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Even the ILO conventions, perhaps, served some less-than-altruistic purposes. Improvement in the conditions of labour was capitalism's defence against the spectre of spreading socialism which had just established itself in the largest country in Europe. States, moreover, had a direct interest in the conditions of labour in countries with which they competed in a common international market: a State impelled to improve labour and social conditions at home could not readily do so unless other States did so, lest the increase in its costs of production render its products non-competitive.

I have stressed the possibly political-economic (rather than humanitarian) motivations for early norms and agreements, identifying a State’s concern for the welfare of some of its nationals as an extension of its Statehood and perhaps reflecting principally concern for State interests and values. If some norms and agreements in fact were motivated by concern for a State’s own people generally, they did not reflect interest in the welfare of those in other countries, or of human beings generally. State interests rather than individual human interests, or at best the interests of a State’s own people rather than general human concerns, also inspired voluntary inter-State co-operation to promote reciprocal economic interests.

I would not underestimate the influence of ideas of rights and constitutionalism in the seventeenth and eighteenth centuries, and of a growing and spreading enlightenment generally: Locke, Montesquieu, other Encyclopedists, Rousseau; the example of the Glorious Revolution in England and the establishment of constitutionalism in the United States; the influence of the French Declaration of the Rights of Man and of the Citizen. Such ideas and examples have influenced developments inside countries, but they did not easily enter the international political and legal system. Concern by one country for the welfare of individual human beings inside another country met many obstacles, not least the conception and implications of Statehood in a State system. The human condition in other countries and the treatment of individuals by other Governments were not commonly known abroad since they were not included in the information sources of the time. Information (and concern) were filtered through the State system and through diplomatic sources, and human values as such were not the business of diplomacy. For those reasons, and for other reasons flowing from the State system, other States took little note and expressed little concern for what a Government did to its own citizens. In general, the veil of Statehood was impermeable. If occasionally something particularly horrendous happened — a massacre, pogrom — and was communicated and made known by the available media of communication, it evoked from other States more-or-less polite diplomatic expressions of regret, not on grounds of law but of noblesse oblige or of common princely morality wrapped in Christian charity (whose violation gave princes and Christianity a bad name).

Even if the implications of Statehood had not been an obstacle, as regards any but the grossest violations of what we now call human rights, few if any States had moral sensitivity and moral standing to intercede. When a State invoked an international standard of justice on behalf of one of its nationals abroad, it may have been invoking a standard unknown and unheeded at home. Few States had constitutional protections and not many had effective legislative or common-law protections for individual rights. Torture and police brutality denials of due process, arbitrary
detention, perversions of law, were not wildly abnormal. Surely, few States recognized political freedom — freedom of speech, association and assembly universal suffrage. Many States denied religious freedom to some, and few States granted complete religious toleration; full equality to members of other than the dominant religion was slow in coming anywhere. Women were subject to rampant and deep-rooted inequalities and domination, often to abuse and oppression. Even today such violations are not the stuff of dramatic television programmes and do not arouse international revulsion and reaction; in earlier times, surely, violations of what are today recognized as civil and political rights caused little stir outside the country. A State’s failure to provide for the economic and social welfare of its inhabitants was wholly beyond the ken of other States. There were no alert media of information and few civil rights or other non-governmental organizations to sensitize and activate people and Governments...

E. BIRTH OF THE MOVEMENT: THE UN CHARTER AND THE UDHR

The Nuremberg trial and several provisions of the United Nations Charter of 1945 held centre stage in the incipient human rights movement until 1948, when the UN General Assembly approved the Universal Declaration of Human Rights. For 28 years, the UDHR occupied centre stage. The two fundamental human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both became effective in 1976. (Note: only these two human rights treaties bear the solemn title of ‘Covenant’.)

Together with the Declaration, the Covenants form the International Bill of Human Rights, which now stands at the centre of the universal human rights system — universal in the sense that membership is open to states from all parts of the world. Chapter 11 examines three regional human rights systems, each open to members only from the designated part of the world: the European Convention for the Protection of Human Rights and Fundamental Freedoms (known as the ‘European Convention on Human Rights’), the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights. Each of these treaties is supported and developed (in different ways) by an intergovernmental body that in most cases is created by the treaty itself. The central institutional participants in the human rights movement also include other intergovernmental bodies such as the International Labour Organization, national governments and human rights agencies, nongovernmental human rights organizations, and a range of nongovernmental (and often international) organizations such as labour unions and churches.

This section focuses on the Charter and Declaration, while the next two chapters examine respectively civil and political rights, and economic and social rights. The Declaration itself includes both categories. These categories are far from airtight. Many treaties declare rights that straddle the two, or that fall clearly within the
domains of both of them. Many rights are hard to categorize. Nonetheless, at their core, the conventional distinctions are clear, whatever the relationships and interdependency between the two. Freedom from torture, equal protection, due process and the right to form political associations fall within the first category; the right to health or food or education come within the second.

**COMMENT ON THE CHARTER, UDHR AND ORIGINS OF THE HUMAN RIGHTS MOVEMENT**

The human rights movement is not simply a systematic ordering, basically through treaties and customary law, of fundamental postulates, ideologies and norms (that is, 'oughts' in the form of rules, standards, principles). To the contrary, these basic elements are imbedded in institutions, some of them state and some international, some governmental or intergovernmental and some nongovernmental and in related international processes. It is impossible to grasp this movement adequately without an appreciation of its close relation to and reliance on international organizations. For example, the basic instruments of the universal system were drafted within the different organs of the United Nations and adopted by its General Assembly, before (in the case of the treaties) being submitted to states for ratification. UN organs play a major role in monitoring, officially commenting on, and applying sanctions to state behaviour.

The United Nations Charter itself first gave formal and authoritative expression to the human rights movement that began at the end of the Second World War. Since its birth in 1945, the UN has served as a vital institutional spur to the development of the movement, as well as serving as a major forum for many-sided debates about it. The purpose of the present comments is to call attention to aspects of the UN and its Charter that bear particularly on the human rights movement.

Readers should now become familiar with the provisions (in the Documents Supplement) of the Charter that are referred to below, and of the UDHR.

**Charter Provisions**

Consider first the Charter's radical transformation of the branch of the laws of war concerning *jus ad bellum*. Recall that for several centuries that body of law had addressed almost exclusively *jus in bello*, the rules regulating the conduct of warfare rather than the justice or legality of the waging of war. The International Military Tribunal at Nuremberg was empowered to adjudicate 'crimes against peace', part of *us ad bellum* and the most disputed element of that Tribunal's mandate.

The Charter builds on the precedents to which the Nuremberg Judgment refers and states the UN's basic purpose of securing and maintaining peace. It does so by providing in Article 2(4) that UN members 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state', a rule qualified by Article 51's provision that nothing in the Charter 'shall impair the inherent right of individual or collective self-defence if an armed attack occurs' against a member.
The Charter's references to human rights are scattered, terse, even cryptic. The term 'human rights' appears infrequently. Note its occurrence in the following provisions: second paragraph of the Preamble, Article 1(3), Article 13(1)(b), Articles 55 and 56, Article 62(2) and Article 68.

Several striking characteristics of these provisions emerge. Many have a promotional or programmatic character, for they refer principally to the purposes or goals of the UN or to the competences of different UN organs: 'encouraging respect for human rights', 'assisting in the realization of human rights', 'promote . . . universal respect for, and observance of, human rights'. Not even a provision such as Article 56, which refers to action of the Member States rather than of the UN, contains the language of obligation. It notes only that states 'pledge themselves' to action 'for the achievement of purposes including the promotion of observance of human rights. Note that only one substantive human right, the right to qual protection receives specific mention in the Charter (Articles 1(3), 13(1)(b) and 55).

The Universal Declaration

Despite proposals to the contrary, the Charter stopped shy of incorporating a bill of rights. Instead, there were proposals for developing one through the work of a special commission that would give separate attention to the issue. That commission was contemplated by Charter Article 68, which provides that one of the UN organs, the Economic and Social Council (ECOSOC), 'shall set up commissions in economic and social fields and for the promotion of human rights'. In 1946, ECOSOC established the Commission on Human Rights (referred to in this book as the UN Commission), which evolved over the decades to become the world's single most important (and perhaps most disputed) human rights organ. At its inception, the new Commission was charged primarily with submitting reports and proposals on an international bill of rights. (The UN Commission was displaced by a newly created Human Rights Council in 2006. Chapter 9 examines the work of both the Commission and Council.)

The UN Commission first met in its present form early in 1947, its individual members (representatives of the states that were members of the Commission) including such distinguished founders of the human rights movement as René Cassin of France, Charles Malik of Lebanon and Eleanor Roosevelt of the United States. Some representatives urged that the draft bill of rights under preparation should take the form of a declaration — that is, a recommendation by the General Assembly to Member States (see Charter Article 13) that would exert a moral and political influence on states rather than constitute a legally binding instrument. Other representatives urged the Commission to prepare a draft convention containing a bill of rights that would, after adoption by the General Assembly be submitted to states for their ratification.

The first path was followed. In 1948, the UN Commission adopted a draft Declaration, which in turn was adopted by the General Assembly that year as the Universal Declaration of Human Rights (UDHR) with 48 states voting in favour and eight abstaining — Saudi Arabia, South Africa and the Soviet Union together with four East European states and a Soviet republic whose votes it controlled. (It is something of a jolt to realize today, in a decolonized and fragmented world of over 190 states, that UN membership in 1948 stood at 56 states.)
The Universal Declaration was meant to precede more detailed and comprehensive provisions in a single convention that would be approved by the General Assembly and submitted to states for ratification. After all, within the prevailing concepts of human rights at that time, the UDHR seemed to cover most of the field, including economic and social rights (see Art. 22–26) as well as civil and political rights. But during the years of drafting — years in which the Cold War took harsher and more rigid form, and in which the United States strongly qualified the nature of its commitment to the universal human rights movement — these matters became more contentious. The human rights movement was buffeted by ideological conflict and the formal differences of approach in a polarized world. One consequence was the decision in 1952 to build on the UDHR by dividing its provisions between two treaties, one on civil and political rights, the other on economic, social and cultural rights.

The plan to use the Universal Declaration as a springboard to treaties triumphed, but not as quickly as anticipated. The two principal treaties — the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) — made their ways through the drafting and amendment processes in the Commission, the Third Committee and the General Assembly, where they were approved only in 1966. Another decade passed before the two Covenants achieved in 1976 the number of ratifications necessary to enter into force.

During the 28 years between 1948 and 1976, a number of specialized human rights treaties such as the Genocide Convention entered into force. But not until the two principal Covenants became effective did a treaty achieve as broad coverage of human rights topics as the Universal Declaration. It was partly for this reason that the UDHR became so broadly known and frequently invoked. During these intervening years, it was the only broadly-based human rights instrument available. To this day, it:

has retained its place of honor in the human rights movement. No other document has so caught the historical moment, achieved the same moral and rhetorical force, or exerted as much influence on the movement as a whole.... [T]he Declaration expressed in lean, eloquent language the hopes and idealism of a world released from the grip of World War II. However self-evident it may appear today, the Declaration bore a more radical message than many of its framers perhaps recognized. It proceeded to work its subversive path though many rooted doctrines of international law, forever changing the discourse of international relations on issues vital to human decency and peace.7

As a declaration voted in the General Assembly, the UDHR lacked the formal authority of a treaty that binds its parties under international law. Nonetheless, it remains in some sense the constitution of the entire movement, as well as the single most cited human rights instrument.

Other UN Organs Related to Human Rights

Together with the UN Commission, other UN organs have played major roles in developing universal human rights. Their full significance with respect to drafting

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and approving treaties or declarations, monitoring, censuring, and authorizing or ordering state action becomes apparent in later chapters. A brief description follows.

Chapter IV of the Charter sets forth the composition and powers of the General Assembly. Those powers are described in Articles 10-1 in terms such as ‘initiate studies’, ‘recommend’, ‘promote’, ‘encourage’ and ‘discuss’. Particularly relevant are Articles 10 and 13. Article 10 authorizes the General Assembly to ‘discuss any questions or any matters within the scope of the present Charter [and] ... make recommendations to the Members of the United Nations ... on any such questions or matters’. Article 13 authorizes the GA to ‘make recommendations’ for the purpose of, *inter alia*, ‘assisting in the realization of human rights’. Throughout its history, the GA has been active in voting resolutions related to human rights issues.

Contrast the stronger and more closely defined powers of the Security Council under Chapter VII. Those powers range from making recommendations to states parties about ending a dispute, to the power to authorize and take military action ‘to maintain or restore international peace and security’ (Article 42) after the Council ‘determine[s] the existence of any threat to the peace, breach of the peace, or act of aggression’ (Article 39). Under Article 25, member states ‘agree to accept and carry out’ the Security Council’s ‘decisions’ on these and other matters. No such formal obligation of states attaches to recommendations or resolutions of the General Assembly. As Chapter 9 indicates, the SC has in recent years used its powers to address situations involving major human rights violations.

Two of the seven Main Committees of the General Assembly—committees of the whole, for all UN members are entitled to be represented on them—have also participated in the drafting or other processes affecting human rights. The Social, Humanitarian and Cultural Committee (Third Committee) and the Legal Committee (Sixth Committee) have reviewed drafts of proposed declarations or conventions and often added their comments to the document submitted to the plenary General Assembly for its ultimate approval.

**Historical Sequence and Typology of Instruments**

That part of the universal human rights movement consisting of intergovernmental instruments—that is, excluding for present purposes both national laws and nongovernmental institutions forming part of the movement—can be imagined as a four-tiered normative edifice, the tiers described generally in the order of their chronological appearance.

(1) The UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject. But what it does say has been accorded great significance. Through interpretation and extrapolation, as well as frequent invocation, the sparse text has constituted a point of departure for inventive development of the entire movement.

(2) The UDHR, viewed by some as a further elaboration of the brief references to human rights in the Charter, occupies in important ways the primary position of constitution of the entire movement. Today many understand the UDHR—or more specifically, numbers of its provisions—to have gained formal legal force by becoming a part of customary international law.
(3) The two principal covenants, which alone among the universal treaties have broad coverage of human rights topics, develop in more detail the basic categories of rights that figure in the Universal Declaration, and include additional rights as well.

