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Human Rights through the Backdoor: The Contribution of Special Procedures to the Normative Coherence and Contradictions of International Human Rights Law

Elvira Domínguez-Redondo*

1. Introduction

Special procedures are human rights monitoring mechanisms established by the United Nations Human Rights Council to address either specific country situations or a phenomenon of human rights concern worldwide. The existence of special procedures is the unintended result of the competence accorded to the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the 1967 Economic and Social Council Resolution No 1235 (XLII),¹ by which these Commissions were authorised 'to examine information relevant to gross violations of human rights and fundamental freedoms'.² This authorisation was understood as conferring power to nominate experts who could monitor the situation of human rights in specific countries (geographic mandates). Since 1980 this practice has been extended to, and largely replaced by, monitoring specific violations of human rights on a worldwide basis (thematic mandates). The lack of foresight in the creation of mechanisms which would come to be known as 'special procedures' is a fundamental factor in explaining the diversity of legal frameworks that they use to promote and protect human rights. The conditions which regulate their creation and renewal also contribute to their variety.

The birth of a special procedure is dependent on approval of a resolution creating the mandate by a simple majority of the UN Human Rights Council (or by its precursor, the Commission on Human Rights).³ As a consequence, the resolutions determining a special procedure mandate, including scope of competence and method of work, result from political negotiations between states. As these matters are often framed in vague and open-ended terms, special procedure mandate holders have been afforded great flexibility and autonomy

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¹ Question of the violation of human rights and fundamental freedoms, including politics of racial discrimination and of segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories, 6 June 1967.

² *Ibid.* at para 2.

³ Until 2006, the Commission on Human Rights, a subsidiary body of the Economic and Social Council created in 1946, was the main human rights policy-making organ of the United Nations. It consisted of representatives of 53 states and met publicly once a year in Geneva for a six-week session: see ECOSOC Res 5 (I), 16 February 1946; and ECOSOC Res 9 (II), 21 June 1946. The Human Rights Council was created by GA Res 60/251, 15 March 2006. The Human Rights Council is a subsidiary organ of the UN General Assembly consisting of representatives of 47 states, which meets no fewer than three times every year for a period of no less than ten weeks.

when operationalising their activities. Such flexibility has led to a diversity of methodologies, and to the progressive expansion of the competences of special procedures through practice, adding to the complexity of the functions they have come to fulfil. Today, most special procedures cover not only the examination of situations of gross violations of human rights, but also extend to the consideration of complaints from individuals; the use of 'urgent appeals' to protect the life and/or physical integrity of people allegedly under imminent risk; the conduct of fact-finding missions; the provision of technical assistance; and the codification of emerging norms of international human rights norms[1].⁴ This latter activity will form the prime focus of this chapter.

This chapter explores the contribution of mandate holders of special procedures to the coherence of international human rights standards using as a paradigm their diverse interpretation of the legal framework, which serves as the basis of their operations. It evaluates the extent to which the human rights norms developed by the special procedures are consonant with other international efforts to regulate the same matters.

The chapter is divided into four sections. Sections 1 to 3 provide an overview of the role of special procedures in the creation and/or consolidation of new norms of international human rights in the context of clarifying their own scope of competences. Special attention is paid, in the final section, to the most salient human rights instruments drafted by mandate holders, understanding as such, those that have received approval or endorsement by their parent body, the Commission on Human Rights and, sometimes, also the General Assembly. Whether these efforts contribute to the strengthening of emerging trends in international law (for example, the recognition of the right to water, or sexual orientation as human rights issues), or whether they add a layer of complexity to the quest for supporting the universality of human rights on the basis of the existence of uniform norms on a given topic, remains an open question, as will be demonstrated.

2. Early Conceptual Contributions by Special Procedures to International Human Rights

The expertise of special procedures mandate holders has been regularly used to assist in the codification of new international human rights standards.⁵ As early as 1976, the Commission on Human Rights ordered its Ad Hoc Working Group of Experts on Southern Africa to evaluate the Declaration and Programme of Action of the International Seminar on

⁴ A more detailed explanation of the functions covered by special procedures can be found in Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff, 2009).

⁵ Freedman, *The United Nations Human Rights Council: A critique and early assessment* (Routledge, 2013) at 110–1.

the Eradication of Apartheid and in Support of the Struggle for Liberation in South Africa.⁶ Conceptual contributions by experts in charge of special procedures have been facilitated by the political nature of the resolutions to which they owe their existence. The open-ended nature of these resolutions has allowed mandate holders to use a wide range of binding and non-binding national, regional and international norms as normative frameworks to evaluate the information brought before them. The codification of norms by special procedures has at times culminated in the approval of a Declaration by the General Assembly which may be the leading or exclusive normative framework for a given field, such as extreme poverty, internally displaced persons or business and human rights.⁷

Mandate holders of special procedures are formally required to evaluate the information they receive in the light of any internationally recognised human rights standards relevant to their mandate, as stated by the operative paragraph 6 of their Code of Conduct,⁸ which codified a practice already well established among them. However, some mandates were created to monitor rights with no clear normative framework identified; for example, the mandates on foreign debt, the use of mercenaries as a means of impeding the right to self-determination, the right to water and the right to food. Therefore, some mandate holders have had to focus on clarifying, and sometimes codifying, the human rights standards they are called upon to promote and implement.

The oldest thematic procedure, the Working Group on Enforced or Involuntary Disappearances, has included thematic studies in its reports from its inception, relying on a wide range of international human rights instruments.⁹ Its 1981 report included a study of the wide range of civil, political, economic, social and cultural rights infringed by the practice of enforced or involuntary disappearances.¹⁰ The Working Group based its analysis on the full range of relevant human rights instruments. These included the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the American Declaration on the Rights and Duties of Man; the American Convention on Human Rights (ACHR); the European Convention on Human Rights (ECHR); the Standard Minimum Rules for the Treatment of Prisoners;¹¹ and Additional Protocol 1 to the Geneva Convention of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts. It also

⁶ See UNCHR Res 8 (XXXII), 4 March 1976; and UNCHR Res 6 (XXXIII), 4 March 1977.

⁷ See section 4 below.

⁸ HR Council Res 5/2, 18 June 2007.

⁹ The Working Group on Enforced Disappearances was established by the UNCHR Res 1980/20, 29 February 1980.

¹⁰ E/CN.4/1435, at paras 184–187.

