

# The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights

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- I. Introduction
- II. Development of the Thematic Mechanisms
- III. Legal Status of the Rapporteurs and Working Groups and its Significance for Customary Human Rights
- IV. Case Study No. 1: The Working Group on Enforced or Involuntary Disappearances
  1. Origins and Procedure
    - a. Public Character of the Procedure
    - b. The Power to Deal with Individual Cases and the Applicable Procedure
    - c. Further Procedural Achievements
  2. Applicable Legal Standards
  3. On-site-missions
  4. Evaluation
- V. Case Study No. 2: The Working Group on Arbitrary Detention
  1. Origins and Procedure
    - a. Extent of the Mandate
    - b. "Adversary" Character of the Procedure?
    - c. The Procedure for Examining Individual Cases
  2. Applicable Legal Standards
  3. On-site-missions
  4. Evaluation
- VI. Case Study No. 3: The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance
  1. Origins and Procedure
  2. Applicable Legal Standards
  3. On-site-missions
  4. Evaluation
- VII. Conclusion

## I. Introduction

Among the public procedures of the United Nations Commission on Human Rights (the "Commission") its so-called "thematic mechanisms" hold an important place. This term comprises Special Rapporteurs and Working Groups which deal with specific types of human rights violations and have a mandate that is not limited to a single country or geographical region. In contrast to mere "Study Rapporteurs", their task is not only to study a specific problem on a theoretical level, but also to examine individual cases of alleged violations of human rights falling within their specific subject area and to respond to them.<sup>1</sup> The Commission first adopted this "thematic" approach of monitoring the implementation of human rights in 1980 to counter the criticism that the establishment of "Country Rapporteurs" is politically biased because it singles out certain states and disregards the human rights violations committed by others. Today, the "thematic mechanisms" constitute an accepted means of international monitoring of human rights on a worldwide level and outside the framework of special human rights treaties.

The mandates of the thematic mechanisms are manifold; they cover all fundamental rights of the human person, e.g. life, liberty, the prohibition of torture, freedom of religion, freedom of opinion, and the prohibition of racial discrimination. In addition, there are thematic mechanisms on especially vulnerable groups, such as women, children, mi-

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<sup>1</sup> The scope of the term varies even within the United Nations system. The High Commissioner for Human Rights, e.g., lists indiscriminately Rapporteurs having the task of examining individual cases, Study Rapporteurs, and mandates entrusted to the Secretary-General or the High Commissioner, see <http://www.unhchr.ch/html/menu2/7/b/tm.htm>. Earlier publications only mentioned the first category, see *UN Action in the field of human rights* (Doc. ST/HR/2/Rev.4), 1994, 20-22. The first CHR Resolution using the term was even more restrictive, see CHR/RES/1988/30 of 8 March 1988, ESCOR 1988, Suppl. 2, 85. The definition used in this article is shared by P. Alston, "The UN Commission on Human Rights", in: id. (ed.), *The United Nations and Human Rights*, 1992, 126 et seq., (160); T. van Boven, "'Political' and 'Legal' Control Mechanisms - Their Competition and Coexistence", in: A. Eide/B. Hagtred (eds), *Human Rights in Perspective*, 1992, 36 et seq., (44-45); M. Nowak, "Country-oriented Human Rights Protection by the UN Commission on Human Rights", *NYIL* 32 (1991), 39 et seq., (44); F. Newman/D. Weissbrodt, *International Human Rights*, 1990, 145.

grants and internally displaced persons. Other thematic mechanisms pertain to a "third-generation right", the right to self-determination, and to a principle of municipal constitutional law, the independence of the judiciary. The success of the thematic mechanisms as a legal institution of the Commission is reflected in the fact that in UN parlance new procedures concerning economic, social and cultural rights are labelled "thematic" although they cannot be qualified as thematic mechanisms *strictu sensu*. They differ from earlier thematic mechanisms in that they do not monitor violations, but focus on the "progressive realization" of a right<sup>2</sup> or on specific obstacles to the realization of so called "second-generation" human rights.<sup>3</sup> The creation and naming of these procedures are due to the interest of developing countries in having recognized the equal importance of economic, social and cultural rights as compared to that of civil and political rights.

For the international lawyer, the thematic mechanisms are of interest because they act as an independent intermediary between states and nongovernmental organizations (NGOs) or human rights activists in individual cases of alleged human rights violations. So far, however, the focus has mainly been on the actions of NGOs. When they provide relevant information to the thematic mechanisms and comment upon the responses of states, NGOs act on the international plane, and do so to an ever increasing extent. By these actions and by their participation in the debate on the reports of the thematic mechanisms within the Commission, NGOs also substantially influence the understanding of the applicable human rights norms. The role of such non-state actors in the formation and application of international law has gained recognition in recent years, but its legal significance remains difficult to assess.<sup>4</sup>

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<sup>2</sup> As is the case for the Special Rapporteur on the Right to Education, established by CHR/RES/1998/33 of 17 April 1998, para. 6(a)(1). The Commission chairman appointed Katarina Tomasevski (Croatia). For her latest report see Doc. E/CN.4/2000/6 and Add.1.

<sup>3</sup> As is the case for the Special Rapporteur on Effects of Foreign Debt on the Full Enjoyment of Economic, Social and Cultural Rights, established by CHR/RES/1998/24 of 17 April 1998, para. 9(a). The post is held by Reinaldo Figueredo Planchart (Venezuela). His first report is published in Doc. E/CN.4/2000/51 (as a joint report with the independent expert on structural adjustment policies).

<sup>4</sup> See, e.g., S. Hobe, "Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations", *Ind. J. Global Legal Stud.* 5 (1997), 191 et seq.; id., "Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht", *AVR* 37 (1999), 152 et seq.;

In contrast, the activities of the Thematic Rapporteurs and Working Groups and their legal significance have not provoked similar interest.<sup>5</sup>

Despite the diversity of the thematic mechanisms established so far, two central questions arise for each of them: how do they collect and process the information they receive, and what standards do they use when evaluating information? The first question relates to the procedural rules to be applied by the Thematic Rapporteurs and Working Groups, and the second to the substantive law applicable. A comparison of the answers to the first question reveals a common minimum standard, a kind of procedural *acquis onusien*, and shows room for further development. The answer to the second question leads to the conclusion that the thematic mechanisms can contribute to the development or concretization of human rights under customary international law. To illustrate these two points, three thematic mechanisms will be compared in the following discussion. This analysis is preceded by a short history of the thematic mechanisms, their legal status and its significance for the development of customary human rights.

## II. Development of the Thematic Mechanisms

Like the Country Rapporteurs, the thematic mechanisms are “extra-conventional mechanisms” of the Commission on Human Rights because they are created outside the framework of a special treaty for the protection of human rights. The legal basis for all of these “special procedures” is the power of the Commission, established by ECOSOC, to submit proposals, recommendations, and reports concerning all ques-

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K. Hübner, “Non-Governmental Organizations (NGOs) im System der Vereinten Nationen”, *Friedens-Warte* 2 (1996), 115 et seq.; D. Otto, “Non-governmental Organizations in the United Nations System: The Emerging Role of International Civil Society”, *HRQ* 18 (1996), 107 et seq.; J. Smith/R. Pagnucco/G.A. Lopez, “Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s”, *HRQ* 20 (1998), 379 et seq.

<sup>5</sup> For a recent in-depth-study of thematic mechanisms see B. Rudolf, *Die thematischen Berichterstatte und Arbeitsgruppen der UN-Menschenrechtskommission*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.142, 2000. For a study on the procedural aspects of their work see O. de Frouville, *Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme*, 1996.

tions of human rights.<sup>6</sup> When the Commission was enlarged in 1966 to respond to the increased number of UN Member States after decolonization, it abandoned its doctrine according to which it had "no power to act" on individual communications alleging human rights violations.<sup>7</sup> This change of heart was ratified by ECOSOC through the adoption of Resolution 1235 (XLII) of 6 June 1967, which instituted an initial, albeit weak, procedure to deal with information on alleged violations of human rights, including individual cases.<sup>8</sup> By enabling the Commission to deal with the human rights situation in a specific country in an open debate, ECOSOC limited the states' reserved domain to an important extent. However, individual cases of human rights violations could not be dealt with in this procedure, but only in the confidential procedure established by ECOSOC Resolution 1503 (XLVIII) in 1970.<sup>9</sup> The apparent lacuna of these two procedures was that only states that were politically isolated at the time became the object of public debate, such as South Africa, Israel, and Chile. In the 1970s, NGO pressure in Western countries led to an increased recognition of the realization of human rights as a foreign policy objective. On the level of the UN, the first tangible result of this position was the institution of Country Rapporteurs.<sup>10</sup> But as the decision to set up a country mechanism depended on a majority in the Commission on Human Rights and in ECOSOC, a number of states escaped such monitoring either because they enjoyed the support of their political allies or because they could hide behind a misconceived understanding of regional solidarity. Consequently, this

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<sup>6</sup> E/RES/5 (I) of 16 February 1946, as amended on 18 February 1946, ESCOR 1946, Verbatim and Summary Records, Annex 8, 163 (para. 1), and E/RES/9 (II) of 21 June 1946, *ibid.*, page 400 (para. 1).

<sup>7</sup> For this doctrine see Commission on Human Rights, Report to the ECOSOC on the 1st Sess. of the Commission, ESCOR 1947, Suppl. 3 (Doc. E/259), para. 22, approved by E/RES/75 (V) of 5 August 1947, ESCOR 1947, Resolutions, 20 (Doc. E/573). For the background of the change see: T. Gonzales, "The Political Sources of Procedural Debates in the United Nations: Structural Impediments to Implementation of Human Rights", *N.Y.U.J. Int'l L. & Pol.* 13 (1981), 427 et seq., (450).

<sup>8</sup> For further background see, e.g., H. Tolley jr., "The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications", *HRQ* 6 (1984), 420 et seq.

<sup>9</sup> Of 27 May 1970, ESCOR 1970, Suppl.1A, 8.

