4 The United Nations Charter system

CONTENTS

4.1 INTRODUCTION

The UN Charter was not designed to address human rights, at least directly, but was instead a mechanism primarily intended to maintain and secure international peace and security. None the less, some scant references to human rights are visible therein, but as will be discussed in this chapter these were not originally meant to confer strict obligations on states or otherwise to establish a global order of rights-holders. Despite these shortcomings the human rights framework of the Charter remains crucially important because in the sixty or so years since its adoption many of the Charter's principal organs and their subsidiary institutions have been instrumental in the promotion and protection of human rights worldwide. Given that the Charter is a living instrument it is only natural that organs originally devoted to human rights have fallen into desuetude and others have surfaced to take their place. Thus, the Charter represents a constantly changing battleground of ideas, institutions, actors and activities within which politics and human rights are at odds. In the midst of this battleground, however, one finds a plethora of actors, both states and NGOs, that seek to close this gap between politics and rights.

Although initially this seemed like a vain uphill struggle on account of the fact that the UN is quintessentially a political organisation, since the end of the Cold War in the early 1990s there has been a shift towards a more visible human rights-centred approach. This is evidenced from the increased

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depoliticisation of human rights institutions, the adoption of a human rights agenda by the Security Council and the mainstreaming of human rights within the Organisation as a whole. Thus, as will become evident in the next section the UN Charter can no longer be construed in accordance with the political climate and notions of state sovereignty prevailing in 1945. In equal manner, article 2(7) of the Charter, which forbids the Organisation to intervene in the domestic affairs of states, necessarily now excludes human rights violations from its ambit.

A comprehensive discussion of the UN's human rights work and institutions is an infinite task given that every atom of the organization is engaged in one way or another in the promotion or protection of rights. As a result, this chapter is confined to the examination of the principal human rights institution, the HRC, and the various mechanisms operating under its wing. This includes a discussion of the universal periodic review (UPR), the Council's complaint procedure, as well as its so-called special procedures. The chapter then goes on to analyse the important human rights dimension of the General Assembly and the Security Council since both possess authority to take direct action against violations, in addition to their standard-setting capacity. Institutions that have produced important human rights work, but whose mandate is otherwise peripheral to human rights, such as the ICJ, are referred to in this chapter but are not extensively analysed. Equally, space precludes us from examining specialised agencies such as UNICEF and the UN High Commissioner for Refugees (UNCHR).

It should be pointed out that Charter-based institutions are distinguished from treaty organs engaged in human rights work, such as the HRC of the ICCPR.[1] Although all of these treaty organs reside within the UN they are in fact independent from the organisation itself, unless treaty members have entered into a collaboration agreement to the contrary with the UN. As a result, treaty organs are not susceptible to the authority of the Security Council, as is the case with Charter-based organs.

4.2 THE HUMAN RIGHTS DIMENSION OF THE CHARTER

The Charter is rightly viewed as having a *constitutional* force over and above other international treaties and obligations assumed by states because article 103 thereof expressly says so. This necessarily implies that the human rights provisions of the Charter prevail over any conflicting provisions contained in other treaties and are derogable solely in accordance with the Charter. This observation is of practical significance only if the Charter's human rights

[1] The CESCR, on the other hand, is not a treaty organ, but was founded by ECOSOC resolution 1985/17 (28 May 1985). For reasons of coherency its work is explored in the chapters dealing with international treaty systems and ESC rights.

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provisions are couched in the form of concrete obligations for member states. If not, and particularly if the language employed is hortatory, then the risk is that human rights may be marginal to the Charter framework and outside the strict purview of the mandate assigned to its organs and institutions. A literal reading of the Charter demonstrates that human rights were not a priority among delegates to the San Francisco conference that preceded its adoption and in fact the majority of members were averse to any reference to them. It is well known that even the meagre human rights provisions in the Charter were the result of the determined efforts by human rights lobbyists and Eleanor Roosevelt, the wife of the then US president.

Be this as it may, the *travaux préparatoires* (preparatory work) of the San Francisco conference are of little use in analysing the human dimension of this constitutional instrument, as are its human rights provisions. The preamble and article 1(3) of the Charter prescribe the purposes of the organization, which includes among others the reaffirmation of fundamental human rights, equal rights for men and women and self-determination of peoples. This is followed by article 55 which provides that the UN shall 'promote ... universal respect for, and the observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. The purposes of article 55 are to be achieved by 'all members pledg[ing] to take joint and separate action in cooperation with the Organisation', in accordance with article 56. If one considers that pledges within the UN are not viewed as binding promises and that the 'promotion' and 'observance' of human rights constitute weak, and rather ineffective, obligations, it is evident that from a strict textual reading the Charter is not a legal basis for the assumption of serious human rights obligations.

Like most contemporary treaties, the UN Charter is a living instrument which by necessity must be construed in accordance with the evolutionary method of interpretation.[2] This method rejects literal interpretation or interpretation based on the original intent of the drafters, but instead adopts meanings derived from current state practice and particular understandings shared between nations, which are themselves derived from practice.[3] An illustration is poignant. The cornerstone of the Charter in 1945 and in subsequent years was the containment of armed conflict across international frontiers with a view to averting yet another world war. As a result UN member states were willing to turn a blind eye to authoritarian regimes that

[2] Express acceptance of this method was made, for example, by the IACtHR in *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, of 1 October 1999, Ser. A, no. 16, para. 193.

[3] See S. Fish, *Is There a Text in the Class? The Authority of Interpretative Communities* (Cambridge, MA: Harvard University Press, 1980), who coined the theory of interpretative communities and according to which sovereign actors have formed an interpretative community in which they share common understandings about certain notions, including human rights, and interpret these notions in a relatively uniform manner.

committed genocide or blatantly abused fundamental human rights. Thus, human rights on many occasions lost out to the Charter's strict reading of international peace and security as the organisation's paramount priority.

Such an interpretation is no longer viable for several practical reasons. For one thing, it is now universally acknowledged that international peace and security may be threatened by domestic conflicts, either because they tend to spill over into neighbouring nations, or because they cause large migration and refugee flows, or destabilise entire regions. The disintegration of the former Yugoslavia is a poignant reminder. Moreover, it is now well understood that the absence of rule of law and human rights leads sooner or later to weak, fragile or indeed failed states. The Fund for Peace maintains an annual 'failed states index' which is premised on twelve indicators, a number of which are pertinent to this discussion: massive refugee or internally displaced person movements, uneven economic development, criminalisation/delegitimatisation of the state, widespread violation of human rights, lack of the rule of law, and the security apparatus operating as a state within a state.[4] Finally, the entrenchment of human rights has become so fundamental to the activities and *raison d'être* of the international community that even the very notion of peace and security cannot be divorced or read separately from human rights.[5] As a result, the rather hortatory or weak language of the Charter should not mislead us into thinking that fundamental rights are not an integral part of the UN's principal external aims and priorities. It is correct therefore to construe the provisions of the Charter in conformity with fundamental human rights.

The dynamic nature of the UN Charter is especially evident in respect of the institutions originally destined to promote and observe human rights. The chief protagonist was one of the five principal organs of the organization, namely ECOSOC. ECOSOC in turn set up the CommHR, the predecessor to what is now the HRC.[6] As will be discussed in the next section, although the Commission largely failed to take effective measures to protect and enforce human rights[7] it did none the less succeed in pushing forward

[4] See the Fund for Peace, 'Failed states index 2009', available at: www.fundforpeace.org/web/index.php?option=com_content&task=view&id=99&Itemid=140.

[5] UNGA resolution 65/281 (20 July 2011), preamble, which stresses that 'peace and security, development and human rights are the pillars of the UN system and the foundations for collective security and well-being'. Equally, the Security Council has underlined the perils of HIV/AIDS for regional security and post-conflict reconstruction; UNSC resolution 1983 (7 June 2011).

[6] At the same time, ECOSOC set up another Commission, that on the Status of Women.

[7] In fact, the Commission adopted a statement in 1947 whereby it argued that it had no power to take any action with respect to complaints alleging violations of human rights. (CommHR report of first session E/259 (1947), paras. 21–22). For a background analysis, see T. Gonzales, 'The Political Sources of Procedural Debates in the United Nations: Structural Impediments to Implementation of Human Rights', *New York University Journal of International Law and Politics* (*NYUJ Int'l L. & Pol.*) 13 (1981), 427, at 450.

a standard-setting agenda, followed by the drafting of substantive human rights treaties. The Commission is credited with the Bill of Rights, which consists of the Universal Declaration of Human Rights, in addition to the ICCPR and the ICESCR. It was also responsible for the drafting of other important treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination. Yet ECOSOC has remained largely peripheral to the human rights developments stemming from within the organization and did not live up to the expectations of the Charter's drafters. On the other hand, the General Assembly, and particularly its third committee, the Security Council and their respective subsidiary organs, have adopted a mix of significant political decisions and legal initiatives in the field of human entitlements. Equally, the ICJ, although by no means designed to address individual complaints or human rights disputes, has on many occasions addressed violations through the prism of state responsibility, while at the same time taking the opportunity to elaborate upon relevant human rights rules.[8]

The slow realisation of rights within the organization is explained by the fact that its principal organs are political in nature – save for the ICJ – and this is also true in respect of many of their subsidiary organs. Political, as opposed to independent, appointees are not impartial and owe allegiance to the governments that appointed them. This has inhibited bodies such as ECOSOC and the CommHR to respond even to the most flagrant violations that came to their attention. During the Cold War the UN institutions largely declined to collaborate with, or make use of, information provided by external stakeholders, particularly human rights NGOs. Although it is true that most European nations generally welcome the participation of civil society, countries with poor human rights records fiercely resisted private intrusions into their domestic affairs. The organization has now become responsive to external stakeholders and this is evident, for example, in the mandate of the HRC, its complaints procedures and the UPR, all of which will be analysed shortly.