¹¹ ECOSOC Res 663 C (XXIV), 31 July 1957.

relied on other relevant resolutions of the General Assembly,¹² as well as the report of the Working Group on the situation of human rights in Chile.¹³ In subsequent reports, the Working Group on Enforced or Involuntary Disappearances has been completing and updating its normative framework by focusing on other international human rights provisions potentially violated in relation to groups affected by disappearances such as children and mothers¹⁴ or other relatives of the victims.¹⁵

The Special Rapporteur on arbitrary and summary execution is another early example of the breadth of normative standards used by special procedures to delimit the conceptual and legal contours of their mandates. From his first report in 1983, the then Special Rapporteur, Amos Vako, listed the international and national standards used to carry out his work, including the UDHR; ICCPR; ACHR; ECHR; the African Charter on Human and Peoples' Rights; commentaries of the Human Rights Committee; Code of Conduct of Law Enforcement Officials;¹⁶ UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment;¹⁷ Standard Minimum Rules for the Treatment of Prisoners;¹⁸ Geneva Conventions of 1949 and their Protocols; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Suppression and Punishment of the Crime of Apartheid; and numerous General Assembly resolutions.¹⁹

In the context of delimiting the scope of his mandate, the first Special Rapporteur on torture, Peter Kooijmans, addressed from his first report the meaning of 'torture' in international law, as well as the judicial and administrative measures available to prevent it and mitigate its effects.²⁰ The report contained an analysis of the conditions under which torture is normally perpetrated.²¹ More significantly, it introduced innovative approaches to the topic of torture. The Special Rapporteur was the first human rights monitoring body to recognise rape as a method of torture and to report on the use of gender-based torture such as rape, sexual assaults and sexual threats.²² Kooijmans was also ahead of his time when

¹² GA Res 34/179, 17 December 1979; and GA Res 35/188, 15 December 1980.

¹³ A/33/331.

¹⁴ See E/CN.4/1492, at paras 164–171; and E/CN.4/1984/21, at paras 151–161.

¹⁵ E/CN.4/1984/21, at paras 147–150.

¹⁶ GA Res 34/169, 17 December 1979.

¹⁷ GA Res 3452 (XXX) annex, 9 December 1975.

¹⁸ *Supra* n 11.

¹⁹ See E/CN.4/1983/16, at paras 22–47. On the conceptual analysis of the scope of the mandate, see paras 48–67.

²⁰ See E/CN.4/1986/15, at paras 22–54.

²¹ *Ibid.* at paras 112–117.

²² E/CN.4/1986/15, at para 119. This has been repeatedly established by subsequent special rapporteurs and relevant case law. See, for instance, report of the Special Rapporteur on torture, A/HRC/7/3, at para 36. On the significance and limitations of the recognition of rape as torture by the

he examined the legal framework applicable to the trade of implements specially designed to implement torture in 1986.²³ This was a topic not properly considered by intergovernmental bodies until the twenty-first century, again by another mandate holder of the mandate on torture, Theo van Boven,²⁴ with the first – and still unique – set of multilateral trade controls set up by the European Union in 2005.²⁵ This expansive approach by the first mandate holders found opposition among states [it is immediate as these are the very first mandate holders][2], although the Commission on Human Rights did not immediately respond to their objections.²⁶ The Code of Conduct of mandate holders of special procedures has since limited this practice²⁷ and, currently, special procedures may only rely on treaties ratified by the state concerned when examining violations of human rights in relation to specific states.²⁸

3. Clarifying or Obscuring Contentious Human Rights Issues?

Many mandate holders of special procedures have continued to devote a significant part of their reports to explaining the legal framework within which they develop their work. However, this activity has rarely followed a coherent approach and the outcomes constitute a myriad of analyses on a range of human rights topics. This section presents some of the most salient examples, illustrating the possible overlaps and contradictions within the system. The cases chosen demonstrate that the framework of analysis selected by mandate holders is crucial in determining the outcome and divergences between special procedures' approaches to human rights topics.

A. Hate Speech

Special Rapporteur in 1986, see Blatt, 'Recognizing Rape as a Method of Torture' (1992) 19(4) *New York University Review of Law and Social Change* 821 at 833 and 847. For a compilation of international jurisprudence on the topic, see 'Redress for Rape: Using international jurisprudence on rape as a form of torture or other ill-treatment', 2013, available at: [www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20\(1\).pdf](http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20(1).pdf).

²³ E/CN.4/1986/15, at para 120.

²⁴ See several studies on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destinations and forms: E/CN.4./2005/62, at paras 12–39; E/CN.4/2004/56, at paras 66–68; A/58/120, at paras 22–28; and E/CN.4/2003/69. Other failed attempts to codify the trade of torture equipment can be found in Dymond and Fraha, 'The trade in torture technologies', in ACAT, *A World of Torture* (ACAT-France, 2013) 243.

²⁵ See Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2007] OJ L 200/1; and Regulation (EU) No 1352/2011 of 20 December 2011 amending it (OJ L 338/31).

²⁶ Ramcharan, *The concept and present status of the international protection of human rights: Forty years after the Declaration* (Martinus Nijhoff, 1987) at 136.

²⁷ *Supra* n 8 at Article 6(c).

²⁸ On the establishment of this rule and its implications, see Domínguez-Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law – The Case of Special Procedures' (2011) 29(3) *Netherlands Quarterly of Human Rights* 261.

The controversy over the cartoons portraying the Muslim Prophet Muhammad, published on 30 September 2005 by the Danish newspaper *Jyllnadds-Posten*,²⁹ provides a striking example of contradictory approaches by special procedures mandates. In this instance, the Human Rights Council requested a joint report by its mandate holders on racism and on freedom of religion on the question of incitement to racial and religious hatred.³⁰ In their final reports the two mandate holders took divergent positions, which had the effect of fuelling rather than assuaging the controversy.³¹

The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, unequivocally expressed his condemnation of the cartoons, labelling them 'racist'. As explained by Keane,³² the position of Doudou Diène was already well established in the context of drawing the conceptual contours of his report 'Defamation of religion and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia',³³ in which he based his analysis on Articles 18 (freedom of religion) and 19 (freedom of expression) of the ICCPR.³⁴ According to the Special Rapporteur the cartoons reflected 'an alarming resurgence of defamation of religions ... [and] failed to show the commitment and vigilance that [the Danish Government] normally displays in combating religious intolerance and incitement to religious hatred'.³⁵ Diène used the joint report³⁶ to reaffirm his previous position on the defamation of religions and what he viewed as the relationship with racist trends promoting racial and religious hatred in the context of the post-9/11 'war on terror'.