<sup>10</sup> For a list of them see Alston, see note 1, 62.

type of special procedure was easily criticized for applying a double standard.<sup>11</sup>

This consideration was used by the Argentine government to rally support for its resistance to the creation of a Country Rapporteur to investigate the massive cases of disappearances in its country after the military coup, and it led to the creation of the first thematic mechanism in 1980, the "Working Group on Enforced or Involuntary Disappearances"<sup>12</sup>. Since then, three main phases can be distinguished in the development of the thematic mechanisms: a first "probationary" phase which lasted until 1985. During this time, only two further thematic mechanisms were created (the "Special Rapporteur on Mass Exoduses" in 1981, who was abolished a year later,<sup>13</sup> and the "Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions" in 1982<sup>14</sup>), and the Commission reacted harshly to attempts of criticism, in particular to the fact that reports named states as having violated human rights.<sup>15</sup> A second phase of consolidation followed in the years between 1985 and 1987. Not only were three more thematic mechanisms instituted (on torture,<sup>16</sup> religious intolerance,<sup>17</sup> and on mercenaries<sup>18</sup>), but the Com-

- <sup>11</sup> T.M. Franck, "Of Gnats and Camels: Is there a Double Standard at the United Nations?", *AJIL* 78 (1984), 811 et seq., (821-825); H. Boeckle, "Western States, the UN Commission on Human Rights, and the '1235-Procedure': The Question of Bias Revisited", *NQHR* 13 (1995), 367 et seq.
- <sup>12</sup> See under IV. Its present members are Ivan Tosevski (Chairman-Rapporteur, the former Yugoslav Republic of Macedonia), Agha Hilaly (Pakistan), Jonas K.D. Foli (Ghana), Diego García-Sayán (Peru) and Manfred Nowak (Austria). Their latest report is contained in: Doc. E/CN.4/2000/64 and Add. 1.
- <sup>13</sup> Established by CHR/RES 29 (XXXVII) of 11 March 1981, ESCOR 1981, Suppl. 5, 230, and abolished by CHR/RES/1982/32 of 11 March 1982, ESCOR 1982, Suppl. 2, 150.
- <sup>14</sup> Established by CHR/RES/1982/29 of 11 March 1982, ESCOR 1982, Suppl. 2, 2 and 147. Presently, the post is held by Asma Jahangir (Pakistan). Her last report is contained in: Doc. E/CN.4/2000/3 and Add. 1-3.
- <sup>15</sup> M.Bossuyt, "The Development of Special Procedures of the United Nations Commission on Human Rights", *HRLJ* 6 (1985), 179 et seq., (196-197).
- <sup>16</sup> Special Rapporteur on the Question of Torture, established by CHR/RES/1985/33 of 13 March 1985, ESCOR 1985, Suppl. 2, 71. Presently, the post is held by Sir Nigel Rodley (UK). For his last report see Doc. E/CN.4/2000/9 and Add. 1-3.

mission came to regard the existence of such mechanisms as an established type of special procedure and gradually tolerated clear language of the reports. However, the third phase, in which new and diverse thematic mechanisms were created, did not begin until 1990, after the UN's financial crisis at that time had been overcome. Since then, nine new thematic mechanisms were set up, sometimes two at a time. Among these mechanisms were the "Working Group on Arbitrary Detention"<sup>19</sup>, a Special Rapporteur on the sale of children,<sup>20</sup> on internally displaced persons,<sup>21</sup> on freedom of opinion,<sup>22</sup> on racial discrimination,<sup>23</sup> on violence against women,<sup>24</sup> on the independence of the judiciary,<sup>25</sup>

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- <sup>17</sup> Special Rapporteur on the Question of Religious Intolerance, established by CHR/RES/1986/20 of 10 March 1986, ESCOR 1986, Suppl. 2, 66. The present holder of the post is Abdelfattah Amor (Tunisia). His last report is contained in: Doc. E/CN.4/2000/65.
- <sup>18</sup> Special Rapporteur on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination, established by CHR/RES/1987/16 of 9 March 1987, ESCOR 1987, Suppl. 5, 58. The post has been held continuously by Enrique Bernales-Ballesteros (Peru). For his last report see Doc. E/CN.4/2000/14 and Corr. 1.
- <sup>19</sup> See under V. Its members are Kapil Sibal (Chairman, India), Louis Joinet (Vice-Chairman, France), Roberto Garretón, (Chile), Laity Kama (Senegal) and Petr Uhl (Czech Republic). Their latest report is contained in Doc. E/CN.4/2000/4 and Add.1-2.
- <sup>20</sup> Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography, established by CHR/RES/1990/68 of 7 March 1990, ESCOR 1990, Suppl. 2, 145. Presently, the post is held by Ofelia Calcetas-Santos (Philippines). Her last report is contained in Doc. E/CN.4/2000/73 and Add.1-3.
- <sup>21</sup> Representative of the Secretary-General on Internally Displaced Persons, established by CHR/RES/1991/25 of 5 March 1991, ESCOR 1991, Suppl. 2, 69. Since the beginning, the holder of the post has been Francis Deng (Sudan). For his last report see Doc. E/CN.4/2000/83 and Add. 1-2.
- <sup>22</sup> Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, established by CHR/RES/1993/45 of 5 March 1993, ESCOR 1993, Suppl. 3, 154. The post is held by Abid Hussain (India). His last report is published in: Doc.E/CN.4/2000/63 and Add. 1-4.
- <sup>23</sup> See under VI. The post is held by Maurice Glélé-Ahanhanzo (Benin). For his last report see Doc. E/CN.4/2000/16 and Add. 1.
- <sup>24</sup> Special Rapporteur on Violence against Women, its Causes and Consequences, established by CHR/RES/1994/45 of 4 March 1994, ESCOR 1994, Suppl. 4, 26 and 140. The post is held by Radhika Coomaraswamy

and on the effects of illicit dumping of toxic products on the enjoyment of human rights<sup>26</sup>. In 1998, after a temporary standstill, the most recent Special Rapporteur was instituted, dealing with the rights of migrants.<sup>27</sup>

### III. Legal Status of the Rapporteurs and Working Groups and its Significance for Customary Human Rights

The Special Rapporteurs and members of Working Groups are subsidiary bodies of the UN.<sup>28</sup> They are appointed as independent experts in their personal capacity and are thus only subject to the directions of the Commission on Human Rights.<sup>29</sup> As “experts on mission” they enjoy the privileges and immunities that are provided for by the Convention on the Privileges and Immunities of the United Nations,<sup>30</sup> in particular immunity from legal proceedings for any acts committed “in the course

(Sri Lanka). Her last report is published in: Doc. E/CN.4/2000/68 and Add. 1-2.

<sup>25</sup> Special Rapporteur on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and on the Independence of Judges and Lawyers, established by CHR/RES/1994/41 of 4 March 1994, ESCOR 1994, Suppl. 4, 25 and 135 (in 1995 abbreviated as “Special Rapporteur on the Independence of Judges and Lawyers”, CHR/RES/1995/36 of March 1995, ESCOR 1995, Suppl. 4, 118). The post is held by Dato’ Param Cumaraswamy (Malaysia). His last report is published in: Doc. E/CN.4/2000/61 and Add. 1.

<sup>26</sup> Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, established by CHR/RES/1995/81 of 8 March 1995, ESCOR 1995, Suppl. 4, 241. The post is held by Fatma Zohra Ksentini (Algeria). For her last report see Doc. E/CN.4/2000/50 and Add. 1.

<sup>27</sup> CHR/RES/1999/44 of 27 April 1999. The Commission chairman appointed Gabriela Rodríguez Pizarro (Costa Rica). Her preliminary report is contained in: Doc. E/CN.4/2000/82.

<sup>28</sup> G. Jaenicke, “On Article 7”, 195 et seq.; Mn. 9 and 15, in: B. Simma (ed.), *Charter of the United Nations. A Commentary*, 1994.

<sup>29</sup> See generally: Office of Legal Affairs of the Secretary-General, “Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat”, *ILCYB* 1985 II-1, 145-210, (180, para. 10).

<sup>30</sup> Of 3 February 1946, UNTS Vol. 1 No. 4 .



of the performance of the mission.”<sup>31</sup> Recently, the need for such immunity became apparent when the courts of Malaysia denied the Special Rapporteur on the Independence of the Judiciary immunity in defamation actions for a statement he made during a press conference.<sup>32</sup> In its Advisory Opinion on extent of such immunity, the ICJ rightly held that article VI Sect. 22 of the Convention has to be understood as encompassing all acts that are related to the mission, including public statements, and is not limited to acts by which the mandate is fulfilled.<sup>33</sup> The Court did not have to answer the question of who decides on whether a contested act falls within this provision, and only referred to the “pivotal role” of the Secretary-General.<sup>34</sup> The Secretary-General holds the view that he has the exclusive authority to make this determination.<sup>35</sup> However, his decision does not have legally binding force, as can be concluded from article VIII Sec. 29 and 30 of the Convention, which provide for compulsory dispute settlement, including the power of the ICJ to give binding Advisory Opinions in disputes about the interpretation or application of the Convention. As a consequence, a UN Member State has to resort to these means of dispute settlement if its government or its courts disagree with the legal opinion expressed by the Secretary-General.

The status of the thematic mechanisms as subsidiary organs of the UN is of legal importance because their actions are attributable to the UN. Consequently, acts performed within the discharge of the mandate must be regarded as the practice of an international organization. If accompanied by an *opinio iuris*, they are, therefore, capable of contributing to the development of customary international law. Both the lan-

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<sup>31</sup> See also CHR/RES/1991/33 of 5 March 1991, ESCOR 1991, Suppl. 2, 86, para. 1.

<sup>32</sup> He now faces judgements for damages totalling US\$ 112 Mio., see the written statement of the Secretary-General of 2 October 1998 submitted to the ICJ, paras 16, 21 and 23 (<http://www.icj-cij.org/icjwww/idocket/inuma/inumaframe.htm>, last visited on 3 December 1999).

<sup>33</sup> ICJ - *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, paras 53-55.

<sup>34</sup> *Id.*, see note 33, para. 50.

<sup>35</sup> As expressed, e.g., in his statement to the ICJ, see note 32, paras 38-49, and generally in the study of the UN Secretariat, *The Practice of the United Nations, the Specialized Agencies and the IAEA concerning their Status, Privileges and Immunities*, Doc. A/CN.4/L.383/Add.1, para. 57; M. Gerster, “On Article 105”, 1137 et seq., Mn. 24, in: Simma, see note 28.

guage of Article 38 para. 1 lit.(b) of the Statute of the ICJ, which refers to "general practice", and not merely to "state practice", and the case law of the Court reflect the understanding that not only states, but all subjects of international law, participate in forming customary law.<sup>36</sup> Although this possibility has been widely accepted as a theoretical possibility,<sup>37</sup> it is rarely tested in practice. In the field of human rights, this finding assumes particular relevance because the activities of the Thematic Rapporteurs and Working Groups can participate in shaping the contents of the human rights they are to monitor.

A necessary prerequisite for their practice to be conducive to customary international law is that the Commission approves of the acts performed by them and thus does not express an *opinio iuris* to the contrary. A further necessary prerequisite for this hypothesis is that the mechanisms act on the international plane, i.e., in an interaction with a subject of international law. This precondition is fulfilled if a Special Rapporteur or Working Group engages in a dialogue with a state concerning an alleged violation of human rights and reaches a finding on the existence *vel non* of a violation in a specific case. In this case, the actions of the thematic mechanism as an organ of the UN do not differ from the actions of states in their international relations, which are re-

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<sup>36</sup> See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 15 et seq., (25) and the joint Dissenting Opinion of judges McNair, Read and Hsu Mo, *ibid.*, 31 et seq., (35); Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Judgement, ICJ Reports 1974, 3 et seq., (26); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgement, ICJ Reports 1996, 595 et seq., (611, para. 20).

