

# Special Procedures and the New Human Rights Council – A Need for Strategic Positioning

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## Abstract

As the scope of the Special Procedures mandates grows, the system is achieving more and more coherence as a whole. In this article, the author proposes a strategic positioning of the system of Special Procedures mandates. Starting with a survey of the development of the geographic and thematic mandates, the author identifies the imbalances within this system. After examining its merits and limitations, he asserts that these imbalances give cause for a strategic positioning of the system as a whole. The author argues, amongst others, that an overall strategy will make the system less vulnerable to political influences, which will allow for more continuing mandates. In this way, the system of Special Procedures mandates would be able to protect human rights more effectively. This article gives compelling reasons for a strategic positioning and translates them into elements that should be incorporated in this overall strategy.

## 1. Introduction

The Special Procedures mandates of the United Nations Commission on Human Rights (CHR) entitle experts to exchange information, receive individual complaints, visit countries and submit reports on a particular human right or on human rights in a particular context. At the 2005 session of the CHR, a record-breaking total of 44 mandates<sup>1</sup> were in place to examine human rights situations across the globe, on topics ranging from adequate housing to violence against women, and on countries ranging from Afghanistan to Sudan. The Special Procedures have been praised as the ‘front-line protection actors of the United Nations’,<sup>2</sup> the ‘conscience of humanity’<sup>3</sup> and the ‘[t]rue

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This record figure has now decreased to a total of 41, comprised of 28 thematic and 13 geographic special procedures mandates. Online: <http://www.ohchr.org/english/bodies/chr/special/index.htm>, last accessed 5 Feb. 2007.

<sup>2</sup> B. Ramcharan, ‘The Special Rapporteurs and Special Procedures of the United Nations Commission on Human Rights and Human Security’ in B. Ramcharan (ed.), *Human Rights and Human Security* (The Hague: Kluwer Law International, 2002), at 81.

defenders of the Universal Declaration of Human Rights'.<sup>4</sup> Others question their relevance or do not even know about their existence. Despite their existence for over a quarter of a century, the literature is surprisingly silent on Special Procedures mandates and their contribution to the effective protection and promotion of human rights. The present article intends to begin to fill this gap, by retracing the uneven evolution of the Special Procedures mandates and by examining generically the life cycle of those mandates. It argues that the mandates have achieved a notable degree of internal coherence and that they cover a broad, if not exhaustive, range of human rights. After discussing some of their present merits and limitations, the article will make the case for a strategic positioning of the Special Procedures within the new Human Rights Council and will put forward some measures to address the fragility of the system.

## 2. A constructive approach to imperfect standards?

### 2.1 The past: From geographic to thematic mandates

The legal foundation for discussing human rights in particular countries at the United Nations goes back to articles 1(2), 55 and 56 of the UN Charter, which state that human rights is one of the main purposes of the organization. Despite this clear mandate, UN member States were reluctant to authorize the CHR to debate the human rights situation in particular countries, since this was deemed to violate the prohibition of non-interference contained in article 2(7) of the Charter.<sup>5</sup>

The picture began to change in 1965, when the General Assembly's Special Committee on Decolonisation requested the CHR to take action in response to petitions from individuals in apartheid South Africa.<sup>6</sup> After two years of deliberations the CHR adopted, in 1967, a procedure to discuss the violation of human rights 'in all countries',<sup>7</sup> especially, but not only, with regard to situations involving racism, apartheid and colonialism. It also set up, for the first time, an *ad hoc* Working Group on the situation of human rights in Southern Africa, which was later transformed to investigate violations in the Palestinian Occupied Territories.

This twin development of the late 1960s is significant, since it opened up the path for the CHR to mandate individuals to examine the human rights situations in any given country. A 'system' began to be possible. At first, progress remained limited as both mandates concerned what were considered international pariah states.<sup>8</sup> It was not until twelve years later that the CHR set up the first mechanism on country situations involving neither racism nor foreign occupation: the Working Group on Chile. An

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<sup>3</sup> N. Al-Hajjaji, in United Nations, *Annual Meeting of the Special Procedures 2003*, 5 Aug. 2003, UN Doc. E/CN.4/2004/4, para. 44.

<sup>4</sup> C. Flinterman, J. Gutter, 'The UN and Human Rights, Achievements and Challenges' in UNDP, *Human Development Report 2000 Background Papers*, 2000. Online: [http://hdr.undp.org/docs/publications/background\\_papers/flinterman2000.pdf](http://hdr.undp.org/docs/publications/background_papers/flinterman2000.pdf), last accessed 5 Feb. 2007.

<sup>5</sup> N. Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition?' in *Human Rights Quarterly* 25 (2003), 882-908.

<sup>6</sup> P. Alston, *The United Nations and human rights: a critical appraisal* (Oxford: OUP, 1992), 126-210 at 144.

<sup>7</sup> The Economic and Social Council endorsed this wording in Resolution 1235, known as the 'public procedure'. It continues to be the basis of almost all Special Procedures mandates until today.