Meanwhile the Special Rapporteur on freedom of religion or belief, Asma Jahangir, adopted a more cautious approach towards limiting freedom of expression. Rather, that Special Rapporteur emphasised the distinction between racism and religious defamation.³⁷

²⁹ See Müller and Özcan, 'The Political Iconography of Muhammad Cartoons: Understanding Cultural Conflict and Political Action' (2007) 40(2) *Political Sciences and Politics* 287.

³⁰ See HR Council Decision 1/107, 30 June 2006, decided by a recorded vote of 33 votes to 12, with one abstention. The votes against came from Canada, the Czech Republic, Finland, France, Germany, Japan, the Netherlands, Poland, Romania, Switzerland, the Ukraine and the United Kingdom; the Republic of Korea abstained.

³¹ Joint Report, 'Incitement to Racial and Religious Hatred and the Promotion of Tolerance', A/HRC/2/3.

³² Keane, 'Cartoon Violence and Freedom of Expression' (2008) 30(4) *Human Rights Quarterly* 845.

³³ See report submitted by Diène, E/CN.4/2006/17, following the request in UNCHR Res 2005/3, 12 April 2005, at para 16.

³⁴ E/CN.4/2006/17, at paras 23–47.

³⁵ *Ibid.* at para 25.

³⁶ A/HRC/2/3.

³⁷ See Rehman, 'The Shari'ah, International Human Rights Law and the Right to Hold Opinions and Free Expression: After Bilour's Fatwā', in Frick and Müller (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Martinus Nijhoff, 2013) 244 particularly at 252.

At the heart of these seemingly contradictory positions are the different normative frameworks and interpretations used by each mandate holder to deal with the topic. The Human Rights Council had requested the mandate holders to examine the question under Article 20(2) of the ICCPR which prohibits 'hate speech';³⁸ however, the joint report also engaged Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³⁹ In Keane's words:

Jahangir's comments are representative of the legal instruments that govern racial discrimination and religious intolerance. While racist speech is prohibited under Article 4 of the binding International Convention on the Elimination of Racial Discrimination 1965, no comparable international instrument exists in the area of religion. Her analysis was conducted solely under Article 20(2) ICCPR, and the Danish cartoons do not reach the required level to constitute incitement under this provision. Diène seems to associate the cartoons with racist propaganda, as prohibited by Article 4 ICERD. Jahangir appears not to agree with this assessment.⁴⁰

It is important to emphasise that the Human Rights Council's request⁴¹ Special Rapporteur on freedom of expression, Ambeyi Ligabo, who in 2008 provided his own understanding of the legal restrictions on freedom of expression.⁴² [3] Without referring to the report of his peers, he underlined his strong stance against defamation laws, a stance already published in 2002 along with the Organisation for Security and Co-operation in Europe (OSCE) Representative on freedom of the media, and the Organization of American States (OAS) Special Rapporteur on freedom of expression.⁴³ Complicating matters further, the Committee on the Elimination of Racial Discrimination, which monitors implementation of the ICERD, took a similar stance as the Special Rapporteur on racism.⁴⁴ For their part, the successors as special rapporteurs on religion and racism took a slightly different approach to their predecessors, underlining the importance of framing this issue within the existing human rights framework instead of viewing it as a matter of defamation of religion.⁴⁵

³⁸ Article 20(2) ICCPR provides: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

³⁹ Article 4 ICERD provides: 'States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination'.

⁴⁰ Keane, *supra* n 32 at 872.

⁴¹ See HR Council Decision 1/107, 30 June 2006, *supra* n 30.

⁴² A/HRC/7/14, at paras 30–53.

⁴³ *Ibid.* at para 43.

⁴⁴ Keane, *supra* n 32 at 873–4.

⁴⁵ A summary of the discussion and the positions held by the Chair of the Committee on the Elimination of Racial Discrimination at the time, Anwar Kemal, and the newly-appointed Special

These divergent approaches to the same topic within the UN were a catalyst to dialogue and cooperation among the special rapporteurs involved in the interpretation and implementation of international standards on freedom of expression, freedom of religion and racial discrimination. This resulted in the emergence of consensus regarding some of the most controversial issues, such as blasphemy laws, and a departure from a focus on 'defamation of religion'.⁴⁶ On 22 April 2009, the Special Rapporteurs on racism, freedom of religion and freedom of expression issued a joint statement enshrining a common view on 'defamation of religion'.⁴⁷ The Office of the High Commissioner for Human Rights (OHCHR) hosted a multilateral discussion on the relationship between Articles 19 and 20 of the ICCPR which took place in the context of expert workshops held in 2011, in Europe, Africa and Asia. The aim of these workshops was to arrive at a 'comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression as protected by international human rights law'.⁴⁸ Members of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the mandate holders of special procedures on racism, freedom of religion and freedom of expression participated in several working groups.⁴⁹ The outcome report states a common UN position on the interpretation of Articles 19 and 20 of the ICCPR and Article 4 of the ICERD with specific recommendations to states on how to incorporate human rights legislation at domestic level.

The conclusions regarding policies aimed at states, the UN and other stakeholders do little beyond acknowledging the importance of cooperating and sharing information between the various regional and cross-regional mechanisms working on these issues worldwide. Still, it can only be welcome that the dialogue served as the immediate precedent

Rapporteurs on racism, Githu Muigai, and on freedom of religion and belief, Heiner Bielefeldt, can be found in International Service for Human Rights (ISHR), 'Support for "defamation of religion" continues to decline; draft resolutions passes by only 12 votes', Press Release, 25 November 2010, available at: www.ishr.ch/news/support-defamation-religion-continues-decline-draft-resolution-passes-only-12-votes.

⁴⁶ However, this does not mean that states within the Organisation of Islamic Cooperation have abandoned their positions on this topic: see Rehman and Berry, 'Is "Defamation of Religions" Passé? The United Nations, Organisation of Islamic Cooperation, and Islamic State Practices: Lessons from Pakistan' (2012) 44(3) *The George Washington International Law Review* 431.

⁴⁷ Joint Statement by Mr Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Ms Asma Jahangir, Special Rapporteur on freedom of religion and belief, and Mr Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Freedom of expression and incitement to racial or religious hatred', 22 April 2009, available at: www2.ohchr.org/english/issues/racism/rapporteur/docs/Joint_Statement_SRs.pdf.

⁴⁸ See 'Rabat Plan of Action', OHCHR Press Release, 2013, available at: www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx.