Finally, some mention should be made of the OHCHR. This was established in 1993 by the General Assembly, its purpose being to mainstream[9] and coordinate the organisation's human rights activities as well as to promote and ensure realisation of rights – particularly by making recommendations to other UN bodies – within the framework of the Charter and the Bill of Rights.[10] Although a large portion of the OHCHR's work is clerical, especially given that it is not staffed to undertake more substantive roles or missions, ever since Mary Robinson's tenure it has become much more activist. This

[8] See R. Higgins, 'Human Rights in the International Court of Justice', *Leiden Journal of International Law* (*LJIL*) 20 (2007), 745.

[9] Although this task seems to have now been shouldered by the HRC, on the basis of UNGA resolution 65/281 (20 July 2011), Annex, para. 42.

[10] UNGA resolution 48/141 (20 December 1993), para. 4.

has been achieved through vibrant human rights diplomacy and the maintenance of a vocal and public profile. By way of illustration the OHCHR did not hesitate to criticise the USA for its handling of the Guantánamo detainees, demanding that they be entitled to fundamental rights under human rights and humanitarian law.[11]

The following section and subsections will focus on the mandate and work of the HRC.

4.3 THE HUMAN RIGHTS COUNCIL

The HRC, although among the newest human rights bodies in the UN system, is certainly among the most important. Its establishment is the result of the acute politicisation and lack of credibility of its predecessor,[12] the CommHR and ECOSOC. While it is true that the Commission achieved significant landmarks in both standard-setting and rule-making through the promulgation of declarations and treaties, it also struggled with the political agendas of many of its member states, many of which were anti-human rights oriented. A number of nations were driven to hold seats in the Commission with the sole purpose of obfuscating and preventing condemnation of their human rights records, as well as those of their allies.[13] It is true to say that with the exception of Israel and South Africa – both of which were, however, politically isolated – the Commission never really managed to condemn or seriously investigate the gross human rights abuses committed by any country against its own people. This state of affairs was tolerated because of the lack of an alternative option, particularly during the Cold War, the futility of attempting to amend the relevant part of the UN Charter and also because the liberal democracies in the Commission were satisfied that this body was at least contributing to the promulgation of positive human rights law. By the early 2000s it had become apparent that the Commission could no longer fulfil a serious role in the protection and monitoring of human rights worldwide and that it would have to be replaced by a new institution that was not prone to political manipulation and which would enjoy the confidence of public and private actors alike.

A number of events prompted the need for the creation of the HRC, besides the overpoliticisation and loss of credibility of its predecessor. For one thing, the USA and its European allies had long lost the requisite majority to thwart

[11] See CommHR, Situation of Detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (15 February 2006).

[12] Report of the High-level Panel of Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 (1 December 2004), para. 283.

[13] UN Secretary-General Report, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005/Add.3 (26 May 2005), paras. 140–7.

Third World politics within the Commission. Secondly, the monitoring and complaint mechanisms of the Commission had become merely ceremonial and had been replaced in practice by the various UN treaty mechanisms and the work of treaty bodies. Thirdly, much of the work which would otherwise have been the domain of the Commission had been assumed by the Third Committee of the General Assembly and to a much lesser degree by the Security Council. Fourthly, the political 'aberration' previously associated with the notion that the UN could collaborate with civil society organisations in the field of human rights had long been replaced by a global climate where such collaboration was welcome at all levels. Lastly, following the end of the Cold War era, which was plagued by the complete inability of the UN to tackle human rights catastrophes such as that of Cambodia, industrialised nations and their populations were now inclined to be vocal against human rights abuses and the political cost no longer seemed acceptable to politicians and the masses.

By and large, the UN's human rights agenda could certainly have survived without bodies such as the Commission or the Council, given that all its organs, bodies and entities are already actively engaged with human rights issues. Moreover, human rights are incorporated and streamlined in all UN activities and operations.[14] So why the need for yet another dedicated, yet still political, human rights body? As the global guarantor of peace and security, including human rights, the UN no doubt needs a permanent standing body dedicated solely to advancing, protecting and monitoring human rights, lest the otherwise welcome diffusion and overlap of human rights agendas within the organization risks becoming random, uncoordinated and perhaps also conflicting. The ideal permanent body must moreover enjoy significant political clout, otherwise it will be ignored, sidelined or made irrelevant. Such clout can only be derived from the active participation of sovereign states at the helm, as opposed to a self-standing court, quasi-court or civil society organisations. The latter, as important as they are, can only play a complementary role to that of states in the protection and promotion of rights, particularly with respect to countries that openly and blatantly flout most human entitlements. Finally, apart from condemnatory resolutions by the Security Council and the General Assembly, there exists no other mechanism within the UN system where states can discuss their human rights

[14] By way of illustration, all entities within the UN system involved in development projects adopted in 2003 a Statement on a Common Understanding of a Human Rights-based Approach (HRBA) to Development Cooperation. Therein it is stated that all projects must be guided by the Bill of Rights and that development cooperation 'contributes to the development of the capacities of "duty-bearers" to meet their obligations and of "rights-holders" to claim their rights'. Equally, mainstreaming gender perspectives into all policies and programmes of the UN was formally institutionalised in 1997. See UN Doc. E/1997/66 (12 June 1997).

issues in an open and non-confrontational manner with a view to exposing such problems and potentially – although certainly not always – finding solutions. Despite their precedential value, human rights tribunals and treaty mechanisms are only useful for resolving individualised violations and do not allow the international community to address the culprit state, with the aid of NGOs, in a detailed discussion of *all* its human rights problems. The HRC aspires to assume this unique role.

Unlike the Commission, which was set up by ECOSOC, the HRC was set up by the General Assembly and is a subsidiary organ thereof.[15] Its task is to carry on the work of the Commission, as well as assume its responsibilities[16] and as a result its creation was not meant to sever all ties with the past. Its legal status allows it to bring all matters relating to human rights, whether urgent or long term, for discussion before the General Assembly, which certainly enjoys far more exposure and political power than ECOSOC. The HRC was entrusted with three major responsibilities: (1) a thorough and ongoing review of the human rights record of all UN members, known as UPR; (2) examination and investigation of situations concerning gross and systematic violations of human rights; and (3) optimisation of the UN's institutional capacity to deal with human rights.

The first two will be examined in discrete sections in this chapter, so it is prudent briefly to discuss institutional optimisation at this stage. Since 1945 every entity within the UN has assumed some kind of human rights function and over time this has given rise to unnecessary duplication and overlap. This is not only costly, but risks generating friction and inefficiency. The HRC is responsible for rationalising and coordinating the various human rights mandates and functions, save for the standing work of the General Assembly and the Security Council. Moreover, despite the fact that the UN is automatically associated with human rights, it is not self-evident that all its departments and institutions are guided by a specific human rights agenda and policy. By way of example, a strategy of sanctions designed to prevent a regime from amassing nuclear weapons but which causes malnutrition, child mortality and deaths as a result of the lack of health care is devoid of a human rights orientation. Equally, policies that promote rights but which do not take into consideration the particular needs of women and girls are devoid of a gender perspective. It was therefore crucial that the HRC was entrusted with mainstreaming gender and human rights considerations into all UN policies and actions.[17]

If all of these laudable aspirations which the new Council is poised to fulfil are to be achieved, it needs to be impartial, objective, transparent and results oriented. This is a tall order given the politicised nature of its predecessor

[15] UNGA resolution 60/251 (3 April 2006), para. 1. [16] Ibid., para. 5(g).
[17] Ibid., paras. 3 and 6.

and certainly cannot be achieved by mere rhetoric. That is why the Assembly decided on the imposition of certain, seemingly stringent, conditions for the election of states to the forty-seven members comprising the HRC. Although membership of the Council is open to all UN members, the Assembly 'shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'.[18] Although this falls rather short of requiring a solid human rights record of potential members it does represent a significant departure from past practices and no doubt states with poor records may find themselves dissuaded or simply discouraged. Moreover, in extreme cases, the Assembly, by a two-thirds majority of present and voting members, may suspend a particular member engaged in gross and systematic violation of human rights.[19] In practice, because membership to the Council is highly valued from a strategic perspective, states have vied for election to it and in their pledges to the Assembly made a serious effort to demonstrate their commitment to human rights both domestically and internationally. Of course, this usually does not amount to much when it comes from countries with a history of repression and abuse.[20] Certain groups of states went as far as publicly declaring their voting criteria, as was the case with EU members which committed themselves not to vote for candidates that were subject to UN sanctions for human rights violations.[21] The USA, although a member of the Council since 2009, initially voted against resolution 60/251 because it only required a simple majority, for the election of members, as opposed to a more stringent two-thirds majority, and also because it did not automatically exclude candidates subject to UN sanctions.[22]

Yet the system is far from perfect and has faced legitimacy concerns from the outset. Membership to the Council is based on equitable geographical distribution among the various regional groups.[23] Ideally, states will compete for available seats and will thus be elected by their regional peers on the basis of their human rights record. In practice, many regional groupings

[18] Ibid., para. 8. [19] Ibid.

[20] For example, see Egyptian Pledge, UN Doc. A/61/878 (23 April 2007), 5, where the then Mubarak regime pledged, *inter alia*, to preserve the freedom of the press and of the judiciary and to strengthen civil society and political dialogue! The texts of all 2007 election pledges are available at: www.un.org/ga/61/elect/hrc/.

[21] H. Upton, 'The Human Rights Council: First Impressions and Future Challenges', *HRLR* 7 (2007), 29, at 33.

[22] In fact, in April 2008 the Bush administration announced that it would be withholding a portion of its contribution to the 2008 UN regular budget, equivalent to the country's share of the HRC budget. In June of the same year it further announced that the USA would engage with the HRC 'only in matters of deep national interest'. The Obama administration reversed this hostile climate and in 2009 the USA was elected to the Council, submitting its first UPR in 2010.