(4) A host of multilateral human rights treaties (usually termed 'conventions' for there are only the two basic 'covenants'), as well as resolutions or declarations with a more limited or focused subject than the comprehensive International Bill of Rights, have grown out of the United Nations (drafting by UN organs, approval by the General Assembly) and (in the case of treaties) have been ratified by large numbers of states. They develop further the content of rights that are more tersely described in the two covenants or, in some cases, that escape mention in them. This fourth tier consists of a network of treaties, most but not all of which became effective after the two Covenants, including: the Convention on the Prevention and Punishment of the Crime of Genocide (140 states parties as of January 2007), the International Convention on the Elimination of all Forms of Racial Discrimination (173 parties), the Convention on the Elimination of all Forms of Discrimination against Women (185 parties), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (144 parties), and the Convention on the Rights of the Child (193 parties).

This book discusses to one or another degree most of these instruments.

QUESTION

Compare the premises to and character and provisions of the UDHR with the prior illustrations in Chapter 2 of certain premises and doctrines in international law that constitute 'background' to the postwar human rights movement. In what respects (putting aside its legal character as a declaration rather than a treaty) does the UDHR stand out as strikingly different, as resting on premises that were not simply alien to but close to heresies within the preceding international law?

NOTE

Consider the following observations in Louis Henkin, *International Law: Politics, Values and Functions*, 216 Collected Courses of The Hague Academy of International Law (Vol. IV, 1989), at 215:

The United Nations Charter, a vehicle of radical political-legal change in several respects, did not claim authority for the new human rights commitment it projected other than in the present consent of States. Unlike the international standard of justice for foreign nationals, which derived from the age of natural law and clearly reflected common acceptance of some natural rights, the Charter is a 'positivist' instrument. It does not invoke natural rights or any other philosophical basis for human rights. The principal Powers could not have agreed on any such basis. The Charter Preamble links human rights with human dignity but treats that value as 'elf-evident, without need for justification.' Nor does the Charter...
define either term or give other guidance as to the human rights that human dignity requires. In fact, to help justify the radical penetration of the State monolith, the Charter in effect justifies human rights as a State value by linking it to peace and security.

Perhaps because we now wish to, we tend to exaggerate what the Charter did for human rights. The Charter made the promotion of human rights a purpose of the United Nations; perhaps without full appreciation of the extent of the penetration of Statehood that was involved, it thereby recognized and established that relations between a State and its own inhabitants were a matter of international concern. But the Charter did not erode State autonomy and the requirement of State consent to new human rights law.

In 1945, the principal Powers were not prepared to derogate from the established character of the international system by establishing law and legal obligation that would penetrate Statehood in that radical way; clearly, they themselves were not ready to submit to such law.

NOTE

From the start, the human rights movement had universal aspirations. It was not to address only the developed countries of the West/North but rather all regions and all states, whatever their form of government, socio-economic situation or religious-cultural traditions. After all, the key document at the very start of the movement was entitled the Universal Declaration of Human Rights. Its language, like that of many later human rights treaties, speaks abstractly of ‘everyone’, or ‘no person’. It communicates no sense of differentiation among its subjects based on religion, gender, colour, ethnicity, national origin, wealth, region, education. To the contrary, the human rights texts fasten on equal protection as a cardinal concept.

Over the decades, the question of how ‘universal’ the postwar human rights are or should seek to become has assumed greater prominence. The ‘universal’ is often contrasted with the ‘particular’ or ‘culturally specific’, or ‘cultural relativism’. The different meanings of these concepts and illustrations of their significance for a number of human rights topics figure as a central theme in Chapters 6 and 7. As a preface to those chapters, and as companion to this section’s introduction to the UDHR, the excerpts below from Mary Ann Glendon’s book on the making of the Declaration comment on the question of its universality and on the political and ethical traditions that inform it.

MARY ANN GLENDON, A WORLD MADE NEW (2001), at 221

Ch. 12. Universality under Siege

of the world’s best-known philosophers had been asked to ponder the question, “How is an agreement conceivable among men who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought?”

No one has yet improved on the answer of the UNESCO philosophers: Where basic human values are concerned, cultural diversity has been exaggerated. The group found, after consulting with Confucian, Hindu, Muslim and European thinkers, that a core of fundamental principles was widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language of rights Their survey persuaded them that basic human rights rest on “common convictions,” even though those convictions “are stated in terms of different philosophic principles and on the background of divergent political and economic systems?”

The hopeful view of the UNESCO philosophers was challenged when a host of new nations appeared on the international stage in the 1950s With sixteen new members joining the United Nations in 1955 alone and with many Latin American countries retreating from their pro-US positions, the balance of power in the General Assembly had shifted.

Over the years that mood was expressed in characterizations of the Declaration as an instrument of neocolonialism and in attacks on its universality in the name of cultural integrity, self-determination of peoples, or national sovereignty. In some cases the motivations are transparently self-serving. When leaders of authoritarian governments claim that the Declaration is aimed at imposing “foreign” values, their real concern is often domestic: the pressure for freedom building among their own citizens. That might have been the case, for example, when the Iranian representative at a ceremony commemorating the Declaration’s fiftieth anniversary in 1998 charged that the document embodies a “Judeo-Christian” understanding of rights unacceptable to Muslims. Or on the occasions when Singapore’s Lee Kuan Yew attempted to justify the suppression of human rights in the name of economic development or national security.

... [M]any challenges to the Declaration’s universality are made by individuals who are genuinely concerned about ideological imperialism ... University of Buffalo law professor Makau Mutua described the Declaration as an arrogant attempt to universalize a particular set of ideas and to impose them upon three-quarters of the world’s population, most of whom were not represented at its creation Kenyan-born Mutua said, “Muslims, Hindus, Africans, non-Judeo-Christians, feminists, critical theorists, and other scholars of an inquiring bent of mind have exposed the Declaration’s bias and exclusivity.”

These accusations of cultural relativism and cultural imperialism need to be taken seriously. Is the Declaration a “Western” document in some meaningful sense, despite its aspiration to be universal? Are all rights relative to time and place? Is universality a cover for cultural imperialism? Let us examine the charges on their merits.

Those who label the Declaration “Western” base their claim mainly on two facts: 1) many peoples living in non-Western nations or under colonial rule, especially those in sub-Saharan Africa, were not represented in the United Nations in 1948; and 2)
most of the Declaration's rights first appeared in the European and North or South American documents on which John Humphrey based the original draft. Those statements are accurate, but do they destroy the universality of the Declaration?

... It is true that much of the world's population was not represented in the UN in 1948: large parts of Africa and some Asian countries remained under colonial rule and the defeated Axis powers — Japan, Germany, Italy, and their allies — were excluded as well. But Chang, Malik, Romulo, Mehta, and Santa Cruz were among the most influential, active, and independent members of the Human Rights Commission. And the members of the third committee, who discussed every line of the draft over two months in the fall of 1948, represented a wide variety of cultures.

... Before the whole two-year process from drafting and deliberation to adoption reached its end, literally hundreds of individuals from diverse backgrounds had participated. Thus Malik could fairly say, “The genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.”

Proponents of the cultural-imperialism critique sometimes say that the educational backgrounds or professional experiences of men like Chang and Malik “westernized” them, but their performance in the Human Rights Commission suggests something rather different.

... On December 10, 1948, Brazil's Belarmino de Athayde summed up sentiments that had been expressed by many other third committee members when he told the General Assembly that the Declaration did not reflect the particular point of view of any one people or group of peoples or any particular political or philosophical system. The fact that it was the product of cooperation among so many nations, he said, gave it great moral authority.

... The Declaration was far more influenced by the modern dignitarian rights tradition of continental Europe and Latin America than by the more individualistic documents of Anglo-American lineage. The fact is that the rights dialect that prevails in the Anglo-American orbit would have found little resonance in Asia or Africa. It implicitly confers its highest priority on individual freedom and typically formulates rights without explicit mention of their limits or their relation to other rights or to responsibilities. The predominant image of the rights bearer, heavily influenced by Hobbes, Locke, and John Stuart Mill, is that of a self-determining, self-sufficient individual.

Dignitarian rights instruments, with their emphasis on the family and their greater attention to duties, are more compatible with Asian and African traditions. In these documents, rights bearers tend to be envisioned within families and communities; rights are formulated so as to make clear their limits and their relation to one another as well as to the responsibilities that belong to citizens and the state...

In the spirit of the latter vision, the Declaration's “Everyone” is an individual who is constituted, in important ways, by and through relationships with others “Everyone” is envisioned as uniquely valuable in himself (there are three separate references to the free development of one's personality), but “Everyone” is expected to act toward others “in a spirit of brotherhood.” “Everyone” is depicted as situated
in a variety of specifically named, real-life relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order. Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in “a spirit of brotherhood” and ends with community, order, and society.

Whatever else may be said of him or her, the Declaration’s “Everyone” is not a lone bearer of rights... [The] departure from classical individualism while rejecting collectivism is the hallmark of dignitarian rights instruments such as the Declaration.

In the years since its adoption, the Declaration’s aspiration to universality has been reinforced by endorsements from most of the nations that were not present at its creation. Specific references to the Declaration were made in the immediate post-independence constitutions of [the author names 19 African and Asian states]....

...All in all, it has been estimated that the Declaration has inspired or served as a model for the rights provisions of some ninety constitutions.... And in 1993,. representatives of 171 countries at the Vienna Conference on Human Rights affirmed by consensus their “commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights.”...

It would be unwise, however, to minimize the danger of human rights imperialism. Today governments and interest groups increasingly deploy the language of human rights in the service of their own political, economic, or military ends. One of the twentieth century’s most distinguished diplomats, George F. Kennan, expressed his misgivings about the United States’ statements and demands concerning human rights in a 1993 memoir. He sensed in them, he said, “an implied assumption of superior understanding and superior virtue”...

...Much confusion has been created in current debates by two assumptions that would have been foreign to the framers of the Declaration. Today both critics and supporters of universal rights tend to take for granted that the Declaration mandates a single approved model of human rights for the entire world. Both also tend to assume that the only alternative would be to accept that all rights are relative to the circumstances of time and place.

Nothing could be further from the views of the principal framers. They never envisioned that the document’s “common standard of achievement” would or should produce completely uniform practices. ...

The Declaration’s architects expected that its fertile principles could be brought to life in a legitimate variety of ways. Their idea was that each local tradition would be enriched as it put the Declaration’s principles into practice and that all countries would benefit from the resulting accumulation of experiences....

There is little doubt about how the principal framers of the Universal Declaration would have responded to the charge of “Western-ness.” What was crucial for them — indeed, what made universal human rights possible — was the similarity among all human beings. Their starting point was the simple fact of the common humanity shared by every man, woman, and child on earth, a fact that, for them, put linguistic, racial, religious, and other differences into their proper perspective.
NOTE

Makau Mutua, to whose ideas Glendon refers in the preceding excerpts, takes a fundamentally different position about the origin and character of the UDHR—a position examined in the materials on cultural relativism in Chapters 6 and 7. He states:

...Non-Western philosophies and traditions particularly on the nature of man and the purposes of political society were either unrepresented or marginalized during the early formulation of human rights... There is no doubt that the current human rights corpus is well meaning. But that is beside the point... International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise... Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

QUESTIONS

1. As a principle of interpretation, in what direction (if any) would Glendon’s understanding of the UDHR’s ‘dignitarian’ tradition point with respect to, say, (1) a question of freedom of speech as applied to hate speech, (2) a question of individual liberty in relation to the right of others to an adequate standard of living, (3) a question of equal protection in relation to a claim for gay marriage?

2. From a textual examination of the UDHR (that is, independent of locating the UDHR in a larger historical and philosophical context) are you persuaded by Glendon’s more community-oriented account of its rights-based prescriptions or by a more individualistic account?

3. Based on Glendon’s argument in these excerpts, how do you react to her position that the UDHR was at its origin and is now properly understood as having universal validity?

NOTE

Understandings of the Universal Declaration have inevitably changed over time. Appreciation of earlier ideas at the start of the human rights movement illuminates its general evolution as well as suggests how perceptions of it and, more broadly, international law have developed over the 60 years. There follow some excerpts from an influential book by a preeminent scholar of international law of his generation,
Hersch Lauterpacht. At the time of the book’s publication, the Declaration was two years old and untested as to its character and significance.

H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950), at 61

Chapter 4: The Subjects of the Law of Nations, the Function of International Law, and the Rights of Man

... What have been the reasons which have prompted the changes in the matter of subjects of international law, with regard both to international rights and to international duties? These causes have been numerous and manifold. They have included, with reference to the recognition of the individual as a subject of international rights, the acknowledgment of the worth of human personality as the ultimate unit of all law; the realisation of the dangers besetting international peace as the result of the denial of fundamental human rights; and the increased attention paid to those already substantial developments in international law in which, notwithstanding the traditional dogma, the individual is in fact treated as a subject of international rights. Similarly, in the sphere of international duties there has been an enhanced realisation of the fact that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law and of its effectiveness in a period of history in which the destructive potentialities of science and the power of the machinery of the State threaten the very existence of civilised life.

Above all, with regard to both international rights and international duties the decisive factor has been the change in the character and the function of modern international law. The international law of the past was to a large extent of a formal character. It was concerned mainly with the delimitation of the jurisdiction of States. ... In traditional international law the individual played an inconspicuous part because the international interests of the individual and his contacts across the frontier were rudimentary. This is no longer the case. ...

... [I]t is in relation to State sovereignty that the question of subjects of international law has assumed a special significance. Critics of the traditional theory have treated it as an emanation of the doctrine of sovereignty. In their view it is State sovereignty — absolute petty, and overbearing — which rejects, as incompatible with the dignity of States, the idea of individuals as units of that international order which they have monopolised and thwarted in its growth. It is the sovereign State, with its claim to exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity...
... [T]he recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms, as the ultimate subject of international law, is a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the State as a being distinct from the individuals who compose it, with all that such personification implies. That recognition brings to mind the fact that, in the international as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts. 

... International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State. ... [T]he recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that vital extent they both signify the recognition of a higher, fundamental law not only on the part of States but also, through international law, on the part of the organized international community itself. That fundamental law, as expressed in the acknowledgment of the ultimate reality and the independent status of the individual, constitutes both the moral limit and the justification of the international legal order.

