

The UN Special Procedures in the field of human rights. Institutional history, practice and conceptual framework

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Introduction

Nowadays it is acknowledged that the UN system of human rights protection is made up of two major components: committees that monitor States' compliance with human rights Conventions, also called treaty-monitoring bodies, and the Special Procedures (SPs) the UN Commission on Human Rights (CHR) has been establishing since the second half of the 1960s. SPs is a technical wording used to mean international experts appointed by the UN CHR and charged with the task of dealing with questions relating to human rights. In the UN jargon, the experts are called Special Rapporteurs (SRs) when a single individual is tackling human right situations, or Working Groups (WGs) when they work in groups of five experts to carry out the human rights activity entrusted by the CHR.

While the pertinent literature on treaty-monitoring bodies is comprehensive and thorough, SPs have received little attention by scholars. Specifically, even though articles have been written on the institution and practice of the SPs¹, a conceptual definition has not yet been elaborated. Moreover, it seems fair to maintain that the UN CHR's practice itself has in part hindered such an

analytical process. In this regard it is noteworthy that the establishment of SPs, especially from the 1980s onwards, has evidenced a serious shortcoming: a lack of methodical and conceptual clarity. In fact, while the creation of the UN human rights mechanisms initially was based on an implicit hierarchy depending on the gravity of the situation and the kind of response by the Commission², since the second half of the 1980s the CHR's «creative boost» has failed to meet the above criteria and has blurred their significance³. The lack of rationale and consistency in the establishment of the Procedures has thus hindered the development of a coherent conceptual definition of SPs by the CHR itself. Indeed, «conceptual neatness and institutional clarity are not necessarily hallmarks of UN action»⁴.

All this considered, this study tries to fill the gap in the analysis of SPs by developing and putting forward a conceptual definition of the UN mechanisms in question. To this aim it will turn on three main questions: Are there some «constitutional elements» of SPs? What are the main features of SPs' human rights activity? What is the significance of such activity in terms of Human Rights Protection and Monitoring?

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¹ See for instance, RODLEY, N., «The United Nations Non-Treaty Procedures for Dealing with Human Rights», in HANNUM, H. (eds.), *Guide to International Human Rights Practice*, 1994, at 70; JERNOW, A., «Ad Hoc Extra-Conventional Means for Human Rights Monitoring», in *New York Journal of International Law and Politics*, vol. 28, 1996, at 97; BOSSUYT, M.,

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«The Development of Special Procedures of the United Nations Commission on Human Rights», in *Human Rights Law Journal*, vol. 6, 183-206.

² ALSTON, P., «The Commission on Human Rights», in *The United Nations and Human Rights*, 1992, at 165.

³ *Ibidem*.

⁴ BUERGENTAL, T., «New Customary Law: Taking Human Rights Seriously?», in *American Society of International Law and Procedure*, vol. 87, 1993, at 230-231.

The avenue that will be followed in order to answer the above questions is to attempt to define the SPs in light of a careful and thorough analysis of the CHR's Resolutions creating them (Section I) and their practice (Section II).

Before engaging in the analysis of the UN documents, it is worth providing the main details of the institutional history of the UN Procedures. This exercise will elucidate the reasons that brought about the establishment of the SPs' system and draw up the historical and institutional background with which to begin a study aimed at elaborating a conceptual definition of the UN SPs.

1. *The Establishment of the SPs*

The establishment of the SPs, a tremendous development in UN activity in the field of human rights, is the climax of the legal and political empowerment of the CHR. An empowerment that followed the first twenty years of the Commission's practice (1946-1966), a period of time that may be stigmatized as the *no power to act phase*. In this lapse of time, the UN body, on the basis of a restrictive interpretation of its mandate, decided that it had no power to act with respect to individual communications concerning human rights and confined its activity to a mere promotional ambit⁵. Despite such a self-denial policy, during the twenty years in question the CHR gave a significant contribution to the international Protection of human rights. The UN body played a key role in setting up part of its normative structure by drafting the two pivots of international human rights treaty law. Namely, the International Covenant on Economic Social and Cultural Rights and the International Covenant of Civil and Political Rights, which, *inter alia*, provided for the creation of the most authoritative human rights treaty monitoring body. That is, the Human Rights Committee.

The legislative pattern that led to the CHR's emancipation may be traced back to the decade 1966-1977, during which there has been a gradual, but significant, attribution of competences to the Commission as enshrined in some ECOSOC and General Assembly (GA)'s Resolutions⁶. Among these documents, ECOSOC Resolution 1235 XLII of 1967⁷ is especially relevant. As a matter of fact, requesting the CHR «to examine information relevant to gross violations of human rights and fundamental freedoms»⁸, carrying out «a thorough study of situations which reveal a consistent pattern of violations of human rights»⁹, the above document constitutes the legal basis for the establishment of the SPs. Actually, the SPs draw their juridical origin from Resolution 1235, since they were to be the tools the CHR singled out and employed to carry out the «thorough study» entrusted by its parent body. Besides, during the eighties the Commission would have broadened the scope of such a «thorough examination» including phenomena of human rights violations occurring on a world-wide scale. Stated differently, the Commission deduced from the wording of ECOSOC Resolution 1235 the implicit authorization to appoint international experts, and to entrust them with the tasks of examining information on human rights violations¹⁰, studying in the light of such information either human rights Country situations or human rights phenomena, and reporting on the result of such studies.

If the adoption of Resolution 1235 lays down the legal foundation for the creation of the SPs, it has also to be borne in mind that two other developments played a crucial role in fostering the establishment of the human rights mechanisms. Indeed, these two developments created the right political climate and *consensus* necessary for using Resolution 1235 to set up human rights monitoring procedures under the auspices of UN, and not provided by any International Covenant.

⁵ *Commission on Human Rights, Report of the First Session, E/259*, para. 22. See also Sir Lauterpacht and Professor Alston's comments: LAUTERPACHT, H., *The International Protection of Human Rights, 70 Recueil des Cours* 5, 1947; «Reports on Human Rights, the Charter of the UN and the International Bill of the Rights of Man», in I.L.A., *Report of the Forty-Third Conference*, Brussels, 1948, at 80, 96-103, 128-129., ALSTON, *supra* note 2, at 142.

⁶ GA Resolution 1514 (XV), 14 December 1960, Y.U.N. 49, and GA Resolution 1654 (XVI), 14 December 1960, Y.U.N.56; ECOSOC Reso-

lution 1102 (XL), 4 March 1966, ESCOR XL, supp. 1, E/4176, at 6; ECOSOC Resolution 1102 (XL), 4 March 1966, ESCOR XL, supp. 1, E/4176, at 6; AG Resolution 2144 A (XXI), 26 October 1966, GAOR XXI, Supp. 16 (A/6316), at 46-47;

⁷ ECOSOC Resolution 1235, ESCOR XLII, Supp. 1, (E/4393), at 17-18.

⁸ *Ibidem*.

⁹ *Ibidem*.

¹⁰ ZUIDWIJK, T., *Petitioning the United Nations. A Study on Human Rights*, 1982, at 20.

The first development is the second increase of the CHR's membership in summer 1966¹¹. Such enlargement of the Commission's composition had a strong impact on the political dynamics of the UN body, provoking significant changes in its practice and decision-making process. As a matter of fact, ECOSOC's decision to authorize the increase in the number of the Commission's members from 21 to 32, 20 of which were representatives of the former Asian and African colonies of Western States, marked a significant loss of power of the Western Countries and the rise of a new Afro-Asian majority within the CHR¹². Significantly, the new majority was strongly and truly determined to develop non-treaty based communication type procedures to tackle phenomena of racial discrimination and adopted the UN CHR as the proper international body within which and through which to achieve such an aim¹³.

In this respect it is noteworthy that the rise of the new majority within ECOSOC's subsidiary body was almost to coincide with the second development. That is, the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) by the GA in 1965¹⁴, which provided for a procedure for the examination of complaints, from individuals or groups, against those state parties of the Convention which accepted the procedure in question¹⁵. The adoption of the ICERD strengthened the determination of the new members of the Commission to create extra-conventional monitoring procedures, meant to be additional tools to deal essentially with racial discrimination, the scope of which was to be re-shaped and broadened in the light of the wording of Resolution 1235 to include the examination of any human rights Country situations and phenomena¹⁶.

Before concluding, it should be noted that it took almost twenty years for the SPs to develop, from the beginning of the seventies to the first half of the nineties. In other words, the establishment of the system of the SPs was the result of an incremental process that culminated in the nineties, and that was not foregone during the decade following the adoption of Resolution 1235 (1967-1977).

In the period in question, the CHR reviewed only colonial situations or matters related to racial discrimination¹⁷ although, as seen, Resolution 1235 gave the CHR the mandate to examine any situation. In this respect, the failure of the then Sub-Commission on Prevention of Discrimination and Protection of Minorities' endeavors to include Greece and Haiti in a list of exclusively colonial situations to be brought to the attention of the Commission¹⁸ and the consequent inability of the latter to take any action with respect to the two cases in question are especially symptomatic¹⁹.

Thus, during the decade 1967-1977, the CHR authorized investigations under Resolution 1235 with respect to three special human rights situations: that in South Africa, the one concerning the Arab Territories occupied by Israel in 1967, and the situation in Chile. In each case the Commission established a Working Group.

The Working Group on South Africa (WGSA) was created on 6 March 1967²⁰ with the task of investigating cases of torture and ill-treatment of prisoners and detainees in the state in question.

Two years later, the Working Group on Arab Territories (WGAT) was mandated to investigate breaches of the Fourth Geneva Convention in the territories occupied by Israel after the six days war²¹.

¹¹ It has to be noticed that the CHR composition was enlarged for the first time by ECOSOC in 1961. The Commission members increased from 18 to 21. See with this respect TOLLEY, H., *The United Nations Commission on Human Rights*, 1987.

¹² KENNY, K., «Formal and Informal Innovations in the United Nations Protection of Human Rights: The Special Rapporteur on the Former Yugoslavia», in *Austrian Journal of Public International Law*, vol. 48, 1995, a at 22.

¹³ ALSTON, *supra* note 2, at 143.

¹⁴ GA Resolution 2106 (XX), 21 December 1965.

¹⁵ *Ibidem*, Article 14.

¹⁶ In addition it is noteworthy that the new Afro-Asian majority was supported by the Socialist states, that, as ALSTON noticed, *supra* note 2, «were happy to encourage attention to what were assumed to be quintessentially

Western sins», and by the then US government that by the mid-sixties committed itself to the implementation of civil and political rights.

¹⁷ ALSTON, *supra* note 2, at 157.

¹⁸ See ZUIDWIJK, *supra* note 10, at 21 and ALSTON, *supra* note 2, at 157. For further details on the discussion concerning the Haitian and Greek cases within the Commission see ZUIDWIJK at 21-23.

¹⁹ *Report on the Twenty-Fourth Session of the Commission on Human Rights*, E/4475, (1968), paragraphs 140-210.

²⁰ CHR Resolution 2 (XXIII), *Commission on Human Rights, Report on the Twenty-Third Session*, ESCOR, XLII, Supp. No. 6, (E/4322), paragraph 186.

²¹ CHR Resolution 8 (XXVI). See also *Commission on Human Rights Report on the Twenty-Sixth Session*, ESCOR XLVIII, Supp. No. 5, E/4816, at 78.

Finally, in 1974, the CHR established a Working Group to inquire into the human rights situation in Chile after the 1973 military *coup*²².

This last case was crucial for the development of the system of SPs for a special reason. The three WGs were established on the «understanding» that they would have not constituted a precedent, as they investigated situations presented as unique by the sponsors of the bodies in question²³.

However, as noticed²⁴, while the South African and Arab cases were *sui generis*, concerning, respectively, the institutionalization of racism at every level of the society and a particular situation brought about by the six days war of 1967, the Chilean case was deeply different. It concerned neither racial discrimination nor colonialism, the main issues dealt with by UN human rights organs in the period 1967-1977²⁵. As Zuijdwijk noticed, the case in question related to a situation that « ... [was] not considered in and of itself a violation of human rights. Condemning a government merely for acquiring power thorough a military *Coup* would not be acceptable at the UN. [The inquiry in Chile] was therefore primarily brought about by humanitarian concern»²⁶.

There were several reasons why the Chilean case had such a relevance: the Country had a long democratic tradition, the *coup* was particularly bloody, the overthrown government was a member of the non-aligned Movement and of the Socialist International, and the US involvement in the events of August-September 1973 were fully documented²⁷.

Therefore, the Chilean case was to be a crucial precedent for the use of Resolution 1235 potentially in *any situation*, «provided that the political will could be mustered»²⁸.

Thus, the case heralded a new phase of the Commission's activity, during which time the procedure under Resolution 1235 was to be employed more effectively and lead to the building up of the current SPs'system.

2. *The Setting up of the System of the Special Procedures*

The years 1978-1991 marked a new phase of the CHR's practice culminating in the establishment of several SPs. In this period, the UN Commission's human rights protection system was structured and built up. Its structure was made up of two main components, Country and Theme SPs²⁹. The main difference between these two SPs was to be the subject-matter of the human rights activity entrusted by the CHR. The former were authorized to study human rights situations occurring within the boundaries of certain states, while the latter were mandated to examine serious phenomena of human rights violations occurring on a world-wide scale.

Besides, SPs were to be international experts with a remarkable reputation in the field of human, and the examination entrusted to them was to be carried out either by a single individual, technically called Special Rapporteur (SR), or by a group, the so-called Working Groups (WGs).

Thus, since 1978 there has been a sort of «creative vein» of the Commission that, at first, led to the appointment of Country SRs such as the SR on Chile³⁰ and the SR on Equatorial Guinea³¹. Then, in the early 1980s the CHR appointed the SR for El Salvador and the expert on Bolivia³². Such appointments were followed by the establishment of the SR on Afghanistan and the SR on Iran in 1984 and 1985³³; the SR on Iraq, the SR on Kuwait Territories occupied by Iraq³⁴, the SR on Cuba³⁵ and the expert on Haiti in 1991³⁶.

²² CHR Resolution 8 (XXXI), 1975.

²³ ALSTON, *supra* note 2, at 158.

²⁴ *Ibidem*. See also ZUIJDWIJK, *supra* note 10, at 304.

²⁵ *Supra* note 24.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

²⁸ *Ibidem*.

²⁹ NOWAK, M., «The Promotion and Protection of Human Rights by UN», *SIM Newsletter*, 2/1988, at 15-17; BOSSUYT, M., *supra* note 1.

³⁰ CHR Resolution 11 (XXXV).

³¹ CHR Resolution 15 (XXXV). For further details see RANDALL, F., «The United Nations Commission on Human Rights: the Equatorial Guinea Case», in *Human Rights Quarterly*, vol. 3, 1981, at 34-47.

³² Respectively CHR Resolution 32 (XXXVIII) 11 March 1981, and CHR Resolution 23 (XXXIII) 12 September 1980. See also BOSSUYT, *supra* note 1, at 184-185.

³³ Respectively: CHR Resolution 1984/55, 15 March 1984; CHR Resolution 1984/54, 14 March 1985. See also BOSSUYT, *supra* note 1, at 186-188, and 185-186.

³⁴ Respectively CHR Resolution 1991/74, and CHR Resolution 1991/67.

³⁵ CHR Resolution 1991/68. For further details see WEISSBRODT, D., «Country-Related and Thematic Developments at the 1988 Session of the United Nations Commission on Human Rights», in *Human Rights Quarterly*, vol. 10, 1988, at 550-558.

³⁶ E/CN.4/1991/33.

However, the most significant development a more extensive use of Resolution 1235 has produced has been the creation of Theme SPs. In 1980 the CHR created a Working Group on Enforced or Involuntary Disappearances (WGD)³⁷ as the UN response to the phenomenon of Enforced Disappearances in Argentina³⁸. Then, in 1981 the Commission appointed a Special Rapporteur on Extra-Legal Summary and Arbitrary Executions (SRESAEs)³⁹ and four years later it established the Special Rapporteur on Torture (SRT)⁴⁰. As will be illustrated in Section II, the above human rights mechanisms played a pivotal role in shaping the system of UN SPs. This is because of the brave interpretation they gave of their terms of reference: it allowed them to single out special work techniques for the implementation of their respective mandates which were, afterwards, endorsed by the CHR, and which, at present, are the procedural standards employed by all the Thematic and Country UN SRs⁴¹. Furthermore, it is especially noteworthy that such a daring reading of their respective terms of reference enabled the WGD and the two SRs to formulate authoritative legal interpretations of those international human rights rules they were mandated to examine, and to contribute to the Progressive Development of International Law⁴².

The establishment of three mentioned thematic SPs was followed by the institution of the SR on Religious Intolerance in 1986⁴³, the SR on Mercenaries in 1988⁴⁴, a SR on the Sale of Children in 1990 and a Working Group on Arbitrary Detention in 1991⁴⁵.

To conclude, at the beginning of the nineties the CHR brought the consolidation of its human rights protection and monitoring system to an end.

The system was to undergo further transformations during the first half of the nineties. It is, then, to an overview of this period that the analysis undertaken in this paper turns.

3. *The Special Sessions of the UN CHR and the 1993 Vienna Conference on Human Rights: Two Crucial Moments for the Introduction of Innovations in the System of the Special Procedures*

The first half of the 1990s was a very important time for the strengthening of the system of SPs. It is in this period that there has been the introduction of several innovative elements in the system of SPs, which have testified a new trend in human rights protection under the auspices of the UN.

Some innovations were formally introduced by the CHR during its first and second special sessions and relate to the mandate of the Special Rapporteur on the Former Yugoslavia (SRFY)⁴⁶.

More specifically, the innovations sanctioned in Resolution S-1/1 adopted during the first special session and appointing the above SR, were the following:

- a) The authorization to monitor human rights within the boundaries of a Group of states⁴⁷ (usually SRs are mandated to study the human rights situation of a single Country);
- b) The request to submit «periodic» reports to the CHR every two or three months (usually Country SRs submit annual reports)⁴⁸;

³⁷ CHR Resolution 20 (XXXVI), 29 February 1980.

³⁸ ALSTON, *supra* note 2, at 160; RODLEY, N., «United Nations Action Procedures against “Disappearances”, Summary or Arbitrary Executions and Torture», in *Human Rights Quarterly*, vol. 8, 1986, at 701-715; WEISSBRODT, D., «The 1980 United Commission on Human Rights on the Disappeared», in *Human Rights Quarterly*, vol. 3, 1980, 19-33; BOSSUYT, *supra* note 1, at 203.

³⁹ CHR Resolution 1982/35, 7 May 1982. See also RODLEY, *supra* note 38, at 715-717; BOSSUYT, *supra* note 1, at 205-206; WEISSBRODT, D., «The Three “Theme” Special Rapporteurs of the United Nations Commission on Human Rights», in *American Journal of International Law*, vol. 8, 1986, at 687-693.

⁴⁰ CHR Resolution 1985/33, 13 March 1985. See also RODLEY, *supra* note 38, at 724-725; BOSSUYT, *supra* note 1, at 205-206; WEISSBRODT, *supra* note 39, at 693-695.

⁴¹ See in this respect the 1995 report of the SR on the Independence of Lawyers where the expert expressly states that in carrying out his mandate he would have employed the same working procedures of the SR on Torture: E/CN.4/1996/37.

⁴² With this respect it is significant the SR on Torture’s view on Corporal Punishment. See RODLEY N., *The Treatment of Prisoners in International Law*, 1999, at 314.

⁴³ CHR Resolution 1986/20.

⁴⁴ CHR Resolution 1987/10.

⁴⁵ Respectively CHR Resolution 1990/68, and CHR Resolution 1991/42.

⁴⁶ CHR Resolution S-1/1.

⁴⁷ The states in question were Slovenia, Croatia, Bosnia and Herzegovina, Serbia and Montenegro.

⁴⁸ CHR Resolution S-1/1 paragraph 18.

- c) The authorization to make such reports available to the SC⁴⁹;
- d) The collaboration between the SRFY and other SPs⁵⁰. That is the WGD, the SRT, the SRESAEs, and the Representative of the SG on Internally Displaced People.

A further innovation was introduced during the second special session of the Commission: it concerned the deployment of a Human Rights Field Operation in the states set up following the dissolution of Former Yugoslavia, charged with the task of assisting the SR in gathering information on the gross violations occurred in the States in question⁵¹. In addition, the practice of the SRFY has brought about two other innovations in the UN fact-finding which were subsequently formally endorsed by the CHR. That is: the collaboration between the SRFY and external experts (non UN staff), and the undertaking of visits on the spot by UN Secretariat staff without the SR himself⁵². Although the analysis of the above innovations, especially the informal ones, will be carried out in Section II of this study, it is suffice to notice that they are symptomatic of an endeavor aimed at making the implementation of SPs' mandate more scientific and a true technical exercise⁵³. Moreover, it is noteworthy that the formal innovation concerning the submission of the SRFY periodic reports to the SC constituted a first, albeit small, step towards a true UN strategy that links human rights and the maintenance of international peace and security, a strategy foretold in some very important UN documents such as the Agenda for Peace⁵⁴ and the Vienna Declaration on Human Rights adopted by the Human Rights Conference convened in Vienna in 1993⁵⁵.

Apart from envisaging the mainstreaming of human rights vis-à-vis international peace and security, the 1993 Vienna Declaration has heralded two further innovations in the system of SPs⁵⁶.

The first relates to Economic Social and Cultural Rights (ESCRs).

By putting special emphasis on the implementation of the above rights in the name of a true inter-dependence of all human rights, an inter-dependence neglected during the period of the cold war because of the different and apparently irreconcilable conceptions of human rights of the then two world powers, the Document has stirred the CHR to appoint several Theme SRs for ESCRs, introducing a new kind of theme SP in its human rights protection system. They are the SR on Poverty⁵⁷, the SR on Education⁵⁸, the SR on Development⁵⁹, and the SR on Toxic Waste⁶⁰, the SR on the right to food⁶¹, the SR on adequate housing⁶², and the SR on the right to everyone to the enjoyment of the highest attainable standard of physical and mental health⁶³.

The second innovation is connected with the effort aimed to rationalize the activity of the CHR' SPs. In this respect, the 1993 Vienna Declaration has underlined the importance of a better coordination among the SPs, and asked the UN SRs and WGs to meet periodically with the aim of improving the effectiveness of their human rights activity⁶⁴. The implication of such request has emerged since the second half of the nineties, when SPs started holding periodic meetings to harmonize the overall functioning of the SPs system⁶⁵.

Finally, it has to be noted that during the nineties the Commission appointed some other theme SRs: the SR on Freedom of Expression⁶⁶, the SR on the Independence of Lawyers⁶⁷, the SR on Racial Discrimination⁶⁸, the SR on Migrant Workers⁶⁹ and the SR on Violence against Women⁷⁰. Yet, from the year 2000 onwards the UN body appointed a SR on the Human Rights and Fundamental Freedoms of Indigenous People and a Working Group on Problems of Racial Discrimination Faced by People of African Descent⁷¹, and the SR on Trafficking of Persons⁷².