[23] UNGA resolution 60/251, para. 7.

operate manufactured (or closed) slates, meaning that competition within the group is discouraged because seats are allocated under the table by mutual agreement between group members. Astonishingly, Syria's candidacy for the Council was unopposed within the Asian group in the run up to the 2011 elections, despite global reports that its security forces had killed more than 800 demonstrators at the time. Following widespread condemnation the Asian group finally urged Syria to withdraw its candidacy and nominated Kuwait in its place.[24] Despite these shortcomings the Council is a far cry from its predecessor where the withdrawal of a candidacy for persistent human rights violations would have seemed laughable. This conclusion is reinforced by the suspension of Libya from the Council by the General Assembly on 1 March 2011,[25] only nine months after it was elected on a closed African slate. The practice of closed slates that encompass autocratic and brutal regimes has somewhat alarmed the western European group, which although itself put forward a closed slate for the 2011 elections, promised competitive rounds in the future. These developments certainly indicate an evolving dynamic permeating the operation and membership of this new institution. The UPR mechanism, examined in the following subsection, justifies a reserved excitement about this dynamic.

4.3.1 The universal periodic review

The UPR is a creature born out of Assembly resolution 60/251.[26] It assumes that an HRC composed as far as possible of countries that promote and implement human rights can serve as a forum for a holistic, honest, yet non-confrontational, discussion of each nation's persistent human rights issues. The Assembly made it clear that this reporting mechanism should not duplicate existing reporting obligations, must avoid becoming burdensome to the UN and its member states and should moreover add value to the promotion of human rights. Before going any further it is important to examine in what way the UPR is different from similar reporting mechanisms within the UN system, particularly the seven treaty-based mechanisms and any Charter-based periodic reports. Charter-based reporting is no longer available, its last manifestation, a periodic self-reporting mechanism,[27] having been formally terminated in 1980 as obsolete and far too marginal to be of any relevance.[28] The reporting dimension of the treaty bodies, on the other hand, has fared much better and has enhanced the effectiveness of individual communications, general comments, inter-state complaints and on-site inquiries, where available. None the less, despite the extensive comments and

[24] HRW, 'UN: Limited Choice Marks Rights Body Election' (20 May 2011).
[25] UNGA resolution 65/265 (1 March 2011). [26] Para. 5(e).
[27] ECOSOC resolution 624B (XXII) (1 August 1956).
[28] UNGA resolution 35/209 (17 December 1980).

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recommendations of the various treaty bodies in their responses to national reports, these are necessarily confined to the limited number of rights contained in the treaties. Moreover, this process is confined only to those states that have ratified the treaties.

By contrast, under the UPR states are reviewed on the basis of obligations arising from the UN Charter, the UDHR, instruments to which they are parties and any unilaterally assumed voluntary pledges and commitments.[29] These may in fact turn out to be more extensive than most treaty obligations. Even further, although the treaty bodies are not supported by an enforcement mechanism, their comments and recommendations on the parties' periodic reports are not meant to serve as mere points of discussion. On the contrary, because the obligations arising out of human rights treaties are binding, the recommendations of the treaty bodies aim, among other things, to demonstrate where and how compliance is poor or ineffective. In this sense the treaty bodies' periodic reporting mechanisms are not necessarily free from friction and compulsion. Finally, treaty bodies employ for their reporting processes independent experts, whereas the UPR is premised on peer review, which is conducted by the representatives of states elected to the HRC.

The reader may well ponder what makes a country that is not a party to any, or a few, treaty-based mechanisms decide to take part in a UPR where the entirety of its human rights record risks being scrutinised before the rest of the world. The simple answer to this question lies in the fact that even the most brutal regimes, with the exception perhaps of North Korea, is weary of a perpetual political and financial isolation and is cognisant that its human rights record will eventually surface, thanks to the pace of modern media and the speed of information exchange. As a result, even countries such as Myanmar have submitted themselves to the scrutiny of the UPR.

The process is relatively straightforward. To start with, states are under an obligation to submit a national report which should discuss the state of human rights in their country and which ideally should be prepared on the basis of a broad consultation with all relevant stakeholders.[30] This national report should not exceed twenty pages, unlike the extensive reports submitted before human rights treaty bodies. No doubt these national reports will attempt to paint a favourable picture and in many cases deflect attention from serious abuses or hide behind laws that were never meant to be respected or implemented by the authorities. In order for the Council to assess the national report the UPR provides for the compilation of two distinct sources of information that are made publicly available: (1) information contained in the reports of treaty bodies, special procedures, including observations

[29] HRC resolution 5/1 (18 June 2007), Annex, para. 1.
[30] HRC resolution 5/1, Annex, para. 15(a).

and comments by the state concerned, and other relevant UN documents which shall not exceed ten pages;[31] (2) a summary of credible information provided by other relevant stakeholders, namely NGOs, which again must not exceed ten pages.[32] In practice, given the vibrancy and organisation of the international human rights NGO movement, the information provided in national reports is quite literally picked apart in the NGO summaries. By way of illustration, NGOs have consistently emphasised that torture is not only widespread but publicly sanctioned in Uzbekistan and that the country has wholly failed to implement the right to fair trial, having resorted to exaction of forced confessions, denial of defence rights and government appointment of judges.[33] In respect of Myanmar, the contributing NGOs contested the suggestion of the government that the new constitution was transparent and democratic, noting *inter alia* that article 445 of this instrument effectively granted a blanket amnesty to government officials for past and future serious crimes.[34]

The national report along with the compiled information is then processed and reviewed by a working group consisting of three rapporteurs, selected by the drawing of lots among the members of the Council and from different regional groupings (also known as the troika).[35] The conduct of the review is conducted through an interactive dialogue, which may involve the participation of observer states and other stakeholders.[36] The purpose of this format is to pose meaningful and pressing questions to the reviewed state by any interested party sharing particular human rights concerns, thus also avoiding giving the impression that the troika operates in a quasi-judicial manner. A list of questions or issues may be prepared in advance by observer nations and submitted to the state under review with a view to facilitating its preparation and providing some focus for the interactive dialogue.[37] In practice, this list of issues and questions has become a significant part of the process, particularly since many of the issues raised have evoked strong responses on account of their sensitive nature.

The Uzbek delegation, for example, reacted forcefully to allegations that it had covered up its military repression of government dissent in Andijan province which resulted in the loss of hundreds of lives, noting that this was a national security issue which it was not willing to discuss further.[38] In other instances, the list of questions against liberal democracies has addressed a

[31] Ibid., para. 15(b). [32] Ibid., para. 15(c).

[33] NGO summary on Uzbekistan, UN Doc. A/HRC/WG.6/3/UZB/3 (16 September 2008), paras. 8, 9, 14.

[34] NGO summary on Myanmar, UN Doc. A/HRC/WG.6/10//MMR/3 (18 October 2010), paras. 5, 12.

[35] HRC resolution 5/1, Annex, para. 18(d). [36] Ibid., para. 18(b) and (c).

[37] Ibid., para. 21.

[38] Report of the WG on the Uzbek UPR, UN Doc. A/HRC/10/83 (11 March 2009), para. 97.

variety of non-mainstream human rights issues. The USA, for example, was criticised, among other things, for its poverty discrepancy between blacks and whites, for rapes in prison and discrimination against indigenous peoples.[39] No doubt, states are compelled to respond to the questions posed, even if to dismiss them. The interactive dialogue itself, with the presence of observers and stakeholders, is scheduled to last no more than three hours.[40] This is followed by the deliberation of the troika and the adoption of a so-called outcome. Prior to its adoption, the country under review will have a chance to respond to the issues raised.[41] The outcome is equivalent to the report adopted by treaty bodies and consists of a summary of the proceedings, a conclusion and/or recommendations and a list of the voluntary commitments of the state concerned.[42]

Because the UPR is founded on the principle of cooperation, country involvement and non-confrontation, the conclusion/recommendation section of the outcomes does not criticise countries under review. Instead, it offers suggestions for improvement, shares best practices, and offers the possibility of cooperation, technical assistance and capacity-building, among other things.[43] The idea underlying the UPR is to identify problems, discuss them with the state concerned and offer assistance to overcome them, and in practice most countries tend to adopt at least some of the recommendations offered in the course of their UPR.[44] At the same time it has to be acknowledged that the HRC, special procedures and treaty bodies have identified a plethora of instances where states have paid mere lip service even to pledges made by themselves. The HRC may decide if and when any specific follow up is necessary, and in situations where a state fails to take any remedial action the HRC may address as it deems appropriate all instances of persistent non-cooperation.[45]

Overall, the UPR, despite its drawbacks, has managed to make deliberation transparent and open to external actors, particularly NGOs, and has forced governments to respond to questions they would otherwise prefer not to engage with. It is still too early to assess whether it is effective, but it is a reality that a number of nations have taken steps to remedy problematic situations mainly through the introduction of new legislation.

[39] Report of the WG on the United States, UPR, UN Doc. A/HRC/16/11 (4 January 2011), paras. 76, 78–9.

[40] HRC resolution 5/1, Annex, para. 22.

[41] Ibid., paras. 28–32.

[42] Ibid., para. 26.

[43] Ibid., para. 27.

[44] Chad, for example, agreed to ratify the OPCAT and to establish a national prevention mechanism, something applauded by the Committee against Torture (CtAT). See Concluding Observations on Chad, UN Doc. CAT/C/TCD/CO/1 (4 June 2009), para. 36.

[45] HRC resolution 5/1, paras. 37–8. In practice, special procedures also warn recalcitrant countries of failing to implement both their pledges as well as the most pertinent recommendations addressed to them in their UPR. See Special Rapporteur on North Korea, UN Doc. A/HRC/16/58 (21 February 2011), para. 74.