⁴⁹ The documentation resulting from these workshops, stakeholders' positions and background papers is available at: www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx.

for the adoption of General Comment No 34 on freedoms of opinion and expression by the Human Rights Committee in July 2011.⁵⁰ The interpretation of the ICCPR by the three special rapporteurs was considered in the drafting process of the general comment.⁵¹ The discussion also seems to have prompted the Committee on the Elimination of Racial Discrimination to revisit Article 4 of the ICERD and to issue, in September 2013, its General Recommendation No 35 on combatting racist hate speech.⁵² While the Committee reiterates its belief that laws are needed to combat racist speech, it also took a more balanced view to the issue, favouring the Jahangir rather than the Diène approach, and seeking a more synchronised approach with other UN treaties.⁵³

B. Armed Conflicts and Applicability of International Humanitarian Law[4]

The use of drones for targeted killings has renewed interest in the controversial discussion among scholars over the applicability of international human rights law in armed conflict situations.⁵⁴ Pre-conflict, conflict and post-conflict scenarios may lead to divergence in approach by special procedure mandate holders due to the lack of clear guidance in international law.⁵⁵ A further opportunity for divergence arises where special procedures have been created with an unequivocal mandate to investigate situations that may involve violations of international humanitarian law, as is the case with the Special Rapporteur on the situation of human rights in the occupied Arab territories.⁵⁶ This is so because, for the most part, mandates have been created without specific mention of the applicability of international humanitarian law as a legal framework of reference. Even when special rapporteurs have requested specific guidance from the Commission on Human Rights on this question, they have not always received an answer.⁵⁷

⁵⁰ General Comment No 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34.

⁵¹ O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 12(4) *Human Rights Law Review* 627 at 648 and 650–1.

⁵² General Recommendation No 35: Combating racist hate speech, CERD/C/GC/35.

⁵³ McGonagle, 'New General Recommendation Combating Racist Hate Speech', *Database on legal information relevant to the audiovisual sector in Europe*, available at: merlin.obs.coe.int/iris/2013/10/article7.en.html.

⁵⁴ See Ohlin, 'Is *Jus in Bello* in Crisis?' (2013) 13(1) *Journal of International Criminal Justice* 27.

⁵⁵ Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel operation of human rights law and the law of armed conflict and the conundrum of *jus ad bellum*' (2007) 40(2) *Israel Law Review* 592; and Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body' (2008) 90 *International Review of the Red Cross* 549.

⁵⁶ Despite the clear mandate, Israel had strong objections to this as reflected in the report of the Special Rapporteur, who sought further guidance on this point from the Commission: see Report of the Special Rapporteur on the situation of human rights in the Occupied Arab Territories, including Palestine, E/CN.4/2002/32, at paras 7–10.

⁵⁷ Domínguez-Redondo, 'Making the Connection: Security and Human Rights', in Bassiouni and Schabas (eds), *New Challenges for the Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 255.

Third[5], as in virtually every other matter covered by special procedure mandates, the uncertain terms of the mandates have allowed experts to follow different approaches. The Special Rapporteur on extrajudicial, summary or arbitrary executions has interpreted the scope of his mandate to cover armed conflict scenarios engaging applicable humanitarian standards.⁵⁸ The Special Representative on the situation of human rights in El Salvador devoted a specific section of his reports to the implementation of international humanitarian law.⁵⁹ When Felix Ermacora took up the mandate of Special Rapporteur on the situation of human rights in Afghanistan, he laid down the legal framework relevant to his mandate, including international humanitarian law.⁶⁰ However, others, such as the Working Group on Arbitrary Detentions, have decided from the outset not to deal with situations and cases linked to the existence of an armed conflict.⁶¹ Similarly, in light of the competence of the International Red Cross to address situations of disappearance during international armed conflicts, the Working Group on Enforced or Involuntary Disappearances has determined not to deal with situations of international armed conflict, although it considers disappearances in internal armed conflicts when the agent perpetrating [is that the term used in the enforced disappearances convention?][6] an enforced disappearance is apparently a representative of the state.⁶²

The hosting of special sessions has contributed to the standardisation of the use of humanitarian law in the work of the Human Rights Council (and formerly the Commission) since the early 1990s. These special sessions are mostly linked to situations of armed conflict and, therefore, the mandates of the inquiry commissions and special procedures mandates resulting from the sessions are routinely empowered with the authority to gather, compile and investigate information on acts that constitute breaches of international humanitarian law.⁶³ In addition, these resulting reports are made available to the Security

⁵⁸ The position of the Special Rapporteur over the years is well summarised in Alston et al., 'The competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts' (2008) 18(1) *European Journal of International Law* 183 at 202–6.

⁵⁹ See, for instance, E/CN.4/1992/32, at paras 96–117; and A/47/596, at paras 105–117.

⁶⁰ E/CN.4/1985/121, at para 161.

⁶¹ The Working Group established its position in its first report (E/CN.4/1992/20, at para 16), and it is reflected in its current working methods: currently published by the OHCHR as 'Fact Sheet No 26: The Working Group on Arbitrary Detention', annex IV, available at: www.ohchr.org/Documents/Publications/FactSheet26en.pdf.

⁶² The Working Group established its position for the first time in relation to the cases of disappearances brought to its attention during the Iran–Iraq war: see E/CN.4/1983/14, at paras 118–120. This was confirmed as a general position in the WGEID report in 1984: see E/CN.4/1984/21, at paras 20 and 21. See also the methods of work published in E/CN.4/1996/38, annex I at para 5; and A/HRC/13/31, annex 1 at para 11; and the comment on inconsistencies by the Working Group on Arbitrary Detention and Working Group on Enforced or Involuntary Detention in Domínguez-Redondo (2011), supra n 57 at 272–3.

⁶³ For the mandate of the inquiry commission established following the 5th special session on the situation of occupied Palestinian territories, see UNCHR Res 2000/S-5/1, 19 October 2000, at para 6(a). See also UNCHR Res 1999/S-4/1, 27 September 1999, at para 6, for the mandate of the inquiry

Council. Since the creation of the Human Rights Council these sessions have increased exponentially, adding further to this trend.⁶⁴ Under the Universal Periodic Review mechanisms, humanitarian norms are expressly called upon to evaluate the situation of human rights worldwide.⁶⁵ Some special procedures considered such standards, not only because they have chosen to include them by their own initiative, but because they are included expressly in their mandates, established by the Human Rights Council. This development is nonetheless viewed with caution by some commentators and practitioners, because of its inconsistency and carry [7]a risk of undermining humanitarian standards if not taken seriously or if applied in a disjointed manner by human rights bodies.⁶⁶

C. Approaches towards Non-State Actors

The importance of non-state actors as potential violators of human rights has been another live issue in the lifetime of special procedures.⁶⁷ In the past, this subject has been addressed mostly in relation to the laws of armed conflict and the existence of paramilitary and armed opposition groups. Nonetheless, it involves a wide range of non-governmental actors potentially responsible for human rights abuses including international organisations, peacekeeping operations, transnational corporations and internationally-administered territories.