⁴⁹ *Id.*, paragraph 15.

⁵⁰ With this respect see also paragraph 18 of Resolution S-2/1.

⁵¹ CHR Resolution. S-2/1.

⁵² KENNY, *supra* note 12, at 63-73.

⁵³ *Ibidem*, at 21.

⁵⁴ DPI/1623 (95.115).

⁵⁵ A/Conf.157/9.

⁵⁶ *Ibidem*.

⁵⁷ CHR Resolution 1998/250.

⁵⁸ CHR Resolution 1998/33.

⁵⁹ CHR Resolution 1998/72.

⁶⁰ CHR Resolution 1993/781.

⁶¹ CHR Resolution 2000/10.

⁶² CHR Resolution 2000/9.

⁶³ CHR Resolution 2002/31

⁶⁴ *Supra* note 55, Part E, paragraph 95.

⁶⁵ See the following reports on SPs' meetings: E/CN.4/1999/3; E/CN.4/2000/5; E/CN.4/2002/14; E/CN.4/2003/6.

⁶⁶ The mandate can be found in E/CN.4/1994/33.

⁶⁷ CHR Resolution 1994/41.

⁶⁸ CHR Resolution 1994/64.

⁶⁹ CHR Resolution 1999/44.

⁷⁰ CHR Resolution 1994/45.

⁷¹ Respectively, CHR Resolution 2001/57, CHR Resolution 2002/68.

⁷² CHR Resolution 2004/11.

On the other hand, during the years in question, the number of the Country SRs also increased following the establishment of six new SRs: the SRFY in 1992⁷³, the SR on Rwanda and the SR on Sudan in 1994⁷⁴, the SR on Myanmar⁷⁵, the SR on Burundi and the SR on former Zaire in 1995⁷⁶. During the early 2000 the Commissions also appointed the SR on Belarus⁷⁷, the SR on Chad⁷⁸ and the SR on the Democratic Republic of Korea⁷⁹.

4. Concluding Remarks

On the eve of the 21st Century, the UN CHR finalized the setting up of its own system of human rights protection. The institutional, political and legal process that resulted in the esta-

blishment and consolidation of the system of SPs has not always been straightforward. During the seventies it has been hindered by the CHR member States, which were against the development of extra-conventional mechanisms that would have addressed human rights situations; it has then gained unpredictable momentum with the creation of Theme SPs at the beginning of the eighties, and induced innovative hints during the nineties.

These are, in sum, the main features of the historical and institutional framework of the establishment of the system of the SPs as sketched out in the previous paragraphs. Such an exercise opens the door to the conceptualization of the Procedures, the main endeavor of this study.

⁷³ See *supra* note 46.

⁷⁴ Respectively, CHR Resolution S-3/1, and CHR Resolution 1994/79.

⁷⁵ CHR Resolution 1992/58.

⁷⁶ Respectively CHR Resolution 1995/90 and CHR Resolution 1995/69.

⁷⁷ CHR Resolution 2003/77.

⁷⁸ CHR Resolution 2004/5.

⁷⁹ CHR Resolution 2004/13.

Section I

As mentioned in the introduction, this section will try to answer the question of whether there are some constitutive elements of SPs. In order to carry out this exercise, the UN CHR's Resolutions establishing the mechanisms will come under examination. The challenge is to work out a conceptual definition of the Commission's Procedures deducing their «constituent elements» from the UN documents in question. Only the status of SPs will be analyzed by relying on documents other than the CHR's Resolution, because, they, usually, do not define it.

It is then to the first constitutive element of the Procedures as enshrined in the UN Resolutions, namely the individual requirements for the appointment, that this section now turns.

1. *The «Individual Requirements» for the Appointment of Special Procedures*

The CHR's Resolutions establishing Theme and Country SPs contain the first constituent requisite for the appointment of a SR or the members of a WG, namely, the relevant individual qualifications necessary for such a designation.

Usually, these Resolutions require the appointment of individuals of «recognized international standing», «expert[s] in human rights»⁸⁰, or persons of «international reputation»⁸¹. The most specific requirement ever applied to a SR was formulated in the Commission's Resolution appointing the SR on Iraq. More specifically, the document states that the SR should have been «an individual of recognized international standing in the field of human rights»⁸².

Some Resolutions designing Theme SRs further specify the skills the experts are expected to have. Thus, for instance, the SR on the Violence against Women should have been «an individual of international standing» with specific experience in addressing women's rights⁸³. The expert on Development was required to have a «high competence in the field of the right to development»⁸⁴.

Sometimes, Resolutions establishing a Special Procedure did not mention any individual requirement for the appointment⁸⁵. However, as testified by the CHR's practice from the second half of the eighties onwards, even in the absence of a *formula* defining the individual skills required for the appointment, the selection process of SRs and WGs usually, privileges individuals with a «legal background». They are usually lawyers by profession or professors of International Human Rights Law or Public International Law. Remarkably, some of them have worked for international NGOs. Thus, Sir Nigel Rodley, former SR on Torture, was formerly Amnesty International's legal advisor⁸⁶, and at present teaches Public International Law at the University of Essex (UK); Mr Bacre Ndiaye, former SR on Extra-Legal Summary and Arbitrary Executions⁸⁷, was Vice-Chair of Amnesty International's Executive Committee. Others were and are members of local NGOs: Mr Diego Garcia-Sayan, former member of the Working Group on Disappearances (WGD), was the head of the Andean Commission of Jurists⁸⁸; Professor Manfred Nowak, a former member of the above Working Group and current SR on Torture, is the head of an Austrian human rights NGO called the Ludwig Boltzman Institute, and teaches Public International Law at the University of Vienna; Mr. Roberto Garreton, former SR on Congo, was the national Legal Director of the Vicariate of Solidarity of the Archdiocese of Santiago, one of Chile's major human rights NGO⁸⁹. The sole SR who was a diplomat, namely,

⁸⁰ See the mandates of the SR on Mercenaries and the SR on Afghanistan. Respectively: CHR Resolution 1987/16, CHR Resolution 1994/55.

⁸¹ See the CHR's Resolution appointing the SR on the Sale of Children: Resolution 1990/68.

⁸² CHR Resolution 1991/74.

⁸³ CHR Resolution 1994/45 paragraph 8.

⁸⁴ CHR Resolution 1998/72, paragraph 10 (b).

⁸⁵ See the CHR's Resolutions establishing the SR on the Former Yugoslavia and the Independent Expert on Haiti. Respectively: Resolution S-1/1, Resolution 1995/70.

⁸⁶ See in this respect LEARY V., «A New Role of Non Governmental Organizations in Human Rights. A Case Study on Non-Governmental Participation in the Development of International Norms on Torture», in CASSESE (ed.), *UN Law/Fundamental Rights*, 1979, at 202. Also, it is worth stressing that Sir Rodley is, at present, a member of the Human Rights Committee.

⁸⁷ CHR Resolution 1982/35.

⁸⁸ JERNOW A., «Ad Hoc Extra-Conventional Means for Human Rights Monitoring», in *New York Journal of International Law and Politics*, vol. 28, 1996, at 97.

⁸⁹ *Ibidem*.

the SR on the Arab Territories Occupied by Israel, was dismissed in Fall 2000⁹⁰.

Besides, CHR's Resolutions establish an important principle that informs the way SRs and WGs' tasks are to be carried out. It relates to the performance itself of the experts and appears to respond to a sort of «professionalism imperative». In particular the experts are requested to implement their mandate with «discretion», «objectivity», «independence», to serve in their «individual capacity», and to act in an effective and expeditious manner⁹¹. It is submitted that the introduction of an *NGO component* in the system of SPs has to be welcomed as it may dramatically contribute to the fulfillment of the above principle and consequently reduce the negative effects of the political character of their appointment. As affirmed in the Resolutions creating SPs, the selection of the individuals to be appointed as UN experts is carried out by the Chairman of the Commission after having consulted the regional groups of the UN body. If the Procedure to be created is a Working Group, the principle informing the above selection is one of «equitable geographic distribution»⁹².

Such a scheme of designation has been subjected to severe criticism. In the view of some scholars its «quintessentially political nature»⁹³ does not always ensure «the impartiality and independence that might be achieved by an individual appointed by the Secretary General»⁹⁴. Also it is significant that in certain cases the target Country has been involved in the selection process itself⁹⁵, and that there have been appointments as SRs of individuals from the same region of the Country being investigated⁹⁶. Yet, some scholars highlighted that the selection process leading more often than not to the appointment of diplomats has neglected expertise and competence in the field

of human rights, the main requisites for the establishment of a Special Procedure. Hence, the appointment of current or former NGOs members is symptomatic of a new trend in the designation of the CHR's experts which may contribute to preserve UN SRs and WGs' independence and impartiality in two ways. First, by enabling them to implement their mandates both as «outside experts»⁹⁷ closely aligned with the NGOs activists and as UN officials. Second, by making the UN monitoring more public than when it was carried out by career diplomats, and most importantly, by turning it into a *true legal and technical work* through the introduction of new work methods borrowed from NGOs themselves, such as the technique of case by case reporting.

Finally, it is noteworthy that in the UN practice there is nothing to prevent an individual from being appointed at the same time as a Country SR and a Theme expert⁹⁸.

2. The Status of Special Procedures

The second constituent element of SPs concerns their rank within the UN legal system. Usually, Resolutions appointing a SR or a Working Group do not define the status of the experts designated. Arguably, the UN would have never tackled such an issue if the case of the SR on the Independence of Judges and Lawyers (SRIJL) had not occurred. Indeed this case would have clarified the matter and highlighted the tremendous implications of the status of SRs on the independence and integrity of the system of SPs.

Remarkably, the case was so serious as to require an Advisory Opinion of the International Court of Justice (ICJ)⁹⁹ in which the

⁹⁰ He is the Italian Mr. Giacomelli. Apparently, the reasons of his dismissal were due to contrasts between him and the Italian Government.

⁹¹ See the Resolutions appointing the Working Group on Disappearances, the SR on Extra-Legal Summary and Arbitrary Executions, the SR on Torture, the Working Group on Arbitrary Detention. Respectively: Resolution 20 (XXVI), Resolution 1982/35, Resolution 1985/33, Resolution 1991/42.

⁹² See the Resolutions appointing the Working Group on Disappearances and the Working Group on Arbitrary Detention, *supra* note 12.

⁹³ ALSTON P., *The Commission on Human Rights*, 1992, at 165.

⁹⁴ RODLEY N., «United Nations Action Procedures against "Disappearances", Summary or Arbitrary Executions and Torture», in *Human Rights Quarterly*, vol. 8, 1986, at 702. There are two experts appointed by the

SG. They are the Independent Expert on Haiti and the Independent Expert on Somalia. Respectively CHR Resolution 1995/70, and CHR Resolution 1993/86.

⁹⁵ See in this respect Ian Guest's view on the appointment of Lord Colville as SR on Guatemala in *Behind the Disappearances: Argentina's Dirty War against Human Rights and United Nations*, 1990.

⁹⁶ ALSTON, *supra* note 14, at 166.

⁹⁷ JERNOW, *supra* note 9.

⁹⁸ It is the case of Mr. Garretton who has been a member of the Working Group on Arbitrary Detention and the former SR on Congo.

⁹⁹ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, General List: No. 100.

World Court came to grips with the sensitive issue of the international status of the CHR's SPs and its legal consequences.

The basic tool the Court availed itself of to deal with the issue at stake has been the 1946 Convention on the Immunities and Privileges of the UN (thereafter the 1946 Convention), which provides for immunities and privileges for UN officials, that is to say, individuals employed by the UN accordingly to certain terms and conditions¹⁰⁰. In this respect it has to be noted that SRs and members of WGs are not UN officials in the above sense. Rather, they are individuals who already have their own occupation and who have accepted the appointment as experts of the Commission by virtue of a strong commitment to the cause of human rights, and because of the prestige of the appointment itself. However, such a different position of SRs in respect to other UN officials did not prevent the Court from holding that the status of SPs is defined and regulated by the provision of a specific section of the 1946 Convention.

Before turning to the Court's Opinion, this section will provide a brief account of the facts from which the case arose.

2.1. THE FACTS

In November 1995 the CHR's SRIJL, the Malaysian jurist Dato'param Cumaraswamy¹⁰¹, was interviewed by *International Commercial Litigation*, a magazine published in the UK but circulated also in Malaysia. In the interview the expert commented on certain litigations carried out in Malaysian courts¹⁰². As a result the article «Malaysian Justice on Trial» was published. Following this publication, two Malaysian commercial companies filed a suit against the SRIJL in Malaysian courts, claiming that Mr. Cumaraswamy used defamatory language in the November 1995 interview and sought damages amounting to approximately to \$ 12 million¹⁰³.

On 16 January 1997 the UN Legal Counsel, acting on behalf of the Secretary General (SG), sent a *note verbale* to the Permanent Representative of Malaysia to the UN. In this document the Counsel stated that the article «Malaysian Justice on Trial» clearly referred to Mr. Cumaraswamy in his official capacity as the UN CHR's SRIJL. Consequently, it requested the Country «... to promptly advise the Malaysian courts of the SR's immunity from legal process»¹⁰⁴ with respect to the suit at stake. On 7 March 1997 the SG issued a further *note verbale* re-stating that the observations made by the SR, and on which the lawsuit was based, were spoken by the expert in the course of his mission, and that therefore, Mr. Cumaraswamy was «immune from legal process with respect thereto»¹⁰⁵. However, on 12 March 1997 the Malaysian Minister of Foreign Affairs filed a certificate with the trial court concerned, the Court of Kuala Lumpur, without referring, in any way, to the SG's *note verbal*. Moreover, the certificate invited the Court to determine at its own discretion whether immunity applied, and stated that this was the case «only in respect of words spoken or written and acts done by [the SR] in the course of the performance of his mission»¹⁰⁶.

Thus, on 18 June 1997 the competent Judge of the Court of Kuala Lumpur concluded that she was unable to hold that Mr. Cumaraswamy was completely protected by the claimed immunity, as the SG *note verbale* was merely «an opinion with scant probative value and no binding force upon the court»¹⁰⁷.

Moreover, on 10 July 1997 and 23 October 1997 two further lawsuits were filed against the SR¹⁰⁸. Such legal actions were followed by two other SG's *notes verbales* re-stating the SR's immunity from legal process»¹⁰⁹.

On 7 November 1997 the SG informed the Malaysian Prime Minister that a difference between his government and the UN

¹⁰⁰ See Article V of the Convention.

¹⁰¹ The SR was appointed by CHR Resolution 1994/41 of 21 April, 1994, endorsed by ECOSOC in decision 1994/251 of 22 July, 1994. The expert was entrusted with the tasks of inquiring into substantial allegations concerning threats to the independence of the judiciary, lawyers and court officials; identifying and recording attacks against judges, lawyers and court officials; and reporting to the Commission.

¹⁰² More specifically, he is quoted as having said «complaints are rife that certain highly placed personalities in business and corporate sectors are able to manipulate the Malaysian System of Justice»: *Supra note 20*,

paragraphs 12-14. See also the SR's reports E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32, E/CN.4/1998/39.

¹⁰³ *Supra note 20*, at 5, paragraph 5.

¹⁰⁴ *Ibidem*, at 6, paragraph 6.

¹⁰⁵ *Ibidem*.

¹⁰⁶ *Supra note 20*, at 6, paragraph 7.

¹⁰⁷ ICJ Press Release 99/16 bis at 3.

¹⁰⁸ *Ibidem*, at 4.

¹⁰⁹ The first was issued on 11 July, 1997, and the second on 27 October, 1997, *supra note 20*, at 7, paragraphs 11-12.

existed¹¹⁰. Nonetheless, on 19 February 1998 the Federal Court of Malaysia denied Mr. Cumaraswamy application for leave to appeal on the ground that he was neither a sovereign nor a full-fledged diplomat but only an «unpaid, part-time provider of information»¹¹¹.

Following the failure of the SG' Special Envoy's official mission¹¹² to Kuala Lumpur (26-27 February 1998), during which he endeavored to reach a settlement of the matter, the case was referred to the ECOSOC with the view to request an Advisory Opinion of the ICJ¹¹³.

The request was expressly made on the basis of Article 30 of the 1946 Convention¹¹⁴. Malaysia did not oppose the request¹¹⁵. It, indeed, recognized the UN's right to refer matters to its organs in order to obtain an Advisory Opinion from the ICJ as provided by the above Article¹¹⁶.

The Article sanctions the Court's advisory function provided that a difference between the UN and one of its members arises. It reads as follows:

*all differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. 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*¹¹⁷.

As observed by the Court, the *expressis verbis* mention of Article 30 in ECOSOC's decision¹¹⁸, conferred to the Advisory Opinion, which by definition has a non-mandatory character, obligatory effects¹¹⁹. Therefore, the ruling of the Court would have been accepted as binding by the parties¹²⁰.

The ECOSOC requested the Advisory Opinion on 5 August 1998¹²¹.

More specifically the Court was requested to rule on the legal question of the applicability of Article VI Section 22 of the

1946 Convention in the case of Mr. Cumaraswamy as the CHR's SRIJLs.

The Opinion was given on 29 April 1999.

2.2. THE ADVISORY OPINION ON «DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS»

For analytical purposes the reasoning of the Court will be split up into three parties which deal respectively with the following legal questions: the applicability of Article VI Section 22 of the 1946 Convention to the SRIJL; the applicability of the Article VI Section 22 of the 1946 Convention in the specific circumstances of the case; the legal obligations of Malaysia¹²².

In dealing with the legal question of the applicability of Article VI Section 22 of the 1946 Convention in the case of Mr. Cumaraswamy, the Court, firstly, analyzed the «threshold question of whether Mr. Cumaraswamy was and is an expert on mission»¹²³ in the sense of the above Article.

The Article reads as follows:

(a) 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 time spent on journeys in connection with their missions. In particular they shall be accorded:

...

(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.

In order to answer the «threshold question», the Court recalled its Advisory Opinion of 14 December 1998, in which it dealt

¹¹⁰ *Ibidem*, paragraph 13.

¹¹¹ *Ibidem*.

¹¹² He was Mr. Forter from Canada.

¹¹³ *Supra* note 20, at 7, paragraph 7.

¹¹⁴ *Ibidem*, at 10, paragraph 20.

¹¹⁵ For further details see *supra* note 20, at 8, paragraph 15.

¹¹⁶ *Ibidem*.

¹¹⁷ *Supra* note 20, at 12, paragraph 24.

¹¹⁸ *Ibidem*, paragraph 25.

¹¹⁹ *Interpretation of Peace Treaties with Bulgaria, Hungary, Romania, First Phase, Advisory Opinion*, ICJ Reports, (1950), at 71.

¹²⁰ *Ibidem*.

¹²¹ Decision 1998/297.

¹²² It is the same analytical pattern followed by the Court itself. *Supra* note 20, at 15-20.

¹²³ *Supra* note 20, at 26, paragraph 39.

with the issue of the applicability of Article VI in respect to a SR of the then Sub-Commission on the Prevention of Discrimination and Protection of Minorities (it was the more notorious Mazilu case)¹²⁴. More specifically in this Opinion the Court analyzed the application of Section 22 *ratione personae*, *ratione temporis*, *ratione loci*¹²⁵.

It, thus, held that «the purpose of Section 22 is... evident, namely, to enable the UN to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them such privileges and immunities as are necessary for the independent exercise of their function»¹²⁶.

Importantly, the Court stressed that «the essence of the matter lied not in the administrative position of [SRs] but in the nature of their missions»¹²⁷.

In the light of this argument the Court concluded that a SR of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, who is entrusted with a research mission, must be regarded as an *expert on mission* within the meaning of the Article VI.

The above conclusion applies *a fortiori* to a SR appointed by the CHR, of which the Sub-Commission is a subsidiary body¹²⁸. More specifically, in the view of the Court, what is truly decisive to conclude that Article VI Section 22 applies to the CHR's SRs is the fact that the experts in question are mandated to carry out not only research missions, but also visits on the spot. Stated differently, the CHR's SRs enjoy the immunities and privileges provided for in Article VI Section 22 as they are entrusted with *in situ* visits. As in the case of a SR of the UN Sub-Commission, the application of the Article to SPs is aimed at guaranteeing the independent exercise of their functions. Therefore, the Court concluded that Mr. Cumaraswamy «*must be regarded as an expert on mission within the meaning of Article VI Section 22,*

*as from April 21 1994*¹²⁹, *that by virtue of this capacity the provisions of the Section were applicable to him at the time of the [interview with International Commercial Litigation], and they continue to be applicable*»¹³⁰.

Furthermore, the Court noticed that Malaysia acknowledged since the very moment of Mr. Cumaraswamy's appointment as a SR of the Commission that he had to be considered an *expert on mission*, and that as such he enjoyed the privileges and immunities provided by the 1946 Convention in his relations with the states parties «*including those of which they are nationals or on the territory of which they reside*»¹³¹.

The Court, then, turned to the second issue at stake, namely the applicability of Article VI Section 22 of the 1946 Convention in the specific circumstances of the case. More specifically, the Court dealt with the question of whether the words spoken by the SRIJL during the interview published in the 1995 November issue of International Litigation were used in the course of performing his mission as SR of the UN CHR, and whether he was, therefore, immune from legal process in respect to these words¹³². In this regard the Court conclusively held that Mr. Cumaraswamy, in speaking the words quoted in the interview in question, did act in the course of the performance of his tasks as UN SR¹³³. Consequently, Article VI Section 22 (b) applied to him and afforded him immunity from legal process of any kind¹³⁴. The Court came to these conclusions observing, first, that in the article itself Mr. Cumaraswamy was specifically mentioned as the CHR's SRIJL¹³⁵, and remarking that «it has become standard practice of SRs to have contacts with the media»¹³⁶.

With regard to the Malaysian obligations, the Court pointed out that such a question arose because of the government's failure to promptly inform the competent Malaysian judicial

¹²⁴ ICJ Reports (1989), at 194, paragraph 47.

¹²⁵ *Ibidem*.

¹²⁶ *Ibidem*.

¹²⁷ *Ibidem*.

¹²⁸ *Supra note 20*, at 17, paragraph 43.

¹²⁹ It is the date of the appointment of the SR.

¹³⁰ *Supra note 20*, at 17, paragraph 45. The Conclusion was adopted by 14 votes to one. See *supra note 20*, at 21, paragraph 67.

¹³¹ *Ibidem*, at 17, paragraph 46.

¹³² *Supra note 20*, at 18, paragraph 47.

¹³³ *Ibidem*, at 9, paragraph 56.

