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MANUAL ON THE UNIVERSAL HUMAN RIGHTS SYSTEM

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Foreword

This **Manual** aims to both provide the user with a reduced and updated version of our ***Curso de Derecho internacional de los derechos humanos*** (Madrid, Trotta, 2002; reprint: 2006, 1.028 p.) and to respond to the academic requirements of the Master on International Protection of Human Rights offered in English by the University for Peace in San José, Costa Rica.

The **Manual** shall be supplemented by ***Prácticas de Derecho internacional de los derechos humanos*** prepared with Prof. C. Faleh Pérez (Las Palmas University). Its edition of October 2013 is accessible at http://www.aedidh.org/sites/default/files/Practicas%202013.pdf .We believe on a practical methodology to appropriate teach and train on international human rights law. Thus, the **Manual**'s main objective is to empower participants to make a good use of the different UN mechanisms for the protection of human rights.

Both **Manual** and ***Prácticas*** are divided in two main Parts along with the conventional or extra-conventional nature of different protection mechanisms. Each Part is composed of Sections in which the protection mechanisms are grouped in accordance with their legal nature.

Both **Manual** and ***Prácticas*** have proven their efficacy as tools to teach and train on international human rights law at University level. They have been used for many years at the International Institute of Human Rights (Strasbourg); the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (University of Lund**,** Sweden); the *Instituto de Derechos Humanos de la Universidad Nacional de La Plata* (Argentina); the *Universidad Iberoamericana* of Mexico D.F.; FLACSO-Mexico; and the Academy on Human Rights and Humanitarian Law of the American University (Washington). In Spain they are often used in Masters on IHRL taught at the Universities of Alcala (Madrid), Basque Country (Bilbao) and Autonomous University of Madrid.

Lastly, both the **Manual** and the ***Prácticas*** are focused on the **Universal Human Rights System**, i.e. the United Nations system for the protection of human rights, also known as "the universal system". Therefore, regional systems, as well as International Humanitarian Law, International Refugees Law and International Criminal Law shall not be discussed.

San José de Costa Rica, 1st February 2014.

THE AUTHOR.

General introduction:

The international human rights law

We are living in Europe and other developed countries a long systemic crisis that is the result of the economic development model based since the end of the Cold War ((1989) in the economic and financial globalization which was imposed by the market rules of liberalism and maximum profit of multinational enterprises. This model imposed in the world the progressive privatization of essential public services (education, health), social de-regularization of working conditions, the economic growth without consideration of its environmental sustainability, increase of social inequalities and social exclusion, increase of unemployment, political corruption and weakness of the rule of law and the democratic institutions.

In the field of international relations, the crisis affected the principles and purposes established by the 1945 Charter of the United Nations that were severely questioned. However, the UN Charter had established the international legal order governing the international community today composed of 193 sovereigns States[1]. Among such principles we must remember the prohibition of threat and use of force; the pacific settlement of disputes in conformity with international law; respect for the right to self-determination and economic and social development of peoples; and respect for human rights and fundamental freedoms of all, without discrimination.

The current systemic crisis has more than 12 years. It was originated by the unprecedented terrorist attacks of 11 September 2001 that blew-up New York Twin Towers and reached the Pentagon in Washington DC. Following the declaration of "war against terror" by President Bush's Administration as a reaction to such attacks, the United States and its allies undertook a unilateral military intervention in Iraq without the compulsory authorization of the Security Council. Further military interventions in Afghanistan and Libya obtained the SC's authorization, but were not followed by the monitoring that should have been performed the Security Council and the Secretary-General in accordance with the UN Charter. In all cases, military interventions were carried out in a flagrant violation of both the international humanitarian law and the international human rights law. Most of the victims of such interventions were innocent civilians that, despite enjoying special international protection, found their rights violated in total impunity.

In reply to the international crisis the former UN Secretary-General K. Annan proposed in 2005 an ambitious reform of the United Nations articulated on the three basic pillars upon which the UN Charter is based, namely: An effective collective security system (which would require the reform of the Security Council); economic and social development of peoples; and the

[1] The last State to join the UN was *South Sudan* (General Assembly resolution of 14 July 2011).

effective respect for human rights and fundamental freedoms universally accepted[2].

Unfortunately, on 16 September 2005 the last serious attempt to reform the UN was turned-off without further action. World leaders tried to adapt the world Organization to the new challenges of an extremely complex and deeply unequal international community, as its 193 Member States are. That day the Heads of State and Government from all over the world approved in New York the "2005 World Summit Outcome Document"[3]. Such a Document restated the UN Charter principles, which was not a trivial matter if we consider the world crisis carried out by a "war against terror" that has probed its failure, since the world today is much more insecure than in 2001.

Indeed, the 2005 Outcome Document restated the fundamental principles of the Organization just as they were adopted in the 1945 Charter, acknowledging that "peace and security, development and human rights are the pillars of the United Nations system and the foundations of security and collective wealth", reason why all those values "are interrelated and mutually reinforcing"[4]. This evidenced that international peace and security cannot be interpreted only in military terms (States national security), since security also matters peoples and individuals (human security).

Thus the Summit reiterated what the United Nations Development Program (UNDP) already showed in 1994: "security has gotten more close to the nation-States than to the people", evidencing that "legitimate concerns of common people trying to have security in their daily life were left aside. For many, security symbolized protection against disease, hunger, unemployment, crime, social conflict, political repression, threat and environmental risk… it is not a concern because of weapons: it is a concern for life and human dignity"[5].

In addition, world leaders reaffirmed in 2005 that gender equality and the enjoyment of all human rights by all people "are essential to promote development, peace and security" [6]. They also committed to increase effectiveness, "accountability and credibility of the United Nations system"[7]. Morever, they resolved "to create a more peaceful, prosperous and

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[2] *A broader concept of freedom: Development, security and human rights for all*. Secretary General report Doc. A/59/2005 of 21 March 2005, 88 p., *passim.*

[3] General Assembly resolution 60/1 of 26 September 2005.

[4] Paragraph 9 of resolution 60/1.

[5] UNDP, *Human Development Report 1994*, p. 25.

[6] Resolution 60/1, *cit*., paragraph 12.

[7] Id., paragraph 15.

democratic world", providing "multilateral solutions to the problems of the four following fields: development, peace and collective security, human rights and rule of law and strengthening of the United Nations"[8].

Finally, the Summit affirmed the responsibility of the States to protect (*R2P*) peoples from genocide, war crimes, ethnic cleansing and crimes against humanity. Failing the concerned State to do so, the international community has the same responsibility in accordance with Chapters VI and VIII of the UN Charter, i.e., through the appropriate pacific means such as diplomatic and humanitarian means. Should the pacific means be inadequate the Summit announced to be ready to adopt further collective measures through the SC, including (military) sanctions in accordance with Chapter VII of the UN Charter[9].

Laudable purposes that, unfortunately, have not been followed by appropriate implementation measures, fundamentally due to the lack of political will of dominating States to reform the *status quo* represented by the 1945 Charter, in which the government of the world was entrusted to a directory of the five major powers that won the Second World War. As a result, the P-5 States were provided with the *veto* right that still prevails in the executive body of the Organization (Security Council), leading to its paralysis in times of crisis (i.e. Middle East, Syrian Arab Republic).

It is clear today that the Security Council has an unbalanced composition. Therefore, the majority of States have repeatedly expressed in the General Assembly – the parliamentary body of the UN-, that the Security Council should be democratized in its composition to respond to the current composition of the international community (193 Member States of the UN). Moreover, the SC methods of work should be transparent and the right to *veto* should be reviewed. Civil society organizations (CSO) also claim their participation in the work of the SC, which today is still not permitted.

Despite these structural constraints that have conditioned the development of an international law that should be more democratic, participatory and inclusive of sovereign States, throughout the Cold War (1945-1989) the international community has patiently built an *institutional* structure characterized by the development of international intergovernmental Organizations, which established permanent channels aiming at institutionalize the international cooperation among States and with the Organization to fulfill the purposes and principles spelled out in the UN Charter.

Therefore, historical, political and ideological conditions have been present in the development of contemporary international law, and have also

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[8] Id., paragraph 16.

[9] *Ibidem id*, paragraphs 138-139. See *inter alia*: NIEMELA, P., *The politics of responsibility to project: problems and prospects*. Erik Castren Institute of International Law and Human Righs, Helsinki, 2008; PATTISON, J., *Humanitarian intervention and responsibility to protect: who should intervene?* Oxford University Press, Oxford, 2010.

tailored today's international human rights law (hereinafter: IHRL). However, the progressive weight of human rights in the international arena has acted as a spearhead forcing major contemporary transformations of international law.

Indeed, we have moved from an international law model exclusively designed to regulate relations among sovereign States, to one in which States agree to progressively limit their sovereignty as subjects of international law, and to accept other *international actors* strongly emerging and claiming to participate with the States in the development and implementation of IHRL. Among them, the international organizations and individuals that, organized as civil society, have decisively contributed to the gradual humanization of international law and to the emerging of a strong IHRL.

The new paradigm of institutional structure has paid off. Since the 1945 UN Charter to date, 69 years have elapsed in which the UN has incorporated leading specialized agencies such as ILO, UNESCO, FAO and WHO. Subsidiary bodies were added as UNHCR, UNICEF, UNDP and WFP. Key departments of the Secretariat were strengthened (Office of the High Commissioner for Human Rights, Humanitarian Affairs, Peace-keeping Operations and Peace-building, etc.) And the States established regional organizations as the Council of Europe, the Organization of American States (OAS), the African Union (AU), the Arab League and the Organization of Islamic Cooperation (OIC).

As a whole, intergovernmental organizations have developed a complex institutional and normative framework, decentralized and still imperfect, upon which it has been constructed a human rights promotion and protection system consisting of primary or *substantive* rules (declarations of rights) and secondary or *procedural* rules (permanent institutions for protection and promotion of those rights)[10]. This system, known in legal terms as ILHR, constitutes the best civilization legacy received from the XX century.

The first substantive rule that summarized in 30 visionary articles the content of "fundamental human rights and freedoms" set out in the San Francisco Charter, was the **Universal Declaration on Human Rights** (UDHR), adopted by the UN General Assembly on 10 December 1948[11]. Since then the basic principles enshrined in the UDHR have become more precise in many legal standards set forth in more than 200 human rights international treaties and protocols, as well as in innumerable rules of general international law, customary law and general principles of international law.

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[10] Vid. SÁNCHEZ PATRÓN, José Manuel: Las Organizaciones Internacionales ante las violaciones de los derechos humanos. Oviedo, Septem Ediciones, 2004, 368 p. In a more critical approach, vid. VILLÁN DURÁN, C.: "La refundación de la ONU", Pensamiento Propio (Buenos Aires), núm. 27 (enero-junio de 2008), pp. 73-99.

[11] Vid. VILLÁN DURÁN, C.: "La Declaración Universal de Derechos Humanos en su 60° aniversario: origen, significado, valor jurídico y proyección en el siglo XXI", *in* CABALLERO OCHOA, José Luis (Coordinador), La Declaración Universal de Derechos Humanos. Reflexiones en torno a su 60 aniversario. México, Edit. Porrúa, 2009, 557 p., *at* XXI-XLI.

The set of both substantive and procedural law of IHRL makes a genuine **International Code of Human Rights**.

Certainly the **Code** has developed much more the *substantive* norms, since it contains an impressive number of human rights internationally recognized (civil, political, economic, social, cultural and solidarity rights as the right to development) providing standards to set their content and scope. Besides, the Code also includes secondary norms establishing international institutions dealing with the defense, promotion and protection of human rights, as well as internal regulations and methods of work dealing with the functions and competences of those institutions, generally composed by independent experts.

As regards to the international human rights **protection** bodies *stricto sensu*, their functions are rarely of a jurisdictional nature. Those existing worldwide (International Criminal Court, Ad Hoc International Criminal Tribunals, Mixed Tribunals) are competent to trying **individuals** guilty of genocide, war crimes or crimes against humanity. On the contrary, they cannot judge States because they do not accept to be suited internationally. This explains why there is not yet a World Court of Human Rights before which the victim could directly suit the State for alleged violation of human rights. However, the existence of regional courts (i.e., European Court of Human Rights, Inter-American Court of Human Rights, African Court of Human and Peoples' Rights) highlights that more and more States have already accepted that judicial international bodies are necessary to address impunity of human rights violators.

Therefore, the *institutional* structure prevailing in the international community led to the establishment of international protection bodies respectful of States' sovereignty. Consequently, bodies of independent experts (Committees established in treaties and special procedures of the Human Right Council) were established initially in the field of the **promotion** of human rights (such as the examination of periodical reports of States by the Committees, or the study of massive and flagrant violation of human rights by the special procedures). Subsequently, due to growing influence of international actors – particularly the civil society -, States have accepted that the competence of those bodies of independent experts be extended to develop mechanisms of **victims protection** in the strictest sense, with jurisdiction to adjudicate individual complains for alleged violations of human rights. To sum up, those mechanisms have a quasi-jurisdictional o quasi-contentious nature.

In the field of human rights the most important decision of the 2005 Summit was to establish the **Human Rights Council** (HR Council), whose essential functions were defined in 2006 by the General Assembly[12]. It is an

[12] General Assembly resolution 60/251 of 15 March 2006. It was adopted by 170 votes in favor, 4 against (United States, Israel, Marshall and Palau Islands) and 3 abstentions (Belarus, Iran and Venezuela).

intergovernmental body reporting to the General Assembly, with a membership of 47 States. It replaced the former Commission on Human Rights on 16 June 2006 and since then it has held 24 regular sessions and 20 special sessions[13].

As it will be discussed later[14], the evaluation of the first five years of the HR Council shows a disappointing result, having increased the politicized level that the former Commission on HR was accused for. In fact, the debates in the HR Council are clearly dominated by the Government representatives of their 47 member States, in jeopardize of the important role that the civil social organizations (CSO) had in the former Commission on Human Rights.

The impressive set of substantive and procedural standards that make the **International Human Rights Code** elaborated during the last 69 years, have become a relatively autonomous section of the international law known as ***international human rights law***. According to the definition that we have already stated[15], the IHRL is:

> *A system of principles and rules governing a sector of relations of institutionalized cooperation among States of unequal socioeconomic development and power, whose purpose is to promote respect for human rights and fundamental freedoms universally recognized, as well as the establishment of mechanisms to guarantee and protect such rights and freedoms, which are considered a* ***legitimate concern*** *and, in some cases, fundamental interests for the current international community of States as a whole.*

The biggest challenge of the XXI century is to get the **Code** correctly implemented at the domestic field of the States, so that everyone can enjoy all the rights enshrined in the international level, leaving no room for any kind of discrimination. The universal standard treatment is the necessary consequence of human dignity, a fundamental value upon which the legal human rights system was built.