<sup>8</sup> P. Flood, *The effectiveness of UN human rights institutions* (Westport: Praeger, 1998), at 41.

individual expert, the Special Rapporteur on the Human Rights Situation in Chile, then replaced this Working Group. This was the birth of geographic mandates as they are known today.<sup>9</sup>

Geographic mandates allow the expert to examine the human rights situation in a specific country or region. This increases, in principle, the visibility of the issue at hand as well as the expert's authority to visit the area and receive information from governmental and non-governmental sources in the country. When a country cooperates with the expert and improves its human rights record, the expert may report publicly on the progress. Countries thus have an incentive to cooperate, since they can obtain significant international credit for their efforts.<sup>10</sup> Yet a long-standing criticism of bias states that certain countries, notably in the West, benefit from some form of informal immunity from geographic mandates. It has also been suggested that mandates are only established where a political coalition can be built.<sup>11</sup> As a result, many cases of systematic or massive human rights violations were left out of consideration. It is indeed true that, historically, the overwhelming majority of geographic mandates have concerned situations in Latin America, Africa and Asia. While the absence of a mandate on a particular country does not necessarily mean inaction by the Commission, these biases do pose a problem whenever situations of comparable severity do not receive equal treatment. It has been stated that double standards in the selection of countries still prevail and that this can only be cured by the political will of Commission members to examine all States equally.<sup>12</sup> The absence of a new mandate on the human rights situation in Iraq at the 2004 session of the Commission, for example, has been rightly qualified as a 'perplexing and troubling omission'.<sup>13</sup> Yet it should also be noted that in all those cases where country mandates were indeed set up, they often achieved notable results.

Thematic mandates were not created intentionally but were the result of a compromise. In the late 1970s Argentina came under scrutiny for the phenomenon of disappearances in its 'dirty war'. The Argentinian government successfully lobbied against a country mechanism, which would have put it on a par with its historic rival, Chile. Eventually, this dispute led to the establishment of the first thematic mandate of the Special Procedures system, the Working Group on Disappearances, in 1980.<sup>14</sup> It was soon followed by the creation of the mandates of the Special Rapporteur on Summary or Arbitrary Executions and the Special Rapporteur on Torture. The first three thematic Special Procedures were intended to deal with the 'triad' of particular grave human rights violations – torture, unlawful executions and disappearances - as an additional protective mechanism where other national and international measures had failed.<sup>15</sup>

Over time, new thematic mandates were established almost every year on a range of key human rights. Some mandates directly take up a right proclaimed in one of the

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<sup>9</sup> There currently exist 13 geographic Special Procedures mandates.

<sup>10</sup> Flood, n. 8 above, at 42.

<sup>11</sup> J. Fitzpatrick, *Human rights in crisis: the international system for protecting rights during states of emergency* (Philadelphia: University of Pennsylvania Press, 1994), at 148.

<sup>12</sup> Alston, n. 6 above, at 164.

<sup>13</sup> United Nations, *Address at the Closing of the 60<sup>th</sup> CHR by the Acting High Commissioner for Human Rights*, Press Release 23 April 2004.

<sup>14</sup> United Nations, *Commission on Human Rights Resolution 20 (XXXVI)*, 29 Feb. 1980. Online: [http://www.ohchr.org/english/issues/disappear/E-CN.4-RES-1980-%2020%20\(XXXVI\).pdf](http://www.ohchr.org/english/issues/disappear/E-CN.4-RES-1980-%2020%20(XXXVI).pdf), last accessed 5 Feb. 2007.

<sup>15</sup> Rodley, n. 5 above, at 897.

Covenants, such as freedom of religion or the right to food, while others relate to interrelated issues such as the protection of human rights defenders or human rights in the fight against terrorism. As opposed to geographic mandates, which are sometimes discontinued after a number of years, almost all thematic mandates, once established, remain in existence.<sup>16</sup>

One advantage of thematic mechanisms is that all States are, at least in principle, equally under scrutiny. Thematic experts can potentially achieve universal coverage and examine the human rights situation in any country without requiring specific authorisation by the CHR. Thematic mandates allow the study of a topic from a holistic point of view and can be an entry point to the discussion of human rights in countries that have not ratified some of the relevant human rights treaties. In this sense, they can also fill a gap and afford victims substitute protection.

For the first fifteen years not a single mandate on economic and social rights was created, reflecting the long-standing neglect of economic and social rights within international human rights law. It was only in 1994, with the creation of a mandate on foreign debt and later with mandates on education, poverty and structural adjustment policies, that this balance began to be redressed. Not everyone welcomed this development. Van Boven argues that economic topics, due to their structural character, do not lend themselves very well to fact finding and should instead be dealt with by the (hierarchically lower) Sub-Commission on Human Rights. In his view the establishment of structural mandates relating to economic rights risks the dilution of the system: the 'notion of accountability of Governments ... tends to lose its focus'.<sup>17</sup> To this it can be answered that there is nothing inherent in the mandates on health, housing or food that prohibits them from visiting countries, engaging in dialogue with governments, studying the phenomenon as well as offering recommendations. It is also a question of political weight that economic and social rights deserve to be treated with the same attention and at the same level as civil and political rights.

An imbalance of a more hidden nature was reflected for a long time by the absence of mandates dealing with the particular vulnerability of women as victims of human rights violations. The breakthrough in this matter only occurred with the establishment of a Special Rapporteur on Violence Against Women in the context of the Vienna World Conference on Human Rights in 1993. This mandate was crucial, as it related to a problem that had not been explicitly dealt with in either of the two human rights Covenants and which concerned both sets of human rights. Carried out by a courageous and inspired mandate-holder, the work of the Special Rapporteur allowed the topic of violence against women to be examined from a plethora of different angles, covering domestic violence, trafficking, cultural practices, sexual slavery, rape in the community, and violence in prisons, but also included recommendations on model legislation and response mechanisms. Many other UN bodies have subsequently taken up the issue of violence against women. As a result, the Rapporteur considers that there now exists a comprehensive international monitoring system on violence against women.<sup>18</sup>

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<sup>16</sup> There are currently a total of 28 thematic mandates.

<sup>17</sup> T. Van Boven, 'Political' and "legal" control mechanisms revisited' in M. Bergsmo (ed.), *Human rights and criminal justice for the downtrodden* (Leiden: Brill, 2003), at 544.

<sup>18</sup> R. Coomaraswamy, 'Special Rapporteurs must be made part of mainstream', *Human Rights Features*, 14 – 20 April 2003.