Chapter 5: The Idea of Natural Rights in Legal and Political Thought

... The law of nature and natural rights can never be a true substitute for the positive enactments of the law of the society of States. When so treated they are inefficacious, deceptive and, in the long run, a brake upon progress. ... The law of nature, even when conceived as an expression of mere ethical postulates, is an inarticulate but powerful element in the interpretation of existing law. Even after human rights and freedoms have become part of the positive fundamental law of mankind, the ideas of natural law and natural rights which underlie them will constitute that higher law which must forever remain the ultimate standard of fitness of all positive law, whether national or international. ... 

[Lauterpacht then turns to historical antecedents of 'the notion and the doctrine of natural, inalienable rights of man pre-existent to and higher than the positive law of the State'. He observes that 'ideas of the law of nature date back to antiquity', and briefly describes such ideas and notions of natural right in Greek philosophy and the Greek state, in Roman thought, in the Middle Ages, and in the Reformation and the period of Social Contract. Lauterpacht then addresses 'fundamental rights in modern constitutions'.]

In the nineteenth and twentieth centuries the recognition of the fundamental rights of man in the constitutions of States became, in a paraphrase of Article 38 of the Statute of the Permanent Court of International Justice, a general principle of the constitutional law of civilised States. It became part of the law of nearly all European States. ...

... [T]here is one objection to the notion of natural rights which, far from invalidating the essential idea of natural rights, is nevertheless in a sense unanswerable. It is
a criticism which reveals a close and, indeed, inescapable connexion between the idea of fundamental rights on the one hand and the law of nature and the law of nations on the other. That criticism is to the effect that, in the last resort, such rights are subject to the will of the State: that they may—and must—be regulated, modified, and if need be taken away by legislation and, possibly, by judicial interpretation; that, therefore these rights are in essence a revocable part of the positive law of a sanctity and permanence no higher than the constitution of the State either as enacted or as interpreted by courts and by subsequent legislation...

Chapter 17: The Universal Declaration of Human Rights

The Universal Declaration of Human Rights... has been hailed as an historic event of profound significance and as one of the greatest achievements of the United Nations... Mrs. Roosevelt, Chairman of the Commission on Human Rights and the principal representative of the United States on the Third Committee, said: 'It [the Declaration] might well become the international Magna Carta of all mankind... Its proclamation by the General Assembly would be of importance comparable to the 1789 proclamation of the Declaration of the Rights of Man, the proclamation of the rights of man in the Declaration of Independence of the United States of America, and similar declarations made in other countries'...

The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. The debates in the General Assembly and in the Third Committee did not reveal any sense of uneasiness on account of the incongruity between the proclamation of the universal character of the human rights forming the subject matter of the Declaration and the rejection of the legal duty to give effect to them. The delegates gloried in the profound significance of the achievement whereby the nations of the world agree as to what are the obvious and inalienable rights of man... but they declined to acknowledge them as part of the law binding upon their States and Governments...

...[T]he representative of the United States, in the same statement before the General Assembly in which she extolled the virtues of the Declaration, said: 'In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation....'

... It is now necessary to consider the view, expressed in various forms, that, somehow, the Declaration may have an indirect legal effect

In the first instance, it may be said—and has been said—that although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however
imperfect, binding upon the Members of the United Nations. It is unlikely that any tribunal or other authority administering international law would accept a suggestion of that kind. To maintain that a document contains an authoritative interpretation of a legally binding instrument is to assert that that former document itself is as legally binding and as important as the instrument which it is supposed to interpret. . . .

...[T]here would seem to be no substance in the view that the provisions of the Declaration may somehow be of importance for the interpretation of the Charter as a formulation, in this field, of the 'general principles of law recognized by civilized nations.' The Declaration does not purport to embody what civilized nations generally recognize as law. . . . The Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by States Members of the United Nations. . . .

Undoubtedly the Declaration will occasionally be invoked by private and official bodies, including the organs of the United Nations. But it will not—and cannot—properly be invoked as a source of legal obligation... .

Not being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot form the subject matter of legal interpretation. There is little meaning in attempting to elucidate, by reference to accepted canons of construction and to preparatory work, the extent of an obligation which is binding only in the sphere of conscience. . . .

The fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance. It is possible that, if divested of any pretence to legal authority, it may yet prove, by dint of a clear realisation of that very fact, a significant landmark in the evolution of a vital part of international law. . . .

... The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of the sacrifice of the sovereignty of States which it involves. Thus conceived, the fundamental issue in relation to the moral authority of the Declaration can be simply stated: That authority is a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own. . . .

Its moral force cannot rest on the fact of its universality—or practical universal-ity—as soon as it is realised that it has proved acceptable to all for the reason that it imposes obligations upon none. . . .

...[C]ompare the Declaration of 1948 with that of [the French Declaration of] 1789 and similar constitutional pronouncements. These may not have been endowed, from the very inception, with all the remedies of judicial review and the formal apparatus of enforcement. But they became, from the outset, part of national law and an instrument of national action. They were not a mere philosophical pronouncement. . . . One of the governing principles of the Declaration—a principle which was repeatedly affirmed and which is a juridical heresy—is that it should proclaim rights of individuals while scrupulously refraining from laying down the duties of States. To do otherwise, it was asserted, would constitute the Declaration a legal instrument. But there are, in these matters, no rights of the individual except as
a counterpart and a product of the duties of the State. There are no rights unless accompanied by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration.

QUESTION

Looked at from today's perspective, which of Lauterpacht's ideas or predictions about the UDHR and human rights would require substantial revision?

ADDITIONAL READING

PART B

NORMATIVE FOUNDATION OF INTERNATIONAL HUMAN RIGHTS
This chapter takes a systematic look at the United Nations human rights system created by, and in response to, the United Nations Charter, and traces the evolution of that system over more than sixty years. While it consists of a complex and often confusing set of institutional arrangements, it is crucial to an understanding of the universal regime which now exists. The materials focus particularly on the Human Rights Council, created in 2006, to replace the Commission on Human Rights which had functioned since 1946. Consideration is given to the vital role played in the setting of new human rights standards by these intergovernmental bodies and to the techniques they have developed for responding to violations. Consideration is also given to two of the other ‘principal organs’ of the UN, the Security Council and the International Court of Justice. The role of each in relation to human rights has developed very significantly in recent years.

COMMENT ON CONCEPTIONS OF ENFORCEMENT

For individuals whose human rights are being violated, and for the groups that seek to defend them, the effectiveness of the UN’s human rights system depends to an important degree upon its ability to ‘enforce’ respect for the legal norms that originated within it. But the very concept of such international ‘enforcement’ is controversial and resisted by a significant number of governments (a few of which do so overtly, while many others use more subtle methods). As suggested by Chapter 8, it is therefore not surprising that the UN’s often hotly contested efforts to establish institutions and procedures capable of securing enforcement have been less successful than its work in setting human rights standards, often consensually.

An evaluation of the UN’s performance will be strongly influenced by the observer’s starting point or perspective on world order. For example:

1. Do we assume that the ‘globalization’ of issues such as human rights is desirable, even unavoidable, so that a nation’s treatment of its own nationals is a legitimate concern of all others (an *erga omnes* approach, p. 167, *supra*)? Or do we hold to a more traditional image of the sovereign state that emphasizes the inviolability of national boundaries for at least most human rights issues as well as other purposes?

2. Even if the former, do we envisage a world in which an effective multilateral organization (which might or might not be the UN) should be able to act against the
will of the government(s) concerned to enforce universal norms? Or do we believe that although we live in a globalizing context, the actual implementation by individual governments of human rights standards each in its own way, remains the most effective, desirable or realistic approach?

3. Are we prepared to accept that the measures that we would happily support against another country might, in a different context, be applied against our own? Do we assume that international enforcement actions must be applied equally to powerful nations and to smaller states, so that we should only adopt policies that can be applied across the board, consistently? Or are there legitimate differences in the ways in which the international community should respond to human rights violations in different types of states (democratic — non-democratic, large — small, developed — developing, etc.)?

The answers to such questions depend partly on the definition of enforcement. Do we refer only to the relatively rare peacekeeping and so-called ‘police’ actions that involve the presence in a state of UN or other foreign forces? The only use of the term ‘enforcement’ in the UN Charter occurs in relation to the enforcement under Chapter VII of decisions of the Security Council (Article 45). This has led some international lawyers to equate enforcement with the use of, or threat to use, economic or other sanctions or armed force. Although most dictionary definitions of enforcement include an element of compulsion, it is nonetheless true that compulsion may be moral as well as physical. It is also true that the use of force for human rights purposes has won increasing support in recent years, especially in light of developments in relation to Kosovo and East Timor, but this is surely not what is meant by calls for the UN to ‘enforce’, routinely, universal human rights norms.

At the other extreme from the use of sanctions or armed force, enforcement has been defined as ‘comprising all measures intended and proper to induce respect for human rights’¹ That definition could extend to the other extreme of UN action, the frequent debates or recommendatory resolutions of the Human Rights Council or the General Assembly. But such a definition is so open-ended that it provides no criteria against which to evaluate the UN’s performance. It puts the emphasis on intentions rather than on results achieved, and suggests that ‘enforcement’ measures might be confined to the adoption of resolutions and other such hortatory activities of the UN.

**QUESTION**

Is the term ‘enforcement’ the right term to use to describe what you would like the UN to be able to do in response to its findings that gross violations of human rights are taking place or are likely to take place? Are there other powers, stopping short of this sense of ‘enforcement’, that you would wish to vest in the UN or any other international organization to respond to gross violations?

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9. The United Nations Human Rights System

A. THE UN SYSTEM: CHARTER-BASED INSTITUTIONS

The UN's human rights monitoring arrangements consists of a two-track approach:

(1) Charter-based organs including those (a) whose creation is directly mandated by the UN Charter, such as the General Assembly and the Human Rights Council (as the successor to the Commission on Human Rights and the role previously played by the Economic and Social Council), or (b) which have been authorized by one of those bodies, such as the Sub-Commission on the Promotion and Protection of Human Rights, and the Commission on the Status of Women; and

(2) Treaty-based organs such as the Human Rights Committee formed under the ICCPR referred to in this book as the 'ICCPR Committee' in order to reduce confusion with the UN Human Rights Council that is identified as the 'UN Council', that have been created by a range of other human rights treaties originating in UN processes. These organs are intended to monitor compliance by states with their obligations under those treaties.

The focus of this chapter is on Charter-based organs. Treaty-based organs are dealt with especially in Chapters 3 (CEDAW Committee) 4 (ESCR Committee) and 10 (ICCPR Committee). While the work of the UN Council is of particular importance, other UN organs are also significant.

COMMENT ON CHARTER ORGANS

The 'principal organs' created by the UN Charter of 1945 are the Security Council, General Assembly, Economic and Social Council, Trusteeship Council, the Secretariat and the International Court of Justice. One of these organs is now virtually defunct — the highly successful post-War decolonization processes overseen by the UN rendered the Trusteeship Council superfluous and it suspended its work in 1994. Although the Economic and Social Council (ECOSOC) once played a major role as an intermediary between the Assembly and the Commission on Human Rights, and still has a theoretically important role of coordination within an increasingly disparate UN system, its substantive contributions to the human rights debate since the 1970s have been extremely limited and its coordination efforts have had little practical impact. One of the aims of creating the Human Rights Council in 2006 was to bypass the role of the ECOSOC and enable the new Council to report directly to the General Assembly. As a result the main human rights-relevant role played today by ECOSOC concerns the granting of 'consultative status' with the UN to nongovernmental organizations.

We turn now to the organs whose work is examined in this chapter. Until the mid 1990s, the Security Council was extremely reluctant to become involved in human
rights matters. Since that time, its role in the field has become significant in a variety of ways. Similarly, the International Court of Justice (ICJ) exerted a relatively marginal influence over the understanding and interpretation of international human rights law until the mid 1990s, despite its consideration of a handful of important cases focusing on issues such as self-determination and genocide. Over the past decade, however, the ICJ has adopted a series of judgments of major importance in terms of their contribution to an understanding of aspects of the international human rights regime.

The Secretariat is led by the Secretary-General, who is appointed for five years by the General Assembly on the recommendation of the Security Council. A nominee may thus be vetoed by any of the five permanent members of the Council (China, France, Russia, the United Kingdom and the USA). The Secretary-General is the chief administrative officer of the UN and also exerts important moral authority within the wider international system. For decades successive Secretaries-General were very reluctant to embrace human rights concerns actively for fear of offending governments and jeopardizing their wider role in the promotion of international peace and security. Two examples illustrate this reluctance. In the 1950s Dag Hammarskjold of Sweden was said to have kept the UN human rights programme cruising at no more than minimum flying speed. In 1993 the proposal that led to the creation of the post of High Commissioner for Human Rights in December 1993 was strongly opposed by then Secretary-General Boutros Boutros-Ghali (of Egypt). In contrast Kofi Annan, of Ghana, the Secretary-General for a decade from 1997, took a much more active human rights stance than any of his predecessors and appointed a series of strong High Commissioners. He also oversaw a process of ‘mainstreaming human rights throughout the organization which meant that bodies dealing with issues such as development, peacekeeping and environment were encouraged to address systematically the human rights dimensions of their work. It remains to be seen what approach will be adopted by his successor Ban Ki-moon, of South Korea, whose term of office began on 1 January 2007.

Under the Secretary-General, the High Commissioner for Human Rights (HCHR) is the UN official with principal responsibility for human rights. In formal terms she is subject to the direction and authority of the Secretary-General and acts within the mandate given her by the policy organs. In practice she and her Office (the OHCHR) are increasingly viewed as central players in their own right. The High Commissioner is appointed by the Secretary-General with the approval of the General Assembly, due regard being paid to geographical rotation, for a four-year term with the possibility of one renewal. The fourth High Commissioner, Louise Arbour, of Canada, took office in July 2004 (see p. 824, infra). Her Office has close to 670 staff members and its operational role has expanded rapidly in recent years. As of January 2007 it was running seven regional offices and 15 country offices.

Much of this chapter concentrates on the work of the UN Human Rights Council and its predecessor, the Commission on Human Rights. Since the debates declarations, resolutions and recommendations of the General Assembly, the vital plenary organ, play an important role, various readings draw also on its work. A brief description of each of these organs follows.
The General Assembly. The Charter empowers the Assembly to 'discuss any questions or any matters within the scope of the ... Charter' (Article 10) and to 'initiate studies and make recommendations for the purpose of ... [inter alia] assisting in the realization of human rights' (Article 13). The Assembly's principal significance derives from the fact that it is composed of all UN Member States, each of which has one vote regardless of population, wealth or other factors. While most issues are decided by a simple majority vote, decisions on important questions, such as those on peace and security, admission of new Members, and budgetary matters, require a two-thirds majority. Nevertheless, much of its work is carried out on a consensus basis, thus avoiding the need for a vote. The Assembly meets intensively from September to December each year and at other times as required. Its resolutions are not per se legally binding but they are an important reflection of the will of the world community. Much of the debate and drafting occurs in six Main Committees, three of which are of particular relevance to human rights: the Third (Social, Humanitarian and Cultural issues); the Fifth (Administrative and Budgetary issues); and the Sixth (Legal issues).