<sup>37</sup> See, e.g., the report of the ILC to the General Assembly, *ILCYB* 1950 II, 364 et seq., (372); M. Akehurst, "Custom as a Source of International Law", *BYIL* 47 (1974/75), 1 et seq., (11); C.H. Alexandrowicz, *The Law-Making Function of the Specialized Agencies of the United Nations*, 1973, 2 (expressly on the UN and its specialized agencies); J.A. Barberis, "Reflexions sur la coutume internationale", *A.F.D.I.* 36 (1990), 9 et seq., (33/34); G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, Vol.I/1, 1989, 56; G. Danilenko, "The Theory of International Customary Law", *GYIL* 31 (1988), 9 et seq., (20 et seq.); L.F. Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des Etats", *RdC* 192 (1985), 233 et seq., (298); Sir R. Jennings/Sir A. Watts, *Oppenheim's International Law*, Vol.I/1, 1992, 47; Nguyen Quoc Dinh/P. Daillier/A. Pellet, *Droit International Public*, 1994, 318 et seq.; K. Wolfke, *Custom in Present International Law*, 1993, 81-83 and 152.

garded as conducive to the development of customary law. Such a conclusion is, however, not possible if other states contradict the *opinio iuris* expressed by the thematic mechanism.

## IV. Case Study No. 1: The Working Group on Enforced or Involuntary Disappearances

### 1. Origins and Procedure

The difficult and tortuous negotiations that led to the establishment of the Working Group on Enforced or Involuntary Disappearances in 1980 were successful only because some of the central questions were left open, namely the definition of disappearances and the power of the Group to deal with individual cases of alleged violations.<sup>38</sup> The text adopted defined the task of the Working Group as "to examine questions relevant to enforced or involuntary disappearances",<sup>39</sup> and thus neither referred to "cases", as proposed by the United States, nor did it refer to "urgent situations", as had been the counter-proposal of the non-aligned states.<sup>40</sup> When the Argentine delegation declared after the adoption of the resolution that the Working Group had to respect ECOSOC Resolution 1503 (XLVIII),<sup>41</sup> the tone was set for the future resistance to the work of the Working Group. This position aimed at limiting the Working Group to finding whether a "consistent pattern of gross and reliably attested violations" exists, to confidentiality of its procedure, and to the requirement of the exhaustion of local remedies.

#### a. Public Character of the Procedure

If the request for confidentiality had been successful, the Working Group would have been deprived of its only possibility to sanction non-compliance with international law, that of exerting public pressure.

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<sup>38</sup> For its present membership, see note 12. For a detailed account of the negotiations see D. Kramer/D. Weissbrodt, "The 1980 U.N. Commission on Human Rights and the Disappeared", *HRQ* 3 (1981), 18 et seq.

<sup>39</sup> CHR/RES/20 (XXXVI) of 29 February 1980, ESCOR 1980, Suppl. 3, 180, para. 1.

<sup>40</sup> For a detailed analysis of the text see Rudolf, see note 5, 62-63.

<sup>41</sup> ESCOR 1980, Suppl. 3A, Annex IX, 143.

For this reason, the Group spent much effort in its initial years on establishing its power to name the countries to which it transmitted information of alleged disappearances<sup>42</sup> and to publish the replies of governments.<sup>43</sup> In its resolution on the first report submitted by the Working Group, the Commission seemed to heed the call for such confidentiality, when it reminded the Working Group of its obligation “to discharge its mandate with discretion, so as, *inter alia*, to protect persons providing information or to limit the dissemination of information provided by Governments.”<sup>44</sup> This reminder, however, proved to have been mere lip-service to the principle of discretion because the Commission did not take any further action when the Working Group continued to publish the information it had transmitted and the governmental replies thereto.

The Working Group even changed the presentation of information in its reports so as to increase public pressure: from 1984, it gave an account of the alleged violations, of governmental replies and of NGO comments on a country-by-country basis. Although the Working Group refrained from taking a stand on the accuracy of either position, this juxtaposition at last permits a reader to read between the lines and thus to get a more truthful picture of the situation in a given country. Furthermore, this approach put an end to the former practice of reproducing governmental replies *verbatim* in an official document, which had created the wrong impression of them being accepted by the organization. Finally, in 1995, the Working Group began to add its own “observations” to the government and NGO information on a specific country and thus started to evaluate openly the information before it.<sup>45</sup> This positive development, however, came to a standstill because of the severely limited financial resources available to the Working Group.<sup>46</sup>

A further means of using public pressure is that the Working Group reminds states of yet unresolved cases that it transmitted in the past. In addition, until 1994 it concluded a section on a state by a statistical list

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<sup>42</sup> For this criticism see, e.g., the statement of Algeria (Doc. E/CN.4/SR.1606, paras 20-21) and Brasil (Doc. E/CN.4/SR.1605, paras.40-41), and the account of the debate in: ESCOR 1981, Suppl. 5, para. 203.

<sup>43</sup> For criticism, see, e.g., the statement of Argentina, Doc. E/CN.4/1435, Annex IX, 2-3.

<sup>44</sup> CHR/RES/10 (XXXVII) of 26 February 1981, para. 4, ESCOR 1981, Suppl. 5, 209.

<sup>45</sup> Doc. E/CN.4/1995/36.

<sup>46</sup> Doc. E/CN.4/1999/62, para. 7.

of resolved and unresolved cases. Although human rights groups criticized this method as "dehumanizing" the problem of disappearances,<sup>47</sup> it at least serves as an additional reminder of outstanding cases, and thus puts additional public pressure on the state concerned. While the Commission on Human Rights repeats its approval of the Group's working methods every year and calls upon the states to cooperate with the mechanism, it has never taken any specific action to increase significantly the pressure on states by, e.g., singling out the most uncooperative states. The general approval and the absence of specific criticism at least permit the conclusion that the acts of the Working Group are attributable to the Commission and thus are relevant for determining the contents of the customary human rights in question.

### b. The Power to Deal with Individual Cases and the Applicable Procedure

As already mentioned, the question of whether the Working Group was empowered to deal with individual cases of alleged disappearances was left unresolved.<sup>48</sup> However, the text of the mandating resolution provided a strong indication for such power by providing that the group should "respond effectively to information that comes before it".<sup>49</sup> This conclusion is warranted by a comparison with the interpretation of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories established by the General Assembly that its power "to investigate" and "to report" excluded the "power to make an *effective response* to the numerous appeals made to it."<sup>50</sup> It is noteworthy that the Commission's resolution on the first report did not even call into question this part of the work carried out by the Working Group. Western states had made it clear during the debate that they supported the Group, and the General Assembly had called for its continuation.<sup>51</sup> The states opposing such power, most notably Argentina, therefore realized that at

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<sup>47</sup> Doc. E/CN.4/1984/21, para. 16.

<sup>48</sup> See under IV. 1.

<sup>49</sup> CHR/RES/20 (XXXVI), see note 39, para. 6.

<sup>50</sup> Doc. A/8089, para. 44 (emphasis added). See also: B.G. Ramcharan, "Introduction", in: id. (ed.), *International Law and Fact-Finding in the Field of Human Rights*, 1982, 1 et seq., (5).

<sup>51</sup> GA/RES/35/193 of 15 December 1980, GAOR 35th Sess., Suppl. 48 (Doc. A/35/48), 206 et seq., para. 2.

tempts to restrict the mandate to consistent patterns of reliably attested violations, as provided for in ECOSOC Resolution 1503 (XLVIII), were futile,<sup>52</sup> and chose another approach.

The opponents of the mechanism put forward that the admissibility conditions for information on an individual case were identical to those contained in Resolution 1503 (XLVIII), i.e. that the local remedies had to be exhausted, before the Working Group could take up the examination of that individual case.<sup>53</sup> This interpretation did not win the support of the Commission's majority, as can be concluded from the oblique reference in the considerations of its Resolution in 1981 to "the need to observe United Nations standards and practice regarding the receipt of communications, their transmittal to Governments concerned and their evaluation".<sup>54</sup> The Working Group paid lip-service to this requirement,<sup>55</sup> but continued without substantive changes. The fact that the Commission did not adopt a more precise clause subsequently but moved it into the operative part of its resolutions, and its general approval of the work carried out must be regarded as an implicit approval of that practice.<sup>56</sup> This also explains why the attempt failed to transfer the local remedies rule as codified in the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) to the practice of the Working Group.<sup>57</sup> When rejecting this approach, the Group pointed to the humanitarian character of its task and the Commission's approval of its practice.<sup>58</sup>

The self-conception of the Working Group as being a purely "humanitarian" mechanism is a recurrent theme and explains why the procedure of dealing with individual communications has not reached a high level of sophistication. Its purpose is to clarify the fate of a victim of an alleged enforced disappearance, and not to make a finding on the responsibility of a state. This objective and the large number of cases

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<sup>52</sup> But see the statement of the USSR and Ethiopia (Doc. E/CN.4/1982/SR.38, paras 125 and 142, respectively).

<sup>53</sup> Doc. E/CN.4/1435, paras 74-76, and Annex IX (Argentina), repeated in 1981 (Doc. E/CN.4/1492, para. 51), and Doc. E/CN.4/1982/SR.38, para. 125 (USSR).

<sup>54</sup> CHR/RES/10 (XXXVII), see note 44, 5th consideration.

<sup>55</sup> Doc. E/CN.4/1984/21, para. 5.

<sup>56</sup> See CHR/RES/1984/23 of 6 March 1984, ESCOR 1984, Suppl. 4, 57, para. 5.

<sup>57</sup> As was the position of Colombia, cf. Doc. E/CN.4/1986/18, para. 6.

<sup>58</sup> Doc. E/CN.4/1986/18, para. 26.

dealt with<sup>59</sup> cause the Group to summarize the information transmitted to a government in general terms, describing typical groups of victims and circumstances of disappearances. The reports do not contain detailed accounts of how the Working Group evaluated allegations of violations that it received, nor do they identify the cases that the government replied to.

The major achievement of the Working Group is having established the principle of equality of arms between the sources of alleged violations and the states by obliging the latter to respond to the allegations and by permitting the former to comment on the response.<sup>60</sup> The procedure begins with the receipt of information on an alleged case of disappearance by the Working Group. It must at least contain the name of the alleged victim, the time, place and circumstances of his or her disappearance, or information about the detention center in which the victim was last seen, and the measures taken to investigate the case. The Group examines whether this information is plausible by comparing it with other information on the state in question, namely the circumstances of an enforced disappearance or the details given on the detention center in question. If the question of plausibility is answered in the affirmative, the information is transmitted to the government for investigation and conclusive clarification. If the governmental reply contains information that the Working Group regards as definitely clarifying the fate of the victim, it lists the case as being resolved. If however, as is true for a larger number of cases, the government cannot give information on the present whereabouts of a person or is unwilling to do so, or if it refutes the allegations in an unsubstantiated way, the Group asks the source of the initial information for a comment. If that comment contradicts the reply "on reasonable grounds", the case remains on file and the government is requested again to respond. Even in the absence of a comment by the source, the Working Group reserves the right to request supplementary information from the state if it is not satisfied by its reply.<sup>61</sup> However, it did not set up a time limit for such replies.

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<sup>59</sup> As of 1999, the Working Group has transmitted a total of 48.770 cases to 79 governments. 2.926 of them have been clarified, while 45.825 cases are still outstanding, see Doc. E/CN.4/1999/62, para. 334.