¹³⁴ The Conclusion was adopted by 14 votes against one. *Supra note 20*, at 21-22, paragraph 67.

¹³⁵ The Court also refers to the former High Commissioner for Human Rights' letter dated 20 October 1998 in which Mrs. Robinson maintained 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». *Supra note 20*, at 19, paragraph 53.

¹³⁶ *Ibidem*.

authorities of the findings of the SG that Mr Kumaraswamy spoke during the fulfillment of his mission as a UN SR and that was, therefore, entitled to immunity from legal process¹³⁷. The Court concluded, then, that «Malaysia [had] the obligation [under Article 105 of the UN Charter and Article 30 of the 1946 UN Convention] to inform the Malaysian Courts of the position taken by the SG¹³⁸».

This further implied that the Malaysian courts had the legal obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided in *limite litis*¹³⁹. Furthermore, the SR should not have been liable for any costs imposed upon him by Malaysian Courts, in particular taxed costs¹⁴⁰.

Malaysia fulfilled its legal obligation in June 2001¹⁴¹.

2.3. CONCLUSIONS

The Court Advisory Opinion provides decisive elements to define the international status of SPs.

Indeed, it contains a detailed and comprehensive legal analysis of the status of SRs, its legal implication, and the obligations upon UN member states flowing from it.

Thus, as it appears from the reasoning and conclusions of the Court SRs, and consequently, members of WGs must be considered as *Experts on mission for the UN* for they have been entrusted by the Commission with *in situ* visits. By virtue of such a status they enjoy the immunities and privileges contained in Article VI section 22 of the 1946 Convention. Such immunities and privileges are provided for guaranteeing the independent fulfillment of their functions.

Finally, UN member states, who from the very moment of the appointment of SRs and members of WGs acknowledge their status of *Experts on Mission*, are under an obligation to accord them the above immunities and privileges regardless of the fact that the international experts are nationals or residents on their territory.

3. The Mandate

The third integral element of SPs is their mandate, namely, the legal formulation of both the tasks the Procedures are charged with and the authorization to carry them out. Such a formulation is enshrined in the CHR's Resolutions establishing SPs.

In this respect it is important to note that the Commission's competence is not confined to the determination of SP's terms of reference. In fact, the UN body may decide to enlarge the mandate, to change its nature, or to put an end to it¹⁴². Usually, such decisions reflect the evolution of the human rights situations the experts are dealing with. Thus, the enlargement of the mandate, entailing for instance a more comprehensive and broader monitoring activity, will correspond to a worsening of the situation or to the acknowledgement that the situation calls for further action.

Yet, a change in terms of requiring, for instance, the expert to provide states with technical assistance or advisory service will indicate that the Countries have been improving their human rights performance, that the Commission welcomes such development and changes its attitude from conflictive into cooperative.

Finally, the CHR may put an end to SPs when it recognizes that a given phenomenon of human rights violations or a certain Country situation does not require any further monitoring activity. However, the end of a Procedure is not necessarily sanctioned in a CHR's decision¹⁴³.

In order to accomplish a comprehensive examination of SPs' terms of reference the following two paragraphs turn to two separate analyses of the subject-matter of Country and Theme mandates. In particular, following a chronological criteria the section will start examining the mandate of Country SRs as they were the first Procedure created by the Commission. This section will first focus on the subject matter of the mandates and then on the functions to be carried out by the experts, both Country and Theme.

¹³⁷ *Ibidem*, at paragraph 59.

¹³⁸ *Ibidem*, at 13, paragraph 67.

¹³⁹ *Ibidem*, at 14, paragraph 67.

¹⁴⁰ *Ibidem*. Such a conclusion was adopted unanimously.

¹⁴¹ See the 2002 Report of the SR E/CN.4/2002/72, paragraph 122.

¹⁴² BOSSUYT M., «The Development of Special Procedures of the United Nations Commission on Human Rights», in *Human Rights Law Journal*, vol. 6, at 204.

¹⁴³ *Ibidem*, at 205.

3.1. THE SUBJECT MATTER OF COUNTRY MANDATES

The CHR's Resolutions appointing Country procedures show two significant characteristics: they synthesize the several political views of the Commission's member states in respect to a given human rights situation, and more importantly, are fashioned upon the situation under scrutiny.

It follows, then, that the CHR determines the *ratione materiae* of Country mandates according to the circumstances which occurred or are coming about within the boundaries of the target state. The UN body's practice allows the identification of four «categories» of situations within the context of which the human rights violations the experts are mandated to monitor occur.

They are:

- a) illegal occupation. That is, situations amounting to a breach of Article 2.4 of the UN Charter;
- b) internal armed conflicts;
- c) «situation of transition», including post-conflict situations;
- d) «Normal situations», that is, situations in which the root causes of gross human rights violations are to be ascribed to factors which are intrinsic in the policy and culture of a state.

In respect to the situations under item a, SRs are usually requested to investigate allegations made against the party that carried out the occupation. At present there is one Rapporteur that investigates a situations under item a: the SR on the Occupied Arab Territories who is mandated to investigate Israel's breaches of human rights and humanitarian law in the Arab territories occupied in 1968¹⁴⁴.

When Country Rapporteurs are mandated to deal with human rights situations classifiable under items b, c, d, the subject matter of their monitoring activity is quite broad and covers the overall human rights situation in the countries in question. This implies that no specific rights are given priority: the monitoring activity includes civil and political rights, economic social and cultural rights, women's rights. SRs that monitor situations under item b are requested also to deal with breaches of humanitarian Law¹⁴⁵.

SRs dealing with situations under item b are the expert on the Former Zaire¹⁴⁶, and the SR on Sudan¹⁴⁷. On the other hand, the expert on Burundi¹⁴⁸ and the SR on Afghanistan¹⁴⁹ deal with situations classifiable under item c, while the SR on Chad¹⁵⁰, the SR on Myanmar¹⁵¹ the SR on Belarus¹⁵², and the SR on the Democratic Republic of Korea¹⁵³ focus on situations under item d.

In addition, Country mandates do not contain an express *ratione temporis* regarding possible considerations of past events. Generally, Country SRs do refer and go back to past events in order to provide the CHR with a better understanding of the situation they have to examine. They deal with them in the introductory sections of their reports in which they sketch out the political, economic and historical background of the target Country¹⁵⁴. As far as the monitoring activity is concerned, the experts focus on the most recent events which sparked off the perpetration of grave human rights violations¹⁵⁵, and which usually go back to no more than one year prior to their appointment¹⁵⁶. The sole exception is the SR on Arab territories¹⁵⁷.

¹⁴⁴ CHR Resolution 1993/2 A paragraph 3 (a).

¹⁴⁵ See for instance the report of the SR on Sudan, E/CN.4/2004/3 and E/CN.4/2005/6.

¹⁴⁶ CHR Resolution 1994/87.

¹⁴⁷ CHR Resolution 1994/79.

¹⁴⁸ CHR Resolution 1995/90.

¹⁴⁹ CHR Resolution 1994/55.

¹⁵⁰ CHR Resolution 2004/85.

¹⁵¹ See CHR Resolution 1992/58 and E/CN.4/2000/38.

¹⁵² CHR resolution 2003/77.

¹⁵³ CHR Resolution 2004/13.

¹⁵⁴ See for instance the following reports of the SR on Sudan, the SR

on Afghanistan, the SR on former Zaire, and the SR on Burundi: E/CN.4/2001/48, E/CN.4/2001/43, E/CN.4/2001/41, E/CN.4/2001/44.

¹⁵⁵ Significantly, the SR on Rwanda was also mandated to investigate the «root causes and responsibilities for the recent atrocities [occurred in the African state]». See CHR Resolution S-3/3.

¹⁵⁶ See for instance the mandate of the SR on the former Yugoslavia, CHR Resolution S-1/1, and the mandates of the SR on Rwanda, the SR on Burundi, *supra notes* 76 and 69.

¹⁵⁷ The Procedure was created in 1972 as a Working Group. In 1993 the CHR transformed it into a SR. However such changed did not affect the mandate of the procedure which is still monitoring a situation going back to 1968.

3.2. THE SUBJECT MATTER OF THEME MANDATES

As seen¹⁵⁸, the subject matter of Theme mandates are phenomena which entail systematic violations of certain fundamental rights, i.e., the practice of enforced or involuntary disappearances¹⁵⁹, extra-legal summary and arbitrary executions¹⁶⁰, torture¹⁶¹, threats to the independence of the judiciary¹⁶², racial discrimination and related intolerance¹⁶³, the use of mercenaries¹⁶⁴, religious intolerance¹⁶⁵, the situation of migrant workers¹⁶⁶, arbitrary detention¹⁶⁷, violence against women¹⁶⁸, sale and prostitution of children¹⁶⁹, extreme poverty¹⁷⁰, the situation of Indigenous People¹⁷¹, and the Protection of People of African descent¹⁷², the trafficking of persons¹⁷³.

Furthermore, since the second half of the nineties the CHR started to appoint SRs on Economic Social and Cultural rights (ESCR). The challenge is to pave the way to the monitoring of states' implementation of these rights. The rights that are subject of the Commission' activity are the following: the right to education¹⁷⁴, the right to food¹⁷⁵, the right to adequate housing and the right to the highest attainable standard of physical and mental health¹⁷⁶.

Generally, Thematic Rapporteurs carry out their monitoring activity focusing on four specific aspects of the phenomena:

- a) the causes and factors which determine the dynamic of the phenomena;

- b) the overall Country situations in which the phenomena occur;
- c) the legal analysis of the breaches of International Human Rights Law occurring within the context of the phenomena;
- d) Individual cases.

The *ratione temporis* of thematic mandates is not mentioned in the CHR's Resolutions: they simply require the examination of a given phenomenon¹⁷⁷. As suggested by the thematic reports, SRs and WGs usually tackle events contemporary to their appointment¹⁷⁸. Only the Working Group on Disappearances (WGD) has considered cases dating back to the 1970s and the early 1980s¹⁷⁹.

However, this is not to say that thematic SRs are prevented from considering older cases and events relating to the phenomena they have to study.

3.3. THE TASKS OF COUNTRY AND THEME SPECIAL PROCEDURES

The main components of Country and Theme mandates are the fact-finding task and the reporting function, that also includes the formulation of recommendations on how to improve Country situations.

As far as the former is concerned it has to be noticed that the CHR has formulated it with different wording and terminology. Thus, Country and Theme Rapporteurs have been authorized «to examine»¹⁸⁰, «to investigate»¹⁸¹, «to monitor»¹⁸², «to stu-

¹⁵⁸ See paragraph 2 of the introductory section of this study.

¹⁵⁹ *Supra* note 12.

¹⁶⁰ *Ibidem*.

¹⁶¹ *Ibidem*.

¹⁶² *Supra* note 22.

¹⁶³ CHR Resolution 1993/20.

¹⁶⁴ CHR Resolution 1987/16.

¹⁶⁵ CHR Resolution 1986/20.

¹⁶⁶ CHR Resolution 1994/42.

¹⁶⁷ CHR Resolution 1991/42.

¹⁶⁸ CHR Resolution 1993/18.

¹⁶⁹ CHR Resolution 1990/68.

¹⁷⁰ CHR Resolution 1998/25.

¹⁷¹ CHR Resolution 2001/57.

¹⁷² CHR Resolution 2002/68.

¹⁷³ CHR Resolution 2004/10.

¹⁷⁴ CHR Resolution 1998/33.

¹⁷⁵ CHR Resolution 2000/10.

¹⁷⁶ Respectively: CHR Resolution 2000/9 and CHR Resolution 2002/31.

¹⁷⁷ See the Resolutions mentioned *supra* notes 80-97.

¹⁷⁸ See the reports of the Working Group on Arbitrary Detention, the SR on the Sale of Children, the Working Group on Disappearances, the SR on Summary and Arbitrary Executions, the SR on Torture, the SR on Education, and the SR on Migrant Workers: E/CN.4/2001/14, E/CN.4/2001/78, E/CN.4/2001/68, E/CN.4/2001/9, E/CN.4/2001/66, E/CN.4.2001/52, E/CN.4/2001/83.

¹⁷⁹ See E/CN.4/1998/43. The cases regarded Disappearances in Chile and Argentina.

¹⁸⁰ See the mandate of the SR on Myanmar, *supra* note 72. See also the terms of reference of the Working Group on Disappearances, the SR on Extra-legal Summary and Arbitrary Executions, the SR on Torture, *supra* note 12.

¹⁸¹ See the mandates of the SR on Arab Territories and the SR on Sudan, respectively, *supra* note 65 and 68. See also the mandate of the Working Group on Arbitrary Detention, *supra* note 12.

¹⁸² See the mandate of the SR on Toxic Waste, CHR Resolution 1995/81.

dy»¹⁸³, or «to evaluate»¹⁸⁴ human rights country situations and phenomena; others «to gather information»¹⁸⁵ or «to draw up reports»¹⁸⁶ on them; others «to focus»¹⁸⁷ or «to report» on the status of a particular right¹⁸⁸. Despite the different terminology such tasks have been primarily meant as fact-finding functions. That is, gathering information relating to particularly worrying human rights Country situations or phenomena in order to identify the alleged breaches of international human rights law norms, and analyze them.

The fact-finding function has been carried out through a basic sub-task: the traditional UN method of receipt of information on human rights violations occurring in a given Country or a human rights phenomenon. The information is submitted by a wide range of sources¹⁸⁹. In fact, SPs receive information by anyone, notwithstanding, CHR's Resolutions, sometimes, restrict potential providers of information¹⁹⁰. The range of sources is, thus, quite wide and includes individuals and groups (the victim/s, the family/ies of the victim/s, eyewitnesses, lawyers), Organizations (International and local NGOs, local human rights associations, IGOs), Governments.

Usually the information on human rights violations is sent to the UN Secretariat which then forwards it to the office of the SR responsible. The latter will analyze it and send it to the government concerned for clarification. The government will submit further information that the expert will examine in light of both the complaints sent by the primary source and the international human rights standards. The results of the analysis of the information (both governmental and non-governmental) received by the SRs are summarized in a report which is submitted to the Commission at its annual session.

The reporting function is the second task provided for in the Resolutions appointing theme procedures: it gives sense and

meaning to the fact-finding activity of Country and Theme Rapporteurs.

Country reports focus on an introductory description of the social, the economical and historical situation of the Country under scrutiny, the analysis of the human rights situation, and the identification of breaches of human rights norms. Theme reports, on the other hand, usually contain an introduction to the mandate and methodology of work of the experts; sketch the features and dynamics of the phenomena; reproduce the number of allegations received, their legal analysis, the cases transmitted to each government, the name of the countries which furnished further information; and make conclusions on the occurrence of human rights violations.

Most importantly, theme and country reports contain recommendations addressed both to the target state and the UN CHR. Recommendations at the national level indicate the measures to be adopted and implemented by the state to appropriately redress human rights violations, while those at the UN level suggest further actions the CHR should undertake vis-à-vis human rights Country situations/phenomena under examination. The reporting activity is, then, paramount because of the impact SPs' reports may have on the Commission's future strategy in respect to a given phenomenon of human rights violations or Country situation. Indeed, SPs' reports may actually trigger further action by the Commission, this action being contingent upon the approach adopted by the UN experts in the reports themselves. In fact, as professor Alston noticed, if the reports contain extensive conclusions and recommendations, as is usually the case, the CHR will not be able to tackle human rights Country situations and phenomena in a way that significantly differs from that indicated by the SPs¹⁹¹. In other words, SPs' reporting activity may determine the CHR's approach in dealing with serious and worrying human rights questions.

¹⁸³ See the Resolutions appointing the SR on Mercenaries, *supra* note 85, and the Independent Expert on Development, *supra* note 5.

¹⁸⁴ See the mandate of the SR on Poverty, *supra* note 91.

¹⁸⁵ See the mandate of the SR on Freedom of Expression, CHR Resolution 1995/40, and the Resolution appointing the SR on former Zaire, *supra* note 67, paragraph 8.

¹⁸⁶ *Supra* note 69.

¹⁸⁷ See the mandate of the Independent Expert on Development, *supra* note 5.

¹⁸⁸ See the Resolution appointing the SR on Education, *supra* note 95, paragraph 6 (a).

¹⁸⁹ ZUIDWIJK T., *Petitioning the UN. A Study in Human Rights*, 1982, at xi.

¹⁹⁰ See for instance the Resolution appointing the SR on Sudan, *Supra* note 68, paragraph 3: it does not mention NGOs, but only political leaders, governments, the victims, their families and their lawyers.

¹⁹¹ ALSTON, *supra* note 14, at 171.

Interestingly, in some cases reports are not only submitted to SPs' parent body, but also to the General Assembly. Thus, the SR on Myanmar¹⁹², the SR on Sudan¹⁹³, the SR on Torture, the WGD, the Working Group on Arbitrary Detention, the SR on Religious Intolerance and the SR on Racial Discrimination¹⁹⁴ are requested to present *interim* reports to the GA. On the other hand, the SR on Education, the Expert on Poverty and the SR on Violence against Women report to the Commission on the Status of Women¹⁹⁵.

3.4. THE INTRODUCTION OF *IN SITU* VISITS AND THE URGENT MESSAGES PROCEDURE: A TURNING POINT IN THE SYSTEM OF SPECIAL PROCEDURES

There are two further work techniques which deserve special attention. They were introduced by the Working Group on Disappearance (WGD) and had a big impact on the overall system of SPs. In fact, they were adopted informally by the Theme and Country procedures created right after the WGD and included by the UN CHR in the Resolutions creating theme mechanisms from the early nineties onwards¹⁹⁶.

They are the *in situ* visits and the Urgent Messages Procedure (UMP).

The visits on the spots¹⁹⁷ were developed as a consequence of the WGD's establishment of «direct contacts» with governments during meetings with their representatives in Geneva¹⁹⁸. Actually, the meetings, initially aimed at paving the way to an exchange of information on cases of disappearances with the states concerned, led the experts to explore the possibility to undertake missions within the territory of these states and even to solicit the visits formally¹⁹⁹.

As showed by the WGD's reports on its first visits on the spot, such new work technique enabled the experts to enhance the dialogue between, on the one hand, the government autho-

rities, and the families or the legal representative of the victims, and local groups, on the other hand²⁰⁰.

The state to visit is usually selected in the light of the number and gravity of the allegations, reports of NGOs which clarify the range of the phenomenon, the absence of adequate responses by the government, recurring contradictions between the information received by the sources and that sent by the government.

Typically, visits are carried out by the SRs themselves and their respective assistants, or in the case of Theme Working Groups by two or three members of the Groups accompanied by one or two assistants (Secretariat staff members)²⁰¹. SPs, usually, travel on one or two missions in the target areas every year²⁰².

The primary objective of *in situ* visits is to gather «first-hand» information by interviewing government officials, victims of human rights violations and their families, NGOs members; visiting population centers, detention centers, and refugees camps. The findings resulting from the visits are summarized in special reports called *addendum* reports. In this respect it is noteworthy that SPs have even started to carry out «follow-up» visits, within a reasonable period of time, after the first mission in order to verify whether the government implemented the recommendations made in the *addendum* report.

The WGD invented a further, arguably, more revolutionary and innovative technique. That is, the UMP. It was implicitly deduced from the wording of the Resolution creating the Working Group itself²⁰³, which required the experts to perform their functions in an «effective and expeditious manner» and «to respond effectively to information [coming] before them»²⁰⁴.

Such technique was subsequently adopted by all Theme and Country SRs and sanctioned in most of the CHR's Resolutions on theme mandates. It basically enables SPs to react promptly to

¹⁹² *Supra* note 72.

¹⁹³ *Supra* note 68.

¹⁹⁴ *Supra* notes 12, 86 and 84.

¹⁹⁵ The Expert on Poverty reports also to the Commission on Social Development, *supra* note 91.

¹⁹⁶ RODLEY, *supra* note 15, at 720 and 724.

¹⁹⁷ *Ibidem*.

¹⁹⁸ See the Resolution appointing the Working Group on Disappearances, *supra* note 12.

¹⁹⁹ E/CN.4/1435, Annex VIII.

²⁰⁰ E/CN.4/1996/3 paragraph 23.

²⁰¹ KENNY K., «Formal and Informal Innovations in the United Nations Protection of Human Rights: The Special Rapporteur on the Former Yugoslavia», in *Austrian Journal of Public International Law*, vol. 48, 1995, at 44.

²⁰² *Ibidem*.

²⁰³ *Supra* note 12.

²⁰⁴ E/CN.4/1435 paragraph 30.

particularly urgent reports highlighting cases that require immediate action²⁰⁵. More specifically, the procedure is initiated in those cases in which there are sufficiently reliable allegations testifying that:

- a) a person has been subjected to a violation of the rights monitored by the experts;
- b) the continuation of such violation brings about a serious danger to the person's health or life²⁰⁶.

Thus, in these cases the experts fax an urgent appeal to the fastest-moving governmental channel of communication, namely, the Minister of Foreign Affairs of the state concerned, urging the government to take immediately the appropriate measures to ensure to the individual his/her right to life, and/or physical and mental integrity. As stressed by the SR on Torture²⁰⁷ and confirmed in the reports of all Theme SPs' reports²⁰⁸, the urgent messages have a merely humanitarian character: they are not accusatory but preventive in nature and purpose. This implies that it is the SR who has to assess whether there are reasonable grounds to believe that the person's life or health are at risk. Such an evaluation is carried out in light of a precise analysis of the reliability of the sources of information, or a study of the existent legislation of the Country concerned such as, for instance, that which permits «practices» that facilitate violations of the rights monitored by the experts²⁰⁹. The urgent messages technique presents the higher rate of government response and clarification, namely, the 25% against the 7% of the ordinary fact-finding method analyzed at paragraph 3.3. Thus, focusing on individual cases Theme SPs do «the most concrete work of the Commission on Human Rights in protecting human rights in specific cases by saving lives, stopping torture, resolving disappearances...»²¹⁰.

Furthermore, as Professor Rodley pointed out, the UN mechanisms «constitute one of the closest things possible in the present state of international organisation to *Habeas Corpus*»²¹¹.

4. *The Contribution of Special Procedures to the Development of International Human Rights Law*

SPs carry out another significant task. Generally speaking, it concerns their contribution to the development of International Human Rights Law.

Such function is performed in three ways. That is, monitoring the implementation of human rights soft law instruments²¹², advocating for the drafting of new human rights Conventions and participating in such drafting process and providing a decisive contribution²¹³, and enlarging the scope of human rights rules with authoritative interpretations²¹⁴.

