually immune to the pressures of that body. Attempts within the Commission to water down the freedom of States to decide whether or not to invite a thematic mechanism to its territory have so far been unsuccessful. Any formulation that could be interpreted as limiting this freedom has met with stiff resistance from certain Governments. Similarly, the initiative to open up the possibility to accept beforehand any request by a United Nations thematic procedure for an on-site visit (standing invitation) essentially confirms the rule of prior State consent, while as a *strategy* it seeks to undermine it.

As already mentioned above, a considerable period of time may pass from the moment of a first positive reaction or even a formal invitation for an on-site visit to the moment when the visit actually takes place. With the negotiations on the modalities of an on-site visit the process enters a new stage with potential new obstacles, in particular delaying strategies. Taken as a whole, the balance sheet is certainly not negative. Important progress has been made with the adoption of the 'Terms of reference for fact-finding missions by Special Rapporteurs/Representatives of the Commission on Human Rights', which strengthened the position of the mandate holders vis-à-vis Governments, but situations such as the extremely protracted negotiations between the Special Rapporteur on Torture and the Government of China cannot be excluded.

Furthermore, thematic procedures only have very limited possibilities to deal with restrictions imposed or incidents occurring during the visit itself. In the absence of a competence to demand and enforce full compliance with the terms of reference of the visit, the weak means of redress at the disposal of thematic procedures are: a protest, a refusal to carry out (part of the) mission and/or reporting the incident or breach of agreement to the Commission. Practice shows that whenever incidents (harassment of individuals, refusal to allow a visit to places of detention, failure to grant an interview etc.) had occurred, thematic procedures usually found themselves placed before a *fait accompli* and, indeed, could do little more than protesting and reporting back to the Commission. In practical terms the direct impact of these protests has remained limited, especially since the Commission usually does not 'punish' the Governments concerned. Even more difficult to redress, however, have been incidents reported after the visit had been carried out, usually reprisals against persons with whom thematic procedures had been in contact during the mission.

What many commentators and observers nowadays consider to be the biggest obstacle to the effective implementation of the method of on-site visits is the issue of providing a follow-up to the visits, particularly the difficulties involved in establishing and maintaining some form of 'continuous dialogue' with the Governments concerned regarding the progress and obstacles encountered in the implementation of recommendations. Clearly, at the present stage of development of thematic procedures no miracles can be expected, not in the last place because the success of the methods established for this purpose, *i.e.* follow-up visits and follow-up letters, largely depends on the active cooperation of the Governments concerned. In many situations, the method of follow-up visits is simply not a realistic option, whereas the method of follow-up letters is probably too weak in its own right to yield any meaningful results. This weakness is further reinforced by the limited possibilities of exposing the Governments concerned in the annual reports and addenda of thematic procedures presented to the Commission.

Indeed, while the annual reports of thematic procedures, their principal means of communication with the Commission, are considered 'valuable sources of information, not only for analysing specific phenomena, but also for acquiring a more accurate idea

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of the human rights situation in the different regions of the world',<sup>18</sup> their practical impact continues to be impaired at two levels. Firstly, a major drawback inherent in the thematic approach has always been its reduced capacity to exploit the 'nuisance value' or 'embarrassment value' of its annual reports in order to put pressure on *specific* Governments. Notwithstanding the fact that over the years significant adjustments have been made to the format of the annual reports, such as the inclusion of statistics (Working Group on Enforced or Involuntary Disappearances), the names of the victims (Special Rapporteur on Torture, Working Group on Arbitrary Detention) and country-specific observations (Working Group on Enforced or Involuntary Disappearances, Special Rapporteur on Torture), leading, *inter alia*, to a more judgmental tone in the reports, other factors, particularly enforceable page limits, but also the unavailability of documents in certain languages or otherwise the existence of multilingual documents (addenda) have also had a significant impact on the quality – and, therefore, also on the credibility – of the reports, especially in the case of the Working Group on Enforced or Involuntary Disappearances. Secondly and more significantly, the annual reports have usually had little impact on the practice of the Commission, which has never included country-specific references in thematic resolutions and, thereby, further minimised the 'mobilisation of shame' involved in the approach. A recent initiative (2003) to counter that tendency has been the introduction of an interactive dialogue, but it would seem that it is still too early to evaluate the impact of that innovation.

The reason for putting so much emphasis on the question of the real impact of thematic procedures on the promotion and protection of human rights and fundamental freedoms has been that effectiveness is an important consideration when trying to answer such pertinent questions as (1) 'are Governments legally obliged to cooperate with thematic procedures?' and (2) 'would it be possible to revoke the mandates of the Commission's system of special procedures without replacing it with a system possessing comparable competences and characteristics?'

In trying to formulate as honest an answer as possible to these questions it is essential to go to the heart of the matter and to find out what it is that inhibits thematic procedures from becoming fully effective. Is it really a lack of resources or a lack of coordination of their activities?<sup>19</sup> Is it really a lack of political will on the part of the Members of the Commission to take action on the reports of thematic procedures; is it politicisation or political capture by Governments of the Commission's agenda for their own interests?<sup>20</sup> Although these are all real problems with which the thematic procedures and the Commission are confronted in the exercise of their tasks, the present author believes that they are symptoms rather than the cause of the limited

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<sup>18</sup> HRM, Nos. 32-33 (1996), p. 24.

<sup>19</sup> As suggested by Sir Nigel Rodley, see Rodley, EHRLR 1997, p. 9.

<sup>20</sup> See International Service for Human Rights, Analytical report of the 60th session – Geneva, 15 March to 23 April 2004, 'Overview of the 60th Session' under 'General Comments', HRM 2004, p. 1: internet document, see [www.ishr.ch](http://www.ishr.ch)

impact of thematic procedures. The real cause lies in the current state of international relations, particularly – and we must have the courage to say this – the non-existence of an effective sense of community required to support the objectives, norms and standards proclaimed and adopted within the context of the United Nations. Despite significant progress in terms of establishing the institutions, procedures and international instruments to work towards commonly agreed objectives, *inter alia*, in relation to the promotion and protection of human rights and fundamental freedoms, without a minimum correspondence to a given social order, the implementation of these objectives, norms and standards will remain highly problematic.

This fact should be a ground for being (more) realistic about what can and what cannot be reasonably expected from thematic procedures at the present stage of the development of international relations. Particularly, it must be recognised that thematic procedures, rather than steering the course of international relations in a particular direction, follow or react to other developments, which have a much bigger impact on the relations between States and peoples and within States.

Abstract legal constructions cannot make good the 'real' discrepancy between the proclaimed values of the United Nations and its Member States on the one hand, and social reality on the other. In his *opus magnum*, 'Theory and Reality in International Law', writing on 'Convergences of law and power in positive international law' and, more particularly, on the relevance of social and political factors, De Visscher focused precisely on this problem as he explained the importance for international justice 'to maintain a proper relationship between social data and the rules designed to govern them.'<sup>21</sup> As he pointed out, 'individualisation pushed to excess leads to the destruction of the rule', especially since legal rules never embrace social reality in its fullness and complexity, but the contrary is also true: 'abstraction pushed to the extreme degenerates into unreality.' A 'constant return to respect for the facts' and 'exact observation of the concrete and very special conditions which in the international domain contribute to forming the legal rule and govern its applications' should prevent us from falling into the trap of legal formalism. According to De Visscher, where the facts give insufficient support for a rule,

'[d]octrine does better service to the progress of law when it points out the sometimes openly antisocial consequences of the present distribution of power than when it gives rein to a sort of 'legal totalitarianism' which masks behind a façade of unreal architecture of the present disorder of international relations.'<sup>22</sup>

Thus, while it might be tempting to formulate and assert that States are under a legal obligation to cooperate with United Nations special procedures – and of course the

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21 De Visscher 1968, pp. 142 and 143.

22 Ibid.

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argument is made!<sup>23</sup> – the present author believes that, particularly at this stage of the development of international relations, the facts are simply too important ‘to be neutralised by claims (...) devoid of effectivity’<sup>24</sup> and the facts are that all too often Governments still fail to (fully) cooperate with special procedures by not responding to requests for information, by responding too late or selectively or in an entirely dissatisfactory manner. Certainly, through its resolutions on ‘thematic procedures’ the Commission has urged States to cooperate with its thematic procedures, but again, in the light of the facts, these exhortations, even though adopted by consensus, are clearly insufficient to effectively assert the existence of a legal obligation to cooperate with thematic procedures. This is even more obvious in the case of on-site visits where, notwithstanding the fact that strategies are being deployed to attempt to circumvent the rule of prior State consent, nothing points in the direction of a legal obligation of States to respond positively to a request for an invitation issued by thematic procedures.

Of course, by signing and ratifying the Charter of the United Nations Governments have committed themselves to working in good faith towards the achievement of the ‘political’ purposes of the Organisation.<sup>25</sup> As regards the promotion and protection of human rights and fundamental freedoms this commitment has been further concretised through Articles 55 and 56 of the Charter and, as this research has shown in considerable detail, these articles have indeed provided the basis for important developments initiated by the political organs of the United Nations. These developments have significantly shaped the meaning and scope of the concept of domestic jurisdiction as contained in Article 2 paragraph 7 of the Charter, but they have left intact the essential structure of the Charter, the architecture and powers of its organs and, in particular, they have confirmed the political method with its emphasis on study, discussion, report and recommendation as the key to growth. As emphasised over and over again in this research, this political process has its own dynamics in which legal considerations play a role, but which cannot be captured or understood through legal logic and legal reasoning.

States, in other words Governments, have committed themselves to participating in the political process of the Commission, which means that they have, in principle, accepted the methods and means, including thematic procedures, available to that organ to promote and protect human rights, whether or not *they choose* to actively cooperate therewith. In 1945 US delegate Dulles characterised the competences and activities of the United Nations in the field of human rights as ‘the voluntary means of a free and voluntary association of nations.’<sup>26</sup> He was probably right inasmuch as there is no legal sanction for non-cooperation and the Commission moreover lacks the

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23 See, for example, Kamminga, NILR 1987, p. 322; Van Dongen 1986, pp. 470 and 471 and particularly Lauterpacht’s vision on Articles 55 and 56 of the Charter, Lauterpacht, Hague Recueil 1947, pp. 13 ff., esp. 16 and 17. In a recent book, Lempinen deals extensively with this question: Lempinen 2005, pp. 112-126.

24 De Visscher 1968, p. 328.

25 See also Brownlie 1998, p. 296.

26 See Preuss, Hague Recueil 1949, p. 578 (supra Chapter II.3, note 42).

competence to enforce an alleged duty to cooperate with its thematic procedures. On the other hand, this statement in no way prejudices the possibility that non-cooperation may have political consequences (political pressure, condemnation, loss of reputation etc.) This may be a consideration which will induce certain Governments to cooperate (partially), but, once again, in the absence of a truly effective sense of community this possibility still applies unevenly from one State to another.

In this section, a great deal of attention has been paid to the apparent hesitation of commentators and others in formulating an adequate answer to such questions as the effectiveness of thematic procedures or the (non-)existence of a legal duty to cooperate with thematic procedures and in acknowledging the absence of an effective sense of community which is necessary before law may play its ordering role. Some reasons have been given as to why this might be the case. One factor, which has so far not been touched upon, but which the present author suspects might have obscured the discussions as well, has to do with the emergence of the United Nations as an actor on the international scene and the Organisation's growing moral and cultural prestige, especially since the end of the Cold War, and the attractiveness of its purposes, not in the last place to those professors of international law, practitioners in foreign offices and international organisations etc. '[working] in international law' and, therefore, naturally 'connected with an ethos both internationalist and reformist.'<sup>27</sup> Certainly, this suspicion demands an explanation and clarification, which may also help us in formulating an answer to the second question mentioned above, namely the possibility of revoking the mandates of thematic procedures without replacing them by a system possessing comparable competences and characteristics. Moreover, it will provide the basis for making a tentative re-evaluation of the international legal order, the final objective of this research.

### V.2.3 Emergence of an Actor: the United Nations

The thesis of the emergence of the United Nations as an actor on the international plane and its growing cultural and moral prestige rests on two developments in particular. These are what Michael Ignatieff in his discussion paper mentioned in the introductory chapter of this research, Chapter I, has called the 'juridical revolution' and the 'advocacy revolution.' The juridical revolution, initiated with the adoption of the Universal Declaration of Human Rights in 1948, has accorded individuals – regardless of race, creed, gender, age or any other status – both rights and remedies and thereby laid the foundations for Governments to be held accountable for the manner in which they treat the persons falling under their jurisdiction. The 'advocacy revolution' refers to the growing network of non-governmental organisations promoting human rights, as well as the emergence of a United Nations cadre of human rights

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<sup>27</sup> Koskenniemi, AYIL 1995, p.1.

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activists.<sup>28</sup> The present author would also include the human rights academia as part of the advocacy revolution.<sup>29</sup>

Indeed, as this research has shown and concluded on the basis of an analysis of the development within the so-called Charter-based bodies, the achievements of the United Nations in the field of human rights are real, not in the last place from an institutional perspective. From an organ essentially active in international standard-setting the Commission on Human Rights, in an incremental manner, has effectively been transformed by its Members into a body possessing a human rights monitoring function as well, exercised first and foremost through the system of special country and thematic procedures made up of persons formally unconnected with Governments. The different aspects of this transformation have been summarised above under the headings 'formalisation', 'juridification', 'changing the rules of international law' and 'institutionalisation.'

Consequently, the developments and practices within the political organs of the United Nations have also become legally significant. Particularly the International Court of Justice's Advisory Opinion in the *Cumaraswamy* Case, read in conjunction with and building on the earlier Advisory Opinion in the *Reparations for Injuries* Case, may be understood as giving support for the view that the human rights monitoring competences of the United Nations have indeed become part of the present-day purposes and functions of the United Nations as developed in practice, which in the light of the Organisation's objective legal personality can be invoked against all States.

Moreover, though formally still the product of the collective will of States, the end of the Cold War seems to have further strengthened the separate and independent identity of the United Nations as an actor on the international plane, especially in the light of the Organisation's purposes in the field of human rights. The victory of the West in the Cold War seemingly opened up unprecedented opportunities for the implementation of the doctrine of human rights as 'the major article of faith of a secular culture (...) the *lingua franca* of global moral thought.'<sup>30</sup> From a place of ideological confrontation between East and West, the United Nations, unlike any other institution in the world, has emerged as the embodiment of the ideal of a world of human dignity and peace under the rule of law.<sup>31</sup> In the post-Cold War world order,

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28 Ignatieff also identified a third revolution, the so-called 'enforcement revolution', referring in particular to the creation of instruments to punish violators of human rights and standards of humanitarian law, in particular the establishment of the *Ad Hoc* Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) and the International Criminal Court (1998). Ignatieff 1999, pp. 10-11.

29 The Netherlands School of Human Rights Research, for example, bringing together human rights researchers from a number of (predominantly) law faculties in the Netherlands 'aims at promoting disciplinary and multidisciplinary scientific research in the field of human rights. By means of critical analysis and the submission of proposals, based on thorough scientific research, the School wants to contribute to the further implementation and strengthening of international, regional and national systems of protection of human rights.'

30 Ignatieff 1999, p. 12.

31 Koskeniemi, AYIL 1995, p. 2. Also Enzensberger 1993, pp. 12 ff. See also Cassese 2001, pp. 372 ff. where he describes the present role of human rights.

more than ever before, human progress seems to be associated with the Organisation's capacity to implement its human rights agenda. This perception has also penetrated the United Nations bureaucracy, which from the early 1990s onwards started to act in a more self-confident and autonomous manner, not in the last place as a result of the creation of the post of United Nations High Commissioner for Human Rights and the transformation of the Geneva-based human rights secretariat into the Office of the High Commissioner for Human Rights.<sup>32</sup> After a careful start, the political profile of the post of High Commissioner for Human Rights has increased significantly, particularly under the leadership of Mary Robinson, the former President of the Republic of Ireland.<sup>33</sup> But as this research has shown, at a lower, less visible level for the general public, the vacuum left by the Cold War world order has also benefited the Commission on Human Rights' special (thematic) procedures. Not only did they expand dramatically in quantitative terms, but they also started to emancipate themselves from Governments, stimulated in particular by two interrelated developments described in this research. The first development relates to the tendency of special procedures, especially since the 1993 World Conference on Human Rights, to perceive themselves as a 'system of human rights protection' and, increasingly, to act as a system as well, reflected in particular by the introduction of joint annual meetings of all mandate holders and joint actions of different (coalitions of) mandate holders. The second development relates to the recruitment and nomination of new mandate holders and the emergence of a 'human rights elite' available for official United Nations functions. As has been shown, the Office of the High Commissioner on Human Rights has been given an important function in the selection process of mandate holders by drawing up and maintaining a list of possible candidates possessing the necessary professional and personal qualities. Increasingly, this development has permitted independent experts formally unconnected with Governments, not infrequently law professors, such as Theo van Boven, Philip Alston and Manfred Nowak (the present Special Rapporteur on Torture), but also people with a non-governmental background such as Sir Nigel Rodley, to be nominated as Special Rapporteur or as a Member of a Working Group. Moreover, it has occurred that a particular expert, Manfred Nowak for example, has held different mandates at different times.<sup>34</sup> Similarly, a certain 'exchange' seems to take place between experts sitting on the so-called treaty bodies (Human Rights Committee etc.) and special procedures (and *vice versa*).<sup>35</sup>

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<sup>32</sup> See also, Kamminga 2001, p. 9.

<sup>33</sup> For her work as United Nations High Commissioner for Human Rights she was awarded, amongst others, the Erasmus Prize 1999 in recognition of her efforts to enforce human rights. It was at this occasion that Ignatieff wrote the discussion paper referred to in this research.

<sup>34</sup> The only incompatibility being that a given individual should *not hold more than one mandate at a given time*.

<sup>35</sup> For example, Sir Nigel Rodley who joined the Human Rights Committee in 2001 or Martin Scheinin who left the Human Rights Committee in 2005 to be appointed Special Rapporteur on the topic of human rights and terrorism in that same year.

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Now how do these developments relate to the question of whether it would be possible to revoke the mandates of thematic procedures without replacing them with a system possessing comparable competences and characteristics? According to the present author, several aspects are relevant in this respect.

Firstly, from a formal perspective it is Governments that take the decisions in political organs like the Commission on Human Rights. Governments, Members of the Commission, have decided to create, by resolution, different special procedures usually for a period of three years after which the mandate concerned comes up for renewal. As a parent-body, being able to create new mandates and to renew existing ones, the Commission on Human Rights naturally possesses the competence to abolish mandates or even to unconditionally revoke an entire system. The question is, of course, whether this will also happen in practice?

Here, the present author would argue that under normal circumstances this is not very likely to occur precisely in the light of what has been said above concerning the 'juridical' and 'advocacy revolutions' in the field of human rights. As Ignatieff put it, these revolutions have given the doctrine of human rights 'real power in the international political arena.' Even though it is true that some States – especially those known as the Like-Minded Group of States – have seized the review processes initiated within the context of the Commission on Human Rights as an occasion to try to place the Commission's subsidiary mechanisms increasingly under the control of Governments and to limit the influence of such autonomous processes as the annual meetings of special procedures mandate holders as a source of new initiatives, what characterised these attempts has most probably been the intention 'to slow down rather than to shut down' the system of special procedures, as a commentator once put it.<sup>36</sup>

Over the years, the Commission's system of special procedures with its competence to monitor the implementation of human rights and fundamental freedoms has become so firmly embedded in the practice of the United Nations, supported year after year by States, that it has found support even in the advisory opinions of the International Court of Justice and, in today's 'globalised' world where modern media report on even the most remote human rights violations, it corresponds to the real existing demands of what may be called a human rights community made up of, *inter alia*, a United Nations human rights bureaucracy headed by a High Commissioner for Human Rights, a human rights elite, those described by Koskenniemi as connected with an ethos both internationalist and reformist, including foreign office officials, law professors, other academics and persons active in NGOs, the media etc., as well as important parts of the public at large. These achievements as well as the present-day geopolitical world order should be strong enough to outweigh any negative tendencies that might want to turn back the clock to the pre-1980 period.

At the time of writing these conclusions, the United Nations and its Member States are engaged in the process of attempting to negotiate important amendments to the Charter, first and foremost relating to the composition and competences of the Security

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<sup>36</sup> See HRM, No. 8 April 1990, pp. 3-28.

Council, but also in respect of the future of the Commission on Human Rights.<sup>37</sup> Such a far-going reform process obviously bears therein the risk of opening a Pandora's Box. In his reform proposals the Secretary-General of the United Nations recommends that Member States should consider transforming the Commission on Human Rights into a (smaller) Human Rights Council and upgrading its status to that of a principal organ of the United Nations. Although this reform proposal does not mention what should happen to the Commission's system of special procedures – which the reform paper otherwise refers to as a 'unique system of independent and expert special procedures to observe and analyse human rights compliance'<sup>38</sup> – it is difficult to imagine that the Secretary-General had in mind to achieve his stated objective of '[according] human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations'<sup>39</sup> solely by renaming and upgrading one political body into another without conserving a system incrementally developed over a period of more than thirty years. Similarly, it is difficult to imagine how a majority of Governments – particularly those committed to the promotion and protection of human rights – could support such a reform, be it only for the fact that a system of independent United Nations human rights monitors removes some of the heat from individual Governments having to name and shame other Governments. But here, we also enter the terrain of speculation and the outcome of the negotiations concerning the United Nations system of human rights promotion and protection will be part of a package deal hinging first and foremost on the ability to reach a successful compromise concerning the reform of the Security Council.

In the opinion of the present author, practical considerations, above all, decrease the likelihood that the system of special procedures, as it has grown under the auspices of the Commission on Human Rights, will be revoked. However, there are also voices which go a step further and ascribe the present constellation with some hierarchical features – in the light of the community characteristics of the system of special procedures – and the nature of the activities of the UN as a whole. Tomuschat, for example, wrote about 'centres of consolidated normativity [in the international legal order, JG] (...) to support and effectuate the law enforcement', which include the Charter-based mechanisms established by the Commission on Human Rights.<sup>40</sup> Others might regard the establishment and development of thematic procedures as part of an irreversible process of *humanisation of international law* or see in it the contours of an even broader process of *constitutionalisation* of the international legal order. However attractive a thesis – the type of idea De Visscher once classified as 'great intuitions' or 'civilising ideas (...) positive forces that generate political and social change'<sup>41</sup> –, the present author does not adhere to an approach which attributes the

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37 See 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, U.N. Doc. A/59/2005.