The mandate on violence against women led the way to the establishment of several mandates dealing with other previously neglected issues, such as Internally Displaced Persons (IDPs) or human rights defenders. These thematic mandates are of a particular nature, since they are intended to raise awareness and sensitise governments, non-governmental organisations (NGOs) and civil society at large to a topic that has not yet been sufficiently dealt with in treaties, declarations and other instruments.

Special Procedures mechanisms thus resulted from compromises and *ad hoc* solutions, rather than from a plan or predefined strategy. Initially, the mandates' justification was to deal with 'particularly disturbing practices'.<sup>19</sup> Over time, this notion was interpreted more generously to include an ever more complete list of topics and country situations. Long-standing thematic imbalances, such as the preference given to civil and political rights over economic and social rights, are gradually disappearing. The selection of countries covered by geographic mandates, however, still leaves something to be desired. On balance though, it seems true that the UN 'can no longer be justly accused of ignoring the very standards it had done so much to lay down'.<sup>20</sup> In the words of the late UN High Commissioner on Human Rights Sergio Vieira de Mello, the mandates are 'a constructive, critical approach to imperfect human rights standards'.<sup>21</sup>

## 2.2 The present: A generic life cycle analysis

Taking into account the unique character of each mandate, an analysis of only a few selected mandates would run the risk of arbitrariness. It is thus proposed to examine Special Procedures as a whole from a generic point of view, following the main steps in the existence of a mandate. This generic life cycle analysis of Special Procedures in turn examines the different titles given to the mandate; the wording of the constitutive resolutions establishing mandates; the process of selection of mandate holders; the office support received by the mandate holders; their working methods; and finally the outreach and transmission of their findings to other actors and the public at large.

The different terms given to Special Procedures mandates, such as Working Groups, Special Rapporteurs, Independent Experts, or Special Representatives, reflect the unplanned and negotiated character of the establishment of these very mandates. From a legal perspective all mandates enjoy the same protection, in particular the privileges and immunities for experts on mission as defined in article VI of the 1946 Convention on the Privileges and Immunities of the United Nations. Politically and diplomatically, however, the differing terminology was initially intended to indicate an unstated hierarchy, commensurate with the gravity of the situation. The nomination of an Independent Expert would thus be considered a weaker signal than that of a Special Rapporteur. It would reflect more of an 'advisory mechanism' instead of a 'scrutiny mechanism'.<sup>22</sup> In this logic it is not uncommon for the CHR to 'ease down' mandates from Special Rapporteur to Independent Expert, as was the case in 2003 with the Special

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<sup>19</sup> Van Boven, n. 17 above, at 544.

<sup>20</sup> N. Rodley, 'The Evolution of United Nations' Charter-based Machinery for the Protection of Human Rights' in F. Butler, *Human Rights Protection: Methods and Effectiveness* (The Hague: Kluwer Law International, 2002), at 196.

<sup>21</sup> S. Vieira de Mello, 'Membership entails responsibility' *Human Rights Features*, 22 – 25 Apr. 2003.

<sup>22</sup> J. Symonides (ed.), *Human rights: international protection, monitoring, enforcement*, UNESCO (Aldershot: Ashgate, 2003), at 51.

Rapporteur on Afghanistan, and later to transfer the item to the agenda item on technical cooperation, effectively discontinuing the mandate and replacing it by Office of the High Commissioner for Human Rights (OHCHR) technical cooperation.

An element common to all mandates is the reference to international law in the resolutions establishing the mechanisms. A brief survey of several recent as well as some older resolutions shows that the prime basis for the establishment of a mandate is to be found in international law, and particular in international human rights law. A majority of these 'constitutive' resolutions begins by reference to the UN Charter, the Universal Declaration on Human Rights, and the International Covenants. Beyond these rather general references, other instruments referred to depend on the context of the mandate in question.

The selection of mandate holder should ideally result in the choice of strong personalities, 'charismatic authorities',<sup>23</sup> who excel by pushing the topics entrusted to them. In many instances experts have been praised for their commendable work, commitment and credibility that makes their mandate directly relevant to victims. In other instances mandate holders were accused of whitewashing the country they were supposed to examine critically. The existing literature deplores the 'quintessentially political process' of this selection, which does 'little to ensure expertise and competence'.<sup>24</sup> It has to be noted, however, that the literature on this aspect is rather outdated, and that current mandate holders receive, in general, much more appraisal. Nevertheless it remains clear that even the strongest mandate stands and falls with the choice of the individual. Usually the chairperson of the CHR chooses mandate holders after consultation with all regional groups.<sup>25</sup> Thus considerable deference is given to the chairperson and only little guidance or coherence. In addition, the process lacks transparency and coordination, since mandate holders are announced in press releases on different dates, without any indication for outsiders on how the nomination had come about. While the nomination usually results from a consensus decision by the members of the CHR, the exact details of the selection and nomination process are not known to the general public. This can camouflage a number of flaws. An example of such flaws might be the gender balance of the system. The current forty-one mandates are serviced by fifty-six mandate holders. However, only five thematic Rapporteurs, seven members of Working Groups and four country Rapporteurs are women. This equates to a 28.6 per cent share in the total number of Special Procedures mandate holders.<sup>26</sup> In addition to this low score, the representation of women within the Special Procedures actually decreased in 2004.<sup>27</sup> Other imbalances have been noted regarding the professional origin of mandate holders. For example, in the early stages of the system many mandate holders were lawyers or judges, thus replicating a certain over-representation of the legal profession within the human rights community at large. This only changed over time, when mandate holders came from more diverse backgrounds geographically, covering

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<sup>23</sup> Kaelin, interview with the author, July 2004.

<sup>24</sup> Alston, n. 6 above, at 165.

<sup>25</sup> Or, in the case of Special Representatives, by the Secretary General.