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[13] From the 20 special sessions, six have been dedicated to the crisis of human rights in the Middle East (Arab territories occupied by Israel, including East Jerusalem, South Lebanon conflict, aggression to Gaza and assault to the humanitarian fleet). In others the crisis of human rights has been studied in different countries of the world, namely: Sudan/Darfur, Myanmar, D.R. of Congo, Sri Lanka, Haiti, Côte D'Ivoire, Libya, Syria and Central African Republic. Two other special sessions addressed thematic issues, such as the global food crisis and the effects of the world's economic and financing crisis in the universal performance and effective enjoyment of human rights.

[14] See below, Second Part, Section B: *Other mechanisms of human rights promotion at the Human Rights Council. Introduction.*

[15] For an analysis of the concept and essential elements of the IHRL see our Curso de derecho internacional de los derechos humanos. Madrid, Trotta, 2002 (reimpresión: 2006), 1.028 p., Lección 2, pp. 85-140.

Accordingly, the IHR Code is an unfinished work for three reasons:

First, the permanent increase in the international community of new areas in the social relations require new substantive regulation in the field of human rights, thus giving rise to the progressive development of the Code. This was the reason why the General Assembly, in recent years, adopted the *Convention on the Rights of Persons with Disabilities and its Optional Protocol* (13 December 2006), the *International Convention for the Protection of All Persons from Enforced Disappearance* (20 December 2006) and the *Declaration on the Rights of Indigenous Peoples* (2007).

In 2011 the General Assembly adopted the *United Nations Declaration on Education and Training in Human Right*[16]. The Human Rights Council also adopted three new instruments, namely: Firstly, the *Guiding Principles on the Foreign Debt and Human Rights*, prepared by the Independent Expert on this issue[17]. Secondly, the *Guiding Principles on Enterprises and Human Rights*[18], prepared by the Special Representative on this matter. And, thirdly, the *Guiding Principles on Extreme Poverty and Human Rights*, prepared by the Special Rapporteur Magdalena Sepúlveda[19].

Other new standards are still in process. Thus, the HR Council established in 2006 a special committee to draft complementary international standards to the International Convention on the Elimination of All Forms of Racial Discrimination[20]. In addition, the HR Council established in 2010 a working group to consider a draft convention on private military and security companies that the working group on the use of mercenaries had drafted[21].

Similarly, the HR Council took in 2012 four new initiatives in the field of the international codification and progressive development of the IHRL. Firstly, it requested the WG on the right to development to prepare new

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[16] GA res. 66/137, adopted on 19 December 2011.

[17] Doc. A/HRC/20/23, of 10 Abril 2011, Annex.

[18] Doc. A/HRC/21/21 and HR Council res. 17/4, of 16 June 2011, para. 1. See also the report of the Special Representative in doc. A/HRC/17/31.

[19] HR Council res. 21/11 of 27 September 2012. Doc. A/HRC/21/39. Available at http://www.ohchr.org/Documents/Issues/Poverty/A-HRC-21-39_sp.pdf

[20] HR Council's decision 3/103, of 8 December 2006. The fifth session was held in May 2013 (res. 21/11, of 28 September 2012).

[21] HR Council res.15/26, of 1st October 2010; res. 21/29, of 28 September 2012, para. 13; and res. 21/5, of 27 September 2012, para. 1. See also docs. A/HRC/WG.10//1/2, of 13 May 2011, 27 p.; and A/HRC/WG.10//1/4, of 22 November 2011. *Vid.* WHITE, Nigel D.: "The Privatization of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention", Human Rights Law Review, vol. 11, 2011, pp. 133-151.

standards on implementation of the right to development with a view to adopt guidelines aiming to draft an imperative international legal standard[22]. Secondly, it requested the WG on arbitrary detention to prepare principles and basic guidelines on procedures dealing with the right of all individual in detention to have access to a court to decide as soon as possible on the legality of the individual's detention and order the individual's freedom if the detention is illegal in accordance with the international obligations of the State[23]. Thirdly, it reiterated to the Independent Expert on human rights and international solidarity to prepare a draft declaration on the right of peoples and individuals to the international solidarity[24]. And, fourthly, it established a new WG to draft a UN declaration on the rights of peasants and other people working in rural areas, under the basis of the draft submitted by the Advisory Committee[25].

Secondly, the **Code** is incomplete because the improvement of enforcement measures of its rules will be obtained with the approval of new *procedural* rules that establish new institutions and mechanisms for the international protection of human rights, or substantially improve the existing ones. In this way of progress two new Committees were established by the above-mentioned Conventions of 2006, which assume a plurality of functions to monitor the implementation of the rights considered in both Conventions, including the Committees' competence to receive individual complaints.

In addition, it has been a landmark the adoption by the General Assembly, on 10 December 2008, of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, since it recognized for the first time at conventional level the ESCR' justiciability[26].

Moreover, the GA adopted on 19 December 2011 the (third) optional protocol to the *Convention on the Rights of the Child*, providing the Committee on the Rights of the Child with the competence to receive, *inter alia*, individual complaints and making inquiries[27].

The next step is to recognize that, when the national protection system fails, the best way to adequately protect all human rights recognized at the international level is through the judicial protection, which would require establishing in the future a *World Court of Human Rights*.

Thirdly, because the international community took advantage of the end of the Cold War (which is identified with the fall of the Berlin Wall on 9

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[22] HR Council res. 19/34 of 23 March 2012, para. 5 g) and h).

[23] Paras. 10 and 6 d) of HR Council res. 20/16, of 6 July 2012.

[24] Res. 21/10, of 28 September 2012, para. 14.

[25] Res. 21/19, of 28 September 2012, para. 1. The draft declaration prepared by the Advisory Committee is in doc. A/HRC/WG.15/1/2, of 20 June 2013, 7 p.

[26] GA res. 63/117, of 10 December 2008, Annex. The OP was ratified by 10 States, entering into force on 5 May 2013.

[27] HR Council res. 17/18, adopted on 17 June 2011. Having obtained 10 ratifications the new OP to CRC will enter into force on 14 April 2014.

November 1989) to discuss in large -World Conferences with broad participation of civil society- global problems that we must face regarding peace and security, development, environment, disarmament and respect for human rights. The Declarations and Plans of Action adopted at the UN Summits during the nineties have pointed out the need to meet these challenges in an integrated manner.

In this sense, it was recognized as a top priority the eradication of extreme poverty and inequality, because they generate the greatest violations to human rights. Therefore, the Millennium Development Goals as proclaimed following the Millennium Declaration (2000), were reiterated by the 2005 Outcome Document.

However, 13 years later we find that the world has become more insecure. The doctrine of the "war against terror" led to arms race, raising to US 1.756 billons in 2012[28]. This explains that today more than 40 armed conflicts are on life in the world. In addition, arms race jeopardizes the effective financing of economic and social development of peoples. In fact, economic and social inequalities in the world have increased. According to FAO in 2013 persisted 842 million people in extreme poverty and hunger, mostly women and children in developing countries); and the massive violations of human rights and international humanitarian law remain unpunished.

From the human rights perspective, effective response to global security problems and economic and financial crisis afflicting the humanity, is the affirmation of the ***rights of solidarity*** based on the model of the *United Nations Declaration on the Right to Development* of 1986, which identifies both individuals and peoples as right-holders. Thus, new emerging solidarity rights are claimed along with the right to development, such as the right to a healthy environment, the right to disarmament, the right to the common heritage of mankind, the victims' right to humanitarian assistance, or the right of victims to be protected by the international community against genocide, war crimes, crimes against humanity or gross violations of human rights when the State of its jurisdiction will not or fail to, protect ("responsibility to protect").

A special mention deserves the **human right to peace**, whose international recognition is promoted by the *Spanish Society for International Human Rights Law*[29] since 2005. The *Luarca Declaration on the Human Right to Peace,* adopted on 30 October 2006, proved that this right must respond to a holistic and integrated approach, synthesis of all human rights already recognized (civil, political, economic, social, cultural rights and right to

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[28] SIPRI Yearbook 2013. *Cfr.* www.sipri.org/yearbook/2013/03

[29] Hereinafter: SSIHRL (in Spanish: AEDIDH). Established in 2004, it has a membership of 120 experts on IHRL spread in Spain and Latin America. The Society's activities and achievements are available at: www.aedidh.org

development)[30]. Furthermore, it is a right deeply rooted in the UN Charter and the Universal Declaration of Human Rights (Art. 28). Without international peace and security, it is not possible the economic and social development, neither the effective respect for human rights. These are the three pillars underpinning the UN Charter.

The *Luarca Declaration* was revised in 2010 by the Spanish experts Technical Committee meeting in Bilbao to incorporate the inputs received from the different world's cultural sensitivities, which were collected through Consultations with experts organized by the SSIHRL in the five regions of the world[31]. The result of this work was the *Bilbao Declaration on the Human Right to Peace of 24* February 2010[32].

The *Bilbao Declaration* was also reviewed and internationally legitimized by the *International Drafting Committee* of ten independent experts (representatives of the five regions of the world), which approved on 2 June 2010 the *Barcelona Declaration on the Human Right to Peace*[33].

The *international legislative initiative* of the civil society culminated in the International Congress on the Human Right to Peace, which met in Santiago de Compostela (Spain) on 9-10 December 2010, on the occasion of the 2010 World Social Forum on Education for Peace. The civil society representatives attending the Congress approved two important documents:

(1) *Santiago Declaration on the Human Right to Peace*, which reflects the aspirations of the international civil society as a whole. A large group of 1795 CSO from around the world, coordinated by the SSIHRL, submitted the *Santiago Declaration* to the Human Rights Council (March-June 2011) and its Advisory Committee (January 2011), urging States and experts to continue the official codification of a universal declaration of human right to peace on the basis of texts prepared by the civil society[34].

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[30] Vid. RUEDA CASTAÑÓN (C.R.) & VILLÁN DURÁN (C.), (editors): The Luarca Declaration on the Human Right to Peace. 2nd Edition, Granda (Asturias), Ediciones Madú, October 2008, 560 p.

[31] Regional declarations can be checked at: VILLÁN DURÁN (C.) & FALEH PÉREZ (C.) (Editors), Regional Contributions for a Universal Declaration on the Human Right to Peace, Luarca, SSIHRL, July 2010, 640 p., Annex II. Also available at: www.aedidh.org

[32] *Ibidem*, Annex I (*Bilbao Declaration* in three languages). Also available at: www.aedidh.org

[33] Vid. ICIP, *Barcelona Declaration* on the Human Right to Peace. Barcelona, ICIP / SSIHRL, 2010, 106 p. Also available in multiple languages at www.aedidh.org.

[34] The Santiago Declaration on the Human Right to Peace is available at http://www.aedidh.org/sites/default/files/Paz-migraciones-y-LD-de-los-Pueblos.pdf

(2) The Statutes of the *International Observatory of the Human Right to Peace* (IOHRP)[35], which entered into force on 10 March 2011. The Observatory is part of the SSIHRL, thus benefiting from the experience gained during the SSIHRL four-year World Campaign in favor of the human right to peace. However, the autonomy of IOHRP is assured since it will have its own bodies (General Assembly, Executive Committee and International Secretariat).

The IOHRP provides the international civil society with a permanent institutional mechanism to ensure that the official codification process of human right to peace under the Human Rights Council and its Advisory Committee have due regard of the *Santiago Declaration*. The IOHRP will also conduct studies, publish reports and develop indicators to assess the States and other international actors' compliance with the rights and obligations recognized by the *Santiago Declaration*.

Resolution 14/3 of the Human Rights Council, adopted on 17 June 2010, opened the official codification process of the right to peace, explicitly recognizing "... the important work of civil society organizations to promote the right of peoples to peace and to codify that right"[36]. The HR Council endorsed "the need to further promote the implementation of the right of peoples to peace," and requested "the Advisory Committee, in consultation with Member States, civil society, academia and all appropriate stakeholders, to prepare a draft declaration on the right of peoples to peace and to report on progress made to the Council at its 17th session"(June 2011)[37].

A year later, the HR Council (resolution 17/16 of 17 June 2011) took note of the first progress report submitted by the Advisory Committee and reiterated its request to submit a final draft declaration at its 20th session (June 2012).

To this purpose, the Advisory Committee (recommendation 5/2 of 6 August 2010) established a drafting group of four experts (extended to six in 2011). A year later (AC recommendation 7/3 of 12 August 2011) adopted the first draft Declaration on the right of peoples to peace, strongly inspired by the *Santiago Declaration*, and requested the drafting group to submit a final draft Declaration in February 2012 to be sent to the HR Council in June 2012.

Finally, the HR Council established its own WG to continue drafting the UN Declaration on the right to peace[38], on the basis of the draft submitted by

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[35] Also available at http://www.aedidh.org/sites/default/files/Paz-migraciones-y-LD-de-los-Pueblos.pdf

[36] Last paragraph of the preamble of res. 14/3.

[37] Idem *id*., § 15 of the resolution.

[38] Res. 20/15, of 5 July 2012, adopted by a vote of 34 in a favor (African, Asian and Latin American States), 12 abstentions (European States and India) and one against (United States).

the Advisory Committee. In the first session of the WG (Geneva, February 2013), the States made a first reading of the AC draft with the participation of numerous CSO[39]. Both SSIHRL and IOHRP, on behalf of 1792 CSO and cities worldwide, welcome the AC draft declaration which had incorporated some 85% of the Santiago Declaration, and pointed out to their amendments dealing with the remaining 15% of standards[40]. The mandate of the WG was extended for a year in the HR Council res. 23/16 of 13 June 2013 to enable it to hold a second session to start on 30 June 2014.

Our aim is that one day the HR Council will request the UN General Assembly to adopt a *Universal Declaration of Human Right to Peace* as close as possible to the *Santiago Declaration*, stating the rights and obligations of all international actors in implementing the human right to peace. The Declaration should also include measures for monitoring and enforcement[41].

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The incorporation and implementation of IHRL into the States' domestic level is done with great difficulty, as it often is hindered by the Governments, or goes unnoticed by the judges, lawyers and other legal professionals in the country, as well as by civil society organizations (CSO) and national and regional human rights institutions (NHRI).

Moreover, national lawyers face unknown legal categories, because IHRL is often perceived as foreign to their domestic law. Hence, there is hesitation on the IHRL implementation, despite of fact that the IHRL provides a valuable supplement to the domestic legal system of protection of human rights.

On the other hand, individuals and CSO are for the international mechanisms for protection of human rights -established in the various inter-governmental organizations- as essential as it is the fuel for cars. Indeed, the heavy institutional machinery of international organizations could not work if there is a freeze on the steady stream of complaints and reports of human rights violations from worldwide non-government sources. Therefore, there is a mutual interest of victims, national human rights institutions (NHRI) and international organizations, to maintain good communication channels among

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[39] See the report of the first session of the OEWG in doc. A/HRC/WG.13/1/2, of 26 April 2013, 18 p. It was assessed by SSIHRL in doc. *Analysis of the first session of the open-ended working group on the draft declaration on the right to peace.* Geneva, April 2013, 16 p. Available at www.aedidh.org

[40] See doc. A/HRC/23/NGO/96, of 24 May 2013.