4.3.2 The Council's complaints procedure

Given the myriad individual complaint mechanisms available through the UN's treaty bodies and regional human rights tribunals, an additional procedure seems rather superfluous. This is all the more true considering that the so-called 1503 procedure,[46] the predecessor to the Council's current complaints mechanism, is confidential, time consuming and oriented towards achieving a friendly settlement with the culprit state, rather than addressing the plight of the victims. As a result, it is not self-evident why the Assembly thought it wise to renew the life cycle of the 1503 procedure.[47] There are some cogent reasons. For one thing, whereas individual complaint mechanisms require the consent of states for the submission of communications by their nationals, the 1503 procedure does not. Moreover, the procedure is triggered only with respect to gross and systematic violations of human rights,[48] not mere individual and isolated infractions. In terms of effectiveness the 1503 procedure was largely discredited because it failed to seriously investigate many of the widespread violations of its era, including the glaring crimes of the Argentine junta in the 1980s and those of the Fujimori regime. The case of the Rwandan genocide is also illustrative. Although the Commission had ample information a year before the genocide that it was in fact impending, it none the less decided to keep the situation confidential under the 1503 procedure. What is more alarming is that Rwanda at the time held a seat on the Commission.

Other criticisms against the Commission is that it addressed only a limited number of civil and political rights, thus excluding altogether ESC rights, and demonstrated a deep political bias which rendered it unable to act against particular governments.[49] Between 1974 and 2005 a total of eighty-four countries were examined with violations ranging from mass killings and disappearances to forced labour and religious persecution.[50] Although little information has become publicly available, it is known at least that the CommHR adopted condemnatory resolutions only in respect of seven countries, while three were referred directly to the public (as opposed to the confidential nature of the 1503 mechanism) 1235 procedure.[51]

[46] It is known as such because it was enunciated in ECOSOC resolution 1503 (XLVIII) (27 May 1970), as amended by ECOSOC resolution 2000/3 (19 June 2000). CommHR resolution 2000/109 (16 April 2000) further reduced the procedural steps for the filing of communications from five to four.

[47] See para. 3 of UNGA resolution 60/251, wherein the Assembly decided to retain this mechanism.

[48] ECOSOC resolution 1503, para. 1.

[49] P. Alston, 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1995), 151.

[50] H. Tolley, 'The Concealed Crack in the Citadel: The UN Commission on Human Rights' Response to Confidential Communications', *HRQ* 6 (1984), 420.

[51] ECOSOC resolution 1235 (XLII) (6 June 1967). This followed the 1503 procedure and was originally intended to allow the Commission to consider the situations in South Africa,

The revamped 1503 complaints procedure[52] has remedied many of the defects of its predecessor and as a result of the proliferation of treaty-based and regional communications mechanisms its role is practically limited to being an early warning system and a complementary political pressure mechanism. Quite significantly it is expressly applicable to all rights and not only to those considered fundamental, as long of course as their violation is gross.[53] It is also hailed as victim oriented on account of the fact that it requires the Council to reach an outcome within a maximum of two years from the submission of the complaint to the state and also because it provides for the involvement of the complainant.[54] Given that the procedure is directed towards gross, and therefore ongoing, human rights violations it is evident that a two-year process involving deliberations with the culprit state is inadequate for addressing urgent situations. It is also unlikely that the Security Council will be in the dark in relation to gross and widespread human rights violations likely to endanger peace and security, and no doubt other early warning mechanisms, both intergovernmental and private, will be more alert to the first signals of crimes and violations. Much like the use of the ICJ to impose interim measures in the *Bosnian Genocide* case,[55] which although unable to yield any immediate relief for the victims was none the less able to put pressure on Serbia, the revamped 1503 procedure will ultimately serve as a complementary forum for political pressure.

From a procedural point of view it is no different from other complaint mechanisms. In order to be considered admissible an application must not be politically motivated, should adequately describe alleged violations and be submitted by the victim or any person or group with direct and reliable information, even second-hand, as long as the information is not based exclusively on media reports. Moreover, local remedies need to have been exhausted, assuming they are effective, and the case should not have been

Rhodesia and Portuguese colonies. However, the Sub-Commission on Human Rights, now disbanded, hijacked the process and allowed NGOs to make oral interventions or circulate statements, which in turn allowed it to recommend to the Commission that it establish a committee of experts to consider situations in Greece and Haiti during 1967. A shocked Commission then adopted the 1503 confidential procedure to avoid further political embarrassment. The rationale of the 1235 procedure has none the less been retained in the revamped procedure under HRC resolution 5/1, Annex, para. 109(d).

[52] Its modalities are elaborated in HRC resolution 5/1, Annex, Part IV.

[53] Ibid., para. 85.

[54] Ibid., paras. 85 and 105–8. Minimal is an understatement, given that the complainant has no access to what is being discussed in the relevant proceedings administered by the working groups.

[55] Case Concerning *Application of the Genocide Convention* (*Bosnia* v. *FRY*), Provisional Measures Order of 8 April 1993 ICJ Reports 1993, 3.

referred to another human rights procedure.[56] Communications are filtered for the purposes of admissibility, including an assessment of whether the alleged violations are indeed gross and persistent, by a working group on communications that is staffed by members of the Council's advisory committee.[57] Once considered admissible the complaints filtered are passed to a working group on situations, whose task is to investigate the allegations. This is composed of Council members serving, however, in their personal capacity.[58] As already noted, the procedure is confidential, albeit the plenary of the Council is notified of all proceedings.[59] The state under investigation must cooperate and make every effort to provide a response no later than three months after receiving the request. Five potential outcomes are available from this process: (1) full discontinuation; (2) retention of the situation under review followed by a request to the state to provide further information; (3) retention under review and appointment of a country rapporteur; (4) discontinuation of the confidential procedure and reverting to a public consideration of the situation; and (5) recommendation of technical assistance, capacity-building or advisory services through the OHCHR to the state under consideration.[60]

4.4 SPECIAL PROCEDURES

It was in 1980 that the then Sub-Commission on the Promotion and Protection of Human Rights recommended to the CommHR the establishment of a working group (WG) on enforced or involuntary disappearances (WGEID) which were at the time common place among South America's dictatorial regimes.[61] The WG was immensely successful because it proved flexible and was able to visit numerous countries for on-site investigations, something which neither the Commission nor the Sub-Commission were able to do.[62] Moreover, the WG was able to respond quickly to urgent situations and as a result it became a useful paradigm for human rights reporting and investigation.

The function and nature of special procedures is quite different from that of other Charter-based and human rights treaty bodies. Special procedures are set up to scrutinise and/or investigate specific countries where acute human rights violations are alleged to have taken place, or investigate

[56] HRC resolution 5/1, Annex, para. 87. [57] Ibid., paras. 91–5. [58] Ibid., paras. 96–7.
[59] Exceptionally, the Council may decide to conduct a public meeting in those situations of 'manifest and unequivocal lack of cooperation', in accordance with para. 104, ibid.
[60] Ibid., para. 109. [61] CommHR resolution 20(XXXVI) (29 February 1980).
[62] The Sub-Commission had prior to 1980 set up intersessional and sessional working groups, such as those on slavery (1975) and the administration of justice (1974).

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and report on the trends, developments and implementation of particular entitlements around the world. The former are known as country-specific mandates, whereas the latter are known as thematic mandates. Thematic mandates may be established in the form of a WG or by means of an independent expert or special rapporteur (which is a standing institution unlike the expert). Although their establishment has never been driven by particular methodological imperatives, for instructive purposes thematic mandates can be distinguished in three ways: (1) by reference to their pursuits those that seek to investigate and analyse the state and implementation of rights clearly established in the Bill of Rights (e.g. enforced or involuntary disappearances, torture, freedom of religion or belief, racism and racial discrimination); (2) those who seek to demonstrate the impact of contemporary situations on the enjoyment of rights (e.g. those of people of African descent, the effects of foreign debt and other related international financial obligations of states on the full enjoyment of human rights, mercenaries, countering terrorism, extreme poverty); and (3) those that investigate the status and viability of new and emerging rights (e.g. international solidarity, transnational corporations and their impact on rights, contemporary forms of slavery, migrants).[63]

What distinguishes the UN's special procedures from other Charter-based mechanisms is that all mandate-holders are independent from any government. In fact, although a certain degree of lobbying is necessarily involved, interested candidates are urged to apply independently. In practice, such posts have largely been assumed by human rights academics, who are able to combine their academic activities with the exigencies of their mandates. This is by no means a trivial issue because other than their expenses mandate-holders are not entitled to a salary and it is natural, given the time-consuming nature of these posts, that they only attract the wealthy or academics (equipped with human rights expertise) able to rearrange their schedules. Since most thematic mandates demand a team of full-time staff to deal with the increasing load of communications and research, it is evident that mandate-holders from developing nations have little, or no, access to the level of resources and funding of their wealthier counterparts. This in turn has been counterproductive for the work of some mandates and the Assembly recently addressed this critical issue by requesting the OHCHR to make available requisite funding from the UN budget as well as from extrabudgetary sources.[64]

Special procedures are not meant to process individual complaints in the manner practised by Charter-based mechanisms (e.g. the 1503

[63] By August 2011 there were thirty-three thematic mandates and eight country mandates.
[64] UNGA resolution 65/281 (20 July 2011), Annex, paras. 31–4.

procedure) or treaty bodies, which exercise a judicial or quasi-judicial function. Equally, they have no authority to demand that culprit states undertake any particular action.[65] Finally, UN member states have no general reporting obligations towards any of the special procedures, as well as no obligation to respond to particular allegations. None the less, special procedures have played an immensely significant role in shaping human rights policies in areas insufficiently understood by policy-makers,[66] as well as in addressing urgent human rights crises in a manner that other bodies with judicial authority could not. By way of illustration, it has aptly been demonstrated that the right of access to food is affected by domestic agricultural policies, gender discrimination and global market fluctuations, among other things. Equally, special rapporteurs have adduced concrete evidence that government debt affects all fundamental rights.[67] The following subsections aim to show how mandate-holders have employed the three tools in their armoury to make their mandates flexible, responsive and relevant. It is precisely because of their flexibility and immediate response to violations that special procedures mandate-holders are a constant nuisance for many countries. More often than not they have been made the object of political attack and have been asked to resign.[68] In one case the special rapporteur on the independence of judges and lawyers was convicted and incarcerated by his native Malaysian courts because it was considered that he defamed certain firms which he accused of being involved in corruption. The ICJ emphatically pointed out that things said or done in the course of a special rapporteur's mandate are immune from prosecution.[69]

[65] Of course, this has not stopped special procedures, in cases of recalcitrant governments, of notifying the Security Council recommending that it take appropriate action to ensure that the culprit government respect its human rights obligations. See Report of the Special Rapporteur on Belarus, UN Doc. E/CN.4/2006/36 (16 January 2006), para. 80.