<sup>26</sup> 20.8 per cent of thematic Rapporteurs, 36.8 per cent of Working Group members and 30.8 per cent of country Rapporteurs are women.

<sup>27</sup> Only four of 14 new or reassigned mandate holders appointed in 2004 are women whereas a total of 6 women ended their mandate that year. Since then, the representation of women has increased within working groups and country procedures but decreased within thematic procedures.

both industrial and developing nations, as well as professionally, including mandate holders with grass-roots experience as human rights defenders.

Regarding improved support given to Special Procedures by the United Nations, a key step forwards was the creation of the Office of the High Commissioner for Human Rights in 1993, and in 2003 the establishment of a Special Procedures Branch (SPB).<sup>28</sup> The staff of this new Branch are able to focus solely on working for their mandate, instead of having potentially conflicting responsibilities, such as direct tasks for the High Commissioner or technical cooperation projects. Yet, as so often at the United Nations, financial restraints seriously limit their effectiveness. The OHCHR's low budget share from the UN regular budget (only 1.54 per cent of the regular UN budget) means that the Special Procedures suffer from chronic underfunding and understaffing. The annual budget for Special Procedures is US\$1.5 million from the regular budget and US\$3.1 million requested from extra budgetary sources.<sup>29</sup> Many mandates receive no more than a quarter to a half of the time of an OHCHR staff member as office support. Universities and research institutes sometimes step in to provide additional research capacities. Also, even after the creation of the Special Procedure Branch, OHCHR staff servicing the Special Procedures continue to be scattered across different branches. While these organizational matters may appear trivial, they can structurally affect the capacity of the mechanisms to properly carry out their mandates.

The work carried out by the Special Procedures depends very much on the individual mandate. It is one of the system's advantages that its open structure permits the definition of an individual range of tasks and responsibilities for each topic or country under examination. A common feature is that they are all asked to collect information, analyse the problems and make recommendations and suggestions. They are thus active in the fields both 'of diagnosis and of cure'.<sup>30</sup> Many experts are entitled to consider information received from all sources and to send communications or urgent appeals to governments on alleged violations. One of the most important functions is the carrying out of country visits, since they allow direct contact with governments, civil society and others in the field. Country visits are increasingly carried out in a coordinated manner among the different mandate holders. An example is the Special Rapporteur on Housing, who had visited Peru and subsequently encouraged the Special Rapporteur on Health to visit that country. When the latter went to Peru a year later, his local interlocutors already knew what a Special Rapporteur does and his work was considerably facilitated. In other cases, however, it may make sense to coordinate missions in order *not* to visit the same countries.

It remains clear that an overall trend exists towards more unity of function and activities, such as more combined activities and joint appeals, which in 2003 made up 70 per cent of all appeals.<sup>31</sup> Annual Meetings of mandate holders, held since 1993, further contribute to this collaboration, for example in achieving better coordination between country visits by mandates and visits by the High Commissioner. Another sign of increasing integration and coherence occurred in 2004, when the CHR adopted a resolution entitled 'Human Rights and Special Procedures',<sup>32</sup> instead of the previous title 'Human Rights and Thematic Procedures'. This resolution for the first time united

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<sup>28</sup> K. Ghezraoui, interview with the author, July 2004.

<sup>29</sup> OHCHR, Annual Appeal 2004.

<sup>30</sup> Symonides, n. 22 above, at 51.

<sup>31</sup> OHCHR, Annual Appeal 2004.

<sup>32</sup> United Nations Commission on Human Rights Resolution 2004/76, 21 April 2004.

geographic and thematic mandates in a common framework. It recognized the equal importance of both civil and political and economic and social rights, and endorsed stronger cooperation between the Special Procedures and the UN Country Teams as well as the treaty bodies. A range of countries, notably from the Organisation of Islamic States as well as China and Cuba, were, however, opposed to what they considered an unacceptable 'quantum jump',<sup>33</sup> since in their view only the thematic mechanisms had come into existence with full consent of the CHR. Historically speaking, this criticism puts the horse before the cart, for, as noted above, geographic mandates clearly preceded the thematic ones. In terms of political cost to governments, geographic mandates put a spotlight on a region or a country wherever the situation justifies that in the view of the CHR members. As the system has moved beyond pariah-states like apartheid South Africa and has gained considerably in breadth, width and legitimacy, geographic mandates now bother countries to the extent that they would often wish to do away with them. This may arguably be seen as a sign of their success and development. The geographical imbalance of the system certainly needs to be tackled, but the way forward should be through the establishment of country mandates wherever reasonably justified, and not through the abolition of this important focused mechanism.

The final step in this life cycle analysis relates to the outreach of Special Procedures to the wider human rights community and beyond: what happens with their reports and recommendations and how are they transmitted to other actors? It has been argued that it is not the task of Special Procedures to improve human rights in a country, but to raise awareness.<sup>34</sup> It does indeed take numerous other actors in order to change the situation on the ground. The reports, press releases, urgent appeals and other forms of communication by the mandate holders are thus a crucial link between their analysis of the situation and subsequent action. An intelligent division of labour should guide the way. Special Rapporteurs are part of a wider struggle in which they play an important role. Effective international protection relies on a well-balanced division of labour between the different actors in this field, ranging from the various UN bodies to NGOs and governments.<sup>35</sup> Increasing cooperation between experts themselves further strengthens the transmission of the human rights message from Special Procedures to other actors.

### 3. Merits and limitations of the existing system

While a certain trend towards more cooperation and coherence within the Special Procedures system can be observed, as discussed in the previous chapter, several imbalances remain to be addressed. As will be argued below, these difficulties can best be met through a strategic positioning of Special Procedures. In order to get a better grasp of the elements required for such a strategy, it is proposed to review the merits and limitations of the present system.