[41] See VILLÁN DURÁN, Carlos: "Civil society organizations contribution to the Universal Declaration on the Human Right to Peace", *International Journal on World Peace*, vol. XXVIII, no. 4, December 2011, pp. 59-126. See also C. Villán Durán & C. Faleh Pérez (Directors), The International Observatory of the Human Right to Peace. Luarca, SSIHRL, 2013, 547 p. Also available on line at www.aedidh.org

them.

In general, the rules contained in the human rights treaties are compulsory to States parties once the international treaties have been ratified and entered into force. Therefore, they must quickly be incorporated into domestic law. In the case of Spain this incorporation is made by publication in the Official Gazette *[Boletín Oficial del Estado]*, which guarantees the principle of legal security, and facilitate treaties implementation at the domestic level by the courts of justice as bodies of the State (Art. 96.1 of the Constitution of 1978)[42] and even by individuals. If a given treaty regulates issues belonging to the competence of an Autonomous Community (region), the latter must adopt the necessary implementation measures (legal or equivalent) to ensure the treaty implementation at regional level.

In addition, the Spanish Constitution provides that the rules contained in international treaties may not be repealed or amended by domestic law, unless "in the manner provided for in the treaties themselves or in accordance with the general rules of international Law" (Art. 96.1 *in fine* of the Constitution). So, taking into account the specialty of their origin, the Constitution reserves to international treaties, once ratified and published, a superior hierarchical rank than ordinary law. Unless they require to be developed by domestic regulations, self-executing rules of international treaties should be directly enforceable in the courts of justice.

Furthermore, in the case of human rights recognized in the Spanish Constitution, Article 10 (2) prevents any possible conflict between international and constitutional human rights standards providing that the constitutional ones

> *"Shall be interpreted in accordance with the Universal Declaration on Human Rights and international treaties and agreements thereon ratified by Spain."*

Consequently, the internal bodies of the State (courts, national, regional and local governments, national and regional parliaments) cannot unilaterally interpret the scope of human rights as recognized in IHRL which is compulsory to Spain, as IHRL is the "external guarantor" of rights and freedoms that the Constitution recognize [43] . In addition, the Spanish Constitutional Court held that the rights enshrined in the European Convention on Human Rights should be interpreted according to the jurisprudence developed by the European Court of Human Rights[44].

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[42] Cfr. FERNÁNDEZ DE CASADEVANTE ROMANÍ, Carlos (Director): España y los órganos internacionales de control en materia de derechos humanos. Madrid, Dilex, 2010, p. 45.

[43] Cfr. GONZÁLEZ CAMPOS, Julio D.: "La interacción entre el derecho internacional y el derecho interno en materia de derechos humanos", *in* MARIÑO MENÉNDEZ (F. M.) (editor), El Derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa. Madrid, Trotta, 2002, pp. 333-350, *at* 349.

[44] *Idem*, pp. 340-342.

Similar legal hierarchie (infra-constitutional and supra-legal) of standards contained in the international treaties ratified by Spain, is extended to international costumary standards, since there is no legal hierarchie in international law standards. The same applies to the acts of international organizations of cooperation to which Spain is member[45].

Consequently, the State's bodies (courts; national, regional and local governments; national and regional parliaments) may not interpret in a restrictive way the scope of the human rights as recognized in the IHRL accepted by Spain, since the latter is the external guarantor of the rights and liberties recognized by the Constitution[46].

Another development widely shared among Constitutions commentators similar to the Spanish Constitution (such as the Venezuelan, Argentinian. Mexican or Colombian Constitutions) emphasized the notion of "block of constitutionality" which would consist in IHRL accepted by the State and the relevant Constitutional provisions on human rights. The block of constitutionality should be interpreted and implemented by national authorities and courts in good faith, having in mind the general principle that requires the application in all circumstances of the most beneficial standard to the individual (*pro persona* principle[47]).

From the national courts perspective, including constitutional courts, Prof. C. AYALA CORAO stressed that they should carry out a "conventional control", so that national courts should implement with priority the standards contained in the international human rights treaties ratified by the State, in particular when a national standard is in contradiction with an international standard. In addition, the human rights standard should be interpreted following the jurisprudential criteria developed by the international bodies empowered to do it, namely: The International Court of Justice; The Inter American Commission and Court of Human Rights; the European Court of Human Rights; the African Commission and Court of Human and Peoples

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[45] Vid. JIMÉNEZ PIERNAS, Carlos (director), *Introducción al Derecho internacional público. Práctica de España y de la Unión Europea*. Madrid, Tecnos, 2011, pp. 152-156.

[46] *Cfr*. GONZÁLEZ CAMPOS, Julio D.: "La interacción entre el derecho internacional y el derecho interno en materia de derechos humanos", *in* MARIÑO MENÉNDEZ (F. M.) (editor), El Derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa. Madrid, Trotta, 2002, pp. 333-350, *at* 349.

[47] Vid. REY CANTOR, Ernesto: Celebración y jerarquía de los tratados de derechos humanos (Colombia y Venezuela). Caracas, Universidad Católica Andrés Bello, 2007, pp. 137 y ss.; CORCUERA CABEZUT, Santiago: Derecho constitucional y derecho internacional de los derechos humanos. México, Oxford University Press, 2001, 353 p.; ABRAMOVICH (Victor), BOVINO (Alberto) y COURTIS (Christian) (compiladores): La aplicación de los tratados sobre derechos humanos en el ámbito local. La experiencia de una década. Buenos Aires, Editores del Puerto, 2007, 1.006 p.; y CABALLERO OCHOA, José Luis: La incorporación de los tratados internacionales sobre derechos humanos en España y México. México, Porrúa, 2009, 375 p.

Rights; and UN Committees established in human rights treaties[48].

Essential Reading:

- The International Bill of Human Rights http://www2.ohchr.org/english/law/index.htm

- UNOHCHR: www.ohchr.org . See more specifically information on the UN human rights bodies: http://www.ohchr.org/english/bodies/index.htm

- International human rights instruments: http://www2.ohchr.org/english/law/

- UNOHCHR: Working with the UN Program in the field of human rights. A Handbook for civil society. New York and Geneva, 2008, 194 p. Available at: www.ohchr.org/civilsocietyhandbook/

- ISHR (International Service for Human Rights). A NGO monitoring the UN human rights bodies: http://www.ishr.ch/

Suggested Readings:

- Cassese, A. International Law, (second ed., 2005), pp.435-462

- Weissbrodt, D. and De La Vega, C. Procedures for the Implementation of Human Rights (2006)

- Moyn, Samuel. The Last Utopia. Human Rights in history. Chapter 5. International Law and Human Rights. The Belknap Press of Harvard University Press. Cambridge Massachusetts and London, England, 2010. pp 176-211.

Issues:

1. What are the essential elements of the IHRL?

2. Identify the components of the International Code of Human Rights.

3. Identify the international human rights treaties to which your country is a State Party.

4. How is IHRL implemented at domestic level?

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[48] AYALA CORAO, Carlos, Del diálogo jurisprudencial al control de la convencionalidad. Caracas, Editorial Jurídica Venezolana, 2012, 295 p., *passim.*

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This Manual will present a practical study of the mechanisms for human rights protection in the United Nations system, emphasizing on the role of individuals (the victims) and civil society organizations. To this purpose, the procedures will be grouped in two Parts, namely: Those procedures established in international treaties ("*conventional* protection") and those procedures established in resolutions adopted by political bodies of the relevant international organizations ("*extra-conventional* protection").

FIRST PART
CONVENTIONAL PROTECTION OF HUMAN RIGHTS

A growing number of international human rights treaties established international mechanisms to protect the rights enshrined therein, providing a real innovation in international law. Among them, both the mechanisms of *periodic reports* (non-contentious) and the *quasi-contentious* complaints procedure will be discussed.

A. Periodic reports procedure

1. United Nations System

a) Field of application

In the United Nations the *periodic reports* procedure is envisaged in **eleven** conventional instruments and related protocols, **nine** of which are in force. Those conventions are binding on States provided that they have voluntarily ratified them, thereby becoming States parties. Both the international treaties or protocols and the internal rules of the treaty-bodies (Committees)[49], establish the legal regime applicable to the system of *periodic reports*.

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[49] See "Summary of the internal rules of the human rights treaty-bodies", doc. HRI/GEN/3/Rev.3 of May 28, 2008, 222 p., www.ohchr.org. In addition, the CRPD internal rules are available at doc. A/66/55 (2011), Annex VI, pp. 43-70. The revised internal rules of CRC are in doc. CRC/C/4/Rev.2 of 9 December 2010, 22 p. The revised internal rules of CCPR in doc. CCPR/C/3/Rev.9, of 13 January 2011, 26 p. And the internal rules of the CED in doc. CED/C/1, of 22 June 2012, 37 p.

TABLE 1: UN TREATIES ESTABLISHING A PERIODIC REPORTS PROCEDURE		
Treaty or Convention		**States Parties**
1.	International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965)	176
2.	International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)	161
3.	International Covenant on Civil and Political Rights (ICCPR, 1966)	167
	Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (1989)	78
4.	Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979)	187
5.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT, 1984)	154
6.	Convention on the Rights of the Child (CRC, 1989)	193
	Optional Protocol on Involvement of Children in Armed Conflict (2000)	166
	Optional Protocol to the CRC in the sale of children, child prostitution and child pornography (2000)	152
7.	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC) (1990)	47
8.	Convention on the Rights of Persons with Disabilities (CRPD, 2006)[50]	139
9.	International Convention for the Protection of All Persons from Enforced Disappearance (CED) (2006[51])	41

Source: Doc. HRI/MC/2013/2, of 12 April 2013, p.4. Updated to 10 December 2013.

Periodic reports procedure was discontinued under the following conventions, as the official abolition of the *apartheid* regime in South Africa was achieved:

1. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and

2. International Convention against *Apartheid* in Sports.

b). **Legal nature**

The *periodic reports* procedure is the oldest in the field of monitoring the implementation of international human rights standards. Therefore, it is very close to the procedures offered by traditional international law to settle disputes among States when violations of treaty obligations are alleged.

Indeed, this procedure merely requires States to submit regularly written **reports** on *legislative, judicial, administrative or other measures* they have adopted to give effect to the rights enshrined in the relevant international treaty to which they are parties. States must also report on both progress made as obstacles encountered in implementing the treaty.[52]

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[50] The Committee on the Rights of Persons with Disabilities (CRPD) examines periodic reports of States parties and may receive individual and interstate complaints.

[51] In 2011 the Committee on Enforced Disappearance (CED) was established.

[52] Status reporting to the various committees can be found –by State- in the document

The Secretary-General receives the *periodic reports* of States and forwards them for examination by the Committee of independent experts[53], set up by the convention under review. There are **nine Committees** which are responsible for examining written reports of States.

Committees examine *periodic reports* of States in public meetings and in direct debate of theirs members with representatives of the State under review ("constructive dialogue"). Other international actors, as NHRI and CSO may attend the discussion but they are not allow to intervene. Prior to the debate with the State's representatives, Committees will enable spaces exclusively dedicated to separately receive information from other international actors.

Originally, the periodic reporting procedure was conceived as a tenuous control mechanism, respectful to the idea of international cooperation among sovereign States. Therefore, during the Cold War confrontation or accusation against States for violations of human rights was avoided. Hence, it is not a contentious or contradictory procedure by nature. Its purpose is to assist and cooperate with States in the promotion of human rights within the framework of "constructive dialogue" that each Committee engages with representatives of the State during the consideration of *periodic reports*.

In this sense, the procedure has a **preventive** nature to avoid the repetition of future violations, so it is not a strictly protection mechanism dealing with individual violations that have already occurred. This does not prevent some of the Committees, when they are receiving serious reports on systematic violations of human rights, to take advantage of the *periodic report*s procedure to request clarification from the State under review and, where appropriate, decide to conduct an inquiry in the field to determine whether the situation reveals massive and systematic violations of human rights recognized in the respective Convention[54]. It is also common for Committees, when reviewing *periodic reports* of States, to get interested in tracking their own opinions delivered in the context of individual complaints[55].

HRI/GEN/4/Rev.5, 2005 ("Recent reporting history under the main international human rights instruments") and its updates. All United Nations documents are available on the Internet in the Website of the Office of the United Nations High Commissioner for Human Rights (OHCHR): www.ohchr.org

[53] The number of experts of the Committees varies according to the Conventions. From 10 CAT members to 18 members of CERD, HR Committee, CESCR, CRC and CRPD, to 23 of CEDAW and 25 of the Subcommittee on Prevention of Torture. Members are elected by the Assembly of States Parties to each Convention for a term of four years and may be reappointed. See doc. HRI/ICM/2011/4 of May 21, 2011 ("Report on the working methods of treaty bodies relating to human rights reporting process by States parties"), p. 4.

[54] *Vid. infra*, paragraph A.1.h). *The inquiry procedure*.

[55] *Vid. infra*, paragraph B.1. *Individual complaints in the universal system.* See also "Structure

The *periodic reports* procedure also has a clear **advocacy** role of respect of human rights conventions, as the Committees recommend and encourage States parties examined to incorporate in their domestic legal order legislative changes, adopt public policies and review administrative practices that should be consistent with their international obligations arising from the ratification of the relevant treaty.

Despite its original limitations, the evolution of the **periodic reports** system is remarkable in the field of the United Nations since the end of the Cold War (1989). The new climate established in international relations allowed the Committees to make a gradual transformation of the *periodic reports* procedure by revising their internal rules and working methods. Thus, over the years the Committees have rolled out their functions in the light of their own experience in examining *periodic reports* of States.

Today the nine Committees hold "days of general discussion"[56], "thematic debates", some of them visit countries, make "declarations" and even take "decisions". In addition, they approve "concluding observations[57]" addressed to individual countries following consideration of their respective periodic report, as well as "general comments"[58] addressed to all States Parties to the convention with a view to interpreting the scope of certain provisions set forth in the respective Convention.

Declarations are reserved for international events and issues affecting the implementation of treaties. Thus, in 2007 CESCR made a statement on the assessment of the obligation to take steps to "maximum available resources" in order to provide States with interpretation of the scope of Article 2.1 of ICESCR, about the possibility of adopting the optional protocol that would enable the CESCR to receive individual complaints[59]. In 2008, "the global food crisis" was addressed[60]. In 2010 it gave its opinion on the right to sanitation[61]. And in 2011, recalled "the importance and relevance of the right

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of the dialogue between the treaty bodies and States parties, structure and length of the concluding observations and mode of interaction of the treaty bodies with stakeholders, particularly with national human rights institutions and civil society actors". Note by the Secretariat. Doc HRI/ICM/2011/2, of 18 May 2011, 23 p., *passim*.

[56] By 2011 the CESCR had held 22 days of general discussion. Vid. doc. E/2011/22, E/C.12/2010/3, Annex V, pp. 114-115.

[57] See *infra*, paragraph A.1.e). *Concluding Observations.*

[58] See *infra*, paragraph A.1.g). *General Comments.*

[59] See the above *statement* in doc. E/C.12/2007/1 of 21 September 2007, 5 p.