38 Ibid., para. 181.

39 Ibid., para. 183.

40 Tomuschat, Hague Recueil 1993, pp. 205 ff, especially pp. 354-369.

41 De Visscher 1968, p. 101.

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present organisation of international relations with qualities comparable to those of a fully-fledged (federal) legal order. Notwithstanding the fact that the post-Cold War world order seemingly lends itself well to a (more) legal image of international relations – the above-mentioned ‘ideal of a world of human dignity and peace under the rule of law’ seems to be looming on the horizon<sup>42</sup> –, the institutional structures sustaining that order are still more an expression of the foreign policy objectives of different (groups of) States than an expression of an established international community that evokes in ordinary men the same ‘immediate and tangible solidarities that impose themselves upon them in the framework of national life.’<sup>43</sup> The fact that the idea of an international community nowadays finds such a strong echo among a cosmopolitan *avant-garde*, according to the present author, does not change that. For billions of people, national solidarities largely outweigh the appeal of a sacrifice to a common supranational good, particularly in moments of crisis or when essential national interests are (perceived to be) at stake.<sup>44</sup> After all, the State still has the best moral claim to exercising power over citizens and once again De Visscher may be cited as he observed that

‘the common [supranational, JG] good is an *accepted* and *not a decreed good*, and (...) it will become a *living reality* only when ‘man has ceased to regard the State as the highest form of social organisation’.<sup>45</sup>

Now, the present author has made these relativising remarks concerning the nature of the present-day international legal order neither as an argument not to continue to work within or further develop the structures that have been established to tackle the problems of today’s world, nor as an argument against postulating some ideal or a vision about what should be the ultimate foundation of international society. Rather,

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42 Or as De Visscher wrote: ‘this purely legal image of international relations is the one most satisfactory to the man of law’, *ibid.*, p. 104; see also Koskenniemi writing on how a turn to formalism, general rules and judicial processes helped ‘to restore order and structure in the chaos of our professional lives [the lives of those jurists working with and in the field of international law, JG]’, Koskenniemi, AYIL 1995, p. 11.

43 De Visscher 1968, p. 93.

44 Notwithstanding the fact that, as Koskenniemi remarked, ‘to believe that the world is naturally composed of States, acting as unitary actors, with uniform identities in the pursuit of monolithic national interests (...) is simply poor sociology. (...) Modern sociology insists that inasmuch as our identities are no longer determined by homogenous national backgrounds, we have come to live with partly conflicting, partly overlapping functional identities. Increasing individualisation of our life-choices has offered us the possibility of choosing to participate in professional sporting and other societies overlapping national boundaries and forming ‘interlocking communities’ with interests, values and consent not reducible to any formal State. While States and sovereignty remain at the centre of the international, they are also constantly challenged by communitarian claims and cosmopolitan values.’ Koskenniemi, AYIL 1995, pp. 10 and 11. However, the fact that people with different national, cultural or other backgrounds (are able to) meet, does not mean that they have established a form of community rooted in practice. See also De Visscher 1968, p. 90.

45 *Ibid.*, pp. 71 and 72 [emphasis added].

in the light of the findings of this research, particularly the limited effectiveness of thematic procedures and the explanatory comments made in that respect, he would like to take a stance against excessive formalism and premature systematisation that are so out of place with reality.<sup>46</sup> According to the present author, although the theorisation started from the best intentions, we have gone too far ahead of the facts and, as announced in the introductory chapter to this research, the time may now have come to redraw the balance between the sovereignty of States and human rights. The next and final section of this research will be dedicated to a tentative re-evaluation of these two concepts, emphasising the need to be more modest in our expectations and our (moral) judgments and, particularly, the need to tone down a universalising rhetoric ungrounded in practice.

### V.3 TENTATIVE RE-EVALUATION OF THE NATURE OF THE INTERNATIONAL LEGAL ORDER

*'The United Nations today symbolises, more than it sustains, humanity's hope for peace. It offers an ideal and a propitious meeting-place for those who seek pacification. That is enough to justify its existence; it is too little to warrant any expectation of security.'*<sup>47</sup>

At different times scholars in international law have attempted to account for the changes in the discipline's structure, contents as well as its shift in direction as a result of developments in international relations, economics, technological innovations etc. A particularly famous work written during the 1960s, which has shaped our thinking about the nature of the international legal order, was Friedmann's 'The Changing Structure of International Law'.<sup>48</sup> Of course, developments have not stood still since the publication of that book and some parts of it may now be outdated, particularly those related to the Cold War era, but other parts of his analysis have retained their full validity and are easily transposed to today's world. Thus, the book still constitutes an adequate starting-point for starting a discussion on the nature of the international legal order and, particularly, the relationship between human rights and sovereignty.

Essential in Friedmann's work is the distinction between the 'international law of coexistence' and the 'international law of cooperation.' Here, his observations and analysis regarding the latter more positive body of international law are of particular interest.<sup>49</sup> As Friedmann observed, that body of law emerged in the light of the

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<sup>46</sup> Ibid., pp. 143 and 163.

<sup>47</sup> Ibid., p. 117.

<sup>48</sup> Friedmann 1964.

<sup>49</sup> The 'international law of coexistence' being described as the traditional system of international law aimed at the peaceful coexistence of all States regardless of their social and economic structure. The central concept in this law is the concept of State sovereignty. The central if not the only actor is the State. The rules forming part of this body of international law, for example the rules concerning the limits of national territories and national jurisdiction, have been described as an 'essentially negative

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challenges and demands of modern international relations, which 'are no longer a matter of inter-State relations, but affect groups and individuals and reach into many domains of social and economic life.'<sup>50</sup> Consequently, the range of actors involved in the formulation and implementation of the international law of cooperation include not only the State, but also permanent international organisations established by States and endowed with (limited) legal competences to achieve their objectives. In addition, this body of law potentially allowed – and gradually developed in that direction – for the participation of individuals, corporations and other non-State actors. Next, Friedmann distinguished two levels at which the international law of cooperation operated: at the regional level and at the universal level. His main explanation for this being that, in contrast to the law of coexistence, the international law of cooperation is not politically neutral. As Friedmann correctly observed:

'To the extent, however, that international law expands from what is essentially a set of rules of abstention, to organised international cooperation, it becomes more sensitive to the divergencies of internal systems, as expressed in their political ideology, their legal structure and their economic organisation.'<sup>51</sup>

In the post-Second World War world order these divergencies between States even increased due to two developments. In the first place, it was influenced by the gradual enlargement of the international community of States – the horizontal extension of the membership of the family of nations – which no longer consisted of an exclusive club of Western 'Christian' nations. The emergence of new States in Latin America, but especially Africa and Asia, with different religious and cultural backgrounds, such as Islam, Buddhism and Hinduism, entailed an 'increasing dilution of the homogeneity of values and standards derived from the common Western European background of the original members.'<sup>52</sup> The second development, which complicated the search for common values and interests, in particular in the period from 1945 to 1989, was the ideological split between communist States dominated by the Soviet Union and Western States consisting of the United States and its Allies.

These divisions, of course, had consequences for the universality of international law. According to Friedmann, certain types of the 'new' international law of cooperation reflecting universal interests of mankind, would indeed develop at the universal level. Where this was not the case, *i.e.* when no or only limited common values, interests, fears and affinities existed at the universal level, the law of international cooperation would develop most probably at the regional level first (e.g. European integration). Friedmann wrote:

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code of rules of abstention.' Ibid., pp. 60-62.

<sup>50</sup> Ibid., p. 62.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., p. 6.

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'The extent of the universality of this new cooperative international law is of course closely related to the *nature of the subject-matter*. In certain fields there is a universal community of interest; in others, agreement of the formulation of common standards depends upon a community of interests, values and institutions confined to a more closely knit and limited community. In the field of international communications and transportation, for example, there is generally a universal interest in common standards and a corresponding universality of conventions. In matters of labour, differences of political organisation as well as of economic and social standards make universality far more difficult to attain. Effective international cooperation in cultural and educational matters or in the *protection of human rights against arbitrary interference depends on a correspondence of values* unattainable at this time in the world community but realisable within more limited groups of nations.'<sup>53</sup>

Where disparities in interests and values were still too great and where, moreover, these disparities were accentuated, rather than attenuated, by developments in international relations, the 'old' international law of coexistence retained its full validity. In order to protect what they perceived as their vital interests, States still wished to retain the option to retrench themselves behind the doctrine of State sovereignty. This also explains the ambiguity expressed in the Charter of the United Nations where, simultaneously, the international promotion and protection of human rights is laid down as a universal concern of mankind and States are provided with a safety-valve in the form of the plea of 'domestic jurisdiction'.

Now, as this research has shown and as the present author explicitly acknowledges, international law has come a long way since Friedmann's book was first published in 1964. The doctrine of human rights has made its headway to the centre of international relations – based on the Charter of the United Nations and the Universal Declaration of Human Rights – and has been brought within the ambit of international law. Practice has found its way around the concept of domestic jurisdiction.<sup>54</sup> Moreover, the Cold War era with its ideological stalemate embodied in the concept of 'coexistence' has come to an end. Since Vienna 1993 the international community of States has formally accepted the universality, indivisibility and interdependence of all human rights as the new anti-ideological, anti-political ethic of the emerging world order, making human rights 'the *lingua franca* of global moral thought.'<sup>55</sup> Having adopted a whole series of standard-setting instruments and established the institutional framework to monitor compliance with the commitments entered into, 'implementation' has become the key-word since the beginning of the 1990s.<sup>56</sup> State sovereignty had become an anachronism in a global world.<sup>57</sup>

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53 Ibid., pp. 68 and 69 [emphasis added].

54 See also Brownlie 1998, p. 297.

55 Ignatieff 1999, p. 12.

56 See, for example, Van Hoof, NQHR 2000, pp. 3-5 and also very recently Lempinen 2005, p. 392.

57 Ignatieff 1999, p. 20.

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This vision also penetrated international legal thinking. In the Netherlands, for example, towards the end of the 1990s and the early part of the present decade no less than three inaugural lectures were dedicated to redefining the balance between the concept of State sovereignty and emerging areas of international concern. Two of them, Flinterman's lecture on 'Sovereignty and Human Rights'<sup>58</sup> and Kamminga's 'Humanisation of the Law of Nations'<sup>59</sup> dealt explicitly with the implications of developments in the field of human rights for the international legal order. The third one, Schrijver's lecture on 'Limited Sovereignty – 350 years after the Peace Treaties of Westphalia (Münster) –'<sup>60</sup> showed that the concept has also been exposed in other fields such as arms control, the environment, investment agreements and the specific case of the international community versus Iraq (in the first Gulf War). The conclusions of the three professors did not substantially differ.

Schrijver concluded that 'sovereignty is no longer an absolute and static, but rather a relative and dynamic concept. In the present stage of development of international legal relations State sovereignty has also taken more and more the shape of an 'organising principle' for the realisation of internationally agreed norms and values ... In the modern law of nations sovereignty does not only serve as the basis of rights [of States, JG], but also as a source of responsibility, imputability and liability and as the basis for international cooperation.'<sup>61</sup>

Referring to Schrijver, Flinterman also used the term 'organising principle' for the realisation of internationally agreed norms and values to describe the influence of human rights on sovereignty. He wrote that 'international law and the principle of sovereignty have been modernised and the balance between sovereignty and human rights has changed, while the process of change has not ended. Today, international law prescribes that States should put their national jurisdiction and national competences at the service of the promotion and protection of human rights and that citizens may remind their Governments of these duties, and also that States are accountable towards other States. (...) Under international law States have primary responsibility for the realisation of human rights. They share this responsibility with the international community and other States.'<sup>62</sup> In the final analysis, according to Flinterman, 'humanity takes precedence over sovereignty.'

Kamminga asserted that 'over the past years the relative weight of human rights has increased to such an extent as to shake the foundations – some of them centuries old – of international law. The international legal order may increasingly be characterised

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58 Flinterman 2000.

59 Kamminga 2001.

60 Schrijver 1998.

61 *Ibid.*, p. 41 [author's translation from Dutch].

62 Flinterman 2000, pp. 27 and 28 [author's translation from Dutch].

as a constitutional order where the validity of rules has to be tested against the fundamental rights of citizens.<sup>63</sup>

The conclusions by Flinterman and Kamminga leave no doubt about the fact that the concept of human rights has clearly emerged as a legal concept, which has silently infiltrated other traditional concepts of international law to fundamentally change their scope and meaning. Moreover, the claim that human rights or humanity should prevail over State sovereignty (Flinterman) and the characterisation of the international legal order as a constitutional order (Kamminga) give substance to the idea of a hierarchical order of rules of international law. Even though it is acknowledged that a great deal of work remains to be done and that, from a theoretical point of view, the notion of hierarchy in international law needs further elaboration, both Flinterman and Kamminga take as a point of departure that human rights norms should be the measure for determining the constitutionality of the exercise of power by the States.<sup>64</sup>

All in all, the conclusions by both Flinterman and Kamminga underscore the success of the human rights movement at the expense of an obsolete absolute concept of sovereignty. Although caution against euphoria is expressed (Flinterman) and reference is made to certain obstacles or counter-tendencies such as *lacunae* in the system of the international protection and promotion of human rights (Flinterman) or the phenomenon known as economic globalisation (Kamminga), the general tone of the views they expound and the message they want to get across to their audience is a positive and optimistic one: something is changing!<sup>65</sup>

It is particularly this aspect of these two inaugural lectures that sharply contrasts with the idea of 'human rights in crisis', with which Ignatieff confronts his audience after having presented the achievements in the form of the juridical, advocacy (and enforcement) revolutions referred to earlier on in this study. Ignatieff wonders why human rights activists are so discouraged and why their rethoric is so full of gloom.<sup>66</sup> And, indeed, a superficial survey of reports by non-governmental organisations active in the field of human rights confirms this gloomy picture; confronted with the realities of daily life, violations of human rights seem to be the rule, rather than the exception.<sup>67</sup>

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63 For Kamminga 'humanisation' stands for the process of change in general international law from a law primarily aimed at protecting the interests of States to a law giving more weight to the interests of the individual (citizen). Kamminga 2001, pp. 7-9 [author's translation from Dutch].

64 Flinterman 2000, p. 5 and 28; Kamminga 2001, pp. 8 and 9, 16 and especially 24.

65 Flinterman 2000, pp. 28-31; Kamminga 2001, pp. 24 and 25; see also Schrijver 1998, pp. 39-41.

66 Ignatieff 1999, p. 12.

67 Merely to illustrate this point see, for example, International Federation of Human Rights, The Letter, No. 5, July-August 1999 which was headed 'Disappointed outcome of the 55th session of the Commission on Human Rights'; for years now, the International Service for Human Rights has been drawing the attention of the readers of its Human Rights Monitor to the fact that the best way for a State to protect itself is to be elected to the Commission on Human Rights: 'the list of Member States contains more and more countries where human rights are not properly implemented', HRM, Nos. 53-54, 2001, p. 130; in 2002 the International Commission of Jurists put the following heading on that year's session of the Commission on Human Rights: 'major setbacks in monitoring, some advances in standard-setting', ICJ Press Release 26 April 2002; more recently, on 20 January 2003 Human Rights Watch

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The post-Cold War world order has brought us new conflicts: civil strife, a North-South divide, Islamic fundamentalism etc. Moreover, in the post-9/11 world order optimism may have shrunk even further. But it is not only human rights activists who are infected with this pessimistic virus, it also penetrates the public at large, notably through the modern media, which, as Ignatieff acknowledged, 'have shrunk the distances between zones of safety and zones of danger in today's world and that there is no hiding place from the evidence of our failure to create a worldwide culture of respect for human rights.'<sup>68</sup> Finally, that same feeling of misanthropy had already been described at a very early stage of the post-Cold War era by Enzensberger when he wrote that:

'Wen der Terror der Bilder nicht zum Terroristen macht, den macht er zum Voyeur. Jeder von uns sieht sich auf diese Weise einer permanenten Erpressung ausgesetzt. Denn nur wer zum Augenzeugen gemacht wird, taugt als Adressat der vorwurfsvollen Frage, was er denn gegen das, was ihm gezeigt wird, unternahme. So erhebt sich das korrupteste aller Medien, das Fernsehen, zur moralischen Instanz.'<sup>69</sup>

He is also very clear on the effects of such an overexposure of human suffering and the inability of individuals to do something about it:

'Die psychische und kognitive Überförderung schlägt zurück. Der Zuschauer fühlt sich unzuständig und ohnmächtig; er igelt sich ein, schaltet ab. (...) Der Begriff der paradoxen Reaktion ist aus der Pharmakologie bekannt: ein falsch angewandtes oder falsch dosiertes Mittel kann das Gegenteil der gewünschten Wirkung haben. Moralischen Forderungen

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reported on the election of Libya to the Chair of the Commission on Human Rights and warned that 'Libya's election poses a real test to the Commission. Repressive Governments must not be allowed to hijack the UN human rights system.' See [www.humanrightswatch.org](http://www.humanrightswatch.org). Scholarly work sometimes also reflects this attitude. For example, Lempinen wrote in 2001 that '[d]espite their strength, the special procedures [of the United Nations Commission on Human Rights, JG] are currently facing challenges which not only threaten the credibility of the Commission and its special procedures, but even the credibility of the United Nations as a whole.' He refers in particular to the non-cooperation of Governments. Lempinen 2001, p. 1.

68 Ignatieff 1999, p. 12. In an earlier publication Ignatieff dealt more extensively with the role of the media in today's world. There he wrote, *inter alia*, '[t]hus far I have made the following arguments: the moral empathy mediated by television has a history – the emergence of moral universalism in the Western conscience; this universalism has always been in conflict with the intuition that kith and kin have a moral priority over strangers; the twentieth-century inflection of moral universalism has taken the form of an anti-ideological and antipolitical ethic of siding with the victim; the moral risk entailed by this ethic is misanthropy, a risk and a temptation heightened by television's visual insistence on consequences rather than intentions.' Ignatieff 1998, pp. 9-33, especially p. 25.

69 Enzensberger 1993, p. 76. 'Whoever is not turned into a terrorist under pressure of these images is at least turned into a voyeur. All of us are exposed to constant blackmail in this way. Because only a person who has been made into an eyewitness will be affected by the question of what it is that he is personally undertaking against that which he is being shown. Thus the most corrupt of all media, namely television, presumes to invest itself with moral authority' [author's translation].

Conclusions

gen, die in keinem Verhältnis zu den Handlungsmöglichkeiten stehen, führen am Ende dazu, daß die Geforderten gänzlich streiken und jede Verantwortung leugnen.<sup>70</sup>

Still, Ignatieff sees these problems as 'real problems', but categorises them as problems of success rather than failure. In particular, he wrote:

'The juridical, advocacy and enforcement revolutions have dramatically raised our expectations, and it is unsurprising that the reality of human rights practice should disappoint us. Indeed, there is a dialectic of insatiability in human rights work. The more we achieve, the more work remains to be done.'<sup>71</sup>

How, then, do we deal with these problems of success? And what contribution can a lawyer make to this process? Ignatieff, for his part, has suggested that three intersecting dimensions of the human rights doctrine must be addressed 'if the human rights movement is to regain both its legitimacy and inner conviction.' First, there is a political dimension, which, in the view of Ignatieff comes down to redrawing the balance between sovereignty and individual rights, between stability in international relations and respect for individual human rights. Secondly, he points at a cultural dimension, which relates to the declining legitimacy of the human rights doctrine as a result of more frequent and more inconsistent interventions in the affairs of non-Western societies. Thirdly and finally, he refers to a spiritual dimension, which asks us to reflect on the secular or religious foundations of human rights.<sup>72</sup>

While all three dimensions raise important questions that need to be dealt with, the lawyer/scholar will feel most inclined to say something about the first dimension, whereby considerations from the second and third dimension cannot be ignored. The principal issue that a lawyer/scholar can help to address is to explain and clarify the large rift between the expectations raised by the growth of human rights law (and soft law) and social and political realities, which, in legal terms, have found expression in centuries-old concepts. He can try to rethink and reformulate certain legal concepts, such as the concept of State sovereignty, but he must also be so honest as to admit and state clearly that there are limits to such an exercise of reformulating the law. In some cases, he does better to point at the underlying dilemmas and tensions. For example, he can point to the 'fundamental conflict of principle', as Ignatieff put it, between the international rights of the individual and the stability of the system. He can try to bring back a *sense of reality* in the expectations of the general public, human rights activists

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70 Ibid., p. 79. 'The psychological and cognitive strain begins to tell. The viewer feels incompetent and powerless; he becomes defensive, and switches off. (...) The term paradoxical response derives from pharmacology where it is used to indicate that a drug which is used incorrectly or in incorrect quantities may have the opposite effect. Making moral demands that bear no relation whatsoever to people's actual ability to help will eventually have the effect of completely demoralising them and making them deny all responsibility' [author's translation].

71 Ignatieff 1999, p. 12.

72 Ibid., pp. 13 and 16 ff.

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and the human rights elite referred to earlier on in this study and this, nothing more, nothing less, is precisely what the present author has attempted to do.

The notion of a sense of reality, according to the present author, is crucial to any process of rethinking and reformulating the concept of State sovereignty in international law, especially in the light of the difficulties which the human rights movement is currently facing.<sup>73</sup> There is no doubt that the scope and meaning of the concept of sovereignty in international law has changed. Sovereignty is not an absolute and static concept. Has it ever been one? Isn't this historical perception of sovereignty as absolute and static not just a construction itself against which we now construct a relative and dynamic concept of sovereignty?<sup>74</sup> The point is not that the concept was not more absolute in the nineteenth century than it is today or to deny that until 1945 international law hardly had anything to say about the way a State treated its own citizens, the scope and the meaning of the concept being largely dependent on the context and needs of the time, but that one should not be too dogmatic about it, as if the international shows us the way to heaven.<sup>75</sup> Things are different nowadays, but does that mean that we have made progress?