In 2006 the Human Rights Council replaced the Commission on Human Rights which had functioned since 1946. The Commission was widely said to have become discredited, although as we shall see (p. 791, infra) the reasons cited to justify that assessment vary dramatically from one government or commentator to the next. The Council consists of 47 member governments, one-third of which are elected every year by an absolute majority of the UN General Assembly. States are limited to two consecutive three-year terms. The Council must meet in at least three sessions each year for a total minimum of ten weeks. It can also meet in Special Sessions provided one-third of its members agree.

The tendency of the UN generally to promote geographical and political balance through a system of regional groupings influences much of the work of the Council. The five groups are Asia, Africa, Eastern Europe, Latin America, and Western Europe and Others — the last category including Canada, Australia and New Zealand, and, in practice, the United States. As the European Union has expanded, the traditional historical division of Europe into East and West for these purposes has become increasingly problematic. The position of President of the Council rotates annually among the groups and the regional groups caucus regularly during the Council's sessions. Working groups of five member governments are commonly established to ensure that one member from each group can be included. Although the old Commission was hierarchically inferior to the Assembly and the ECOSOC, in the human rights area it was in practice often more significant than those other bodies. The Council has been established as a subsidiary body of the General Assembly and its work and functioning are scheduled for review in 2011.

Three other bodies warrant a mention at this stage. The first is the Commission on the Status of Women. It was established in 1946 and reports to the ECOSOC in relation to policies to promote women's rights in the political, economic, civil, social

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2 Israel is the only country in an anomalous position in relation to the geographical groups. Geographically, it is part of the Asian region but that group has refused to admit Israel. In 2000 it was given temporary membership, with restricted nominating and other rights by the Western Europe group.
and educational fields. It consists of 45 governmental representatives, who normally meet for only ten days each year. It drafted many of the key treaties dealing with women’s rights ranging from the 1952 Convention on the Political Rights of Women to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Its mandate includes follow-up to the four UN Women’s Conferences held since 1975, and especially that held in Beijing in 1995.

The second is the Permanent Forum of Indigenous Peoples which discusses all aspects of indigenous issues — economic, social, cultural, environmental — as well as human rights, and advises the ECOSOC and other UN bodies and agencies. Since 2002 it has met annually in New York for two weeks.

The third body is the Sub-Commission on the Promotion and Protection of Human Rights (known from 1947 to 1999 as the Sub-Commission on Prevention of Discrimination and Protection of Minorities). Its future, in the context of the transition from the Commission to the Council, remained unclear as of January 2007. In contrast to the Council (and the Commission), which is composed entirely of governmental representatives, the Sub-Commission consists of 26 independent experts, elected upon the nomination of governments. It meets annually in Geneva in August, and much of its preparatory work is undertaken in various Working Groups such as those dealing with communications (complaints under the 1503 procedure, see p. 754, infra), the rights of indigenous populations, contemporary forms of slavery, minorities, transnational corporations, the administration of justice, terrorism, and a Social Forum.

The degree of independence of Sub-Commission members varies radically. For many years it stood out because of its relative independence, its flexible agenda and working methods, its preparedness to act as a pressure group vis-à-vis its parent body (the Commission), and its ambiguous and often antagonistic relationship with that parent. It came under increasing attack in the late 1990s and since 1999 has been instructed not to adopt resolutions on country situations under consideration by the Commission. It previously played an important role by adopting resolutions which put pressure on the Commission to act in relation to specific situations. Although the Sub-Commission continued to generate a large number of detailed studies on specific subjects (a total of 73 between 1956 and 2006, its reputation suffered significantly in the final years prior to the creation of the Council and there were many calls for its abolition. It fought back and proposed that instead it should be renamed, reinvigorated and given a more comprehensive advisory and coordinating role under the new Council.\(^3\) As of January 2007 it seemed likely that it would be succeeded by an Expert Advice Body which would carry out most of the Sub-Commission’s functions.

In contrast with the treaty-based bodies discussed earlier, the Charter-based bodies are political organs which have a much broader mandate to promote awareness to foster respect, and to respond to violations of human rights standards. They derive their legitimacy and their mandate, in the broadest sense from the human rights provisions of the Charter. Consider the following contrasts between the two types of organs.

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\(^3\) See UN Doc A/HRC/Sub 1/58 (2006)
Treaty-based organs are distinguished by: a limited clientele consisting only of states parties to the treaty in question; a limited mandate reflecting the terms of the treaty; a limited range of procedural options for responding to violations; consensus-based decision-making as far as possible; a preference for a non-adversarial relationship with states parties (particularly with respect to state reports) based on the concept of a 'constructive dialogue'; and a particular concern with addressing issues in ways that contribute to developing the normative understanding of the relevant rights.

By contrast, the political organs generally: focus on a diverse range of issues; insist that every state is an actual or potential client (or respondent), regardless of its specific treaty obligations; work on the basis of a flexible and expanding mandate designed to crises as they emerge; engage, as a last resort, in adversarial actions vis-à-vis states; rely more heavily upon NGO inputs and public opinion generally to ensure the effectiveness of their work; take decisions by often strongly contested majority voting; pay less attention to normative issues per se; and are very wary about establishing specific procedural frameworks within which to work, preferring a more ad hoc approach in most situations.

The materials illustrate some of the key themes and approaches that have emerged from the work of these institutions, with particular reference to standard-setting and responding to violations. Before examining the record in those areas a general observation on the current political context is in order. Up until around 1990 the Cold War exerted a major influence over what the UN could and could not do in the human rights area. Some initiatives were simply off-limits because of the strong hostility of either East or West. Others proved feasible either because of a general consensus or because of coalition building by one side or the other with countries of the South in relation to specific issues. During the 1990s the human rights mood within the UN was a relatively open and expansive one and much was achieved. In very recent years, however, strong tensions have again emerged. They are primarily of a North-South character, and have manifested themselves mainly in relation to significantly different assumptions as to: (1) the emphasis that should be placed on specific country situations as opposed to more generic phenomena; (2) the balance between the two sets of rights, and the importance to be attributed to the right to development; and (3) the division of labour between experts and political representatives in making assessments and recommending action.

The result of these tensions, partly manifested by the replacement of the Commission by the Human Rights Council and the ensuing debate over potentially far-reaching structural reforms, is that the UN system is in a state of considerable flux.

One symptom of these tensions is the fact that the principal criterion used by the majority of governments and commentators in assessing the UN's performance is the extent to which it reacts effectively to gross violations. But the priority accorded to this criterion should not be accepted uncritically. A significant amount of the UN's important work concentrates on longer term, structural dimensions of human rights issues: standard-setting, the promotion of greater awareness of those standards both within (e.g., in peacekeeping, or in the work of the World Bank and UN Development Programme) and outside the UN system, and the provision of advice and assistance (formerly known in the UN human rights context as advisory
services' but now referred to as 'technical co-operation'). The organization of world conferences and 'summit meetings' has also been important, particularly for present purposes those relating to human rights (Teheran 1968 and Vienna 1993), children (New York 1990), population and reproductive rights (Cairo 1994), women (Beijing 1995), food (Rome 1996 and 2002), and racism (Durban 2001).

**NOTE**

In historical terms it might well be considered that the single most important contribution made by the Charter-based bodies, and especially by the Commission and now the Council which have frequently played the lead role, has been through the elaboration of an ever growing body of standards designed to flesh out the meaning and implications of the relatively bare norms enunciated in the Universal Declaration. Although the Commission's 1946 terms of reference included a general mandate to address any human rights matter, it spent most of its first 20 years engaged almost exclusively in standard-setting. This included the preparation of the first draft of the UDHR and the two Covenants, as well as a range of other instruments. Even today this standard-setting function continues to be important.⁴

The following materials are designed to provide some historical and political context to the drafting of the UDHR, the majority of which was done in the context of the Commission. The aim is to give some sense of the complex array of factors at work when delegates have the dual challenge of garnering support at home for a particular set of positions and then engaging in multilateral diplomacy to advance those positions in the face of sometimes radically different bargaining postures by the representatives of other states. The focus is on Eleanor Roosevelt, the US delegate, who chaired the UN Commission on Human Rights between 1946 and 1950 and also chaired the Commission's working group which drafted the UDHR. She was a universally admired figure and, by all accounts, played a key role both in bringing the Declaration to fruition and in ensuring official US support for the outcome.⁵

The following materials go beyond the usual approach of paying homage to the unquestionably vital role she played. Instead they illustrate the ways in which even someone of Eleanor Roosevelt's standing can be obliged to make tradeoffs and compromises in the context of domestic and international negotiations over the drafting of a human rights instrument.

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⁴ In 2006 alone the General Assembly adopted both the Convention on the Rights of Persons with Disabilities (and its Optional Protocol) and the International Convention for the Protection of All Person from Enforced Disappearances. The Declaration on the Rights of Indigenous Peoples under consideration by the Commission since 1995 when it received a complete draft from the Sub-Commission, was also adopted by the Human Rights Council in June 2006. It was, however, subsequently rejected by the General Assembly, which called for further work on the draft. And there were ongoing drafting exercises being undertaken by the Council Working Group on an Optional Protocol to the ICESCR, and the Ad Hoc Committee on the Elaboration of Complementary Standards relating to racism, racial discrimination, xenophobia and related intolerance.

J.S. AND R.L. ZANGRANDO, ER AND BLACK CIVIL RIGHTS


[Eleanor Roosevelt was] an advocate of equal opportunities rather than a social critic or an architect of structural change. . . .

There were reasons for these limitations. Eleanor Roosevelt and her cohorts . . . had been reared in the late-nineteenth and early twentieth-century presumptions of racism, in which theories of racial hierarchies abounded. . . .

As they questioned and challenged social injustices, Roosevelt and her contemporaries came to value 'tolerance', "reform", and "brotherhood" in pursuit of the American dream. Accordingly, they looked with suspicion upon the programs of [black nationalist] Marcus Garvey and of the American Communist party. . . . Relying upon the moderate, procedural instruments of a progressive liberalism, Eleanor Roosevelt embraced the New Deal-type solutions that became synonymous with her public behavior.

She was the first President's wife thus to be fully engaged in public affairs, and the first to openly espouse a concern for civil rights. In this, she was far ahead of her husband. He argued that he could not promote civil rights because he needed the cooperation of southern Democrats, first for economic recovery measures and later for defense expenditures.

The postwar decolonization movement among Third World peoples put the question of race in an entirely new light, one that many traditional white Americans found unsettling. Decolonization efforts provided Afro-Americans with models of initiative that challenged existing racial assumptions and jeopardized long-standing racial arrangements that whites had taken for granted.

. . . [Roosevelt's position was that] 'We have . . . to make sure that we have civil rights in this country . . . [because] it isn't any longer a domestic question — its an international question. It is perhaps the question which may decide whether democracy or communism wins out in the world.'

Ironically, the issue of communism cut in both directions simultaneously: the Cold War and McCarthyism imposed a certain conformist mentality on all Americans, even while their eagerness to improve America's international image intensified a concern for racial reform. This contradiction also appeared in the postwar career of Eleanor Roosevelt. . . . [A]s a member of the American delegation to the UN, she had steadfastly refused to introduce the NAACP's 1947 Appeal to the World. . . . [T]his was a stinging indictment of American race relations and a request for UN monitoring of racial injustices. Roosevelt worried that the document would damage America's international reputation, and resented the fact that its introduction
would throw the spotlight on American domestic behavior while leaving the Soviets untouched.

... [One of the leaders of the NAACP wrote in 1955 that Eleanor Roosevelt's] enemies and critics used every device of criticism and slander to stop her, but undaunted, she continued to speak out and act as her conscience dictated. She gave to many Americans, particularly Negroes, hope and faith which enabled them to continue the struggle for full citizenship.'


[T]oward the end of the Second World War, the African American leadership, led by the [NAACP], had already decided that only human rights could repair the damage that more than three centuries of slavery, Jim Crow, and racism had done to the African American community. Civil rights, no matter how noble, could only maintain the gap. The NAACP, therefore, marshaled its resources — including a war chest of more than one million dollars, nearly 500,000 members, and access to power brokers throughout the world — to make human rights the standard for equality. ... Yet, even with all its clout and prestige, the Association recognized that it could not singlehandedly alter the trajectory of America's sordid racial history.

The NAACP, therefore, forged important, but ultimately flawed, alliances with Eleanor Roosevelt and Harry S. Truman to aid in the struggle for African Americans' human rights. Yet, whereas Roosevelt and Truman were clearly committed to some measure of civil rights, they were both unable and unprepared to fight for a world that embraced full equality for African Americans. Truman was emphatic. "I wish to make clear," he told a group of black Democrats, "that I am not appealing for social equality for the Negro. The Negro himself knows better than that, and the highest type of Negro leaders say quite frankly that they prefer the society of their own people. Negroes want justice, not social equality." ...

Similarly, although scholars and admirers speak glowingly about Eleanor Roosevelt's unstinting support for African American equality, she, too, was one of the masters of symbolic equality. The stories of her battles to allow Marian Anderson to sing at the Lincoln Memorial, coupled with her act of racial defiance in a Southern Jim Crow theater, cemented Roosevelt's reputation as "a friend of the Negro." A closer examination of her actions in the UN and the repercussions of those actions for the black community, however, reveal a very different story. Thus, in her role as chair of the UN Commission on Human Rights, although she sympathized with the plight of the African Americans, she was even more responsive to the public relations exigencies of the Cold War, which called for sanitizing and camouflaging the reality of America's Jim Crow democracy. She, therefore, joined with Texas Senator Tom Connally and others in an attempt to thwart a complaint to the
UN charging South Africa with racial discrimination and systematic human rights violations. Roosevelt, Connally, and the other members of the U.S. delegation voiced strong concerns that, if the complaint succeeded, it would set a dangerous precedent that could ultimately lead to the United Nations investigating the condition of "negroes in Alabama."