In this last respect it is noteworthy that when such interpretations are mentioned and shared by the CHR's member States in their statements, or re-affirmed by the CHR itself in its Resolutions, they coincide to States' *opinio iuris* on the ambit of application of human rights norms. This is especially significant in the case of SRs on ESCRs. In fact, the experts are paving the way to the implementation of ESCRs starting from the interpretation of the scope itself of these rights, given their broad formulation in the Covenant on ESCRs. Therefore, the above SRs are playing a key role in contributing to states's *opinio iuris* concerning the «most sensitive and neglected» human rights.

²⁰⁵ *Ibidem*.

²⁰⁶ See the report of the SR on Torture E/CN.4/1992/17, paragraph 14.

²⁰⁷ E/CN.4/1994/31, paragraph 6.

²⁰⁸ *Supra note 99*.

²⁰⁹ It is the case of legislation allowing *Incommunicado* detentions, the origin of systematic torture and arbitrary detention.

²¹⁰ WEISSBRODT D. & BRODY R., «Major Developments at the 1988 Session of the United Nations Commission on Human Rights», in *Human Rights Quarterly*, vol. 11, 1986, at 586.

²¹¹ RODLEY, *supra note 15*, at 700.

²¹² For instance, the WGD was mandated to monitor states' compliance with the Declaration on Enforced Disappearances. See in this respect

CHR Resolution 1993/95, and Resolution 1993/34 and the 1997 report of the experts: E/CN.4/1998/43. Also the SR on Extreme Poverty monitors governments' implementation of the Declaration on Extreme Poverty. See *supra note 92*.

²¹³ It is symptomatic that the WGD has been involved in the drafting of the Convention on Enforced Disappearances: E/CN.4/1998/43.

²¹⁴ See in this respect the SR on Torture's view on corporal punishment in E/CN.4/1997/3, paragraphs 3-11, and the SR on the Sale of Children's definition of the traffic of children: E/CN.4/1999/7, paragraphs 29-47.

5. *The Role of the State*

The last constituent element of SPs to be analyzed is the role of the target state in respect to the SRs' activity. The appropriateness of such an analysis lies in the fact that the consent of the state is the essential requisite for carrying out missions on the spot, the pivotal fact-finding tool of UN SPs.

In this sense, the state's consent is the corollary of the principle of non-intervention of the UN in the internal affairs of member states as sanctioned in Article 2.7 of the Charter. In fact, given that on-site visits place a significant *intrusion* of the UN within the boundaries of the member state, they would amount to an infringement of state' sovereignty and of Article 2.7 in the case in which the state concerned does not consent to them.

States are not obliged by Public International Law to give their consent to *in situ* visits, and the CHR, in turn, does not have the necessary legal powers to make such missions mandatory. The very least that the UN body can do in this respect is to urge the states to invite SRs²¹⁵. Nevertheless, the CHR's practice testifies that the majority of member states consent to the visits.

The reason behind that can be traced back to political calculation that takes «account of all the relevant circumstances as to the relative costs of the co-operation *v.* non co-operation»²¹⁶. Thus, as the costs of the latter are continuously increasing with a detrimental effect on states' international reputation, the governments tend to allow the visits. Eventually, they lobby behind the scenes to avoid them, or try to defend themselves within the Commission by rebutting negative Country reports based on the visits²¹⁷.

State' consent should also imply governmental co-operation. That is, providing the experts with further information, allowing them to visit detention centers, reacting to Urgent Messages, implementing SPs' recommendations, permitting follow-up visits.

In certain cases such co-operation may be lacking. The implication of such gap is very serious: it strongly limits the scope and effectiveness of SPs' activity.

6. *Conclusions*

It is possible, at this point in the analysis, to give a positive answer to the first question of this study. Indeed, there are some constitutive elements of the SPs: they are contained in the Resolutions appointing the experts and in the ICJ's Advisory Opinion on the «Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights».

The first constitutive element of SPs is enshrined in the CHR's Resolutions. It is given by the *personal qualifications required* of the individuals that will be designated as SRs or members of WGs. These qualifications entail a soundly reputed expertise in the field of human rights and a recognized international standing and are meant to ensure a skillful and unswerving fulfillment of SPs tasks. As seen, it may be safely maintained that, currently, the appointment of international human rights law professors, lawyers and, significantly, former/current members of NGOs (both international and local ones) as SPs lives up to the above professional imperatives and also guarantees a more independent and impartial implementation of the Procedures' mandate.

The second constituent element has been authoritatively elaborated by the ICJ in the above Advisory Opinion. Namely, the international status of SPs as *Experts on Mission for the UN* which bestows to UN SRS and members of WGs all the immunities and privileges sanctioned by Article VI of Section 22 of the 1946 Convention on the privileges and immunities of the UN. Among the immunities an expert on Mission enjoys there is absolute immunity from «...*legal process of any kind*»²¹⁸ vis-à-vis acts done and words spoken or written while performing their mission. Indeed, a powerful tool to avoid dangerous intrusions in SPs' activity by the CHR's member States.

The third structural element of the Procedures is again enshrined in the Resolutions creating them: the mandate.

There are two kinds of mandates: Country mandates, which typically request the SRs to tackle human rights violations occurring within States; and Theme mandates authorizing the experts to focus on human rights phenomena.

²¹⁵ CHR Resolution 1994/44.

²¹⁶ ALSTON, *supra* note 14, at 171.

²¹⁷ *Ibidem*.

²¹⁸ Article VI of the 1946 Convention on the Immunities and privileges of the UN.

The tasks envisaged in both Theme and Country mandates are the fact-finding and reporting functions, the on-site visits and the UMP.

As seen, the fact-finding involves the reception and analysis of communications sent by a wide range of sources alleging human rights violations; the transmittal of these communications to the government concerned for further clarification and the undertaking a cross-examination between the new information furnished by the target Country and that forwarded by the primary source. The reporting function, consisting of an accurate summary of the results of the fact-finding activity, holds the true meaning of the fact-finding itself. The reports provide the CHR with fundamental information and data which may determine the UN body's further actions and overall strategy. The on-site visits and the UMP constitute two key work methods that have contributed to enhance, respectively, the mechanisms' fact-finding and approach to very urgent individual cases.

Finally, the limit to SPs' activity represented by the CHR's member states' consent to the experts' visits on the spot should not be forgotten. Such consent is the *conditio sine qua non* for carrying out these visits. In this sense, State consent is a structural element of the Procedures, although not set forth in the Commission's Resolutions.

Section II

Introduction

This section goes a step further than the previous one and provides new elements to infer a conceptual definition of SPs. In fact, while Section I focused on a thorough analysis of the CHR's Resolutions establishing Special Procedures (SPs), this Section will attempt to analyze the practice of some SPs. Such an analysis is, indeed, fundamental to the understanding of how the system of SPs developed, and consequently to answer the second and third question addressed in the introduction of this study. Namely, the questions of the distinguishing features of the activity of SPs and its significance in terms of human rights protection and monitoring.

Thus, in order to tackle the above question this study will deal with the first three Theme Procedures created by the CHR,

that is, the Working Group on Enforced Disappearances (WGD), the Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions (SRESAEs), the Special Rapporteur on Torture (SRT). Indeed, the above procedures played a key role in respect to the setting up of the ECOSOC' subsidiary body's human rights machinery by defining its subject matter and work methods. In particular, it was the way in which the experts interpreted the terms of reference formulated by the CHR to model SPs' way of implementing their mandate and bring about the maturation of the system of SPs as a true *human rights protection and monitoring system*.

The interpretative exercise of the experts raises some crucial questions. How did they actually interpret their mandate? What did such an interpretation bring about in the fulfillment of the tasks the Commission entrusted to them? What are the implications, if any, on the practice of the Theme Procedures subsequently created in the nineties? Were there implications on the practice of Country Special Rapporteurs (SRs)?

In order to answer the above questions this chapter will follow a special analytical pattern. It will deal with the first two questions analyzing the practice of the first three Theme procedures established by the CHR. To tackle the third question, the Working Group on Arbitrary Detention (WGAD) will come under scrutiny. The examination of the practice of the Special Rapporteur on Congo/former Zaire (SRC) and the SR on the former Yugoslavia (SRFY) will be key in answering the fourth question. The SRC, which scholars have not yet analyzed, is especially relevant because it identifies what precedents may or not have been set by the first Theme procedures in the development of Country SRs. On the other hand, the SRFY's practice must, also, be taken into account, although the CHR recently terminated the Procedure's mandate. This is because in certain respects the SR consolidated the innovative practice of the first three Theme procedures, and further, has brought new work techniques to SPs' way of implementing their mandate. Importantly, these novelties can be considered as the latest noteworthy developments in the UN SRs' practice.

From a methodological point of view, the analysis of the practice of the CHR's Procedures will first entail a brief overview of their legislative history followed by an examination of the way the experts interpreted their mandates, and the working methods singled out to implement them. The examination will focus on how the experts meant the scope of their mandates

and the range of sources from which they were authorized to receive information on human rights abuses; the singling out of work methods to deal with such information; the introduction of special working techniques such as on-site visits and the Urgent Messages Procedure (UMP). The analysis of the SRFY will put emphasis on two innovative fact-finding techniques introduced by the expert. Special attention will be also given to the reporting function.

1. *The Working Group on Disappearances (WGD)*

The practice of Disappearances was brought to the attention of the UN General Assembly (GA) at the end of the seventies, in the wake of Amnesty International's denunciations of the human rights situation in Chile after the 1973 *coup*. In 1978, the GA decided to request the CHR to deal with the question of Disappearances²¹⁹. Thus, the CHR, first, authorized a study on the matter by the Sub-Commission on the Promotion and Protection of Human Rights in Spring 1979²²⁰, and subsequently established the Working Group on Disappearances as provided by its Resolution 20 (XXXVI)²²¹ in 1980.

The WGD was composed of five experts designated by the Commission's Chairman on the basis of the principle of equitable geographical distribution²²². The UN body gave the experts the authority «to examine questions relevant to enforced or involuntary Disappearances»; to seek and receive information on the matter from governments, inter-governmental organizations (IGOs), NGOs with a consultative status with the ECOSOC,

humanitarian organizations and other reliable sources; to bear in mind the need to be able to respond effectively and expeditiously to information that would have come before them in order to prevent the occurrence of Disappearances, and to carry out their work with discretion²²³. Finally, the Group was required to report to the CHR during its next session²²⁴.

The mandate of the Group was then renewed in 1981: the experts were reminded «to discharge [their] mandate with discretion», and requested «to protect persons providing information»²²⁵.

Then, in 1982 and 1983 the mandate was renewed without significant changes: the Commission expressed «complete confidence» in the Group²²⁶.

A break-through was sanctioned in 1984, when for the first time, the CHR requested the experts to contribute to «eliminate the practice of enforced or involuntary Disappearances» and even encouraged governments to consent to on-site visits by the Group²²⁷. (See paragraph 1.4).

During the nineties and early 2000, the Commission entrusted the experts with the examination of some questions and human rights phenomena that had implications on the mandate of the Group. For instance, the experts were requested to take into account cases of children of disappeared parents, and to cooperate with the governments concerned in order to clarify the fate and whereabouts of these children²²⁸. Also, they were requested to pay particular attention to the situation of persons detained, subjected to violence, ill-treated or discriminated against for having exercised the right to freedom of expression and opinion²²⁹.

²¹⁹ GA Resolution 33/173.

²²⁰ CHR Resolution 1979/38.

²²¹ For the legislative history of the Resolution see RODLEY N., *The Treatment of Prisoners Under International Law*, 1999, at 249-254.

²²² The Group is composed by Mr. Diego Garcia-Sayan (Peru), Mr. Joel Adebayo Adekanye (Nigeria), Mr. Ivan Tosevski (The former Yugoslav Republic of Macedonia), Mr. Tan Sri Dato Anwar Zainal Abidin (Malaysia), Mr. Stephen J. Toope (Canada).

²²³ Resolution 20 (XXXVI), at 180-181.

²²⁴ *Ibidem*.

²²⁵ See CHR Resolution 10 (XXXVIII), and E /CN.4/1475 at 209-210 (1981).

²²⁶ CHR Resolution 1982/24, CHR Resolution 1983/20.

²²⁷ CHR Resolution 1984/24. See also the most recent CHR Resolutions concerning the Working Group's mandate: Resolution 1994/45, Reso-

lution 1994/46, Resolution 1994/67, Resolution 1994/68, Resolution 1994/69, Resolution 1994/70, Resolution 1995/40, Resolution 1995/43, Resolution 1995/53, Resolution 1995/57, Resolution 1995/75, Resolution 1995/790, Resolution E/CN.4/1999/39, Resolution E/CN.4/ 1997/26, Resolution E/CN.4/1998/40, Resolution E/CN.4/1999/38, Resolution E/CN.4/2000/37. For further recent details on the mandate of the WGD visit the website www.unhchr.ch.

²²⁸ CHR Resolution 1995/38.

²²⁹ As testified by the communications forwarded to the Group, the exercise of these rights might have been at the origin of cases of disappearances the experts dealt with. See in this respect CHR Resolution 1995/40.

In addition, the Group was requested to address the consequences of the acts, methods and practice of terrorists groups²³⁰, to provide information on situations which might have lead to internal displacement and to report thereon²³¹, to deal with the plight of street children²³², to adopt a gender-related approach to its mandate²³³.

The most noteworthy task entrusted to the Group concerns the monitoring of states' compliance to the Declaration on the Protection of All Persons from Enforced Disappearances²³⁴. Given the relevance of such task and the innovative way in which the Group carried it out, this chapter will deal with it in paragraph 1.6.

1.1. THE SCOPE OF THE MANDATE

The WGD's attitude towards the scope of the subject matter of its mandate is the starting point of the analysis of the practice of the human rights mechanism.

Initially, the Working Group did not put forward a «working» definition of disappearances. This is because the experts came across situations in which they had to make *ad hoc* decisions in order to determine what category of cases fell within the phenomenon of missing persons and what did not²³⁵.

Nevertheless, the practice of the UN experts did bear a clear legal definition of disappeared persons.

In fact, from the very beginning of its analysis of cases of missing persons, the Group was able to deduce the three main elements that make up the phenomenon of Disappearances²³⁶. The first component regards the «sinister position» of the missing person. That is, the person is arrested, detained or abducted against his/her will or otherwise deprived of his/her liberty by officials of different branches or levels of Government. The

second element relates to the government's attitude towards the missing person. In other words, typically, the government refuses to disclose the fate and whereabouts of the person concerned, or to acknowledge the deprivation of his/her liberty. The third element is given by the cumulative effect of the previous ones: the deprivation of liberty of the individual and the government's conduct place the person outside the protection of law. Therefore, on the basis of the above elements the Group acknowledged the hallmark of the phenomenon of disappearances. That is, the fact that the capture and detention of an individual remain unacknowledged by the official authorities whose agents have been directly or indirectly responsible for it²³⁷.

Remarkably, such a working-definition of disappearances has been subsequently mirrored in the UN Declaration on Enforced Disappearances²³⁸.

Significantly, the Group, also, identified the «main human rights» which are infringed by the phenomenon of disappearances: the experts established a sort of hierarchy among such rights according to the degree of seriousness of the consequences brought about by the disappearance of the individual²³⁹. In fact, the Group found out that in certain cases missing persons were detained for a given lapse of time during which they were subjected to torture, while in other cases the individuals were not only tortured but also killed²⁴⁰.

On these premises, the Group identified three fundamental rights infringed by the practice of disappearances:

- a) the right to liberty and security of the person;
- b) the right to human conditions of detention and freedom from torture, cruel or degrading treatment or punishment;
- c) the right to life.

analysis of the definition of disappearances see RODLEY, *supra note 3*, Chapter 8, at 243-248.

²³⁸ *Supra note 16*.

²³⁹ E/CN.4/1435 paragraph. 184, and RODLEY, *supra note 3*, at 255-264.

²⁴⁰ *Ibidem*, paragraph 4. As noticed by professor RODLEY, *supra note 3*, cases as such would have also fallen within the SRESAE's mandate, but his office was not yet established when the Group started to implement its mandate. Following the appointment of the mentioned SR, the Group has transmitted cases, even those clarified, relevant to the new Theme mandate to the expert in question.

²³⁰ CHR Resolution 1995/43. See, also, *supra note 9*.

²³¹ CHR Resolution 1995/57. See, also, *supra note 9*.

²³² CHR Resolution 1995/79. See, also, *supra note 9*.

²³³ *Supra note 9*.

²³⁴ GA Resolution 47/33, 18 December 1992, Preambular paragraph.

²³⁵ Such a point was clearly made by the experts. See «Interview with Tonie van Dogen, Member of the United Nations Working Group on Enforced or Involuntary Disappearances», *SIM newsletter*, No. 14/15, August 1986.

²³⁶ *Ibidem*.

²³⁷ E/CN.4/1435 and E/CN.4/1435/Add1. Also, for a thorough legal

Yet, the WGD did not deem necessary to fix a specific lapse of time before someone presumed detained could have been considered disappeared. The reason of this, as remarked by Professor Rodley²⁴¹, lies in the fact that a fixed period of time might have barred the Group to take «expeditious action» to prevent further abuses or death following the detention²⁴².

To sum up, in light of some common features showed by the first cases dealt with, the experts evinced a «working» legal definition of the sinister practice of disappearances which, subsequently, has been enshrined in the Declaration on the Protection of all Persons from Enforced Disappearances. Such an analytical exercise proved to be crucial for the implementation of the WGD's mandate. Indeed, it clarified the legal and operative ambit of the activity of the Group shading light on the main features of the phenomenon of disappearances itself, and allowing the experts to detect the basic rights infringed by it and tackle such violations.

1.2. THE SOURCES OF INFORMATION

Resolution 20 (XXXVI), besides setting the basic mandate of the Group, sketches out, in very general terms, the way in which such mandate is meant to be implemented. More precisely, the experts were requested to analyze the question of disappearances seeking and receiving information on disappeared persons from several sources.

The sources expressly mentioned by the CHR were: governments, special agencies, intergovernmental Organizations (IGOs), NGOs with a consultative status with the ECOSOC, «humanitarian organizations and other reliable sources»²⁴³. In this respect, it is especially noteworthy that the WGD interpreted the possibility of receiving information by several sources broadening the range of providers of information set by the Commission. The terms «humanitarian organizations and other reliable sources»

was key in such an enlargement. In fact, interpreting them in a flexible fashion the Group included in the above list of sources of information individuals, families of disappeared persons and their lawyers, local NGOs and international NGOs without a consultative status with the ECOSOC²⁴⁴. In terms of mandate implementation, such an inclusion meant that the Group was able to receive and examine highly reliable information coming directly from «on-site sources» who, *inter alia*, would have played a crucial role in the analysis of the reliability of the communications provided by the governments. (See next paragraph).

Finally, it is interesting to raise the question of whether a hierarchy among the WGD's sources exists.

Usually, the WGD's reports simply list the relevant information transmitted, together with the sources that submitted it, under the item «communications». This suggests that all sources are considered on equal foot. Nevertheless, this is not to say that the experts are not aware of the special role that local NGOs may play in respect to the implementation of the Group mandate. In fact, as the experts pointed out in their 1996 report, NGOs may act as a channel through which the information is transmitted to the Group, and, at the same time, they may follow up with relatives of disappeared persons on the fate of their loved ones²⁴⁵.

Besides, local NGOs together with international ones have been involved in the Working Group's revision of its working methods. Thus, during the Group's sixty-second session²⁴⁶ the experts met with representatives of local and international NGOs and the latter suggested some changes to be introduced in the implementation of the Group's mandate²⁴⁷. Indeed, this is a token of the valuable NGOs' contribution to the SP's activity and how much the experts trust in such on-governmental actors.

²⁴¹ RODLEY, *supra* note 3, at 278.

²⁴² *Ibidem*.

²⁴³ *Supra* note 5.

²⁴⁴ E/CN.4/1986/18.

²⁴⁵ E/CN.4/1996/38, paragraph 2.

²⁴⁶ It was held in Geneva from 15 to 24 August 2000. The Group is used to convene in sessions during which it implements its mandate. See the next paragraph.

²⁴⁷ E/CN.4/2001/68. For instance they proposed that prior to any decision to discontinue or clarify a case, the Working Group should have made every effort to investigate the reasons behind the inaction of the sources or the families concerned. Also, they submitted that there should have been stricter restrictions on decisions to discontinue a case because the source failed to provide information.

1.3. THE WORK METHODS

The WGD implements its mandate during sessions, that are, typically, convened three times a year, and the length of which varies between four and ten days²⁴⁸.

It was during its early sessions that the Group singled out those working methods aimed at discharging the task of *examining questions relevant to Disappearances*, and, which, importantly, resulted in a daring and original way to carry out human rights protection.

The first work technique identified by the Group relates to the screening of the information submitted to it. Resolution 20 (XXXVI) did not set any formal or substantial requirement concerning the communications to be analyzed by the Group.

Nevertheless, some criteria of admissibility of information emerged from the Group's practice²⁴⁹.

As highlighted by Professor Rodley²⁵⁰, the existence of such criteria is, indeed, remarkable. First because the nature of the phenomenon of disappearances itself makes the gathering of evidence very difficult. Second because as the experts are expected to *act effectively*, that is, rapid enough to prevent the practice of missing persons, their action is based on less evidence than that required to come to a formal conclusion²⁵¹.

The Group identified the following criteria of admissibility of the received information.

First, the information must fall within the mandate of the Working Group²⁵². In other words, it has to concern cases of missing persons falling within the definition analyzed in paragraph 1.1.

Second, the Group considers admissible communications originating from the families or friends of the missing persons, as well as from NGOs, IGOs and other reliable sources that «must

be in a position to follow up with the relatives of the disappeared persons concerning [their] fate»²⁵³.

Third, the information must be factual. That is, the communication has to indicate the name of the missing person, the date of the disappearance, the place of arrest or abduction, parties presumed to have carried out the arrest or abduction or to be holding the disappeared person in an unacknowledged detention, steps taken by the family to determine the fate or whereabouts of its loved one or at least indication that efforts to resort to domestic remedies were frustrated or have been inconclusive²⁵⁴. With respect to this last requirement, it has to be pointed out that the Group did not understand it as a formal requisite that domestic remedies are exhausted, for the experts were aware that sometimes such remedies are non-existent or ineffective. Rather, the requirement has been considered a confirmation of the authorities' refusal to acknowledge the detention²⁵⁵.

Once the Group has carried out the screening of information, it implements the second work technique to fulfill its mandate. That is, it sends the communications considered admissible directly to the governments concerned²⁵⁶. Also, the experts usually seek official meetings with the concerned state's Permanent Representative to the UN (in New York or Geneva), during which they request the state official to bring the communications to the attention of his/her national governments²⁵⁷.