#### 3.1 The merits

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<sup>33</sup> United Nations, Press Release, 21 April 2004. Online: <http://www.unog.ch/news2/documents/newsen/cn04058e.htm>, last accessed 5 Feb. 2007.

<sup>34</sup> M. Lempinen, *Challenges facing the system of special procedures of the United Nations Commission on Human Rights* (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 2001), at 11.

<sup>35</sup> M. Nowak, 'The UNHCHR: a Link Between Decisions of Expert Monitoring Bodies and Enforcement by Political Bodies' in A. Bayefsky (ed.), *The UN treaty system in the 21st century* (The Hague, Boston: Kluwer Law International, 2000), 251-254, at 252.

With regard to the merits, it can be observed that the existence of Special Procedures has become an element of political cost in national policy making.<sup>36</sup> Their relevance must be seen in the context of the significant growth of the scope of human rights, infiltrating all policy areas, from peace and security<sup>37</sup> through peace keeping to the international financial institutions.<sup>38</sup> Governments are increasingly obliged to take human rights considerations seriously and the Special Procedures can benefit from this, since governments must evaluate carefully whether the costs of non-cooperation outweigh those of cooperation.

Special Procedures have also made human rights relevant to victims by examining topics that would otherwise not have been discussed. They have succeeded in many instances in being advocates of those who are not otherwise heard, can speak on their behalf and deal with problems that take place away from the usual centres of attention. In the way that human rights have become 'the cry for the oppressed, the exploited, the dispossessed', designed to protect those 'who have nothing else to fall back on',<sup>39</sup> the experts have provided additional protection. At the same time, they have also exposed all those violations whose existence is widely known but not acknowledged.

Special Procedures mandate holders bring human rights closer to the victims, a development in line with the moves of the UN's human rights work in the field. By presenting their yearly reports to the CHR, the Special Procedures remain firmly anchored at the headquarters of the United Nations' human rights work, while being free to wander the globe in the discharge of their mandate. Special Procedures are unique in shuttling between these two worlds – the headquarters, as centre, and the field, as periphery. This also strengthens the argument of the universality of human rights and allows them, through country visits, to deal more credibly with the question of cultural relativism.

To a certain extent, Special Procedures mandate holders might be considered minor High Commissioners. The profile of the High Commissioner's position has risen dramatically in a few years and governments pay increasing attention to his or her statements. To a lesser degree this might apply to the Special Procedures. Interestingly, the post of the High Commissioner for Human Rights was initially to be called 'Special Rapporteur' or 'Special Representative'.<sup>40</sup> Elsewhere, Special Procedures were referred to as the 'immediate precursors of the High Commissioner'.<sup>41</sup> Just as the High Commissioner, Special Procedures mandate holders speak with an independent and persuasive voice, carry particular authority, are appointed by consensus and enjoy, at least in the case of thematic mandates, global reach.

### 3.2 The limitations

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<sup>36</sup> Flood, n. 8 above, at 128-129.

<sup>37</sup> For example article 39 declaration by the Security Council that situations involving large scale human rights violations constitute a threat to international peace and security. See A. Clapham, 'Peace, the Security Council and Human Rights' in Y. Danieli, (ed.), *The Universal Declaration of Human Rights fifty years and beyond* (Amityville, N.Y.: Baywood, 1999), at 382.

<sup>38</sup> Flinterman, n. 4 above, at 22

<sup>39</sup> C. Douzinas, *The end of human rights: critical legal thought at the turn of the century* (Oxford: Hart, 2000), at 145.

<sup>40</sup> A. Clapham, *The United Nations High Commissioner for Human Rights, Achievements and Frustrations*, unpublished paper, on file with author.

<sup>41</sup> Flood, n. 8 above, at 79.

One of the most obvious limitations is the lack of financial and personnel resources. This has numerous detrimental effects on their work, such as the possibility of undertaking on-site visits and to carry out in-depth studies, even if on-site visits do not *per se* guarantee objective and impartial investigation.<sup>42</sup> This problem continues to worsen with the ever-growing number of mandates, which are not likely to be accompanied by corresponding funding.

Another often-quoted limitation of their work is the politicisation of the CHR and thereby of the Special Procedures. While the element of politics is inherent to its parent body, the CHR, politics are not necessarily reflected in the actual work carried out by the experts. Paradoxically, the same governments that set up the Special Procedures mechanisms are the ones that criticise, threaten and challenge them in a number of ways. The problem seems to lie less with the experts than with the governmental representatives at the CHR. In addition, the Special Procedures play a complementary role to the more 'legalistic' UN treaty bodies.

Finally, there are inherent limitations caused by the mandate and by the subject matter. To improve human rights in a given situation is a complex thing. Therefore, the establishment of independent experts is not a goal in itself but rather aims to assist governments to establish the facts, to suggest measures<sup>43</sup> and to mobilise civil society, the media and others to take action. Normative developments are definitely no guarantee of improvements on the ground, and so the establishment of Special Procedures mandates to push for respect for a wide range of rights is a step forward, but can never be sufficient as such. It takes more than law and Special Procedures to effectively improve the protection and promotion of human rights. Former Special Rapporteur Nigel Rodley notes that the UN itself cannot change things directly, but that it can monitor the situation and thereby support those local forces that will be able to achieve changes.<sup>44</sup> It can also have an important preventive function.<sup>45</sup>

#### 4. A Need for Strategic Positioning

##### 4.1 The case for strategic positioning

Firstly, strong mandates run the risk of being discontinued, weak mandate holders could be chosen over better candidates, and significant topics or country situations could be overlooked. The absence of a strategy for the system of Special Procedures leaves too much latitude to the political will and mood present during a session of the CHR, and can lead, for instance, to the discontinuation of strong mandates. In the absence of an initial mission statement or a declaratory 'Big Bang', it is difficult to identify the precise role the Special Procedures are intended to play and the desirable course of action for their future. Since there is no overall strategy on how the Special Procedure system shall evolve and since the resolutions themselves are silent on the purpose of the mandate, there remains a risk of abolition.<sup>46</sup>

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<sup>42</sup> Lempinen, n. 34 above, at 26.