<sup>60</sup> A summary of the working methods is contained in the 9th Report of the Working Group (Doc. E/CN.4/1988/19, paras 20-30).

<sup>61</sup> For initial criticism see, e.g., the statement of Ethiopia (Doc. E/CN.4/1982/SR.38, paras 142-143) and of Nicaragua (*ibid.*, para. 155).

The quest for clarifying a case conclusively limits the possibilities for the Working Group to sanction uncooperative states. This explains why it did not feel in a position to follow the proposal to resort to the presumption of truthfulness of an allegation if a state does not contradict in a substantiated way.<sup>62</sup> The purpose of the procedure also explains the large number of unresolved cases on file with the Group. Without the power and means of the Working Group to undertake investigations on site, the crucial factor for clarifying cases is the willingness of a government to investigate seriously. Public pressure is of itself not enough to spur cooperation if a state uses enforced disappearances in a systematic way or if civil strife seriously limits its possibilities for investigation.

### c. Further Procedural Achievements

During the debate on the creation of a mechanism on disappearances, human rights organizations already pointed to the need for the Working Group to react quickly once it receives information on a case of enforced disappearance.<sup>63</sup> Their experience showed the crucial role of protective action for a victim in the first days after his or her arrest. For this reason, the Working Group decided in its first year to create an "urgent action" procedure permitting its chairman to act between the Group's sessions.<sup>64</sup> Typically, he contacts the government of the state in question and requests it to investigate into the allegations, and to ensure the safety of the alleged victim. The legal basis for this procedure is the reference in the mandating resolution to the need "to respond effectively to information that comes before it".<sup>65</sup> Some states criticized this procedure as an act *ultra vires* because it did not concern massive and flagrant violations.<sup>66</sup> As this view was based on a wrong equation of the

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<sup>62</sup> Subcommission/RES 15 (XXXIV) of 10 September 1981, para. 6b), Doc. E/CN.4/1512, 88, see also N. Rodley, "U.N. Action Procedures Against "Disappearances", Summary or Arbitrary Executions, and Torture", *HRQ* (1986), 700 et seq., (715); Amnesty International (ed.), *"Disappearances" and Political Killings*, 1994, 203. This approach stands in stark contrast to that of other human rights bodies, see note 110.

<sup>63</sup> See the joint statement of several NGOs, reprinted in: Newman/Weissbrodt, see note 1, 132-156.

<sup>64</sup> Doc. E/CN.4/1435, para. 30.

<sup>65</sup> CHR/RES/20 (XXXVI), see note 39, para. 6.

<sup>66</sup> As did the USSR in 1981, (Doc. E/CN.4/SR.1605, para. 12) and Ethiopia in 1982 (Doc. E/CN.4/1982/SR.38, para. 142).



thematic mechanism with Resolution 1503 (XLVIII), the Commission was right in not sharing it.

The reference to the need to protect persons providing information to the Working Group that the Commission made in its resolution on the first report<sup>67</sup> constituted another major achievement of the mechanism. Without this recognition, it would not have been in a position to keep the identity of its sources confidential,<sup>68</sup> and would have endangered human rights activists and thus would have jeopardized its own work. To improve the protection of its sources, the Working Group instituted a "prompt intervention" procedure.<sup>69</sup> Under this procedure, the Group contacts a state immediately when it receives information on threats against, or the disappearance of, persons who have cooperated with it in the past. By these two procedures, the latter also being applied to witnesses or relatives of a disappeared person, the Working Group created a set of procedures to render its work effective. They have served as an example for all thematic mechanisms established subsequently.

## 2. Applicable Legal Standards

For the purpose of defining its own mandate, the Working Group had to define the term "enforced or involuntary disappearance". It understands it as denoting an arrest, detention or abduction of a person by personnel established as, or believed to be, an organ of the government, or to be controlled by it, or in case of overt or latent governmental complicity.<sup>70</sup> A further precondition is that the government in question denies its responsibility or does not account for these actions. In case of doubt as to the government involvement, the Working Group deals with the case. Because of the immense obstacles it faced in the beginning, the Working Group played down the legal impact of its work by insisting on the "humanitarian character" of its work. As a consequence of its non-judgmental approach, the Group closes a file when a person reappears alive; if, however, the victim is found dead, it will continue to investigate the case, provided his or her fate is unaccounted for some time between the arrest and the time of death.

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<sup>67</sup> See under IV. 1. a.

<sup>68</sup> As was criticized by Argentina (Doc. E/CN.4/1435, paras 74-76).

<sup>69</sup> Doc. E/CN.4/1991/20, para. 26 and Doc. E/CN.4/1992/18, para. 34.

<sup>70</sup> Doc. E/CN.4/1435, paras 3-4.

The identification of the human rights violated in the case of a disappearance contained in its initial reports remained rather superficial and was not used as a yardstick in the examination of information in subsequent years. The Working Group lists, *inter alia*, the victim's right to liberty and security, in particular the prohibition of arbitrary arrest, and the right to a fair trial.<sup>71</sup> By doing so, it adopts a more extensive approach than the Inter-American Commission on Human Rights or the Human Rights Committee, which only consider the violation of the right to liberty.<sup>72</sup> Furthermore, it points to the rights of the victim's family, such as the right to family life, and the right to an appropriate standard of living and to education. In the view of the Working Group, the latter three rights are infringed upon by the psychological and financial consequences of a disappearance.<sup>73</sup> This understanding reveals an extensive interpretation of the scope of application of human rights that also encompasses indirect consequences of an act of the state. This approach is correct, as these consequences are not only foreseeable, but are also intended because they serve as a means of intimidating the family and general public. Against this background, the Working Group would only be consequential to share the view of the Human Rights Committee and the Inter-American Commission according to which the psychological suffering of the victim's family amount to a violation of the prohibition of inhuman treatment.<sup>74</sup>

The humanitarian approach, and more specifically the lack of concern for the attributability of an enforced disappearance to the state, excluded any relevance of the Group's work in respect of the concretization of the customary human rights during that period. In contrast, in

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<sup>71</sup> Doc. E/CN.4/1435, paras 184-187; it also lists the rights that typically, but not necessarily, are infringed upon, such as the right to humane detention conditions, the prohibition of torture, and the right to life, see Doc. E/CN.4/1983/14, para. 131.

<sup>72</sup> For the former see, e.g., Resolution 17/82 (Case No.7821) and Resolution 18/82 (Case No.8722), OAS, Annual Report of the Inter-American Commission on Human Rights 1981-1982 (OEA/Ser.L/V/II.57, Doc.6 Rev.I), 87 and 89; for the latter see, e.g., the case of Elena Quinteros Almeida and María del Carmen Quinteros v. Uruguay, Decision of 21 July 1983, Communication No.107/1981, *Yearbook of the Human Rights Committee* 1983-1984, Vol.II (CCPR/4/Add.1), 523 et seq, para. 13.

<sup>73</sup> Doc. E/CN.4/1435, paras 184-187.

<sup>74</sup> See the Case of Quinteros v. Uruguay, see note 72, para. 14, and OAS, Annual Report of the Inter-American Commission on Human Rights 1982-1983 (OEA/Ser.L/V/II.61, Doc. 22, Rev. I), 31.

its observations on country situation made since 1995, the Working Group uses the 1993 UN-Declaration on the Protection of All Persons from Enforced Disappearance<sup>75</sup> as a yardstick for its evaluation. It thus started to express an *opinio iuris* through its observations. Given the relatively low number of instances in which the Group unequivocally concluded that a state does not meet these international standards, its reports have not yet become an important source for the concretization of the customary human rights at issue. At least, however, the work of the Group did contribute to creating an *opinio necessitatis* of codifying legal rules to outlaw disappearances, as was done by the adoption of the 1993 UN Declaration, which may become the catalyst for the development of customary law rules.

The way in which the Group handles individual cases and communicates with governments reveals at least one clear *opinio iuris*, e.g., the conviction that a state is obliged to investigate alleged cases of disappearances. The Working Group derives this obligation from the states' "responsibility for what happens within their borders".<sup>76</sup> Despite its misleading wording, the Working Group does not understand this term as being a rule of imputability that also covers private acts. This conclusion must be drawn from its refusal to deal with cases of disappearances that were, according to the information submitted by the source, allegedly committed by terrorist groups.<sup>77</sup> In addition, the Working Group found the legal basis of the states' obligation to investigate cases of disappearances in their obligation to punish the persons responsible for a disappearance, and on the right of the victims' relatives to know about the fate of the disappeared person.<sup>78</sup> Based on these considerations, the Group did not accept the argument that abuses were committed by a past regime<sup>79</sup>, and it rejected the attempts of states to end the investiga-

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<sup>75</sup> A/RES/47/133 of 18 December 1993, GAOR 47th Sess., Suppl. 49 Vol.I (Doc. A/47/49), 207.

<sup>76</sup> This was already stressed during the debate on the establishment of the mechanism, see ESCOR 1980, Suppl. 3, para. 215.

<sup>77</sup> E.g. by Tamil guerrilleros (Doc. E/CN.4/1992/Add.1, paras 104 and 186) and kidnapping in the former Yugoslavia with the aim of extorting ransom (Doc. E/CN.4/1994/26/Add.1, para. 49).

<sup>78</sup> Doc. E/CN.4/1435, paras 7-9, and Doc. E/CN.4/1988/19, para. 19.

<sup>79</sup> This argument was put forward by Nicaragua after the overthrow of the regime of Somoza by the Sandinistas, Doc. E/CN.4/SR.1605, para. 18, and contradicted by the Working Group in: Doc. E/CN.4/1988/19, para. 30. Since 1992, Nicaragua no longer challenges its obligation to investigate these cases, see Doc. E/CN.4/1992/SR.26, para. 28.

tion of past abuses by enacting laws to that end.<sup>80</sup> It is noteworthy that it was upon the recommendation of the Working Group that this unrestricted obligation to investigate was inserted into the 1993 UN Declaration on Enforced Disappearance (para. 13).<sup>81</sup>

### 3. On-site-missions

The last achievement of the Working Group to be mentioned here is perhaps its most significant contribution to the institution of thematic mechanisms: already in its first report, the Working Group suggested that it be invited to carry out missions into Member States to deal with the problem of disappearances on site, and it even named possible candidates for such visits.<sup>82</sup> The legal basis for this proposal was the power of the Group "to seek and receive information". However, the first mission undertaken ended as an "embarrassing failure"<sup>83</sup> because the chairman of the Working Group, Viscount Colville of Culross, agreed not to mention Mexico in future reports in exchange for the promise that 43 outstanding cases were clarified.<sup>84</sup> The hope that this agreement would buy the willingness of the Mexican government to cooperate seriously was in vain, and after five years of unsubstantiated denials the Working Group listed Mexico again.

The missions to Peru undertaken in 1985 and 1986 brought about a significant change. In its reports, the Working Group abandoned its traditional non-judgmental approach in favour of clear evaluations and findings of violations and responsibility for them. They are a valuable source of information both as to the extent of disappearances in a specific state and as to the conditions facilitating them. The major problems identified by the Working Group were the lack of democratic control of

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<sup>80</sup> Doc. E/CN.4/1984/21, paras 35 and 42 (Argentinean law establishing a legal presumption of death).