Having said this, the question may be asked whether it has been helpful that Flinterman, Kamminga and to lesser extent Schrijver have described the fundamental changes taking place in the international legal system? Does it help that we know that the concept of sovereignty has changed, that humanity takes precedence over sovereignty or that 'something' that could be labelled the *process of humanisation of international law* or the *constitutionalisation of the international legal order* is currently taking place? Are these processes or tendencies really taking place or are we not just creating another myth? Again, the reason for asking these questions is not that the present author fundamentally disagrees with the writings of the three professors or to deny that today's world is changing and facing many challenges – political, economic, ecological and humanitarian – that need to be addressed and for which international law can play a useful role. Rather, it has been done because he wonders how such 'theorising' would affect our ability to observe what is really going on.<sup>76</sup>

The strength of Ignatieff's argument resides precisely in the fact that, while acknowledging the achievements of the human rights movement and describing them, he does not make these achievements and successes the core of his message, toning down counter-tendencies or tensions. On the contrary, the fundamental conflicts of

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73 Hilhorst 2002, pp. 33-39.

74 Koskeniemi, AYIL 1995, pp. 10 and 11, and more generally his larger work: id. 1989.

75 For the reasons as to why we should consider the nineteenth century to be the age of absolute sovereignty see Steinberger, Encyclopedia 2000, pp. 510 and 511. For an understanding of the rise of the modern State, the interrelatedness of its philosophical foundations with political factors and historical developments, see De Visscher 1968.

76 See also Koskeniemi: 'The insight that there is no natural direction or morality in history – for instance 'increasing interdependence' or moving towards more or less 'freedom' – which the law should seize or become anachronistic, liberates legal study to reflect critically on prevailing institutional and political agendas from a variety of angles.' Koskeniemi, AYIL 1995, p. 18.

principle underlying the emergence of the doctrine of human rights constitute the very essence of his message and the central theme of his writing; these are not just marginal issues in an otherwise progressive, irrevocable and inevitable process of humanisation. Ignatieff tells us that we must deal honestly with the implications of success. As pointed out above, in this respect Ignatieff's approach differs fundamentally from Flinterman's and Kamminga's approach. For these two authors the essence of their message was to show the changing concept of State sovereignty to the benefit of individual human rights and to show the existence of a process of humanisation. The counter-tendencies and obstacles to these developments, which the authors clearly see, have unfortunately been marginalised as 'some short relativising remarks' at the very end of their respective orations.<sup>77</sup> These remarks leave the critical and careful reader puzzled. Have we made progress or not? Serving as a disclaimer against the charge of being a 'wishful thinker' or an idealist, by introducing these short remarks both Flinterman and Kamminga seem to have made a fatal concession to the very point they wanted to make.<sup>78</sup> Either you believe what they say, or you do not.

There is a risk in not being more explicit about the fundamental conflicts of principle, the conflict between the stability of the system and individual rights, the conflict between the West, the United States in particular, and the rest or the conflict concerning the ultimate foundation for human rights. The risk is that we sacrifice reality to the benefit of an idea. In 1968 De Visscher formulated this problem as follows:

'The confusion surrounding the whole problem of human rights today is an example of the distortions that impatient radicalism and ulterior political motives may force upon an idea which is profoundly just in itself but which could be brought into application only with much wisdom and circumspection.'<sup>79</sup>

The huge gap between theory and practice cannot be filled by signalling trends in international relations, by showing that despite all the misery in the world there really is something as a process of constitutionalisation, that we are making progress. Enzensberger has warned us against the dangers of too much rhetoric, the reality of everyday life and people's inability to do something about it: there comes a moment when people switch off their televisions. Koskenniemi experienced similar feelings at a UN Congress of International Law celebrating the middle of the 'UN Decade of International Law' where 'today's great names in international law from academia and foreign offices' spoke about international law's role after the Cold War. Koskenniemi wrote:

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<sup>77</sup> Supra Chapter I.1, note 12. Flinterman 2000, p. 28-31; Kamminga 2001, pp. 24 and 25.

<sup>78</sup> Koskenniemi, AYIL 1995, pp. 5-8.

<sup>79</sup> De Visscher 1968, p. 130. In a recent publication the philosopher Hans Achterhuis cited Ignatieff at the 2002 Thomas More Lecture (Amsterdam, the Netherlands), where he said that great gestures or political action of a merely symbolic nature will destroy our ideals, only a scrupulous and patient analysis of the facts can bring them a little closer to reality. Achterhuis 2002, p. 63.

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‘A paradoxical contrast emerged between the inflated global rhetoric of the speeches and the complete irrelevance with which the Congress was treated by the political centre. Globalist rhetoric: marginal practice – and none was surprised, indeed, nobody expected otherwise.’<sup>80</sup>

Subsequently, Koskenniemi analysed why international reformism is being challenged by recent developments both in doctrine and practice. His final observations on the future of (international) reform are not so far removed from what Enzensberger has written. According to Koskenniemi:

‘Nor can reform be quite what it was. For *it is not the case that the only acceptable moral and political arguments are those which treat all people as if they shared the same preferences*. In fact people do not hold the same preferences and the fact that they do not is not a sign that some are ahead while others are behind. That we should expect all people would wish to be treated like we wish to be treated derives from *a Kantian universalism which sets impossible moral demands on us* and ultimately undermines our ability to honour the special obligations we may have towards our own communities and the most vulnerable of any communities.’<sup>81</sup>

This conclusion, in turn, is not so far removed from the essence of Ignatieff’s message in his essay on the crisis in human rights. Again, we are confronted with the hard facts when he writes that ‘[f]or all the rhetoric about common values, the distance between America and Europe on rights questions – like abortion and capital punishment – is growing, just as the distance between the West and the Rest is bound to grow too.’<sup>82</sup> However, he does not signal the end of the human rights movement, but rather

‘its belated coming of age, its recognition that we live in a plural world of cultures which have a right to equal consideration in the argument what we can and cannot, should or shouldn’t do to human beings. In this argument, the ground we share may actually be quite limited: not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. *But this is already something*. In such a future (...) rights are not the universal credo of a global society, not a secular religion, but (...) the common ground from which our arguments can begin and the common minimum which keeps us struggling to be human.’<sup>83</sup>

It is with this, perhaps minimalist, but in any case more modest conception of human rights in mind – a conception more in line with social realities – that we should try to approach the *global* problems of today. Does this mean that we are back to square one? Certainly not, but it does mean that we have to give up the view which defines and

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80 Koskenniemi, AYIL 1995, p. 2.

81 Ibid., p. 19 [emphasis added].

82 Ignatieff 1999, p. 54.

83 Ibid., p. 54.

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reduces the problems regarding the implementation of human rights and fundamental freedoms to ‘problems of effectiveness and coordination for which the correct responses are technological, bureaucratic [or institutional, JG] ones.’<sup>84</sup> Whether we like it or not, the implementation of human rights and fundamental freedoms has largely remained a question of politics. Moreover, what we must have the courage to say, in the midst of the turbulence and suffering in our world, is that the consequences of any policy we may come up with will remain uncertain<sup>85</sup> and that moral perfectionism, therefore, is not an acceptable policy-option in the world of men, however tempting that may be, particularly for an organisation like the United Nations.

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84 Koskenniemi, AYIL 1995, p. 2.

85 Ibid., p. 14.



## SAMENVATTING

### 1 ALGEMENE INLEIDING (HOOFDSTUK 1)

In de periode na de Tweede Wereldoorlog heeft het internationale recht een enorme (kwantitatieve en kwalitatieve) ontwikkeling doorgemaakt. Misschien wel het meest in het oogspringend is deze ontwikkeling geweest op het terrein van de rechten van de mens, dat middels het Handvest van de Verenigde Naties een onderwerp van internationale zorg en geleidelijk aan ook van internationaal recht is geworden.

Het Handvest van de VN noemt 'het bevorderen en stimuleren van eerbied voor de rechten van de mens en voor fundamentele vrijheden voor allen, zonder onderscheid naar ras, geslacht, taal of godsdienst' als één van de hoofddoelstellingen van de organisatie.

Tegelijkertijd bevestigt het VN Handvest een aantal fundamentele 'traditionele' beginselen van internationaal recht, in het bijzonder het beginsel van de staatssoevereiniteit en het complementaire verbod op inmenging in aangelegenheden die wezenlijk onder de binnenlandse rechtsmacht van een Staat vallen, als grondslag voor de werkzaamheden van de organisatie.

Aldus schiepen de oprichters van de Verenigde Naties een op het eerste gezicht problematische verhouding tussen doelstellingen en beginselen. Immers, er is weinig discussie over mogelijk dat Staten ten tijde van de oprichting van de VN in 1945 een naar internationaal recht vrijwel onbeperkte vrijheid hadden in de behandeling van hun eigen onderdanen, een bevoegdheid die derhalve wezenlijk tot de binnenlandse rechtsmacht mocht worden gerekend. Er bestond aanvankelijk dan ook enige angst dat de organisatie zichzelf had verlamd wat betreft haar mogelijkheden invulling te geven aan één van haar hoofddoelstellingen. In de praktijk is deze angst evenwel ongegrond gebleken.

Sinds 1945 is in verschillende VN organen, in het bijzonder in de in 1946 door de Economisch en Sociale Raad (ECOSOC) van de Verenigde Naties ingestelde Commissie voor de Rechten van de Mens, belangrijk werk verricht dat onder andere heeft geleid tot de aanvaarding van de Universele Verklaring van de Rechten van de Mens (UVRM) in 1948 en – als afgeleide daarvan – de aanvaarding van het Internationaal Verdrag inzake Burgerlijke en Politieke Rechten (IVBPR) en het Internationaal Verdrag inzake Economische Sociale en Culturele Rechten (IVESCR) in 1966. Met name in de periode na 1966 zijn VN organen zich meer en meer gaan toelagen op het creëren van procedures en mechanismen om Staten (publiekelijk) aan te spreken/ter verantwoording te roepen in geval van (grootschalige) schendingen van de rechten de mens op hun territorium, danwel plaatshebbend onder hun rechtsmacht.

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Deze ontwikkeling heeft de Commissie voor de de Rechten van de Mens geleidelijk aan in staat gesteld om in beginsel elke Staat aan te spreken op zijn ‘mensenrechtenbeleid’, ongeacht het feit of de Staat in kwestie al dan niet partij is bij de één van de (VN) mensenrechtenverdragen. In eerste instantie bediende de Commissie zich hierbij van zogenaamde landenprocedures: werkgroepen of speciale rapporteurs aangesteld met de opdracht publiekelijk aan de Commissie te rapporteren over de mensenrechtensituatie in een bepaald land.

In 1980 ging de Commissie over tot een andere aanpak. In dat jaar namelijk besloot zij tot de oprichting van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen met de opdracht te rapporteren over gevallen van ‘verdwijningen’ waar dan ook ter wereld gepleegd. Met andere woorden de Werkgroep kreeg een wereldwijd mandaat om informatie te verzamelen en te rapporteren betreffende één bepaald type van mensenrechtenschendingen. Deze ‘thematische’ aanpak heeft vervolgens een hoge vlucht genomen en in de jaren die volgden zijn vergelijkbare mechanismen ingesteld, bijvoorbeeld de Speciale Rapporteur inzake Buitengerechtelijke, Standrechtelijke of Willekeurige Executies (1982), de Speciale Rapporteur inzake Martelingen (1985) en de Werkgroep inzake Willekeurige Detentie (1991). In 2002 was het aantal thematische procedures gegroeid tot 27.

Tegenwoordig wordt de spectaculaire ontwikkeling – sommigen spreken van proliferatie – van de thematische aanpak beschouwd als één van de belangrijkste wapenfeiten van de Commissie voor de Rechten van de Mens over de afgelopen 25 jaar en wordt de aanpak alom geroemd als hoeksteen van het huidige VN mensenrechtenbeleid. Verschillende redenen liggen aan de populariteit van de thematische aanpak ten grondslag.

Zo wordt er bijvoorbeeld vaak gerefereerd naar de flexibele en niet vast omschreven wijze waarop de Commissie voor de Rechten van de Mens de mandaten van de eerste thematische procedures heeft opgesteld. Mede hierdoor hebben de thematische procedures hun mandaten op creatieve en innovatieve wijze vorm kunnen geven. Zo hebben ze in de loop der tijd een viertal ‘technieken’ kunnen ontwikkelen: (1) ‘routine’-verzoeken om informatie van regeringen; (2) een zogenaamde ‘urgent action procedure’ in spoedeisende gevallen; (3) landenbezoeken; en (4) jaarrapporten aan de Commissie.

Tot op heden is er relatief weinig onderzoek gedaan naar de internationaal-rechtelijke achtergronden en implicaties van de aanstelling en werkzaamheden van thematische procedures. Gezien de hierboven uiteengezette ogenschijnlijke tegenstelling tussen doelstellingen en beginselen van de Verenigde Naties mag dit enigszins verrassend heten. Immers, hoe moet de hedendaagse praktijk van de thematische procedures en de Commissie voor de Rechten van de Mens worden geduid in het licht van het soevereiniteitsbeginsel en het interventieverbod zoals die door de oprichters van de VN in het Handvest zijn vastgelegd? In dit onderzoek zal deze vraag worden beantwoord aan de hand van een nauwkeurige bestudering en analyse van de (ontwikkeling van de) werkzaamheden van drie (van de 27) thematische procedures:

de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen, de Speciale Rapporteur inzake Martelingen en de Werkgroep inzake Willekeurige Detentie.

Daarnaast zal – mede aan de hand van de bevindingen betreffende bovenstaande onderzoeksvraag – een poging worden gedaan om de ontwikkelingen op het gebied van de rechten van de mens in een iets bredere context te plaatsen en in het bijzonder zal een poging worden gedaan een antwoord te formuleren op de vraag of deze ontwikkelingen de aard van de internationale rechtsorde, traditioneel gebaseerd op wat Gill de ‘*statist presumption of international law*’ heeft genoemd, hebben veranderd.

## **2 BINNENLANDSE RECHTSMACHT, MENSENRECHTEN EN DE VERENIGDE NATIES (HOOFDSTUK 2)**

Het tweede hoofdstuk van het onderzoek gaat dieper in op de mensenrechtenbepalingen en op het non-interventiebeginsel (het verbod op inmenging in aangelegenheden die wezenlijk onder de binnenlandse rechtsmacht van een Staat vallen) zoals vastgelegd in het VN Handvest. Het stelt als uitgangspunt, dat het VN Handvest, gelijk een nationale grondwet, de doelstellingen van de organisatie opsomt, het institutionele kader schept en bevoegdheden attribueert. Tevens regelt het de besluitvorming in de verschillende VN organen en de juridische (lees: internationaalrechtelijke) status van hun beslissingen.

Tegen deze achtergrond wordt vastgesteld, dat de mensenrechtenbepalingen van het VN Handvest worden gekenmerkt door de vage wijze waarop ze zijn geformuleerd. Met name bevat het Handvest noch een definitie noch een opsomming van relevante rechten van de mens. Ten tweede wordt geconcludeerd, dat, krachtens het Handvest, de primaire verantwoordelijkheid voor de bevordering van de rechten van de mens ligt bij de *politieke* organen van de organisatie (de Algemene Vergadering, ECOSOC en de Commissie voor de Rechten van de Mens) en dat het Internationale Gerechtshof, als voornaamste gerechtelijk orgaan van de VN slechts een rol speelt voor zover partijen of hiertoe gemachtigde politieke VN-organen een beroep op haar doen. Ten derde wordt er op gewezen, dat de besluiten van de politieke organen van de VN juridisch niet-bindend zijn voor de Lid-Staten van de organisatie, met andere woorden deze besluiten hebben formeel juridisch gezien slechts de status van een aanbevelingen. Deze drie kenmerken van de mensenrechtenbepalingen van het Handvest en de werkwijze van de VN dient men in ogenschouw te nemen bij verdere analyse van de praktijk van de VN sinds 1945. Concreet betekent het namelijk, dat die praktijk slechts ten dele kan worden verklaard aan de hand van strikt juridische redeneringen en dat het recht in deze politieke processen niet (altijd) de boventoon voert.

Voor wat betreft het non-interventiebeginsel zoals dat is neergelegd in het VN Handvest, laat hoofdstuk 2 de volgende onderdelen de revue passeren: de status van het beginsel en zijn plaats in het VN Handvest als ‘algemeen beginsel’ van de gehele organisatie en derhalve van toepassing op al haar werkzaamheden; het ontbreken in de formulering van het beginsel in het VN Handvest van een verwijzing naar het ‘internationaal recht’ als criterium voor de beoordeling van de vraag of een

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'aangelegenheid' al dan niet onder de binnenlandse rechtsmacht valt; het achterwege laten van het bekleeden van enig VN-orgaan met een exclusieve interpretatiebevoegdheid inzake de toepasselijkheid van het non-interventiebeginsel; en ten slotte, de discussie inzake de 'correcte' interpretatie van de termen 'wezenlijk' (aangelegenheden die wezenlijk onder de binnenlandse rechtsmacht vallen) en 'interventie' (welke vorm of intensiteit moet de inmenging aannemen om als verboden 'interventie' te worden beschouwd?). Aan de hand van deze analyse wordt vastgesteld, dat de reikwijdte van het non-interventiebeginsel in de praktijk vooral zal afhangen van de effectiviteit van de besluiten van de politieke organen van de Verenigde Naties (tegen de achtergrond van de ontwikkeling van de internationale betrekkingen).

Na deze theoretische uiteenzetting van de relevante bepalingen van het VN Handvest, wordt een overzicht en analyse gegeven van de praktijk van de VN organen in de periode 1945-1980. Dit overzicht laat zien, hoe – en onder invloed van welke politieke omstandigheden – verschillende VN organen vorm hebben gegeven aan de doelstellingen van de organisatie op het gebied van de rechten van de mens en welke praktische implicaties dit heeft gehad voor de reikwijdte van het non-interventiebeginsel. Als basis voor dit deel van hoofdstuk 2 dienen de onderzoeken die andere auteurs zoals Lauterpacht, Preuss, Higgins, Ermacora, Zuidwijk, Kamminga en Alston in de loop der tijd hebben verricht.

In de eerste plaats wordt kort ingegaan op de wijze waarop VN organen inhoud hebben gegeven aan de vage mensenrechtenbepalingen van het Handvest, waarvan werd gezegd dat zij geen concrete juridische verplichtingen voor Staten inhielden. Met name door de UVRM te gaan gebruiken als 'intern recht' van de organisatie en als nadere precisering van de doelstellingen en andere mensenrechtenbepalingen van het Handvest, hebben deze organen een belangrijke bijdrage geleverd aan de operationalisering en de positivering van het mensenrechtenbegrip in het internationale recht, zoals uiteindelijk ook erkend door het Internationaal Gerechtshof in de zgn. *Tehran Hostages Case* in 1980. Een belangrijke katalysator voor deze ontwikkeling vormde zonder enige twijfel de apartheidspolitiek in Zuid-Afrika en de intensieve VN bemoeienis met deze praktijk sinds het begin van de jaren '50 van de vorige eeuw.

Vervolgens wordt uitvoeriger ingegaan op de ontwikkeling van toezichthoudende procedures en mechanismen door de Commissie voor de Rechten van de Mens. De analyse maakt onderscheid tussen de periode 1945-1966 en de periode 1966-1980. De eerste periode wordt gekenmerkt door een passieve houding van de Commissie ten aanzien van het vraagstuk van het ter verantwoording roepen van mensenrechtenschendende Staten. Dit betekende overigens niet, dat de Commissie helemaal niets deed. Op basis van ECOSOC resoluties 75 (V) van 1947 en 728F (XXVIII) van 1959 deed de Commissie wel degelijk enige ervaring op in het kennismaken van mensenrechtenschendingen, maar zich beroepend op de zgn. 'no power' doctrine ondernam zij geen verdere actie en omarmde daarmee *de facto* een ruime interpretatie van het non-interventiebeginsel zoals neergelegd in het VN Handvest. Deze houding kwam de Commissie op stevige kritiek te staan. De invloedrijkste kritiek, die van Sir Hersch Lauterpacht, wordt kort behandeld.

Tegenover de 'passiviteit' van de Commissie in deze periode staat een meer actieve rol van de Algemene Vergadering (en in mindere mate de Veiligheidsraad) van de VN. Onder druk van nieuwe Lid-Staten, een gevolg van het dekolonisatieproces, ziet dit orgaan in het non-interventiebeginsel van het Handvest geen hindernis om de apartheidspolitiek van de Zuid-Afrikaanse regering aan de kaak te stellen. De dynamiek van de Koude Oorlog versterkt deze ontwikkeling doordat Oost-Europese Lid-Staten gewillig zijn de nieuwe Lid-Staten te ondersteunen in hun strijd tegen apartheid, kolonialisme en het probleem van rassendiscriminatie, dat vooral de Westerse VN-Lidstaten treft. De analyse laat verder zien hoe deze VN organen het non-interventiebeginsel hebben omzeild door een verband te construeren tussen het probleem/het conflict in kwestie en aspecten (zoals de bedreiging van de internationale vrede en veiligheid) die wel een zaak van internationale zorg zijn. Ten slotte wordt gewezen en ingegaan op de aanvaarding van het Internationaal Verdrag inzake de Uitbanning van Alle Vormen van Rassendiscriminatie (1966) door de Algemene Vergadering, het werk van de inmiddels (sinds 1994) niet meer actieve Trustschapsraad, de oprichting van Speciale Comit es met betrekking tot koloniale vraagstukken, zoals het Dekolonisatie Comit e (1961) door de Algemene Vergadering als belangrijke wegberijders voor de ontwikkelingen die zouden plaatsvinden vanaf 1966 en die met name de werkzaamheden van de Commissie ingrijpend zouden veranderen.