For the most part, special rapporteurs have adhered to the less controversial norms of international law concerning responsibility for breaches of international law by confining their attribution of alleged human rights violations to state actors. As a consequence they have implicitly or explicitly adopted the principle that non-state actors should not be approached in the course of their investigations into cases or situations of human rights violations.⁶⁸ Until recently it remained exceptional to read reports such as those of the former

commission on East-Timor; and UNCHR Res 1994/S-3/1, 25 May 1994, at para 21, for the mandate of the Special Rapporteur on Rwanda. Humanitarian law violations are present in the resolutions resulting from the first two special sessions on the former Yugoslavia, but were not articulated expressly as elements of the mandate of the Special Rapporteur: see UNCHR Res 1992/S-1/1, 14 August 1991; and UNCHR Res 1992/S-2/1, 1 December 1992.

⁶⁴ By March 2014, twenty special sessions had been held by the Human Rights Council.

⁶⁵ See HR Council Res 5/1, 18 June 2007, endorsed by GA Res 62/434, 3 December 2007, at para 1. On the opposition by some states to this provision, see Domínguez-Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) *Chinese Journal of International Law* 721 at 727.

⁶⁶ O'Donnell, 'Trends in the application of international humanitarian law by United Nations human rights mechanisms' (1998) 38 *International Review of the Red Cross* 481. See also Meron, 'The humanization of humanitarian law' (2000) 94(2) *American Journal of International Law* 239 at 269 and 270.

⁶⁷ One of the earliest contributions can be found in the 1992 Report of the Working Group on Enforced Disappearances, E/CN.4/1992/18, at paras 373–381.

⁶⁸ One of the early explicit explanations of this can be found in the 1986 report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1986/18, at para 34. Nonetheless, as visible in

Special Rapporteur on the situation of human rights in El Salvador, where he interpreted the political nature of the special procedure as giving him a licence to investigate human rights violations attributed to insurgents or guerrilla groups.⁶⁹ Thus, even those experts who routinely acknowledge abuses of human rights perpetrated by non-state actors, such as the Special Rapporteur on summary executions,⁷⁰ emphasise that their methods of work only permit them 'to intervene when the perpetrators are believed to be government agents or have a direct or indirect link with the state'.⁷¹

However, special rapporteurs have increasingly (though not unanimously) taken the approach that, while non-state actors cannot strictly be held accountable for human rights violations deriving from obligations they are not bound by – mainly inter-state human rights treaties they cannot ratify – they are nonetheless expected to respect common human rights standards such as those expressed in the Universal Declaration of Human Rights.⁷² The possibility of divergent approaches is acknowledged in the 2008 Manual of operations of the special procedures of the Human Rights Council,⁷³ which devotes an entire section to the relationship between special procedures and non-state actors.⁷⁴ It affirms states' responsibility under international law for violations committed within their jurisdiction, either by state agents or others, and then leaves open the possibility of holding non-state actors 'to account for human rights violations', stating that they 'may be relevant interlocutors in the quest to restore respect for human rights and to establish accountability for violations'.⁷⁵

The manual of operations makes explicit reference to the possibility of communication between special rapporteurs and the 'de facto' authority in specific territories,⁷⁶ which confirms traditional principles of state responsibility.⁷⁷ Many mandate

the report of the visit to Peru that same year, the Working Group has sometimes listed allegations of disappearances by non-state actors without investigating them: see E/CN.4/1986/18/Add.1; and E/CN.4/1987/15/Add.1.

⁶⁹ The mandate holder, José Antonio Pastor-Ridruejo, explained this decision, based on political and ethical considerations rather than legal principles, in 'Les procédures publiques spéciales de la Commission des Droits de l'Homme des Nations Unies' (1991) 228(3) *Recueil de Cours de l'Académie de Droit International* 183 at 214–15.

⁷⁰ In his first report the mandate holder focused only on governmental actions, referring to them in subsequent reports. For a summary of this approach with references to the case law of the International Court of Justice, the Human Rights Committee and the Inter-American Commission on Human Rights, see E/CN.4/2005/7, at paras 65–76.

⁷¹ E/CN.4/2002/74, at para 71.

⁷² See Clapham, 'Human rights obligations of non-state actors in conflict situations' (2006) 88 *International Review of the Red Cross* 491 at 504–7.

⁷³ Available at: www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf.

⁷⁴ *Ibid.* at section E, paras 81–83.

⁷⁵ *Ibid.* at para 81.

⁷⁶ *Ibid.* at para 82.

⁷⁷ Article 9 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), included as annex in GA Res 56/83, 12 December 2001, and corrected by document A/56/49(Vol.I)/Corr.4.

holders have sent communications in relation to human rights cases and situations perpetrated by governments which may not have enjoyed international recognition, such as the Taliban in Afghanistan⁷⁸ or the once unrecognised government of Haiti in the early 1990s.⁷⁹ Mandate holders have also addressed alleged human rights violations committed by international authorities in territories under their jurisdiction such as in Timor Leste between 1999 and 2002⁸⁰ and Kosovo between 1999 and 2008.⁸¹

After the attacks against the United States on 11 September 2001, groups labelled as terrorist have gained prominence among non-state actors for whom accountability for human rights abuses is sought by states. Whether this is a change of focus or merely a change of language is a matter beyond the scope of this paper. However, the mandate holder with the closest relationship to the issue, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has adopted a 'neutral' approach to this topic. The former mandate holder, Martin Scheinin, expressed his willingness to follow the work of the (then) Commission on Human Rights on the question of whether human rights violations can be attributed to non-state actors.⁸²

The launch of a Forum on Business and Human Rights within the United Nations in 2012⁸³ is another milestone in the consideration of non-state actors by UN Charter bodies, and marks the culmination of a process ignited by the Global Compact project launched by the former Secretary-General Kofi Annan in 1999.⁸⁴ This represents a substantial change from the sporadic and fragmented consideration of the impact of trade,⁸⁵ economic aid⁸⁶ and

⁷⁸ See, for instance, the reports of the Special Rapporteur on freedom of religion or belief, A/56/253, at paras 25–30.

⁷⁹ See Report of the Special Rapporteur on the situation of Haiti, E/CN.4/1993/47, at para 124(c).