Roosevelt also used her chairmanship and influence to manipulate the human rights treaties in ways that would shield the United States from UN scrutiny and assuage the powerful Southern Democrats, who "were afraid" that the UN's treaties just "might affect the Colored question." After all, the senators from Georgia and Texas railed, those treaties were nothing more than a "back-door method of enacting federal anti-lynching legislation." Mrs. Roosevelt, therefore, fought for the insertion of a clause in the Covenant on Human Rights that would allow states that were in a federal system such as Georgia, to disregard the treaty completely. Mrs. Roosevelt explained the benefits of this federal-state clause to a skeptical Southern audience as she promised that, even with a Covenant on Human Rights, the federal government would never interfere in "murder cases," investigate concerns over "fair trials," or insist on "the right to education." In essence, Eleanor Roosevelt had just assured the Dixiecrats that the sacred troika of lynching, Southern Justice, and Jim Crow schools would remain untouched, even with an international treaty to safeguard human rights. Obviously, then, although the United States was willing to use the rhetoric of human rights to bludgeon the Soviet Union and play the politics of moral outrage that the Holocaust engendered, the federal government, even the liberals, steadfastly refused to make human rights a viable force in the United States or in international practice.

QUESTIONS

1 The materials relating to the drafting of the UDHR emphasize the importance of the political context and of individual personalities, and also highlight the complex domestic political considerations which might influence the approach adopted by delegates. Do any of these dimensions give you cause for concern? If so, why?

2 In 1986 the General Assembly (Res 41/120) adopted 'guidelines for future human rights standard-setting. It suggested that proposed instruments should, *int r alia*:

(a) be consistent with the existing body of international human rights law;
(b) be of fundamental character and derive from the inherent dignity and worth of the human person;
(c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
(d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
(e) attract broad international support.

Are these guidelines likely to exclude very many proposals? What factors do you consider might be the most crucial in deciding whether or not to embark upon a new standard setting exercise?
B. TECHNIQUES FOR RESPONDING TO VIOLATIONS

While the Human Rights Council was designed to remedy the perceived shortcomings of the Commission, an understanding of the latter’s approach is essential in order to appreciate the challenges confronting the Council. The following materials focus primarily on the Commission’s endeavours to respond to violations. Those efforts began only in 1967 when it effectively overturned a much-criticized statement it adopted in 1947 to the effect that it had no power to take any action in regard to any complaints concerning human rights.

The early efforts to address serious violations were directed only to problems associated with racism and colonialism. In 1979, however, the Commission’s work entered a third phase in which it began to apply the procedures it had developed in an increasingly creative fashion to an ever-widening range of countries and violations. For purposes of evaluating the Commission’s work, one should bear in mind that it is less than 30 years since it first began to respond to violations in general.

By the time of the Commission’s demise in 2006 it was using several different procedures to deal with alleged violations. They were: (1) confidential consideration of a situation under the 1503 procedure; (2) public debate under the 1235 procedure, which might have led to the appointment of a Special Rapporteur, a Special Representative of the Secretary-General, or some other designated individual or group to investigate a situation; (3) the designation of one or more experts to consider all aspects, including violations, of a specific theme; and (4) the appointment of an expert to report on the situation in a given country under the rubric of providing technical advice. Use of the latter approach was more palatable to governments than the appointment of a rapporteur to examine violations per se. While the reports produced under (4) often differed little from those under (2), it was assumed that the government concerned could save face as a result.

In principle, each of these procedures is relatively distinct from the others in terms of its origins, the nature of its mandate, the steps to be followed and the types of outcome available. In practice, there is considerable overlap. For our purposes it is sufficient to distinguish between the 1503 procedure and the ‘special procedures’ which encompass (2) and (3) above. Under the Commission’s rules ‘special procedures’ might be concerned either with themes such as torture or the right to education, or with specific countries (‘country rapporteurs’). While Resolution 1235 provided the formal mandate for both (2) and (3), by 2006 its significance had become purely formal and historical.

Before turning to look at the functioning of 1503 and the special procedures, we consider the role of fact-finding which is a central element in all of the procedures and raises very complex issues that go to the heart of the aspirations and potential achievements of the international human rights regime.
1 FACT-FINDING

Fact-finding is a term which has long been used to describe the function of international human rights monitors whose task is to ascertain what is going on in a given situation and to report thereon in relation to international human rights standards. The notion that the international community would seek to 'find facts' that may not accord with, or even flatly contradict, those provided officially by a sovereign government would have been virtually unthinkable not many years ago. For example, when the 1907 Hague Convention relating to international commissions of inquiry was adopted, its scope was carefully limited so as to cover only 'disputes involving neither honour nor essential interests. Today, international fact-finding is an accepted and relatively common activity. It is carried out not only by a large number of international organizations but also by individual states and above all NGOs.

Fact-finding depends for its credibility and potential impact upon the extent to which it is perceived to have been thorough, politically objective and procedurally fair. For that reason attempts have been made to draw up rules or guidelines for fact-finders. The procedures and guidelines set forth in the following materials bear directly on investigations and reporting within the UN system. But they are also relevant to fact-finding by NGOs and by regional organs such as the Inter-American Commission on Human Rights (p. 1039, infra).

In the following materials, Nicholas Valticos introduces some general issues. An excerpt from the State Department's annual Country Report on Human Rights Practices emphasizes the difficulty of getting to the truth of the matter. We then examine the standards that are used by Special Rapporteurs appointed by the Human Rights Council.

NICHOLAS VALTICOS, FOREWORD

[Fact-finding] is no longer a matter of ascertaining the facts in cases which merely involve the interests of two States.... [I]ssues of major importance to both the international community and the State concerned are often at stake. What type of action can be taken in such cases to meet the requirements of the international community while taking account of the susceptibilities of the State involved?

... [F]act-finding in the field of human rights has a special importance, and also encounters special difficulties, both because of the subject-matter and because of the importance attached to it by public opinion, which regards it as the acid test of the effectiveness of international organisations. [It] is however all the more difficult, because it frequently concerns the action and essential interests, if not indeed the very structure, of the States involved, who are therefore less inclined to accept international intervention in such matters. The issues often have political aspects and are
the subject of discussion in political bodies a factor which necessarily complicates their examination. Lastly, ... fact-finding on questions concerning human rights has been undertaken by various organisations and bodies in differing contexts, and the methods used have not always been similar.

Having myself taken part in such procedures, I should like to set out some general reflections on the problem.

In the first place, as we are on the frequently unstable terrain of international law, it is necessary, as has previously been recognized, not to confine oneself within unduly rigid categories or rules. In international law, functions intertwine — at times, indeed, too much — and judicial aspects cannot always be distinguished clearly from non-judicial ones. It is therefore not always possible, in international fact-finding, to transpose internal judicial procedures in full. Nor is it always possible — or even desirable — to establish unduly detailed rules which may turn out not to be applicable in practice. If procedures are too formal and judicial and rules too detailed, they may prove not to be adapted to the great variety of situations, to the susceptibilities and objections of the States concerned, or to practical needs.

One conclusion to be drawn from this is that it is necessary to have available a variety of procedures suited to different situations, ranging from quasi-judicial inquiries to methods involving a minimum of formality such as 'direct contacts'...

The principles must be such that, having regard to the procedure followed and the persons entrusted with it, the fact-finding process enjoys the confidence of the international community as well as of the State concerned. It thus becomes possible more readily to obtain the co-operation of the latter, while not leaving the international community in any doubt about the integrity and reliability of the findings.

These principles must naturally be based on the principal concepts of due process of law in domestic procedures (such as the age-old rule 'auditur et altera pars'), but they must also make allowance for the special features of this kind of international action. Thus, in the event of on-the-spot visits, it will not normally be possible for a representative of the complainant to be present, nor will it be appropriate for a representative of the party complained against to take part in interviews with private individuals. The latter party should, however, be given an opportunity to comment on allegations received in the course of such visits. Similarly, precautions have sometimes to be taken to ensure the safety of witnesses and to protect them against intimidation or reprisals (or the mere fear of reprisals). ..

A process as difficult as human rights fact-finding calls not only for procedural safeguards. In a divided and distrustful world, and on questions where there exist profound differences of views, fact-finding itself and the conclusions and recommendations emanating from it are more likely to find acceptance if it is entrusted to independent and impartial persons. Not only logic, but also several decades of experience lead to that conclusion.
COMMENT ON FRAMEWORKS FOR FACT-FINDING

Issues of fact-finding, including the quest for accuracy in the face of limited access to information and the incentive for governments and others to provide misinformation, arise in the context of almost all human rights reporting, whether undertaken by the UN, NGOs or governments. Note the following comments in US Department of State, *Country Reports on Human Rights Practices* — 2005 (2006):

[The State Department's Bureau of Democracy, Human Rights, and Labor (DRL)] strives to learn the truth and state the facts in all of its human rights investigations. Each year, DRL develops, edits, and submits to Congress a 5,000-page report on human rights conditions in over 190 countries that is respected globally for its objectivity and accuracy.

Appendix A: Notes on Preparation of the Country Reports and Explanatory Notes

We have attempted to make the reports as comprehensive, objective and uniform as possible in both scope and quality of coverage. We have paid particular attention to attaining a high standard of consistency in the reports despite the multiplicity of sources and the obvious problems associated with varying degrees of access to information, structural differences in political, legal, and social systems, and differing trends in world opinion regarding human rights practices in specific countries.

Evaluating the credibility of reports of human rights abuses is often difficult. With the exception of some terrorist organizations, most opposition groups and certainly most governments deny that they commit human rights abuses and sometimes go to great lengths to conceal any evidence of such acts. There are often few eyewitnesses to specific abuses, and they frequently are intimidated or otherwise prevented from reporting what they know. On the other hand, individuals and groups opposed to a government sometimes have powerful incentives to exaggerate or fabricate abuses, and some governments similarly distort or exaggerate abuses attributed to opposition groups. We have made every effort to identify those groups (for example, government forces or terrorists) or individuals that are believed, based on all the evidence available, to have committed human rights or other abuses. Where credible evidence is lacking, we have tried to indicate why it is not available. Many governments that profess to oppose human rights abuses in fact secretly order or tacitly condone them or simply lack the will or the ability to control those responsible for them. Consequently, in judging a government's policy, the reports look beyond statements of policy or intent and examine what a government has done to prevent human rights abuses, including the extent to which it investigates, brings to trial, and appropriately punishes those who commit such abuses.

There have been various efforts by the international community to 'codify' some of the responsibilities of governments and the rights and obligations of fact-finders in the human rights context. The most important precedent in the UN context was a

http://www.state.gov/g/drl/rls/rpt/2005/61746.htm
Memorandum of Understanding with the Government of Chile, which was negotiated in advance of a visit by an Ad Hoc Working Group established by the UN Commission on Human Rights. It subsequently became a template for other fact-finding missions, and much of its content was reflected in 'The Belgrade Minimum Rules of Procedure for International Human Rights Fact-Finding Missions' adopted in 1981 by the International Law Association.

In 1997 the Special Rapporteurs and other independent experts of the Commission on Human Rights adopted their own terms of reference which have since been used extensively:

During fact-finding missions, special rapporteurs or representatives of the Commission on Human Rights, as well as United Nations staff accompanying them, should be given the following guarantees and facilities by the Government that invited them to visit its country:

(a) Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;
(b) Freedom of inquiry, in particular as regards:
   (i) Access to all prisons, detention centres and places of interrogation;
   (ii) Contacts with central and local authorities of all branches of government;
   (iii) Contacts with representatives of non-governmental organizations other private institutions and the media;
   (iv) Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the special rapporteur; and
   (v) Full access to all documentary material relevant to the mandate;
(c) Assurance by the Government that no persons, official or private individuals who have been in contact with the special rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings;
(d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above;
(e) Extension of the same guarantees and facilities mentioned above to the appropriate United Nations staff who will assist the special rapporteur/representative before, during and after the visit

REPORTS BY THE SPECIAL RAPPORTEUR ON TORTURE, MANFRED NOWAK

Consider the following excerpts from reports by the Special Rapporteur on Torture, Manfred Nowak in relation to the terms of reference for missions.

8 UN Doc A/33 331 (1978), Annex VII
9 75 Am J. Int. L 163 (1981)
10 Terms of Reference for Fact-Finding Mission
21. The aim of carrying out country visits is to see first-hand what the true practice and situation of torture and ill-treatment is: to identify gaps as well as acknowledge positive measures, to recommend ways to improve the situation, and to initiate a process of sustained constructive cooperation with the Government together with the international community and civil society in order to eradicate torture and ill-treatment. Such visits necessarily entail meetings with authorities most directly concerned with the issues, alleged victims or their families, as well as NGOs and relevant international actors.

22. To ensure that any assessment of the situation of torture and ill-treatment will be honest, credible and objective, a number of basic preconditions must be guaranteed by the Government. The 1997 terms of reference, reproduced above, are integral to his methods of work. The Special Rapporteur notes that similar standards for conducting visits to detention facilities have been recognized in international instruments, such as in the European Convention for the Prevention of Torture.

23. It is axiomatic that freedom of inquiry in places of detention implies: unimpeded access, with or without prior notice, to any place where persons may be deprived of their liberty (e.g. police lock-up, pretrial, prison, juvenile, administrative, psychiatric or other facilities, as well as detention facilities within military installations); not being subject to arbitrary time limits for carrying out his work (e.g. visiting hours, working hours of daytime prison staff, etc.); free movement within the facility and access to any room in order to gather information, including by use of electronic means, such as photography; having access to any detainee or staff, and the possibility of conducting confidential and private interviews, unsupervised by government officials, in places either chosen by the Special Rapporteur or in cooperation with the detainee; being assisted by independent medical specialists who are qualified to document and assess injuries, in accordance with the Istanbul Protocol, as well as being assisted by independent interpreters; and being provided with copies of relevant information and documentation as requested.

24. The Special Rapporteur observes that in recent years much concern has been raised by Governments with respect to the above-mentioned terms of reference, particularly with regard to unannounced visits to places of detention. Were he to announce in advance, in every instance, which facilities he wished to see and whom he wished to meet, there might be a risk that existing circumstances could be concealed or changed, or persons might be moved, threatened or prevented from meeting with him. This is an unfortunate reality that the Special Rapporteur faces. In fact, such incidents have even occurred where he has been delayed in entering a facility by as little as 30 minutes.