[66] Some special procedures have even proceeded to issue general comments in the same manner as treaty bodies. See the WGEID, General Comments on enforced disappearance as a continuous crime, and the right to the truth in relation to enforced disappearances. Available on the WG's website, at: www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx.

[67] See Draft Guiding Principles on Foreign Debt and Human Rights, adopted by the UN Special Rapporteur on the effects of debt on the enjoyment of human rights.

[68] See 'Statement by US Ambassador to the HRC for the Resignation of Special Rapporteur Richard Falk' (7 July 2011), available at http://geneva.usmission.gov/2011/07/07/donahoe-statement/. The Special Rapporteur is alleged to have posted a cartoon on his blog depicting a dog labelled 'USA' wearing a Jewish head cover urinating upon a female who was meant to depict justice.

[69] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999), ICJ Reports 62, paras. 39ff.

INTERVIEW 4.1
With UN Special Rapporteur
(Cephas Lumina)

Cephas Lumina, a Zambian national, is UN Special Rapporteur on the effects of debt on the enjoyment of human rights, having been appointed in 2008.

How are you able to combine your position as SR with your busy academic and professional schedule? Do you receive any secretarial or other assistance from the UN or other bodies?

It is very difficult to combine academic and professional responsibilities with work as a UN special procedures mandate-holder. A number of colleagues either have low teaching loads or have been granted leave of absence by their institutions in order to devote more time to UN work. Unfortunately, this has not been the case with me and I was constrained to leave my academic position because the workload did not leave me sufficient time for my academic work and my home institution was not very supportive in this regard.

Although the OHCHR is enjoined to provide administrative assistance, this is quite limited due to budgetary constraints, which means that fewer human and financial resources are available to support the work of the special procedures. I personally receive no support from other sources (I think due to the contentious nature of my mandate), but some of my colleagues get extra funding from some countries which allow them to engage additional support staff or undertake thematic studies. There are also problems flowing from a high staff turnover in the OHCHR which is attributable to staff career movements and cumbersome UN recruitment procedures. Some of the support staff work on short-term contracts and therefore are forced to seek longer-term, and more secure, job opportunities elsewhere. To illustrate the gravity of the problem, I have had a total of seven OHCHR staff supporting my mandate since I assumed it in May 2008 until early 2012 (some lasting only a couple of months)!

Do you think that affected individuals and communities are aware of your mandate and that by communicating with you they feel they can make a difference?

No. Many individuals and communities do not seem to be aware of my mandate and in particular the connection between foreign debt and human rights. I do not know the reasons for this but I suspect that generally there is little public awareness of the UN special procedures and how they can assist affected individuals and communities. Personally, I have endeavoured to increase the visibility of my mandate by participating in public events

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such as conferences and by drawing global attention to the human rights implications of foreign debt through media statements focusing on a range of issues, including climate change and commercial creditor litigation against impoverished countries.

In practice, how receptive have governments and international finance institutions been to your reports and recommendations?

Developing countries have generally been very receptive to my reports and recommendations while developed countries and international financial institutions have not. That said, there are occasions when I have engaged constructively with the World Bank and the African Development Bank, both of which have been involved in the consultations that have been held concerning the Draft Guiding Principles on foreign debt and human rights which I am developing in the context of my mandate. Norway and Australia have also engaged with the mandate and commented positively on aspects of my country mission reports. I have engaged with the IMF and the Asian Development Bank during missions but their response has generally not been encouraging.

What are your primary sources of information?

I draw my information from a broad range of sources but this depends on the type of report I have to produce. For thematic reports, I rely principally on academic research, official (UN and government) documents and studies by NGOs. For country mission reports, I rely on official documents (including national legislation and policy documents), UN documents, academic research and information from discussions with government officials and other stakeholders (such as development partners and NGOs).

4.4.1 Communications

A good number of special procedures are entitled to receive information concerning human rights violations from governments, NGOs, intergovernmental organisations, victims and witnesses. When credible information is furnished, showing that a violation within the scope of the mandate has occurred or is about to occur, the mandate-holder possesses the discretion to intervene with the government concerned and communicate its findings. The Code of Conduct for special procedures sets out the relevant admissibility criteria,[70] which are the same as those required for the complaints procedure of the HRC, described above. Two types of communication are available. The first concerns situations that are ongoing, life threatening or in respect of which harm is imminent and thus require urgent action.

[70] HRC resolution 5/2 (18 June 2007), Annex.

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Such communications are known as urgent appeals and their motivation is to inform the state of the situation with a view to making an immediate intervention that will terminate or prevent the violation. The second type concerns violations that have already occurred and in respect of which the relevant communications are known as letters of allegation. In neither case does the mandate-holder have authority to make the case public or condemn the target government – a case is publicised when the special rapporteur submits his/her report to the Council or the Assembly – but rather urges it to take all appropriate action to investigate and address the allegations. In practice, the press releases issued by mandate-holders can be sharp and rather accusatory,[71] which is a sign of the confidence and respect they enjoy.

In 2010, 604 communications were sent to 110 states, covering 1,407 individuals of whom 19 per cent were women. Of the total number of communications, 66 per cent were issued jointly by more than one mandate. Governments responded to 35 per cent of communications, 18 per cent of which were subsequently followed up.[72]

4.4.2 Country visits

Country visits are an integral part of the work of the special procedures because they allow mandate-holders to perform on-site investigations in respect of urgent situations and draft accurate and detailed reports. Yet, no state is obliged to provide access to special rapporteurs, or any other mechanism for that matter, to conduct on-site investigations. Country visits are only possible following a standing invitation or an *ad hoc* invitation issued by the requesting nation. Standing invitations allow all mandate-holders to visit the country concerned for work related to their mandate without the need to make a formal request. Even so, special rapporteurs must notify the authorities in advance of each visit and the institutions or persons they intend to converse with. As of 31 December 2010 a total of seventy-eight countries had extended standing invitations to special procedures, including all EU member states and some countries with poor human rights records, such as Kuwait, but excluding Russia, China and the USA. During the 1980s and 1990s at a time when states zealously guarded their domestic jurisdiction from external scrutiny over their human rights practices and thus refused all country visits, mandate-holders stationed themselves in neighbouring countries that provided them access and interviewed refugees and those in flight. This was particularly true in respect of the Israeli and Chilean country mandates.

[71] See press release by Special Rapporteur on the right to food, 'Madagascar's Hungry Population is Taken Hostage Denounces UN Special Rapporteur' (22 July 2011).

[72] OHCHR, UN Special Procedures: Facts and Figures 2010 (April 2011), 8–10. The WGEID is not included in this report. According to its own 2010 annual report it transmitted 105 cases of enforced disappearance to twenty-two states.

Once an invitation is issued the government should not stifle the mission with administrative or other hurdles, or by imposing conditions. In fact, a coherent body seems to have emerged of customary principles pertinent to fact-finding missions,[73] which are wholly applicable to country visits. This includes full freedom of movement and inquiry, access to all requested facilities, contact with all requested persons and organisations (confidential and unsupervised where relevant), including prisoners and NGOs, and full access to documentary material pertinent to the mandate. It is also crucial that the government provide assurance that no person interviewed or in contact with the special rapporteurs will suffer threats, harassment or punishment.[74] In practice, reprisals are common, as will be analysed shortly. In 2010 sixty-seven country visits to forty-eight countries were undertaken, 48 per cent of which were to countries that had not issued a standing invitation.[75]

Besides facilitating the investigative work of special procedures, country visits have given rise to an additional dimension that is of great significance. Any visit is always an event much-talked about in the media of the visited nation and the public perception is that a UN human rights body would not undertake an official visit unless a serious issue was at stake. This tension obviously trickles down to the country's political institutions which are keen, in most cases, to appease public sentiment and the nation's image abroad. A visit therefore may act as a pressure point for a number of changes.[76]

4.4.3 Annual reports

The reporting function of special procedures may seem trivial compared to the dispatch of communications and country visits. None the less, both annual and *ad hoc* reports are extremely important. Reports provide a unique insight into particular human rights situations for the benefit of public institutions as well as other private stakeholders. Given the independence of special rapporteurs their reports are both critical and revealing and as a result the information contained in them is often attacked by target states. This evidently renders them all the more valuable and in practice they are employed as authoritative secondary sources of law and fact by scholars and UN institutions. We have already explained that the UPR relies to a great extent on the reports issued by special procedures. Moreover, in situations

[73] See F. Viljoen, 'Fact-finding by UN Human Rights Complaints Bodies: Analysis and Suggested Reforms', *MPYBUNL* 8 (2004), 49; see also Declaration on Fact-finding by the UN in the Field of Maintenance of International Peace and Security, UNGA resolution 46/59 (9 December 1991), Annex.

[74] Terms of Reference for Fact-finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights, UN Doc. E/CN.4/1998/45 (20 November 1997), Appendix V.

[75] Facts and Figures 2010, above note 72, 11.

[76] Ibid.

where the law is yet to crystallise, is unregulated by treaty or lacks concrete state practice, as in the case of transnational corporations, human rights defenders, the right to development, the impact of sovereign debt on human rights and other matters, the reports of special rapporteurs usually mould and shape legal developments.