<sup>81</sup> The recommendation is contained in Doc. E/CN.4/1990/13, paras 31-38; for the draft Declaration see the report of the Subcommission on its 42nd Sess. (Doc. E/CN.4/1991/2 – Doc. E/CN.4/Sub.2/1990/59).

<sup>82</sup> Doc. E/CN.4/1435, para. 8 (Uruguay). See also Doc. E/CN.4/1989/18, para.11 (EL Salvador, Iran, Iraq, Philippines, Sri Lanka) and Doc. E/CN.4/1996/38, para. 31 (India, Iraq, Turkey).

<sup>83</sup> M.T. Kamminga, "The Thematic Procedures of the UN Commission on Human Rights", *NILR* 34 (1987), 299 et seq., (312).

<sup>84</sup> This can be concluded from Doc. E/CN.4/1983/14, para. 80.

the military, impunity for human rights violations, and the weakness of the judiciary. The outspokenness of the Group<sup>85</sup> was a reaction to the inviting state's interest to rally international support for its effort to investigate past human rights abuses after the demise of a military regime.

Another example is the report on the visit to the Philippines, which has been characterized as "perhaps the most insightful report on a country situation" as compared to Country Rapporteurs of the Commission.<sup>86</sup> It contains a critical analysis of the caselaw of the High Court, which in the eyes of the Group rendered *habeas corpus* proceedings ineffective.<sup>87</sup> Moreover, the Working Group clearly rejected the attempts of the Philippine government to blame the Guerrilla organization New People's Army (NPA) for its internal situation; instead, it criticized the existence of "civil defense forces", which fosters the occurrence of disappearances, and the practice of "red-labelling" human rights organizations as sympathizing with terrorist groups, which exposes these organizations to violence by paramilitary groups.<sup>88</sup>

#### 4. Evaluation

The firm establishment of the Working Group as a special procedure of the UN Commission on Human Rights permits the conclusion that the time has come to intensify the follow-up procedures and to adopt a more judgmental approach in its examination of individual communications. So far, the Group's report on the implementation of its recommendations both as regards its examination of individual cases and after a mission to a Member State occur only haphazardly. Regular information on this question would increase the political pressure on the states, which is the Group's only means of sanctioning non-compliance. Furthermore, the examination of individual communications should follow a stricter procedure, notably by the introduction of strict time limits for governmental responses and by regular reminders sent to uncooperative states. Finally, the Group should consider adopting a finding of a violation based on the information provided to it by the source in case of

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<sup>85</sup> See, e.g., Doc. E/CN.4/1986/18/Add.1, paras 106-107; Doc. E/CN.4/1987/15, Add.1, paras 17 and 47-48.

<sup>86</sup> N.N., "The UN Commission on Human Rights and the New Working Group on Arbitrary Detention", *Rev. ICR* 46 (1991), 23 et seq., (25).

<sup>87</sup> Doc. E/CN.4/1991/20/Add.1, especially paras 91-97 and 104-107.

<sup>88</sup> Doc. E/CN.4/1991/20/Add.1, paras 18, 20, 32 and 137-139.

persistent non-response by the state in question. If the state concerned retains the possibility of disproving a violation that is attributable to it, this approach would exert additional public pressure without being counterproductive to the humanitarian objective of the mechanism. Lastly, a more direct support for these activities by the Commission on Human Rights is desirable, but most probably will not materialize because of the Commission's preference for consensus when adopting resolutions.

## V. Case Study No. 2: The Working Group on Arbitrary Detention

### 1. Origins and Procedure

Arbitrary detention has always been used by oppressive regimes to silence opposition. Although the need to fight this widespread practice has long been obvious — as is reflected in the creation of NGOs such as *Amnesty International* — it was only in 1991 that the joint effort of France, Peru, the United States, and human rights organizations culminated in the creation of a thematic mechanism for this question, the Working Group on Arbitrary Detention.<sup>89</sup> The ground for this development had been prepared by a study on administrative detention<sup>90</sup> submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>91</sup> and by the fact that the term “political prisoners,” which had been an obstacle to earlier efforts to create a monitoring mechanism, was left out of the resolution adopted.<sup>92</sup>

The Working Group, which consists of five independent experts<sup>93</sup>, was entrusted with “the task of investigating cases of detention imposed

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<sup>89</sup> P. Parker/D.Weissbrodt, “Major Developments at the UN Commission on Human Rights in 1991”, *HRQ* 13 (1991), 573 et seq., (600); R. Brody, “The United Nations Creates a Working Group on Arbitrary Detention”, *AJIL* 85 (1991), 709 et seq.

<sup>90</sup> Doc. E/CN.4/Sub.2/1990/29 and Add.1 (report by Louis Joinet, France, who later became the first chairman of the Working Group on Arbitrary Detention).

<sup>91</sup> In 1999 renamed as “Sub Commission on the Promotion and Protection of Human Rights”.

<sup>92</sup> For the drafting history see Rudolf, see note 5, 202-203.

<sup>93</sup> For its membership, see note 19.

arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned."<sup>94</sup> Thus, the question of whether only administrative detention or also criminal detention fell within the Group's mandate was not unequivocally resolved. As in the case of the Working Group on Enforced Disappearances, the substantive delimitation of its mandate was thus left to the mechanism itself.

### a. Extent of the Mandate

While the debate about the scope of the mandate of the Working Group on Enforced or Involuntary Disappearance only touched the periphery, i.e. notably disappearances caused by nonstate actors, in the case of the Working Group on Arbitrary Detention, the dispute over the scope of its mandate concerned the very heart of the subject. The central question was whether imprisonment after a criminal conviction was covered by the mandate. A number of states of the Western group favoured the inclusion of criminal detention, whereas developing countries and some Western states warned against the danger that the Working Group would be turned into an appellate body.<sup>95</sup> Although this warning cannot lightly be dispensed with, the restriction to administrative or pre-trial detention harbours the danger that states use sham trials to exempt victims from the protection offered by the Working Group.

For this reason, the Working Group used its first report to establish a categorization of arbitrary detention making clear that it would also look into imprisonment imposed after a criminal procedure.<sup>96</sup> The Group defended this position with extensive legal reasoning and repeated its position upon the request of the Commission<sup>97</sup> that was caused by the persistent efforts of Cuba, later joined by the People's Republic of China, to restrict its mandate to administrative detention.<sup>98</sup> The Group's conclusion that the term "detention" also covers post-trial

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<sup>94</sup> CHR/RES/1991/42 of 5 March 1991, ESCOR 1991, Suppl. 2, 103, para. 2.

<sup>95</sup> Brody, see note 89, 711.

<sup>96</sup> Doc. E/CN.4/1992/20, Annex I, 10-13.

<sup>97</sup> See Deliberation 03 (Doc. E/CN.4/1993/24, 14-20) and Doc. E/CN.4/1997/4, paras 50-94.

<sup>98</sup> For the position of Cuba see, e.g., Doc. E/CN.4/1993/SR.33, para. 24, and Doc. E/CN.4/1995/SR.32, paras 22-23. For the position of the People's Republic of China see Doc. E/CN.4/1995/SR.27, paras 41-42.

imprisonment is correct because it is based on the drafting history of the mandating resolution, the terminology used in other UN documents, and the identity of the rights applicable in both situation.<sup>99</sup> Moreover, the Commission tolerated the practice of the Working Group, and continued to do so even when it adopted a seemingly more restrictive wording in its Resolution 1997/50.<sup>100</sup> Although the text excludes “cases in which domestic courts have taken a final decision”, this exception is limited to judgements in conformity with, *inter alia*, international law. This requirement necessitates a prior determination by the Working Group of whether it is fulfilled in a specific case. For this reason, the Group is correct in assuming that it still could examine cases of criminal detention.<sup>101</sup> In the future, however, states supporting the Working Group should beware such textual compromises in the Commission because they cast doubt on the extent of the mandate and thus endanger the effectiveness of human rights protection through this thematic mechanism.

#### b. “Adversary” Character of the Procedure?

As concerns the procedural aspects of the mandate of the Working Group, it is worded in a unique way because the Group is entrusted with the task “to investigate cases”,<sup>102</sup> and not “to examine questions” — as was the case of other thematic mechanisms existing at the relevant time. The Working Group understands this term as conferring an “adversarial nature” upon the examination of individual cases of alleged violations.<sup>103</sup> Although the Commission repeatedly acknowledged the “very special character” of the mandate,<sup>104</sup> it took up the term “adver-

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<sup>99</sup> For a more detailed analysis see Rudolf, see note 5, 243–244.

<sup>100</sup> Of 15 April 1997, ESCOR 1997, Suppl. 3, 164. Para. 1 refers to the task “of investigating cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.”

<sup>101</sup> Doc. E/CN.4/1999/63, para. 59.

<sup>102</sup> CHR/RES/1991/42, see note 94, para. 2.

<sup>103</sup> Doc. E/CN.4/1992/20, para. 13, No. 2.

<sup>104</sup> First in CHR/RES/1993/36 of 5 March 1993, ESCOR 1993, Suppl. 3, 136, para. 2, and last in CHR/RES/1997/50, see note 100, para. 2(c). The term is not used in the 1998 and 1999 resolutions (CHR/RES/1998/41 of 17 April



sarial" only once.<sup>105</sup> Since 1994, however, it has replaced it by a reference to the "importance of respecting the dialogue with States,"<sup>106</sup> which in 1999 was reduced to being merely mentioned.<sup>107</sup> This change and the fact that thematic mechanisms established after 1991 also contain the term "to investigate" or the comparable term "to inquire"<sup>108</sup> warrant the conclusion that the procedure applied by the Working Group is not linked to the specificities of the mandate and could, therefore, be copied by other thematic mechanisms.

### c. The Procedure for Examining Individual Cases

A characteristic feature of the examination of alleged arbitrary detention is the *quasi*-judicial approach taken by the Working Group on Arbitrary Detention. It is reflected in strict time limits for governmental replies (90 days) to information transmitted, the right of the sources to comment on them, the governments' right to reply, and the formal "decision" which concludes the consideration of the case.<sup>109</sup> In these decisions, which since 1997 carry the more harmless label "opinion", the Group either states whether a detainee has been released in the meantime, or it determines whether a detention was arbitrary or otherwise inconsistent with the applicable international standards *vel non*, or it concludes that the information available was not sufficient to make such determination.

In an attempt not to reward uncooperative states, the Group limited the scope of application of the last category considerably by applying rules of evidence including the presumption of truthfulness so as to arrive at a sufficient factual basis for a decision. This approach is compa-

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1998, ESCOR 1998, Suppl. 3, 144 and CHR/RES/1999/37 of 8 April 1999, ESCOR 1999, Suppl. 3, 138).

<sup>105</sup> CHR/RES/1993/36, see above, para. 1.

<sup>106</sup> First in CHR/RES/1994/32 of 4 March 1994, ESCOR 1994, Suppl. 4, 112, para. 1, and last in CHR/RES/1997/50, see note 104, para. 1.