25. On occasion, in order to deny the Special Rapporteur the unimpeded access described above, it has been argued that national legislation restricts access to facilities except for a select number of enumerated individuals. However, it must be pointed out that an official visit of the United Nations Special Rapporteur, undertaken at the express invitation of a Government, is clearly an exceptional event.
Therefore, one would expect that the Government would demonstrate its good faith and cooperation by facilitating the work of the Special Rapporteur to the fullest extent possible. In practical terms, this has been achieved by providing the Special Rapporteur with letters of authorization signed by the relevant ministries, as was done recently in Georgia, Mongolia and Nepal.

26. In the view of the Special Rapporteur, these terms of reference are fundamental, necessary and common sense considerations. Moreover, by their nature, “common sense” methods for fact-finding cannot be subject to negotiation or selective approval by States. This was one of the reasons for the cancellation of the visit to Guantanamo Bay. Any suggestion to the contrary can only be considered as an attempt to compromise later findings. Likewise, subsequent violations of these conditions would seriously call into question the intentions behind inviting the Special Rapporteur.


[Eds.: The Special Rapporteur first requested a mission to China in 1995. Four years later the government suggested a ‘friendly visit’, which would not have followed the standard methodology for country visits by rapporteurs. The invitation was declined. In 2004 an unconditional invitation was extended. Behind the scenes, the issue of the Special Rapporteur’s visit was the subject of extensive bilateral discussions by the USA and the European Union in their diplomatic exchanges with China.]

I. Particular circumstances of fact-finding

9. The Special Rapporteur . . . credits the Ministry [of Foreign Affairs] for its great efforts in ensuring that the mission proceeded as smoothly as possible and that his terms of reference (TOR) were in principle respected. All meetings with detainees were carried out in privacy and in locations designated by the Special Rapporteur. No request for a meeting or interviewing of a particular individual nor for a visit to any particular detention centre was refused. Prison staff were generally cooperative and helped the Special Rapporteur meet with prisoners on his list, even those who had been transferred to different facilities.

10. The Special Rapporteur feels, however, compelled to point out that security and intelligence officials attempted to obstruct or restrict his attempts at fact-finding, particularly at the outset of the visit when his team was followed in their Beijing hotel and its vicinity. Furthermore, during the visit a number of alleged victims and family members, lawyers and human rights defenders were intimidated by security personnel, placed under police surveillance, instructed not to meet the Special Rapporteur, or were physically prevented from meeting with him.

11. Prison officials restricted interviews to their own working hours, which limited the number of facilities visited and detainees interviewed. The Special Rapporteur and his team were also prevented from bringing photographic or electronic equipment.
into prisons. Furthermore, as the Special Rapporteur was unable to obtain a letter of authorization from the relevant authorities to visit detention centres alone (in contrast to his previous country visits), officials from the Ministry of Foreign Affairs accompanied him to detention centres to ensure unrestricted access. As the authorities were generally informed approximately an hour in advance the visits could not be considered to have been strictly "unannounced". Nonetheless, this practice significantly improves upon the modalities employed in previous visits to China of the special procedures of the Commission on Human Rights.

Press Release on 'Postponement of Visit to Russian Federation'
4 October 2006

As the Special Rapporteur announced on 6 July 2006 . .., he was invited by the Government of the Russian Federation to carry out a fact-finding visit from 9 to 20 October 2006, with a particular focus on the North Caucasus Republics of Chechnya, Ingushetia, North Ossetia and Kabardino-Balkaria.

However, at a very late stage in the preparations, he was informed by the Government that certain elements of his Terms of Reference for carrying out visits to detention facilities would contravene Russian Federation law, particularly with respect to carrying out unannounced visits, and holding private interviews with detainees. Since these issues could not be resolved prior to the visit, he regrets to announce that he is not in a position to proceed as planned.

QUESTIONS

1. Is the account by Valticos convincing in terms of the feasibility of combining respect for due process with the sort of flexibility and adaptability that he says is essential?

2. Given the State Department's emphasis upon the incentives that various actors have to present misinformation, are the standards reflected in the 1997 UN 'terms of reference' sufficient to enable UN investigators to find the 'truth'?

3. The 'Terms of reference for fact-finding missions' used by UN Special Rapporteurs have never been formally endorsed by the Commission or the Council. Is this problematic in any way? Should such rules be 'negotiated' by an intergovernmental body such as the Council, or adopted by the relevant experts?

4. Is it reasonable to expect governments to provide a UN rapporteur with the sort of guaranteed privileged access insisted upon by Nowak?

5. Suppose the killing of 20 residents of a small village by hooded men takes place on night. The government denies responsibility which it places on a guerrilla group seeking to prevent villagers from cooperating with the government. What options are open to a UN rapporteur to pursue an inquiry, and are they adequate?
2. THE 1503 PROCEDURE: PROS AND CONS OF CONFIDENTIALITY

The 1503 procedure is named after Economic and Social Council Resolution 1503 (XLVIII) (1970). The resolution authorized the Commission to establish a procedure for the examination of communications (complaints) pertaining to 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission'. Its origins lay in a dramatic change in the composition of the major UN organs by the mid 1960s as a result of the influx of new members, mainly newly independent African and Asian states. Membership of the Commission went from 18 in 1960 to 32 in 1967 (20 of which were from the Third World), en route to 53 members in 2006.

In 1965 a complaints procedure had been included in the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The willingness of the Third World majority to develop new procedures for treaty bodies applied even though there was a significant 'risk' that the scope or reach of these procedures might eventually be extended to address a broader range of problems for which Third World governments might be responsible. And indeed this development cleared the way for an Optional Protocol to the Covenant on Civil and Political Rights to be adopted the following year.

At the same time, Third World countries, strongly supported by the Eastern Europeans, were pressing for a general, non-treaty-based, communications-type procedure as an additional means by which to pursue the struggle against racist and colonialist policies, particularly in southern Africa. These efforts resulted in the adoption of what eventually turned out to be two separate procedures, the scope of each of which was extended to include violations anywhere in the world. The first, established under ECOSOC Resolution 1235 (XLII), laid down the principle that violations could be examined by the Commission and responded to. It provided the necessary authorization for the Commission to engage in public debate on the issue each year. The second was the 1503 procedure. Although it was adopted after, and built upon, the 1235 procedure, it developed more rapidly than the latter, and has often been used as a precursor to action under it. Thus we consider the 1503 procedure first.

The UN Commission had previously (under Resolutions 75 (V) (1947) and 728 F (XXVIII) (1959)) used communications only as a means of identifying general trends, thus providing no response whatsoever to the particular violations at issue. The adoption of the 1503 procedure involved a typical horse-trading exercise in which governments with competing objectives sought to reconcile their goals through the use of open-ended and flexible language. Both the resolution itself and the subsequent Sub-Commission resolution that laid down the admissibility criteria for communications are perfect case studies in ambiguity.

Under the terms of the 1503 resolution the Sub-Commission was authorized to establish a Working Group which would review all communications and government replies to those communications and bring to the attention of the Sub-Commission any of them which appeared 'to reveal a consistent pattern of gross and
reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission. The Sub-Commission would then decide which, if any, of those situations should be brought to the attention of the Commission.

For its part the Commission could determine that the situation warranted either a thorough study followed by a public report to the Commission and ECOSOC, or the appointment of an ad hoc committee of investigation. The latter would require 'the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it'. Even the membership of the committee was subject to the consent of the government concerned. Its work was to be entirely confidential and it should 'strive for friendly solutions' at all times. This committee procedure has never been used. The 1503 resolution provided that all activities pursuant to it would 'remain confidential until such time as the Commission may decide to make recommendations to the ECOSOC.

In 1971, the Sub-Commission (Res. 1 (XXIV)) adopted procedures on admissibility under 1503. They permitted communications to come from any person or group who is a victim or has direct and reliable knowledge of violations, including NGOs. Communications would not be accepted if they were anonymous, prejudiced arrangements of other UN agencies, contained insulting references, were manifestly politically motivated or contrary to the UN Charter if viable domestic remedies have not been exhausted, or if not submitted within a reasonable time.

**CASE STUDY OF SAUDI ARABIA UNDER THE 1503 PROCEDURE**

Until the mid 1980s the United Nations received around 25,000 complaints per year. In 1993 the number ballooned to around 300,000, but many of these complaints were identical as a result of letter-writing campaigns by groups with large and active memberships. It seems that, on average, about 50,000 complaints are still received each year. The processes involved are tedious and time-consuming. This is because the procedure was carefully designed to ensure that governments would not lightly be accused of violations and because it is concerned not with individual cases, but with 'situations'.

In statistical terms, the 1503 procedure has 'touched' an impressive number of countries. Between 1972 and 2005, 86 states have been subject to scrutiny. Of these, 27 were in Africa, 27 in Asia (including the Middle East), 16 in Latin America, 10 in Eastern Europe, and 6 in Western Europe. While no final decision had been taken as of January 2007, it seems highly likely that the 1503 procedure will be maintained, with minor amendments, by the new Human Rights Council. At its second session, in 2006, the Council considered only three countries under the 1503 procedure — the Islamic Republic of Iran, Kyrgyzstan, and Uzbekistan. Its only action was to...
remove Kyrgyzstan from the procedure on the grounds that the situation had changed and the government had committed itself to taking positive steps.

The entire 1503 procedure is shrouded in secrecy, with each of its stages being accomplished in confidential sessions by the bodies concerned. The only public statement is an indication provided by the Chairperson of the Commission each year of the names of the countries which are currently under consideration and those cases which have been discontinued. Nevertheless, the details have invariably been leaked to the media for one reason or another and the complete documentation on several country situations has been made available as a result of Commission decisions to release all relevant documentation in cases concerning Equatorial Guinea, Uruguay, Argentina and the Philippines. Since those cases are now too old to provide a reliable guide to current practice, this case study on Saudi Arabia was compiled on the basis of 'confidential' but leaked UN documents as well as information gleaned from interviews with participants.

In April 1996 Amnesty International submitted a communication entitled 'Continuing Human Rights Violations in Saudi Arabia' to the UN, and sent a copy to the Saudi Government for information. It followed two previous communications submitted in April 1994 and April 1995. While the precise form of the ten-page report differed from Amnesty's published reports, the content reflected long-standing concerns published in various contexts by Amnesty and, according to the communication repeatedly raised by Amnesty with the government without any response. The content was accurately reflected in Amnesty's public report issued in advance of the 1999 Commission session. A US State Department assessment issued prior to the Commission's 1998 session spoke in similar terms. Excerpts from the two reports follow:


Gross and systematic human rights violations continue in Saudi Arabia. Hundreds of people are detained indefinitely on political grounds. Although Saudi Arabia is a party to the Convention against Torture, torture and ill-treatment are widespread. Amputations, a form of torture, and floggings, amounting to torture or cruel, inhuman and degrading treatment, continue to be imposed and carried out as judicial punishments. Saudi Arabia has one of the highest execution rates per capita in the world. People continue to be executed, often in public, after summary and secret trials in blatant disregard of the most basic standards for fair trial.

Contrary to international standards, defendants are denied access to lawyers. They are denied the basic right to bring witnesses in their defence or to cross examine those appearing for the prosecution. Appeals are conducted in total secrecy and the defendant is denied access to the proceedings and even knowledge of their progress.

Prisoners are often held for indefinite periods without charge, in incommunicado detention, and there is no independent impartial judicial supervision of arrest and detention. Such conditions foster torture and a climate of impunity for the perpetrators of torture and other gross human rights violations.


January 30, 1998

The Government commits and tolerates serious human rights abuses. Citizens have neither the right nor the legal means to change their government. Security forces continued to abuse detainees and prisoners, arbitrarily arrest and detain persons, and facilitate incommunicado detention. Prolonged detention is a problem. Security forces committed such abuses, in contradiction of law, but with the acquiescence of the Government. The Government disagrees with internationally accepted definitions of human rights and views its interpretation of Islamic law as its sole source of guidance on human rights.

In August 1996, the Sub-Commission agreed to forward the communication from Amnesty to the Commission under the 1503 procedure. The Saudi Government was then invited by the Commission to respond, which it did in a reply dated March 1998, just as the Commission session was getting under way. The 17-page reply alleged that the Amnesty figures relating to matters like execution, amputations and public floggings were inaccurate, but supplied no alternative figures on any of these issues. The Amnesty report was variously described as exaggerated, extreme, groundless, inaccurate, selective, ambiguous and distorted. At one point the Government questioned how Amnesty could characterize any Saudi trials as being unfair since its complaint lacked precise case details.

The two reports — one by Amnesty and the Government’s reply — were the principal documents before the UN Commission when it met in private session on 8 April 1998 under the 1503 procedure. In the course of about one hour the Commission disposed of the case. It first heard the Saudi representative affirm the Government’s faith in human rights and its confidence in the UN’s human rights mechanisms. He also indicated that the Government was considering contributing more money to a UN Trust Fund for the Victims of Torture, that it had respected international standards and had sought to improve the functioning of its judicial system. A succession of speakers — from Pakistan, Sri Lanka, Sudan, Morocco, Bangladesh, Malaysia, South Korea, the Philippines, China, Uganda, Indonesia and Tunisia — then welcomed the Government’s cooperative attitude and proposed that the Commission’s 1503 examination of the situation in Saudi Arabia be discontinued. The US representative remained silent throughout, while speakers from Denmark and Germany posed some questions based on the Government’s report.

After the Saudi representative indicated that note had been taken of the questions put, the Commission decided to discontinue the case. The Chairperson of the Commission provided neither reasons for the outcome nor details of the debate. The documentation remained confidential. NGOs were highly critical of the decision and at a subsequent press conference, the US Permanent Representative to the UN in Geneva was asked to comment on the issue. Ambassador Moose replied as follows:

I would say that indeed the issues of human rights in Saudi Arabia received intensive discussion and consideration in this Commission this year. In fact, one of the things we did see this year was a much greater readiness on the part of the Saudi government to respond to the concerns that have been raised in the Commission. Frankly it was on the basis of that responsiveness that the Commission determined to drop Saudi Arabia from the 1503 Procedures. On this issue, as on every other issue, I would simply say that we continue to look to the future, we will continue to monitor and to dialogue with the Saudis and with others to ensure that the responsiveness that we have seen is in fact the beginning of a process of ongoing dialogue and response.