[60] It can be found in doc. E/C.12/2008/1 of 20 May 2008, 4 p.

[61] See doc. E/2011/22, E/C.12/2010/3 (2011), Annex VI, pp. 116-117. The list of 18

to development" and the obligations of States Parties "in connection with the business sector and economic, social and cultural rights"[62].

For their part, CEDAW, CAT, CRC, and CERD frequently make declarations. CRPD made six declarations during its first four sessions[63].

The CRC adopted since 1991 more than 40 **decisions** relating to their working methods or substantive issues[64]. The bolder decision –effective in 2006- was to divide the 18 members in two Chambers of 9 members each, to work simultaneously on the study of *periodic reports* of States, thereby doubling its capacity to work on this matter. CEDAW adopted since 1983 more than 100 decisions, which were published in annual reports that the Committee submits to the General Assembly. CRPD also passed several decisions in its first four sessions[65].

As to the **country visits**, it should be remembered that CESCR sent in the nineties two missions of technical assistance to Panama and the Dominican Republic as a follow up to its concluding observations at the end of the study of the respective periodic reports of the States. It is desirable that this type of visits *in loco* be generalized to other Committees, but always within the monitoring procedure of follow up that Committees are entrusted to supervise States' compliance with recommendations made in the concluding observations.

On the contrary, it has been observed that in recent years several States made invitations to Committees or individual members thereof, to visit their countries at the beginning of the next review of their periodic reports by the Committee, in an attempt to unduly influence the outcome of the review process. To avoid this potential abuse, United Nations will not consider such visits as officials. In addition, interested experts were encouraged to discuss the opportunity of the visit with their colleagues in the Committees and, in any case, experts were recommended not to participate in press conferences to avoid the risk of anticipating the outcome of the review report of the State party[66].

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declarations previously approved by the CESCR is available on the same doc., Annex IV, pp. 112-113.

62 Respectively docs. E/C.12/2011/2 and E/C.12/2011/1, both of 12 July 2011.

63 See doc. A/66/55 (2011), Annex IX to XIV, pp. 77-87.

64 Doc. CRC/C/19/Rev.10 contains 40 of these "decisions".

65 See doc. A/66/55 (2011), Annex VII, pp. 71-74.

66 Guidelines of the High Commissioner of 23 March 2005 on the visits of treaty bodies experts to States whose reports will be examined. See doc. HRI/MC/2005/4, cit, Appendix, pp. 40-41.

c). Committees' guidelines

In order to properly prepare their reports, States should follow the **guidelines** prepared by different Committees as to the form and content that initial and periodic reports should have[67]. Today there is a growing process of increasing harmonization of these guidelines, driven by the Secretary-General[68] and by the coordination meetings annually held since 1995 among the Presidents of the nine Committees in force. This process of coordination has been strengthened since 2002 with the annual meeting among Committees, attended by three members of each Committee.[69]

Under the framework of these coordination meetings it has been discussed, *inter alia*, upon the harmonization of the respective methods of work adopted by each Committee. In the case of periodic reports of States, the overriding concern has been to avoid unnecessary duplication of information or States reports inadequately detailed. Such initiative is also intended to ensure a consistent approach by all Committees when considering the reports, in order to guarantee equal treatment for all States parties to the various conventions.[70]

In particular, harmonized guidelines recommended that the State reports be contained in two documents clearly separated. In the first document, called "core document", general factual information and statistics on the State must be provided (demographic, social and cultural features of the State; constitutional, political and legal structure of the State; general framework of human rights protection, indicating the internal acceptance procedure of international human rights standards, the overall legal framework for protecting and promoting human rights at the national level; the participation of different stakeholders in the preparation of *periodic reports,*

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[67] See "Compilation of guidelines regarding the form and content of reports submitted by States parties to international treaties on human rights" in doc. HRI/GEN/2/Rev.6, of 3 June 2009, 146 p. This document contains guidelines applied by *seven* of the committees currently in force. In connection with the CESCR, guidelines were updated in the doc. E/C.12/2008/2 of 24 March 2009, 18 p. As to the CRPD, it adopted its guidelines in 2011: see doc. A/66/55, Annex V, pp. 24-42.

[68] The Secretary-General proposed in 2005 that all reports that a State must submit to the various Committees be merged into a single report and the study of it be made by a single supra-Committee, with similar functions to study the periodic reports of States. See also the "Concept Paper on the proposal of the High Commissioner on a unified standing treaty created", doc. HRI/MC//2006/2, of 22 March 2006.

[69] See UNOHCHR, The United Nations Human Rights Treaty System. An introduction to the core human rights treaties and the treaty bodies. Geneva, United Nations, 2005, 52 p., *at* 30.

[70] "Harmonized guidelines on reporting under human rights treaties, including guidelines on the preparation of an expanded core document and treaty-specific targeted reports", doc. HRI/MC/2005/3, of 1 June 2005, 34 p., *at* 5, para. 4.

the implementation of the Committees concluding observations, and the fulfillment by the State of the general obligation to eliminate discrimination and promote equality of all people, indicating the measures taken to accelerate progress towards equality.[71]

The second document, however, will contain information related to the specific implementation of *each treaty by each State party* and will be prepared following specific guidelines of the respective Committee, depending on the requirements of each Convention.[72]

In any case, the Committees offered wide resistance to a reform process that intended to be imposed "top down". In the last two years international meetings have multiplied, and concerns from experts that are part to the nine Committees have been heard[73]. The *Dublin Declaration* on 19 November 2009, signed by 16 experts, claimed that such reform should be undertaken in close consultation with all stakeholders, particularly members of the Committees, and should avoid entering into a process of amendments to the treaties, of an uncertain future[74].

Periodic reports will be submitted every 4 or 5 years to the relevant Committee[75] for their examination in cooperation with representatives of the State under review, within the aforementioned "constructive dialogue" to be held in public session. It is appropriate for Governments to establish inter-departmental commissions for the preparation of each periodic report, with the participation of the other branches of State (legislative and judicial branches,

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[71] *Idem*, pp. 10-20, paras. 35-72.

[72] *Ibidem id.* pp. 20-21, paragraphs 73-75. Thus, in 2010 CCPR adopted its guidelines for specific documents relating to the ICCPR (doc CCPR/C/2009/1, of 22 November 2010, 22 p.). The CRC also approved in 2010 its "General guidelines regarding the form and content of reports submitted by States parties" on both the Convention and its two Optional Protocols thereon (doc. CRC/C/58/Rev 2, of 23 November 2010, 20 p.).

[73] See "Report of the Secretary-General on measures taken to implement resolution 9/8 and the obstacles to their implementation, including recommendations for more effective, harmonizing, and reforming the system of bodies created by virtue of treaties". Doc A/HRC/16/32, of 5 January 2011, 5 p.

[74] See O'FLAHERTY, Michael: "The Dublin Statement on the process of Strengthening of the United Nations human rights treaty-body system", *Netherlands Quarterly of Human Rights*, vol. 28/1, 2010, pp. 116-127. By the same author: "Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement," *Human Rights Law Review*, vol. 10 / 2, 2010, pp. 319-335.

[75] Currently there are nine Committees in place, one for each Convention. The Convention or the relevant Committee sets frequency; the initial reports must be submitted within 1-2 years after the Convention enters into force for each State.

autonomous communities or other sub-state entities), as well as civil society representatives and national and regional human rights institutions.

For this reason, the State delegation to the respective Committees does not have to be exclusively governmental. On the contrary, it should consist of representatives of different State branches (national Executive and sub-state entities, as well as judiciary and legislative branches).

d). <u>List of issues</u>

Once presented the State written report to the Secretary-General, each Committee shall prepare a **list of issues**[76] and questions addressed to the State before proceeding to exam the report in the Committee plenary meeting. It is intended that the State completes the information contained in its initial written report, and provide additional information regarding the questions that their representatives will be asked to respond during the formal consideration of the report.

To this end, the Committees appoint one or more of its members as rapporteurs for the country whose report is to be examined. They are responsible for drafting the list of issues with the assistance of the Secretariat, taking into account all available information that is reliable (sources both official and non-governmental). The lists of issues will be formally approved within a working group of the respective Committee, which meets before the session that will discuss the report of the State under review[77].

To simplify the procedure of periodic reports, CAT approved in 2007 a new optional procedure involving the preparation of ***lists of preliminary questions to the presentation of the report***, instead of the traditional guidelines for the preparation of periodic reports[78]. Drafted on the basis of the recommendations contained in the last concluding observations (CO), the responses of States should be more relevant, directly related to the recommendations.

The State's response to the **previous list** of questions (or "report focusing on the responses to the list of questions") replaces the traditional periodic report. In 2009 CAT decided to implement this optional procedure on

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[76] See as an example the list of issues addressed to Spain by CCPR during the consideration of the fifth periodic report, doc. CCPR/C/ESP/Q/5, of 7 August 2008, 5 p. Similarly, see the list of issues addressed to Spain by CESCR while considering the fifth periodic report in doc. E/C.12/ESP/Q/5, of 2 September 2011, 4 p.

[77] On the lists of issues, see doc. HRI/IMC/2011/4, of 23 May 2011, pp. 12-16, paragraphs 35-50. The identity of country rapporteurs is public, except in the HR Committee practice (*ibid*., paragraph 60), in which case it greatly hinders access to it by CSO.

[78] See doc. A/65/44 (annual report of CAT to the GA, 2010), pp. 6-7.

a regular basis which has been accepted by a number of States.[79]

HR Committee established the same procedure in 2010 for a probationary period of five years, appointing a working group to assess and review the procedure for **lists of previous questions**. Such procedure shall not apply to initial reports and will be optional for States. However, HR Committee may decide that the procedure of previous list does not apply to a State if it considers that special circumstances justify a full report (e.g., fundamental change in legal and political approach of the State). All stakeholders, including NHRI and CSO must have sufficient time to provide relevant information to HR Committee before it proceeds to draft and approve the lists of preliminary questions. Such reports should be reviewed within a maximum period of one year.[80]

e). Concluding observations (CO)

Since the end of the Cold War Committees have increasingly assumed confrontational roles in the field of *periodic reports* that were not originally envisaged, with the purpose of providing States with a diagnosis of the situation in their countries on the real enjoyment of rights as recognized by the respective Convention. This is the meaning of **concluding observations** addressed to each country, with which the Committees finish their work of assessing the *periodic reports* of States. It may be considered that concluding observations contain an undeniable critical evaluation by the Committee concerning the situation of each country.

Moreover, originally the procedure only envisaged the exclusive relationship between the Committee and the representatives of the State in the examination of *periodic reports*. Even though the debate is carried out in open meetings and anyone interested can attend, nobody but the Committee members and the representatives of the State are allow to participate in the "constructive dialogue". Additionally, the Committees may receive written contributions from specialized agencies of the United Nations, such as the International Labor Organization, UNESCO, FAO or the World Health Organization. To a lesser extent, Committees also had information provided by subsidiary bodies of the United Nations system, such as UNHCR, UNDP, or UNICEF.

Notwithstanding, participation of **individuals and civil society organizations and CSO** in the process of *periodic reports* of States has made its way steadily since 1990. Thus, CESCR has been the first Committee officially authorized by its parent body (the Economic and Social Council, ECOSOC) to receive reports, written and oral, from NGO in consultative status with ECOSOC. Subsequently, other Committees extended the practice of receiving reports from CSO with or without consultative status.

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[79] The new optional procedure is explained in detail in doc. HRI/ICM/2011/4, cit. pp.12-16.

[80] See doc. CCPR/C/99/4, of 29 September 2010, 8 p., *passim.*

Written reports of CSO (known as “shadow reports” or “parallel reports”) may be sent to the Secretariat at any time after the publication of the State's written report. CSO written reports should reach the Committees before the special rapporteur or working group prepare the list of issues addressed to the State, to assist on this exercise. CSO documents are posted on the web site of each Committee, on the Web site of the Office of the High Commissioner for Human Rights for general knowledge, including the State itself[81]. CSO can also counter-argument regarding any written responses provided by States to the Committees’ lists of issues.

As stated, the Committees also provide spaces in plenary or informal meetings to receive the latest CSO and NHRI oral information, immediately before the "constructive dialogue" to be undertaken exclusively with the State’s representatives.

The non-governmental information is extremely valuable for the Committee to confront the official report of the State and thus get a more complete and objective view of the prevailing situation in the country. Hence, it is important that national CSO coalitions be coordinated by theme or conventions, so that they can provide the Committee with the overall vision of civil society in the country under review.[82]

In terms of **national human rights institutions** (NHRI), most of the Committees[83] have ruled in favor of incorporating them to the process of preparation of "periodic reports" of the States -at all times guaranteeing their independence from the Executive- and to the process of developing the "list of issues" already mentioned. Their participation will be effective to the extent that the information provided to the Committees is relevant in the context of each State report.

On the other hand, NHRI, CSO and individuals concerned may be present during the oral debate between Committee members and representatives of the State, as such discussion is public. Although unable to participate actively in the debate, their presence will facilitate tracking the process and the views expressed by both members of the Committee and representatives of the State participating in the “constructive dialogue” with the Committee.

Furthermore, nothing prevents the Committee members from receiving on personal basis and at any time information from individuals, CSO and even NHRI. They shall decide consciously on their eventual use. So HR Committee

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[81] See doc. E/2010/22, E/C.12/2009/3, para.60.

[82] See doc. HRI/ICM/2011/4, cit., pp. 34-38. See also doc. HRI/ICM/2011/2, cit., paragraphs. 45-54 and 63-67.

[83] CESCR, CAT, CRC, CERD, CMW & CEDAW. See doc. HRI/ICM/2011/4, cit., pp. 33-34. See also doc. HRI/ICM/2011/2, cit., paras. 42-44 & 55-62.

was in connection with the CSO during the Cold War and continues to do so with NHRI.[84]

After the discussion with representatives of the State, the Committee meets in private to discuss and adopt **concluding observations** (CO) on the proposals made by the rapporteur of each country, assisted by the Secretariat. The concluding observations summarize the review of the periodic report in three parts: positive aspects, principal subjects of concern and recommendations addressed to the State. Once approved the CO are communicated to the concerned State and thereafter posted on the web site that each Committee has on the Internet Portal of the Office of the United Nations High Commissioner for Human Rights[85]. CO will also be included in the reports annually submitted to the General Assembly by the Committees on the activities carried out[86]. Concerned States may submit comments in writing to the CO, which will also be published as official documents.

Contrary to the traditional doctrine that considered "concluding observations" of the Committees as mere "recommendations" without any legal force, the **International Court of Justice** (ICJ) in its opinion of 9 July 2004 recognized the legal value and *authorized interpretation* of both CESCR and CCPR' *concluding observations* following the examination of the *periodic reports* prepared by Israel. Indeed, both Committees established that the two International Covenants on Human Rights apply to all territories and populations that are under the effective control of Israel[87], so that the State has the obligation to facilitate and protect the enjoyment of rights enshrined in the Covenants to all people living in the occupied Palestinian territories.