The third work technique entails a cross-examination of the governments' replies in light of the sources' comments, and especially of those by the mentioned «on-site» sources²⁵⁸. In other words, the governments' replies are transmitted to the source from whom the communication originated, who is requested to make observations on them. If the source does not reply within six months of the date on which the government's communication was sent, or it contests the governmental information on grounds considered unreasonable by the experts, the case is deemed clarified²⁵⁹. If the source contests the government's information on

²⁴⁸ It is paradigmatic that in the year 2001 the WGD held the first session from 24 to 27 April, the second from 21 to 25 August, the third from 10 to 14 November. See *supra note 29*, paragraph 10. In this respect it is important to note that from 1995, due to the UN financial situation the WGD was requested to reduce the length of its sessions.

²⁴⁹ E/CN.4/1984/21, paragraph 1.

²⁵⁰ RODLEY, *supra note 3*, at 273.

²⁵¹ *Ibidem*.

²⁵² *Supra note 27*, Annex paragraph 7.

²⁵³ *Ibidem*.

²⁵⁴ *Ibidem*, paragraph 8 (a), (b), (c), (d), (e).

²⁵⁵ RODLEY, *supra note 3*, at 273.

²⁵⁶ *Supra note 27*, paragraph 10.

²⁵⁷ *Ibidem*.

²⁵⁸ *Ibidem*.

²⁵⁹ *Ibidem*.

reasonable grounds the government is asked to comment on the source's point of view²⁶⁰. The aim of such a *cross-examination* is to assess the reliability of the governmental communications and to provide the Group with further elements to conclude whether or not the disappearance occurred and to shed light on the fate of the missing person. The replies of the governments, the sources' comments and the experts' conclusive views are, finally, summarized by the Group in its annual reports to the CHR²⁶¹.

Concluding, the Working Group's practice shows that the experts did not mean the task of *examining* the phenomenon of Disappearances as the undertaking of a theoretical study on the matter. Rather, they, daringly, understood it as a process to assess, through a factual criterion and a cross examination procedure, the reliability of the information received in order to clarify *individual cases* of disappearances submitted to them.

1.4. THE ON-SITE VISITS

Meeting with States' Permanent Representatives at the UN enabled the WGD to introduce, without any previous authorization from the Commission, a work technique that changed the Group's overall approach to the phenomenon of Disappearances. The technique in question is the carrying out of on-site visits²⁶². Basically, during the mentioned meetings with states' representatives the experts explored the possibility of conducting visits in the territories of the states concerned²⁶³. Following the Group's initiative some governments started to formally invite the experts to travel to their Countries, sanctioning the definitive introduction of such working technique within the mandate of the Working Group. In fact, even though, the CHR, initially, did not authorize the experts to carry out the visits, it never expressed a negative view on such a new working technique.

Moreover, it started to receive the reports on such visits, the so-called *Addenda* reports, subsequently endorsed the visits in the Group's mandate, and even strongly encouraged states to consent to on-site visits.

The first visit was carried out in Peru and marked the beginning of the departure of the WGD from its non-judgmental approach to the phenomenon of disappearances²⁶⁴. More specifically in the *Addendum* report on the visit²⁶⁵, the Group started to link cases of missing persons to the behavior of certain governmental agents, without, however, expressly attributing a direct responsibility to the latter.

As seen in the previous section²⁶⁶, the true break-through in the non-judgmental approach occurred after the visit to Sri Lanka²⁶⁷. In fact, in the *Addendum* report on that visit, the Group explicitly mentioned the army and the police as being «involved in disappearances»²⁶⁸.

Such a judgmental approach still characterizes the WGD's practice²⁶⁹ and would have been shared by the Theme SPs created following the Group's institution. Importantly, such an approach would have turned Theme SPs from tools conceived to avoid targeting single Countries into quasi-judicial bodies that started to focus and report on states' compliance to those human rights relevant to their thematic mandates.

Since the second half of the nineties the Group even started to carry out follow up visits in order to verify the extent to which states formerly visited complied with the recommendations formulated in the *Addenda* reports on the previous visits in their territory²⁷⁰.

The most recent visits by the WGD have been carried out in Yemen²⁷¹, Turkey²⁷² and Sri Lanka²⁷³.

²⁶⁰ *Ibidem*, paragraph 18.

²⁶¹ *Ibidem*, paragraph 14.

²⁶² See one of the Group's first report, *supra* note 21, paragraphs 6 and 30.

²⁶³ *Ibidem*, paragraphs 12-15.

²⁶⁴ E/CN.4/1986/18/Add.1, and E/CN.4/1987/15/ Add.1.

²⁶⁵ See Section I, paragraph 3.4.

²⁶⁶ *Ibidem*.

²⁶⁷ E/CN.4/1992/ Add.1, and E/CN.4/1993/Add.1.

²⁶⁸ *Ibidem*. See also the report on the visit to Philippines, which was

prior to that on Sri Lanka: the Group attributed responsibility to the government in question more directly than in the report on its visit to Peru. See E/CN.4/1991/20/Add.1 paragraph 159.

²⁶⁹ The Addendum reports of the WGD can be found on the web-site of the UN High Commissioner for Human Rights: www.unhchr.ch.

²⁷⁰ See the follow-up visit to Sri Lanka: E/CN.4/2000/64/Add.1.

²⁷¹ E/CN.4/1999/62/Add.1.

²⁷² E/CN.4/1999/62/Add.2.

²⁷³ E/CN.4/2000/64/Add.1.

1.5. THE URGENT MESSAGES PROCEDURE

The most remarkable working technique «invented» by the Group is the Urgent Messages Procedure (UMP). The experts implicitly inferred it from the authority to «respond effectively» to the information coming before them. It became an integral part of the work methods of the experts from their very first session: its aim was to deal with particularly serious and urgent cases of disappearances that required immediate action. That is cases in which there were reasonable grounds to believe that the life or physical and mental integrity of the disappeared person was seriously threatened²⁷⁴. More specifically, the experts decided that with regard to cases that occurred three months preceding receipt of communications, the Chairman was authorized to transmit the cases in question to the Ministers of Foreign Affairs of the Countries concerned with the most direct and rapid means, such as faxes or telexes²⁷⁵. In such faxes or telexes the Chairman would have asked the authorities to clarify the fate and whereabouts of the individual and to release him/her immediately.

As specified by the experts such transmission of urgent cases can be entrusted to the Chairman «on the basis of special delegation of power given to him by the Group»²⁷⁶.

1.6. MONITORING THE DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

The monitoring of the Declaration on the Protection of all Persons from Enforced Disappearances was entrusted to the Group at the beginning of the nineties, when the CHR invited the experts to consider in their reports any obstacle to the proper application of the Declaration and to recommend means to overcome them²⁷⁷.

Initially the Group limited itself to request all states to provide it with all the relevant information on the measures taken to implement the provisions of the Declaration, and the eventual obstacles that they might have encountered²⁷⁸. However,

despite such a request the experts noticed that very little progress had been made in practice. With few exceptions, states did not even begin to take consistent steps to incorporate in their national legislation the principles set forth in the UN Declaration²⁷⁹. Thus, with the aim to more effectively focus the attention of governments on the relevant provisions of the Declaration, the Working Group decided, at its forty-seventh session, to adopt General Comments on those provisions of the Declaration that might have needed further explanation²⁸⁰.

The decision of the experts has to be strongly welcomed: it is a further token of their daring way of interpreting the tasks entrusted by the CHR. Indeed, it is another significant step towards a more accurate way of implementing their mandate through the elaboration of some «legal guidelines», the principal aim of which is to clarify states' conduct with regard to the phenomenon of Disappearances. More specifically, the adoption of General Comments has two direct effects on the Group implementation of its mandate.

Firstly, they augment the authority of the experts constituting a sort of «jurisprudence» which substantiates the Group's monitoring of the Declaration; secondly they define precisely the scope and the ambit of the broad principles set by the UN Declaration limiting states' discretion in complying with such principles²⁸¹.

Interestingly, the formulation of general comments makes the WGD very similar to treaty monitoring bodies. In fact, it is a very well settled practice of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic Social and Cultural Rights to work out general comments on some provisions of the Conventions the implementation of which they are mandated to monitor²⁸².

Yet, the WGD's General Comments contribute to the development and clarification of International Human Rights Law norms and to the application of soft law human rights instruments.

At present, the Group formulated General Comments on Articles 3, 4, 19 10 and 17 of the Declaration²⁸³.

²⁷⁴ E/CN.4/1999/62, paragraph 19.

²⁷⁵ *Supra note 27*, paragraph 11.

²⁷⁶ *Ibidem*.

²⁷⁷ CHR Resolutions 1993/35 and Resolution 1994/34.

²⁷⁸ *Supra note 27* paragraph 49.

²⁷⁹ *Ibidem*, paragraph 46.

²⁸⁰ *Ibidem*, paragraph 47.

²⁸¹ See for instance the definition of «continuing offence» set in the General Comment on Article 17. *Supra note 29* section E.

²⁸² Treaty Bodies' general comments are available at www.unhcr.ch.

²⁸³ *Supra note 29*, paragraphs 25-32.

1.7. TECHNICAL ASSISTANCE AND THE WORKING GROUP'S ROLE WITH REGARD TO THE FUTURE CONVENTION ON DISAPPEARANCES

In the nineties the WGD has undertaken a task that was not provided in any CHR's Resolution on its mandate. The task in question relates to the clarification of «old cases» of disappearances dating back to the seventies or early eighties, and which became a real challenge for the Group because of the high degree of difficulty in establishing the fate and whereabouts of the victims²⁸⁴.

Such task has not only led to intensified efforts by the Group to mediate between the families of the missing persons and the respective governments in order to find a solution to such «old cases», but also to an additional role of the WGD itself. That is, to provide technical assistance in solving such «old cases» through two means: judicial declarations of presumption of death, and gathering information on compensation of the victims²⁸⁵. With this regard it is noteworthy that in June 1997 the WGD wrote to those Countries with more than twenty «old cases» and asked about the following: the legal basis for compensation in the Country in question and the amount of compensation, the legal requirements and the procedures leading to a presumption of death²⁸⁶.

The last noteworthy development concerning the WGD's practice is its formulation of comments on the draft of the future Convention on Enforced Disappearances as worked out by the Sub-Commission on the Promotion and Protection of Human Rights' Sessional Working Group on the Administration of Justice upon request of the CHR²⁸⁷. Interestingly, since 1997 the WGD has been invited to the meetings of the Sessional Working Group and played an active role in the drawing up of the Convention. Indeed, the experts have been carefully analyzing and commenting on the above draft and proposed that the monitoring body of states' conformity to the new Convention should have been an already existing supervising organ: the Human Rights Committee or the WGD itself²⁸⁸.

1.8. THE REPORTING TASK

Notwithstanding that the reporting function was expressly provided by the CHR, and did not entail any interpretative exercise by the experts, this section deals with it by virtue of two fundamental reasons.

Firstly, because the WGD's reports constitute the record of the innovations introduced by the experts' practice. In other words, they are the synthesis of the break-through brought about by the daring endeavors the experts. Secondly, because consequently the innovations introduced by WGD in their mandate, the reports' rationale itself underwent some significant changes. In other words, the experts drew such reports up not in the form of an abstract examination of disappearances, but they worked them out with the view to sanction the analytical pattern and high methodical rigor of their human rights activity, and to influence and even determine the CHR's strategy with regard to the practice of disappearances. In this sense the reports are the climax of the break-through practice of the WGD.

Typically the WGDs' reports are outlined into four main sections:

1. the first one summarizes the experts' activity carried out during the year prior to the Commission session; it also include a synthesis of the work methods adopted by the Group to implement its mandate;
2. the second one contains three Country-Chapters dealing respectively with:
 - a) Countries with new cases of Disappearances or clarified cases;
 - b) Countries with regard to which the Group received comments from governments and NGOs;
 - c) Countries from which the WGD received no information or comment.

²⁸⁴ E/CN.4/1998/43.

²⁸⁵ See the case of Brazil reported in E/CN.4/1997/34, paragraph 413.

²⁸⁶ *Ibidem*, paragraphs 23-65.

²⁸⁷ *Ibidem*, paragraph 3. See also the note of the Secretary General on that matter: E/CN.4/1999/11.

²⁸⁸ *Supra note* 66 paragraphs 18-20. In case the WGD will be charged with the monitoring of States' compliance with the Convention on Disappearances, its functions will be very similar to those of the Inter-American Commission on Human Rights For details see SHELTON D., «The Inter-American Human Rights System», in *Guide to International Human Rights Practice*, 1992, at 119-132.

3. the third one sets the Conclusions and recommendations of the experts;
4. the fourth is a series of annexes containing statistics on the cases reported by the Group since its establishment, decisions on individual cases taken during the year in respect of which the experts are reporting; comments on the draft Convention on Enforced Disappearances.

1.9. FINAL REMARKS

The WGD's practice is a remarkable departure from the wording of Resolution 20 (XXXVI). In accomplishing such departure the Group, sometimes, availed itself of some terms in the above Resolution to deduce a daring interpretation of its mandate and to introduce innovative tools to implement it. The enlargement of the range of sources through a flexible interpretation of the terms «humanitarian organizations and other reliable sources» which allowed the Group to introduce the *cross-examination* procedure; the interpretation of the task of *examining* questions relevant to Disappearances as a «technical process» aimed to assessing the reliability of the information received and clarifying individual cases of Disappearances, and the «invention» of the UMP relying on the task of responding rapidly and effectively to especially urgent information, are very paradigmatic in this sense.

On the other hand, the experts deduced the on-site visits, the technical assistance activity, and the formulation of comments on the Convention on Disappearances without relying explicitly on the text of Resolution 20 (XXXVI). They, basically, understood them as implied in the overall rationale of their mandate, and informally, introduced them in their practice. The same is true for the adoption of the General comments on the Declaration on Enforced Disappearances. Indeed, the experts' resort to the General Comments is a very welcomed development which may lead to a more effective and punctual implementation of the Declaration, and which may further strengthen international human rights protection against disappearances: in fact, the WGD's practice in this respect already constitutes the model to

be followed by the future monitoring body of the Convention on Disappearances, be this the WGD or another body provided by the Convention itself.

2. *The Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions (SRESAEs)**

The SRESAEs was created in 1982 by CHR's Resolution 1982/35.

In the above Resolution the Commission decided to appoint an individual of recognized international standing as a SR in order to examine the occurrence and extension of the practice of summary and arbitrary executions, and to report on this phenomenon with recommendations and observations to the CHR itself.

From 1982 onwards the mandate has been regularly renewed and broadened by the Commission.

Thus, in 1985 the Commission gave the SR the authority to «respond effectively» to communications forwarded to him indicating that a summary or arbitrary execution was threatened or imminent or it has occurred²⁸⁹, while in 1993 the subject matter of the mandate of the SR was broadened to include extra-judicial executions²⁹⁰.

During the second half of the nineties and the early 2000, the CHR requested the SR to pay special attention to summary, arbitrary and extra-legal executions of children, women and human rights defenders; to violations of the right to life of participants in demonstrations or other peaceful manifestations; to violations of the right to life of persons belonging to minorities²⁹¹; to keep monitoring the implementation of international standards on guarantees and restrictions related to the imposition of capital punishment bearing in mind the General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee²⁹² as well as the Second Optional Protocol of the Covenant; to apply a gender perspective to his work²⁹³.

* This section deals with the practice of the first SRESAEs, Mr. Ndiaye by virtue of his pioneer and crucial role in building up and strengthening the system of SPs.

²⁸⁹ CHR Resolution 1985/37.

²⁹⁰ CHR Resolution 1992/42.

²⁹¹ CHR Resolution 1996/7 paragraph (d).

²⁹² *Ibidem*, (f).

²⁹³ *Ibidem*, (g). See also the following reports: E/CN.4/1997/61, E/CN.4/1998/68, E/CN.4/1999/35, E/CN.4/2001/30, E/CN.4/2001/35 and E/CN.4/2004/7.

2.1. THE SCOPE OF THE MANDATE

As the analysis of the WGD, the examination of the practice of the SREASEs starts dealing with the expert's attitude toward the scope of his mandate. In this respect it has to be noticed that the CHR's Resolutions on the SR's mandate refer to «extra-judicial, summary and arbitrary executions» without clarifying the meaning of these terms.

Nevertheless, the SRESAEs did evince a «working» definition of the above terms²⁹⁴.

Thus, in the light of the SR's reports, summary and arbitrary executions are impositions of the death penalty without observance of some legal safeguards such as the right to fair trial, to right to seek pardon or commute of sentence²⁹⁵. It follows, then, that the SR will have to verify whether all the legal safeguards and guarantees which are provided in Articles 9, 14 and 15 of the ICCPR and ECOSOC Resolution 1989/65²⁹⁶ are fully respected in every case examined.

The SR, also, intervenes if the convicted person is a minor, a mentally ill person, a pregnant woman or recent mother, a person expelled to a Country where he/she is likely to be sent to death.

On the other hand, as Professor Rodley put it, extra-legal executions are «officially sanctioned deprivations of life without trial and without the justifications of either a legitimate law enforcement response to protect life or limb, or a use of force compatible with the rules of international humanitarian law applicable in armed conflicts»²⁹⁷.

More specifically, the SR singled out five categories of extra-legal executions²⁹⁸:

- a) death threats and fear of imminent extra-judicial executions by state officials, paramilitary groups, private individuals

- or groups cooperating with or tolerated by the Government, as well as unidentified persons who may be linked to the categories mentioned above²⁹⁹;
- b) deaths in custody due to torture, neglect or the use of force, or life-threatening conditions of detention³⁰⁰;
- c) deaths due to the use of force by law enforcement officials, or persons acting in direct or indirect compliance with the State, when the use of force is inconsistent with the criteria of absolute necessity and proportionality³⁰¹;
- d) deaths due to attacks by security forces of the State, by paramilitary groups, death squads or other private forces cooperating with or tolerated by the Government³⁰²;
- e) violations of the right to life during armed conflicts, especially of the civilian population, contrary to humanitarian law³⁰³.

Also, the SR is concerned with the most egregious violation of the right to life, that is, Genocide³⁰⁴, and with the criminal law consequences arising from violations of the right to life. That is, breaches of the obligation to investigate alleged violations of the right to life and to bring those responsible to justice, and breaches of the obligation to provide adequate compensation to victims of violations of the right to life³⁰⁵.

Such a thorough definition of Summary Arbitrary and Extra-Legal Executions led the expert to set up the legal framework of his activity, and to identify the international human rights standards in light of which to ascertain cases of violations of the right to life coming before his attention.

2.2. THE SOURCES OF INFORMATION

The SRESAEs had a special attitude towards the sources of information that initially was not consistent with Resolution 1982/35.

²⁹⁴ See the 1993 and 1994 reports: respectively E/CN.4/1993/46 paragraphs 42-68, and E/CN.4/1994/7 paragraphs 9-10.

²⁹⁵ See Article 6 of the ICCPR, GA Resolution 2200 A (XXVII), December 1966, ECOSOC Resolution 1984/50, GA Resolution 35/72, E/CN.4/1984/84. On the definition of summary and arbitrary executions see RODLEY, *supra* note 3, Chapter 6.

²⁹⁶ The Resolution requests States to publish, if possible on an annual basis and for each category of offence for which death penalty is imposed information on the use of capital punishment: for instance the number of persons condemned, the number of executions carried out.

²⁹⁷ RODLEY, *supra* note 3, at 182-190.

²⁹⁸ See E/CN.4/1996/4.

²⁹⁹ *Ibidem*, paragraph 10 (b).

³⁰⁰ *Ibidem*, (c).

³⁰¹ *Ibidem*, (d).

³⁰² *Ibidem*, (e).

³⁰³ *Ibidem*, (f).

³⁰⁴ *Ibidem*, (h).

³⁰⁵ *Ibidem*, (i), (j).

The range of sources singled out by the above CHR's Resolution was more restrictive than that one the Commission provided for the WGD. The SR was requested to seek information from governments, specialized agencies, IGOs, NGOs in consultative status with the ECOSOC. Resolution 1982/35 did not mention «humanitarian organizations and other reliable sources», that is, those terms contained in Resolution 20 (XXXVI) that allowed the WGD to enlarge the range of providers of information.

Nevertheless, the SR sought and received information under no explicit limitation in respect to the sources he could rely on³⁰⁶. Thus, the expert considered information received by local NGOs, NGOs without a consultative status with the ECOSOC, families of the victims, eyewitnesses, lawyers³⁰⁷. Indeed, the SR was perfectly aware of the fundamental role such sources might have played in corroborating governmental information.

Moreover, in 1986 the Resolution renewing the SR's mandate did not contain any limit concerning the sources of information³⁰⁸.

2.3. THE WORK METHODS

Resolution 1982/35 did not contain the work methods to be implemented in fulfilling the *examination* of the phenomenon of extra-legal, summary and arbitrary executions.

Their setting up was left to the discretion of the SR, who, *inter alia*, was also able to follow the steps of the WGD³⁰⁹.

Thus, as the Working Group, the first work method adopted by the SRESAEs is the verification of the admissibility of the information.

Indeed, the SR set a basic factual criterion to assess the reliability of communications³¹⁰. That is, the communications must contain very accurate details concerning the victim and the precise circumstances of the violation. Such details are:

information regarding the date, place, time, and nature of the incident; information regarding the alleged perpetrator; information regarding the victim (name, surname, nationality); information regarding the source of the allegation; information regarding steps taken by the victim and their families and steps taken by the authorities to redress the case³¹¹.

If the SR is doubtful about a given communication he continues to seek corroboration from other sources of «unmistakable credibility» sending them the communications and requesting to comment on them³¹². These sources are NGOs and individuals whose reputation, advocacy and commitment in the field of human rights are well-known in the international arena.

Following such a corroboration from these «trustworthy sources», the SR implements the second work method to carry out his mandate, that is, he transmits the communications considered reliable to the governments concerned³¹³. More specifically, such communications are sent to the governments concerned together with a letter from the SR requesting the authorities to make the expert acquainted with the progress and the results of the investigations conducted with regard to the case submitted, the criminal or disciplinary sanctions imposed on the perpetrators, the compensation provided to the family of the victim and any other pertinent comments or observation³¹⁴. The SR also sends allegations of more general nature and asks the governments to provide specific information on, for instance, persistent impunity or legislation alleged not to be conform to the restrictions on the application of the death penalty contained in the relevant international instruments³¹⁵. The third method adopted by the SR lies in corroborating the governmental information asking the sources to examine it.

In other words, as the WGD, the SR is used to request the sources to comment on the governments' replies, and, then, to

³⁰⁶ See the 1993 report, *supra note 76*, paragraphs 17-20. See also RODLEY N., «United Nations Action Procedures against "Disappearances", Summary or Arbitrary Executions, and Torture», *Human Rights Quarterly*, vol. 8, 1986, at 701 and 728.

³⁰⁷ See the 1993 report, *Supra note 76*, paragraph 17.

³⁰⁸ ECOSOC Resolution 1986/36, 23 May 1986.