NOTE

In the mid-1970s, Amnesty International characterized the confidentiality of 1503 as 'an undisguised stratagem for using the United Nations, not as an instrument for promoting and protecting and exposing large-scale violations of human rights, but rather for concealing their occurrence'. In a similar vein, the then Director of the UN's human rights Secretariat, Theo van Boven, made this thinly veiled allusion to the procedure in his opening statement to the Commission in 1980:

Is it satisfactory to place so much emphasis on the consideration of situations in confidential procedures thereby shutting out the international community and oppressed peoples? Are certain procedures in danger of becoming, in effect, screens of confidentiality to prevent cases discussed thereunder from being aired in public? While there is probably no alternative to trying to co-operate with the Governments concerned, should we allow this to result in the passage of several years while the victims continue to suffer and nothing meaningful is really done?

Some commentators have strongly defended the procedure on the grounds that: (1) 1503 review facilitates subsequent consideration of a country under the public procedures; and (2) it enables attention to be paid to situations that would otherwise be ignored. Others have commented that: 'While the 1503 process is painfully slow, complex, secret, and vulnerable to political influence at many junctures, it does afford an incremental technique for placing gradually increasing pressure on

offending governments'. In 2007 it was under review and various proposals for reform have been made.

QUESTIONS

1. One way to grasp loopholes for governments in the 1503 procedure is to imagine a case and formulate arguments based on the procedure to the effect that the matter does not fit within the relevant guidelines and therefore should not be considered. Suppose that the government you represent is responding to a communication alleging that a hundred members of a group have been arbitrarily detained for six months. The communication was submitted by a small NGO based in your country. The group’s secretary is also the leader of a political party opposed to the government. The complaint, based upon newspaper reports and accounts provided by relatives of eleven detained persons, mentions that the government is widely considered to be both oppressive and exploitative. The communication notes that the state’s courts have always done the government’s bidding and that it would be a waste of time and resources to ask the courts to order the release of the detainees. What arguments would you make against admissibility?

2. What criteria for effectiveness would you use in evaluating the 1503 procedure? Under what circumstances do you consider the use of confidentiality in such procedures to be justified? What reforms would you suggest to improve this procedure?

3. THE 1235 PROCEDURE

ECOSOC Resolution 1235 (XLII) (1967) established the procedure on the basis of which the Commission held an annual public debate focusing on gross violations in a number of states. The pertinent parts of the resolution are as follows.

**ECOSOC RESOLUTION 1235 (XLII) (1967)**

*The Economic and Social Council*

...  
1. *Welcomes* the decision of the Commission on Human Rights to give annual consideration to the item entitled Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid*, in all countries, with particular reference to colonial and other dependent countries and territories. ...  
2. *Authorizes* the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ... to examine

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information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa . . . and to racial discrimination as practised notably in Southern Rhodesia. . . .

3. Decides that the Commission on Human Rights may, in appropriate cases, and after careful consideration of the information thus made available to it, in conformity with the provisions of paragraph 1 above, make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa . . . and racial discrimination as practised notably in Southern Rhodesia, and report, with recommendations thereon, to the Economic and Social Council;

. . .

COMMENT ON THE 1235 PROCEDURE AND ITS POTENTIAL OUTCOMES

The provisions of Resolution 1235 provide a vivid illustration of the extent to which the Commission's mandate has evolved. The ways in which violations are now dealt with by the Commission under the rubric of the 1235 procedure bear only a passing resemblance to the Resolution. It was not until the late 1970s that the procedure began to fulfil its potential. In 1976 to 1977 the Commission had notably failed to act publicly with regard to horrendous violations in Pol Pot's Democratic Kampuchea (Cambodia), Amin's Uganda, Bokassa's Central African Empire, Macias' Equatorial Guinea, the military's Argentina and Uruguay, and several other situations. Developing public opinion about these failures (almost by definition among the elites in the West and a limited number of Third World countries) combined with the higher profile given to human rights issues by the Carter Administration in the United States, and several of its allies, contributed to a political climate in which expansion of the Commission's work was almost an imperative. Starting with Equatorial Guinea and Cambodia in the late 1970s the UN Commission gradually widened the range of countries whose records were publicly scrutinized under the 1235 procedure.

That procedure eventually operated to provide the foundation for two types of activity. The first, in accordance with the mandate, involved the holding of a public debate during the Commission's annual session in which governments and NGOs were given an opportunity to identify publicly those country-specific situations that they considered to merit the Commission's attention. The second involved studying and investigating particular situations (or individual cases) through the use of whatever techniques the Commission deemed appropriate. Such investigative activity was only authorized in relation to a small proportion of the situations identified during the annual debate. This did not mean that the remaining situations were entirely neglected, for the Commission could contribute in other ways to pressures on a government accused of violations. A broad range of outcomes might follow
9. The United Nations Human Rights System

Identification of a serious country situation by a government or an NGO within the framework of the 1235 debate. They included:

- the mere mention of a situation in the debate might embarrass a country (sometimes referred to as the sanction of 'shaming'), generate media coverage, or influence another country's foreign policy;
- an NGO might use the occasion to pressure other governments to take up the issue on a bilateral or multilateral basis;
- a draft resolution might be circulated, and then withdrawn, perhaps after a strong lobbying effort by the government concerned or in response to concessions offered by that government; or
- the Chairperson of the Commission might issue a statement of exhortation, with the (either formal or de facto) approval of the Commission.

If the Commission did take up the matter it might:

- decide that the country concerned should be provided with 'advisory services', thus avoiding condemnation but making clear its concern;
- adopt a resolution calling for all available information to be submitted to it with a view to considering the matter at a later session;
- call upon the government to respond to the allegations in detail and in writing before its next session;
- adopt a resolution criticizing the government (for which purpose, language ranging from the diplomatic to the highly critical might be used) and calling upon the government to take specific measures;
- appoint an independent expert to provide the country with 'technical assistance', which is essentially a face-saving way of appointing someone who acts very much like a Special Rapporteur;
- appoint a Special Rapporteur or other individual or group to examine the situation and submit a report to the Commission on the basis of a visit (if possible) to the country;
- call upon the Secretary-General to appoint a Special Representative to perform a similar function; or
- call upon the Security Council to take up the issue, with a view to considering the adoption of sanctions or some other punitive measure.

The impact of any of these measures varied greatly depending on factors such as the nature of the violations and especially the extent to which their continuation was central to the government's strategy for retaining power, the relative influence of domestic pressure groups, the degree of support for the measure in the Commission, the openness of the country concerned to external influences, the vulnerability of the country to trade, aid or other pressures; and the attitude taken by the country's allies and its regional neighbours.

As of January 2007 the following 13 country situations, all inherited from the Commission, were being examined under separate 'country mandates' by the Human Rights Council: Belarus, Burundi, Cambodia, Cuba, Democratic People's...
Republic of Korea, Democratic Republic of the Congo, Haiti, Liberia, Myanmar, Palestinian Territories Occupied since 1967, Somalia, Sudan and Uzbekistan.

The following excerpts illustrate the approach to reporting taken by country rapporteurs, in this case in relation to the Democratic People’s Republic of Korea (North Korea).

REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA, VITIT MUNTARBHORN

UN Doc. E/CN.4/2006/35

... 2. ... It is regrettable that, to date, the Democratic People’s Republic of Korea [DPRK] has declined to invite him to the country. His approach remains constructive, thus inviting the [DPRK] to view this mandate as a window of opportunity to engage with the United Nations system.

3 The Special Rapporteur welcomes the fact that the [DPRK] is a party to four key human rights treaties — [the ICCPR, the ICESCR, the CEDAW and the CRC] — which offer a platform for the country to promote and protect human rights...

A. General concerns

10. To guarantee food security, there is also a need to move towards more sustainable agricultural techniques which are environment-friendly, given that the country suffers from limited arable land and overexploitation of such land. In addition, it cannot be overstated that the excessive expenditure by the authorities on its defence sector, based upon the country’s “military first” policy causes serious distortions in the national budget and its use of national resources. This is a key impediment to the country’s development process as well as the right to food and life and other rights.

11. Second, with regard to the right to security of the person, humane treatment, non-discrimination and access to justice, given the non-democratic and repressive nature of the regime in power there continue to be many reports of transgressions by the authorities... The incarceration system has been described as follows:

The criminals sentenced to correctional punishment are typically economic or violent criminals, rather than political criminals, and would be detained in the correctional centres managed by the correctional bureau of the People’s Security Agency. In addition to official correctional facilities, North Korea has been criticized for operating political concentration camps, collection points and labour training camps. Political criminals are incarcerated in kwanliso operated by the ‘farm guidance bureau’ of the State Security Agency... [Fn: White Paper on Human Rights in North Korea 2005, Korean Institute for National Unification Seoul, 2005, pp 69–70]
13. Third, there is the question of freedom of movement, asylum and refugee protection. Throughout 2005, there were reports of potential or actual forced return ("refoulement") of [DPRK] nationals who had sought asylum in neighbouring countries — without adequate guarantees of safety. . . .

18. The opaque and non-democratic nature of the State militates against the right to self-determination and the need for democracy in the country. Although the advent of technology and globalization has meant that some [DPRK] nationals have more access to foreign information, there is still no genuine free access to information, since media and related information are State-controlled and it is illegal to listen to foreign radio, watch foreign TV or to own computers without official permission.Political dissent is repressed, with a pervasive security network and detention camps for political prisoners. Interestingly, at the end of 2005, with various media speculation on the issue of succession in regard to the leadership of the country, it was reported that the authorities had issued an instruction forbidding discussion of the subject, with the threat of life imprisonment for those who failed to follow the instruction.

19. While there are official claims that freedom of religion is allowed, the reality suggests otherwise, as seen in a recent report on the issue, based upon many interviews, which highlights a myriad of threats not only to religious freedom but also to the right to life and humane treatment:

Ownership of a Bible or other religious materials is illegal, with sentences ranging from imprisonment to execution. One other interviewee, while imprisoned following repatriation to North Korea, met a fellow prisoner who was imprisoned because a Bible had been found in his home. Another interviewee reported that while detained following repatriation . . . , six other detainees were sent to prison camp for political prisoners after confessing that they were followers of Jesus . . . . In 2002, the North Korean Government formally notified the United Nations that State and religion are separated from each other and the State neither interferes in nor discriminates against any religion. This statement is disingenuous at best. All legally sanctioned religious activity in North Korea takes place under the auspices of Government-controlled federations . . . . [FN: Thank You, Father Kim Il Sung. Eyewitness Accounts of Severe Violations of Freedom of Thought, Conscience, and Religion in North Korea, United States Commission on International Religious Freedom, Washington (pp. 14-16).]

IX. RECOMMENDATIONS

81 The [DPRK] should take the following measures/actions:

(a) Abide effectively by human rights, particularly by implementing the four human rights treaties to which it is a party, in addition to acceding to and implementing the totality of human rights instruments, and accord
adequate resources to ensure their implementation, especially to reallocate military budgets for this purpose:

(b) Allow humanitarian agencies to stay in the country to ensure food distribution to target groups with effective monitoring and promote sustainable agricultural development to ensure food security;

(c) Reform the national law in order to not require travel permits and prohibit punishment of those who leave the country without permission;

(d) Initiate reform of its prison system under the concept of the rule of law with improvement of the criminal justice system, due safeguards for the accused, independent judiciary and access to justice, and abolish sanctions for political dissent;

(e) Liberalize its laws policies and practices to ensure respect for the totality of civil, political, economic, social and cultural rights;

(f) Address the specific concerns of women, children, older persons, those with disabilities and the ethnic dimension by substantively promoting non-discrimination;

82 The rest of the international community should:

(a) Support the various recommendations of the Special Rapporteur . . .;
(b) Continue to provide food aid . . .;
(c) Respect the principle of asylum . . .;
(d) Assist the [DPRK] to reform its prison system and to abide by the rule of law;
(e) Respond in a balanced manner to the [DPRK’s] concerns about “security” by packaging human rights initiatives with security guarantees and incentives for economic and other development, reflective of a comprehensive approach to human rights with practical implementation measures.

NOTE

In response to the resolution appointing the Special Rapporteur the Government replied to the Commission as follows:

The DPRK has already repeatedly stated its resolute rejection of the resolution and still remains invariable in its position. The resolution, as initiated by the European Union, is based on political motivations, taking sides with the United States policy of hostility against the DPRK and therefore, has nothing to do with genuine promotion and protection of human rights.

The resolution is also in pursuit of confrontation and double standards in flagrant violation of internationally recognized principles including universal, non-selective and objective handling of human rights issues through dialogue and cooperation. Consequently, the resolution in its entirety represents one of the major factors contributing to the serious undermining of the credibility of the Commission on Human Rights in whose activities the principle of non-politicization, objectivity
and impartiality should be thoroughly observed. The DPRK rejects and does not even recognize the resolution itself since it runs counter to the genuine promotion and protection of human rights in actual fact. 18

The following summarizes a 2006 Government reply to a communication from several thematic special procedures alleging the trafficking of women from the DPRK to China:

the forces hostile to the DPRK were becoming ever more reckless in their attempts to defame, disintegrate and overthrow the state and social system of the country. As part of these attempts they were resorting to every possible means in the international human rights field including by continuing to circulate fabricated information on and forcing the allies and various individuals of the world to join their plot against the DPRK. In the light of its political motives, provocative nature and fabricated contents, the joint letter, was construed as a product of a conspiracy undertaken in line with hostile forces’ attempts. 19

QUESTIONS

1. When, if ever, might a state view a country-specific mandate as a window of opportunity to engage with the United Nations system?

2. What, if any, limits are there to the type of issue that a country rapporteur can reasonably address? Consider, for example the reference to the need for environment-friendly agricultural policies, the assertion that the national defence budget should be reduced, and the decision to address apparent human rights violations (refoulement) by neighbouring countries.

3. What sources should a rapporteur make use of? Is it appropriate to cite lengthy quotations from South Korean and US sources?

4. How compelling are Muntarbhorn’s recommendations? How would you suggest they might be improved?

C. THE THEMATIC ‘SPECIAL PROCEDURES OF THE COMMISSION AND COUNCIL

COMMENT ON SPECIAL PROCEDURES

In 2006 former UN Secretary-General Kofi Annan described the special procedures as ‘the crown jewel of the [UN human rights] system. Those procedures consist of

19 UN Doc. E CN.4 2006/62 Add 1 para .8.
the country mandates described in the preceding section and a range of 'thematic procedures'. The latter are devoted to a theme rather than a state or region and hence their concerns are likely to have global reach. The first such mechanism was the Working Group on Disappearances, established by the Commission in 1980. Its origins lay in efforts to respond to the massive 'disappearances' that took place during the 1970s in Argentina's 'dirty war' against leftist and other forces opposed to the military government. The government's strategy was effective in avoiding condemnation by international human rights fora until 1978 when the Inter-American Commission on Human Rights issued a damning indictment. Despite this precedent, within the UN context many governments were reluctant to 'name' Argentina, for a variety of reasons ranging from trade interests to fear that they themselves might be next on the list.