<sup>43</sup> Nowak, n. 35 above, at 254.

<sup>44</sup> N. Rodley, quoted in Douzinas, n. 39 above, at 145.

<sup>45</sup> L.-A. Sicilianos (ed.), *The Prevention of Human Rights Violations* (The Hague: Kluwer Law International, 2001), at 97-98.

<sup>46</sup> Special Procedures Branch has published two documents describing the system and future measures to strengthen it. They do not, however, reach the threshold of an actual strategic outline. OHCHR,

Secondly, as has become clear, there are no guidelines and no predefined logic defining which mandates shall be established and which not. This is not to say that the process is left to chance, and the decisions are often influenced by lobbying from a particular government, or an NGO (for example Amnesty International in the case of the Special Rapporteur on Torture). Although such lobbying may originate from genuine human rights motivations, it is still evident from first-hand accounts that the process is heavily influenced by horse-trading, vote buying, double standards and political opportunity.<sup>47</sup> One implication of this situation is the historical imbalance, in terms of both thematic and geographic coverage. It has required a great deal of advocacy by states and NGOs to begin to correct those biases. Even this progress remains inherently fragile.

Thirdly, the trend towards ever more mandates seems unabated. On the one hand, this has permitted the correction of some of the historic imbalances, has broadened their focus and can be interpreted as a signal that Special Procedures are considered a valuable tool that is here to stay.<sup>48</sup> On the other hand, however, the mushrooming of mandates has also led to concerns. As noted above, the rise in new mandates has not been supported by a commensurate rise in financial and personnel resources from the regular UN budget. The breakthrough for Special Procedures in the early 1990s coincided with the UN's most serious financial crisis to date.<sup>49</sup> By establishing new mandates the CHR could thus paradoxically weaken the mechanism as a whole, as the cake gets smaller for everyone. As a way to remedy this, voluntary funding is sought, yet this creates a new problem since the majority of funding stems from Western countries. This makes the system vulnerable to attacks of being funded on a partisan basis, and a strategy is needed to respond to this difficulty and to suggest ways out without weakening the system.

Fourthly, the growing number of mandates may constitute a burden on States, which are being asked to reply to ever more communications, requests for visits and so on. Governments may indeed find it difficult to deal with all requests for information from Special Procedures. Some thus began to complain of the proliferation of mandates to 'unmanageable proportions'.<sup>50</sup> A strategy is needed to reflect on the way forward for Special Procedures. This is also necessary since the establishment of new procedures requires a reflection on whether this will duplicate existing mandates. In the past, the CHR has on several occasions merged similar mandates, for example in 2000, when two separate mandates were combined into the new mandate of the Independent Expert on Structural Adjustment and Foreign Debt.<sup>51</sup> The fact that mandates overlap is, however, not exceptional, nor is it necessarily detrimental to their functioning. An example is the Special Rapporteur on Torture and the Special Rapporteur on Health. By definition, all acts of torture have effects on the physical and mental health of the victim. By approaching such instances with different criteria, both Rapporteurs can intervene by means of sending an Urgent Appeal to the authorities concerned. This has not only had

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*Strengthening Special Procedures: The way forward*, non-dated. Online: <http://www.ohchr.org/english/bodies/docs/special-paper.doc>, last accessed 5 Feb. 2007. OHCHR, *Challenges and principal tasks for 2004: Special Procedures Branch*, non-dated, on file with author.

<sup>47</sup> J. Bueno de Mesquita, interview with the author, April 2004.

<sup>48</sup> L. Oldring, interview with the author, July 2004. See also Van Boven, n. 17 above.

<sup>49</sup> T. Buergenthal, 'A Court and Two Consolidated Treaty Bodies' in A. Bayefsky, n.35 above, at 299.

<sup>50</sup> Van Boven, n. 17 above, at 553.

<sup>51</sup> Symonides, n. 22 above, at 52.

the advantage of reinforcing the significance of the action, but also underlines the interrelatedness of civil rights and social rights and permits a situation to be examined from different angles.<sup>52</sup>

The creation of a permanent Human Rights Council on 15 March 2006 has added urgency to this matter. As with every change in a highly politicised environment, this reform presents both opportunities and threats for the Special Procedures. The Human Rights Council will add substantive weight to the topic of human rights at the United Nations. In reference to earlier documents issued by the UN Secretariat and by expert panels, its creation further emphasizes the interconnection and mutual interdependence of human rights, security and development. Special Procedures mandate holders will be able to present their conclusion more immediately and their findings can be followed up more quickly. The Human Rights Council will furthermore allow the arbitrariness of discussing human rights in an intergovernmental forum *in spring only* to be overcome, and might – or is it wishful thinking – render superfluous polemics on special sessions to be held outside the regular meeting time. One might hope that the quality of deliberations will increase and thereby also the taking into account of the work of Special Procedures.

Yet on the other hand, there is a danger that, with the Human Rights Council, Special Procedures might be deprived of the international attention that the opening of the CHR used to generate. Their message might be more difficult to be heard. Even worse is the prospect that some member states might be tempted to argue that, with a permanent Council deliberating on human rights matters all year long, experts are no longer needed.

In its resolution, the General Assembly states that the new Council shall *inter alia* ‘assume, review and, where necessary, improve and rationalize’<sup>53</sup> the mandates and mechanisms such as the Special Procedures within one year of the Council’s first session. This is exactly the opportunity to be seized: an overall strategy on Special Procedures and a mission statement spelling out their *raison d’être* need to be developed in order to consolidate what has been achieved so far and in order to prevent the positive development of the creation of the Human Rights Council being used to weaken the Special Procedures system.