³⁰⁹ The Work methods of the SR are set in his 1993 report, *supra note 76*. See also E/CN.4/1995/61 paragraphs 9-12, E/CN.4/1996/4, paragraphs 11-12, E/CN.4/2000/3, paragraphs 6-20.

³¹⁰ See the 1993 report, *supra note 76*, paragraph 17.

³¹¹ *Ibidem*.

³¹² *Ibidem*, paragraphs 16-17.

³¹³ *Ibidem*, paragraphs 19-22.

³¹⁴ *Ibidem*.

³¹⁵ *Ibidem*. paragraph 30.

send to the authorities concerned a follow-up comment requesting additional information if the sources' observations contradict the governmental replies³¹⁶.

The aim of this request for additional information and cross examination by the sources is to enable the SR to draw up conclusions on the alleged violations of the right to life and to submit them in the annual reports to the CHR³¹⁷.

The above overview of the expert's working methods allows the conclusion that, like the WGD, the SR meant the «examination of his phenomenon» as a screening process of communications the primary aim of which is the legal verification of the violations of the right to life perpetrated against individuals alleged in the communications in question.

2.4. THE ON-SITE VISITS

Like the WGD, the SR interpreted his mandate to include the possibility of soliciting and conducting visits to some Countries in which the situation of the right to life was especially worrying, even in the absence of an express mention of such visits in his terms of reference.

The first visit carried out without a previous authorization by the Commission was in Suriname in 1982³¹⁸. Since then, the missions have become an essential component of the SR's mandate: they allow the SR to obtain first-hand information on the situation of the right to life in the Country which will be visited, to report on such findings, and to co-operate and assist the state in improving situations conducive to violations of the right to life³¹⁹. The state to be visited is selected in the light of the number and gravity of allegations, and on the basis of reports from the «trustworthy sources» concerning summary and

extra-legal executions which occurred or that are occurring within the territory of certain Countries³²⁰.

Also, the absence of an adequate response from the governments, or recurring contradictions between the information received from the sources and the government response, may lead the SR to explore the possibility of conducting an *in situ* visit in a given Country³²¹. Besides, from the second half of the nineties onwards the SR started to maintain close contacts with governments of Countries visited in order to carry out follow-up missions and assist such governments in implementing the recommendations worked out after his previous visits³²². In the second half of the nineties and early 2000, the SR visited Burundi³²³, Papua Guinea³²⁴, Sri Lanka³²⁵, the U.S.³²⁶, Macedonia and Albania³²⁷, Mexico³²⁸, Turkey, Afghanistan, the Democratic Republic of Congo and Brasil³²⁹.

Usually, like the WGD's reports, the SR's reports on the visits are published in *addenda* to the annual reports³³⁰.

2.5. THE URGENT MESSAGES PROCEDURE

The most significant development of the SR's practice regards the UMP.

Initially the SR was not authorized «to respond effectively»³³¹ to the communications brought to his attention. Remarkably, despite such a lack in his terms of reference, the SR developed, since the first year of his appointment, a system of UMP³³²: he identified thirty-seven countries allegedly responsible for imminent summary and arbitrary executions and sent to the Ministers of Foreign Affairs of such Countries telexes in order to prevent the carrying out of these executions³³³. Even though the SR was criticized by the members of the CHR, he continued

³¹⁶ This is because the replies are too general, or the government tries to refute the correctness of the allegation, or it states that the investigation are not yet finalized. See E/CN.4/1995/61 paragraph 21.

³¹⁷ *Supra* notes 91- 97.

³¹⁸ E/CN.4/1983/16.

³¹⁹ See E/CN.4/1986/21 paragraph 56, and especially E/CN.4/1993/46 paragraphs 35-37 in which the SR explains the rationale of the visits.

³²⁰ *Ibidem*.

³²¹ *Ibidem*.

³²² CHR Resolution 1993/47.

³²³ E/CN.4/1996/4 Add.2.

³²⁴ E/CN.4/1998/68/Add.1.

³²⁵ E/CN.4/1998/68/Add.2.

³²⁶ E/CN.4/1998/68/Add.3.

³²⁷ E/CN.4/12000/3/Add.2.

³²⁸ E/CN.4/2000/3/Add.3.

³²⁹ E/CN.4/2002/74/Add.1, E/CN.4/2003/3/Add.4, E/CN.4/20003/3/Add.3, E/CN.4/2004/71/add.3.

³³⁰ *Supra* notes 105-11.

³³¹ See the Resolution appointing the SR: CHR Resolution 1982/35.

³³² See the first report of the expert, *supra* note 100.

³³³ *Ibidem*.

to send telexes to the certain governments with the aim to avert specific summary or arbitrary executions³³⁴.

Finally, in 1984 the ECOSOC asked the SR «to pay special attention to cases in which a summary or arbitrary execution is imminent or threatened» and «to respond effectively to information that comes before him»³³⁵.

The SR's urgent appeals concern death threats and fear of imminent execution of death sentences in contravention of the limitations on capital punishment set forth in the pertinent international instruments³³⁶. In addition the SR may also send urgent appeals to governments after having been informed of the imminent expulsion of persons to a Country where they are at risk of summary or arbitrary executions³³⁷.

Since the basic aim of urgent appeals is the prevention of loss of lives, the SR transmits the allegations of imminent extra-judicial, summary or arbitrary executions to the government, regardless of whether the domestic remedies have been exhausted³³⁸. Usually, in such urgent appeals the SR asks the government concerned to ensure effective protection of those under threat or risk of execution.

States are also requested to inform the SR on every step taken in this regard³³⁹.

Yet, it has to be stressed that, most of the urgent messages have dealt with threatened executions in cases where a formally pronounced death sentence seemed in danger of being carried out³⁴⁰. Few cases concerned threatened extra-legal executions. As noticed³⁴¹, the reasons of that lies in the fact that only in rare circumstances extra-legal executions are known in advance. That is, in cases in which a «death list» has been made known, where someone survived the extra-legal execution, or where, generally speaking, there is a sort of legal procedure³⁴².

2.6. THE REPORTS

The points made with regard to the reporting function of the WGD apply to that of the SRESAEs. Indeed, the SR's reports are emblematic of his innovative practice and give sense to it³⁴³. In fact, they summarize the analytical activity of the SR and suggest means to tackle summary, arbitrary and extra-legal executions. More specifically, in his reports the expert, first sketches out the legal and operative framework of his mandate; he, then, describes the activities carried out in the year prior to the Commission' session; he lists the Country situations dealt with, and draws up conclusions and recommendations on how to address the question of extra-legal, summary and arbitrary executions.

2.7. CONCLUSIONS

The SRESAEs departed from Resolution 1982/35 and consolidated the WGD's practice. It is significant that in certain ways his daring interpretative endeavors went even further those of the Working Group.

As seen, the expert broadened the range of sources of information even if the above CHR's Resolution did not contain terms which might have allowed for interpretative devices to enlarge the number of providers of information; furthermore, he started to send urgent messages without being authorized to act expeditiously. Also, the accurate legal definition of summary and arbitrary and extra-legal executions, the identification of the procedural pattern to screen the information on individual cases of violations of the right to life, and the introduction of on-site visits highlight further the expert's steady determination to fulfill true human rights protection and monitoring tasks.

³³⁴ See the second and third reports of the experts. Respectively: E/CN.4/1984/29, E/CN.4/1985/17.

³³⁵ ECOSOC Resolution 1984/35. See also GA Resolution 39/110.

³³⁶ RODLEY, *supra* note 88, at 200.

³³⁷ *Ibidem*.

³³⁸ *Ibidem*.

³³⁹ E/CN.4/1985/17, E/CN.4/1986/21 and the 1993 report, *supra* note 76. See also the most recent reports of the SR: E/CN.4/2001/9, E/CN.4/2000/3.

³⁴⁰ *Ibidem*.

³⁴¹ RODLEY, *supra* note 88, at 722.

³⁴² *Ibidem*.

³⁴³ SR's reports are available at www.unhchr.ch.

3. *The Special Rapporteur on Torture (SRT)*

The UN commitment to struggle against the practice of torture dates back to the second half of the seventies. In this period of time the GA, spurred by the developments in post 1973 Chile and Amnesty International's campaign on those events, played a leading role in the standards setting on the prohibition of torture. Thus, in 1975 and 1984 the GA adopted respectively the Declaration on Torture³⁴⁴ and the Convention against Torture³⁴⁵. Within this context the appointment, in 1985, of the SRT by the CHR is the uttermost sign of the UN advocacy in the struggle against torture.

The experts' tasks set in Resolution 1985/33 were the following: to examine questions relevant to torture; to respond effectively to information concerning torture that would have come before him; to act discretely and to report annually to the CHR on the occurrence and extension of the practice of torture. The mandate was constantly renewed³⁴⁶.

In addition, the SR, has been, recently, requested to pay attention to special torture related issues: impartiality and independence of the judiciary, jurors and assessors, and the independence of lawyers³⁴⁷; the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms³⁴⁸; impunity³⁴⁹; extra-judicial, summary and arbitrary executions³⁵⁰; disappearances³⁵¹; arbitrary detentions³⁵²; the integration of the rights of women in the human rights mechanisms of the UN³⁵³; the plight of street children³⁵⁴.

Also, as pointed out in the 2001 report³⁵⁵, the SR addressed the question of racism and related intolerance in view of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban from 31 August to 7 September 2001³⁵⁶.

Finally, it is important to highlight that the SRT is mandated to submit *interim* reports to the GA: in particular, during the year 1999 and early 2000 the GA asked the expert to present two *interim* reports on overall trends and developments regarding torture³⁵⁷. The main issues tackled with in these reports relates to gender-specific form of torture, torture and children, torture and human rights defenders, torture and poverty, compensation for the victims of torture³⁵⁸.

3.1. THE SCOPE OF THE MANDATE

Resolution 1985/33 has raised some interpretative problems relating to the scope of the mandate of the SRT. In fact, while the preambular paragraph refers both to «torture» and «cruel, inhuman and degrading treatment or punishment», the operative paragraphs mention only torture. Arguably, such a wording would seem to imply that the expert should have focused only on torture.

Nevertheless, the SR never adopted an overly narrow interpretation of the scope of the phenomenon he was to examine³⁵⁹.

More precisely, the SR not only analyzed practices inflicted on detainees under interrogation³⁶⁰, but he also identified and

³⁴⁴ AG Resolution 3452 (XXX), 9 December 1975.

³⁴⁵ Resolution 1984/21, 6 March 1984, Commission on Human Rights, Report 40th session, ESCOR, 1984, Supplement No. 4, Chapter II A.

³⁴⁶ See for instance CHR's Resolutions 1993/40, 1993/37 and 1998/38.

³⁴⁷ CHR Resolution 1999/33, and 2000/45.

³⁴⁸ CHR Resolution 1999/34, and 2000/42.

³⁴⁹ CHR Resolution 1999/35.

³⁵⁰ CHR Resolution 1999/36, and 2000/32.

³⁵¹ CHR Resolution 2000/38.

³⁵² CHR Resolutions 1999/38, and 2000/37.

³⁵³ CHR Resolution 1994/45, and 2000/53.

³⁵⁴ CHR Resolution 1994/83. See also the introduction of the year 2000 report E/CN.4/2001/9.

³⁵⁵ E/CN.4/2001/66, in particular see the executive summary. See also E/CN.4/2004/56 and E/CN.4/2005/62.

³⁵⁶ *Ibidem*.

³⁵⁷ GA Resolution 53/139 paragraph 24, and Resolution 54/156 paragraph 29. See also CHR Resolution 1999/32 paragraph 29, and Resolution 2000/43 paragraph 33.

³⁵⁸ A/54/426; A/55/290.

³⁵⁹ «Interview with Professor Koojijmans Special Rapporteur on Torture for the United Nations Commission on Human Rights», *SIM Newsletter*, No. 16, November 1986, at 4. See also RODELY, *supra note 88*, at 726. See also the first and the 1997 reports in which both the former SR and his incumbent explain this point. Respectively E/CN.4/1986/15 paragraphs 61 and 95, and E/CN.4/1997/7 paragraph 7.

³⁶⁰ Indeed, torture is perpetrated especially in this circumstance. See in this respect the European Court of Human Rights jurisprudence, with particular reference to: *Northern Ireland case*, 19 *Yearbook of the European Convention on Human Rights*, 512, 750, (1076); *Greek Case*; 12 *Yearbook of the European Convention on Human Rights case 504*, (1966). See also the Human Rights Committee's practice: *Sindic v. Uruguay*,

dealt with some «gray areas»³⁶¹ between «torture» and «other cruel and inhumane and degrading treatment and punishment». That is, practices that are on the borderline of torture and other ill treatments, such as prisons and cells conditions. As noticed³⁶², the SR expressed concern about «sleep deprivation and threats against detainees», as well as «beatings» in the Republic of Korea³⁶³; «beating, kicking and punching of asylum seekers or members of ethnic minorities» in Germany³⁶⁴.

Yet, it is significant that in his visit to the Russian Federation in 1994, the SR remarked that the conditions in general cells measuring some six by twelve meters and holding from 80 to 130 prisoners amounted to cruel and inhuman and degrading treatment³⁶⁵. Furthermore, in his *addendum* report on this visit, he also specified that «to the extent that suspects are confined [in the general cells] to facilitate the investigation by breaking their wills with a view to eliciting confessions of information, they can be properly described as being subjected to torture»³⁶⁶. He, also, described the prison conditions in Caracas as inhuman, cruel and degrading³⁶⁷, and used the same terms to depict the situation in some detention centers in Burundi³⁶⁸.

Importantly, the SR included in the «gray areas» issues of medical care³⁶⁹, non segregation of juveniles from adults³⁷⁰, cases of corporal punishment³⁷¹, and rape³⁷².

Like the WGD and the SREASEs, the SRT clearly defined the ambit of his activity and identified those practices to be addressed in tackling the phenomenon of torture.

Moreover, the clarification of the scope of the broad international norm on the prohibition of torture by the expert

constitutes a very significant contribution to the development of international human rights law.

3.2. THE SOURCES OF INFORMATION

Resolution 1985/33 listed as sources from which the SR was mandated to receive information on torture governments, specialized agencies, IGOs, NGOs. Regrettably, it did not make clear whether the SR might have resorted to sources other than those mentioned.

As pointed out³⁷³, a restrictive interpretation of the sources as set in the CHR's Resolution, would have deprived the expert of the most direct evidence available concerning his mandate such as the communications from families of victims of torture, lawyers, eyewitnesses. In this respect, it is noteworthy that the SRT, as well as the WGD and the SRESAEs, interpreted his mandate flexibly and since his appointment has been receiving information on torture from any kind of source³⁷⁴. As mentioned, such an approach towards the sources of information would have led to a more accurate and punctual verification of the reliability of the governmental information.

3.3. THE WORK METHODS

The SRT set his work methods down in his reports³⁷⁵. They are the same adopted by the WGD and the SRESAEs. That is, several tools to process the communications submitted to him, and to determine whether or not the violations falling within his mandate were perpetrated.

(63/979), Report of the Human Rights Committee, GAOR 37th session, supplement No. 40, (1982), Annex VIII; *Bleir v. Uruguay*, *ivi* Annex X; *Quinteros v. Uruguay* (107/1988), Report of the Human Rights Committee, GAOR 37th session, Supplement No. 40 (1983), Annex III.

³⁶¹ E/CN.4/1986/15.

³⁶² RODLEY, *supra* note 3, at 98.

³⁶³ E/CN.4/1998/38, paragraph 158.

³⁶⁴ *Ibidem*, paragraph 102.

³⁶⁵ E/CN.4/1995/34/Add.1, paragraphs 42 and 53, and E/CN.4/1995/34/Add.1/Corr.1, paragraphs 43-45 and 71.

³⁶⁶ *Ibidem*.

³⁶⁷ E/CN.4/1997/7/Add.2, paragraphs 58-73 and 81: the SR describes the situation at the Sabenata Prison in Maracaibo, which was not only overcrowded but anarchic because of the lack of control exercised by the national authorities.

³⁶⁸ E/CN.4/2000/19 paragraph 160: the situation in these detention centers were depicted as cruel, inhuman and degrading treatment because of the overcrowding, malnutrition, lack of hygiene. See also paragraph 182 of the same reports: it deals with the use of electric rods on prisoners in some Chilean prisons.

³⁶⁹ *Ibidem*.

³⁷⁰ E/CN.4/1997/7/Add.2, paragraphs 58-73, and 80.

³⁷¹ See the report on the SR's visit to Saudi Arabia, E/CN.4/1997/7/Add.1. The government challenged the report.

³⁷² *Supra* note 143, paragraph 119, E/CN.4/1995/34 paragraph 19, E/CN.4/2000/19 paragraph 323.

³⁷³ RODLEY, *supra* note 88, at 726.

³⁷⁴ *Supra* note 143, paragraphs 61 and 95, see also E/CN.4/1994/31.

³⁷⁵ See the paragraphs on his mandate and work methods in his first report, *supra* note 143, and the most recent report *supra* note 150.

First, the expert identified some criteria of admissibility of the information that comes before him.

Thus, the information to be «credible and reliable»³⁷⁶ must contain as many details as possible, though, as stated in the model questionnaire to allege acts of torture prepared by the expert³⁷⁷, «the lack of a comprehensive accounting should not necessarily preclude the submission of [the allegations]»³⁷⁸.

The elements of minimum information to be forwarded to the SR in order to enable him to deal with communications alleging the occurrence of torture are the following³⁷⁹: full name of the victim, date on which the incident(s) of torture occurred, place where the person was seized, indication of the forces responsible for acts of torture, description of the form of torture carried out and any injury suffered as a result, identification of the person or organization submitting the report³⁸⁰.

Second, the credible and reliable information analyzed by the SR is transmitted to the government. Importantly, like the SREASEs³⁸¹, the SR is used to send to governments communications alleging individual cases as well as a generalized pattern of torture. More precisely, in these communications the SR urges governments to adopt measures in order to investigate into the allegations; to prosecute and impose appropriate sanctions on any person guilty of torture regardless of the rank, office or position he may hold; to prevent the recurrence of such acts; to compensate victims or their relatives in accordance with the relevant standards on torture.

Third, the SR analyses the governments' responses and transmits them to the sources, as appropriate, for comment. The expert carries, then, out a cross-analysis of both the governments' replies and the sources' remarks and draws up concluding observations on the cases sent to him.

Finally, he summarizes the communications, the governments' replies, and the sources' comments in his reports and submits them annually at the Commission's sessions.

3.4. THE ON-SITE VISITS

As the WGD and the SRESAEs, the SRT meant his terms of reference as to include the undertaking of visits to certain Countries with a significant incidence of torture even if Resolution 1985/33 did not expressly contain any authorization in this respect.

The visits are either solicited by the SR or a result of governments' invitations which are usually, extended through a formal letter from the authorities concerned³⁸².

The visits allow the SR to carry out true fact-finding tasks gathering information on cases of torture from the authorities, the victims, their families and their representatives, and NGOs. Also, the visits enabled the SR to formulate more precise recommendations to the states, that is recommendations shaped upon the reality of the state concerned. Yet, the implementation of such recommendations is followed up by the SR, who is used to request information from the authorities of states visited on the steps undertaken to implement such recommendations and the obstacles encountered in this respect³⁸³.

The first on-site visit took place in Indonesia (including East Timor)³⁸⁴. By the end of 1997 the SR visited the Russian Federation³⁸⁵, Ceylon³⁸⁶, Chile³⁸⁷, Pakistan³⁸⁸, Venezuela³⁸⁹, Mexico³⁹⁰, Turkey³⁹¹, Cameroon³⁹², Romania³⁹³, Kenya³⁹⁴, Azerbaijan³⁹⁵, Brazil and Uzbekistan³⁹⁶.

As it emerges from the report on the visit to Azerbaijan, during his missions on the spot the expert is also used to hold

³⁷⁶ CHR Resolution 1985/33 paragraphs 3 and 6.

³⁷⁷ E/CN.4/1997/7 Annex.

³⁷⁸ *Ibidem*.

³⁷⁹ *Ibidem*.

³⁸⁰ *Ibidem*.

³⁸¹ See paragraph 2.3 of this Section.

³⁸² See the report mentioned *supra* note 150, paragraph 6, where the SRT mentions a letter dated 15 February, 1998, with which the government of China invited him, or the formal invitation by Brazil.

³⁸³ See the report on follow-up to recommendations made by the SR during his visits to Chile, Colombia, and Mexico E/CN.4/2000/9/Add.1.

³⁸⁴ E/CN.4/1992/17/Add.1.

³⁸⁵ E/CN.4/1995/34/Add.1.

³⁸⁶ It was a joint mission with the SRESAEs. See E/CN.4/1995/111.

³⁸⁷ E/CN.4/1996/35/Add.1.

³⁸⁸ E/CN.4/1997/7/Add.1.

³⁸⁹ E/CN.4/1997/7/Add.3.

³⁹⁰ E/CN.4/1998/38/Add.2.

³⁹¹ E/CN.4/1999/61/Add.1.

³⁹² E/CN.4/2000/9/Add.2.

³⁹³ E/CN.4/2000//Add.3.

³⁹⁴ E/CN.4/2000/9/Add.4.

³⁹⁵ E/CN.4/2001/66/Add.1.

³⁹⁶ E/CN.4/2001/66/Add.2, E/CN.4/2003/68/Add.2.

talks with high-ranking state officials such as Ministers of Internal Affairs, Ministers of Justice, Presidents of national Supreme Court, and even heads of the state of the Countries visited³⁹⁷.

Extremely important are the visits to detention centers, which enable the expert « to pierce» into the places in which torture is typically perpetrated.

Indeed, within the context of such visits he has the possibility to meet with detainees, policemen and detention facilities staff³⁹⁸.

Finally, it is noteworthy that as a rule, the SRT does not seek to visit a state within the mandate of a Country SR³⁹⁹. In respect to Countries to which other Theme SPs might, also, travel, the SR seeks consultations with them in order to solicit either a visit in parallel to that of the other experts or a joint visit with them⁴⁰⁰. Also, when the Committee against Torture is considering to visit a Country under Article 20 of the UN Convention against Torture, and such consideration may lead to a visit by the Committee, the SRT does not seek to solicit a mission in the Country in question⁴⁰¹.

3.5. THE URGENT MESSAGES PROCEDURE

Following the practice of the WGD and the SRESAEs, and relying at the same time on his authority to «respond effectively to information that come before him», the SRT implemented the UMPs. As noticed by the expert, the procedure aims «to clarify the situations of individuals whose circumstances give grounds to fear that treatment falling within the Special Rapporteur's mandate might occur or be occurring»⁴⁰².