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[84] In 2011 there were 67 NHRIs accredited to the United Nations (Category A) under the Paris Principles. See docs. A/HRC/16/77, of 3 February 2011, 18 p. ("Process currently used by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights to accredit national institutions in accordance with the Paris Principles." Report of the Secretary General); and A/HRC/16/76, of 7 February 2011, 19 p. ("National institutions for the promotion and protection of human rights." Report of the Secretary General.

[85] www.ohchr.org

[86] A comprehensive study of the reporting procedures in both the UN and specialized agencies such as UNESCO and ILO is in VILLÁN DURÁN, Carlos: *Curso de Derecho internacional de los derechos humanos*. [Course on international human rights law]. Madrid, Trotta, 2002 (reprint: 2006), pp. 382-424. The most updated practice of Committees in this area can be found in doc. HRI/IMC/2011/4, cit, pp. 22-24, paragraphs 74-79.

[87] ICJ, *Legal consequences of building a wall in the occupied Palestinian territories,* opinion of 9 July 2004, párrs. 107-113. Israel claimed the exclusive application of international humanitarian law in the occupied Palestinian territories at the expense of human rights norms contained in treaties ratified by Israel. By contrast, the ICJ found that both international humanitarian law and IHRL are applicable to the occupied Palestinian territories (*ibid*., para. 114).

Moreover, when **concluding observations** are published undoubtedly exert a moral and political influence on Governments. As they are excellent analysis of the situation prevailing in the country regarding the enjoyment of the rights enshrined in each treaty, CO should be used more often by CSO and human rights organizations and other representatives of civil society of the country, as well as by national human rights institutions, in order to obtain from the Administration the adoption of public policies consistent with CO.

As already noted, the State delegation to the respective Committees does not need to be exclusively governmental. On the contrary, it should be made of representatives of different branches of the State (national Government, regional and local governments, judiciary and legislative branches). In addition, national and regional human rights institutions as well as representatives of CSO, should also participate in both the process of preparation of each *periodic report* and monitoring the effective implementation of the CO of each Committee.

f). <u>Follow-up to concluding observations (CO)</u>

All treaty-bodies request States in their subsequent reports or during the dialogue with them to provide information on the implementation of the recommendations made in the previous concluding observations.

In addition, several Committees have taken specific measures[88]. Since 2001 the HR Committee has appointed a **Special Rapporteur on follow-up to concluding observations**, which analyzes the information that the State submits to the Committee within a year on measures adopted by the State in compliance with particular recommendations on urgent o grave situations that the Committee had selected (from two to four recommendations). The Special Rapporteur is appointed every two years and is assisted by a deputy SR and the Secretariat[89].

Follow up reports from States should consider guidelines given by the HR Committee. They should be short, focused exclusively on the selected recommendations by the Committee and submitted within a year[90]. Similarly, the HR Committee shall receive follow up alternative reports from NIHR and interested CSO.

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[88] See doc. HRI/IMC/2011/4, cit, pp. 24-26, para. 80-87.
See also OHCHR, <u>Follow up to UN recommendations on human rights. Practical guide to civil society</u>. Geneva, 2013, 60 p. Available at:
http://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendationsSP.pdf

[89] See doc. CCPR/C/108/2, of 21 October 2013 (follow up procedure to concluding observations), paras. 3, 6 & 8.

[90] The States follow up reports to the HR Committee may be sent on-line to: ccpr@ohchr.org

The Special Rapporteur prepares a public report on its activities, which brings together the available monitoring data for each country under review[91].The report shall be discussed and adopted by the HR Committee in full. Since 2009 the SR classified information provided by the State on a scale ranging from "no response" to "highly satisfactory"[92]. The SR should keep correspondence with the State requesting it to submit more specific implementation measures or asking it for a meeting to discuss the issue. Once two reminders were sent to the State, the follow up procedure will be terminated. If the issue is still unsettled, it will be included in the list of issues regarding the next State periodic report[93].

The HR Committee thinks that its SR should have the means to undertake follow-up country visits to enable the SR to make a complete assessment of the implementation of the Committee's recommendations at the national level.

For its part, CAT may, if the State has not met some of the obligations of the respective Convention, entrust to one or more of its members as rapporteurs to be "kept informed of compliance" by the State "of the conclusions and recommendations of the Committee"[94]. The Committee may also "indicate the term by which comments are received from States parties[95]." Based on this procedure, CAT provides its CO follow-up recommendations with a protection purpose, which must be replied by the State within one year[96]. To monitor compliance, the Committee may appoint a rapporteur to monitor CO, which presents partial reports on the results of the procedure[97]. CAT also decided to publish on the OHCHR web site any

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91 See recent reports of the HR Committee's SR to monitor the CO in docs. A/65/40 (Vol. I), pp. 166-200; CCPR/C/97/2 of 11 November 2009, 26 p.; CCPR/C/98/2 of 19 April 2010, 30 p.; CCPR/C/99/2, of 20 September 2010, 36 p.; CCPR/C/100/2 of 25 November 2010, 36 p.; CCPR/C/101/2 of 2 May 2011, 42 p., and CCPR/C/102/2 of 9 September 2011, 31 p. The latter report includes follow-up action in relation to the fifth periodic report of Spain (*op. cit*., pp. 18-19). See also CCPR/C/104/2, of 30 April 2012, pp. 13-14; A/68/40 (Vol. I) (2013), pp. 234-300; CCPR//C/107/2, of 30 April 2013, 30 p.; and CCPR/C/109/2, of 19 November 2013, 27 p. The current SR to follow up to CO is the expert Fabian O. Salvioli (Argentina).

92 See CCPR/C/108/2, cit., paras. 16-19.

93 *Ibidem,* párrs. 25-28.

94 Article 68 (1) of the Rules of CAT. See doc. HRI/GEN/3/Rev.3 of 28 May 2008, pp. 165-166.

95 *Idem*, Art. 68 (2).

96 See doc. A/65/44 (annual report of CAT to the GA, 2010), para. 69.

97 HRI/ICM/2011/4, cit, para. 82. The Rapporteur for follow-up of CAT CO is Ms. Felice Gaer.

correspondence between the Rapporteur and the concerned States.[98]

Given the growing objections of some States to the concluding observations of the Committees considering them "too critical", CAT recently recalled that CO "are an instrument of cooperation with States parties, and collect common assessment that the Committee undertakes on the obligations of each State". The Committee performs these functions "independently and competently", "in its capacity as guardian and guarantor of the Convention." Finally, CAT recalled "the obligation of all States parties to cooperate with the Committee and to respect the independence and objectivity of its members."[99]

As for CERD, it may request additional information on measures taken by the State to implement recommendations addressed by the Committee. Since 2004 there is a *follow-up coordinator* appointed for a period of two years, working in collaboration with the country rapporteurs[100]. Since then, the annual report of the Committee to the General Assembly includes a brief report on the follow-up. In 2006 the follow-up coordinator was invited to visit Ireland to assess the measures taken by the State. Given the positive outcome of that visit, the Committee proposed in 2007 to develop an optional protocol to the Convention including coordinator's follow-up country visits[101], among others.

For its part, CEDAW began in 2008 to ask States to provide information on measures taken to implement the specific recommendations contained in their CO within 1-2 years. Three members of CEDAW made an initial follow up visit to Luxembourg in October 2008, evidencing the relevance of the visit even to European countries, where is generally considered that the United Nations mechanisms are less relevant. Furthermore, in 2009 CEDAW appointed a rapporteur to monitor follow up to CO and a deputy.[102]

Since 1999 CESCR requests States to provide in the next periodic report measures taken to follow up CO recommendations. In special circumstances or emergencies, it may request the State to provide more information prior to the next periodic report. In this case it will be assessed by a working group that may recommend CESCR to approve new CO. If the information received was not satisfactory, CESCR may request the State to accept a visit from one or two members of the Committee. This happened on two occasions when technical assistance missions were sent to Panama and

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98 A/65/44, cit., para. 74. See the latest monitoring report of the Rapporteur in pp. 164-174.

99 CAT declaration of 14 May 2009. See CAT annual report in doc. A/64/44. United Nations, New York, 2009, Annex IX, pp. 269-270.

100 Article 65 of CERD internal rules, doc. HRI/GEN/3/Rev.3, of 28 May 2008, p. 86.

101 Doc. CCPR/C/95/3, of 16 July 2009, paras. 20-21.

102 HRI/IMC/2011/4, cit, para. 85.

Dominican Republic to address the issue of right to housing. In addition, CESCR entrusts their country rapporteurs to ensure the follow-up for those countries they have studied between sessions until the next time they must appear before the Committee[103].

As noted, so far follow-up measures taken by the Committees are too timid[104]. A working group of the joint Committees' meeting recommended all Committees to implement follow-up measures and harmonized guidelines[105]. It would certainly be desirable to provide additional resources to Committees so that they could generalize follow-up country visits to enable them to better assess the implementation of its recommendations at the national level.

On the other hand, NHRI and civil society as a whole have an essential role in the following-up procedure, since they must encourage national authorities to implement the recommendations that Committees have addressed to the States. They can also inform the Committees of the achievements and obstacles encountered in following-up to the recommendations. This was recommended by the Committees annual meeting and endorsed in the meeting of Presidents held in 2007[106].

However, the *periodic reports* system cannot work properly if States fail to provide the Committee's with their periodic reports because of negligence or lack of technical capacity, in breach of a conventional basic obligation. The number of periodic reports "pending to file" is too high. To avoid the collapse of the mechanism, the Committees have adopted in their respective internal rules an *exceptional* examination procedure consisting on approaching the exam of the implementation of the relevant treaty in the State when it has not submitted any of the outstanding periodic reports, despite repeated appeals of the Committee to fulfill the State reporting obligation[107]. If, in addition to not reporting, the State did not send representatives to participate in the deliberations of the Committee, this will generate an examination of the situation in the country in light of all information received, including the CSO, and the Committee shall adopt observations that shall be considered as

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[103] *Ibid*, para. 84. See also doc. E/2011/22, E/C.12/2010/3 (Report of CESCR to the ECOSOC on its 44th and 45th sessions, 2010. United Nations, New York and Geneva, 2011), paragraphs 26-39.

[104] A table showing the convergences and divergences of the follow-up procedures of eight Committees can be found in doc. HRI/ICM/WGFU/2011/2, of 18 November 2010, pp. 8-9.

[105] "Report of working group meeting on monitoring Committees of the concluding observations, decisions on individual complaints and investigations." Doc HRI/ICM/2011/3, of 4 May 2011, pp. 14-17.

[106] Doc. A/62/224, p. 27.

[107] This mechanism is provided for the first time under conventional basis in the Convention on the Rights of Persons with Disabilities, Art. 36 (2).

preliminary until the State rules upon them in a reasonable period of time, after which the observations will become conclusive.[108]

On the other hand, CERD innovated in 1993 adopting procedures for **early warning** and **emergency action**: first, to prevent existing problems in States from becoming new conflicts or to revive the existing ones. Second, to address problems requiring immediate attention to prevent serious violations of the Convention or reduce its scale or its number.[109]

For these purposes it has been established a working group of five members of CERD to manage such procedures. They are initiated ex-officio or at the request of CSO and other stakeholders. In 2007 it adopted guidelines, indicators, and the mandate of the working group[110]. So far CERD has used the mechanism to review the situation in over 20 States. Final decisions on this matter were adopted in 2012 regarding Cameroon, Costa Rica, Ethiopia, Guyenne, India, Japan, Nepal, Peru, The Philippines, Slovakia, Surinam, United States and Tanzania[111].

However, the increase of pending periodic reports due to the incorporation of new conventions and committees, was not matched with increase of adequate resources. In fact, the periodic reporting mechanism has worked in the last years because most of the States do not submit their reports, thus violating a basic conventional obligation.

To overcome this situation, the High Commissioner proposed to unify methods of work of nine Committees in force establishing a master calendar of all reports to be submitted by States to all Committees, in a cycle of five years, determining the dates in which each State will be examined (two State reports per year). State written reports should be no longer than 60 pages and should be focused on former concluding observations. The new integrated procedure shall cost US 52 additional millions[112].

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[108] See UNOHCHR, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies. Geneva, Fact Sheet 30, 2005, pp. 24-25 & 44. See also doc. HRI/IMC/2011/4, cit, pp. 26-28.

[109] Doc. HRI/IMC/2011/4, cit, para. 95-97.

[110] See guidelines in the doc. A/62/18, Annex III. The Working Group's Coordinator is Prof. Thornberry (United Kingdom).

[111] See A/68/18 (2013), pp. 6-9.

[112] PILLAY, N., Strengthening the United Nations human rights treaty body system. A report by the United Nations High Commissioner for Human Rights. Geneva, 2013, pp. 37-62.

g). General Comments (GC)

The Committees also adopt ***general comments or recommendations*** that originally were intended to assist States to understand what kind of information the Committees wanted to receive, based on acquired experience. In this way, deficiencies of the reports were pointed-out, improvements were suggested and States were encouraged to achieve the full implementation of the rights enshrined in the corresponding treaty.[113]

However, all Committees are adopting general comments that go beyond their initial purposes, since in practice GC amount to an exercise of **interpretation** of the content and scope of the obligations contained in certain provisions of the relevant treaty. GC have been generally well accepted by the States parties. In this regard, international human rights law innovated in relation to general standards of international law that attribute to States parties the monopoly of interpretation of an international treaty.[114]

The development of a GC is a very laborious process and often takes several years. Firstly, members of the Committee should identify the subject or provision that the Committee wishes to develop. Secondly, the Committee appoints one or more members as rapporteurs who shall carry out a preliminary study. Thirdly, the Committee shall convene a day of general discussion, seminars, workshops and other international events in which the Committee will undertake consultations with all stakeholders interested in the development of international human rights law (States, IO, NHRI, academia, CSO and NGO). Fourthly, once the consultations are completed, the Committee with the assistance of its rapporteurs and the Secretariat, discusses different projects in private meetings. Finally, the Committee announces the adoption of a new GC, which is immediately made public in both the Portal of the OHCHR and the annual report of each Committee to the General Assembly[115].

Thus, the HR Committee has developed so far 34 very valuable GC concerning the contents and scope of Arts. 1, 2, 3, 4, 6, 7, 9, 10, 12, 14, 17, 18, 19, 20, 23, 24, 25, 27 and 40 of the ICCPR and in relation to the OP1. It has also provided GC on the status of foreigners under the ICCPR; the reservations to the Covenant; the principle of non-discrimination; and the

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[113] A compilation of observations and general recommendations adopted by the various Committees is contained in the doc. HRI/GEN/1/Rev.9 (Vol. I), of 27 May 2008, 318 p. (collection of the GC's of CCPR and CESCR) and HRI/GEN/1/Rev.9 (Vol. II) of 27 May 27 2008, 311 p. (collection of the CERD and CEDAW GR, as well as the CAT and CRC GC). They are also available on the Internet Portal of the OHCHR: www.ohchr.org.