<sup>107</sup> CHR/RES/1999/37, see note 104, para. 1 simply takes note of the dialogue established by the Working Group with states.

<sup>108</sup> CHR/RES/1995/81 of 8 March 1995, ESCOR 1995, Suppl. 4, 241, paras 7(a) and (b) (Special Rapporteur on Toxic Waste), and CHR/RES/1994/41 of 6 March 1994, ESCOR 1994, Suppl. 4, 135, para. 3(a) (Special Rapporteur on the Independence of the Judiciary), respectively.

<sup>109</sup> The working methods are reprinted in: Doc. E/CN.4/1998/44, Annex I, para. 18.

nable to that taken by the Human Rights Committee, which also renders decisions by default, i.e. based on the facts alleged, if the state in question does either not cooperate at all or simply contradicts the allegations in general terms.<sup>110</sup> A necessary prerequisite for such determination is that the information submitted by the source is sufficient, but the Working Group requests supplementary information from the source before deciding that the factual basis is insufficient<sup>111</sup> and uses other UN human rights mechanisms, such as the Special Rapporteur on Torture, or the Special Rapporteur on Cuba.<sup>112</sup>

Although the Working Group does not indicate the legal basis for its procedure, the comparison with the practice of the Human Rights Committee reveals that it is to be found in the obligation of the states to cooperate with the mechanism. Whereas this obligation under the First Optional Protocol to the ICCPR derives from article 4 para. 2, it is the general obligation of the UN Member States to cooperate with the UN bodies that serves as the legal foundation in the case of the Working Group. Thus, the provision of Article 56 of the Charter, usually limited in scope and effect,<sup>113</sup> assumes a particular importance in the context of human rights.

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<sup>110</sup> See, e.g., *Mojica v. Dominican Republic*, Communication No. 449/1991 view of 15 July 1994, *HRLJ* 17 (1996), 18 et seq., para. 5.2; *Mukong v. Cameroon*, Communication No.458/1991 view of 21 July 1994, *RUDH* 6 (1994), 457 et seq., para. 9.2; generally: C. Tomuschat, "Weitere Entwicklung der Beweisregeln für das Individualbeschwerdeverfahren vor dem Menschenrechtsausschuß", *EuGRZ* 7 (1980), 317; M. Nowak, "On Article 5 of the First Optional Protocol", 690 et seq., Mn. 4, in: M. Nowak (ed.), *Covenant on Civil and Political Rights. Commentary*, 1993. On the comparable approach of the Inter-American Commission on Human Rights see J. Kokott, *Das Interamerikanische System zum Schutz der Menschenrechte*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.92, 1986, 79-81.

<sup>111</sup> See, e.g., Decision 16/1995 concerning Peru (Doc. E/CN.4/1996/40/Add.1), para. 5(d)-(f) and para. 6; Decision 33/1995 concerning Turkey (*ibid.*), para.11(a).

<sup>112</sup> See generally, Decision 7/1992 concerning Peru, *ibid.* para. 5; Doc. E/CN.4/1993/24, para. 7 and Decision 11/1992 concerning Cuba (*ibid.*), para. 6(d); Decision 12/1993 concerning Cuba (Doc. E/CN.4/1994/27), para. 6(c).

<sup>113</sup> For this characterization see R. Wolfrum, "On Article 56", 793 et seq., Mn. 2 and 5, in: Simma, see note 28.

When evaluating contradicting evidence, the Group uses a medium standard of evidence, that of "convincing evidence"<sup>114</sup> as opposed to evidence beyond a reasonable doubt. By lowering the standard of evidence, the Working Group follows the example of the Inter-American Court of Human Rights in the Velásquez Rodríguez Case.<sup>115</sup> In conjunction with the practice of rendering opinions comparable to default judgements, the procedural rules of the Working Group considerably ease the objective burden of proof resting upon the source, and thus strengthen the position of the individual represented before the Working Group. The application of these procedural rules also bears witness to the Group's self-image as a *quasi*-judicial body. It even goes beyond the practice of the Human Rights Committee in that when its opinions conclude the existence of a violation, they also contain the request that the state take "the necessary steps to remedy the situation in order to bring it into conformity" with the applicable international human right norms. The Working Group considers the release of the victim as fulfilling this request.<sup>116</sup> This practice can be explained by the legal concept of deprivation of liberty as a continuing violation. Consequently, it can be terminated only by releasing the victim.<sup>117</sup>

The procedural achievements analyzed so far are not equalled by a development of enforcement machinery. In this respect, the opinions of the Working Group suffer from the same weakness as do the views of the Human Rights Committee — they lack legally binding force.<sup>118</sup> It is

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<sup>114</sup> See, e.g., Decisions 9, 10 and 14/1992 concerning Cuba (Doc. E/CN.4/1993/24), para. 6(h); Decision 36/1996 concerning Indonesia (Doc. E/CN.4/1997/4/Add.1), para. 19; Decision 10/1995 concerning Peru (Doc. E/CN.4/1996/40/Add.1), para. 6.

<sup>115</sup> *Manfredo Velásquez Rodríguez v. Honduras*, Judgement of 29 July 1988, Series C No.4; J. Kokott, *Beweislast- und Prognoseentscheidungen bei der Inanspruchnahme von Grund- und Menschenrechten*, 1993, 400 and footnote 1230. The position of the European Court of Human Rights was doubtful, see B. Rudolf, "Beweisprobleme in Verfahren wegen Verletzung von Art. 3 EMRK", *EuGRZ* 23 (1996), 497 et seq. (498-499); but was clarified to be "evidence beyond reasonable doubt", see *Aydin v. Turkey*, Judgement of 25 September 1997, Report of Judgements and Decisions 1997-IV, 1888-89, para. 70.

<sup>116</sup> Doc. E/CN.4/1994/27, para.29(a), Doc. E/CN.4/1995/31, para. 31.

<sup>117</sup> See generally arts 41 and 43 (1) of the ILC Draft on State Responsibility, Report of the ILC on the work of its 48th Sess., Doc. A/51/10, 141 et seq.

<sup>118</sup> On the Human Rights Committee see Nowak, see note 110, 690 et seq., Mn. 33.

regrettable that, due to political considerations, the Commission on Human Rights has not been able to engage in a real follow-up to ensure the implementation of the Group's opinions. It would be unrealistic to hope for a change to the better in the near future, given the fact that the Human Rights Committee shares the same fate. The Working Group should, therefore, at the very least introduce regular reminders to be sent to states that have not yet reported any action taken upon its recommendation.

## 2. Applicable Legal Standards

According to the mandating resolution, the Working Group shall investigate "cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned."<sup>119</sup> When identifying these standards, the Working Group pointed to the UN Body of Principles for the Protection of Detained or Imprisoned Persons<sup>120</sup> which it considered to have codified pre-existing customary law.<sup>121</sup> Furthermore, the Group referred to the ICCPR as being a "declaratory instrument" whose substantive rules are also applicable to states not parties. Despite the legal flaws of this reasoning,<sup>122</sup> it is of utmost relevance, because the Group thus characterizes the standards it uses to assess the arbitrary character of a deprivation of liberty as being customary international law. For this reason, its decisions can be regarded as the relevant prac-

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<sup>119</sup> CHR/RES/1991/42, see note 944, para. 2.

<sup>120</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173 of 9 December 1988, Annex (Doc. A/43/49), 297 et seq.

<sup>121</sup> Doc. E/CN.4/1993/24, Deliberation 02, paras 20 and 25-26. This view is also held by T. Treves, "The UN Body of Principles for the Protection of Detained or Imprisoned Persons", *AJIL* 84 (1990), 578 et seq., (585). But see J. Toman, "The Treatment of Prisoners: Development of Legal Instruments and Quasi-legal Standards", in: G. Alfredsson/P. Macalister-Smith (eds), *The Living Law of Nations, Essays in Memory of Atle Grabl-Madsen*, 1996, 421 et seq., (437-438.), according to whom the Body of Principles is a 'quasi-legal standard' that may only serve as a means of interpreting binding norms.

<sup>122</sup> Critically: J.-Y. Morin, "L'Etat de Droit", *RdC* 254 (1995), 9 et seq., (360) and Rudolf, see note 5, 251-252.

tice of an international organization based on an *opinio iuris* and thus contribute to the concretization of the prohibition of arbitrary detention.

The request, in 1996, of the Commission that the Working Group should apply human rights treaties only to their States parties<sup>123</sup> did not alter the relevance of the practice of the Working Group because it only concerned the *pacta tertiis* rule, but remained silent as to the customary law applicable. For this reason, there was no contradiction when the Working Group announced that it would follow this order,<sup>124</sup> while continuing to find violations of the Universal Declaration.<sup>125</sup> By doing so, it upheld its opinion that the applicable rules are binding as customary law.

In dealing with cases of alleged arbitrary detention, the Working Group has developed a rich and diverse case law. It identified three categories of arbitrary deprivation of liberty – detention or imprisonment (1) imposed without any legal basis, (2) imposed because of the exercise of human rights, and (3) imposed in violation of the principle of fair trial.<sup>126</sup> Of these categories, the last covers the greatest variety of situations. The Group has used it to denounce arrest without a specified arrest warrant, incommunicado detention (without giving any indication as to the maximum length of such detention), unfair *habeas corpus* procedures, excessively long pre-trial detention, cases of torture in detention, decisions by courts that were not competent under national law, by courts established *ex post facto*, or by courts that were either not independent or not impartial. It has found violations of fair trial by judgements that were rendered after a secret procedure or in violation of the right to have defense witnesses examined, or judgements that were based on a confession obtained through torture, or violations of the principle of *ne bis in idem*. For the most part, the decisions taken by the Working Group conform with the case law of other international supervisory bodies. This fact and the general approval of its work expressed by the Commission permit the conclusion that the case law of the Group helped to concretize the content of the customary law pro-

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<sup>123</sup> CHR/RES/1996/28 of 19 April 1996, ESCOR 1996, Suppl. 3, 109, para. 5.

<sup>124</sup> Doc. E/CN.4/1997/4, para. 9.

<sup>125</sup> See, as the most recent examples, Opinion 1/1998 (concerning Cuba), Doc. E/CN.4/1999/63/Add.1, para. 15, and Opinion 2/1998 (concerning the United Arab Emirates), *ibid.*, para.16.

<sup>126</sup> For a critical analysis of the standards applied, see Rudolf, see note 5, 240-310.

hibition of arbitrary detention as encompassing these types of detention.

### 3. On-site-missions

The Working Group also established its power to evaluate internal legislation for compatibility with international standards. It uses this power occasionally in the examination of individual cases<sup>127</sup> and regularly in missions undertaken in UN Member States. In its missions undertaken before 1998, the Group also laid the foundation for the minimum requirements for its on-site missions. In particular, it has the right to visit places of detention and to confer in private with detainees freely chosen by itself and using its own interpreters.<sup>128</sup> Perhaps most surprising about the missions undertaken by members of the Working Group is that they include such visits because the conditions in detention only exceptionally fall within the mandate of the Group.