The SR made clear that the UMP is basically different from the transmittal of information as a Urgent Message (UM) is made in the light of information indicating the fact that a person is at risk of being subjected to torture⁴⁰³. As specified by the expert,

the UMP may be implemented on the basis of «...accounts by witnesses of the person's physical conditions while in detention, or the fact that the person is kept *incommunicado*, a situation which may be conducive to torture»⁴⁰⁴.

Other factors taken into account by the SRT in determining whether or not there are reasonable grounds to conclude that «an identifiable risk of torture» exists are the following: the previous reliability of the sources of information, the findings of other international bodies, the existence of national legislation such as that permitting prolonged incommunicado detention which, as said, can facilitate torture⁴⁰⁵.

Any one of the above factors may be decisive for sending a UM, even though, as it emerges from the SR's practice, more than one are generally present⁴⁰⁶.

The SRT defined more accurately than the other two Theme procedures analyzed in the previous paragraphs, the nature of UM procedure. It is, essentially a humanitarian procedure with a preventive and not, *per se*, accusatory purpose⁴⁰⁷.

The government is just requested to look into the matter and take the necessary steps to protect the right to physical and mental integrity of the person concerned, in conformity with the relevant international human rights standards⁴⁰⁸. Importantly, given the *extreme time sensitiveness* of the information contained in the UM, the appeal is sent directly by fax to the Ministry of Foreign Affairs of the Country concerned⁴⁰⁹.

When appropriate the SR sends UMs jointly with other SPs⁴¹⁰. Moreover, as noticed in the 1994 report, the Urgent Messages procedure gives the government concerned the opportunity to look into matters related to torture and to comply with its obligations under International Law by instructing the detaining authorities to respect the individual's right to physical and mental integrity⁴¹¹.

³⁹⁷ *Supra* note 177, paragraph 2.

³⁹⁸ *Ibidem*, paragraph 3.

³⁹⁹ *Supra* note 150, paragraph 11. It is noteworthy that the SR visited Rwanda at the request of the SR on Rwanda from 10-20 June 1994. See 1994 report E/CN.4/1995/34, paragraph 7.

⁴⁰⁰ *Supra* note 150.

⁴⁰¹ *Ibidem*.

⁴⁰² *Ibidem*, paragraph 13.

⁴⁰³ E/CN.4/1992/17 paragraph 14.

⁴⁰⁴ *Supra* note 159, paragraphs 2 (b) and 3.

⁴⁰⁵ *Ibidem*. See also E/CN.4/1994/31 paragraphs 6-7.

⁴⁰⁶ *Ibidem*.

⁴⁰⁷ *Ibidem*.

⁴⁰⁸ *Ibidem*, paragraph 4.

⁴⁰⁹ *Ibidem*, paragraph 5.

⁴¹⁰ *Ibidem*, paragraph 6.

⁴¹¹ *Ibidem*.

3.6. THE REPORTS

The reporting activity is the crowning achievement of the UN expert's fulfillment of his tasks. The SRT is used to submit analytical and thorough reports divided up into four sections: one related to his mandate and work methods, one regarding the activities carried out in the year prior to the annual session of the Commission, one summarizing the information reviewed with respect to several countries, one containing conclusions and recommendations.

Also, in his reports he includes some annexes on the revision of his methods of work, principles of effective investigation, and some documents on torture⁴¹².

3.7. CONCLUSIONS

In implementing his mandate the SRT followed the steps of the WGD and the SRESAEs: he adopted a flexible approach to the scope of his mandate; he enlarged the range of sources of information in respect to that set in Resolution 1985/33; he identified a procedure to ascertain the reliability of the information on torture; he carried out on-site visits, and sent UMs.

All this considered, it is safe to conclude that by consolidating the WGD and the SRESAEs's practices the SRT became one of the three pillars of the system of UN SPs.

4. The Working Group on Arbitrary Detention (WGAD)

The WGAD was established by the CHR in 1991, in pursuance of the recommendations made by the Sub-Commission on the Promotion and Protection of Human Rights with regard to ar-

bitrary detention⁴¹³. More precisely, in its Resolution 1991/42 the Commission entrusted the Group with the following mandate:

- a) to *investigate cases* of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights (UDHR) or in the other relevant international legal instruments accepted by the states concerned;
- b) to report annually to the Commission⁴¹⁴.

Remarkably, The Group is the only non-treaty based procedure mandated to consider individual cases. In other words, its action is based on the right of petition of individuals anywhere in the world⁴¹⁵. The Group was, also, requested to carry out its tasks with discretion, objectiveness and independence⁴¹⁶.

Its mandate was renewed in 1994⁴¹⁷, in 1997⁴¹⁸ and in the years 2000 and 2003⁴¹⁹, each time for a period of three years.

The Group is composed of five members appointed by the Chairman of the Commission according to the criteria of equitable geographical distribution⁴²⁰ that applies to the UN.

4.1. THE SCOPE OF THE MANDATE

As the Commission's documents creating the first three Theme procedures, Resolution 1991/42 did not exactly define the scope of the mandate of the WGAD. It was subsequently defined in Resolution 1997/50, which renewed for the second time the Group's mandate. In particular, the UN document refers to «deprivation of liberty imposed arbitrarily» and qualified it as deprivation of freedom before, during or after the trial⁴²¹, and deprivation of freedom in absence of any kind of trial⁴²². Interestingly, the Group has included in such definition forms of detention such as measures of house arrest and rehabilitation

⁴¹² *Ibidem*.

⁴¹³ See the Sub-Commission' study on this subject E/CN.4/Sub.2/1990/29 and Add.1.

⁴¹⁴ CHR Resolution 1991/42.

⁴¹⁵ ZUIDWIJK T., *Petitioning the United Nations*, 1982.

⁴¹⁶ Following such a request the Group had adopted the following rule: when a case under consideration concerns a Country of which one of the members of the Group is a national, that person shall not take part in the discussion.

⁴¹⁷ CHR Resolution 1994/32.

⁴¹⁸ CHR Resolution 1997/50.

⁴¹⁹ See E/CN.4/2001/4 and CHR Resolution 2003/31.

⁴²⁰ The members of the WGAD are: Mr. Louis Joinet (France), Chairman-Rapporteur Ms Leila Zerrougui (Algeria), Ms Soledad Villagra de Biedermann (Paraguay), Mr Tamás Ban (Hungary), Mr Seyed Mohammad Hachemi (Islamic Republic of Iran).

⁴²¹ More precisely it is a term of imprisonment imposed following conviction.

⁴²² It is the so-called administrative detention.

through labor in those cases in which they are accompanied by serious restrictions of liberty of movement⁴²³.

Moreover, Resolution 1997/50 provided the experts with some legal guidelines to establish whether or not a detention is arbitrary. More specifically, it points out that an arbitrary detention must result from a final decision taken by a domestic judicial authority inconsistently with domestic law or with the human rights standards enshrined in the UDHR and any other relevant international instrument accepted by the state concerned.

On these premises, the experts deduced very accurate criteria to be applied to cases coming before them. They were drawn from Article 9 of the UDHR⁴²⁴, and Article 9 of the International Covenant on Civil and Political Rights (ICCPR)⁴²⁵, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment⁴²⁶.

According to such criteria a detention is arbitrary:

«a) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (Category I)⁴²⁷;

b) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 10 and 21 of the UDHR and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (Category II)⁴²⁸;

c) when the total or partial non-observance of the international norms relating to the right to a fair trial spelled out in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III)⁴²⁹».

Sometimes, the experts received communications requesting them to declare the unfairness of a deprivation of liberty; to

examine the value of the evidence produced during a trial; to deal with cases of disappeared prisoners or cases of torture or inhuman conditions in detention centers. As noticed by the experts⁴³⁰, these kind of allegations are not within the mandate of the Group. In particular, in respect to the latter kind of allegations it has to be noticed that the experts are used to submit the information on cases of torture or disappearances to the pertinent Theme mechanisms⁴³¹.

Yet, it is noteworthy that in 1996, the CHR requested the Group to deal with the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative detention without the possibility of administrative judicial remedy, and to include observations on this question in its annual report. With regard to such a new question the Group has identified some critical issues to be addressed and set up fourteen criteria to determine whether or not the custody is arbitrary⁴³².

Finally, it is worth noticing that the situation of the prisoners held in Guantanamo Bay by the U.S.A following the war in Afghanistan has been one of the most sensitive questions the experts tackled during the early 2000⁴³³.

4.2. THE SOURCES OF INFORMATION

In contrast with the Resolutions appointing the WGD, the SRESAEs, and the SRT, the CHR's document creating the WGAD provided for quite a wide range of sources of information. In fact, it expressly mentioned not only governments and IGOs, but also NGOs, (both international ones regardless of their consultative status with the ECOSOC and local ones), the individuals concerned, their families or their representatives⁴³⁴.

⁴²³ *Supra* note 201.

⁴²⁴ The Article states that «no one shall be subjected to arbitrary arrest, detention or exile» (GA Resolution 167/A (III), 10 December 1948).

⁴²⁵ This provision is more precise: «Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds in accordance with such procedures as are established by law».

⁴²⁶ GA Resolution 43/73, 9 December 1988.

⁴²⁷ E/CN.4/1998/44 paragraph 8 (a).

⁴²⁸ *Ibidem*, (b).

⁴²⁹ *Ibidem*, (c).

⁴³⁰ *Ibidem*, paragraph 25 (a), (b), (c), (d), (i), (ii).

⁴³¹ Interestingly, in the year 2000 the Group received allegations contesting the pre-trial detention of General Talic by the International Criminal Tribunal of the former Yugoslavia. For further details see *supra* note 201, paragraphs 12-24.

⁴³² CHR Resolution 1997/50 and E/CN.4/1999/63. For further details on how the Group tackled the question of asylum seekers and immigrants see *supra* note 201.

⁴³³ For new issues dealt with at the end of the nineties and early 2000 see E/2001/4 Annex, E/CN.4/2004/3, and E/CN.4/2005/6.

⁴³⁴ *Supra* note 196.

4.3. THE WORK METHODS

The work methods of the WGAD are similar to those set up by the first three Theme Procedures⁴³⁵.

The first working method concerns the way in which the experts assess the reliability of the communications sent to them. In particular, the experts analyze communications containing any kind of information that might be relevant to identify the person detained and his /her legal status. That is, the date and place of the arrest or detention or of any form of deprivation of liberty; the identity of those presumed to be responsible for such deprivation of liberty; any other relevant information that clarifies the circumstances in which the person was deprived of liberty; the reasons given by the authorities for the arrest and/or the deprivation of liberty; the legislation applied in the case in question; the action taken to ascertain the measures of deprivation of liberty at both a national or international/regional level; the results of such action or the reasons why it was ineffective or not taken; an account on why the deprivation of liberty is deemed arbitrary⁴³⁶.

In order to facilitate its work, the Group has prepared a model questionnaire to be filled in order to submit a case before it. Importantly, the use of such questionnaire is not compulsory and the failure to submit cases using it will not result in the inadmissibility of the communication⁴³⁷.

The second working method lies in the transmission of the communications considered admissible to the Government concerned. More precisely, it is the Chairman or Vice-Chairman of the Group that, usually, sends the communications by letter to the state concerned' s Permanent Representative to the UN, who, in his turn, will forward the cases to his/her government⁴³⁸. The Government is asked to reply within 90 days⁴³⁹. Sometimes, upon request of the authorities concerned the Group may grant a further period of no more than two months within which to reply⁴⁴⁰.

Once the government replied submitting further information to clarify the cases dealt with by the experts, the Group may take one of the following measures:

1. file a case if the person has been released, for whatever reason, following the reference of the case to the Working Group. Importantly, the Group will, also, give an opinion on whether or not the detention was arbitrary notwithstanding the release of the person concerned⁴⁴¹;
2. declare an opinion if it concludes that a case is not one of arbitrary detention⁴⁴²;
3. keep a case pending if it maintains that further information is required⁴⁴³;
4. file a case provisionally or definitely if it considers that it is unable to obtain sufficient information on such case⁴⁴⁴;
5. formulate an opinion with recommendations addressed to the Government if the arbitrary nature of a detention is ascertained⁴⁴⁵.

The basic aims of the opinions are essentially two. The former is to determine a consistent set of precedents in order to establish the criteria on the basis of which deprivations of freedom linked with certain situations may result arbitrary⁴⁴⁶. The latter is to assist states for purposes of prevention and eradication of the practice of arbitrary detentions⁴⁴⁷.

The Opinions of the Group are, usually, brought to the attention of the CHR during its annual sessions when the experts submit their periodic reports to the UN body.

Also, the Group forwards these opinions to the governments and to the sources⁴⁴⁸.

Finally it is noteworthy that the experts have also set up a procedure to review their opinions which can be started up either by the government or the sources⁴⁴⁹.

⁴³⁵ *Supra* note 209, paragraph 9-19.

⁴³⁶ *Ibidem*, paragraph 9 (a), (b), (c), (d), (e).

⁴³⁷ *Ibidem*, paragraphs 11-12. The same approach is shared by the SRT, see paragraph 3.3 of this Section.

⁴³⁸ *Ibidem*, paragraph 15.

⁴³⁹ *Ibidem*.

⁴⁴⁰ *Ibidem*, paragraph 16.

⁴⁴¹ *Ibidem*, paragraph 17, (a).

⁴⁴² *Ibidem*, (b).

⁴⁴³ *Ibidem*, (c).

⁴⁴⁴ *Ibidem*, (d).

⁴⁴⁵ *Ibidem*, (e).

⁴⁴⁶ It is the case, for instance, of rehabilitation through labor or house arrest.

⁴⁴⁷ See also the WGAD web-site: www.unhcr.ch/html/menu6/2.

⁴⁴⁸ The Group sends the opinion to the sources three week after its transmittal to the government. *Supra* note 209, paragraph 19.

⁴⁴⁹ The sources and the governments can request the opinion under special circumstances: See *supra* note 209, paragraph 21 (a), (b), (c).

4.4. THE ON-SITE VISITS

Following the lead of the WGD, the SRESAEs and the SRT, the WGAD has interpreted its mandate as to include on-site visits. During such visits the experts usually meet with judicial and penitentiary officials, detainees, and their families, representatives of the governments concerned and members of the civil society. As mentioned, such visits are a unique opportunity to pave the way to a fruitful co-operation between the authorities of the Country visited and the Working Group, and to better understand the reality of the Country.

In the second half of the nineties and early 2000 the Group visited the following Countries: Nepal⁴⁵⁰, Bhutan⁴⁵¹, China⁴⁵², Peru⁴⁵³, UK⁴⁵⁴, Romania⁴⁵⁵, Indonesia, Australia, Iran, China and Latvia⁴⁵⁶.

4.5. THE URGENT MESSAGES PROCEDURE

The WGAD resorted to the UMP without being expressly mandated by the Commission .

More specifically, the Group singled out two circumstances in which such a procedure may be started up: when there are sufficiently reliable allegations that a person is being arbitrarily deprived of his/her liberty and that the continuation of such deprivation of liberty constitutes a serious threat to the person's life or health; when there are other particular circumstances that require urgent action⁴⁵⁷.

Typically, the UM is sent to the Minister of Foreign Affairs of the Country concerned through the most rapid means.

As stressed by the experts, the procedure has a mere humanitarian feature and it does not prevent the Group from later rendering an opinion assessing the arbitrary character of the detention in respect of which the UM was sent⁴⁵⁸.

Importantly, the introduction of the UMP shows that even in dealing with very urgent cases the Working Group drew its «inspiration» from its three predecessors.

4.6. THE REPORTS

The WGAD reports testify the extent to which it followed the lead of the first three Theme procedures created by the CHR. In such reports the Group, basically, indicates the way it carried out his task: how it handled the communications received, and how many communications were transmitted to the government. Yet, it summarizes its opinions, the UMs sent, and lists the visits undertaken including follow-up visits. Finally, it makes critical remarks and suggests strategies to defeat the practice of arbitrary detention.

4.7. CONCLUSION

The examination of the WGAD is especially interesting. In fact, it, first, allows the conclusion that the Group is the «*direct heir*» of the WGD, the SRESAEs and the SRT.

Indeed, the Group sanctions the precedential significance of the practice of the above Theme procedures. In this respect it is noteworthy that in the Resolutions on the mandate of the Group the CHR formalized the interpretative endeavors introduced by the WGD's practice and consolidated by the two Theme SRs.

In fact, in such Resolutions the CHR defined the scope of the WGAD's mandate, and enable it to receive information from all kinds of sources. Most importantly, the Commission expressly mandated the Group to deal with individual cases, while, the other three Theme procedures tackled communications on individual cases without any prior authorization to do so by their parent body.

Yet, the methods adopted to assess the credibility of the information, the procedure of transmittal of such information to the governments, the introduction of on-site visits, and the adoption of the UMP are further significant evidence of how the

Group followed the lead of the first three Theme procedures.

⁴⁵⁰ E/CN.4/1997/4/Add.2.

⁴⁵¹ E/CN.4/1997/4/Add.3. It was a follow-up visit to a previous mission undertaken in 1994 See E/CN.4/1995/31/Add.3.

⁴⁵² E/CN.4/1998/44/Add.2.

⁴⁵³ E/CN.4/1999/63/Add.2.

⁴⁵⁴ E/CN.4/1999/63/Add.3. The WGD investigated on cases of detentions of asylum seekers and immigrants.

⁴⁵⁵ E/CN.4/1999/63/Add.4.

⁴⁵⁶ E/CN.4/2000/4/Add.2, E/CN.4/2003/8/Add.2, E/CN.4/2004/3/Add.2, E/CN.4/2005/6/Add.4, E/CN.4/2005/6/Add.2.

⁴⁵⁷ *Supra* note 209, paragraph 22 (a) and paragraphs 55-59.

⁴⁵⁸ *Ibidem*, paragraph 23.

Finally, the analysis carried out in this section highlights the innovative strain of the WGAD. Actually, the most noteworthy innovation is the formulation of opinions which enabled the Group to develop a set of precedents on the basis of which to verify and analyze communications coming before it. They may be considered, as the WGD's general comments, a sort of «jurisprudence» of the experts, *alias*, the legal framework against which to measure out the arbitrary nature of cases of deprivation of liberty or detention.

5. The Special Rapporteur on Congo/former Zaire (SRC)

The SRC was appointed by the CHR in 1994 as one of the main UN human rights monitoring bridge-head in the Great Lakes region⁴⁵⁹.

The mandate of the SR was clearly formulated in Resolution 1994/87. According to its literal wording the expert was requested to establish direct contacts with the authorities and people of the former Zaire⁴⁶⁰, and to report on the human rights situation in the state in question in light of the information submitted by NGOs.

5.1. THE SCOPE OF THE MANDATE

The SR was entrusted with a very vague mandate. Reporting on the human rights situation in the former Zaire might have meant everything and nothing at the same time. Therefore, Resolution 1994/87 entailed an interpretative effort on the part of the expert in order to properly discharge his reporting task. In this respect, the reports of the expert are especially meaningful and definitely indicative of how the SR understood the words «*the human rights situation in the former Zaire*».

Generally, such reports contains a detailed introduction on the current political situation in the African state followed by a thorough analysis of the various conflicts⁴⁶¹ in which the Country is involved and the violations of Humanitarian Law perpetrated in these contexts⁴⁶². Also, the SR is concerned with basic civil and political rights such as liberty of person⁴⁶³, freedom of expression⁴⁶⁴, torture⁴⁶⁵, right to due process⁴⁶⁶, freedom of movement⁴⁶⁷, freedom of conscience⁴⁶⁸, right to democracy⁴⁶⁹, the imposition of death penalty⁴⁷⁰, the protection of persons at risks such as human rights defenders⁴⁷¹, women and children⁴⁷².

All this considered, it is safe to conclude that the SRC has interpreted the task of reporting on the human rights situation in the former Zaire as monitoring breaches of Humanitarian Law and violations of civil and political rights, with special attention to the violations of basic rights of groups of persons that are usually the easiest targets in warfare and emergency situations.

5.2. THE SOURCES OF INFORMATION

Resolution 1994/87 besides formulating the SR's task in a very broad fashion, is, also, ambiguous about the sources. It only mentions the NGOs as providers of information. Therefore, a literal interpretation of the Resolution would seem to allow the inference that the SR is not mandated to receive communications from sources other than NGOs.

Nevertheless, it may be argued that, as the UN document requests the expert to establish contacts with the authorities and people of the former Zaire, it also implies that such «contacts» are primarily aimed at collecting information on the human rights situation in the African state. The SR's practice confirms such an interpretation and shows that the expert shares the same flexible approach to the sources of information as that of the WGD, the SRESAEs, the SRT⁴⁷³.

⁴⁵⁹ The CHR appointed also a SR on Rwanda and a Human Right Field Operation in Rwanda. See Resolution S-3/3.

⁴⁶⁰ The Resolution and other UN documents on the African State referred to it as Zaire up to 1996. From 1997 onward following the political developments in the Country the UN documents mention it as Democratic Republic of Congo. Such documents available on the High Commissioner for Human Rights' web-site, *supra* note 51.

⁴⁶¹ They are nine. See the 2000 report of the expert E/CN.4/2001/40 paragraph 154.

⁴⁶² *Ibidem*, paragraphs 153-162.

⁴⁶³ *Ibidem*, paragraph 167.

⁴⁶⁴ *Ibidem*, paragraph 168.

⁴⁶⁵ *Ibidem*, paragraph 169.

⁴⁶⁶ *Ibidem*, paragraph 170.

⁴⁶⁷ *Ibidem*, paragraph 171.

⁴⁶⁸ *Ibidem*, paragraph 172.

⁴⁶⁹ *Ibidem*, paragraph 164.

⁴⁷⁰ *Ibidem*, paragraph 166.

⁴⁷¹ *Ibidem*, paragraph 165.

⁴⁷² *Ibidem*, paragraph 174.

⁴⁷³ See the following reports of the SR: E/CN.4/1997/6, E/CN.4/1998/64, E/CN.4/1999/64, E/CN.4/1999/31, E/CN.4/2000/42, E/CN.4/2003/43.

5.3. THE WORK METHODS

The working methods of the SRC are the same as those of the WGD, the SRESAEs, and the SRT⁴⁷⁴.

Such methods include the following stages.

First, the SR receives communications on the violations of human rights in the African state and assess their reliability in the light of the «factual» criterion developed through the practice of the mentioned Theme SPs.

Secondly, the expert sends the communications that he considers as reliable and credible to the authorities of the African state⁴⁷⁵.

Third, once the government replies submitting information on the violations alleged in these communications, the SR forwards the governmental information to the sources asking them to comment on it.

Finally, in light of the reply of the government and the sources' comments the SR draws up his conclusions in regard to the violations brought to his attention, and summarizes them in his annual reports to the CHR.

5.4. THE ONE-SITE VISITS

As every Country mandate, the original SRC's terms of reference did not provide for Country visits.