To get around this opposition the UN Commission opted to avoid a country-specific inquiry and instead established the first 'thematic' mechanism. Argentina hoped that the thematic approach would not single out any one country, would demonstrate that Argentina was only one of many countries that had problems, and would give a significant number of governments a strong incentive to ensure that the new mechanism would be kept under careful political control and thus remain ineffectual. But in the first few years of its existence, the Disappearances Working Group played an important role in developing techniques which were subsequently to serve as a model for a growing range of mechanisms dealing with other themes.

**Number and scope**

The thematic mechanisms have grown almost exponentially. In 1985 there were three, in 1990 six, in 1995 fourteen, in 2000 twenty-one, and in January 2007 there were twenty-eight. Of these, there were eight each dealing with civil and political rights, economic, social and cultural rights, and specific groups. In addition, there were four working groups — on disappearances, arbitrary detention, mercenaries, and people of African descent. In 2004, by way of example, these mechanisms submitted over 100 reports to the Commission, including reports on the human rights situation in some 40 countries. The same year, more than 1,300 communications were sent to 142 governments concerning 4,448 individual cases.

The 28 mandates deal with (1) disappearances, (2) extrajudicial executions, (3) torture, (4) freedom of religion or belief, (5) the sale of children, child prostitution and child pornography, (6) arbitrary detention, (7) freedom of opinion and expression, (8) contemporary forms of racism, racial discrimination, xenophobia and related intolerance, (9) independence of judges and lawyers, (10) violence against women, (11) toxic and dangerous products and waste, (12) extreme poverty, (13) migrants; (14) foreign debt, (15) the right to education, (16) the right to food, (17) the right to housing, (18) human rights defenders, (19) indigenous peoples, (20) people of African descent, (21) the right to health, (22) internally displaced persons, (23) trafficking in persons (24) mercenaries, (25) terrorism, (26) international solidarity, (27) transnational corporations, and (28) minority issues. Thus, in the 26 years since the creation of the first mechanism the Commission created an average of slightly more than one new mechanism every year.
The terminology used for the different mechanisms is confusing — ‘Working Group, ‘Special Rapporteur, ‘Independent Expert’, ‘Representative’ or ‘Special Representative’ of the Secretary-General — but relatively little significance attaches to it in practice. A few are appointed by the Secretary-General or the HCHR but most are appointed by the Chairperson of the Council who is expected to ‘consult’ with the regional groups before making an appointment. Those selected are generally prominent personalities from human rights-related backgrounds, including academics, lawyers, economists and NGO leaders. The first female expert was not appointed until 1994 and the current proportion of women is only about one-third. The experts receive no financial reward for their work, although their expenses are covered. They rely upon the Office of the UN High Commissioner for Human Rights for secretariat services, but they have long complained of the gross inadequacy of the assistance available to them as a result of chronic financial and staff shortages within the OHCHR.

Functions

The functions undertaken by the Special Procedures include the following:

- Act urgently on information that suggests that a human rights violation is about to happen, or is already occurring. Urgent action usually takes the form of direct contact with the foreign ministry of the country concerned, or through the release of a public statement.
- Respond to allegations that a violation has already taken place, through direct contact with the permanent mission of the country concerned in Geneva (or New York if necessary), or through a public statement.
- Undertake fact-finding missions to examine, at first-hand, allegations of violations and provide detailed recommendations and advice to the government concerned.
- Examine the global phenomenon of a type of violation through studies in order to provide an understanding of the problem and its solutions.
- Clarify the applicable international legal framework to address a particular violation.
- Present annual reports to the Commission (and in some cases interim reports to the General Assembly) documenting their activities, which can include a summary of communications with governments, mission reports and mission follow-up, studies and recommendations. 20

Evaluation and reform

Comment by Amnesty International: “The Special Procedures are at the core of the UN human rights machinery. As independent and objective experts who are able to monitor and rapidly respond to situations and allegations of violations against...”

individuals or groups occurring anywhere in the world, they play a critical and often unique role in promoting and protecting human rights. This poses a dilemma when it comes to reviewing their effectiveness and identifying ways to strengthen them. The Special Procedures have evolved haphazardly and without any overall institutional framework. Over a period of nearly forty years, they have been undermined by chronic under-funding, a lack of cooperation from states, marginalisation by the Commission in its political decision-making processes, and the variable quality of work of the mandate-holders. At the same time, there is the suspicion that some governments would like to use efforts to enhance the Special Procedures in order to emasculate them by imposing unnecessary restrictions on their working methods. As the Special Procedures were never conceived as a 'system', there are recurring difficulties associated with co-ordination, consistency and overlap, which were identified by the World Conference on Human Rights and have continued to resonate through subsequent resolutions adopted by the Commission.21

Comment by the High Commissioner for Human Rights: 'The strength of the special procedures lies in their independence and the concerted focus with which they address a single issue or situation. The special procedures constitute a unique link between governments, national institutions, and non-governmental and civil society organizations. They address human rights concerns and make recommendations directly to governments and at the highest levels of the United Nations' intergovernmental machinery. They interact daily with actual and potential victims of human rights violations around the world and advocate vocally for the respect of their rights. Through the expertise they have developed over the years, the special procedures have advanced the discourse on human rights. All major stakeholders have, however, emphasized that the special procedures, both as individual mandates and as a system, lack the tailored support and resources they need. As a result, they argue, the special procedures cannot adequately fulfil their mandate to affect positively the human rights situation around the world. Observers have noted a number of weaknesses in the system, particularly a lack of coordination among the various mandates, inadequate public awareness about the special procedures in general, and only limited follow-up to recommendations and individual complaints.22

The future

General Assembly Res. 60/251 requires the Council to 'assume, review and, where necessary, improve and rationalise all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures...; the Council shall complete this review within one year after the holding of its first session' (i.e. by June 2007).

Of the functions performed by the Special Procedures, three stand out in importance: (1) the presentation of an annual report and associated efforts to develop
The United Nations Human Rights System

1. ANNUAL REPORTS AND THE DEVELOPMENT OF JURISPRUDENCE

While it is risky to generalize too much when seeking to capture the practice of 28 different thematic procedures, most mandate-holders use their annual report to provide an overview of current and pressing issues, to systematize in some way the approach adopted to the mandate and the lessons learned, and to develop particular interpretations of the norms in question. In the excerpts below the Special Rapporteur on adequate housing uses his final report to reflect on the key issues confronting his mandate and to launch a new set of soft law principles. In the following example, the report of the Representative of the Secretary-General on the human rights of internally displaced persons illustrates the extensive use made under that mandate of techniques designed to generate soft law and to influence the way in which states and others interpret the relevant norms.

REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING . . ., MILOON KOTHARI
UN Doc. E/CN.4/2006/41

II Main obstacles and contemporary trends

29 [Based on the six years of his mandate, the Special Rapporteur uses the occasion of what was expected to be his final report (in the transitional arrangements from the Commission to the Council his mandate was extended for one year) to] highlight a number of main obstacles and contemporary trends that require urgent attention:

Adequate housing and land and property concerns. Testimonies, country missions to Afghanistan, Brazil, Cambodia or Kenya, and other sources of information have clearly demonstrated that the realization of the right to adequate housing cannot be examined in isolation from land and property considerations. Relevant concerns include: land and property speculation and the unwillingness of States to intervene in the market to ensure that low-income persons can access rental and owner-occupied housing; land occupation/grabbing; land confiscation and expropriation; destruction and deterioration of land; inequality in land ownership; agrarian reform; housing and property restitution in the context of the return of refugees, evicted persons, and internally displaced persons; and the inability of States to control the growth and power of land mafias and cartels;
Natural disasters and humanitarian emergencies. Tragic events in recent years, such as the earthquake in Bam, Islamic Republic of Iran, in December 2003; the Indian Ocean tsunami in December 2004; the South Asia earthquake in October 2005 that affected areas of Pakistan and India; Hurricane Katrina, which caused flooding along the Gulf Coast of the United States; and Hurricane Mitch, which devastated parts of Nicaragua, have shown that there is a need to integrate human rights standards into relief and rehabilitation efforts. Concerns raised in recent evaluation studies include discrimination and corruption in distribution of aid, compensation and reconstruction work; and overcrowding, lack of water and sanitation, and violations of the human rights to adequate housing, and privacy and security of the person in temporary and intermediate shelters. Attention should be paid to the elaboration of means by which the international community, including international financial institutions and non-government organizations, can incorporate human rights standards in their policies and practices including the speedy transition from temporary shelter to permanent housing.

Urban and rural. Urban areas across the world today are scenes of violations of the right to adequate housing, due to the inability and unwillingness of Governments at local, national and international levels to adequately control land and house speculation, to reverse concentration of land and hoarding of property, to promote affordable rental housing and to invest in social housing. This has led to an increase in the number of people who live in slums; and a rise in "urban apartheid", "segregation", and "ghettoization" with physical borders of separation between wealthy and poor urban residents. While recognizing the enormous challenges stemming from rapid urbanization and the need to respond thereto, the Special Rapporteur has, on numerous occasions, emphasized the need to also urgently address the housing rights of rural populations and the distressed reality of inadequate housing and homelessness in rural areas. This includes paying attention to large-scale projects like dams and mining and other extractive industries that promote urban development while resulting in the displacement and loss of homes and livelihoods of large sections of the rural population. Given the grim status of housing rights, it is imperative that States and other involved actors urgently develop policies for both urban and rural areas. Agrarian reform must be given priority in rural development, and planning must address complex trends such as inequality in land ownership, rapid urbanization, growing homelessness, forced evictions, forced migration, land-grabbing, and segregation;

Housing finance for the very poor. The Special Rapporteur has continuously pointed out the worldwide failure to finance and ensure adequate housing for the poor who comprise the bottom 20 per cent of national populations. It should be possible to restructure the national housing finance system to meet the needs of this group.

Groups in focus. The Special Rapporteur has undertaken considerable work on women and adequate housing. Having identified the persistent "culture of silence" as one of the main obstacles confronting women in their struggle for their right to adequate housing and land, it is critical that the situation of women be attentively addressed in the future. The same is true with respect to the situation of the world's growing homeless population. In addition, an in-depth analysis will be needed on
homelessness and discrimination faced by other groups, such as children, youth, the elderly, persons with disabilities, indigenous peoples, refugees, migrants, minorities, and the poorest of the poor.

III. Practical tools of implementation: Basic principles and guidelines on development-based evictions and displacement

30 Throughout his mandate, the Special Rapporteur has favoured a constructive approach with a view to suggesting concrete recommendations and developing practical implementing tools to this end. In this last report to the Commission, the Special Rapporteur wishes to present practical guidelines for States on development-based evictions and displacement.

34 The basic principles and guidelines on development-based evictions and displacement represent a further development of the United Nations Comprehensive Human Rights Guidelines on Development-based Displacement (E/CN.4/Sub.2/1997/7, annex). They offer several new prescriptions, based on experiences gathered worldwide since 1997, which render more clear the obligations of States within this context. These include: the need for States to conduct comprehensive impact assessments in advance of evictions that take into account their differential impact on women, children and other vulnerable groups; calling for States to take intervening measures to ensure that market forces do not increase the vulnerability of low-income and marginalized groups to forced eviction; affirming the obligation of States to recognize the fundamental human rights of evicted persons to return, resettlement and fair and just compensation; and the requirement that all affected persons be notified in writing and sufficiently in advance with a view towards minimizing the adverse impacts of evictions; the enumeration of detailed steps to be taken by States to protect human rights prior to, during and after evictions; and the establishment of stringent criteria for initiating and carrying out evictions in exceptional circumstances.

REPORT OF THE REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE HUMAN RIGHTS OF INTERNALLY DISPLACED PERSONS, WALTER KÄLIN

UN Doc. E/CN.4/2006/71

I. Protection of internally displaced persons:

A. Conceptual framework

4. Protection of IDPs is the foundation of the Representative's mandate, and the essential point of departure for all operational and practical recommendations. A comprehensive understanding of protection in the various phases and contexts of displacement accordingly is at the heart of the Representative's methodology. In all activities pursuant to his mandate, the Representative uses as a framework the
Guiding Principles, and the underlying norms of international human rights, humanitarian and refugee law which they reflect and with which they are consistent

6. The primary duty and responsibility to protect and assist IDPs within their jurisdiction lies with national authorities from whom IDPs have the right to request and receive such protection and assistance (Guiding Principle 3). .

7. From a practical perspective, and in line with best practices from all parts of the world, national Governments are encouraged to take 12 key steps in order to fulfil their responsibility. They should:

(a) Take effective measures to prevent displacement and minimize its adverse effects;
(b) Acknowledge the existence of internal displacement where it happens and raise national awareness of the problem;
(c) Collect data on the number and conditions of IDPs;
(d) Support training of government officials at all levels on the rights of IDPs;
(e) Create a legal framework for upholding the rights of IDPs;
(f) Develop, on the basis of such legislation, a national policy or plan of action on internal displacement;
(g) Designate an institutional focal point on IDPs;
(h) Encourage national human rights institutions, where they exist, to integrate internal displacement into their work;
(i) Ensure the participation of IDPs in decision-making affecting them;
(j) Support durable solutions based on the free choice of the IDPs concerned, including return to their homes, integration at the place of displacement or resettlement to another part of the country;
(k) Allocate adequate resources to the problem;
(l) Cooperate with the international community to the extent that national capacity is insufficient.

Protection in the context of internal displacement resulting from natural disasters

9. The human rights implications of internal displacement arising from natural disasters have not heretofore thoroughly been examined and have only begun to gather wider attention in the wake of the catastrophic natural disasters suffered in late 2004 and 2005. Following the Representative's working visit to South Asia, he spelled out the human rights aspects of natural disasters in his report on the visit. Further, the Representative proposed the development of operational guidelines for United Nations human rights and humanitarian organizations on the human rights of IDPs in situations of natural disaster. The IASC Working Group welcomed that proposal and the guidelines will be presented to that body in 2006 .