CASE STUDY 4.1
Reprisals against those collaborating with UN human rights procedures

A little-exposed facet of the work of the various procedures of the HRC concerns the fate of the individuals providing information, making complaints or simply collaborating with the Council and its institutions. Although, as explained, most of the procedures involve a large degree of confidentiality, it is inevitable that during country visits the identity of those conversing with special rapporteurs is made known, as is also the case *mutatis mutandis* when urgent communications are issued in respect of particular violations. Reprisals against such persons take the form of harassment, intimidation, arbitrary arrests, physical aggression, refusal to issue travel documents, death threats and killings. The HRC has identified the seriousness of the problem, which greatly undermines the entirety of its human rights work, and has called for governments to take urgent and remedial action.[1] It should be stressed that reprisals are committed not only by government agents, but also by non-state actors, as the following case aptly illustrates.

On February 2005 Sister Dorothy Stang was shot several times as she walked to attend a meeting in the town of Anapu, in Brazil. The victim was an environmentalist, human rights defender and member of the Pastoral Land Commission, whose aim is to defend the rights of rural land workers and bring about land reform. On October 2004 Sister Dorothy had met the UN Special Rapporteur on the Independence of Judges and Lawyers, during the latter's visit to Belem, Brazil and a week prior to her murder she had met the Brazilian Human Rights Minister to report that four local farmers had received death threats from loggers and landowners. Following immediate communications from several UN special procedures the government of Brazil initiated prosecutions and soon after made several arrests.[2]

In other cases where the culprits were government-sanctioned agents, the authorities generally took no remedial action. While on the one hand the issue highlights the vulnerability of victims, defenders and collaborators, on the other hand it demonstrates that UN procedures are perceived as a powerful tool against violations by those who commit them.

[1] HRC resolution 12/2 (12 October 2009).

[2] CommHR Report, Cooperation with Representatives of United Nations Human Rights Bodies, UN Doc. E/CN.4/2006/30 (6 February 2006), paras. 6ff.

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QUESTIONS

- **What are the benefits and disadvantages of independent and government-appointed human rights posts within the United Nation's machinery?**
- **Is there any institution, principal organ or body – other than the Security Council – which presides and oversees the work of other human rights entities within the UN Charter framework?**
- **Is the United Nations legally bound by international human rights law? Your response should consider whether the UN is bound institutionally (e.g. in respect of its employees' labour rights), as well as with regard to its external operations.**
- **The human rights procedures and mechanisms operated by UN institutions – other than the Security Council – do not carry the element of compulsion which one finds in most international courts and tribunals. How effective do you consider they are and what recommendations would you make to render them more effective?**
- **What is the additional value generated by the UPR, given that most states already face extensive reporting obligations on account of their membership to multilateral universal human rights treaties?**

4.5 THE GENERAL ASSEMBLY AND HUMAN RIGHTS

The Assembly is a principal organ of the organization under article 7 of the UN Charter. It is political in nature but unlike other organs its membership is universal and each state is entitled to a single vote of equal value. With very few exceptions, its resolutions are not binding on member states, but at the very least all its unanimous, or near-unanimous, resolutions are highly persuasive. The Assembly's influence and law-making capacity is also manifest in the fact that states are careful in their statements and endorsements of resolutions adopted therein because of possible estoppel implications (i.e. they cannot renege on statements made before the Assembly). Moreover, it is strongly argued that unanimous resolutions that are subsequently re-endorsed are concrete evidence of consistent state practice (whether in the form of *usus* or *opinio juris*) and thus may well crystallise into custom.[77] As a result, the standard-setting work of the Assembly in the field of human rights assumes increased significance.

The Assembly possesses a rather broad power to deal with human rights, given that articles 10 and 11 of the UN Charter authorise it to discuss any

[77] G. Sloan, 'General Assembly Resolutions Revisited: (Forty Years Later)', *BYIL* 58 (1987), 39.

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questions or matters within the scope of the Charter and make appropriate recommendations to the states concerned, as well as the Security Council. Exceptionally, the Assembly is not competent to deal with an issue that is under examination by the Security Council. The Assembly's vast workload is diffused through six committees and despite the many linkages between their respective thematic mandates for the purpose of this section the third committee deals with human rights. Unlike the Security Council, the Assembly has from the outset maintained that human rights are not encompassed under article 2(7) of the UN Charter and are thus susceptible to discussion and investigation. It supported this view on the basis that articles 1, 2 and 55 of the Charter render the enforcement of human rights a matter of international concern. As a result, the Assembly recommended in 1946 the suspension of Spain (under Franco) from UN membership[78] and later rejected the applicability of article 2(7) to the Soviet invasion of Hungary, arguing that this was in violation of article 2(4) and moreover constituted genocide.[79]

From a practical perspective the Assembly's human rights work has three dimensions: (1) promotion of human rights and humanitarian law through standard-setting resolutions (e.g. UDHR), discussion of emerging issues, such as HIV/AIDS and poverty, as well as acting as a forum for the adoption of treaties; (2) condemnation of specific human rights violations and where competent taking measures against culprit states, culminating in the expulsion of certain UN entities, such as that of Libya from the HRC;[80] and (3) establishment and funding of peacekeeping, peace enforcement, observer and other missions with a view to dispatching them to troubled areas. The Assembly's authority in setting up peacekeeping missions is crucial because of its exclusive authority under article 17 of the Charter to decide on budgetary issues, with money being the most necessary prerequisite for such missions to materialise.[81] Transitional, or post-conflict, justice and management are now a significant aspect of the Assembly's human rights agenda although in practice their implementation is undertaken by the HRC and the OHCHR.[82]

[78] UNGA resolution 39(I) (12 December 1946).

[79] UNGA resolution 1132(XI) (10 January 1957); UNGA resolution 1133(XI) (14 September 1957), and especially UNGA resolution 1127(XI) (21 November 1956).

[80] UNGA resolution 65/265 (1 March 2011).

[81] For the period 1 July 2011 to 30 June 2012 the Assembly authorised a budget for its peacekeeping operations at a cost of $7 billion. UNGA resolution 65/303 (1 July 2011).

[82] The Assembly may even leave the initiative to the Council. For example, the HRC dispatched an independent commission of inquiry in respect of the 2010 post-electoral violence in Côte d'Ivoire without a prior resolution from the Assembly relying on the basis of its founding mandate in UNGA resolution 60/251. See HRC resolution 16/25 (25 March 2011).

4.6 THE SECURITY COUNCIL

Although it is not readily obvious, the Security Council has the potential to be the most effective institution in the protection of human rights. This is reinforced by the stipulation in articles 24 and 25 of the Charter which confer upon it primary responsibility for the maintenance of international peace and security through the adoption of decisions that are binding on all UN member states. We have already alluded to the fact that the contemporary construction of peace and security encompasses human rights and humanitarian law, and given that the Council is designed to be a quick-response mechanism to crises and unfolding international situations, its vested authority necessarily renders it an ideal forum for immediate action. This is unlike any other human rights organ or institution within the UN or otherwise, all of which are unable to respond immediately and/or with force if necessary, against culprit states or non-state actors. While it is well known that during the Cold War the Security Council was effectively precluded from taking any action with respect to situations of gross human rights violations, since the early 1990s this has no longer been the case. Of course, when reading Council resolutions one must not forget that these are primarily intended as political decisions, and as a result significant political considerations underlie them.[83] At the same time, and while the Council is not bound to any institutional precedent, it cannot lightly disregard its own resolutions on the same or similar matters.[84] This is true irrespective of the veto power held by the Council's permanent members and it is now common practice for persistent rights violators to be identified. Thus it may be said that the Council's political and humanitarian considerations since the early 1990s have tended to merge more and more, although they are no doubt still distinguishable.

The human rights work of the Council is not susceptible to neat categorisations for the simple reason that on many occasions human rights considerations are only obvious as secondary effects; moreover, the Council deals with crises as and when they arise and only rarely maintains an annual agenda of particular issues, as does the General Assembly, for example. Thus, the Council's human rights 'jurisprudence' may be derived principally from resolutions concerning specific country situations and secondarily from general thematic resolutions. The latter type is employed typically in order to reinforce and bolster existing rules and in a handful of cases also for the purpose of standard-setting. By way of illustration, resolution 1261 and its successors

[83] E. Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis', *ICLQ* 56 (2007), 53.

[84] This of course does not mean that the Council must establish the same mechanisms in respect of similar situations, as is the case with criminal tribunals. Logistical, financial and political considerations may certainly preclude their establishment in particular cases.

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concerned the recruitment and use of children in armed conflict, stressing that this was an international crime and a violation of children's rights.[85] These resolutions effectively quashed any appeal to cultural sensitivities that may have been entertained by various warlords under the guise of tribal custom, thus reinforcing the relevant rules in the CRC and paving the way for the optional protocol to the CRC on the Involvement on Children in Armed Conflict, adopted a year later. Of equal standard-setting value is resolution 1325 and its successors, which urged states to ensure increased participation of women at all decision-making levels and called on all actors negotiating peace agreements to adopt a gender perspective.[86]

The Council's authority as a potent protector of rights is reflected in its practices for determining country situations. For one thing, unlike other organs that meet periodically, the Council can, and does, meet at any time. Moreover, it need not receive an official request or communication in order to deliberate on a crisis and in practice it is only a matter of hours – unfortunately not always – from the start of a crisis before a meeting is convened, albeit it does not always adopt a resolution straight away. Given that an important facet of any armed conflict, humanitarian disaster or brutal repression is human plight and the violation of rights – the other being the spill over into neighbouring nations – the Council has employed its general powers under Chapter VII in various forms. Depending on the cooperation of the target state, the escalation of violence and the threat to human safety and well-being, the Council may well decide to dispatch an observer mission, a peacekeeping or a peace-enforcement contingent. Whereas the objective of the first of these is to monitor and report on the prevailing situation, the latter two play a substantive role in the protection of civilian populations from the calamities of conflict and may assist in containing the conflict itself. What is more, if these missions are authorised to use armed force (under the Council's standard terminology of 'all necessary means') in order to fulfil their mandate, they are no longer idle bystanders to violations but can effectively protect the victims. In the case of Somalia where armed factions were indiscriminately killing civilians and looting food supplies, thus raising the risk of widespread famine, the Council authorised the UN operation in Somalia (UNOSOM) to use all necessary means to establish a secure environment for humanitarian relief operations.[87]