## 4.2 Elements of a Strategy

Such a strategy could take the form of a consensual document elaborated within the Commission on Human Rights, or a persuasive study commissioned and presented by the High Commissioner for eventual endorsement by the Commission. It would not take the form of overly strict guidelines or aim at streamlined activities - this would risk losing the specific added value of each individual mandate and their impact might be reduced to the lowest common denominator. The mandate holders themselves rightly expressed concern about a project by the General Assembly to streamline their methods of work, noting that their only guidelines are ‘the mandate, their conscience and the basis of facts and human rights law’.<sup>54</sup> Rather, a mission statement and a strategy would address the question of the aim and finality of the system. In particular it would answer the question

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<sup>52</sup> J. Bueno de Mesquita, interview with the author, April 2004.

<sup>53</sup> General Assembly Resolution 60/251, UN Doc. A/RES/60/251.

<sup>54</sup> OHCHR, *17 questions on Special Procedures*. Online: <http://www.unhchr.ch/pdf/factsheet27.pdf>, last accessed 5 Feb. 2007.

whether the system aims at eventually covering all international human rights or, if not, what criteria could be applied to decide on this. Thematic mandates initially only covered civil and political rights, and then began to cover economic and social rights and also a number of wider human rights issues that do not fit in either category. The Council's independence as decision-making body will need to be maintained while simultaneously encouraging a more coherent approach to the establishment of new mandates.

First, a key obstacle for the Special Procedures is their lack of visibility and low public profile. In the same way that it has been observed that treaty bodies work in 'splendid isolation from the rest of the UN system'<sup>55</sup>, it can be said that Special Procedures do not get the attention that is due to them. The Special Procedures individually and as a whole need to become more visible. They need to be widely perceived as a system and tool of the United Nations' human rights machinery, not just by insiders and scholars but also by governments and civil society at large. The work of the experts and the purpose of the system need to be transmitted more forcefully to the public. The only regular, institutional public appearance of mandate holders (apart from appearances during country visits and the participation in panels and other events) used to be during the annual session of the Commission on Human Rights. Even there, the different mandate holders presented their conclusions at different dates and times - and this will not necessarily change with the Council. So far, Special Procedures mandate holders only gather once a year to exchange ideas in a closed meeting, parts of which might in future be open to the public.<sup>56</sup> A proper communication strategy, possibly in the context of better communication of the OHCHR's work in general and including all relevant audiences and media, is needed to effectively convey the messages brought forward by the mandate holders.

Secondly, biannual Special Procedures press conferences should be set up, one in Geneva during one of the spring sessions of the Human Rights Council, and one in New York during the General Assembly in autumn. It has been said that the Special Procedures are the 'permanent tools of the CHR',<sup>57</sup> working throughout the year while the now defunct CHR only met once a year. To a certain degree this still holds true with the new Council, which will only meet on a certain number of sessions per year. These conferences would thus be an occasion for all mandate holders to discuss a limited range of topics that in their view deserve particular attention. While maintaining their individual profile over the year, these meetings might strengthen the image of an active and diverse task force of UN human rights experts. They would have the opportunity to give a first impression on how they intend to carry out their mandate and it would signal their immediate readiness to deal with the topic or country concerned. It would also allow a quick overview of the changes to the system in any given year and could be accompanied by a regular compilation of biographies and a statistical breakdown of facts on all appointees.

Thirdly, a new Special Procedures World Report comprising all findings and conclusions of the Special Procedures system should be called into life. This suggestion

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<sup>55</sup> A. Clapham, 'The UN Human Rights reporting procedures: an NGO perspective' in P. Alston, G. Crawford (eds.), *The Future of Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 175-195, at 175.

<sup>56</sup> United Nations, *Annual Meeting of the Special Procedures 2004*, 5 July 2004, UN Doc. E/CN.4/2005/5.

<sup>57</sup> Vieira de Mello, n. 21 above.

was first advanced over two decades ago<sup>58</sup> and resurfaced at the Special Procedures Annual Meeting in 2003.<sup>59</sup> So far, country profiles have been elaborated by the UN for only a small number of countries, thematically listing summarized findings by treaty bodies and Special Procedures. A World Report would allow everyone interested in the subject to get a quick and reliable overview of what exactly the different experts said about human rights across the world. It would also allow comparisons between themes and countries, more clearly expose thematic and geographic gaps in the system, and allow for trends in the overall human rights situation to emerge more clearly. It would increase knowledge about the Special Procedures, would allow more potential victims and people working on their behalf to turn to them, and would help to create a viable political basis in their support. By generating a near-complete picture of the vast range of Special Procedures' findings covering many themes and countries, it could even motivate Special Procedures to investigate themes and places that have so far been neglected, as well as generating a more systematic approach to the establishment of mandates. A strategic framework for the system might also function as a pragmatic solution to the problem of access to countries, since it would increase its overall visibility and increase the political cost of non-cooperation with Special Procedures.

Fourthly, the strategy should look into options for a more permanent basis for Special Procedures. Currently, mandates are set up for terms of one to three years. By extending this to a four or five-year duration, the Human Rights Council would send a clear signal that the topic or country situation under scrutiny is of great importance. Changes in the composition or mood of the Council would not be allowed to jeopardize the existence of the mandate. One might go further than that: the mandate of the Special Rapporteur on the occupied Palestinian territories runs 'until the end of the Israeli occupation of the Palestinian territories occupied since 1967'.<sup>60</sup> *A priori*, nothing speaks against applying such open-ended formulations to other ongoing problems, such as torture or discrimination.<sup>61</sup> Alternatively, the Special Procedures system could be professionalised by asking experts to carry out their mandate full-time.<sup>62</sup> It is however unclear whether the best experts would be willing to give up their regular profession and whether the necessary financial resources to compensate the mandate holders could be made available.<sup>63</sup>

Fifthly, with regard to a number of difficulties discussed in the generic life cycle analysis, the strategy for Special Procedures might also inherently include setting up a panel of eminent persons to advise on suitable candidates to become future mandate

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<sup>58</sup> Theo van Boven in an address to the CHR in 1980. Quoted in B. Ramcharan, 'Leadership in Human Rights', in Bergsmo, n. 17 above, at 703.