De analyse van de periode 1966-1980 begint met een uitvoerige beschrijving van de totstandkoming van ECOSOC Resoluties 1235 en 1503, die de Commissie voor de Rechten het mandaat verschaffen in het openbaar (1235), dan wel in vertrouwelijke sessie (1503) kennis te nemen van grove en grootschalige schendingen van de rechten van de mens waar ook ter wereld, deze schendingen te bediscussi eren en eventueel maatregelen te nemen in de vorm van het aannemen van een veroordelende resolutie of het instellen van een landenprocedure. Deze resoluties hebben o.a. tot gevolg, dat het zwaartepunt van de mensenrechtenactiviteiten van de VN, in het bijzonder wat betreft het toezicht op de naleving van internationaal aanvaarde normen, geleidelijk aan verschuift van de Algemene Vergadering naar de Commissie voor de Rechten van de Mens. Tevens leiden zij ertoe, dat het aanklaarten en ter verantwoording roepen van Staten waar de rechten van de mens op massale wijze worden geschonden – ook al gaat het in deze periode nog om een zeer klein gezelschap bestaande uit Zuid-Afrika (vanaf 1967), Israel (vanaf 1968) en Chili (vanaf 1975) – niet langer wordt gerechtvaardigd met een verwijzing naar een bedreiging van de internationale vrede en veiligheid (met name niet in het geval van Chili), maar dat het plaatsvinden van zulke schendingen *de facto* als een zelfstandige grond voor VN inmenging wordt gezien. Ten slotte wordt verklaard hoe politieke manipulatie en misbruik van de vertrouwelijke 1503 procedure – mensenrechtenschendende Staten, in het bijzonder de Argentijnse regering ten tijde van de zgn. Vuile Oorlog, grepen deze procedure aan om publieke veroordeling en gezichtsverlies te vermijden en tegelijkertijd de indruk te wekken met de Commissie samen te werken – er eind jaren '70 toe leidt, dat de Commissie nieuwe wegen zoekt om Staten publiekelijk aan te spreken op schendingen van de rechten van de mens.  en van deze nieuwe wegen zal zijn de instelling van de

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eerste zgn. thematische procedure, de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen in 1980.

Aan het eind van hoofdstuk 2, de gehele analyse overziend, wordt een aantal vragen geformuleerd, die in de hoofdstukken 3 en 4 nader zullen worden onderzocht. Deze vragen zijn de volgende: (1) heeft de praktijk van de thematische procedures in de periode 1980-2004 een dusdanig niveau bereikt ('*appearance of a coherent practice*') dat gesproken kan worden van een algemeen toepasselijke procedure (in tegenstelling tot de selectieve praktijk uit de jaren '70 waarin slechts enkele landen feitelijk ter verantwoording werden geroepen); (2) hoe staat het met de bevoegdheid van thematische procedures – en meer in het algemeen met die van de VN als geheel – om kennis te nemen en te reageren op individuele gevallen van schendingen van de rechten van de mens; (3) in hoeverre zijn de werkmethode van thematische procedures verankerd/geinstitutionaliseerd in het VN systeem; (4) welke voorwaarden/procedurele vereisten zijn verbonden aan het hanteren van een specifieke werkmethode door thematische procedures en wie bepaalt deze voorwaarden en of in concrete gevallen aan die voorwaarden is voldaan; and (5) in hoeverre zijn thematische procedures er in geslaagd mensenrechtenschendende Staten op meer transparante wijze ter verantwoording te roepen en in hoeverre zijn zij er in geslaagd de internationale publieke opinie te mobiliseren.

### **3 ACHTERGROND EN ONTWIKKELING VAN VN THEMATISCHE RAPPORTEURS, DEEL 1 (HOOFDSTUK 3)**

Het derde hoofdstuk bevat het eerste deel van het onderzoek naar de ontwikkeling en de praktijk van de drie geselecteerde thematische procedures. Dit hoofdstuk behandelt eerst de algemene aspecten van thematische procedures: de rechtsbasis voor hun oprichting en de aard van de procedures. Wat betreft de rechtsbasis wordt geconcludeerd, dat deze (uiteindelijk) berust op de mensenrechtenbepalingen en de algemene autoriteit van het VN Handvest en de uitwerking daarvan, zoals die in de loop der tijd is vormgegeven door VN organen, o.a. middels ECOSOC resolutie 1235. Wat betreft de aard van de procedures wordt gewezen op het feit, dat thematische procedures zijn ingesteld door een politiek orgaan, bij resolutie (zij hebben dus geen verdragsrechtelijke basis en behoeven dan ook niet de instemming van elke afzonderlijke Staat teneinde te kunnen functioneren) en dat de oprichtingsresoluties door hun vage formuleringen veel ruimte voor een flexibele interpretatie door de werkgroep/rapporteur laten. Tegelijkertijd zijn thematische procedures mogelijkwijs kwetsbaarder voor politieke ontwikkelingen dan verdragsrechtelijke toezichthoudende mechanismen, wier bevoegdheden niet alleen duidelijk(er) zijn omschreven, maar ook nog eens uitdrukkelijk aanvaard door Staten en daardoor moeilijker ongedaan te maken. Vanuit dit perspectief zal in de praktijk dan ook veel afhangen van de politieke ervaring en het *Fingerspitzengefühl* van de personen aangesteld als lid van een werkgroep dan wel als speciale rapporteur.

Vervolgens behandelt het derde hoofdstuk de totstandkomingsgeschiedenis van de drie geselecteerde thematische procedures. Extra aandacht wordt besteedt aan de totstandkoming van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen in 1980 en in het bijzonder de rol van de Argentijnse regering in deze. Getoond wordt hoe manipulatie van de 1503 procedure in een poging te verhinderen, dat Argentinië zou worden toegevoegd aan de lijst van 'paria'-Staten, er uiteindelijk toe leidde, dat de Commissie een procedure creëerde met een wereldwijd mandaat in plaats van een landenmandaat (Argentinië). Tevens laat de beschrijving de wisselwerking tussen verschillende VN organen zien (Algemene Vergadering, ECOSOC, Commissie en Sub-Commissie) en hoe op die manier de druk om tot actie over te gaan geleidelijk werd verhoogd. Voor wat betreft de Speciale Rapporteur inzake Martelingen wordt vermeld, dat de kwestie van een toezichthoudend mechanisme inzake martelingen zijn wortels heeft in de jaren '70 (Chili), maar dat het pas echt actueel werd na de aanvaarding door de Algemene Vergadering van het Internationaal Verdrag tegen Foltering in 1984. Een belangrijk argument in de Commissie om in 1985 tot aanstelling van de rapporteur over te gaan, was dat op die manier ook Staten die het Verdrag en zijn toezichthoudende mechanismen niet zouden ratificeren, aan enigerlei vorm van internationaal toezicht inzake martelingen zouden kunnen worden onderworpen. In het geval de Werkgroep inzake Willekeurige Detentie wordt in het bijzonder gewezen op het belang van de aanvaarding van de *'Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment'* door de Algemene Vergadering in 1988 (maar ook hier dateert de eerste VN bemoeienis met dit onderwerp uit de jaren '70) en de uitgebreide studies verricht door de Speciale Rapporteur van de Sub-Commissie betreffende voorstellen voor een toezichthoudend mechanisme inzake willekeurige detentie. Aan het eind van het hoofdstuk van de totstandkomingsgeschiedenis van de drie geselecteerde mechanismen wordt geconcludeerd, dat het beginsel van non-interventie geen rol van betekenis heeft gespeeld.

Hierna wordt uitgebreider ingegaan op achtereenvolgens (1) de structuur, de samenstelling en de onafhankelijkheid van thematische procedures, in het bijzonder hun status als zgn. *'experts on missions for the United Nations'*; (2) de aanstellingsduur van thematische procedures; (3) bevoegdheid *ratione personae*, de actor of actoren tot welke thematische procedures zich richten; en (4) bevoegdheid *ratione materiae*, de omvang van de mandaten/het normatieve kader van de drie geselecteerde thematische procedures.

Met betrekking tot de structuur, samenstelling en onafhankelijkheid van thematische procedures wordt beschreven hoe de Commissie van oudsher, in elk geval gedurende de periode 1963-1979/1980, een voorkeur leek te hebben voor werkgroepen bestaande uit vijf personen overeenkomstig het beginsel van evenwichtige geografische spreiding (één lid uit elk van de vijf VN regionale groepen) en dat deze personen veelal een gouvernementele achtergrond hadden, ook al traden zij op in hun persoonlijke hoedanigheid (bijv. de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen). Een verschuiving wordt echter waargenomen vanaf het eind van de jaren '70/begin jaren '80, als de Commissie er meer en meer toe over gaat één persoon

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'of recognised international standing' aan te wijzen als Speciale Rapporteur (de Werkgroep inzake Willekeurige Detentie vormt een uitzondering in deze). Deze ontwikkeling, o.a. ingegeven vanuit kosten oogpunt (een Speciale Rapporteur is goedkoper) en effectiviteit (consensusbesluitvorming in een vijf-koppige werkgroep), bevordert de onafhankelijkheid van de thematische procedures en opent de deur voor de benoeming van personen met een niet-gouvernementele achtergrond tot Speciale Rapporteur. Een voorbeeld hiervan is de benoeming van Sir Nigel Rodley (o.a. Amnesty International) als Special Rapporteur inzake Martelingen in 1993. Ook wordt gewezen op andere ontwikkelingen, zoals het besluit van de Commissie in 1999 om de aanstelling van personen als Speciale Rapporteur of lid van een werkgroep te binden aan een maximum termijn van twee maal drie jaar en de praktijk (sinds de Wereldconferentie Mensenrechten van 1993) van de verschillende (landen en thematische) speciale rapporteurs/werkgroepen om een jaarlijkse vergadering te beleggen om gezamenlijke problemen te bespreken, dan wel initiatieven te ontplooien. Met name deze laatste praktijk is een interessante ontwikkeling, omdat de verschillende rapporteurs en werkgroepen zich hier als collectief presenteren ('a system of human rights protection') en op deze manier hun onafhankelijkheid en morele prestige als 'custodians of human rights' verder versterken.

De vraag naar de status van thematische procedures als 'experts on missions for the United Nations' heeft betrekking op de problematiek van de privileges en immuniteiten die thematische procedures genieten in de uitoefening van hun mandaat. Twee Adviezen van het Internationaal Gerechtshof, de Mazilu-zaak uit 1989 en vooral de Cumaraswamy-zaak uit 1999, hebben duidelijkheid in deze materie gebracht, in het bijzonder wat betreft de volgende punten: (1) dat thematische procedures voor wat betreft de (uitvoering van) hun door de Commissie opgedragen taken (dus met name ook de toezichthoudende functie) krachtens artikel 22 van de 'Convention on the Privileges and Immunities of the United Nations' (1946) functionele immuniteit genieten als 'experts on missions for the United Nations'; (2) dat deze immuniteit er op is gericht hun onafhankelijkheid als internationale experts in het belang van de organisatie te beschermen; (2) dat deze aanspraak geldt voor alle Staten, inclusief de Staat waartoe de persoon in kwestie behoort; en (3) dat wanneer de Secretaris-Generaal van de VN, uit hoofde van zijn functie als 'chief administrative officer of the Organization' de immuniteit claimt van bijvoorbeeld een thematische rapporteur, deze claim slechts vanwege 'zeer dwingende redenen' (*the most compelling reasons*) door nationale instanties (rechtbank) aan de kant kan worden geschoven. Een bijzonder interessant punt, dat in de Cumaraswamy-zaak naar voren kwam is het feit dat het Hof constateerde, dat de Commissie voor de Rechten van de Mens de gewoonte heeft (thematische) speciale rapporteurs niet alleen met een studietaak, maar ook met een toezichthoudende functie te bekleden. Hieruit kan impliciet worden afgeleid, dat het Hof deze functie beschouwt als '*present-day purposes and functions of the United Nations as developed in practice*' en derhalve niet strijdig met het non-interventiebeginsel.

De ontwikkelingen betreffende de aanstellingsduur van thematische procedures kunnen worden gezien als een belangrijke graadmeter voor de acceptatie van deze toezichthoudende mechanismen door de Commissie voor de Rechten van de Mens. Beschreven wordt hoe de Commissie in eerste instantie een stevige (politieke) greep hield op thematische procedures door deze telkens voor de periode van één jaar aan te stellen. In het midden van de jaren '80 is hier o.a. als gevolg van *glasnost/perestroika* in de Sovjet Unie verandering in gekomen. In 1986 werd het mandaat van de Werkgroep Verdwijningen voor de eerste keer verlengd voor de periode van twee jaar; in 1988 werd ook het mandaat van de Speciale Rapporteur inzake Martelingen met eenzelfde periode verlengd en in datzelfde jaar bepaalde ECOSOC, dat een tweejarige mandaatsperiode zou moeten gelden voor alle thematische procedures. In 1990 besloot ECOSOC deze periode verder op te rekken tot drie jaar. Wat opvalt in de periode na 1990 is, dat de aanstellingsduur en de verlenging van de mandaten van thematische procedures aan het eind van de driejarige mandaatsperiode nauwelijks nog een punt van discussie vormt. Deze praktijk valt zeker uit te leggen als steun voor thematische procedures, echter tegelijkertijd dient te worden gerealiseerd, dat die praktijk een compromis behelst tussen krachten die een permanente aanstelling nastreven en krachten die de autonomie en invloed van thematische procedures onder controle willen houden.

Het vraagstuk van de bevoegdheid *ratione personae* behandelt de vraag tot welke actoren thematische procedures zich richten. In deze materie laten thematische procedures er geen misverstand over bestaan, dat zij zich richten tot Staten/regeringen als hoofdverantwoordelijken voor schendingen van de rechten van de mens op hun grondgebied, dan wel gepleegd onder hun rechtsmacht, zowel door actief handelen van overheidsinstanties/functionarissen als het nalaten op te treden tegen/het gedogen van vergrijpen gepleegd door private partijen. Thematische procedures zijn niet gezwichd voor het vaak door regeringen aangevoerde argument, dat niet zij, maar (private) partijen/opstandelingen/terroristen etc. verantwoordelijk zijn voor mensenrechtenschendingen of het argument dat deze schendingen het optreden (lees: schendingen) door de overheid zouden rechtvaardigen. Desalniettemin dienen enige nuanceringen te worden gemaakt (mede in het licht van de werkelijke situatie ter plekke). Zo hebben thematische procedures wel melding gemaakt van geweld door niet-gouvernementele actoren in hun verslagen van landenbezoeken in het kader van de beschrijving van de algemene politieke situatie in het land in kwestie (*FARC* in Colombia, *Sendero Luminoso* in Peru, Tamil Tijgers in Sri Lanka). Ten tweede heeft de Commissie voor de Rechten van de Mens sinds 1990 jaarlijks (controversiële) resoluties aangenomen, waarin de aandacht wordt gevraagd voor de gevolgen van geweld (in sommige resoluties zelfs gekwalificeerd als schendingen van de rechten van de mens) gepleegd door niet-gouvernementele actoren, in het bijzonder terroristische groepen en organisaties. Aan thematische procedures is gevraagd in hun rapporten ook aandacht aan deze materie te schenken. Echter, dit heeft in de praktijk niet geleid tot een wezenlijk andere opstelling van thematische procedures. De derde kantekening betreft de speciale procedure inzake verdwijningen in het voormalige Joegoslavië ingesteld door de

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Commissie (op voordracht van de Werkgroep Verdwijningen) in 1994 en werkzaam tot 1998. Onder deze procedure werden ook de *de facto* autoriteiten in het gebied aangesproken. Deze afwijking van de algemene regel werd gerechtvaardigd met een beroep op de strikt humanitaire aard van de procedure en mocht derhalve niet worden geïnterpreteerd als een erkenning door de VN. Deze pragmatische, op humanitaire overwegingen gebaseerde aanpak om in bepaalde gevallen ook andere dan *de jure* autoriteiten aan te spreken heeft zijn uitwerking op andere thematische procedures niet gemist. Zo is deze aanpak bediscussieerd in de jaarvergaderingen van de VN speciale rapporteurs en werkgroepen (o.a. in 1996) en, belangrijker nog, sinds 2003 heeft de Speciale Rapporteur inzake Martelingen de aanpak opgenomen in zijn werkmethoden.

Wat betreft de bevoegdheid *ratione materiae* wordt nader ingegaan op de omvang van de mandaten en het normatieve kader op basis waarvan de drie geselecteerde thematische procedures Staten/regeringen aanspreken. In het geval van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen wordt de ontwikkeling geschetst van de situatie in 1980 waarin de werkgroep nog niet de beschikking had over een normatief instrument op het gebied van verdwijningen en hoofdzakelijk werkte op basis van een eigen empirische definitie van het begrip 'verdwijningen' ondersteund door VN resoluties en in meer algemene zin door de bepalingen van de UVRM, naar de situatie vanaf 1992 waarin zij kon terugvallen op de door de Algemene Vergadering aangenomen '*Declaration on the Protection of All Persons from Enforced Disappearances.*' De Werkgroep ontleende steun aan de aanvaarding van de Verklaring om een aantal nieuwe initiatieven te ontplooien, waaronder in het bijzonder het claimen van de bevoegdheid om op te treden als 'toezichthouder' op de naleving van de Verklaring door Staten. Daarnaast ging de Werkgroep er toe over – als eerste stap in de richting van een '*more effective and institutionalised monitoring procedure*' – om zgn. '*country-specific observations*' in haar rapport op te nemen betreffende Staten met grote aantallen (onopgeloste) verdwijningen. Ten slotte leidde de aanvaarding van de Verklaring er toe, dat de Werkgroep een steeds 'juridischer' aanpak ging volgen in plaats van zich hoofdzakelijk te baseren op humanitaire overwegingen (meer hierover in het vierde hoofdstuk). Echter, in de praktijk zijn deze vernieuwingen amper uit de verf gekomen, doordat de Werkgroep, vanwege ernstige financiële en bureaucratische beperkingen (onderbezetting ondersteunend personeel, paginalimiet voor jaarrapporten) er niet in is geslaagd deze op adequate wijze (of zelfs in het geheel niet) in haar rapporten tot uitdrukking te laten komen.

De Speciale Rapporteur inzake Martelingen beschikte bij de instelling van zijn mandaat in 1985 over een duidelijk juridisch kader, neergelegd in o.a. de Verklaring (1975), respectievelijk het Internationaal Verdrag tegen Foltering (1985). Zo kon hij in zijn contacten met regeringen terugvallen op een internationaal aanvaarde (juridische) definitie van foltering. Een 'grijs gebied' tussen 'foltering' en 'andere vormen van wrede, onmenselijke of ontorende behandeling of bestraffing' bleef echter ongedefinieerd en de Speciale Rapporteur heeft voor zichzelf de bevoegdheid geclaimd om van dergelijke gevallen kennis te nemen. Hierdoor is hij er in geslaagd om o.a. de problematiek van lijfstraffen (*corporal punishment*) binnen de werkingsfeer van zijn

mandaat te brengen. Wel is het opvallend, dat – ondanks het bestaan van een duidelijk juridisch kader – ook de Speciale Rapporteur tot begin jaren '90 een zeer pragmatische aanpak – vergelijkbaar met de humanitaire aanpak van de Werkgroep Verdwijningen – prefereerde boven een meer (ver)oordeelende aanpak (op basis van duidelijk omschreven juridische verplichtingen). Na die tijd is de Speciale Rapporteur ook een meer (ver)oordeelende houding gaan aannemen, o.a. door zijn besluit, in 1993, om 'country-specific observations' aan zijn jaarrapport toe te voegen.

Een belangrijke katalysator voor deze ontwikkeling vormde overigens de instelling van de Werkgroep Willekeurige Detentie in 1991. Als enige thematische procedure heeft de Commissie deze Werkgroep gemachtigd een oordeel te vellen in individuele gevallen van willekeurige detentie en/of detentie opgelegd in strijd met de relevante bepalingen van de UVRM of andere relevante door de Staat in kwestie geaccepteerde internationaalrechtelijke instrumenten. Op basis van deze 'quasi-rechtelijke' bevoegdheid is de Werkgroep vervolgens de normen neergelegd in met name de UVRM, het IVBPR en de 'Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment' gaan toepassen. De Werkgroep kreeg echter heftige kritiek te verwerken toen het besloot de verdragsrechtelijke bepalingen van de IVBPR ook van toepassing te verklaren op Staten, die het verdrag niet hadden geratificeerd. Een ander twistpunt betrof het feit, dat de Werkgroep zich bevoegd achtte kennis te nemen van alle gevallen van detentie (zowel in het stadium van voorarrest vastzittende personen als veroordeelde personen). In de Commissie voor de Rechten van de Mens onstond hieromtrent een discussie over het onderscheid tussen de termen 'detentie' (*pre-trial detention*) en 'gevangenschap' (*post-trial imprisonment*), waarbij het argument werd opgevoerd, dat de Werkgroep niet bevoegd was kennis te nemen en een oordeel te vellen in laatst genoemde gevallen, omdat dit inbreuk zou maken op de soevereiniteit van de Staat en in het bijzonder de onafhankelijkheid van de rechterlijke macht. Een derde twistpunt betrof de benaming door de Werkgroep gegeven aan haar uitspraken in individuele gevallen; de Groep gebruikte de term 'besluit' (*decision*), wat in internationaalrechtelijk taalgebruik de indruk zou kunnen wekken, dat het hier om een voor Staten bindend besluit zou gaan. Deze kritiek op de werkwijze van de Werkgroep is niet zonder gevolgen gebleven. Zo droeg de Commissie de Werkgroep in 1996 op, verdragen alleen nog maar toe te passen op Staten die deze ook hebben geratificeerd. Een jaar later, in 1997, zag de Werkgroep zich gedwongen af te zien van het gebruik van de term 'besluit' (*decision*) en haar uitspraken voortaan te betitelen als 'opinies' (*opinion*). In datzelfde jaar herformuleerde de Commissie het mandaat van de Werkgroep en introduceerde zij de ruimere term 'willekeurige vrijheidsontneming' (*arbitrary deprivation of liberty*) ter vervanging van de term 'detentie' (*detention*) en gaf daarmee impliciet aan, dat 'gevangenschap' (*imprisonment*) ook onder het mandaat van de Werkgroep viel. Tegelijkertijd trachtte zij met een nieuwe (ambigue) formulering de indruk weg te nemen, dat de Werkgroep supranationale bevoegdheden bezat zonder haar overigens de bevoegdheid te ontnemen te oordelen over de rechtmatigheid van de detentie van (reeds door een nationale rechter) veroordeelde personen. Terugkijkend op deze ontwikkelingen wordt geconcludeerd, dat de Werkgroep – gezien haar

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unieke mandaat – zich te weinig rekenschap heeft gegeven van de nog steeds bestaande weerstand tegen verregaande internationale inmenging. Daarnaast had zij er beter aan gedaan bij de implementatie van haar mandaat algemeen erkende beginselen van internationaal recht, zoals het beginsel *pacta tertiis nec nocent nec prosunt*, te volgen in plaats van nieuwe wegen te bewandelen en daarmee het risico op de koop te nemen door de Commissie te worden teruggefloten.