[114] See in this sense Arts. 31-33 of the Vienna Convention on the Law of Treaties of 23 May 1969.

[115] Doc. HRI/IMC/2011/4, cit, para. 132-134.

nature of the general legal obligation imposed on States parties to both the Covenant and the OP1.

In the case of GC No. 24 of the HR Committee on reservations to the Covenant, there were objections from France and the United States requesting the application of the traditional rules of the Vienna Convention on the interpretation of international treaties. They were against the opinion of the Committee that these countries' reservations to the ICCPR were incompatible with the object and purpose of the Covenant. The International Law Commission (ILC) concluded that the supervisory bodies established by the human rights treaties can make comments and recommendations regarding the admissibility of reservations by States, and their legal value is equivalent to the supervisory functions entrusted to them. Therefore, States must comply in good faith with the content of the GC[116].

As to CESCR, it has developed 21 GC on Arts. 2.1, 3, 6, 9, 11, 11.1, 12, 13, 14, 15.1, and 22 of the ICESCR. It has also made GC about people with disabilities; the relationship between economic sanctions and respect for economic, social and cultural rights; domestic application of the Covenant; economic, social and cultural rights of older people; non-discrimination and ESC rights; and the right to participate in cultural life.[117]

For its part, CERD has adopted to date 35 *general recommendations* (GR). Among them it has addressed discrimination against non-citizens; prevention of racial discrimination in the administration and the functioning of criminal justice; special measures under the Convention; the monitoring of the Durban Review Conference (2009); racial discrimination against people of African descent (2011)[118]; and fighting hate racist speech[119]. All GR were addressed to States parties to the CERD and are similar in nature to the GC of other Committees.

Similarly, CEDAW adopted 30 *general recommendations* (GR). Among the most recent, it has addressed issues such as violence against women; equality in marriage and in family relationships; political and public life; women and health; older women; Art. 2 of the Convention[120]; and women's role in the

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116 See also "Report of the Working Group meeting on Reservations", doc. HRI/MC/C/2007/5 of 9 February 2007, 23 p., updated in the doc. HRI/MC/2009/5 of 17June 2009, 13 p.

117 See doc. E/2001/22, E/C.12/2010/3, Annex III: List of general comments adopted by CESCR.

118 See A/66/18, Annex IX.

119 Doc. CERD/C/GC/35, of 26 September 2013, 11 p.

120 See GR 27 on older women and protection of human rights, doc. CEDAW/C/GC/27 of 16 December 2010, 10 p.. And GR 28 on Article 2 of the Convention on the nature and scope of the obligations of States parties, doc. CEDAW/C/GC/28 of 16 December 2010, 11 p.

conflict prevention, during conflicts and in post-conflict situations.

As for Committee against Torture, it has approved three GC on the application of Arts. 2, 3 and 14 of the Convention against Torture[121].

The Committee on the Rights of the Child has adopted 17 GC, including general measures of implementation of the CRC, children with disabilities, indigenous children, the child's right to be heard (2009), or child's right to be free from any form of violence (2011))[122]; the children' right to enjoy the highest level of health (2013); the State's obligations on the impact of business on the rights of the child (2013); and the right of the child that his/her superior interest be considered a priority according to Art. 3 (1) of the Convention[123].

Moreover, the Committee on Migrant Workers adopted two GC on migrant domestic workers (2011); and human rights of migrants in irregular situation (2013).

In addition, three Committees (namely: CESCR CRC and CERD) have adopted GC on the role of independent national human rights institutions in the protection of rights enshrined in the respective treaties.

Finally, the Committee on the Rights of People with Disabilities (Com.RPD) adopted internal rules envisaging the adoption of recommendations as well as GC[124]. Since then it has adopted GC on Arts. 9 (accessibility)[125] and 11 of the Convention (equal treatment as individual before the law)[126].

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[121] See GC 3 on art. 14 CAT in doc. A/68/44, Annex X.

[122] See GC 13 (2011) on the right of the child to be free from any form of violence in doc. A/67/41 (2012), Annex V.

[123] Doc. CRC/C/GC/14, of 29 May 2013, 22 p.

[124] Arts. 46 and 47 of the internal rules of CRPD, cf. doc. A/65/55, Annex VI.

[125] Doc. CRPD/C/11/3, of 25 November 2013, 13 p.

[126] Doc. CRPD/C/11/4, of 25 November 2013, 14 p.

h). Inquiry procedure

This procedure, of an optional nature, is provided for in **six international treaties or protocols**, as follows:

TABLE 2: UN TREATIES ESTABLISHING AN INQUIRY PROCEDURE	
Treaty or Convention	**States Parties**
1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT, 1984, Art. 20)[127]	154
2. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Arts. 11-12)[128]	10
3. Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP CRPD, 2006 Art. 6)[129]	79
4. Optional Protocol 3 to the Convention on the Rights of the Child (Art. 13)[130]	10
5. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (OP CEDAW, Art. 8)	104
6. International Convention for the Protection of All Persons from Enforced Disappearance (2006, Art. 33);[131]	41
Source: Author's elaboration (updated: 14 January 2014).	

In the six Conventions listed, the following common features are repeated in the *inquiry procedure*: it is confidential at all stages and optional, so that the procedure has to be expressly accepted by the States. States may also withdraw their statement at any time by notifying the Secretary-General.

Through this mechanism, the State recognizes the Committee's competence to investigate at its own initiative but confidentially, when it receives reliable information that appears to be well-founded indications that there is a *systematic* practice of violation of the rights recognized in the respective Convention in the territory of a State party.

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[127] Completed by internal rules of CAT, doc. A/66/44 (2011), Annex IX, Arts. 75-101.

[128] Effective as of 5 April 2013.

[129] CRPD Internal rules, doc. A/66/55 (2011), Annex VI, Arts. 78-91.

[130] Ratified by 10 States (Albania, Germany, Bolivia, Costa Rica, Gabon, Montenegro, Portugal, Slovakia, Spain and Thailand), it will enter into force on 14 April 2014. It will be complemented by Arts. 30-42 of CRC Rules on OP 3. *Cfr*. doc. CRC/C/62/3, of 16 Abril 2013.

[131] Effective as of 23 December 2010.

Since the beginning of the procedure, the Committee, acting ex-officio, shall invite the concerned State to cooperate in the examination of the relevant information and to this end, to submit its comments on such information.

The inquiry will be entrusted to one or more members of the relevant Committee, who shall report urgently to the Committee and shall decide what measures to take. With the consent of the interested State, some Committee's members may make a *visit* to its territory, always requesting the assistance of the State in all stages of the confidential inquiry procedure, including during the visit *in loco*.

Once the confidential report of the inquiry mission is received, the Committee will review and forward the findings to the State concerned with the observations and recommendations the Committee may consider appropriate. The State will have six months to submit to the Committee its own observations. If such observations are not received on time, the Committee may invite the State to report on measures taken as a result of the inquiry.

The Committee may include a **summary** of the inquiry findings in its annual report (public document), after consultation with the State concerned, even if it is opposed to such publication. The State can also be invited to refer in its *periodic reports* to the Committee on the Convention implementation to the measures taken in response to the inquiry made.

This procedure has proved a reduced potential in the practice developed by two Committees that up-to-date have used it, namely CEDAW and CAT, particularly where the State party has not agreed to cooperate in good faith with the Committee (i.e. Egypt with CAT). Moreover, both victims and human rights defenders regret the confidentiality of the proceedings and the procedural unbalance in favor of the State concerned. The procedure is also too slow (it takes several years) and the limited information made public by the Committee in its annual report -unless the State concerned agrees to the publication of the final report- are additional factors that explain the poor results that this procedure has obtained in the practice developed by CAT and CEDAW.

However, both Committees used the inquiry procedure with regard to **Mexico**, which included field visits by members of the two Committees. Such Committees released **summaries** of their confidential reports [132], which contain very useful recommendations to eradicate torture and ill-treatment in places of detention in Mexico, as well as gender-based violence against women in this country ("feminicide").

[132] See docs. CAT/ C/75 and CEDAW/C/2005/OP.8/MEXICO.

Concerning **Brazil**, the Government authorized CAT in 2009 to publish entirely the report of the visit made to that country in 2005 under Article 20 of the Convention against Torture, along with the comments of the Government[133]. The recommendations made by CAT confirmed the existence of a systematic pattern of abuse and inhumane conditions in detention facilities and prisons of the country[134].

In total, CAT has made confidential inquiry visits to seven countries. Besides Mexico and Brazil, already mentioned, they are Egypt, Peru, Serbia and Montenegro, Sri Lanka and Turkey. Follow-up action on the Committee's recommendations has only been requested in the context of GC on each country as a result of the examination of their *periodic reports*, or as part of new lists of issues to be reported[135].

CRPD rules provide similar follow-up measures (Art. 90.1). Furthermore, the State will have six months to transmit to CRPD comments on the findings of the Committee (Art. 89.2). After this period, CRPD may invite the State party "to inform on the measures taken in response to the investigation" (Art. 90.2)[136].

(i). <u>Urgent action procedure</u>

Only the **Committee on Enforced Disappearances** (CED) may receive under Art. 30 of the *International Convention for the Protection of All Personas from Enforced Disappearance*[137] "a request that a disappeared person should be sought and found as a matter of urgency" (Art, 30.1 *in fine*).

The **urgent actions** procedure was developed in the extra-conventional system of human rights protection since the establishment in 1980 by the then Commission on Human Rights of the Working Group on Enforced or Involuntary Disappearances (WGEID)[138]. Art. 30 of the Convention makes the urgent action procedure a new conventional mechanism.

Unlike the urgent actions of the HR Council Special Procedures, those envisaged by Art. 30 of the Convention do not accept the <u>actio popularis</u>,

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[133] Doc CAT/C/39/2 of 3 March 2009, 90 p.

[134] *Ibid*, pp. 42-48.

[135] *Cfr.* doc. HRI/ICM/WGFU/2011/2, cit., p. 17.

[136] *Cfr.* doc. A/67/55 (2011), Annex VI, p. 69.

[137] Adopted by GA res. 61/177, of 20 December 2006. Ratified by 41 States.

[138] See *infra*, Second Part, Section A.4: *The urgent actions*.

since they should be requested "by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any person having a legitimate interest" (Art. 30.1 *in fine* of the Convention). CED pointed out that the authorization of relatives of the disappeared person, their legal representatives, the counsel or any person having a legitimate interest, would be necessary to file a request of urgent action before the CED[139].

In addition, unlike urgent actions by HR Council Special Procedures –which may be addressed against any Member State of the United Nations-, those requested under Art. 30 of the Convention could only be addressed against one of the 41 States Parties. However, unlike the individual complaints filed under Art. 31 of the Convention, it is not necessary that States Parties recognize expressly the competence of CED to receive requests of urgent actions.

All request of urgent action under Art. 30 of the Convention should also meet the following admissibility criteria enabling CED to declare its admissibility with the assistance of a special rapporteur, a deputy special rapporteur and a substitute appointed by CED to examine petitions of urgent action and also to decide on provisional measures between CED sessions[140]:

Firstly, the request may not be manifestly unfounded (Art. 30.2.a).

Secondly, it should not constitute an abuse of the right of submission of such request (Art. 30.2.b). To meet this requirement, the petition should be filed by written and signed by the petitioner on the official form once all required basic information be provided, namely: information about the author of the petition, about the disappeared person, description of facts, identification of responsible persons, internal remedies used, request of provisional measures, etc.[141].

In order to avoid being considered an abuse of the right to submit such request, the disappearance should have happened no more than three months before the submission of the request to CED. Otherwise the victim disappeared and there was no information on his/her whereabouts three months before the request was filed[142].

CED stated that it will not examine urgent action requests if the enforced disappearance was initiated before the incorporation of the State as

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[139] *Cfr.* Guidelines and form to submit requests of urgent actions under Art. 30 of the Convention, doc. A/67/56 (2012), Annex V, pp. 18-24, *at* 19 *in fine*.

[140] *Cfr.* A/67/56, *cit.*, Annex IV, p. 16, para. A.2.

[141] Written request of urgent action may be addressed to CED by Internet to: ced@ohchr.org

[142] A/67/56 (2012), Annex V*, cit.,* p. 18, para. A.4.

Party to the Convention[143]. The same would apply if the disappearance was initiated more than three months before filing the request of urgent action to the CED[144].

Thirdly, the request should not be incompatible with the provisions of the Convention (Art. 30.2.d).

Fourthly, the same request of urgent action is not being examined under another procedure of international investigation or settlement of the same nature (principle *ne bis in idem*), in accordance with Art. 30.2.e of the Convention. In particular, the HR Council's WGEID[145].

Fifthly, the rule of exhaustion of domestic remedies is limited, since CED should check if the petition has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations where such a possibility exists (Art. 30.2. c).

Once the petition is declared admissible, CED will request the State Party concerned to provide it with information on the situation of the person sought, within a time limit set by CED (Art. 30.2 *in fine*).

In light of the information provided by the State concerned, CED may transmit recommendations to the State, including a request that the State should take all the necessary measures, including interim measures, to locate and protect the person concerned (Art. 30.3 of the Convention).

The State should inform CED, within a specified period of time, of measures taken, taking into account the urgency of the situation (Art. 30.3).

Finally, CED will keep informed the petitioner of its recommendations and of the information provided to it by the State as it becomes available (Art. 30.3 *in fine*), as well as its efforts to work with the State concerned for as long as the fate of the person sought remains unresolved (Art. 30.4).

To conclude, the urgent action procedure under Art. 30 of the Convention, like the urgent actions under HR Council Special Procedures, has a clear humanitarian purpose, since they are aiming to facilitate that the State recognize the detention of the person and guarantee its rights to security, freedom and integrity.

The urgent action request under Art. 30 is totally different from the individual complaint ("communication") envisaged in Art. 31 of the Convention. In this case, Art. 31 is optional and the State should have recognized it

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[143] *Ibidem*, para. A.3.

[144] *Ibidem id.*, para. A.4 *in fine*.

[145] *Ibidem id.*, para. A.2.

expressly. In addition, the complaint procedure aims to obtain final views from CED by which the State would be condemned for violation of the rights recognized in the Convention and CED will indicate measures of reparation in favour of the victim[146].

(j) Periodic visits procedure

With a view to prevent torture and other cruel, inhuman or degrading treatment or punishment, the ***Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*** [147] established a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other ill treatments (Art. 1). It is also stressed that these visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other ill treatment (Art. 4.1 *in fine*).

In addition, Art. 4 OP states that visits shall be allowed by States to any place under their jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a pubic authority or at its instigation or with its consent or acquiescence ("places of detention"). Deprivation of liberty means "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority" (Art. 4.2 OP).

Periodic visits are carried out by independent international and national bodies. Art. 2 OP established the **Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** of CAT (SPT). It will be guided by UN norms concerning the treatment of people deprived of their liberty (Art. 2.2 OP), as well as the "principles of confidentiality, impartiality, non-selectivity, universality and objectivity" (Art. 2.3 OP).