<sup>59</sup> United Nations, n. 3 above.

<sup>60</sup> OHCHR, *Special Procedures of the CHR*. Online: <http://www.ohchr.org/english/bodies/chr/special/countries.htm>, last accessed 5 Feb. 2007.

<sup>61</sup> Lempinen, n. 34 above, at 146.

<sup>62</sup> The UN Secretary-General suggested, *inter alia*, the appointment of more senior staff to service Special Procedures. J. A. Mertus, *The United Nations and Human Rights – A guide for a new era* (London/New York: Routledge, 2005), at 78.

<sup>63</sup> In the 1970s a Standing Body to investigate human rights violations was suggested yet this seems too inflexible a solution, since the weight of the opinion of an individual expert and their individual profile would potentially be lost. Alston, n. 6 above.

holders, similar to a suggestion made in the context of the treaty bodies.<sup>64</sup> The strategy should also emphasise the need for gender equality in the selection of mandate holders, in order to follow up on the commitments made, amongst others, at the Beijing Fourth World Conference on Women and at subsequent UN gatherings, where specific reference to the need of gender mainstreaming within the CHR was made.<sup>65</sup> Gender mainstreaming at the new Council cannot proceed without an increased representation of women as mandate holders, especially given the negative trend observed in this matter over the past few years.<sup>66</sup> Furthermore, the strategy might spell out more clearly the financial needs of Special Procedures and support the cooperation of mandate holders between themselves and with other actors within the United Nations and beyond.

Finally, considering the impressive expertise available in the form of the mandate holders, it might be useful to launch theme-specific *ad hoc* working groups to deal with a problem of particular relevance. Special Procedure working groups could for example examine the question of the legal protection of people displaced by a particular conflict and could comprise the Rapporteur on that country as well as the mandate holders on IDPs, housing, violence against women, torture, and children in armed conflict. Symonides suggested an 'intersectional approach', through which 'unique material of great relevance to international decision-making bodies' could be produced to help prevent or end human rights violations.<sup>67</sup> At their 2004 Annual Meeting, the Special Procedures mandate holders held a thematic discussion on child rights and plan to hold similar debates in the future.<sup>68</sup> This development is to be welcomed and should also continue outside the Annual Meeting.

## 5. CONCLUSION

The Special Procedures system has come of age and is now covering a wide, if not fully comprehensive, range of human rights topics and geographic areas. Increasingly, Special Procedures mandate holders are able to contribute to this endeavour in a more systematic, coherent and cooperative way. Certain imbalances remain but both thematic and geographic mandates have their strengths and weaknesses and it seems that they are largely complementary. In certain cases, Special Procedures mandates have been enabled to fill gaps in the international legal protection of human rights or set in motion a debate on neglected issues. Progressive mandates on violence against women, human rights defenders or IDPs set in motion a debate on previously neglected issues. The added value of Special Procedures thus lies in covering both 'established' rights and those that have come to the fore more recently. Special Procedures have become a political cost to the governments concerned and the experts have brought human rights closer to the victims and made them more relevant to them, often acting on their behalf. To a certain extent, they function as minor High Commissioners, focusing on just one particular topic or country. The lack of financial and personnel resources, the politicisation of the old Commission and inherent difficulties in improving human rights situations have limited

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<sup>64</sup>C. Scott, 'Bodies of Knowledge, a diversity promotion role for the UNHCHR', in P. Alston, G. Crawford (eds.), *The Future of Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), 403-437, at 423.

<sup>65</sup> United Nations, *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, 16 November 2000, UN Doc. A/RES/S-23/3, para 26 and 88.

<sup>66</sup> See chap. 2.2 above

<sup>67</sup> Symonides, n. 22 above, at 58.

<sup>68</sup> United Nations, *Annual Meeting of the Special Procedures 2004*, 5 July 2004, UN Doc. E/CN.4/2005/5.

the success of the Special Procedures. Notwithstanding these difficulties, the proliferation of mandates has continued and currently stands at a total of forty-one mandates. While the bulk of the follow-up must ultimately be carried out by others, Special Procedures have a role in raising these issues and supporting local actors whose daunting task it is to achieve change. In that sense, the experts pass on the torch to others. In challenging times for human rights and the United Nations, a 'strong, independent and authoritative new human rights presence would be the single most effective way'<sup>69</sup> of improving the plight of peoples across the world. Could this presence be in part carried out by the Special Procedures?

'If the twentieth century is the epoch of human rights', writes Costas Douzinas, 'then their triumph is something of a paradox'.<sup>70</sup> Applied to the Special Procedures, it holds true that the proliferation of mandates and the widening of their scope and methods of work have not, or have not yet, achieved a visible decrease of human rights violations worldwide. Does this mean the system has so far not accomplished its goals? In the absence of a clear mission statement this question cannot be answered. With the establishment of the Human Rights Council, the Special Procedures require a mission statement and an overall strategy on their desired identity and the steps to achieve it. The Special Procedures will have to know very clearly who they are and what they want. It is only then that the justifiably high expectations held of them may ultimately be met.

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<sup>69</sup> C. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), at 149.

<sup>70</sup> Douzinas, n. 39 above, at 2.