Als laatste onderdeel van de bevoegdheid *ratione materiae* van thematische procedures wordt de handelswijze van de drie geselecteerde procedures in relatie tot (internationale) gewapende conflicten onder de loep genomen. Hieruit komt naar voren, dat de Speciale Rapporteur inzake Martelingen geen onderscheid maakt tussen verschillende juridische situaties; voor hem geldt de absolute aard van het folterverbod als uitgangspunt voor zijn werkzaamheden. De twee werkgroepen daarentegen hebben het standpunt ingenomen, dat in het licht van de bevoegdheid van het Internationale Comité van het Rode Kruis (ICRC) in situaties van (internationale) gewapende conflicten, dergelijk situaties niet binnen hun mandaat vallen. Niettemin werd de Werkgroep Verdwijningen begin jaren '90 geconfronteerd met de situatie in het voormalige Joegoslavië en kwam de vraag op of zij misschien toch niet een rol moest spelen bij het ophelderen van de verdwijningen in dat land. Daar de geloofwaardigheid van de VN op het spel stond, meende de Werkgroep dat afzijdigheid geen optie was, maar vanwege hoofdzakelijk praktische en juridische redenen (omvang van de problematiek, karakter van het conflict) adviseerde zij de Commissie een speciale procedure inzake verdwijningen in het voormalige Joegoslavië in te stellen (1994-1998). In 2002 stond de Werkgroep Willekeurige Detentie voor de vraag of zij zich moest mengen in de controverse met de Amerikaanse regering inzake de gevangenhouding van personen op Guantánamo Bay, Cuba. In het licht van de weigering van de Amerikaanse regering de Verdragen van Genève van toepassing te verklaren op deze gevangenen, ging de Werkgroep hier inderdaad toe over, ondanks het feit dat de personen in kwestie gevangen zijn genomen in het kader van een internationaal gewapend conflict. De Werkgroep stelt zich op het standpunt, dat gezien de Amerikaanse houding, de situatie op Guantánamo Bay moet worden getoetst op basis van de bepalingen van het IVBPR. De auteur van dit onderzoek stelt, dat de Werkgroep het conflict met de regering van de Verenigde Staten van Amerika te veel op de spits drijft en meent, dat de Werkgroep onnodig een voorschot neemt op de discussie of het internationale recht van de rechten van de mens ook van toepassing moet zijn in internationale gewapende conflicten.

#### **4 ONTWIKKELING VAN VN THEMATISCHE RAPPORTEURS, DEEL 2: WERKMETHODEN (HOOFDSTUK 4)**

Het vierde hoofdstuk behandelt de ontwikkeling van de werkmethoden van de drie geselecteerde thematische procedures. Het stelt hierbij voorop, dat de vage formuleringen van de oprichtingsresoluties van met name de Werkgroep Verdwijningen en de Speciale Rapporteur inzake Martelingen weliswaar ruimte lieten voor een flexibele interpretatie van hun mandaten, maar dat niet uit het oog moet worden verloren, dat

deze vaagheid ook een gevolg was van op dat moment bestaande (ideologische) verschillen van mening omtrent o.a. de positie van het individu in het internationale recht en, als afgeleide daarvan, de bevoegdheid van de VN kennis te nemen van en te reageren op individuele gevallen van schendingen van de rechten van de mens. In de praktijk dienden thematische procedures, zeker gedurende de jaren '80, dan ook met enige behoedzaamheid te opereren. Tegen deze achtergrond wordt laten zien hoe thematische procedures er in zijn geslaagd hun werkmethoden te formaliseren en te institutionaliseren in de structuren van de VN.

In de eerste plaats wordt ingegaan op zgn. 'transmissies', het overbrengen van informatie betreffende een binnen het mandaat van de thematische procedure in kwestie vallende schending van de rechten van de mens aan een regering. De Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen heeft in deze voor een belangrijke doorbraak gezorgd door ook 'individuele gevallen' (van verdwijningen) aan regeringen voor te leggen en deze niet slechts te beschouwen als onderdeel/bewijs voor het bestaan/voorkomen van grootschalige schendingen (waarop de regering in kwestie kon worden aangesproken). De Werkgroep heeft deze doorbraak weten te bewerkstelligen door haar te rechtvaardigen als een 'humanitaire aanpak' (*humanitarian approach*), m.a.w. een aanpak die een beroep deed op de menselijke kant van de zaak (het ophelderen van verdwijningen) en op geen enkele manier probeerde (ver)oordeelend te zijn jegens de aangesproken regering of deze anderszins als hoofdverantwoordelijke aan te wijzen. Met deze niet-juridische aanpak beoogde de Werkgroep ook regeringen te bewegen met haar samen te werken. Zeker in de beginfase van het bestaan van de Werkgroep kan worden gesteld, dat de humanitaire aanpak heeft bijgedragen aan het zekerstellen van de nodige politieke steun in de Commissie. Vanuit dit perspectief is het dan ook niet verwonderlijk, dat naarmate haar werkmethoden duidelijker vorm hadden gekregen en ook waren opgetekend ('gecodificeerd') in haar jaarrapporten (vanaf 1987), de Werkgroep steeds minder nadruk is gaan leggen op de humanitaire aanpak als rechtvaardiging voor haar werkzaamheden. Begin jaren '90 is de verwijzing in zijn geheel uit de beschrijving van de werkmethoden van de Werkgroep verdwenen. Terugkijkend wordt deze verschuiving in verband gebracht met de veranderende geopolitieke situatie vanaf de tweede helft van de jaren '80, de verlenging van de aanstellingsduur van thematische procedure van één naar twee en uiteindelijk naar drie jaar, de oprichting van de Werkgroep Willekeurige Detentie (bevoegd een oordeel te vellen in individuele gevallen) en de totstandkoming en aanvaarding van de '*Declaration on the Protection of All Persons from Enforced Disappearances*'. Overigens heeft de verschuiving geen verandering gebracht in de afhankelijkheid van de Werkgroep van de (vrijwillige) medewerking van Staten. Zo spreekt zij nog steeds geen oordeel/veroordeling uit in individuele gevallen. Daarnaast is de 'winst' grotendeels te niet gedaan door de effecten van andere problemen waar de Werkgroep in de praktijk mee heeft te kampen, in het bijzonder de budgettaire problemen en de hieruit voortvloeiende onmogelijkheid haar juridischere aanpak beter gestalte te geven in haar jaarrapporten.

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Als eerste thematische procedure heeft de Werkgroep Verdwijningen belangrijk werk verzet waar thematische procedures van latere datum van hebben kunnen profiteren. Zo volgde de Speciale Rapporteur inzake Martelingen in grote lijnen dezelfde werkwijze als de Werkgroep door geen ver(oordelend) standpunt in te nemen bij het overbrengen van informatie betreffende (individuele gevallen van) martelingen aan regeringen. Opvallend is wel, dat de Speciale Rapporteur het niet nodig achtte zijn werkzaamheden te verankeren in humanitaire overwegingen of anderszins te rechtvaardigen vanuit een humanitair perspectief (met uitzondering van de methode van 'urgent appeals' in spoedeisende gevallen). Een groter probleem voor de Speciale Rapporteur, zeker in de beginjaren van zijn bestaan, vormde het vraagstuk van de 'coëxistentie' van zijn mandaat en dat van het Comité tegen Foltering opgericht onder het Verdrag tegen Foltering. In 1988 (en later in 1993) deed de Speciale Rapporteur uitvoerig uit de doeken waarin zijn mandaat verschilde van dat van het Comité, waarbij hij met name de nadruk legde op effectiviteit en de preventieve en flexibele aard van zijn mandaat gericht op het verkrijgen van algemene informatie inzake (de voorkoming van) martelingen met als doel algemene aanbevelingen op te stellen ter verbetering van de situatie. Vanaf 1993 is ook de Speciale Rapporteur inzake Martelingen een iets scherpere toon gaan bezigen, althans heeft hij duidelijk gemaakt hoe naar zijn mening het proces van uitwisseling van informatie met regeringen diende te verlopen, waarbij hij overigens aangaf dat de beperkte financiële en personele middelen waarover hij kan beschikken, een ernstig beletsel vormde dit proces naar volle tevredenheid te implementeren. Ook in het geval van de Speciale Rapporteur inzake Martelingen kan de verandering in toon/houding worden toegeschreven aan de hierboven reeds vermelde factoren zoals het einde van de Koude Oorlog, consolidatie van de thematische mandaten en de instelling van de Werkgroep Willekeurige Detentie. Opmerkelijk genoeg lijkt de Special Rapporteur sinds 2001/2002 wederom een iets voorzichtiger houding aan te nemen. Zo benadrukt hij, dat zijn aanschrijven van regeringen betreffende individuele gevallen van marteling geen oordeel inhoudt aangaande de gegrondheid van de klacht en/of informatie en ook dat zijn interventies ten behoeve van bepaalde personen niet mogen worden uitgelegd als instemming met de gedragingen van deze personen. Deze ontwikkeling is niet los te zien van het gepolariseerde politieke klimaat (en de strijd tegen het terrorisme) sinds de aanslagen van 11 september 2001 in de Verenigde Staten van Amerika.

De Werkgroep Willekeurige Detentie vormt een geval apart. Haar mandaat was immers zo geformuleerd, dat het de mogelijkheid bood een oordeel te vellen in individuele gevallen van willekeurige detentie. Derhalve bestond er ook geen noodzaak voor de Werkgroep haar werkzaamheden te rechtvaardigen in humanitaire termen. De door de Werkgroep ingestelde procedure (*'investigation ... of an adversarial nature'*) lijkt nog het meest op die van een quasi-rechtelijk orgaan: zij brengt relevante informatie onder de aandacht van regeringen en vraagt hen hierop te reageren binnen een termijn van 90 dagen, waarna de tegenpartij (de 'klager') de kans wordt geboden hierop te reageren; de Werkgroep behoudt zich het recht voor in het geval een regering niet binnen 90 dagen reageert een oordeel te vellen op basis van de reeds

voorliggende informatie. Alhoewel de procedure in de loop der tijd niet wezenlijk is veranderd, is het interessant te constateren, dat zij met name in haar uiterlijke verschijningsvorm minder assertief is geworden, o.a. door het niet meer gebruiken van de term 'besluit' (*decision*); door niet meer te spreken van een contradictoire procedure (*adversarial procedure*), maar van een consultatieve procedure (*consultative procedure*); en ook door een flexibelere hantering van de 90 dagen termijn.

Hierna wordt in het vierde hoofdstuk nader uiteengezet welke verschillende actoren (*sources of information*) thematische procedures van informatie kunnen voorzien/kunnen worden geraadpleegd (*seek and receive information*) omtrent schendingen van de rechten van de mens en welke ontvankelijkheidscriteria thematische procedures hierbij (dienen te) hanteren. Getoond wordt hoe de formulering '*and other reliable sources*' neergelegd in de oprichtingsresolutie van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen, de Werkgroep in staat stelde kennis te nemen van informatie aangereikt door o.a. (familieleden van) slachtoffers van verdwijningen, mensenrechten ngos etc. Sommige regeringen (de Argentijnse junta in het bijzonder) waren niet van plan deze bevoegdheid zonder slag of stoot te erkennen en beargumenteerden, dat alle klachten (*communications*) afkomstig van individuen en/of ngos dienden te worden getoetst en behandeld overeenkomstig de regels en procedures van de vertrouwelijke 1503 procedure. De Werkgroep daarentegen hield vol, dat zij als gespecialiseerde procedure een complementaire en geen ondergeschikte rol innamen ten opzichte van andere reeds bestaande procedures van de Commissie voor de Rechten van de Mens en dat derhalve de ontvankelijkheidsvereisten en het confidentiële karakter van de 1503 procedure niet op haar werkzaamheden van toepassing waren. De Commissie nam vervolgens een resolutie aan (1981), waarin zij impliciet verwees naar de ontvankelijkheidsvereisten en procedures van de 1503 procedure en zij de Werkgroep opdroeg haar mandaat op discrete wijze uit te voeren, in het bijzonder door de verspreiding van informatie afkomstig van regeringen te beperken. Daar een directe verwijzing naar de 1503 procedure ontbrak moet deze resolutie vooral worden beschouwd als een waarschuwing aan het adres van de Werkgroep behoedzaam te opereren. De discussie omtrent de (niet-)toepasselijkheid van de ontvankelijkheidscriteria van de 1503 procedure hield echter aan tot midden jaren '80 en de Werkgroep zag zich gedwongen enige concessies te doen: zo zegde zij toe niet te handelen in het geval van politiek gemotiveerde informatie (*manifestly politically motivated information*) of informatie die enkel en alleen was gebaseerd op mediareportages (*based exclusively on mass media*); ook beloofde zij, voor zover mogelijk, rekening te houden met het vereiste van de uitputting van de nationale rechtsmiddelen; ten slotte, achtte zij het van belang in contact te blijven (via ngos) met de families van de slachtoffers. In de praktijk veranderde er overigens weinig, zodat familieleden van slachtoffers en ngos de Werkgroep konden blijven voorzien van informatie op basis waarvan deze zich tot de betreffende regeringen richtte. Maar ook nadat bovenstaande discussie enigszins was geluwd, bleven bepaalde Staten de geloofwaardigheid van de bronnen van de Werkgroep in twijfel trekken en probeerden zij (tevergeefs) nieuwe hindernissen op te werpen. Zo argumenteerde de Colombiaanse regering midden jaren '80,

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dat de Werkgroep de (verdragsrechtelijke) ontvankelijkheidsvereisten van het Eerste Facultatieve Protocol bij het IVBPR diende toe te passen. De Werkgroep reageerde op deze aanval door haar werkmethode opnieuw uiteen te zetten (1987), waarbij zij met name de relevantie van het vereiste van de uitputting van nationale rechtsmiddelen in belangrijke mate relativeerde ('*the steps taken to determine the fate ... or at least an indication that efforts to resort to domestic remedies were frustrated or have otherwise been inconclusive*'). Daarnaast maakte de Werkgroep duidelijk, dat zij bij onvoldoende informatie een 'klacht' niet automatisch naast zich neerlegt, maar de auteur ervan inlicht om hem zodoende in de gelegenheid te stellen aanvullende informatie te geven. In antwoord op regeringen, die de betrouwbaarheid van de informatie in twijfel trokken, gaf de Werkgroep aan, dat zij niet over de middelen beschikte de nauwkeurigheid en de geloofwaardigheid van alle informatie te toetsen, maar dat juist regeringen de mogelijkheid werd geboden één en ander op te helderen.

Hoe belangrijk het (voor)werk van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen is geweest voor de thematische aanpak als geheel, wordt duidelijk bij de analyse van de Speciale Rapporteur inzake Martelingen en de Werkgroep Willekeurige Detentie. Zo achtte de Speciale Rapporteur inzake Martelingen zich bevoegd kennis te nemen van informatie afkomstig van privé-personen, ondanks het feit dat zijn mandaat alleen verwees naar ngos. Deze bevoegdheid is in zijn algemeenheid nooit aangevochten. In concrete gevallen moest/moet de Speciale Rapporteur zich overigens wel vaak verweren tegen beschuldigingen dat zijn bronnen niet geloofwaardig zouden zijn of andere dubieuze politieke motieven zouden hebben. Dergelijke kritiek heeft hij gepoogd in te dammen door meer duidelijkheid te geven omtrent de factoren die hij meeweegt in zijn beoordeling van de betrouwbaarheid van de informatie (en de betrouwbaarheid van de bron is één van die factoren). Interessant ook is de expliciete afwijzing van het vereiste van de uitputting van nationale rechtsmiddelen door de Speciale Rapporteur, die hij motiveerde door te verwijzen naar de preventieve aard van zijn mandaat gericht op o.a. het voorkomen van onherstelbare schade. Dit standpunt is nooit aangevochten in de Commissie. In het geval van de Werkgroep Willekeurige Detentie is bovenstaand vereiste wel een punt van discussie geweest – mede in het licht van de Werkgroeps quasi-rechtelijke bevoegdheid –, maar de Werkgroep was van mening, dat indien dit het geval zou zijn, de Commissie dit uitdrukkelijk zou hebben moeten aangeven (wat niet het geval was). Ook hier heeft de Commissie de situatie geaccepteerd zoals zij was. Op basis van deze praktijk wordt het niet van toepassing zijn van het vereiste van de uitputting van nationale rechtsmiddelen op de mandaten van thematische procedures verklaard als een gevolg van de politieke oorsprong van de procedures, waarin effectiviteit en flexibiliteit voorop staan. Dit geldt zelfs voor het quasi-rechtelijke karakter van het mandaat van de Werkgroep Willekeurige Detentie.

Een andere problematiek die wordt behandeld betreft de gevallen van bedreiging, intimidatie en/of bestraffing van personen (familieleden, mensenrechtenactivisten) die met thematische en ander VN procedures samenwerken. Sinds 1990 besteedt de Commissie aandacht aan deze kwestie en de Werkgroep inzake Gedwongen en

Onvrijwillige Verdwijningen heeft gepoogd d.m.v. het instellen van een zgn. 'prompt intervention procedure', vergelijkbaar met de spoedeisende procedure (*urgent action procedure*) die elders in hoofdstuk 4 wordt behandeld, enige bescherming te bieden door gevallen van bedreiging, intimidatie en/of bestraffing met de betreffende regering op te nemen. De andere twee geselecteerde thematische procedures behandelen dergelijke gevallen onder de spoedeisende procedure (*urgent action procedure*).

Vervolgens worden in het vierde hoofdstuk verschillende aspecten van de bevoegdheid *ratione temporis* van thematische procedures behandeld. Zo wordt kort uiteengezet, dat een régimeverandering/statenopvolging niets verandert aan de bevoegdheid van thematische procedures (i.c. de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen) om de nieuwe regering of de regering van de nieuwe Staat op wiens grondgebied de schending (verdwijning) heeft plaatsgevonden, te benaderen omtrent schendingen gepleegd vóór de régimeverandering/statenopvolging. Daarnaast wordt ingegaan op de vraag of het tijdstip waarop een vermeende schending heeft plaatsgevonden een reden kan zijn om een klacht al dan niet in behandeling te nemen, dan wel een reden kan zijn de behandeling van een klacht stop te zetten. De kwestie betreft met name de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen gezien haar doelstelling verdwijningszaken net zolang te behandelen, totdat ze zijn opgehelderd. Na haar instelling in 1980 zag de Werkgroep er (logischerwijs) geen bezwaar in kennis te nemen van verdwijningszaken uit de jaren '70 en deze voor te leggen aan de desbetreffende regering. Echter, naarmate de tijd verstreek en zaken onopgelost bleven, stelden sommige regeringen zich op het standpunt, dat de Werkgroep deze zaken niet langer zou moeten behandelen. De Werkgroep heeft indeze steeds het principiële standpunt ingenomen, dat een tijdsgrens onverenigbaar was met het humanitaire karakter van haar mandaat. Dit principiële standpunt leidde er in de praktijk wel toe, dat de lijst met onopgeloste zaken (41.934 op een totaal van 50.135 zaken in 2005) alleen maar groter werd, daar het ophelderen van gevallen van verdwijningen in vele opzichten een race tegen de klok is (in vele van de opgehelderd verklaarde zaken zijn doodsverklaringen afgegeven, maar de lichamen nooit gevonden). Deze problematiek en de (tot nu toe weinig succesvolle) pogingen van de Werkgroep om de negatieve trend te keren worden uitgebreid belicht, mede aan de hand van beschikbaar cijfermateriaal.

Het probleem van een tijdsgrens of tijdsdruk doet zich minder sterk voor in het geval van de twee andere geselecteerde thematische mechanismen. Dit hangt nauw samen met het feit dat noch de Speciale Rapporteur inzake Martelingen, noch de Werkgroep Willekeurige Detentie een duidelijk omschreven einddoel van hun procedure hebben opgesteld, zodat er ook niet zoiets kan ontstaan als een lijst van onopgeloste gevallen. Dit alles neemt echter niet weg, dat de vraag naar de effectiviteit van de interventies van de Speciale Rapporteur en de Werkgroep, met name wat betreft de zgn. 'reply-rate' (antwoorden regeringen op de interventies?), wel degelijk kan worden gesteld. Aan de hand van beschikbaar cijfermateriaal en toelichtingen en commentaren hierop wordt dan ook getracht een beeld te schetsen van de effectiviteit van beide procedures. Wat betreft de Speciale Rapporteur inzake Martelingen komt hieruit o.a.