As in the case of the Working Group on Enforced Disappearances, the lack of support by the Commission weakens the follow-up of such missions. However, these missions constitute a rich source of information on the situation within a given country<sup>129</sup> and can provide veritable advisory services if a state is willing to implement the recommendations addressed to it by the Working Group.<sup>130</sup>

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<sup>127</sup> See, e.g., Decision 11/1993 (concerning Syria), Doc. E/CN.4/1994/27, para. 5(d); Decision 67/1993 (concerning Nigeria), Doc. E/CN.4/1995/31/Add.1, para. 8.

<sup>128</sup> As was only agreed upon during the first mission to Vietnam, see Doc. E/CN.4/1995/31/Add.4, paras 2, 8-9 and 47. See also Doc. E/CN.4/1997/4/Add.3, para. 58 (mission to Bhutan); Doc. E/CN.4/1997/4/Add.4, para. 4 (mission to Nepal) and Doc. E/CN.4/1997/4/, para. 32 (preparatory visit to the People's Republic of China). For the subsequent application of these principles see the report on the mission to People's Republic of China in: Doc. E/CN.4/1998/44/Add.2, paras 9-10.

<sup>129</sup> See, e.g., the highly critical report on the situation in Peru, Doc. E/CN.4/1999/63/Add.1, especially the serious flaws of the criminal law and the court system.

<sup>130</sup> The mission to Bhutan is exemplary in this respect, see Doc. E/CN.4/1995/31/Add.3 and the report on the follow-up mission in: Doc. E/CN.4/1997/4/Add.3.

#### 4. Evaluation

The Working Group has established itself as a pioneer thematic mechanism, both as regards the fairness of its procedure to investigate individual cases of alleged violations and as regards the unequivocal evaluation of such cases. It has become a full-fledged supervisory mechanism outside the specific human rights treaties,<sup>131</sup> although it rests solely on a consensus of the Commission on Human Rights and the obligation of the UN Member States to cooperate with the organs of the organization. To a large extent, the Group's activist approach is probably due to its composition — its five members were not diplomats, but either legal practitioners, law professors, or former human rights activists. However, developments within the Commission in 1997 have shown that the consensus is not permanent but that some states intend to weaken this mechanism and to question the results achieved so far.

### VI. Case Study No. 3: The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

#### 1. Origins and Procedure

The mandate of a Special Rapporteur on “contemporary forms of racism, racial discrimination, xenophobia and related intolerance” was established in 1993 responding to a need identified by African and Asian states. Their concern had been caused by the rise in industrialized states of violent incidents having a racist or xenophobic motivation. Although most Western states agreed upon this need in principle, they supported the draft resolution only after agreement had been reached that it would be a *quid pro quo* for the establishment of a Special Rapporteur on Freedom of Opinion and Expression.<sup>132</sup> They also insisted that the restriction to racism in Europe and North America be eliminated,<sup>133</sup> which would have made this thematic mechanism the first to

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<sup>131</sup> See also Morin, see note 122, 361; F. Sudre, *Droit international et droit européen des droits de l'homme*, 1997, 393, (para. 298).

<sup>132</sup> As expressed by the United States of America, Doc. E/CN.4/1993/SR.33, para. 12.

<sup>133</sup> See the draft resolution, reprinted in: ESCOR 1993, Suppl. 3, para. 631.

deal exclusively with violations in certain regions of the world. Moreover, the Western group demanded that the terms "racial discrimination, xenophobia and related intolerance" be included in the text, and they insisted on a clear distinction between private and state actions.<sup>134</sup> The resolution adopted reflects these changes.<sup>135</sup> Although it contains no explicit reference to the power to examine individual cases of alleged violations, there was common understanding that the new mechanism was to be a thematic one, and that it should, therefore, possess this power.<sup>136</sup>

From a procedural perspective, the activities of the Special Rapporteur meet with considerable criticism. In the beginning, he published allegations of violations without having given the states concerned the opportunity to reply to them.<sup>137</sup> His explanation that he lacked sufficient financial support to act otherwise<sup>138</sup> cannot justify this blatant violation of a fair procedure before an international body. Later, the information he transmitted to states and published in his reports was a mix of individual cases of alleged violations and allegations of a general nature.<sup>139</sup> Thus, not only does it remain unclear what kind of response he expected to the latter, but it also creates the impression of truthfulness of such accusations if read together with his general conclusions and recommendation.

This approach is all the more dangerous as states use this thematic mechanism to reproach other states with human rights violations. Thus, states turn the thematic mechanism into a propaganda forum for their political objectives, a deplorable fact aggravated by the sometimes sloppy drafting of the reports, which does not clearly distinguish between positions held by states and those held by the Special Rapporteur.

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<sup>134</sup> See, e.g., the statements of Denmark and Austria, Doc. E/CN.4/1993/SR.48, paras 8 and 6, respectively.

<sup>135</sup> CHR/RES/1993/20 of 2 March 1993, ESCOR 1993, Suppl. 3, 102.

<sup>136</sup> See the two drafts ESCOR 1993, Suppl. 3, paras 631 and 632. Therefore, the contrary view expressed by de Frouville, see note 5, 44, is incompatible with the drafting history, and cannot be reconciled with the subsequent practice of the Special Rapporteur, see Rudolf, see note 5, 400, footnote 21.

<sup>137</sup> See his first three reports to the Commission (Docs E/CN.4/1994/66, E/CN.4/1995/78, E/CN.4/1996/72).

<sup>138</sup> Doc. A/50/476, para. 17 and Doc. A/51/301, para. 4.

<sup>139</sup> See, e.g., Doc. E/CN.4/1997/71, paras 47-49 and 78-79 (systematic discrimination of the Australian aborigines, and political situation in Quebec in 1995 after the failed referendum on secession).



teur.<sup>140</sup> This negligence has led to the dangerous precedent that the Commission on Human Rights asked the Special Rapporteur to correct his report on the point in question.<sup>141</sup> Instead of clearly marking that he merely reprinted the position of a government, the Special Rapporteur chose to ask that state whether it upheld its position, thus abdicating the responsibility for his own reports.<sup>142</sup>

In 1997, the Special Rapporteur began to conclude the information on specific states and their replies with his own observations, but these were limited to expressing the hope that the state would resolve the case with due regard to the human rights in question, or to requiring information as to the outcome of legal proceedings.<sup>143</sup> He did not, however, institute any kind of follow up. As a result, the impact of the reports is low.

In 1999 he changed his approach again by announcing that he would not include in the report any allegations to which the government in question replied within a reasonable time and if the Special Rapporteur finds that the allegations are not justified.<sup>144</sup> This procedure may have been prompted by a hope that states consider it an incentive to cooperate with the mechanism. However, this approach conflicts with the public character of the work of the thematic mechanisms and should therefore be abandoned in the future. The same criticism applies to the fact that the Special Rapporteur yielded to the request of the United States of America not to publish its reply to the report on the Special Rapporteur's mission to that state.<sup>145</sup>

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<sup>140</sup> The disputed text reprinted the position taken by the Israeli government according to which "[t]he use of Christian and secular European anti-Semitism motifs (*sic*) in Muslim publications is on the rise, yet at the same time Muslim extremists are turning to their own religious sources, first and foremost the Qur'an, as a primary anti-Jewish source", Doc. E/CN.4/1997/71, para. 27, No.1.

<sup>141</sup> CHR/DEC/1997/125 of 18 April 1997, ESCOR 1997, Suppl. 3, 283 et seq.

<sup>142</sup> See Doc. A/52/471, para. 7.

<sup>143</sup> Doc. E/CN.4/1997/71 (fourth report to the Commission).

<sup>144</sup> Doc. E/CN.4/1999/15, para. 101.

<sup>145</sup> Doc.E/CN.4/1997/71, para. 14.

## 2. Applicable Legal Standards

In his reports, the Special Rapporteur neither bases the explanation of his understanding of the terms “racism, racial discrimination, xenophobia and related intolerance” on legal texts nor elaborates on the question of the circumstances under which a state is obliged to take actions to prevent or punish private activities of this kind. In particular, he simply lists provisions prohibiting discrimination, but does not clearly distinguish between racial discrimination and xenophobia.<sup>146</sup> He neither reveals his understanding of article 1 of the Convention on the Elimination of all Forms of Racial Discrimination<sup>147</sup>, nor takes into account the work of the Committee on the Elimination of Racial Discrimination. Such approach, however, would have been necessary, since so far the term “xenophobia” has not been used in international instruments for the protection of human rights. As a consequence, it cannot be determined whether his actions are based on an *opinio iuris*, and can not therefore contribute to concretizing the customary international law rules in question. For the states concerned it remains unclear whether they are reproached with a violation of international rules in force for them.

Moreover, the absence of clear distinctions between state and private actions leads to undifferentiated conclusions as to the obligations of states. In particular, the Special Rapporteur presumes a general responsibility of the state for discrimination from whatever source and consequently postulates a comprehensive obligation of the state to wipe out any consequences arising out of past discrimination.<sup>148</sup> By doing so, he disregards the wide margin of appreciation granted to states by international instruments to eliminate discrimination.<sup>149</sup> Furthermore, some of the views he expressed reveal that he works on the widely contested assumption that the prohibition of racial discrimination is of higher value than freedom of opinion.<sup>150</sup> As he does not base his position on sound

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<sup>146</sup> Doc. E/CN.4/1994/66, para. 10-12.

<sup>147</sup> UNTS Vol. 660 No. 9464.

<sup>148</sup> See, in particular, his indiscriminate use of the term “structural discrimination”, Doc. E/CN.4/1996/72/Add.1, paras 31 and 40.

<sup>149</sup> For a more detailed discussion of this problem see Rudolf, see note 5, 424-426.

<sup>150</sup> See, e.g., Doc. E/CN.4/1995/87/Add.1, paras 104-107 (mission to the United States) and Doc. A/49/677, para. 144 and Doc. E/CN.4/1997/71/Add.1, para. 68(b) (mission to Colombia).

legal reasoning that would take into account the declarations to the contrary made by states upon their ratification of the Convention on the Elimination of all Forms of Racial Discrimination,<sup>151</sup> or the case law of international human rights bodies,<sup>152</sup> his views remain purely subjective, thus depriving them of the authority that a legal foundation — even if contested — would give them.

### 3. On-site-missions

Like other thematic mechanisms, the Special Rapporteur on Racism has undertaken missions in UN Member States, most importantly in industrialized states such as the United States of America, France, Germany, and the United Kingdom.<sup>153</sup> However, most of the reports lack informational value either because of their brevity or because the substantive areas covered are too vast. The only exception is the report on the mission to the United States that he undertook in 1994. However, despite the unusual length of both the visit and the report the Special Rapporteur did not succeed in making convincing recommendations because they lack either a sufficient factual or legal basis. For example, he calls for affirmative action programs and criticizes, in general terms, the US Supreme Court as having led the attack on such programs.<sup>154</sup> Yet he does not even consider the widespread counter-argument according to which such programs backfire, nor does he examine the case law of the Court. His criticism of the electoral system<sup>155</sup> displays the same superficiality because he neither asks whether international human rights re-

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<sup>151</sup> Such declarations were made at that time, *inter alia*, by France, the United Kingdom and the United States, see Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1995, 102 (Doc. ST/LEG/SER.E/14).