Nevertheless, since 1994 the SRC started to carry them out without being expressly mandated by the Commission⁴⁷⁶. The UN body, subsequently, endorsed such a practice which at present is an integral part of the mandate of the expert. All this considered, it is safe to conclude that introducing *in situ* visits in his mandate the SRC was just following the lead of the WGD, the SRESAEs, and the SRT.

5.5. THE URGENT MESSAGES

Remarkably, even though Country SRs are not authorized to deal with urgent individual cases, the SRC is used to send Urgent Messages when he receives information testifying that violations of basic rights of an individual are likely to threaten his/her life or health, or more in general his/her mental or physical integrity⁴⁷⁷. Indeed, this feature of the SR's practice testifies, once again, the «transversal» consolidation of the first three Theme procedures' working methods.

5.6. THE REPORTS

The reports of the SRC synthesizes all his activity and show how the expert followed the steps of the WGD, the SRESAEs, the SRT.

In fact, the expert' reports give a very detailed and rigorous description of the work methods analyzed in this section⁴⁷⁸.

Moreover, they, clearly depict of the human rights situation in the African states giving a thorough account of all the rights violated, and recommending ways and means, both political and legal ones, to improve this situation.

5.7. CONCLUSIONS

The WGD, the SRESAEs, and the SRT's bold performance set the crucial precedent for the development of the human rights activity of the Country expert analyzed in this section.

Moreover, the fact that also the other Country SRs followed the same pattern of the of the first three Theme Procedures' practice⁴⁷⁹, shows that such Procedures set up the human rights protection and monitoring tools currently employed by all UN Theme and Country SRs in discharging their mandates.

⁴⁷⁴ *Ibidem*.

⁴⁷⁵ In the year 2000 the SR transmitted 60 communications. *Supra* note 243, paragraph 11.

⁴⁷⁶ See the first report of the SR in which he refers to his first attempt to solicit a visit to the African Country. E/CN.4/1995/67 paragraph 4.

⁴⁷⁷ In the year 2000 the SR sent 196 Urgent Messages: see *supra* note 243.

⁴⁷⁸ See the introductory section of the reports mentioned *supra* note 255.

⁴⁷⁹ See the reports of Country Rapporteurs on the web-site of the UN High Commissioner for Human Rights, *supra* note 51.

6. The SR on the former Yugoslavia (SRFY)*

6.1. THE MANDATE AND ITS SCOPE

The SRFY was appointed by the CHR to cope with the extremely grave and serious human rights situation occurred during the armed conflict that involved the states arisen from the crumbling of Yugoslavia. The exceptional character of the situation in the former Socialist state is testified by the convening of the first special session of the ECOSOC' subsidiary body⁴⁸⁰. Thus, it was during this special meeting that the UN human rights body appointed the SRFY. The mandate of the expert was enshrined in Resolution S-1/1. More specifically, the CHR charged the expert with the task of «investigating first-hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina»⁴⁸¹.

The most evident difference between the SRFY's terms of reference and other Country mandates lies in the fact that the expert in question was entrusted with the human rights situation in four states: Slovenia, Croatia, Bosnia and Herzegovina and the Federal Republic of Yugoslavia⁴⁸². Slovenia was excluded from the SR's mandate at the CHR's fiftieth session⁴⁸³.

On the other hand, as far as the *ratione materiae* of the expert's mandate is concerned, it is noteworthy that the CHR did not give any priority to the rights to be monitored. It was left to the discretion of the expert to determine it. Thus, from 1992 up to 1995 the SR dealt with the gross violations which occurred in the above four states during the armed conflict⁴⁸⁴, while from 1995 onwards the expert has even started to deal with the situations of returnees and their right to property, migration issues, war crimes prosecutions⁴⁸⁵.

* This section essentially deals with the practice of Mr Mazowiecki, the first individual appointed by the CHR as SRFY, because of the high significance of the innovations he introduced in his terms of reference. Mr Mazowiecki resigned in 1996. Mrs Rehn and Mr Diensbier have been the two experts who, in different lapses of time, succeeded to him in the post of SRFY. It is noteworthy that in the year 2001 the CHR decided to turn the SR into a Special Representative and recently put an end to the Country Procedure for former Yugoslavia.

⁴⁸⁰ On the CHR's special sessions, their significance and impact see KENNY K., «Formal and Informal Innovations in the United Nations Protection of Human Rights: the Special Rapporteur on the former Yugoslavia», in *Austrian Journal of Public International Law*, vol. 48, 1995, at 26-36.

⁴⁸¹ S-2/1 paragraph 12.

6.2. THE SOURCES OF INFORMATION

Resolution S-1/1 did provide for a wide range of sources from which the SR was authorized to receive information: governments, individuals, IGOs, NGOs⁴⁸⁶.

6.3. THE WORK METHODS

The SRFY' s work methods are alike those of the first three Theme Procedures examined in this chapter⁴⁸⁷. He adopted the same criteria for assessing the admissibility of the communications on human rights violations; he is used to send the communications to the governments concerned asking for clarification, to forward the governments' replies to the sources requesting them to comment on them, and finally to report to the Commission on the violations analyzed.

6.4. THE ON-SITE VISITS

Resolution S-1/1 expressly provided for *in situ* missions by the SR. This is a quite novel component in Country mandates, because, as mentioned in the case of the SRC, none of the original Resolutions appointing Country experts authorized them to undertake Country visits. The SRs, actually, started to carry them out following the practice of the WGD⁴⁸⁸.

Nevertheless, in the view of the present author, the inclusion of on-site visits in the mandate of the SRFY can be considered as a result of seriousness of the human rights violations occurring in the former Yugoslavia rather than a formalization of the above Theme Procedure's practice⁴⁸⁹.

⁴⁸² For an evaluation of such an approach to the crisis in the former Yugoslavia see KENNY, *supra note* 262, at 38.

⁴⁸³ CHR Resolution 1994/72.

⁴⁸⁴ See the first ten reports submitted by Mr Mazowiecki: E/CN.4/1992/S-1/9, E/CN.4/1992/S-1/10, E/CN.4/1993/50, E/CN.4/1994/3, E/CN.4/1994/4, E/CN.4/1994/626, E/CN.4/1998/4, E/CN.4/1994/47, E/CN.4/1994/110.

⁴⁸⁵ See for instance the report E/CN.4/2001/47/Add.1, and compare it with the reports above mentioned.

⁴⁸⁶ *Supra note* 263.

⁴⁸⁷ See A/47/66 paragraph 5, E/CN.4/1993/50 paragraph 9.

⁴⁸⁸ KENNY, *supra note* 262, at 44.

⁴⁸⁹ See also the initial mandate of the SR on Rwanda: CHR Resolution S-3/3.

6.5. THE URGENT MESSAGES

Like every Country mechanism, the SRFY was not authorized to consider especially urgent cases⁴⁹⁰.

He just had to investigate and to report on the human rights situation in the territory of the former Yugoslavia without being mandated «to respond effectively»⁴⁹¹.

However, the SR, actually, intervened with the authorities of the states of the former Yugoslavia in order to draw their attention on particular instances or allegations of human rights abuses against individuals or groups. In each case the expert urged that the situation would have been investigated, and where necessary, remedied without delay⁴⁹². In this respect it is emblematic that, several times, the expert brought to the attention of the Croatian authorities the alleged massacre carried out by the Bosnian Croat forces in the Medak Pocket, the so called *pink zone* in Croatia⁴⁹³.

Moreover, the text of a letter of the SR dated 1 October 1993 faxed to the Minister of Foreign Affairs of Croatia, concerning the above mentioned case was published in a SR's press release⁴⁹⁴.

As noticed, such publication further testifies the endorsement by the SR of the UMP introduced by the WGD⁴⁹⁵.

Yet, it is noteworthy that the SRFY's adoption of the above procedure constituted a precedent which was followed by his two successors Mrs Rhen and Mr Diebnstbier, and the SR on Iraq⁴⁹⁶.

6.6. EXPERTS EXTERNAL TO THE UN SECRETARIAT AS CONSULTANTS OF THE MANDATE

The first especially innovative work technique the SRFY introduced dates back to October 1992, when he carried out on-site visits with experts external to the UN Secretariat.

It was the first time that external experts collaborated with a UN SR within the framework of his mandate⁴⁹⁷.

More specifically the SR availed himself of the expertise of a forensic anthropologist, Dr. Snow, who «located a site near Vukovar which appeared to be a mass grave of victims of war crimes»⁴⁹⁸.

The forensic expert also provided information concerning severe mistreatment of pre-trial detainees in Pristhina⁴⁹⁹, the dismissal of Albanian doctors from the Hospital in Pristhina, and discrimination against Albanian patients⁵⁰⁰.

In addition, a reasoned assessment of allegations received by the SRT, who accompanied the SRFY during his second mission to the Countries of the former socialist state⁵⁰¹, was facilitated by the expertise of a forensic expert who traveled with the Rapporteur on Torture himself to Kosovo⁵⁰².

The SRESAEs was, also, assisted by a forensic doctor when he visited Croatia from 15 to 20 December 1992 at the request of the SRFY⁵⁰³, in order to carry out preliminary investigations into allegations that victims of war crimes were buried in various mass graves and to assess whether these allegations were *prima facie* reliable⁵⁰⁴.

The collaboration of forensic experts was welcomed and endorsed by the CHR during its second special session⁵⁰⁵. In particular, the Commission urged the Commission of Experts established by the Security Council⁵⁰⁶ to set up an immediate and urgent investigation by qualified experts of a mass grave near Vukovar and other mass grave sites and places where mass killings were reported to have taken place⁵⁰⁷.

Then, such collaboration paved the way to a further significant development. In January 1993 an unaccompanied team of medi-

⁴⁹⁰ KENNY, *supra* note 262, at 63.

⁴⁹¹ *Supra* note 263.

⁴⁹² E/CN.4/1994/47 paragraph 6, E/CN.4/1994/110, paragraph 3.

⁴⁹³ A/C.3/48/L.74/Rev.1.

⁴⁹⁴ Press Release Human Rights/3532, 6 October, 1993. See also E/CN.4/1994/47 paragraphs 100-105, E/CN.4/1994/110 paragraph 83, and KENNY, *supra* note 262, at 65 footnote 213.

⁴⁹⁵ *Supra* note 262 at 65.

⁴⁹⁶ *Ibidem*, at 64. It is symptomatic that Mr. Diebnstbier asked the Croatian Authorities to take all the necessary measures to ensure the safety of Mr. Jaksic, a human rights lawyer who was shot and injured by unidentified assailant in December 2000.

⁴⁹⁷ *Ibidem*, at 66.

⁴⁹⁸ E/CN.4/1992/S-1/10, paragraph 18 and annex II.

⁴⁹⁹ A/47/666, paragraph 111.

⁵⁰⁰ *Ibidem*, paragraph 113.

⁵⁰¹ Such collaboration was expressly requested by the CHR in Resolution S-1/1 at paragraph 13.

⁵⁰² E/CN.4/1992/S-1/10, paragraph 3.

⁵⁰³ E/CN.4/1993/50 paragraph 6.

⁵⁰⁴ *Ibidem*, Annex I.

⁵⁰⁵ CHR Resolution S-2/2.

⁵⁰⁶ SC Resolution 780, (1992).

⁵⁰⁷ *Supra* note 262. See also E/CN.4/1993/50 Annex I paragraph II.

cal experts investigated allegations of the widespread occurrence of rape in Bosnia and Herzegovina⁵⁰⁸.

The team was made up of four medical and psychiatric experts⁵⁰⁹, the Director of the UN Divisions for the Advancement of Women and other staff of the UN Center for Human Rights. Their mandate was to report to the SRFY, who strongly endorsed the team observations, conclusions, recommendations in his reports⁵¹⁰.

The mission was carried out *in parallel* to the visits the SR was undertaking in the territory of the former Yugoslavia⁵¹¹.

Never before a team of experts provided assistance to a UN SR undertaking an on-site visit to which the Rapporteur himself did not take part⁵¹².

Such informal innovation in human rights fact—finding was definitively endorsed by the CHR in Resolution 1993/33 concerning human rights and forensic science⁵¹³.

6.7. UNACCOMPANIED VISITS

In gathering information on the human rights situation in the former Yugoslavia, the SR relied also on the UN Secretariat staff's findings concerning gross human rights violations occurred in the *enclave* of Cerska (eastern Bosnia and Herzegovina) in 1993⁵¹⁴.

More specifically two professional members staff from Geneva traveled to the above area spending two weeks in interviewing witnesses, victims and gathering information on the human rights abuses perpetrated in the *enclave*⁵¹⁵.

The advantage of unaccompanied visits is that they allow the UN SR to gather information timely and very rapidly⁵¹⁶.

The new fact-finding tool was also employed by the SR on Iraq, who availed himself of the findings resulting from two unaccompanied visits carried out by a team of two staff members of the UN Center for Human Rights. The first was undertaken to the Iran/Iraq border from 27 August-2 September 1993, while the second one was carried out on the Turkey/Iraq border from 18-24 December 1993⁵¹⁷.

6.8. FINAL REMARKS

The analysis undertaken in the previous paragraphs shows that the SRFY not only adopted the same work methods of the first three Theme procedures, but also introduced significant informal innovations in human rights fact-finding.

In this last respect, it has to be highlighted that the two innovations examined at paragraphs 6.6 and 6.7 are emblematic of the recognition of the need for the UN human rights machinery to employ available technology and expertise⁵¹⁸.

In other words, these two informal innovations are two significant steps, albeit small ones, towards the improvement of the professionalism of UN human rights fact-finding⁵¹⁹, which, in many respects, is still *ad hoc* and lacking of formal procedures which should inform the carrying out of the task of each UN SR.

Most importantly, such developments show that the role of a SR, both thematic and Country, has changed. «SRs are not only expected to receive information from other sources, but rather to gather first hand information in accordance with international standards of due process»⁵²⁰.

This evolution represents a shift away from NGOs submission to a direct UN on-site investigation⁵²¹, and the setting up of more scientific techniques of fact-finding.

⁵⁰⁸ *Supra* note 285, paragraph 7 and Annex II.

⁵⁰⁹ *Supra* note 262 at 67 footnote 224.

⁵¹⁰ *Supra* note 285, paragraph 83.

⁵¹¹ *Ibidem*, paragraph 7.

⁵¹² It has to be noticed that actually the SR briefly met some members of the team in Sarajevo. With this respect see *supra* note 262 at 68.

⁵¹³ See also CHR Resolution 1992/24 which already raised this issues, and the Secretary General's report pursuant to this Resolution E/CN.4/1993/20.

⁵¹⁴ See Press Release Human Rights/3354, 4 March 1993.

⁵¹⁵ *Supra* note 262 at 70, footnote 232.

⁵¹⁶ *Ibidem*.

⁵¹⁷ See the SR's report to the General Assembly, A/48/600, and his report to the CHR at its fiftieth session: E/CN.4/1994/58.

⁵¹⁸ *Supra* note 262 at 69.

⁵¹⁹ *Ibidem*.

⁵²⁰ *Supra* note 262 at 74.

⁵²¹ *Id.*, footnote 249. Also the establishment of human rights missions are a further symptomatic of UN efforts to gather information on human rights directly on the spot. For details on human rights field operations see MARTIN I., «The Early Experience of International Human

Moreover, it is hoped that such a development will be enhanced especially in the light of the increasing emphasis on individual responsibility and prosecution in the UN Resolutions establishing the two *ad hoc* Tribunals for the Former Yugoslavia and Rwanda⁵²², and in the Statute of the International Criminal Court⁵²³. Indeed, UN SPs may play a very significant role in gathering evidence concerning the most heinous crimes falling within the jurisdiction of the above Tribunals and the International Criminal Court.

Finally a last remark. The experts who succeeded to the post of SRFY from 1996 onwards did not avail themselves of the innovations analyzed in this section. This is due to the fact that the situation in the former Yugoslavia has been evolving since 1992, and at present it is not as serious as during the years in which the first SRFY was carrying out his tasks.

This is not to say that the practice of the first SRFY has no precedential value, as the unaccompanied visits have been introduced in the activity of the SR on Iraq.

Rather, it means that it will depend on the willingness of other SRs, both thematic and Country, to follow the first SRFY's steps whenever they will have to confront themselves with situations involving massive violations of basic human rights.

7. *Main Features of SPs' Activity and Its and Significance in terms of Human Rights Protection and Monitoring: Concluding Observations*

In light of the analysis contained in this section, it is safe to conclude that the WGD, the SREASEs and the SRT's interpretative exercises brought about a true transformation of the human rights activity entrusted to them by the CHR, a transformation which, remarkably, was crucial for the building up of the system of SPs as a true human rights protection and mo-

onitoring system. Such a break-through in the practice of the human rights experts was characterized by six stages which are indicative of the main features of SPs' activity and its overall significance.

The first stage concerns the deduction of a legal-working definition of the phenomena the experts had to deal with. In terms of human rights protection, such a deduction meant a clarification of the ambit within which the experts were to carry out their task, and the identification of the fundamental rights infringed by the phenomena themselves. Also, it is noteworthy that the experts' definition proved to be highly authoritative. As seen, the WGD's definition of missing persons is enshrined in the Declaration on Enforced Disappearances, while the interpretative exercises of the SREASEs and the SRT have been crucial in specifying the ambit of application and scope of the two fundamental human rights norms on the right to life and the prohibition of torture. This means that a construction and analysis of the customary significance of the above rights will include the views of the two experts among the sources of Public International Law⁵²⁴.

The second stage regards the experts' attitude towards the sources of information.

The inclusion of local NGOs and individuals in the range of sources envisaged by the CHR has been decisive in paving the way to a more professional and incisive fulfillment of the experts' tasks. On the one hand, such an enlargement entailed the introduction of the cross-examination technique as a tool to verify the credibility and reliability of the governmental information coming before the attention of the experts, and on the other hand, it proved to be key in respect to the follow-up of the cases taken up by the three theme SPs.

At the third stage there is the singling out of the criteria of admissibility of the information and the procedure of receipt and transmission of it. The former would have been fundamen-

Rights Field Operations», *Papers in Theory and Practice of Human Rights*, No. 19, Human Rights Center, University of Essex; O'NEILL W., «Human Rights Monitoring versus Political Expediency: the Experience of the OAS/UN Mission in Haiti», in *Harvard Human Rights Journal*, vol. 8, 1995, 101-127.

⁵²² See with this respect the Statutes of the International Criminal

Tribunals for the former Yugoslavia and Rwanda enshrined respectively in UNDOC S/25704 and SC Resolution 955 (1994).

⁵²³ A/Conf.183/9.

⁵²⁴ See the analysis of the status of the right to life and the prohibition of torture under International Law by professor **RODLEY**, *supra* note 3, Chapter 2, 6, 7, 8.

tal for the verification of the reliability of the communications submitted to the experts, and the speeding-up of such a verification process, while the latter would have become the basic procedural pattern of the verification of individual cases of human rights abuses followed by all UN SPs.

The fourth stage regards the introduction of on-site visits. Indeed, the visits would have been crucial to gather first-hand information directly on the ground and to really understand the features of the human rights phenomena examined by the experts. Moreover, they, radically, changed the perspective of the Theme procedures in respect to their mandates by leading the experts to expressly attribute responsibility for the cases coming before them directly to the authorities of the Countries visited. In other words, the visits turned the three SPs into quasi-judicial bodies.

The fifth stage concerns the UMs. They are the hallmark of the three Theme SPs' activity. They bear three fundamental meanings: a moral one as they enabled the experts to save lives, a political one by virtue of their high intrusiveness in the treatment accorded by states to their citizens, a procedural one as they turned the Theme procedures in quite an effective mechanism to tackle urgent individual cases extremely rapidly. Indeed, such rapidity if compared with the overall «UN times» is really an achievement.

The sixth stage is constituted by the reporting activity, the «official record» of all the changes brought about by the Theme experts and the crucial tools through which they may determine the CHR's decisions concerning especially serious human rights phenomena.

All this considered, the WGD, the SREASEs and the SRT's practice has been a turning point with respect to the CHR's original conception of Theme mechanisms. In fact, even though the UN Body meant the ultimate achievement of Theme mandates as a mere a theoretical study of certain human rights phenomena, the experts developed true human rights protection and monitoring tools in order to discharge their tasks. The key of such a break-through process has been the courage and determination of the experts to go beyond the terms of the Reso-

lutions appointing them, and their flexible attitude towards the fulfillment of their tasks.

It is, then, safe to assert that first three Theme Procedures built up the Ecosoc's subsidiary body's human rights protection system. Their practice was subsequently endorsed by the CHR in the Resolutions renewing their mandates and in formulating new thematic mandates such as that of the WGAD, arguably, the best synthesis of the achievements of the three Theme procedures' practice in terms of human rights protection and monitoring⁵²⁵. Importantly, even SRs on Economic Social and Cultural Rights are implementing their mandates in a way, which is consistent with the first three Theme SPs' practice⁵²⁶.

Furthermore, the interpretative endeavors of the three procedures had «transversal» effects: they became integral parts of the mandate of Country Procedures, as the examination of the practice of the SRC and the SRFY highlighted.

The conceptualization of SPs

By answering the three questions addressed in the introduction this study has drawn a vivid picture of SPs and allows a conceptualization.

Thus, an accurate definition of the SPs flows from the combination of their constituent elements and the break-through practice of the first three Theme procedures. *That is to say that the SPs are human rights specialists regularly appointed by the UN CHR and who play the role of fact-finders and watch-dogs of an international Habeas Corpus.*

The human rights expertise of UN SRs and members of WGs stems from their occupation as professors of International Law and, remarkably, as human rights NGOs' activists, whereas the fact-finding nature of their appointment results from the wording of their mandates and the way they interpreted it. Namely, a strict verification of human rights violations through the analysis of relevant information and the carrying out of one-site visits.

⁵²⁵ See the mandates and reports of Theme Procedures on the High Commissioner for Human Rights web-site *supra* note 51.

⁵²⁶ See the practice of the SR on Education: E/CN.4/2001/52.

Besides, the role of watch-dogs of an international Habeas Corpus arising from the implementation of the UMP is, in the view of this author, the most remarkable feature that characterizes the SPs and distinguishes them from other human rights monitoring bodies, and make their activity especially meaningful and substantial.

Concluding, the above conceptualization of the SPs lays out the true meaning of the ECOSOC' subsidiary body' human rights protection system. It tells that the challenge implied in the setting

up of the SPs was to make human rights protection and monitoring under the auspices of the UN a proper technical and effective endeavor. Indeed, SRs succeeded in such an attempt as the significance of their practice showed. The key of such a success has been the pioneer approach the experts applied to their human rights assignment, and which, remarkably, may still bring about further innovations in the UN human rights protection system. Indeed, the constant determination to develop new ways and means of human rights protection and monitoring places SPs at the front line of the «international struggle to extend the rule of law».

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