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naar voren, dat vele regeringen niet antwoorden op zijn interventies, en in die gevallen waarin zij dat wel doen, zijn hun antwoorden dikwijls selectief, onvolledig of van onvoldoende kwaliteit om de Rapporteur gerust te stellen. Bovendien is de Speciale Rapporteur, mede gezien zijn beperkte (financiële en personele) middelen, niet in staat aangeschreven regeringen op een meer systematische wijze te volgen, dan wel aan te manen (vollediger) te reageren. In de praktijk komt dit er vaak op neer, dat de vermelding van de interventies in (een bijlage van) het jaarrapport het eindstation van zijn bemoeienis betekent. De praktijk van de Werkgroep Willekeurige Detentie laat een iets ander beeld zien. Zo is de *reply-rate* – het aantal regeringen dat reageert op het aanschrijven van de Werkgroep – in de fase voorafgaand aan het oordeel (*opinion*) van de Werkgroep in een individuele zaak aanzienlijk hoger dan die van de Speciale Rapporteur inzake Martelingen (overigens kan de Werkgroep overeenkomstig de 90-dagen termijn ook zonder regeringsreactie een oordeel vellen). Deze positieve(re) resultaten houden echter geen stand vanaf het moment dat Werkgroep een voor een bepaalde regering negatief oordeel velt en deze vervolgens aan de desbetreffende regering voorlegt. In deze fase van de procedure vertoont de praktijk van de Werkgroep sterke gelijkenis met die van de Speciale Rapporteur. In dit verband wordt ook verwezen naar het ambitieuze voorstel van de Werkgroep om de Commissie voor de Rechten van de Mens actief te betrekken in het toezicht op de naleving/uitvoering van haar oordelen. Dit voorstel strandde in schoonheid (1996), waarna de Werkgroep zelf ook aangaf geen prioriteit meer te geven aan het toezicht op de naleving van haar oordelen, maar zich te concentreren op de naleving en uitvoering van aanbevelingen gedaan in de context van landenbezoeken (zie hieronder).

Na in algemene zin over 'transmissies' te hebben gesproken, wordt nader ingegaan op de zgn. '*urgent appeals*' als een bijzondere vorm van transmissies in spoedeisende gevallen, hoofdzakelijk gericht op het voorkomen van onherstelbare schade. De oorsprong en het strict humanitaire karakter van de procedure wordt kort beschreven (en afgezet tegen de bevoegdheid van verdragscomités om voorlopige voorzieningen te treffen). Tevens wordt beschreven hoe de procedure zich heeft ontwikkeld tot een algemeen geaccepteerde werkmethode van thematische procedures en hoe sommige thematische procedures, bijvoorbeeld de Speciale Rapporteur inzake Martelingen en de Werkgroep Willekeurige Detentie, maar niet de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen, er vanaf het midden van de jaren '90 toe zijn overgegaan zgn. '*joint urgent appeals*' uit te vaardigen in situaties met aanknopingspunten naar verschillende thematische mandaten. In dit verband wordt ook melding gemaakt van de instelling van de zgn. '*Quick Response Desk*' door het VN Secretariaat in Genève (*Office of the High Commissioner for Human Rights*), dat als taak heeft alle spoedeisende acties van thematische procedures af te handelen en te coördineren. Deze ontwikkeling onderstreept tevens de verdere institutionalisering van de werkmethode van thematische procedures. Ook wordt opnieuw stilgestaan bij het vraagstuk van de effectiviteit. Met name in het geval van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen is het belang/de effectiviteit van de '*urgent action procedure*' vaak aangeprezen door te wijzen op het hogere ophelderingspercentage

onder deze procedure dan onder de 'normale' procedure. De auteur van dit onderzoek betoogt echter, dat deze twee procedures niet zomaar met elkaar kunnen worden vergeleken – zonder overigens het belang van de 'urgent action procedure' te ontkennen – o.a. omdat het in de praktijk zo is, dat de meeste verdwijningszaken (90 procent) de Werkgroep pas na drie maanden bereiken en derhalve niet meer als 'urgent appeal' worden behandeld. Ook in het geval van de 'urgent action procedure' komt men niet om de conclusie heen, dat de effectiviteit nog te wensen over laat en dat van deze methode niet mag worden verwacht dat zij een structurele bijdrage kan leveren aan het oplossen/laat staan voorkomen van gevallen van verdwijningen. Dit geldt ook voor de Speciale Rapporteur inzake Martelingen en de Werkgroep Willekeurige Detentie.

Naast 'transmissies' vormen landenbezoeken de voornaamste methode van thematische procedures om regeringen aan te spreken met hun mensenrechtenbeleid. Landenbezoeken bieden thematische procedures een uitgelezen mogelijkheid de situatie ter plekke te aanschouwen, met de betrokken autoriteiten, ngos en anderen van gedachten te wisselen en op basis daarvan aanbevelingen op te stellen ter verbetering van de situatie. In het onderzoek worden verschillende aspecten van landenbezoeken belicht. In de eerste plaats wordt ingegaan op de oorsprong (o.a. historische precedentes zoals de VN missie naar Zuid Vietnam in 1963 en het bezoek van de *Ad Hoc* Werkgroep inzake de situatie van de rechten van de mens in Chili aan dat land in 1978) en de verdere ontwikkeling van de methode door thematische procedures, in het bijzonder door de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen. Het overzicht laat zien hoe de Werkgroep er in is geslaagd de methode in te bedden als een 'vanzelfsprekend onderdeel' van haar mandaat ('*natural component of every mandate*': gezamenlijke verklaring van thematische procedures tijdens de Wereldconferentie Mensenrechten 1993); hoe zij er in is geslaagd geleidelijk aan een betere balans te vinden tussen verschillende belangen, zoals de noodzaak de medewerking van de regering en lokale autoriteiten te verzekeren, (met name in de beginfase van het bestaan van de Werkgroep); andere landen, potentiële kandidaten voor een bezoek, niet te veel af te schrikken door een te assertieve aanpak; en, *last but not least*, de belangen van de slachtoffers en daarmee de Werkgroeps eigen geloofwaardigheid (en die van de VN als geheel) niet uit het oog te verliezen. Wat deze laatste ontwikkeling betreft, wordt geschetst hoe de strict humanitaire filosofie van de Werkgroep heeft plaatsgemaakt voor een assertievere, meer zichtbare en ook inhoudelijker aanpak, die tot uitdrukking komt in uitgebreidere verslagen van landenbezoeken, met duidelijkere conclusies en steeds gedetailleerdere aanbevelingen, vervat in een aparte bijlage bij het jaarrapport.

Een tweede aspect van de methode van landenbezoeken dat nader wordt belicht betreft het principe, dat zulke bezoeken alleen kunnen plaatsvinden met de uitdrukkelijke goedkeuring van de desbetreffende regering. Een belangrijk praktisch gevolg van dit principe is natuurlijk, dat het voor thematische procedures niet altijd mogelijk is de Staten te bezoeken, die zij naar objectieve maatstaven gemeten graag zouden willen bezoeken. Aan de andere kant wordt geconstateerd, dat er met name sinds het begin van de jaren '90 een beweging waarneembaar is, die poogt de (politieke) druk op

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regeringen te verhogen om toch vooral positief te reageren op een verzoek van thematische procedures om hun land te mogen bezoeken. In de Commissie voor de Rechten van de Mens komt deze beweging onder meer tot uitdrukking in de sinds 1991 aangenomen 'Human rights and thematic procedures' resoluties. Tegelijkertijd vermijdt de Commissie vooralsnog taalgebruik, dat de indruk zou kunnen wekken, dat Staten niet meer in vrijheid hun beslissing kunnen nemen. Een andere poging van meer recente datum (1999) om het verkrijgen van statelijke toestemming voor landenbezoeken te vergemakkelijken betreft het initiatief van de zgn. 'standing invitations'. Hierbij geeft een Staat bij voorbaat zijn toestemming voor een bezoek van een thematische procedure, die hier (op enig in de nabije toekomst gelegen moment) om verzoekt. Via deze weg hopen de initiatiefnemers (o.a. Noorwegen) geleidelijk aan een steeds groter aantal Staten te bewegen deze optie te aanvaarden en zodoende andere Staten, die (nog) geen *standing invitation* hebben afgegeven verder te isoleren. De toekomst zal moeten uitwijzen in hoeverre deze opzet zal slagen. In de huidige situatie (zoals bevestigd door o.a. de praktijk van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen) zal men echter moeten accepteren, dat sommige regeringen niet bereid zijn om (sommige) thematische procedures toestemming te verlenen hun land te bezoeken en dat deze regeringen gezien de 'politieke immuniteit', die ze om wat voor reden dan ook genieten ook niet op een andere manier kunnen worden overgehaald deze alsnog te geven.

Het derde aspect van landenbezoeken dat in het onderzoek kort wordt behandeld, betreft de kwestie van de zgn. modaliteiten van het bezoek. Nadat een regering een rapporteur of werkgroep zijn toestemming heeft gegeven voor een bezoek aan het land, volgt een fase van onderhandelingen waarin partijen nadere afspraken maken hoe, wanneer en onder welke voorwaarden het bezoek zal plaatsvinden. Aanvankelijk was dit een grijs gebied, dat zich grotendeels voltrok buiten het gezichtsveld van de buitenwereld, waar weinig regels voor bestonden en waarvan weinig (of niets) valt terug te vinden in de jaarrapporten (tenzij zich tijdens het bezoek incidenten hebben voorgedaan). Echter ook in dit opzicht is in de loop der tijd wel enige duidelijkheid geschapen, met name wat betreft de basisvoorwaarden van zo'n bezoek. Zo publiceerde het VN Secretariaat in 1997 algemene richtlijnen voor landenbezoeken van thematische procedures ('*Terms of reference for fact-finding missions by Special Rapporteurs/Representatives of the Commission on Human Rights*'). De voorwaarden die hierin zijn neergelegd omvatten o.a. totale bewegingsvrijheid in het gehele land, in het bijzonder wat betreft zgn. 'restricted areas'; vrijheid van onderzoek, in het bijzonder toegang tot gevangenis, detentiecentra etc. alsmede contactem et gevangenen, privé-personen, ngos etc; toegang tot documenten e.d.; de verzekering dat geen van de personen met wie thematische procedures in contact zijn geweest hiervoor achteraf zullen worden bedreigd of bestraft; en veiligheids garanties voor de rapporteur/leden van de werkgroep en ondersteunend VN personeel. Ook deze ontwikkeling past in de tendens de werkmethode van thematische procedures steeds verder te formaliseren en te institutionaliseren in de structuur van de VN.

Als vierde aspect van landenbezoeken wordt het verloop van het bezoek zelf en de fase na het bezoek (*follow-up process*) onder de loep genomen. Hier wordt ingegaan op de vraag wat er gebeurt als, tijdens het bezoek aan een land, de overeenkomst tussen een thematische procedure en de regering niet wordt nageleefd. Geconstateerd wordt, dat de mogelijkheden van thematische procedures in zo'n situatie beperkt zijn: zij kunnen een protest indienen, zij kunnen dreigen het incident te rapporteren aan de Commissie voor de Rechten van de Mens en zij zouden als *ultimum remedium* kunnen dreigen hun bezoek te beëindigen. Voorbeelden uit de praktijk van de drie geselecteerde thematische procedures illustreren deze problematiek, waarbij overigens wel moet worden opgemerkt, dat over het algemeen gesproken het aantal incidenten redelijk beperkt is gebleven en in geen enkel geval heeft geleid tot het afbreken/voortijdig beëindigen van een landenbezoek. Het vraagstuk van de 'follow-up' – het voortzetten van de 'dialogue' en het toezichthouden op de implementatie van de aanbevelingen in de periode na het bezoek – stelt thematische procedures voor grotere problemen. Dit proces heeft vooral vorm gekregen door middel van zgn. 'follow-up letters', waarin thematische procedures de regering van in het verleden bezochte landen aanschrijven en hen verzoeken schriftelijk te rapporteren over de geboekte vooruitgang in de implementatie van aanbevelingen. Vooralsnog moet echter worden geconstateerd, dat de effectiviteit van deze methode nog veel te wensen overlaat (mede in het licht van de beperkte personele en financiële middelen van thematische procedures), alle pogingen om het *follow-up* proces verder te stroomlijnen (bijv. door het opstellen van richtlijnen voor *follow-up* rapportage door NGOs en regeringen) ten spijt. Een tweede (op het eerste gezicht effectievere) methode om het *follow-up* proces vorm te geven, het afleggen van een tweede bezoek aan een bepaalde land (*follow-up visit*), blijkt in de praktijk nog moeilijker te realiseren. *Follow-up* bezoeken zijn eerder uitzondering dan regel, zoals met name de Werkgroep Willekeurige Detentie moest ervaren, toen in de tweede helft van de jaren '90 bleek, dat zij haar (te) ambitieuze doelstelling op dit gebied niet kon waarmaken.

Een vijfde aspect van landenbezoeken waaraan aandacht wordt besteed, betreft het initiatief van thematische procedures om zgn. 'joint-visits' uit te voeren, waarbij een delegatie van twee of meer thematische procedures tegelijkertijd een land bezoekt (sinds 1995). Dit initiatief, o.a. gepromoot door de Speciale Rapporteur inzake Martelingen, kan opnieuw worden beschouwd als bewijs voor de steeds hechter wordende samenwerking tussen de verschillende thematische procedures. Daar staat echter tegenover, dat regeringen vooralsnog niet erg warm lopen voor het idee om dergelijke zwaardere delegaties toe te laten op hun grondgebied.

Het laatste onderdeel van de werkmethoden van thematische procedures, dat in het vierde hoofdstuk wordt belicht, betreft de jaarrapporten. Met name wordt ingegaan op de vraag in hoeverre thematische procedures er in zijn geslaagd Staten/regeringen in verlegenheid te brengen door de zgn. 'nuisance value' of 'embarrassment value' van hun rapporten uit te buiten. Deze problematiek vormt de achilleshiel van de thematische aanpak, omdat die er toe heeft geleid, dat de mogelijkheden om een bepaalde Staat/regering in verlegenheid te brengen enigszins zijn verwaterd, doordat vele Staten

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in de jaarrapporten worden vermeld. De analyse laat zien hoe de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen heeft gepoogd de situatie in individuele landen te accentueren, o.a. door statistische gegevens, grafieken en (sinds 1994) de hierboven reeds vermelde 'country-specific observations' betreffende Staten met grote aantallen (onopgeloste) verdwijningen, in haar rapporten op te nemen. In het overzicht betreffende de ontwikkeling van de rapporten van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen worden drie perioden onderscheiden. De eerste periode, van 1980-1990, wordt beschreven als een periode van opbouw en verbetering van de presentatie van de jaarrapporten. De tweede periode, van 1990 tot 1994, wordt gekenmerkt als een periode van (geleidelijke) stagnatie, waarin verbeteringen minder goed uit de verf komen, met name omdat bepaalde (externe) factoren het steeds moeilijker maken voor de Werkgroep om zich naar behoren van haar taken te kwijten. Deze factoren, zoals de proliferatie van thematische mandaten bij gelijkblijvende personele en financiële ondersteuning resulterend in een enorme achterstand in het aantal nog te behandelen zaken (*backlog of cases*) en het groeiend aantal taken opgedragen aan thematische procedures door de Commissie, zouden hun uitwerking op de kwaliteit van de rapporten (en daarmee ook op hun potentiële *nuisance value*) niet missen. Vanaf 1994 tot heden, de derde periode, zijn deze ontwikkelingen meer en meer een bedreiging geworden voor de geloofwaardigheid en (daarmee ook de *raison d'être*) van de Werkgroep. Een verplicht maximum aantal pagina's voor jaarrapporten maakte het de Werkgroep praktisch onmogelijk om op een fatsoenlijke manier verslag te doen van haar werkzaamheden. Dit leidde niet alleen tot heftige kritiek op het functioneren van de Werkgroep door o.a. ngos, maar ook intern raakte de Werkgroep verdeeld. Zo besloot een tweetal van haar leden eind jaren '90, en de beginjaren van de deze eeuw een 'separate opinion' aan het rapport toe te voegen, waarmee zij uiting gaven aan hun onvrede met betrekking tot de (verplichte maximale) lengte van de rapporten en de gevolgen daarvan voor de kwaliteit van de rapporten. Sinds 2001/2002 heeft de Werkgroep weer langere rapporten gepubliceerd, wat er op zijn beurt weer toe leidde, dat een ander lid, middels een *separate opinion* in 2002 en 2003, zich uitsprak tegen overschrijding van de maximaal toegestane lengte. Feit blijft echter, dat met name de problematiek van de achterstallige zaken (meer dan 15000 in 2003) de kwaliteit en de representativiteit van de rapporten onverminderd (negatief) beïnvloedt, zoals de Werkgroep ook zelf erkende in 2003. In datzelfde jaar deed ze dan ook een beroep op de Commissie om iets te doen aan de aanhoudende personele en financiële beperkingen, die haar voortbestaan als 'effective instrument' van de Commissie ernstig in gevaar brengen.

De praktijk van de Speciale Rapporteur inzake Martelingen en de Werkgroep Willekeurige Detentie laat weliswaar een minder dramatisch beeld zien dan die van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen, maar ook hier hebben personele en financiële beperkingen alsmede de verplichte lengte van de jaarrapporten zo nu en dan hun sporen achtergelaten. De Speciale Rapporteur inzake Martelingen heeft dit probleem deels weten te ondervangen door belangrijke landeninformatie in steeds omvangrijkere bijlagen (420 pagina's in 2004!) van zijn hoofdrapport op te

nemen. Opvallend is hierbij, dat de bijlagen de namen van (vermeende) slachtoffers van martelingen bevatten (overigens bevat het rapport van de Werkgroep Willekeurige Detentie ook de namen van de klagers, dit als logisch voortvloeisel van de aard van haar mandaat); de Speciale Rapporteur heeft hiermee gepoogd (vermeende) slachtoffers uit de sfeer van anonimiteit te halen en het probleem van martelingen een gezicht te geven. Dit alles neemt echter niet weg, dat het uitbuiten van de *nuisance value* van de publicatie en presentatie van de rapporten van de Speciale Rapporteur, alsmede die van de Werkgroep Willekeurige Detentie, nog veel te wensen overlaat.

Tegen deze achtergrond wordt in hoofdstuk vier enige aandacht besteed aan het initiatief om de dialoog tussen speciale (thematische) procedures en de betrokken regeringen te institutionaliseren als vast onderdeel van de jaarlijkse sessie van de Commissie voor de Rechten van de Mens. Deze zgn. 'interactive dialogue' is voor het eerst ingevoerd in 2003 en heeft inderdaad al geleid tot een aantal pittige discussies tussen regeringen en bepaalde thematische procedures. Echter, gezien het feit, dat het hier om een zeer recent initiatief gaat, kan nog geen duidelijk beeld worden gegeven van de impact op langere termijn.

## 5 CONCLUSIES (HOOFDSTUK 5)

Het vijfde hoofdstuk bevat de conclusies van het onderzoek. Op basis van de beschrijving en analyse van de ontwikkeling van de mandaten van de drie geselecteerde thematische procedures in het derde en vierde hoofdstuk wordt een antwoord gegeven op de vraag of de praktijk van de thematische procedures in de periode 1980-2004 een dusdanig niveau heeft bereikt ('*appearance of a coherent practice*'), dat gesproken kan worden van een algemeen toepasselijke procedure. Deze vraag wordt in drie delen beantwoord: 'Totstandkoming en institutionalisering van de spelregels' ('*Establishing and Institutionalising the Rules of the Games*'); 'Effectiviteit van de thematische procedures' ('*Effectiveness of the Commission's Thematic Procedures*'); en 'De opkomst van een actor: de Verenigde Naties' ('*Emergence of an Actor: the United Nations*').

Onder de kop '*Establishing and Institutionalising the Rules of the Games*' wordt in de eerste plaats geconstateerd, dat het beginsel van non-interventie geen enkele rol van betekenis heeft gespeeld bij de instelling van thematische procedures en in het bijzonder niet ten tijde van de instelling van de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen als eerste thematische procedure. Concreet betekent dit, dat de Commissie voor de Rechten van de Mens de instelling van een speciale rapporteur of werkgroep met een wereldwijd mandaat niet (langer) heeft beschouwd als een schending van het beginsel van non-interventie zoals neergelegd in het VN Handvest. Positiever geformuleerd, betekent dit, dat de Commissie heeft ingestemd met een algemeen toepassingsbereik van de 1235 procedure.

Met bovenstaande conclusie als uitgangspunt worden vervolgens de prestaties van thematische procedures beoordeeld vanuit vier invalshoeken. Gesteld wordt in de eerste plaats, dat de karakterisering van thematische procedures als flexibel, pragma-

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tisch en met name informeel is achterhaald, in zoverre deze karakterisering betrekking heeft op het feit, dat thematische procedures niet zouden werken op basis van min of meer vast omschreven regels. Uit het onderzoek komt met name naar voren, dat zich in de loop der jaren juist een proces van 'formalisering' heeft voltrokken, d.w.z. een proces van geleidelijke definiëring en verduidelijking van de regels en condities op basis waarvan thematische procedures handelen (zich tot regeringen richten). Deze formalisering, zo wordt gesteld, zegt ook iets over de mate van acceptatie van het bestaan van de thematische procedures door Staten. Een tweede ontwikkeling die uit het onderzoek naar voren komt en die wordt omschreven als een proces van 'juridificering', doelt op het feit, dat thematische procedures in toenemende mate hun acties zijn gaan rechtvaardigen in juridische termen in plaats van strikt humanitaire overwegingen. Dit geldt in het bijzonder voor de Werkgroep inzake Gedwongen en Onvrijwillige Verdwijningen, die pas begin jaren '90 kon terugvallen op een specifiek op de problematiek van verdwijningen toegesneden juridisch instrument. Overigens neemt één en ander niet weg, dat thematische procedures bij het benaderen van regeringen in concrete gevallen met enige behoedzaamheid en *Fingerspitzengefühl* dienen te opereren; in dergelijke gevallen doen thematische procedures er goed aan de grenzen van hun mandaat en van het internationale recht in het algemeen te respecteren, bijvoorbeeld door niet de suggestie te wekken, dat zij over supranationale bevoegdheden beschikken en/of door verdragen alleen toe te passen op Staten die hierbij partij zijn. Een derde ontwikkeling die uit het onderzoek naar voren komt, gaat nog een stap verder dan juridificering. In sommige gevallen namelijk, heeft de praktijk van thematische procedures de door het internationale recht gebaande paden verlaten en haar eigen nieuwe regels geschapen. Dit geldt in het bijzonder voor het vereiste van de uitputting van de nationale rechtsmiddelen alvorens een klacht op internationaal niveau ontvankelijk kan worden verklaard. Thematische procedures hebben dit vereiste naar de achtergrond verwezen met name door zich te beroepen op de preventieve aard van hun mandaten. Een vierde waargenomen ontwikkeling kan worden omschreven als de 'institutionalisering' van de thematische aanpak en zijn werkmethoden in de VN bureaucratie ('*Office of the High Commissioner for Human Rights*'). Deze ontwikkeling houdt nauw verband met de snelle groei van de thematische aanpak, met name vanaf het begin van de jaren '90 en de uitdrukkelijke erkenning en bevestiging van het belang van de aanpak als '*system*' (als onderdeel van het door de VN uitgedragen streven de mensenrechten te bevorderen) in de Verklaring van Wenen (1993). In meer praktische zin is deze ontwikkeling o.a. tot uitdrukking gekomen in de jaarlijkse vergaderingen van de verschillende VN landen en thematische speciale rapporteurs/werkgroepen, waar gezamenlijke problemen (immuniteiten, terroristen en niet-statelijke actoren) en initiatieven ('*joint urgent appeals*' en '*joint visits*') worden besproken en afgestemd. Een ander praktisch voorbeeld vormt de instelling van een *Quick Response Desk* voor het afhandelen van alle spoedeisende acties van thematische procedures. Een vraag die in het licht van deze ontwikkelingen opkomt, is of de bevoegdheden en werkmethoden van thematische procedures tot de objectieve

kernbevoegdheden van de VN als geheel zijn gaan behoren en als zodanig haar niet meer kunnen worden ontzegd of ontnomen?