SPT is composed of 25 independent experts as proposed by States Parties. They are elected by the Assembly of States Parties by secret ballot (Art. 7.1. c OP) for a term of four years. They could be re-elected once if re-nominated (Art. 9 OP). Candidates should be persons of high moral character, having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty (Art. 5.2 OP).

The SPT essential mandate is to pay visits to places of detention and make recommendations to States Parties concerning the protection of

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[146] See *infra*, Section F: *Mechanism cuasi-contencious*.

[147] Adopted by GA res. 57/199, of 19 December 2002. In force since 2006, it has 70 States Parties.

persons deprived of their liberty against torture and other ill treatments (Art. 11. a OP). The SPT establishes its programme of periodic visits and notify it to States Parties in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted (Art. 13.2 OP). SPT may notify States Parties some places of detention to be visited, while SPT may pay visits to other places of detention not notified to States Parties[148].

The visits shall be conducted by at least two members of SPT. They may be accompanied by experts of demonstrated professional experience and knowledge in the fields covered by the OP who shall be selected from a roster of experts prepared on the basis of proposals made by the States Parties, the OHCHR and the UN Centre for International Crime Prevention (Art. 13.3 OP). The SPT may propose a short follow-up visit after a regular visit (Art. 13.4 OP)[149].

In accordance with Art. 14 OP, States Parties undertake to grant SPT with unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention, as well the number of places and their location (para. 1.a); unrestricted access to all places of detention and their installations and facilities (para. 1.c); the opportunity to have private interview with the persons deprived of their liberty without witnesses (para.1.d); the liberty to choose the places SPT wants to visit and the persons it wants to interview (para.1.e). The States Parties may object to visit a particular place of detention only on urgent and compelling ground of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent such a visit. The existence of a declared state of emergency as such shall not be invoked by a State Party as a reason to object to a visit (Art. 14.2 OP).

Prohibition of reprisals is absolute in accordance with Arts. 15 & 21: “No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the SPT or to its delegates any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way”. The same applies to NPM (Art . 21).

The SPT shall transmit to the State its recommendations and observations in a confidential report. It will be published if the State so requests it. It the State makes part of the report public, the SPT may publish the report in whole or in part. However, no personal data shall be published without the express consent of the person concerned (Art. 16.2)[150]. In

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[148] Guideline 5, para. 4 *in fine*. *Cfr*. doc. CAT/OP/12/4, of 18 January 2010 (SPT Guidelines regarding visits to States Parties).

[149] SPT has paid follow up visits to Paraguay and Honduras.

[150] Seven States have accepted hte publication of the SPT reports, namely: Benin, Brazil, Honduras, Maldives, Mexico, Paraguay and Sweden. *Cfr.* doc. CAT/C/50/2, of 19 March 2012 (Sixth annual report of SPT, 2012), para. 18. More recently Argentina accepted the publication

addition, SPT shall present a public annual report on its activities to the CAT (Art. 16.3 OP). If the State refuses to cooperate with the SPT or to take steps to improve the situation within six months[151], the CAT may, at the request of SPT, decide to make a public statement on the matter or to publish the report of the SPT (Art. 16.4 OP). However this rule has not yet been used in practice.

In its last report the SPT informed on its methods of work, stressing the grave lack of resources (both financial and human) to appropriately carry out its mandate[152]. To optimize its resources, SPT often combines regular visits with follow up visits or advising visits paid to NMP[153].

Furthermore, Art. 3 OP states that States Parties shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other ill treatments (NPM). SPT shall advise and assist States in the establishment of NPM and maintain direct and confidential contact with the NPM and offer them training and technical assistance with a view to strengthening their capacities (Art. 11.b OP). There are 45 NPM and NPM of 25 States Parties are pending of establishment.

The States shall guarantee the functional independence of the NPM as well as the independence of their personnel, as well as the necessary resources for the functioning to the NPM (Art. 18.3 OP), taking due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights (Art. 18.4 OP). Experts of the NPM shall have the required capabilities and professional knowledge; they shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country (Art. 18.2 OP).

In accordance with Art. 19, the NPM shall be granted at a minimum the power to regularly examine the treatment of the persons deprived of their liberty in places of detention with a view of strengthening, if necessary, their protection against torture and ill treatments; to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other ill treatments, taking into consideration the relevant UN norms; and to submit proposals and observations concerning existing or draft legislation.

States undertake to grant NPM access to all information concerning the number of persons deprived of their liberty in places of detention, as well the

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of the SPT report on its visit to the country in 2012 (doc. CAT/OP/ARG/1, of 27 November 2013, 26 p.).

[151] *Ibidem*, para. 19.

[152] CAT/C/48/2., paras. 38-45. Methods of work are complementary to the internal rules of the SPT that may be found in doc. CAT/OP/12/3, of 5 January 2011, 10 p.

[153] CAT/C/50/2., paras. 49-53.

number of places and their location; Access to all information referring to the treatment of those persons as well as their conditions of detention; Access to all places of detention and their installations and facilities; the opportunity to have private interviews with the persons deprived of their liberty without witnesses, as well as with any other person who the NPM believes may supply relevant information; the liberty to choose the places the NPM wants to visit and the persons they want to interview; and the right to have contacts with SPT, to send it information and to meet with it (Art. 20 OP).

Confidential information collected by NPM shall be privileged. No personal data shall be published without the express consent of the person concerned (Art. 21.2 OP). The authorities of the State shall examine the recommendations of the NPM and enter into a dialogue with it on possible implementation measures (Art. 22 OP). States undertake to publish and disseminate the annual reports of the NPM (Art. 23 OP).

To sum up, the future efficacy of the SPT shall depend on the resources provided to it by the OHCHR. Today the SPT has resources to pay regular visits to the 70 States Parties once every 20 years[154]. This is unacceptable since it is contrary to the object and purpose of the OP.

2. Specialized agencies

Two UN specialized agencies with relevant competence in the field of human rights, have established traditional mechanisms to examine *periodic reports* of States on the implementation in their domestic law of provisions of certain international treaties elaborated within the competence of those agencies. We shall refer to ILO and UNESCO procedures.

(a) International Labor Organization (ILO)

In the framework of the ILO, there have been adopted 189 international labor conventions and 5 protocols, besides 202 recommendations on labor, unions, economic and social issues that sometimes have to do with human rights.[155]. The normative function of ILO is completed with three Declarations: the 1944 *Philadelphia Declaration* on freedom of association; the *Declaration on principles and fundamental rights at work and its follow up*, of 18 June 1998; and the *Declaration on Social Justice for a Fair Globalization,* of 2008. These instruments stress the ILO's engagement with social justice to achieve peace, already present in its Constitution of 1919.

According to its Director General, the ILO should initiate its second century expressing its explicit engagement with the most vulnerable people at

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[154] CAT/C/48/3, of 19 March 2012, para. 44.

[155] See http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS_157892/lang--es/index.htm.

work, i.e., those living in poverty, working under abusive conditions without respect for their fundamental rights; those who are excluded from society without a decent job opportunity; those who work is contrary to their human dignity and their physical and moral integrity; those who are fear from the future because they not have access to social services or basic protection mechanisms[156].

Article 19 of the ILO Constitution established the States obligation to submit all conventions and recommendations adopted by the Organization, for consideration of the competent national authorities. Indeed, once adopted by the International Labor Conference (ILC), both conventions and recommendations must be submitted, within 12 to 18 months, “before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action" (Article 19.5 b of the Constitution).

Subsequently, it has been interpreted that the authority referred to in Article 19 is the national parliament or authority vested with the capacity to legislate in the matter considered by the respective convention. The purpose of such submission is to provide parliamentarians access to the new texts in order to decide in favor of ratification.

However, the ratification will remain a sovereign decision of the Executive Branch of the State so that, if it does not occur, it is merely to inform the Director General of the ILO on "... the position of its law and practice in regard to the matters dealt with in the convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention " (Art. 19.5 e *in fine* of the Constitution).

The obligation "to bring the Convention before the authority or authorities within whose competence the matter lies", just described, is unique in the universal system of human rights protection. In practice it has become a fruitful obligation, as it has enabled the ILO to conduct special studies on depth difficulties that States found to adapt their national legislation to international labor conventions. Such exercise has favored the ratification of many conventions by a large number of States.

For this reason, the technique of submission of the recommendations adopted by the competent authorities also helps as an incentive for the modernization of the domestic legislation in the context of a progressive adaptation of the same international standards in the field. This whole process has, however, a limit: the Executive Branch retains the sovereign right to ratify or not the convention.

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[156] *Cfr*. “Before the ILO Centennial: Realities, renovation and tripartite engagement”. Memory of the Director General. Geneva, ILC, 2013, p. 28, para. 147. Accessible at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_214106.pdf

Once international labor conventions are ratified, States assume the obligation to report on their application in the manner provided in Article 22 of the ILO Constitution:

> "Each of the Members agrees to make an annual Memory to the International Labor Office on the measures which it has taken to give effect to the provisions of conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

As regards to the frequency of memories from States, while Article 22 mentions an annual basis, the subsequent practice has revealed the accumulation of such a large volume of memories, which made it advisable to go gradually extending - up to *five years* in 1995 - the obligation to submit memories on most of the ratified conventions.

However, exceptions to this general rule were admitted, as the ILO bodies responsible for monitoring the implementation of the conventions may, at any time, request States to develop *specific* reports when they experience serious problems or unsolved long-standing situations.

On the other hand, the frequency was reduced to **two years** for **ten** international labor **conventions** that relate more directly to human rights, namely: conventions on freedom of association, equal opportunities, abolition of forced labor, labor inspection, employment policy and tripartite consultation.[157]

In 1998, the International Labor Conference decided to return to the rule of the **annual report** to all Member States of the Organization, but only on **four core human rights principles**, which are identified as a priority for the ILO:

- Freedom of association (association and collective bargaining)
- Elimination of all forms of forced or compulsory labor;
- Effective abolition of child labor; and
- Elimination of discrimination in employment and occupation matters.[158]

1998 Declaration (revised on 5 June 2010) also provided an *ad hoc* follow-up. Thus, annual reports on these four issues, which all States must submit having or not ratified the relevant conventions, are compiled by the

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[157] See Activities of the ILO, 1994-1995 (Report of the Director General) International Labor Conference, 83rd. Session, 1996, pp. 8-9. And ILO activities 1998-1999. Report of the Director General to the ILC at its 88th Session, Geneva, ILO, 2000.

[158] ILC, *the ILO Declaration on Fundamental Principles and Rights at Work and its follow-up*, adopted on 18 June 1998.

International Labor Office and reviewed by the Governing Body assisted by a group of seven experts.

Furthermore, the Director General presents to the Conference a comprehensive report covering all countries – that have or have not ratified the relevant conventions- that each year is devoted to the implementation of one of the four human rights categories above mentioned. In 2001 and 2009 corresponded to forced labor[159]and child labor[160] in 2002 and in 2003 to non-discrimination[161], in 2004 to social justice[162], and in 2008 to freedom of association[163]. The Governing Body is responsible for monitoring debates that have occurred in the Conference on such matters, proposing to Governments technical cooperation programs to facilitate the implementation of fundamental principles. The ILO hopes to contribute to the definition of the basic social standards governing economic globalization.

We believe that the follow-up procedure of the 1998 Declaration and technical cooperation programs are welcome as mechanisms for promoting the application of international legal standards well established. However, they must not divert attention from the ILO on the constitutional mechanisms monitoring the application of international labor conventions ratified by States, which are the main subject of this Manual.

As to the *content* of the memories to be provided by States based on Article 22 of the Constitution, the Governing Body has adopted the practice of preparing specific forms for each convention, which incorporates very precise technical issues to which States should respond in their reports. In addition, the ILO has developed general guidelines addressed to States in order to avoid futile duplications in subsequent reports, which should be limited to indicate only the new facts that occurred between the two periodic reports.

The obligation to report periodically on ratified conventions is complemented, also in a specific manner in the ILO, with the obligation to send copies of such reports to the organizations of employers and workers representatives in each country (Article 23.2 of the Constitution). Such organizations may, in turn, submit comments on the application of certain

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159 OFICINA INTERNACIONAL DEL TRABAJO, Alto al trabajo forzoso. Ginebra, OIT, 2001, 140 p.. Vid. también OIT, El costo de la coacción. Ginebra, OIT, 2009, 94 p.

160 OFICINA INTERNACIONAL DEL TRABAJO, Las buenas prácticas: integrando el género en las acciones contra el trabajo infantil. Ginebra, OIT, 2002, 133 p.

161 OFICINA INTERNACIONAL DEL TRABAJO, La hora de la igualdad en el trabajo. Ginebra, OIT, 2003, 153 p.

162 OFICINA INTERNACIONAL DEL TRABAJO, Organizarse en pos de la justicia social. Ginebra, OIT, 2004, 149 p.

163 OFICINA INTERNACIONAL DEL TRABAJO, La libertad de asociación y la libertad sindical en la práctica: lecciones aprendidas. Ginebra, OIT, 2008, 113 p.

conventions ratified by their countries. This obligation is a direct consequence of the tripartite nature of the ILO.

In regard to international labor conventions on matters not directly related to the basic principles of human rights that have not yet been ratified, and the recommendations adopted, the Conference may request reports on the general status of their application to non-parties States. It can also decide to prepare studies on the problems that States often found to become parties to those conventions.[164]

All reports received in the Organization by the regular procedure established in the Constitution will be examined in depth by two supervisory bodies, which act on and in this order:

(a) Committee of Experts on the Application of Conventions and Recommendations. It consists of 20 independent experts, subject to geographical distribution and the tripartite principle of the Organization.[165] The Commission makes a detailed examination of each of the memories received from each State and each ratified Convention. It reports annually to the Conference on the outcome of its work. It also addresses technical **observations** to States, indicating the measures they should take to accommodate their internal practices to the requirements of the regulations contained in the convention concerned. On other occasions, the Commission addresses **direct requests** to the States.

The annual report of the Committee of Experts is public and constitutes an excellent reference document.[166]

(b) Conference Commission on the Application of Standards. Its composition is tripartite, i.e. delegates of Governments, employers and workers are members in thirds of the Commission. Based on the annual report of the Committee of Experts, which is technical and independent, the Commission examines how States comply with their obligations under the conventions and recommendations or in connection therewith. Given its

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[164] See as an example ILC, General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. ILC.100/III/1B Doc. ILO, Geneva 2011, 317 p. (Report of the Committee of Experts on the Application of Conventions and Recommendations)

[165] This means that the 20 experts are representing, in thirds, governments, employers and workers.

[166] The latest report of the Committee of Experts on the Application of Conventions and Recommendations ("Implementation of International Labor Standards") was submitted to the International Labour Conference at its 102th session (2013) under the series "Report III (Part 1A)". Geneva, International Labour Office, 2013, 1002 p. Accessible at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205508.pdf

tripartite nature, representatives of employers and workers can express their opinion. The Conference Commission annually reviews more than 20 individual cases.