⁸⁰ See Report of the Working Group on Enforced Disappearances, E/CN.4/2002/79, at paras 355–356. The communications of the Group during 2001 were sent to the United Nations Transitional Administration in East Timor (UNTAET) and to Indonesia.

⁸¹ See the allegation letter addressed to the UN Interim Administration in Kosovo (UNMIK) by the Special Rapporteur on trafficking in persons, especially women and children, and the Special Rapporteur on extrajudicial, summary or arbitrary executions on 19 October 2011, available at: [spdb.ohchr.org/hrdb/19th/AL_Kosovo_19.10.2011_\(1.2011\).pdf](http://spdb.ohchr.org/hrdb/19th/AL_Kosovo_19.10.2011_(1.2011).pdf). See also the dialogue established with UNMIK during the visit to Serbia (including Kosovo) in the 2009 report of the Special Rapporteur on freedom of religion or belief, A/HRC/13/40/Add.3.

⁸² E/CN.4/2006/98, at paras 67 and 70.

⁸³ Established by HR Council Res 17/4 on Human rights and transnational corporations and other business enterprises, 6 July 2011, at operative para 12.

⁸⁴ Annan, *The Global Compact* (United Nations World Economic Forum, 1999).

⁸⁵ See Domínguez-Redondo and Sepúlveda Carmona, 'An Overview of Human Rights Instruments to Raise Concerns About Trade and Investment Policies', in Murphy and Paasch (eds), *The Global Food Challenge: Towards a Human Rights Approach to Trade and Investment Policies* (Brot für Alle, 2009) 92.

⁸⁶ See Commission on Human Rights Decision 1997/103, 3 April 1997, appointing an independent expert on the effects of structural adjustment policies on economic, social and cultural rights. On the study by Cassese regarding the impact of foreign economic aid and assistance on respect for human rights in Chile, see Ramcharan (2009), *supra* n 4 at 131.

debt,⁸⁷ as well as that of business enterprises on the enjoyment of human rights that could be found, since 1977, in the reports of different subsidiary bodies of the former Commission on Human Rights.⁸⁸ Mandate holders have also pioneered and rapidly consolidated the practice of scrutinising the role in human rights abuses of transnational corporations. This activity has merited scant contestation despite its problematic legal basis. The practice of engaging with corporations as actors potentially accountable for human rights violations outside the realms of traditional state responsibility is no longer confined to the few mandate holders endowed with competence to deal with violations typically involving business, such as the Special Rapporteur on toxic waste⁸⁹ and the Working Group on Transnational Corporations.⁹⁰ Rather, since 2011, the OHCHR has expressly acknowledged the standardisation of this practice, including in its publications on the ‘facts and figures of special procedures’. These annual publications explain that allegations of human rights violations are not only sent to states, but also to ‘third parties, such as international organisations or multinational corporations, requesting information on the allegation and calling for preventive or investigative action’.⁹¹ Nonetheless, the centralised facts provided by the OHCHR do not yet explain what percentage of communications or interactions are held with non-state actors. Only a few reports by special rapporteurs provide specific details about this practice. However, special rapporteurs increasingly refer to their engagement with corporations, although the vocabulary and approach remains far from uniform. The Special Rapporteur on the sale of children, child prostitution and child pornography uses the term ‘corporate social responsibility’,⁹² while other mandate holders prefer to refer to business and human rights.⁹³ This apparent inconsistency in terminology across mandate holders can be reconciled by the fact that following the adoption of the UN Guiding Principles on Business and Human Rights, with its affirmation of a corporate responsibility to respect human rights, the notion of ‘corporate social responsibility’ has to be reconceptualised from one in which its

⁸⁷ See UNCHR Res 1998/24, 17 April 1998. The mandate on structural adjustment programmes and foreign debt got consolidated as a single mandate by UNCHR Res 2000/82, 26 April 2000.

⁸⁸ Ramcharan (2009), *supra* n 4 at 131–4.

⁸⁹ It is part of the mandate of the Special Rapporteur to examine and produce a list of transnational corporations engaged in the illicit traffic of toxic and dangerous products and wastes to developing countries as requested in the latest Human Rights Council resolution renewing the mandate: HR Council Res 18/11, 29 September 2011.

⁹⁰ For the Methods of Work followed by the Working Group, see A/HRC/WG.12/3/1, annex.

⁹¹ OHCHR, *United Nations Special procedures: Facts and Figures 2013* (OHCHR, 2014) at 10. See also the publications in 2012 at 10; and 2011 at 9.

⁹² A/HRC/25/48, at paras 101–108.

⁹³ Report of the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31.

content is determined by corporations, to one which embodies the universal responsibility of all businesses to respect all human rights.⁹⁴

5. Codification of New International Human Rights Instruments

Exceptionally, special procedures have been created with the main mandate of contributing to the codification of a particular area of law. This is the case, since the creation in 1986,⁹⁵ of the Special Rapporteur on freedom of religion or belief, who is mandated to examine incidents and governmental actions incompatible with the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief⁹⁶ in addition to recommending remedial measures.⁹⁷ The international standards considered by the Special Rapporteur extend beyond this instrument, as laid out in the digest published by the mandate holder in 2011, on the twenty-fifth anniversary of the creation of the mandate.⁹⁸ The standards include the UDHR, most core human rights instruments and the general comments of different treaty bodies.

Most special procedures mandate holders have had to develop conceptual and normative frameworks relevant to their mandate in order to clarify the scope of their competences when dealing with cases or situations of human rights violations. This final section outlines some of the most salient initiatives by special procedures that have been endorsed or approved by their parent bodies, therefore endowing them with special authority. These new human rights standards serve as international benchmarks in a variety of areas. They enjoy a special position among other normative contributions by special procedures because they have been adopted or endorsed by the Human Rights Council (or former Commission) or/and the General Assembly. In the absence of specific restrictions on the geographic scope of their mandates, or the sources they can use in the course of their work, these codification efforts have involved the consideration of a topic from a universal perspective, taking into account the contributions of governmental, intergovernmental and non-governmental actors worldwide. In that sense, the normative standards developed by special procedures function as a catalyst to efforts to conceptualise and codify human rights worldwide.

⁹⁴ Doyle, *Indigenous peoples' issues and participation at the UN Forum on Business and Human Rights: Progress to date and potential for the future* (European Network on Indigenous Peoples, 2014). See also Ruggie, *Just Business* (Amnesty International, 2013).

⁹⁵ UNCHR Res 1986/20, 10 March 1986.

⁹⁶ GA Res 31/138, 16 December 1976.