<sup>152</sup> In particular the Judgement in *Jersild v. Denmark* of 23 September 1994, Series A No. 298, paras 30-35 and the view of the Human Rights Committee in *Faurisson v. France*, Communication No. 550/1993 of 8 November 1996 (CCPR/C/58/D/550/1993).

<sup>153</sup> See Doc. E/CN.4/1995/78/Add.1; Doc. E/CN.4/1996/72/Add.3, Add. 2 and Add.4, respectively.

<sup>154</sup> Doc. E/CN.4/1995/78/Add.1, para. 56.

<sup>155</sup> Doc. E/CN.4/1995/78/Add.1, para. 57.

quire a proportionate system,<sup>156</sup> nor does he mention the strict conditions for delimiting electoral precincts set up by the Supreme Court.<sup>157</sup>

A positive feature of the reports is their outspokenness, which includes critical remarks on the highest state organs.<sup>158</sup> However, the reports do not contain sufficiently specified recommendations, which deprive them of their power of persuasion and render a follow-up of them highly difficult. Furthermore, all too often, the Special Rapporteur does not distinguish between recommendations based on purely political considerations and those based on legal obligations of the state concerned. A change for the better can be observed in the two missions undertaken in 1996, in which the Special Rapporteur limited the questions examined and based his evaluation on the legal commitments of the states visited.<sup>159</sup>

#### 4. Evaluation

Admittedly the Special Rapporteur's task is complicated by the vastness of the subject — a right to equality that pervades every aspect of human and societal life. For this reason, in future he should limit his consideration of individual communications to a specific type of violation and announce the (changing) topic every year in advance. Thus, he would not only publicize his criteria for choosing the allegations he transmits to governments, but he would also be able to take advantage of the expertise of NGOs working in that field. Such self-limitation would permit him to analyze the legal standards applicable and to make useful and well-founded recommendations to States.

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<sup>156</sup> The European Court of Human Rights, e.g., rejects such conclusion, see the analysis of J. Frowein, "Commentary on Article 3 of the First Additional Protocol", in: J.Frowein/H. Peukert, *EMRK. Kommentar*, 1996.

<sup>157</sup> See, e.g., *Shaw et al. v. Reno*, Attorney General, 113 S.Ct. 2816 (2824) (1993).

<sup>158</sup> See, e.g., Doc. E/CN.4/1996/1996/72/Add.2, para. 45, criticizing the statement of the German government according to which Germany is no immigration country.

<sup>159</sup> Doc. E/CN.4/1997/71/Add.1 (Colombia) and Add. 2 (Kuwait). The former mission concerned the realization of the land rights of the black and the indigenous population; the latter mission was undertaken to investigate the situation of foreign houseworkers in Kuwait.

## VII. Conclusion

The diversity of the practice of the thematic mechanisms examined here illustrates the flexibility of this type of special procedure available to the Commission on Human Rights. A common feature is the examination of individual cases, which does not depend on the specific wording of the enabling resolution, but rather on the self-image and courage of the person or persons entrusted with a mandate. The Working Group on Enforced Disappearances (as well as the Special Rapporteur on Religious Intolerance and the Special Rapporteurs on Extrajudicial Executions and on Torture, who could not be treated here) have prepared the ground for such actions, so that the newer thematic mechanism no longer had to struggle for the acceptance of their activities in this respect. The establishment of such extra-conventional complaints procedures constitutes a major breakthrough for the international protection of human rights as it submits states to international control irrespective of their ratification of specific human rights instruments and their control mechanisms. The existence of the thematic mechanisms reflects the universality of the human rights which are their subject and to whose concretization they contribute.

Nevertheless, there are considerable differences in the way of dealing with allegations of human rights violations. They range from merely reprinting the information submitted and governmental replies to a quasi-judicial procedure that is equivalent to that of the Human Rights Committee. In fulfilling their task of "examining cases", the Special Rapporteurs and members of Working Groups are faced with the difficult decision of whether a diplomatic or a judgmental approach is more promising. The experience of the Working Group on Enforced Disappearance shows the limits of a careful and diplomatic approach: It did not further the cooperativeness of states which had a particularly serious human rights record in the specific field. At the same time, by not reminding uncooperative states regularly, let alone by naming them publicly, and by not clearly attributing human rights violations to them, the Working Group deprived itself of one of the few means of exerting public pressure. In contrast, the Working Group on Arbitrary Detention has applied a judgmental approach firmly and consistently without provoking a higher rate of unresponsiveness. On the contrary, it has even succeeded in carrying out on-site missions to countries such as the People's Republic of China or Indonesia, which are among the states most reluctant to accept international monitoring of human rights.

From a procedural perspective, it is noteworthy that the Commission on Human Rights expects the thematic mechanisms to allow states to comment on allegations before their publication and that it calls upon the Rapporteurs and Working Groups to make observations on the cases before them. Thus, it asks for a minimum standard of procedural fairness and generally accepts their quasi-judicial role, and there is no reason why some thematic mechanisms fail to fulfill these requests. However, the authority of their observations depends on their factual basis and on a careful determination of the substance of the human rights applicable. With regard to the investigation of the truthfulness of allegations, all thematic mechanisms are confronted with the inherent limits of their powers, namely the lack of powers to investigate *in situ* without the consent of the state concerned. For this reason, the clarification of an individual case depends largely on the cooperation of the states concerned, and the thematic mechanisms have to develop a method to evaluate the truthfulness of a governmental reply. Here, again, the thematic mechanisms differ considerably: While some content themselves with reprinting the allegations and replies, others request a comment from the source of the initial information. In view of the Commission's call upon the thematic mechanisms to make observations, the former approach falls short of the respective mandate. The difficulties encountered in clarifying cases are increased by the high number of individual cases transmitted to the thematic mechanisms. Given the insufficient financial resources of the Office of the UN High Commissioner for Human Rights and the unwillingness of UN Member States to improve the situation despite the lip-service repeatedly paid to this objective,<sup>160</sup> the only workable solution may be that a Working Group or Special Rapporteur announces a main topic that will constitute the annual centre of interest. Moreover, further support may be gained by resorting to independent academic research institutions, provided that the Working Group or Special Rapporteur remains in control of the evaluation of facts.

A further weak point in all thematic mechanisms examined here is the follow-up of their recommendations. In this respect, they share the fate of other UN bodies, such as the Human Rights Committee and other treaty monitoring bodies. As the Commission is not willing to name states, however uncooperative they may be, the thematic mechanisms have tried a number of ways to develop a flexible scale of increasing public pressure. Yet, all of them are too reluctant to denounce,

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<sup>160</sup> See, e.g., CHR/RES/1999/54 of 27 April 1999, ESCOR 1999, Suppl. 3, 185.

on a regular basis, non-compliant states for their violation of their obligation as a UN Member State to cooperate with UN bodies. In addition to resorting to this means of public pressure, the thematic mechanisms should copy the practice of the Working Group on Arbitrary Detention to take "default decisions," i.e. to evaluate alleged facts on the basis of credible information before it if the state in question does not provide substantiated information to the contrary. As the comparison of the activities of the thematic mechanisms shows, this power is inherent in the competence of a thematic mechanism and is based on the obligation of the UN Member States to cooperate with UN bodies and, therefore, is not unique to the Working Group on Arbitrary Detention.

Although the thematic mechanisms were designed to monitor respect for human rights on a world-wide level, their approach of singling out countries with particularly serious implementation deficit has gained acceptance. In a number of cases, the reports on missions undertaken by the thematic mechanisms examined here amount to *de facto* country reports, sometimes more outspoken than those made by Country Rapporteurs. The reason for this development may be found in the fact that some of the governments that invited a thematic mechanism did so in order to rally international support for their attempts to deal with human rights abuses committed by a past regime. In these cases, the governments did not view the mission of thematic mechanisms as an affront to their country, and therefore were willing to support a mission actively. In contrast, the establishment of a country mechanisms is a highly politicized decision, which in most cases constitutes the ultimate resort for the Commission in cases of massive, widespread, and systematic human rights violations committed by a government. For this reason, visits carried out by a thematic mechanism may face less obstacles, although both kinds of on-site missions depend on the consent of the state concerned.

Despite the less confrontative character of a visit undertaken by a thematic mechanism, their follow-up is weak. Only in a few cases follow-up missions were undertaken, and subsequent reports do not regularly remind states of their obligation to report on the measures they have taken pursuant to the recommendations made at the end of a visit. A positive result of on-site missions is that the thematic mechanisms established their power to evaluate internal legislation as to their conformity with international standards. Moreover, they permit the Working Group or Special Rapporteur to contact local human rights organizations, and the information thus gathered is helpful in the evaluation of individual complaints. For these reasons, the Commission on Human Rights is equipped with a useful tool to monitor the implementation of

international human rights, but there remains potential for improvement.

As regards the concretization of human rights under customary international law, the practice of the Working Group on Arbitrary Detention is by far the most fruitful. Its rich case law and the lack of substantial opposition to its interpretation has furthered not only the development of the concept of the right to a fair trial, but also the understanding that detention imposed after an unfair procedure is in itself illegal. The contribution of the Working Group on Enforced Disappearances is less significant, albeit still noteworthy, because their practice was less extensive and because it was not based clearly on an *opinio iuris* as the Group only recently started to evaluate facts on the basis of the 1993 UN Declaration on Enforced Disappearance. In contrast, the Special Rapporteur on Racism and Racial Discrimination had no impact on the concretization of customary human rights because his practice of dealing with individual complaints is not based on legal considerations.

Generally speaking, the contribution of a thematic mechanism to the concretization of a human right under customary law depends on a clear identification of the rules applicable and an unequivocal evaluation of the facts transmitted to it. The work of the Working Group on Arbitrary Detention is exemplary in this respect: In its first report, the Group categorized the cases of arbitrary detention, and it referred to human rights instruments on which it based its categorization. Moreover, it clearly stated that it considered the prohibition of arbitrary detention as being binding upon states even outside specific human rights treaties. By clearly identifying the legal yardstick to be applied, the Working Group enabled states to engage in a debate on the contents of the right to liberty, an interaction that is a necessary precondition for the concretization of customary human rights. The fact that other thematic mechanisms are less outspoken can in part be explained by the historical development, namely the need to gain acceptance for a mechanism. Today, however, such self-restraint is no longer warranted for thematic mechanisms if they were established by consensus. On the contrary, the lack of a clear identification of the legal principles underlying the work of a thematic mechanism deprives it of authority because its conclusions and recommendations remain purely subjective.

The present comparison between three thematic mechanisms has shown the potential for improved protection of human rights through this type of extra-conventional procedure. Whether this potential will be used in the future depends on the persons entrusted with the mandates and on the reaction of the Commission on Human Rights. The



search for consensus within the Commission should not lure states that are seriously interested in furthering human rights into accepting compromises that restrict this potential or even endanger the significant achievements made so far. Although the thematic mechanisms constitute an accepted means for monitoring the respect for human rights on a world-wide level, this *acquis onusien* has to be defended during every session of the Commission.