Exceptionally, Council resolutions condemning particular acts of repression against civilians are used as a platform by certain nations, with or without opposition by others, as justification for subsequent forceful measures. By way of illustration, although resolution 688 against Iraqi repression

[85] UNSC resolution 1261 (30 August 1999). See also UNSC resolution 1612 (26 July 2005).
[86] UNSC resolution 1325 (31 October 2000), paras. 1 and 8.
[87] UNSC resolution 794 (3 December 1992), para. 10.

of the country's Kurdish population was merely condemnatory,[88] it was none the less relied upon by western European nations to set up a safe haven and a no-fly zone in northern Iraq. This type of implied authorisation is not widely accepted as legitimate under international law, irrespective of the nature or the objective upon which the relevant action relies; yet, it has been routinely invoked by three of the Council's permanent members, namely France, USA and UK, to the chagrin of Russia and China.[89]

Besides urgent action through the deployment of military contingents, the Council has been concerned with post-conflict justice, victims and national reconciliation. Chief among its political objectives has been the eradication of impunity and to this end the Council has not hesitated to establish international criminal tribunals for the prosecution of those most responsible for serious violations of human rights and humanitarian law. The tribunals for the former Yugoslavia (ICTY)[90] and Rwanda (ICTR)[91] are paradigmatic of this objective and despite the Council's lesser involvement in the establishment of subsequent tribunals (e.g. Sierra Leone, Cambodia, Iraq) it is no less determined to fight impunity. Although the authority of the Council to set up international tribunals was initially challenged in the mid-1990s,[92] it is now an uncontested feature of international relations.

The endorsement and spread of criminal justice mechanisms necessarily means that the Council is not only addressing states as violators of rights, but also non-state actors, something which is alien to inter-state human rights courts. Indeed, the Council has not only directly condemned non-state actors[93] but has ordered measures involving the use of force or the enforcement of criminal jurisdiction against them. This is true, for example, in respect of Somali pirates.[94]

Yet although it is now unquestionable that the Council is a capable and willing defender of rights, there is still considerable debate as to whether the Council's choice of enforcement, particularly the use of sanctions, is compatible with fundamental human rights. The Council may infringe human rights and, here are three pertinent examples. (1) The Council imposes an import embargo on the brutal and dictatorial regime of country A, which significantly impedes the availability of basic medicines, food and water to its

[88] UNSC resolution 688 (5 April 1991), with paragraph 3 insisting that Iraq allow access to humanitarian organisations to all those in need of assistance.

[89] See C. Gray, 'From Unity to Polarisation: International Law and the Use of Force against Iraq', *EJIL* 13 (2002), 1, at 8ff.

[90] UNSC resolution 827 (25 May 1993).

[91] UNSC resolution 955 (8 November 1994).

[92] See *ICTY Prosecutor* v. *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), paras. 32–40, where the idea that the Council did not enjoy the power to set up international tribunals was dismissed by the ICTY appeals chamber.

[93] UNSC resolution 814 (26 March 1993), para. 13, calling on Somali factions to desist from breaching humanitarian law and reaffirming their criminal liability for any violations.

[94] UNSC resolution 1950 (23 November 2010), para. 12.

civilian population and as a result a large number of children and vulnerable people die. (2) The Council imposes targeted sanctions on specific individuals suspected of terrorist-related offences, encompassing asset freezing and arrest. The sanctions are final and binding on member states and the suspects have no recourse to any appeal or review mechanism. (3) The Council orders the use of armed force against country A, which is ruled by a brutal dictator. The Council is aware that the regime will strenuously resist its downfall and is fully prepared to sacrifice the lives of many of its people in the process in order to defend itself against a multinational force.

In all of these cases the Council has to take difficult decisions that directly affect the fundamental rights of a large number of people, despite other possible benefits, such as democracy-building, rule of law and cessation of human rights violations. Although it is generally acknowledged that the Council's practice in scenario (2) would be disproportionate and lacking legal support,[95] the other two find an equal amount of support and opprobrium.[96] Yet the Council should not lightly infringe fundamental rights under the guise of collateral damage and should explore other alternatives before deciding to employ sanctions that are likely to affect the rights of entire populations.[97] The Iraq sanctions regime provides an instructive lesson in this respect, not least because it eventually resulted in major changes to the Council's practice towards smarter sanctions.[98] While the comprehensive sanctions imposed against Iraq in the aftermath of the 1990 Gulf War excluded foodstuff and medicine used for humanitarian purposes, it soon became apparent that these limited exceptions were insufficient to provide for the needs of the population. After much wrangling, resolution 986 was adopted in 1995, allowing Iraq to export oil in exchange for foodstuff, medicine and humanitarian goods.[99] The Oil for Food programme thus introduced was referred to as 'a temporary measure to provide for the humanitarian needs of the Iraqi people'.[100] However, the programme's design and implementation undermined its effectiveness, as a result of a combination of factors, particularly the lack of

[95] In *Kadi and Al Barakaat International Foundation* v. *Council of the European Union* [2008] ECR I-6351, paras. 335–7, 349, the ECJ held that the imposition of targeted sanctions (freezing orders in the case at hand) against a suspected terrorist by the EU without any remedy whatsoever in the form of judicial review or a hearing violated the right of effective judicial protection. In similar fashion in *R* (*on the application of Al Jedda*) v. *Secretary of State for Defence* [2007] UKHL 58, Lord Bingham argued that Council resolutions authorising extensive powers of detention 'must ensure that the detainee's rights under article 5 [of the ECHR] are not infringed to any greater extent than is inherent in such detention'.

[96] See S. D. Bailey, *The UN Security Council and Human Rights* (New York: St Martin's Press, 1994).

[97] CESCR, General Comment 8, UN Doc. E/C.12/1997/8 (12 December 1997), para. 3.

[98] C. C. Joyner, 'United Nations Sanctions after Iraq: Looking Back to See Ahead', *Chinese Journal of International Law* (*Chi. J. Intl L.*) 4 (2003), 329–53.

[99] UNSC resolution 986 (14 April 1995), para. 8.

[100] Ibid., preamble.

availability of adequate funds for infrastructure, blocking of dual-purpose goods by the Sanctions Committee, as well as corruption and maladministration. The resulting persistent humanitarian crisis led to repeated adjustments of the programme which, ultimately, failed adequately to offset the adverse impact of sanctions imposed against Iraq at the time.[101] It is for this reason that there is widespread disinclination against all types of broad sanctions because they are deemed incompatible with the enjoyment of human rights.[102]

CASE STUDY 4.2
The Security Council and human rights in North Korea

The secretive and autocratic North Korean regime has been one of the most brutal human rights violators for the last six decades. Although little information is made available, particularly because foreign journalists are not allowed in the country and the local press is tightly controlled by the state, NGOs have been able to paint a picture on the basis of interviews taken from escapees. It is reported that anyone suspected of having religious beliefs or an anti-government ideology is arrested, along with all family members and close friends, and taken without trial to concentration camps for indefinite periods – usually never to be released. These camps are the size of cities and many thousands are held there and subjected to all types of ill treatment.[1]

Despite the corroboration of these allegations through other reports, the Security Council has never discussed North Korea's human rights issues for two reasons. First, it is known that China denies refugee status to all North Korean escapees entering its territory and sends them back although its authorities are fully aware of the consequences for returnees. China is also worried that a disintegration of North Korea will send waves of refugees across its land frontier. The second reason is that the Council's agenda with North Korea is primarily, if not exclusively, concerned with the country's nuclear build up and its military relations with South Korea. Thus, the Council seems to believe that

[1] See in particular, Christian Solidarity Worldwide, 'North Korea: a Case to Answer, a Call to Act' (London: 2007).

[101] UNSC, Report of the Second Panel Established pursuant to the Note by the President of the Security Council (S/1999/100) of 30 January 1999, concerning the Current Humanitarian Situation in Iraq (30 March 1999) UN Doc. S/1999/356 Annex II. H. von Sponeck, *A Different Kind of War: The UN Sanctions Regime in Iraq* (New York, Oxford: Berghahn Books, 2006).

[102] Sub-Commission on the Promotion and Protection of Human Rights, The adverse consequences of economic sanctions on the enjoyment of human rights, UN Doc. E/CN.4/Sub.2/2000/33 (2000), para. 71.

giving a forum to North Korea's gross human rights violations would deflect from the other issues on the agenda and would in fact undermine them. Moreover, its members probably feel that raising the issue of human rights would make no practical difference whatsoever and so other organs and bodies are best suited to take up this matter.

This is a characteristic case in which international peace and security concerns are not necessarily absorbed or intertwined with human rights considerations.

QUESTIONS

- **Is the United Nations bound by the three instruments encompassed within the Bill of Rights? More generally, is the United Nations bound by customary human rights law?**
- **You are the legal advisor to a small human rights NGO. Through your investigations it transpires that the government of country A is engaged in the enforced disappearance of its political dissidents. The abductees number in the hundreds and their family members are too scared to confront the local authorities or approach any international bodies. Under the circumstances, which institution or organ within the United Nations would you inform and what would you expect to achieve? Justify your response.**
- **What is the function of standard-setting within the United Nations?**
- **Does the practice of the HRC include the 'name and shame' technique?**
- **If the Security Council authorises the use of armed force in order to oust a brutal regime it risks setting in motion a war that may cost thousands of lives. Should it instead rely on sanctions or should it support a popular uprising by financial, technological and political assistance? Discuss with reference to the invasion of Iraq in 2003 and the Egyptian uprising in 2011.**
- **Following the adoption of resolution 1373 (2001) by the Security Council in the aftermath of 9/11 a number of countries justified violation of fundamental rights in order to ensure compliance with the terms of the resolution which demanded that states take all necessary measures to prevent and punish terrorist attacks.[2] Should the Council's resolutions expressly stipulate conformity with fundamental human rights, or is this already implicitly understood?**

[2] The Human Rights Committee, among other treaty bodies, emphasised in its examination of state reports that all measures adopted for the implementation of resolution 1373 should be in full compliance with the Bill of Rights. See UN Concluding Observations on Moldova, UN Doc. CCPR/CO/75/MDA (5 August 2002), para. 8.