⁹⁷ This remains a central part of its mandate, as reiterated in HR Council Res 6/37, 14 December 2007, at para 18(c).

⁹⁸ Rapporteur's Digest on Freedom of Religion or Belief, 2011, available at: www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf.

The Working Group on Enforced or Involuntary Disappearances has pioneered codification of a new international instrument among special procedures – the Declaration on the Protection of All Persons from Enforced Disappearance,⁹⁹ the immediate precedent for the Convention with the same name adopted fourteen years later.¹⁰⁰ The Working Group instigated adoption by the UN General Assembly of the Declaration¹⁰¹ and contributed substantially to the final draft.¹⁰² The Working Group oversees states' implementation of the Declaration, which constitutes the main legal framework within which it carries out its mandate.¹⁰³

The Special Rapporteur on the human rights of internally displaced persons¹⁰⁴ understood that the main aim of his mandate was the elaboration of a specific norm for internally displaced people, and framed the Guiding Principles on Internal Displacement,¹⁰⁵ focusing his work on the preparation of such guidelines, and their distribution and promotion.¹⁰⁶ The Guiding Principles have been further complemented by a handbook¹⁰⁷ and legal annotations.¹⁰⁸ In addition, they have had a measurable impact on legislation and policies. The case of Colombia, where the Guiding Principles have been used as basis of decisions of its Constitutional Court, is outstanding,¹⁰⁹ but there are many other examples illustrating their influence at national, regional and international level.¹¹⁰

⁹⁹ GA Res 47/133, 18 December 1992.

¹⁰⁰ International Convention for the Protection of All Persons from Enforced Disappearance, adopted by GA Res 61/177, 20 December 2006 (in force since 23 December 2010).

¹⁰¹ See the recommendations of the Group enshrined in its reports E/CN.4/1985/15, at para 302; and E/CN.4/1988/19, at para 251(b).

¹⁰² E/CN.4/1990/13, at paras 28–38.

¹⁰³ See Revised Methods of Work of the Working Group on Enforced or Involuntary Disappearances, A/HRC/19/58/Rev.1, annex II, adopted on 11 November 2011 and applicable from 1 January 2012, at para 1.

¹⁰⁴ Until 2010 the mandate holder was a Representative of the Secretary-General. On the decision to change the denomination, see HR Council Res 14/6, 23 June 2010. For the original mandate, see UNCHR Res 1991/25, 5 March 1991; UNCHR Res 1992/73, 5 March 1992; and UNCHR Res 1994/68, 9 March 1994.

¹⁰⁵ See E/CN.4/1998/53/Add.2. On the background and process of framing these principles, see Bagshaw, 'Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16 March – 24 April 1998' (1998) 10(3) *International Journal of Refugee Law* 548; and Kälin, *Guiding Principles on Internal Displacement: Annotations* (American Society of International Law, 2000).

¹⁰⁶ Latest mandate for this special procedure can be found in HR Council Res 23/8, 13 June 2013.

¹⁰⁷ UNHCR, *Handbook for the Protection of Internally Displaced Persons* (Global Protection Cluster Working Group, 2010).

¹⁰⁸ Kälin, *The Guiding Principles on Internal Displacement: Annotations*, 2nd edn (American Society of International Law, 2008).

¹⁰⁹ Cepeda Espinosa, 'The Constitutional Protection of IDPs in Colombia', in Arango Rivadeneira (ed.), *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (Brookings Institution/University of Bern, 2009) 1.

¹¹⁰ Wyndham, 'A Developing Trend: Laws and Policies on Internal Displacement' (2006) 14(1) *Human Rights Brief* 7; and Couldrey and Herson (eds), 'Ten Years of the Guiding Principles on Internal Displacement' (2008) Special Issue *Forced Migration Review*.

In 2011 the Human Rights Council formally endorsed¹¹¹ the Guiding principles on business and human rights,¹¹² and a year later adopted¹¹³ the Guiding Principles on extreme poverty and human rights.¹¹⁴ Both sets of guiding principles were drafted by the Special Rapporteurs with mandates on the concerned topic. These three sets of guiding principles provide global policy guidelines on topics not codified in international law, and are now widely used to evaluate state behaviour in relation to displacement of people, poverty, and business and human rights.¹¹⁵

In addition, mandate holders cooperate with the OHCHR in drafting manuals, guides and other publications directly related to their mandates. Besides the Handbook for the Protection of Internally Displaced Persons cited above, other examples include the participation of the Special Rapporteur on torture in the drafting of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)¹¹⁶ and the forthcoming Handbook for realizing the human right to safe drinking water and sanitation prepared by the Special Rapporteur on the human right to water.¹¹⁷ In the context of the preparation of international human rights conferences, the experts in charge of special procedures have also contributed to studies that clarify existing normative frameworks and draw attention to the need for new regulations where appropriate.¹¹⁸

The Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances have drafted the equivalent of 'general comments/observations[8]' following a model pioneered by treaty bodies. The Working Group on Enforced or Involuntary Disappearances uses the same terminology as the treaty

¹¹¹ HR Council Res 17/4, 16 June 2011, at operative para 1.

¹¹² Supra n 93. For a resource centre devoted to the guiding principles, see business-humanrights.org/UNGuidingPrinciplesPortal/Home.

¹¹³ HR Council Res 21/11, 27 September 2012, at para 2. In political terms it is important to notice that in this case the Council 'adopts' rather than 'endorses' the guiding principles.

¹¹⁴ Sepúlveda Carmona, *Final draft of the guiding principles on extreme poverty and human rights*, A/HRC/21/38.

¹¹⁵ For instance, the Guiding principles on extreme poverty were mentioned in the European Committee of Social Rights' decision on the merits in *Defence for Children International (DCI) v Belgium* (69/2011) Merits, 23 October 2012, at para 81.

¹¹⁶ See HR/P/PT/8/Rev.1. The Manual was itself inspired by the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, A/54/426, at paras 53–55.

¹¹⁷ OHCHR, *United Nations Special procedures: Facts and Figures 2013* (OHCHR, 2014) at 6 and 7. This document highlights other contributions to standard-setting during 2013 by the mandates on the use of mercenaries, trafficking in persons, countering terrorism, torture, summary executions and freedom of religion.