Voordat op deze vraag nader wordt ingegaan (zie hieronder), wordt eerst het vraagstuk van de effectiviteit van thematische procedures behandeld. Hier wordt geconstateerd, dat menig commentator voor deze vraag lijkt terug te deinsen. Verschillende redenen worden hiervoor aangevoerd, zoals problemen bij de interpretatie van de beschikbare statistieken van de verschillende thematische procedures, maar ook het probleem, dat men niet bij voorbaat de (toekomstige) relevantie van thematische procedures in twijfel wil trekken en daarom geneigd is te concluderen dat 'iets doen beter is dan niets doen.' Ondanks deze problemen, wordt gesteld, dat de vraag naar de effectiviteit van thematische procedures niet onbeantwoord kan blijven, met name niet omdat deze enig licht kan werpen op factoren – zoals beperkte financiële en personele middelen of een gebrek aan coördinatie, gebrek aan politieke wil, politisering etc. – waarvan gezegd wordt dat ze thematisch procedures vooralsnog beletten doeltreffender op te treden. Alvorens dit te doen worden een aantal kanttekeningen geplaatst bij de term effectiviteit, gedefinieerd als 'de mogelijkheid om een gewenst resultaat te bereiken.' Zo wordt o.a. uiteengezet, dat het vraagstuk van de effectiviteit niet moet worden verward met het claimen of verwerven van de bevoegdheden ('*competences*'), bijvoorbeeld de bevoegdheid kennis te nemen van grootschalige schendingen van de rechten van de mens. Ook wordt gewaarschuwd voor het maken van een vergelijkende analyse (vergeleken bij ... zijn thematische procedures effectiever dan ... etc.). Tegen de achtergrond van deze kanttekeningen wordt ten slotte geconcludeerd, dat de effectiviteit van de drie onderzochte thematische procedures zeer beperkt is en dat uit de analyse van hun verschillende werkmethoden niet blijkt, dat zij in staat zijn een structurele bijdrage te leveren aan het oplossen van het probleem van verdwijningen, martelingen of willekeurige detentie.

Op basis van deze conclusie wordt vervolgens gesteld, dat de hierboven genoemde factoren slechts zijn te beschouwen als symptomen van de werkelijke reden voor de geringe effectiviteit van thematische procedures. De hoofdreden waarom we tot op heden niet in staat zijn doeltreffender op te treden ter voorkoming en/of stopzetting van schendingen van de rechten van de mens moet naar de mening van de auteur van dit onderzoek worden gezocht in de huidige staat van de internationale betrekkingen en in het bijzonder de afwezigheid van een daadwerkelijke internationale gemeenschap en daarbij behorende gemeenschapszin. Vanuit dit perspectief acht hij het niet verstandig de werkelijkheid te verbergen achter juridische constructies, die onvoldoende steun vinden in de feiten, zoals bijvoorbeeld de claim dat op Staten de juridische verplichting rust om met thematische procedures samen te werken.

Onder het derde kopje, '*Emergence of an Actor: the United Nations*' wordt de vraag beantwoord of de bevoegdheden en werkmethoden van thematische procedures tot de objectieve kernbevoegdheden van de VN als geheel zijn gaan behoren en als zodanig haar niet meer kunnen worden ontzegd of ontnomen. In dit verband wordt ingegaan op het enorme morele en culturele prestige van de Verenigde Naties in het bijzonder sinds het einde van de Koude Oorlog. Gesteld wordt, dat het prestige van de

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VN steunt op twee ontwikkelingen: ten eerste, een zgn. 'juridische revolutie' (*juridical revolution*) o.a. gekenmerkt door de hierboven geschetste formaliserings-, juridificerings- en institutionaliserings tendensen; en ten tweede, wat wel is omschreven als de revolutie van de pleitbezorgers van het ethos van internationale samenwerking, ontwikkeling en hervorming (*advocacy revolution*), zoals de opkomst van een VN mensenrechtenbureaucratie in Genève, ngos, wetenschappers, ambtenaren etc. (omschreven als 'mensenrechtenelite'). Tegen de achtergrond van deze twee ontwikkelingen wordt vervolgens geconcludeerd, dat Staten formeel gezien over de bevoegdheid beschikken thematische procedures af te schaffen of hen bevoegdheden te ontnemen (en dit geldt natuurlijk ook voor de VN als geheel), maar dat dit in de praktijk zeer waarschijnlijk niet zal gebeuren, omdat het politieke gewicht van de rechten van de mens in de internationale betrekkingen hieraan in de weg staat.

Deze hoofdzakelijk op praktische gronden gebaseerde verklaring vormt de opmaat voor de afsluitende discussie van het onderzoek ('*Tentative Re-evaluation of the Nature of the International Legal Order*'), waarin een antwoord wordt geformuleerd op de vraag of de ontwikkelingen op het gebied van de rechten van de mens de aard van de internationale rechtsorde, traditioneel gebaseerd op de zgn. '*statist presumption of international law*' hebben veranderd. Uitgangspunt bij deze discussie vormen recente wetenschappelijke artikelen en oraties waarin wordt betoogd, dat de internationale rechtsorde meer en meer de vorm aan neemt van een 'constitutionele orde' met hiërarchische kenmerken. De auteur van dit onderzoek betoogt echter, dat het nog te vroeg is om dergelijke conclusies te trekken en waarschuwt voor de gevaren van te ver doorgevoerde theoretisering en systematisering. De VN symboliseert weliswaar het ideaal van de vrede, maar is daar in de praktijk nog mijlenver van verwijderd. Deze kloof tussen theorie en praktijk kan niet worden opgevuld door het signaleren van wenselijke tendensen, maar vraagt om een bescheidener aanpak met meer aandacht voor het politieke handwerk (en gezond realisme) en minder nadruk op verheven ergens in de toekomst te realiseren idealen.

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- G.A. Res. 1603 (XV) of 20 April 1961 (establishment of the Sub-Committee on the Situation in Angola; providing for a procedure for receiving and hearing information from individual petitioners)
- G.A. Res. 1654 (XVI) of 27 November 1961 (establishment of the Decolonisation Committee; providing for a procedure for receiving and hearing information from individual petitioners)
- G.A. Res. 1699 (XVI) of 19 December 1961 (establishment of the Special Committee on Territories under Portuguese Administration; providing for a procedure for receiving and hearing information from individual petitioners)
- G.A. Res. 1761 (XVII) of 6 November 1962 (establishment of the Special Committee on the Policies of *Apartheid* of the Government of South Africa; providing for a procedure for receiving and hearing information from individual petitioners)
- G.A. Res. 2144 A (XXI) of 26 October 1966, adopted by 94 votes to 1 [approving C.H.R. Res. 2 (XXII) and ECOSOC Res. 1164 (XLI); endorsing the proposition contained in the latter resolution; and bedding for the adoption of ECOSOC Res. 1235 (XLII) in the following year, see below ECOSOC]

###### ECOSOC

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- ECOSOC Res. 9 (II) of 21 June 1946 (establishment of the 'full' Commission on Human Rights, 18 Member States, effective in 1947)
- ECOSOC Res. 75 (V) of 5 August 1947 (endorsing the 'no power' doctrine, but providing an opening in respect of the possibility to consult the originals of communications)
- ECOSOC Res. 728 F (XXVIII) of 30 July 1959 [consolidating Resolution 75 (V)]
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- ECOSOC Res. 1235 (XLII) of 6 June 1967, adopted by 20 votes to 4, with 2 abstentions [establishing the foundation for the Commission's public procedure (the 1235 Procedure), including the development of special country and thematic procedures]
- ECOSOC Res. 1334 (XLIV) of 31 May 1968, adopted by 21 votes to 5, with 1 abstention (enlargement of membership of the Sub-Commission from 18 to 26 establishing an Afro-Asian majority)
- ECOSOC Res. 1503 (XLVIII) of 27 May 1970, adopted by 14 votes to 7, with 5 abstentions (establishing the confidential 1503 Procedure)
- ECOSOC Dec. 1988/129 of 27 May 1988, adopted without a vote (recommending that the mandates of all thematic procedures should be for a period of two years)
- ECOSOC Res. 1990/48 of 25 May 1990, adopted by 53 votes to 1 (enlargement of membership of the Commission from 43 to 53 Member States; the mandates of all thematic procedures shall be of three years duration)

Commission on Human Rights

- C.H.R. Res. (establishment of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities)
- C.H.R. Res. 2 (XXII) of 25 March 1966 (informing ECOSOC that 'in order completely to deal with the question of violations of human rights and fundamental freedoms in all countries, it would be necessary for the Commission to consider the means by which it might be fully informed of violations with a view to devising recommendations for measures to halt them;' and requesting the Sub-Commission to make recommendations on the subject)
- C.H.R. Res. 2 (XXIII) of 6 March 1967, adopted by roll-call vote of 25 to none, with 5 abstentions (establishment of the *Ad Hoc* Working Group of Experts on Human Rights in South Africa)
- C.H.R. Res. 8 (XXIII) of 16 March 1967 (bedding for a United Nations procedure to examine communications and for holding an annual public debate both in the Commission and Sub-Commission)
- C.H.R. Res. 9 (XXIII) of 16 March 1967 [requesting ECOSOC, *inter alia*, to 'confirm the inclusion in the terms of reference of this Commission of 'the power to recommend and adopt general and specific measures to deal with violations of human rights' without prejudice to the functions and powers already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection on human rights and fundamental freedoms.']

Bibliography

- C.H.R. Res. 6 (XXIV) of 27 February 1968, adopted by roll-call vote of 29 to none, Israel did not participate in the vote (Israel resolution following the Six Day War)
- C.H.R. Res. 17 (XXV), February/March 1969 (Procedure for Dealing with Communications concerning Violations of Human Rights)
- C.H.R. Res. 7 (XXVI), February/March 1970 (Questions concerning Procedures)
- C.H.R. Res. 8 (XXXI) of 27 February 1975, adopted without a vote (establishment of the *Ad Hoc* Working Group to Inquire into the Situation of Human Rights in Chile)
- C.H.R. Res. 11 (XXXV) of 6 March 1979 (establishment of a Special Rapporteur on the Situation of Human Rights in Chile and two Experts to Study the Fate of Missing and Disappeared Persons in Chile, replacing the *Ad Hoc* Working Group)
- C.H.R. Res. 15 (XXXV) of 13 March 1979 (establishment of a Special Rapporteur on the Situation of Human Rights in Equatorial Guinea)

Sub-Commission

- S.C. Res. 5 (XIX) (January 1967), adopted by 15 votes to none, with 2 abstentions [appended to this resolution, 'illustrative of a possible method', was a proposal containing the phrase 'to utilise information (...) where it has reasonable cause to believe that such information (...) reveals any consistent pattern of violations of human rights and fundamental freedoms']
- S.C. Res. 2 (XXI) of 14 October 1968, adopted by 9 votes to 2, with 5 abstentions (entitled: 'Procedure for dealing with communications relating to violations of human rights and fundamental freedoms')

2. Reports, Letters, Chairperson's Statements

- U.N. Doc. E/259 (1947) [Report of the First Session of the Commission on Human Rights (containing the statement 'that it has no power to take any action in regard to any complaints concerning human rights' as well as a proposal for a procedure for dealing with communications received from individual applicants)]
- U.N. Doc. A/CONF.157/23, Part I, para. 95 (Vienna Declaration and Programme of Action, Special Procedures of the Commission on Human Rights; 12 July 1993)
- U.N. Doc. E/CN.4/1999/104 (Report of the Bureau of the Fifty-fourth Session of the Commission on Human Rights Submitted pursuant to Commission Decision 1998/112: the *Selebi Report*; 23 December 1998)
- U.N. Doc. E/CN.4/1999/120 (Letter dated 26 February 1999 from the Delegations of Algeria, Bhutan, China, Cuba, Egypt, India, Iran, Malaysia, Myanmar, Nepal, Pakistan, Sri Lanka, Sudan and Viet Nam addressed to the Secretariat of the Commission on Human Rights; concerning agenda item 'Rationalisation of Work')
- Statement by the Chairperson on behalf of the Commission on Human Rights of 28 April 1999 (Fifty-fifth Session of the Commission on Human Rights; concerning the Review of Mechanisms, stating that, *inter alia*, 'any individual's tenure in a given mandate will be no more than six years')
- U.N. Doc. E/CN.4/2000/112 (Report of the intersessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights)
- C.H.R. Dec. 2000/109 of 26 April 2000, adopted without a vote [entitled 'Enhancing the effectiveness of the mechanisms of the Commission on Human Rights' in which the Commission decided, *inter alia*, '[t]o approve and implement comprehensively and in its entirety the report of the intersessional open-ended Working Group on Enhancing the

Bibliography

- Effectiveness of the Mechanisms of the Commission (E/CN.4/2000/112) adopted by consensus by the Working Group on 11 February 2000']
- U.N. Doc. A/57/387 (Strengthening of the United Nations: an agenda for further change, Report of the Secretary-General, 9 September 2002, especially paras. 55-57)
- U.N. Doc. A/59/2005 (In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General; 21 March 2005)

**B. Important United Nations Documents Adopted Previous to the Establishment of the Three Selected Thematic Procedures**

*1. Working Group on Enforced or Involuntary Disappearances*

Resolutions in Chronological Order

- G.A. Res. 33/173 of 20 December 1978, adopted without a vote [first General Assembly resolution on the topic of disappearances, expressing deep concern 'by reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organisations (...)' and requesting the Commission on Human Rights 'to consider the question of disappeared persons with a view to making recommendations.']
- ECOSOC Res. 1979/38 of 10 May 1979, adopted without a vote [first ECOSOC resolution on the topic of disappearances, requesting the Commission 'to consider *as a matter of priority* the question of disappeared persons, with a view to making appropriate recommendations' at its thirty-sixth (1980) session]
- S.C. Res. 5 B (XXXII) of 5 September 1979 (containing a number of recommendations to the Commission outlining the contours of a possible mechanism to deal with the topic of disappearances, including some form of emergency action)
- ECOSOC Res. 1979/36 of 10 May 1979, adopted without a vote (enlargement of membership of the Commission from 32 to 43 Member States, effective in 1980)

Statements

- Opening speech to the Thirty-sixth Session of the Commission on Human Rights by the Director of the United Nations Division of Human Rights, Theo van Boven, Geneva, 4 February 1980: 'Adequacy of some recent approaches and assumptions', reproduced in: Th. van Boven, *People Matter, views on international human rights policy* by Theo van Boven, Director of the United Nations Division of Human Rights 1977-1982, Amsterdam: Meulenhoff, 1982, pp. 65 and 66)

*2. Special Rapporteur on Torture*

Resolutions in Chronological Order

- C.H.R. Dec. (XXX) of 6 March 1974 (approval by the Commission of the Sub-Commission decision to have an agenda item entitled 'Question of the human rights of persons subjected to any form of detention or imprisonment')
- S.C. Res. 7 (XXVII) of 20 August 1974 (under the new agenda item, the Sub-Commission proposed to annually review information regarding the treatment of prisoners in general and

- political prisoners in particular, taking into account information from Governments, intergovernmental organisations and NGOs)
- G.A. Res. 3453 (XXX) of 9 December 1975, adopted without a vote [requesting the Commission to 'study the question of torture and all necessary steps for (...) ensuring the effective observance of' the Declaration on Torture]
- S.C. Res. 1982/10 of 7 September 1982, [in this resolution the Sub-Commission envisaged that, unless the Commission on Human Rights were to assume the task, the sessional working group, at its next session (1983), would give special attention to hearing and receiving information concerning the extent of and facts relating to torture or other cruel, inhuman or degrading treatment or punishment]
- C.H.R. Dec. 1983/104 of 4 March 1983, (the Commission requested the Sub-Commission to defer the implementation of its resolution 1982/10)
- G.A. Res. 39/46 of 10 December 1984, adopted without a vote (adoption of the Convention against Torture)

#### Statements

- U.N. Doc. E/CN.4/1984/SR.63, paras. 41 ff. (closing statement to the Fortieth Session of the Commission on Human Rights by Assistant Secretary-General Kurt Herndl in which he suggested the establishment of a Special Rapporteur on Torture)
- U.N. Doc. E/CN.4/1985/SR.1, paras. 6 ff. (opening speech to the Forty-first Session of the Commission on Human Rights by its outgoing Chairman, Mr Peter Kooijmans in which he brought up the topic of a fact-finding mechanism on torture)

#### 3. Working Group on Arbitrary Detention

##### Resolutions in Chronological Order

- G.A. Res. 3453 (XXX) of 9 December 1975, adopted without a vote (requesting the Commission to prepare 'a body of principles for the protection of all persons under any form of detention or imprisonment on the basis of the Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile and the draft principles on freedom from arbitrary arrest and detention contained therein')
- C.H.R. Res. 1985/16 of 11 March 1985, (requesting the Sub-Commission to analyse available information about the practice of administrative detention, *i.e.* detention in the absence of any kind of trial and to make recommendations on the subject)
- S.C. Dec. 1985/110 of 29 August 1985, (appointing a Special Rapporteur – Mr Louis Joinet – to prepare an explanatory paper suggesting how it might carry out its responsibilities under C.H.R. Res. 1985/16)
- G.A. Res. 43/173 of 9 December 1988, adopted without a vote (adoption of the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment')
- S.C. Res. 1990/22 of 30 August 1990 (Question of human rights of persons subjected to any form of detention or imprisonment: report of Mr Louis Joinet; inviting the Commission to consider the different proposals made by the Special Rapporteur and to act upon one of them)

Bibliography

Reports

- U.N. Doc. E/CN.4/Sub.2/1987/16 (Explanatory Paper on the Practice of Administrative Detention Without Charge or Trial by the Special Rapporteur, Mr Louis Joinet)  
U.N. Doc. E/CN.4/Sub.2/1988/12 (Analysis of Questions Dealt with in the Explanatory Paper on the Practice of Administrative Detention Without Charge or Trial by the Special Rapporteur, Mr Louis Joinet)  
U.N. Doc. E/CN.4/Sub.2/1989/27 (Report on the Practice of Administrative Detention by the Special Rapporteur, Mr Louis Joinet)  
U.N. Doc. E/CN.4/Sub.2/1990/29 and Add.1 [(final) Report on the Practice of Administrative Detention by the Special Rapporteur, Mr Louis Joinet]

**C. Three Selected Thematic Procedures**

*1. Working Group on Enforced or Involuntary Disappearances*

Resolutions

- C.H.R. Res. 20 (XXXVI) of 29 February 1980, adopted without a vote (establishment for the period of one year)  
C.H.R. Res. 10 (XXXVII) of 26 February 1981, adopted without a vote (one-year extension of the mandate)  
C.H.R. Res. 1982/24 of 10 March 1982, adopted without a vote (one-year extension of the mandate)  
C.H.R. Res. 1983/20 of 22 February 1983, adopted without a vote (one-year extension of the mandate)  
C.H.R. Res. 1984/23 of 6 March 1984, adopted without a vote (one-year extension of the mandate)  
C.H.R. Res. 1985/20 of 11 March 1985, adopted without a vote (one-year extension of the mandate)  
C.H.R. Res. 1986/55 of 13 March 1986, adopted without a vote (two-year extension of the mandate 'on an experimental basis')  
C.H.R. Res. 1987/27 of 10 March 1987, adopted without a vote  
C.H.R. Res. 1988/34 of 8 March 1988, adopted without a vote (two-year extension of the mandate)  
C.H.R. Res. 1989/27 of 6 March 1989, adopted without a vote  
C.H.R. Res. 1990/30 of 2 March 1990, adopted without a vote (two-year extension of the mandate)  
C.H.R. Res. 1991/41 of 5 March 1991, adopted without a vote  
C.H.R. Res. 1992/30 of 28 February 1992, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1993/35 of 5 March 1993, adopted without a vote  
C.H.R. Res. 1994/39 of 4 March 1994, adopted without a vote  
C.H.R. Res. 1995/38 of 3 March 1995, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1996/30 of 19 April 1996, adopted without a vote  
C.H.R. Res. 1997/26 of 11 April 1997, adopted without a vote

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- C.H.R. Res. 1998/40 of 17 April 1998, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1999/38 of 26 April 1999, adopted without a vote  
C.H.R. Res. 2000/37 of 20 April 2000, adopted without a vote  
C.H.R. Res. 2001/46 of 23 April 2001, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 2002/41 of 23 April 2002, adopted without a vote  
C.H.R. Res. 2003/38 of 23 April 2003, adopted without a vote  
C.H.R. Res. 2004/40 of 19 April 2004, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 2005/27 of 19 April 2005, adopted without a vote