4.6.1 Fact-finding in practice: the UN mission on the Gaza conflict

Following the Israeli army's incursion into the Gaza strip in late December 2008 (known as operation Cast Led) a significant number of civilian casualties were reported, in addition to a pattern demonstrating the destruction of

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Gaza's economic and social infrastructure. The HRC decided to set up a fact-finding mission to:

> investigate all violations of international human rights law and international humanitarian law by the occupying power, Israel, against the Palestinian people throughout the occupied Palestinian territory, particularly in the occupied Gaza strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission.[103]

The terms of the mandate are important in this case because although it demands that *all* violations be investigated, thus implying any committed also by Palestinians, the remainder of the mandate, and the inclusion of words such as [Israeli] aggression, clearly preempt the investigation by suggesting that only Israeli military actions be scrutinised. The ambassador of Israel to the country's permanent mission to the UN in Geneva, in a letter to the head of the UN fact-finding mission, Richard Goldstone, refused to extend his country's cooperation to the mission on the following grounds:

> This grossly politicised resolution prejudges the issue at hand, determining at the outset that Israel has perpetrated grave violations of human rights and implying that Israel has deliberately targeted civilians and medical facilities and systematically destroyed the cultural heritage of the Palestinian people. It calls for urgent international action directed only against Israel and, as regards the proposed fact-finding mission, makes clear that it regards its mandate as exclusively focused on Israeli violations of human rights and humanitarian law. The fact that several distinguished individuals approached to head the Mission declined reflects the problematic nature of the mission and its mandate.[104]

The four-person mission, composed of three legal experts and a military analyst, received personal attacks during the course of its work and one member, Professor Chinkin, was accused of conflicting interests. In an interview following the completion of the report, Goldstone made the point that:

> Obviously nobody enjoys being attacked. A lot of the attacks have been in intemperate terms not so much in the media but in emails and private messages and that's unpleasant but let me immediately say that it hasn't affected our work. We've gone ahead and did what we had undertaken to do and what our mandate required us to do and the fact we were attacked I don't think came as a surprise to any of us. The vehemence of some of it may have surprised me speaking for myself but if one does this sort of work one's going to be attacked. It's not the first time and probably not the last.[105]

[103] HRC resolution A/HRC/S-9/L.1 (12 January 2009), para. 14.

[104] Letter dated 7 April 2009, in Report of the Fact-finding Mission: Human Rights in Palestine and Other Occupied Arab Territories (Fact-Finding Report), UN Doc. A/HRC/12/48 (25 September 2009), Annex II, 436.

[105] Unofficial transcript of the press conference of 29 September 2009, available at: www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm.

Chinkin's alleged bias was based on a letter she signed along with other leading academics, which was published in *The Times*, where she and her colleagues argued against the legality of operation Cast Led. In fact, the letter made no reference to human rights or international humanitarian law (IHL) violations; it simply examined operation Cast Led from a *jus ad bellum* perspective.

Goldstone rightly dismissed all claims of bias as 'clutching at straws'.[106] The USA complained, among other things, that during the mission's on-site visits to Gaza there was a visible presence of Hamas security in the vicinity, thus exacerbating the mission's bias. Goldstone retorted that none of the mission's members noticed any inappropriate presence of Hamas police during the investigation of witnesses and that even if they were in the vicinity they could not 'in any way [have] overheard or in any way exercised any direct influence on any of the witnesses we saw'.[107] The narration of these incidents is intended to highlight the political intricacies behind the appointment and mandate of a human rights investigative mission and the variety of pressures on individual members.

Based on these criticisms, and despite the terms of the Council's resolution, Goldstone wisely expanded the HRC resolution's mandate by deciding to investigate alleged violations by both sides to the conflict. This clearly provided an additional degree of legitimacy to the final report and the overall work of the mission. It is not unusual for fact-finding missions or other UN subsidiary organs to construe their mandates expansively, whether in temporal or substantive terms. Such a construction is generally dictated by the material exigencies of each particular mission, albeit in respect of the Gaza mission it was prescribed by a desire to rectify the perception of bias without impairing in any way its original mandate.

Fact-finding missions are not meant to ascertain the criminal liability of perpetrators but generally to provide a clear picture of events to their appointing body. As a result, the missions are free to employ any type of evidence and mechanism of inquiry, although ultimately the quality of the evidentiary material will determine the quality of the report and recommendations. In the present instance, the Gaza mission placed particular emphasis on the plight of the victims and resorted to some degree to narrative storytelling. The readers will be able to judge for themselves whether this was an appropriate mechanism under the circumstances. The mission had intended to conduct on-site investigations in Gaza and Israel and interview victims and participants on both sides. However, as a result of Israel's refusal to cooperate the mission was not only precluded from visiting Israel and the West Bank but was unable to enter Gaza, save through Egyptian territory. It was thus forced to ascertain the Israeli side of events from material evidence

[106] Ibid. [107] Ibid.

and witness statements in Gaza and affected neighbouring countries. Besides interviews it employed reports from international organisations, NGOs, medical records, video and satellite images provided by the UN Operational Satellite Applications Program (UNOSAT), forensic analysis of weapons and ammunition remnants collected at incident sites, publicly available material[108] and public hearings in Gaza and Geneva.[109] In numerous cases the mission held that NGO data was more reliable than official government data. By way of illustration, in considering the number of Palestinians who lost their lives during the operation, it relied on NGO reports because the data presented was generally more consistent than that in official Palestinian and Israeli data.[110]

The storytelling dimension of the report, setting out the historical context of the conflict and the basis of operation Cast Led, was apparent from the use of so-called public hearings. These were broadcast live and their purpose was:

> to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The mission is of the view that no written word can replace the voice of victims. While not all issues and incidents under investigation by the Mission were addressed during the hearings, the thirty-eight public testimonies covered a wide range of relevant facts as well as legal and military matters. The mission had initially intended to hold hearings in Gaza, Israel and the West Bank. However, denial of access to Israel and the West Bank resulted in the decision to hold hearings of participants from Israel and the West Bank in Geneva ... Participants in the hearings were identified in the course of the mission's investigations, and had either first-hand experience or information or specialized knowledge of the issues under investigation and analysis. In keeping with the objectives of the hearings, the mission gave priority to the participation of victims and people from the affected communities.[111]

This mechanism resembles public confessions free of criminal liability accepted in the course of truth and reconciliation commissions,[112] as well as the rationale for the participation of victims in international criminal proceedings. It is innovative for the purposes of a fact-finding mission whose role is generally to ascertain facts, not to give a voice to the victims. Yet it does not wholly seem out of place given that fact-finding missions have in the past tended to focus excessively on the type and scale of violations, in this manner dehumanising somewhat the victims of the crimes. It is not far

[108] A number of Israeli soldiers involved in the operation had by that time narrated personal stories to the Israeli press, which in turn made them public.

[109] Fact-Finding Report, above note 104, para. 159. [110] Ibid., para. 30.

[111] Ibid., para. 166.

[112] P. Parker, 'The Politics of Indemnities: Truth Telling and Reconciliation in South Africa', *HRLJ* 17 (1996), 1.

fetched to claim that the aim of fact-finders has typically been to recount the scale and intensity of violations, rather than the victims' suffering, with a view to offering political space and legitimacy to their mandators to undertake further action, whether through sanctions or the establishment of criminal tribunals. Offering a personalised voice to the victims, on the other hand, assists in giving a voice to the facts and restoring the victims' faith in the relevant process.[113] It is a welcome follow-up to the practice of UN special procedures to narrate in their reports the specific crimes committed by governments and non-state actors against their victims, most of which are spelt out by name.[114] The Israeli opposition to these public hearings is instructive:

> This procedure is unprecedented as part of fact-finding operations. The very point of a fact-finding mission is that a team of experts bring their experience and judgment to bear in assessing the available evidence and drawing responsible conclusions – not that raw evidence, perhaps of questionable authenticity, is directly broadcast into the public arena. Such a trial by public opinion, which of necessity cannot give any weight to confidential or sensitive information, can serve little purpose in ascertaining the truth, and is only likely to prejudice public opinion in advance of any other conclusion.[115]

No doubt, UN investigations and fact-finding are not straightforward exercises. There will always be states with opposing interests that will stifle country visits or prevent its agents and nationals from providing testimony of any kind. Such states and their allies will attack the integrity of the mission, and members will be subject to attacks, not necessarily physical, against their persons. Heads of missions need to be creative and not be afraid to explore new methodologies while fulfilling their mandate. Most importantly, they must ensure that their very mandate is even handed, objective and fair and if it is not, to employ their discretionary or implied powers to mould it as such. Ultimately, a mission is not legitimised by its hard work, but largely by its fairness and impartiality.

[113] One should not, of course, be oblivious to the risk that listening to victims alone creates a one-sided truth and prevents a clear understanding of the roots of the conflict. In a study encompassing 120 interviews of ordinary people among Bosnia's three ethnic communities, each vehemently denied the crimes committed by his or her own ethnic group, emphasising that they were perpetrated by members of the other groups. J. N. Clark, 'Transitional Justice, Truth and Reconciliation: an Under-explored Relationship', *Int'l Crim. L. Rev.* 11 (2011), 241, at 256–7.

[114] See e.g. Report by the Special Rapporteur on torture, Mission to Nepal, UN Doc. E/CN.4/2006/6/Add.5 (9 January 2006), 16ff.

[115] Letter dated 2 July 2009, Fact-Finding Report, 448.

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