¹¹⁸ See, for instance, the two thematic studies prepared by the Special Rapporteur on religious freedom prepared for the International Conference on Racism, analysing the issue of 'aggravated discrimination': A/CONF.189/PC.1/7, annex; and 'legal and factual aspects of racial discrimination in education': A/CONF.189/PC.2/22, annex 2. See also, in relation to the same conference, the contribution made by the Special Rapporteur on the rights of migrants, A/CONF.189/PC.2/23.

bodies¹¹⁹ and devoted its first six ‘general comments’, issued between 1996 and 2006, to the interpretation of specific Articles of the Declaration on the Protection of All Persons from Enforced Disappearance.¹²⁰ Since the creation of the Human Rights Council such comments have addressed topics other than Articles of the Declaration, including the definition of enforced disappearance;¹²¹ disappearance as a crime against humanity¹²² and as a continuous crime;¹²³ the right to truth;¹²⁴ the right to recognition as person before the law;¹²⁵ and the specificity of disappearances when affecting children¹²⁶ and women.¹²⁷

The Working Group on Arbitrary Detention uses the terminology ‘deliberations’. Most of its deliberations are related to particular cases which raise matters of a general nature, the aim being to provide consistent precedents in order to assist as many states as possible to prevent the practice of arbitrary deprivation of liberty.¹²⁸

These deliberations offer another striking example of the potential to use special procedures to question the practice of other bodies operating at an international level on concomitant issues. The Working Group on Arbitrary Detention accepted a complaint brought by General Duško Tadić, which challenged the legality of his detention by the International Criminal Tribunal for the Former Yugoslavia on the basis of Article 9 of the ICCPR (the right to liberty and security).¹²⁹ The Group finally accepted its lack of competence to express a view on the conformity of a decision taken by an international court within the norms of international law. It did, however, decide that this raised an interpretation problem and adopted a ‘deliberation’ which would guide the Group in future if other communications relating to the administration of justice by an international criminal court were brought before it.¹³⁰ The Working Group re-engaged with this topic in relation to the arrest of Joseph Kanyabashi, which raised the issue of the legality of the establishment of the International Criminal Tribunal for Rwanda.¹³¹ This was the first time a special procedure

¹¹⁹ See E/CN.4/1997/34, at paras 20 and 21.

¹²⁰ See E/CN.4/1996/38, at paras 48–58 (Articles 3 and 4); E/CN.4/1997/34, at paras 22–30 (Article 10); E/CN.4/1998/43, at paras 68–75; E/CN.4/2001/68, at paras 25–32 (Article 17); and E/CN.4/2006/56, at para 49 (Article 18).

¹²¹ A/HRC/7/2, at para 26.

¹²² A/HRC/13/31, at para 39.

¹²³ A/HRC/16/48, at para 39.

¹²⁴ Ibid.

¹²⁵ A/HRC/19/8/Rev.1, at para 42.

¹²⁶ A/HRC/WGEID/98/1 and A/HRC/WGEID/98/1/Corr.1.

¹²⁷ A/GRC.WGEID/98/2.

¹²⁸ A compilation of its nine Deliberations, covering the issues of house arrest; rehabilitation through labour; immigrants and asylum seekers; allegations against the International Criminal Court for the former Yugoslavia; psychiatric detention; and deprivation of liberty linked to the use of the internet, is available at: www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf.

¹²⁹ E/CN.4/2001/14, at paras 12–33.

¹³⁰ Ibid.

¹³¹ E/CN.4/2003/8, at paras 49–60.

had examined the legality of the practice of another UN body, in particular one established as a subsidiary organ of the Security Council.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has since examined the question of the compliance with human rights standards by the United Nations by assessing the role of the General Assembly, the Security Council and the United Nations field presences in anti-terrorist activities.¹³² The Special Rapporteur has concluded that Chapter VII of the UN Charter does not provide a legal basis for the Security Council framework of mandatory resolutions of a quasi-legislative or quasi-judicial nature,¹³³ has commented on the compatibility of the mandate of the Office of the Ombudsperson of the Security Council with international human rights norms using case law from treaty bodies, the European Court of Human Rights, and British and Swiss domestic courts, among others,¹³⁴ and has recommended a means of improving the accountability of the United Nations in this area.¹³⁵

The Working Group on Arbitrary Detention has also issued a decision on whether the deprivation of liberty of persons held at Al-Khiam prison in south Lebanon involved the responsibility of the government of Lebanon, Israel or the South Lebanon Army.¹³⁶ With this opinion, the Working Group contributed to clarifying the fragmented jurisprudence regarding the need to evaluate attribution of unlawful acts of states, by endorsing the 'overall test' doctrine established by the International Court of Justice, rather than approaches developed by other adjudicatory bodies.¹³⁷

General comments and deliberations issued by the working groups use a variety of international and regional instruments as their normative framework. These include references to the American Convention on Human Rights, the Rome Statute of the International Criminal Court, the Inter-American Convention on Forced Disappearances of Persons, the Hague Convention concerning the Laws and Customs of War, and the Geneva Conventions of 1949, among others. Leading case law articulated by other treaty bodies and international and regional courts is also frequently cited.

6. Conclusions

¹³² See A/65/258.

¹³³ Ibid. at paras 33–58.

¹³⁴ See A/67/396, at paras 12–58.

¹³⁵ Ibid. at paras 68–80.

¹³⁶ E/CN.4/2000/4, at paras 11–18.

¹³⁷ For a commentary, see Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on *Genocide in Bosnia*' (2007) 18(4) *European Journal of International Law* 649 especially at n 19. See also Crawford, *State Responsibility* (CUP, 2013) at 141.

The impact of the special procedures in the creation and consolidation of international human rights standards, and their clarification of the scope of existing human rights norms, is widely acknowledged and one of their least contested activities. It nonetheless creates problems of coordination and duplication of tasks among different organs of the United Nations addressing similar or closely related matters.

The different approaches of mandate holders in understanding their mandate and methods are partly the result of the myriad of existing mandates (55 special procedures were in force by March 2015).¹³⁸ The single rubric 'special procedures' has enabled special rapporteurs to tackle different human rights violations (by country and by theme) through independent experts who have developed different methods of work. The preceding pages have outlined synergies and contradictions in the approaches adopted by special procedures regarding: (a) the scope and content of controversial topics of human rights law (hate speech); (b) the applicability of international standards to their mandates (international humanitarian law); and (c) their different understanding of those potentially responsible for human rights violations when dealing with non-state actors.

Until 1993, when the OHCHR was created and when annual meetings of special procedures became institutionalised, the absence of general standards was complicated by the lack of centralised support and coordination. However, the absence of uniform standards and practice has not prevented these bodies from developing normative frameworks that have become gradually accepted as the most authoritative – and at times exclusive – codification of human rights standards in the diverse human rights covered by the special procedures.

¹³⁸ The list is available at: www.ohchr.org/EN/HRBodies/SP.