Annual reports

- U.N. Doc. E/CN.4/1435 (Thirty-seventh Session of the Commission on Human Rights 1981)  
U.N. Doc. E/CN.4/1492 (Thirty-eighth Session of the Commission on Human Rights 1982)  
U.N. Doc. E/CN.4/1983/14 (Thirty-ninth Session of the Commission on Human Rights 1983)  
U.N. Doc. E/CN.4/1984/21 (Fortieth Session of the Commission on Human Rights 1984)  
U.N. Doc. E/CN.4/1985/15 (Forty-first Session of the Commission on Human Rights 1985)  
U.N. Doc. E/CN.4/1986/18 (Forty-second Session of the Commission on Human Rights 1986)  
U.N. Doc. E/CN.4/1987/15 and Corr.1 (Forty-third Session of the Commission on Human Rights 1987)  
U.N. Doc. E/CN.4/1988/19 (Forty-fourth Session of the Commission on Human Rights 1988; first comprehensive description of the Working Group's working methods, paras. 16-30)  
U.N. Doc. E/CN.4/1989/18 (Forty-fifth Session of the Commission on Human Rights 1989)  
U.N. Doc. E/CN.4/1990/13 (Forty-sixth Session of the Commission on Human Rights 1990)  
U.N. Doc. E/CN.4/1991/20 (Forty-seventh Session of the Commission on Human Rights 1991)  
U.N. Doc. E/CN.4/1992/18 (Forty-eighth Session of the Commission on Human Rights 1992)  
U.N. Doc. E/CN.4/1993/25 (Forty-ninth Session of the Commission on Human Rights 1993)  
U.N. Doc. E/CN.4/1994/26 (Fiftieth Session of the Commission on Human Rights 1994)  
U.N. Doc. E/CN.4/1995/36 (Fifty-first Session of the Commission on Human Rights 1995)  
U.N. Doc. E/CN.4/1996/38 (Fifty-second Session of the Commission on Human Rights 1996; revised and consolidated version of the Working Group's working methods, Annex I)  
U.N. Doc. E/CN.4/1997/34 (Fifty-third Session of the Commission on Human Rights 1997)  
U.N. Doc. E/CN.4/1998/43 (Fifty-fourth Session of the Commission on Human Rights 1998)  
U.N. Doc. E/CN.4/1999/62 (Fifty-fifth Session of the Commission on Human Rights 1999)  
U.N. Doc. E/CN.4/2000/64 and Corr.1 and 2 (Fifty-sixth Session of the Commission on Human Rights 2000)  
U.N. Doc. E/CN.4/2001/68 (Fifty-seventh Session of the Commission on Human Rights 2001)  
U.N. Doc. E/CN.4/2002/79 (Fifty-eighth Session of the Commission on Human Rights 2002; revised and consolidated version of the Working Group's working methods, Annex I)  
U.N. Doc. E/CN.4/2003/70 and Corr.1 and 2 (Fifty-ninth Session of the Commission on Human Rights 2003)  
U.N. Doc. E/CN.4/2004/58 (Sixtieth Session of the Commission on Human Rights 2004)  
U.N. Doc. E/CN.4/2005/65 (Sixty-first Session of the Commission on Human Rights 2005)

Bibliography

Country visits and follow-up visits

- U.N. Doc. E/CN.4/1492/Add.1, paras. 2-9 (Mexico, January 1982)
- U.N. Doc. E/CN.4/1985/15, paras. 51-67 (Bolivia, November 1984)
- U.N. Doc. E/CN.4/1986/18/Add.1 (Peru, June 1985)
- U.N. Doc. E/CN.4/1987/15/Add.1 (Peru, October 1986, follow-up visit)
- U.N. Doc. E/CN.4/1988/19/Add.1 (Guatemala, October 1987)
- U.N. Doc. E/CN.4/1989/18/Add.1 (Colombia, November 1988)
- U.N. Doc. E/CN.4/1991/20/Add.1 (Philippines, August/September 1990)
- U.N. Doc. E/CN.4/1992/18/Add.1 (Sri Lanka, October 1991)
- U.N. Doc. E/CN.4/1993/25/Add.1 (Sri Lanka, October 1992, follow-up visit)
- U.N. Doc. E/CN.4/1994/26/Add.1 (Former Yugoslavia, August 1993; joint mission with the Special Rapporteur on the situation of human rights in the former Yugoslavia)
- U.N. Doc. E/CN.4/1999/62/Add.1 (Yemen, August 1998)
- U.N. Doc. E/CN.4/1999/62/Add.2 (Turkey, September 1998)
- U.N. Doc. E/CN.4/2000/64/Add.1 (Sri Lanka, October 1999, follow-up visit)
- U.N. Doc. E/CN.4/2005/65/Add.1 (Nepal, December 2004)

Special process on missing persons in the territory of the former Yugoslavia

- U.N. Doc. E/CN.4/1995/37 (Republic of Croatia and the Republic of Bosnia and Herzegovina)
- U.N. Doc. E/CN.4/1996/36 (Republic of Croatia and the Republic of Bosnia and Herzegovina)
- U.N. Doc. E/CN.4/1997/55 (Republic of Croatia and the Republic of Bosnia and Herzegovina)

2. *Special Rapporteur on Torture*

Resolutions

- C.H.R. Res. 1985/33 of 13 March 1985, adopted by a roll-call vote of 30 to none, with 12 abstentions (establishment for the period of one year; the resolution was later approved without a vote by ECOSOC by its Decision 1985/144 of 30 May 1985)
- C.H.R. Res. 1986/50 of 13 March 1986, adopted without a vote (one-year extension of the mandate)
- C.H.R. Res. 1987/29 of 10 March 1987, adopted without a vote (one-year extension of the mandate)
- C.H.R. Res. 1988/32 of 8 March 1988, adopted without a vote (two-year extension of the mandate)
- C.H.R. Res. 1989/33 of 6 March 1989, adopted without a vote
- C.H.R. Res. 1990/34 of 2 March 1990, adopted without a vote (two-year extension of the mandate)
- C.H.R. Res. 1991/38 of 5 March 1991, adopted without a vote
- C.H.R. Res. 1992/32 of 28 February 1992, adopted without a vote (three-year extension of the mandate)
- C.H.R. Res. 1993/40 of 5 March 1993, adopted without a vote
- C.H.R. Res. 1994/37 of 4 March 1994, adopted without a vote
- C.H.R. Res. 1995/37 B of 3 March 1995, adopted without a vote (three-year extension of the mandate)
- C.H.R. Res. 1996/33 B of 19 April 1996, adopted without a vote

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- C.H.R. Res. 1997/38 of 11 April 1997, adopted without a vote  
C.H.R. Res. 1998/38 of 17 April 1998, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1999/32 of 26 April 1999, adopted without a vote  
C.H.R. Res. 2000/43 of 20 April 2000, adopted without a vote  
C.H.R. Res. 2001/62 of 25 April 2001, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 2002/38 of 22 April 2002, adopted without a vote  
C.H.R. Res. 2003/32 of 23 April 2003, adopted without a vote  
C.H.R. Res. 2004/41 of 19 April 2004, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 2005/39 of 19 April 2005, adopted without a vote

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- U.N. Doc. E/CN.4/1986/15 (Forty-second Session of the Commission on Human Rights 1986; first report Peter Kooijmans)  
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U.N. Doc. E/CN.4/1988/17 (Forty-fourth Session of the Commission on Human Rights 1988)  
U.N. Doc. E/CN.4/1989/15 (Forty-fifth Session of the Commission on Human Rights 1989)  
U.N. Doc. E/CN.4/1990/17 (Forty-sixth Session of the Commission on Human Rights 1990)  
U.N. Doc. E/CN.4/1991/17 (Forty-seventh Session of the Commission on Human Rights 1991)  
U.N. Doc. E/CN.4/1992/17 (Forty-eighth Session of the Commission on Human Rights 1992)  
U.N. Doc. E/CN.4/1993/26 (Forty-ninth Session of the Commission on Human Rights 1993)  
U.N. Doc. E/CN.4/1994/31 (Fiftieth Session of the Commission on Human Rights 1994; first report new mandate holder, Sir Nigel Rodley; first compilation of working methods, paras. 5-13)  
U.N. Doc. E/CN.4/1995/34 (Fifty-first Session of the Commission on Human Rights 1995)  
U.N. Doc. E/CN.4/1996/35 (Fifty-second Session of the Commission on Human Rights 1996)  
U.N. Doc. E/CN.4/1997/7 (Fifty-third Session of the Commission on Human Rights 1997; consolidated version of the Special Rapporteur's working methods, Annex)  
U.N. Doc. E/CN.4/1998/38 (Fifty-fourth Session of the Commission on Human Rights 1998)  
U.N. Doc. E/CN.4/1999/61 (Fifty-fifth Session of the Commission on Human Rights 1999)  
U.N. Doc. E/CN.4/2000/9 (Fifty-sixth Session of the Commission on Human Rights 2000)  
U.N. Doc. E/CN.4/2001/66 (Fifty-seventh Session of the Commission on Human Rights 2001)  
U.N. Doc. E/CN.4/2002/76 (Fifty-eighth Session of the Commission on Human Rights 2002)  
U.N. Doc. E/CN.4/2002/137 (Fifty-eighth Session of the Commission on Human Rights 2002; first report new mandate holder, Theo van Boven)  
U.N. Doc. E/CN.4/2003/68 (Fifty-ninth Session of the Commission on Human Rights 2003; consolidated version of the Special Rapporteur's working methods, paras. 2-21)  
U.N. Doc. E/CN.4/2004/56 (Sixtieth Session of the Commission on Human Rights 2004)  
U.N. Doc. E/CN.4/2005/62 (Sixty-first Session of the Commission on Human Rights 2005)

Interim reports to the General Assembly

- U.N. Doc. A/54/426 (Fifty-fourth Session of the General Assembly 1999; first *written* interim report to the General Assembly submitted pursuant to G.A. Res. 53/139 of 8 December 1998)

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- U.N. Doc. A/55/290 (Fifty-fifth Session of the General Assembly 2000)
- U.N. Doc. A/56/156 (Fifty-sixth Session of the General Assembly 2001)
- U.N. Doc. A/57/173 (Fifty-seventh Session of the General Assembly 2002)
- U.N. Doc. A/58/120 (Fifty-eighth Session of the General Assembly 2003)
- U.N. Doc. A/59/324 (Fifty-ninth Session of the General Assembly 2004)
- U.N. Doc. A/60/316 (Sixtieth Session of the General Assembly 2005)

Country visits and follow-up visits

- U.N. Doc. E/CN.4/1988/17/Add.1 (Colombia, December 1987)
- U.N. Doc. E/CN.4/1988/17/Add.1 (Argentina, December 1987)
- U.N. Doc. E/CN.4/1988/17/Add.1 (Uruguay, December 1987)
- U.N. Doc. E/CN.4/1989/15, paras. 169-187 (Peru, 1988)
- U.N. Doc. E/CN.4/1989/15, paras. 209-233 (Turkey, August/September 1988)
- U.N. Doc. E/CN.4/1989/15, paras. 188-208 (Republic of Korea, September 1988)
- U.N. Doc. E/CN.4/1990/17, paras. 173-216 (Guatemala, September 1989)
- U.N. Doc. E/CN.4/1990/17, paras. 217-254 (Honduras, September 1989)
- U.N. Doc. E/CN.4/1990/17/Add.1 (Zaire, January 1990)
- U.N. Doc. E/CN.4/1991/17, paras. 203-274 (Philippines, October 1990)
- U.N. Doc. E/CN.4/1992/17/Add.1 (Indonesia/East Timor, November 1991)
- U.N. Doc. E/CN.4/1993/26, paras. 551-558 (former Yugoslavia, October 1992; joint mission with the Special Rapporteur on the situation of human rights in the former Yugoslavia)
- U.N. Doc. E/CN.4/1995/7 (Rwanda, June 1994; joint mission with the Special Rapporteur on the situation of human rights in Rwanda and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions)
- U.N. Doc. E/CN.4/1995/34/Add.1 (Russian Federation, July 1994)
- U.N. Doc. E/CN.4/1995/111 (Colombia, October 1994; joint mission with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions)
- U.N. Doc. E/CN.4/1996/35/Add.2 (Chile, August 1995)
- U.N. Doc. E/CN.4/1997/7/Add.2 (Pakistan, February/March 1996)
- U.N. Doc. E/CN.4/1997/7/Add.3 (Venezuela, June 1996)
- U.N. Doc. E/CN.4/1998/38/Add.2 (Mexico, August 1997)
- U.N. Doc. E/CN.4/1999/61/Add.1 (Turkey, November 1998)
- U.N. Doc. A/54/660 (East-Timor, November 1999; joint mission with the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on Violence Against Women, its Causes and Consequences)
- U.N. Doc. E/CN.4/2000/9/Add.2 (Cameroon, May 1999)
- U.N. Doc. E/CN.4/2000/9/Add.3 (Romania, April 1999)
- U.N. Doc. E/CN.4/2000/9/Add.4 (Kenya, September 1999)
- U.N. Doc. E/CN.4/2001/66/Add.1 (Azerbaijan, May 2000)
- U.N. Doc. E/CN.4/2001/66/Add.2 (Brazil, August/September 2000)
- U.N. Doc. E/CN.4/2003/68/Add.2 (Uzbekistan, November/December 2002)
- U.N. Doc. E/CN.4/2004/56/Add.2 (Spain, October 2003)
- U.N. Doc. E/CN.4/2005/62/Add.3 (Georgia, February 2005)

### 3. Working Group on Arbitrary Detention

#### Resolutions

- C.H.R. Res. 1991/42 of 5 March 1991, adopted without a vote (establishment for a period of three years)  
C.H.R. Res. 1992/28 of 28 February 1992, adopted without a vote  
C.H.R. Res. 1993/36 of 5 March 1993, adopted without a vote  
C.H.R. Res. 1994/32 of 4 March 1994, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1995/59 of 7 March 1995, adopted without a vote  
C.H.R. Res. 1996/28 of 19 April 1996, adopted without a vote  
C.H.R. Res. 1997/50 of 15 April 1997, adopted without a vote (three-year extension of the mandate)  
C.H.R. Res. 1998/41 of 17 April 1998, adopted without a vote  
C.H.R. Res. 1999/37 of 26 April 1999, adopted without a vote  
C.H.R. Res. 2000/36 of 20 April 2000, adopted without a vote (three-year extension of the mandate)  
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U.N. Doc. E/CN.4/2005/6/Add.4 (People's Republic of China, September 2004; follow-up visit)

**C. Other Resolutions Relevant to Special (Thematic) Procedures**

*1. Annual Meetings of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (Annual Meetings of Special Procedures Mandate Holders)*

U.N. Doc. A/CONF.157/9 (Joint Declaration of the Independent Experts Responsible for the Special Procedures for the Protection of Human Rights, Vienna World Conference on Human Rights, June 1993)  
U.N. Doc. E/CN.4/1995/5 (Report of the First Annual Meeting 1994)  
U.N. Doc. E/CN.4/1996/50 (Report of the Second Annual Meeting 1995)  
U.N. Doc. E/CN.4/1997/3 (Report of the Third Annual Meeting 1996)  
U.N. Doc. E/CN.4/1998/45 (Report of the Fourth Annual Meeting 1997)  
U.N. Doc. E/CN.4/1999/3 and Corr.1 (Report of the Fifth Annual Meeting 1998)  
U.N. Doc. E/CN.4/2000/5 (Report of the Sixth Annual Meeting 1999)  
U.N. Doc. E/CN.4/2001/6 (Report of the Seventh Annual Meeting 2000)  
U.N. Doc. E/CN.4/2002/14 (Report of the Eighth Annual Meeting 2001)  
U.N. Doc. E/CN.4/2003/6 (Report of the Ninth Annual Meeting 2002)  
U.N. Doc. E/CN.4/2004/4 (Report of the Tenth Annual Meeting 2003)  
U.N. Doc. E/CN.4/2005/5 (Report of the Eleventh Annual Meeting 2004)

2. *Human Rights and Thematic Procedures*

- C.H.R. Res. 1991/31 of 5 March 1991, adopted without a vote  
C.H.R. Res. 1992/41 of 28 February 1992, adopted without a vote  
C.H.R. Res. 1993/47 of 9 March 1993, adopted without a vote  
C.H.R. Res. 1994/53 of 4 March 1994, adopted without a vote  
C.H.R. Res. 1995/87 of 8 March 1995, adopted without a vote  
C.H.R. Res. 1996/46 of 19 April 1996, adopted without a vote  
C.H.R. Res. 1997/37 of 11 April 1997, adopted without a vote  
C.H.R. Res. 1998/74 of 22 March 1998, adopted without a vote  
C.H.R. Dec. 1999/110 of 28 April 1999, decided without a vote ('mindful of the ongoing discussions on the issue of the review of the mechanisms of the Commission to consider this question again at its Fifty-sixth Session')
- C.H.R. Res. 2000/86 of 27 April 2000, adopted without a vote  
C.H.R. Dec. 2001/116 of 25 April 2001, decided without a vote (postponement of draft resolution E/CN.4/2001/L.91 and the proposed amendments thereto E/CN.4/2001/L.104 until its Fifty-eighth Session)
- C.H.R. Res. 2002/84 of 26 April 2002, adopted without a vote  
U.N. Doc. E/CN.4/2003/126 (Report of the Secretary-General on Human Rights and Thematic Procedures, pursuant to C.H.R. Res. 2002/84)  
U.N. Doc. E/CN.4/2004/97 (Report of the Secretary-General on Human Rights and Thematic Procedures, C.H.R. Res. 2002/84)  
C.H.R. Res. 2004/76 of 21 April 2004 (entitled 'Human Rights and Special Procedures'), adopted by a recorded vote of 35 votes to none, with 18 abstentions

3. *Cooperation with Representatives of United Nations Human Rights Bodies*

- C.H.R. Res. 1990/76 of 7 March 1990, adopted without a vote  
C.H.R. Res. 1991/70 of 6 March 1991, adopted without a vote  
C.H.R. Res. 1992/59 of 3 March 1992, adopted without a vote  
C.H.R. Res. 1993/64 of 10 March 1993, adopted without a vote  
C.H.R. Res. 1994/70 of 9 March 1994, adopted without a vote  
C.H.R. Res. 1995/75 of 8 March 1995, adopted without a vote  
C.H.R. Res. 1996/70 of 23 April 1996, adopted without a vote  
C.H.R. Res. 1997/56 of 15 April 1997, adopted without a vote  
C.H.R. Res. 1998/66 of 21 April 1998, adopted without a vote  
C.H.R. Res. 1999/16 of 23 April 1999, adopted without a vote  
C.H.R. Res. 2000/22 of 18 April 2000, adopted without a vote  
C.H.R. Res. 2001/11 of 18 April 2001, adopted without a vote  
C.H.R. Res. 2002/17 of 19 April 2002, adopted without a vote  
C.H.R. Res. 2003/9 of 16 April 2003, adopted without a vote  
C.H.R. Res. 2004/15 of 15 April 2004, adopted without a vote  
C.H.R. Res. 2005/9 of 14 April 2005, adopted without a vote

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4 *Consequences of Acts of Violence Committed by Irregular Armed Groups and Drug Traffickers for the Enjoyment of Human Rights/Human Rights and Terrorism*

- C.H.R. Res. 1990/75 of 7 March 1990, adopted by a roll-call vote of 41 to none (entitled ‘Consequences of Acts of Violence Committed by Irregular Armed Groups and Drug Traffickers for the Enjoyment of Human Rights’)
- C.H.R. Res. 1991/29 of 5 March 1991, adopted without a vote (entitled ‘Consequences on the Enjoyment of Human Rights of Acts of Violence Committed by Armed Groups that Spread Terror among the Population and by Drug Traffickers’)
- C.H.R. Res. 1992/42 of 28 February 1992, adopted without a vote (entitled ‘Consequences on the Enjoyment of Human Rights of Acts of Violence Committed by Armed Groups that Spread Terror among the Population and by Drug Traffickers’)
- C.H.R. Res. 1993/48 of 9 March 1993, adopted without a vote (entitled ‘Consequences on the Enjoyment of Human Rights of Acts of Violence Committed by Armed Groups that Spread Terror among the Population and by Drug Traffickers’)
- C.H.R. Res. 1994/46 of 4 March 1994, adopted without a vote (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 1995/43 of 3 March 1995, adopted without a vote (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 1996/47 of 19 April 1996, adopted without a vote (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 1997/42 of 11 April 1997, adopted by a roll-call vote of 28 to none, with 23 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 1998/47 of 17 April 1998, adopted by 33 to none, with 20 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 1999/27 of 26 April 1999, adopted by a roll-call vote of 27 to none, with 26 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2000/30 of 20 April 2000, adopted by 27 votes to 13, with 12 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2001/37 of 23 April 2001, adopted by a roll-call vote of 33 to 14, with 6 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2002/35 of 22 April 2002, adopted by a recorded vote of 32 votes to none, with 21 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2003/37 of 23 April 2003, adopted by a recorded vote of 30 votes to 12, with 11 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2004/44 of 19 April 2004, adopted by a recorded vote of 31 votes to 14, with 8 abstentions (entitled ‘Human Rights and Terrorism’)
- C.H.R. Res. 2005/107 of 19 April 2005, adopted by a recorded vote of 40 votes to 2, with 11 abstentions (entitled ‘Human Rights and Terrorism’)

5. *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (since 2003)*

- C.H.R. Res. 2003/68 of 25 April 2003, adopted without a vote
- C.H.R. Res. 2004/87 of 21 April 2004, adopted without a vote
- C.H.R. Res. 2005/80 of 21 April 2005, adopted without a vote (establishment of a Special Rapporteur on the topic of the resolution for the period of three years)

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- U.N. Doc. A/56/10 (Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentaries adopted by the International Law Commission at its Fifty-third Session, 2001, G.A.O.R., Fifty-sixth Sessio, Supplement No. 10, Chapters IV.E.1 and IV.E.2)
- U.N. Doc. E/1998/94 (Note by the Secretary-General concerning the Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, August 1988).
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