Finally, the Commission shall report to the Conference on its final conclusions[167]. In turn, the International Labor Conference, also tripartite, may adopt any decision it deemed appropriate, following the general debate of the issue in plenary, in light of reports that have been submitted by both the Committee of Experts and the Conference Commission.

(b) United Nations Educational, Scientific and Cultural Organization (UNESCO)

The system of *periodic reports* in the framework of UNESCO has a general regulation in the Constitution. Indeed, according to Article 4 of the Constitution, the General Conference of the Member States may adopt recommendations by a simple majority and conventions by a qualified majority of two thirds of members States present.

In the case of conventions and recommendations adopted, Article 8 of the Constitution states that each Member State shall submit to the Organization, at the time and manner decided by the General Conference, reports on laws, regulations and statistics relating to their educational, scientific and cultural institutions, as well as on the action taken on the recommendations and conventions adopted by the Organization.

Since 1965 periodic reports are presented on the basis of a questionnaire at regular intervals of four years. Unlike the UN system, the obligation to submit periodic reports covers in UNESCO all the conventions adopted (whether or not ratified by the Member State), as well as recommendations.

Periodic reports prepared under these parameters will be considered by the **Committee on Conventions and Recommendations**, a monitoring body consisting of 29 member States elected by UNESCO's Executive Board, which in turn consists of 58 representatives of the Member States of the Organization. Consequently, unlike the UN and the ILO system, the Committee on Conventions and Recommendations of UNESCO is a *political* body, comprising representatives of 29 States with a fair distribution of the five regional groups.

The Committee, in view of reports of States, makes a global assessment of the situation and formulates conclusions and

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[167] See ILC, 'Report of the Committee on the Application of Standards. Part I: General Report ", in ILC, Provisional Record No. 18 first part. Geneva, ILO, 2013, 158 p. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_216455.pdf

recommendations for future action by the Organization, which shall be submitted to the **Executive Committee** of the **General Conference**. Moreover, as H. SABA pointed out, the Committee has interpreted the scope of some provisions of the Convention on the fight against discrimination in the field of education.[168]

Six additional UNESCO **instruments** provide for specific arrangements in periodic reports, namely:

Firstly, the **Convention against Discrimination in Education**[169], whose Article 7 recalls the obligation of States parties to submit to the General Conference of UNESCO periodic reports on legislative provisions and other measures taken to implement the Convention. In addition, they shall also report on national policy to promote equal opportunities and treatment in teaching that each State party should develop, indicating the results achieved and obstacles encountered.

Secondly, the **Recommendation concerning the Status of Teachers**[170], is monitored by a Joint Committee of 12 experts from the ILO and UNESCO which review States periodic reports on its implementation. The UNESCO General Conference and the ILO Governing Body appoint the experts in equal proportions, taking into account their personal expertise.

The Joint Committee has developed a questionnaire that Member States must complete and it has liberalized the procedure, so it can receive, in addition to the States periodic reports, information from any authorized source. Thus, the Joint Committee receives valuable contributions from NGO with consultative status with the respective Organizations. These reports may address allegations of discrimination in recruitment and training of teachers, as well as the exercise of their civil and political rights, including the right of association.

The Joint Committee submits its reports to the Executive Council and the General Conference of UNESCO, through its Committee on Conventions and Recommendations.

Thirdly, the **Convention Concerning the Protection of World Cultural and Natural Heritage** of 16 November 1972 (in force since 1975),

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[168] SABA, Hanna: "La UNESCO y los derechos humanos", in VASAK, K. (ed.), Las dimensiones internacionales de los derechos humanos. Paris, Serbal/UNESCO, 1985, vol. II, pp. 552-585, at 567.

[169] Adopted on 14 December 1960 by the General Conference of UNESCO. Entered into force on 22 May 1962 and has been ratified by 101 States. See

http://www.unesco.org/eri/la/convention.asp?KO=12949&language=F&order=alpha

[170] Adopted in Paris by the General Conference on 5 October 1966.

has 192 States Parties[171] and also established a States system report. According to Article 29 of the Convention, States parties will report to the General Conference of UNESCO on various administrative, legislative or otherwise provisions taken to implement the Convention, as well as experience gained.

Such reports will be provided to the **Cultural Heritage Committee**, a body established by the Convention and composed of 21 representatives of States Parties to the Convention. The Committee, in turn, will report to each ordinary session of the General Conference of UNESCO.

It is noteworthy that the Cultural Heritage Committee, which governs its activities by the provisions of the Convention and its internal rules (document WHC/1), works on annual cycles of States reports, in which they propose monuments and national sites that have "outstanding universal value".

The Committee receives States reports and with the assistance of some CSO specialized in this field (notably the International Council on Monuments and Sites, ICOMOS, and the International Union for Conservation of Nature and Natural Resources IUCN), decides which monuments or sites must be entered into a "World Heritage List."

The Committee will also prepare another list of "World Heritage in Danger" and shall determine what measures appear necessary for the proper safeguarding of such sites and monuments, giving the necessary resources available under the World Heritage Fund, which is fed by contributions of States Parties.

Fourthly, the General Conference of UNESCO entrusted its Director General the establishment of an **International Bioethics Committee**, which will be responsible for monitoring the implementation of the **Universal Declaration on Human Genome and Human Rights**, adopted by the UNESCO General Conference on 11 November 1997. The Director General receives regular reports from States on all measures adopted to implement the principles of the Declaration.

Fifthly, the Executive Board of UNESCO also established in 2001 the **Joint Expert Group UNESCO/ECOSOC** (CESCR) to supervise the correct implementation of the **right to education**. It consists of two representatives from Committee on ESCR and two representatives from the Committee on Conventions and Recommendations of UNESCO.[172] The group of experts examines annual reports, prepares practical recommendations on promoting the right to education and advises on indicators on the right to education.

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[171] See http://portal.unesco.org/la/convention.asp?KO=13055&language=F&order=alpha

[172] Decision 162 EX/5.4, October 2001.

In 2011 the UNESCO's participation in the work of the Group was questioned and a reflection was open on the future of this and other alternatives to joint monitoring of the right to education.[173]

The Group also assessed its work since 2003 and regretted that the Executive Council did not examine the results obtained[174]. The Group also decided to strengthen its cooperation with the HR Council Special Rapporteur on the right to education[175].

And, sixthly, the **Convention on the protection and promotion of diversity of cultural expressions**, in force since 17 March 2007[176], established in Art. 23 the *Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions*, which is composed of representatives of 24 States Parties.

Therefore, the Committee, of a political nature, receives periodic reports from States every four years on measures adopted in implementation of the Convention at domestic level, with a view to stimulate a critical review on its functions regarding the objectives of the Convention and to keep a dialogue with other States Parties"[177].

However, the Committee shall transmit the periodic reports to the Conference of States Parties with its remarks and a summary of its contents. The Conference of States Parties (plenary and supreme body of the Convention, stated Art. 22.1) will retain the faculty of examine them (Art. 22.4.b). If the Conference so requests, the Committee could prepare a practical note on the implementation of the Convention (Art. 23. 6.b).

Therefore, the role of CSO in this procedure will be established by the internal rules of the Committee, which could invite them to consultation meetings on specific questions (Art. 23.7). This formula excludes the possibility of CSO to be consulted directly on the periodic reports submitted by States Parties.

Essential readings:

- UNOHCHR: The United Nations Human Rights Treaty System. United Nations, Geneva, 2012, 68 p. Fact Sheet num 30/Rev.1. Available at: http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf

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[173] See at: http://unesdoc.unesco.org/images/0021/002122/212202s.pdf p. 12.
[174] Report of the 11th meeting of the Group, doc. UNESCO/ECOSOC, cit., para. 3 *in fine*.
[175] *Ibidem*, para. 14.
[176] Convention ratified by 123 States and the European Union. Available at: http://www.unesco.org/eri/la/convention.asp?KO=31038&language=S&order=alpha
[177] Cfr. BARREIRO CARRIL, Beatriz: La diversidad cultural en el derecho internacional: la Convención de la UNESCO. Madrid, Iustel, 2011, 365 p., *at* 287.

Look at CSO's alternative ("shadow") reports through the OHCHR web site by clicking on the session of a particular human rights body e.g. the Human Rights Committee. You will then find the State and alternative reports posted next to the country flag. For example:
http://www2.ohchr.org/english/bodies/hrc/hrcs91.htm

Further readings:

- Alfredsson Gudmundur *et al*.: International Human Rights Monitoring Mechanisms. Leiden, Boston: Martinus Nijhoff Publishers, 2009. Chapters 10, 11 and 12, pp. 109-133.

- American University, Washington College of Law WCL's United Nations Committee against Torture Project. http://www.wcl.american.edu/ilp/uncat.cfm

***Issues*:**

1. What is the legal nature of the *periodic reports* procedure?

2. Look at concluding observations addressed by Committees to your country. Evaluate CSO contribution to them. Available at: http://www.universalhumanrightsindex.org/en/

3. Review General Comment 31 of the HR Committee. Available at: http://daccess-dsny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement

4. Review General Comment 3 of the Committee on ESCR. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/PDF/G0842235.pdf?OpenElement

5. Differences between *periodic reports* and *inquiry* procedures.

6. How can Committees improve the *periodic reports* procedure?

7. Differences between the *urgent action* procedure under art.30 CED and the complaints procedure under art. 31CED.

8. ILO and UNESCO particularities monitoring the implementation of human rights conventions.

B. Quasi-contentious procedure

This is the unique procedure in conventional international law with universal scope by which the victim of human rights violations may sue the responsible State before an international body (Committees). It is also known as the complaints procedure ("communications" in the literal text of the Conventions). It requires that a violation of a right enshrined in the Conventions happened. Therefore, is a control mechanism that operates ex post facto (i.e., after the violation has occurred) and that may be used in case of a single violation.

An exception is made for cases in which the procedure works as a **preventive** mechanism, in order to prevent a person being extradited to another State if there are reasonable grounds to believe that the person would be in danger of being subjected to torture. These are the situations envisaged in Article 3 of the Convention against Torture and, by analogy, in Article 7 of the ICCPR. In such cases the State will be asked to refrain from expulsion of the alleged victim.

The complaints procedure is also conceived as subsidiary to the domestic judicial remedies in a democratic country governed by the rule of law. Only when remedies of domestic jurisdiction have been unsuccessfully exhausted, unless reasons for not using such remedies are duly justified, the victim or his/her representative may size the competent Committee to seek redress provided that the State has expressly accepted the complaints procedure through the ratification of optional clauses or protocols.

The quasi-contentious procedure aims to obtain from the competent Committee a legal opinion on whether there has been a violation of the treaty in a particular case (*views*) or not, and draw the legal consequences. Among them, the Committee shall condemn the State as responsible of such violation and will request the State to provide measures of reparation to the victim which should be proportional to the seriousness of the violation.

Therefore, the complaints procedure is contentious and implies that the State may be convicted and punished, and should repair the violation. However, the Committees opinion on the merits (views) is not a judgment, because the Committees are not international tribunals. However, they are bodies of independent experts with authority granted by their Conventions to decide whether there has been a violation of the Conventions or not, so their opinion has the appearance of a court ruling and an undeniable legal value. Since the opinion of the Committees are not enforceable as judicial decisions, the complaints procedure is considered to be **quasi-contentious or quasi-jurisdictional**.

Quasi-contentious procedures know three variants in the United Nations system, depending on who filed the complaint or communication to the competent Committee: a State, a United Nations body or an individual.

Since the first two situations are rarely used in practice due to lack of political will among States Parties, we will focus our study on the third hypothesis, that is, the *complaints of individuals against States*.

1.- Individual complaints in the universal system

As stated, under the **individual complaints** procedure, unique in public international law, a person or group of persons who consider themselves to be victims of human rights violations, are enable to file with the respective Committee, and under certain conditions, complaints against the State under whose jurisdiction the alleged violation was committed.

In the universal system individual complaints are envisaged in **nine treaties** of which eight are in force, in addition to the mechanism provided for in Arts. 24-25 of the ILO Constitution. These are the following Conventions, Protocols or optional clauses that provide their Committees with the competence of receiving individual complaints:

Table 3: Treaties allowing for individual complaints **Treaty or Convention → Competent Committee**	Competence to receive individual complaints	Number of States parties that have recognized the competence
1.International Convention on the Elimination of All Forms of Racial Discrimination → CERD	Art. 14 of CERD	54
2.ICCPR → HR Committee	Optional Protocol 1 to ICCPR	115
3.Convention against torture and other cruel inhuman or degrading treatment or punishment → **CAT**	Art. 22 of CAT	65
4.Convention on the Elimination of All Forms of Discrimination against Women → **CEDAW**	Optional Protocol to CEDAW	104
5.Convention on the Rights of Persons with Disabilities → **CRPD**	Optional Protocol to CRPD	62 [178]
6.International Convention for the Protection of All Persons from Enforced Disappearance → **CED**	Art. 31 of CED	13 [179]

[178] The Committee on the Rights of Persons with Disabilities (CRPD) has already held its first four sessions. See doc. A/66/55: Report to the General Assembly by CRPD. United Nations, New York, 2011, 94 p.. See also doc. CRPD/C/5/5, of 5 April 2012, 22 p.

[179] 41 States Parties to the Convention in force since 23 December 2010. Art. 31 was accepted by 13 States, namely: Albania, Argentina, Belgium, Chile, Ecuador, France, Germany, Mali, Montenegro, Netherlands, Serbia, Spain and Uruguay. Guidelines and form to submit individual complaints are in doc. A/67/56 (2012), Annex VI.

7.ICESCR → Committee on ESCR	Optional Protocol to ICESCR	11[180]
8, CRC → Committee on the Rights of the Child	Optional Protocol 3 to CRC	10[181]

The individual complaints mechanism is also envisaged in the following convention, but it **has not yet entered into force** internationally:

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (45 States parties)[182]. Article 77 of the Convention allows the *Committee of Protection of the Rights of All Migrant Workers and their families* to receive individual complaints[183].

Source: Author's elaboration (updated to 14 January 2014).

2.- General overview of the procedure

Both the Conventions, Protocols and Committees' internal rules[184], establish the legal regime for the individual complaints. The procedure, largely

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[180] OP to ICESCR, of 10 December 2008, in force since 5 May 2013, after being accepted by 10 States, namely: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain and Uruguay. Final approval of this controversial Protocol has been a landmark in the history of human rights, since it is the first international treaty recognizing the justiciability of ESCR.

[181] Adopted by GA res. 66/138, of 19 December 2011. Ratified by 10 States, namely: Albania, Alemania, Bolivia, Costa Rica, Gabon, Montenegro, Portugal, Slovakia, Spain and Thailand), in force as from 14 April 2014. It will be complemented by Arts. 30-42 of the internal rules of CRC on OP 3. *Cfr*. doc. CRC/C/62/3, of 16 April 2013, pp. 16-20.

[182] *Cfr.* the Internet Portal http://untreaty.un.org

[183] So far only three States (Mexico, Guatemala and Uruguay) have agreed to the clause; 10 acceptances are required for the competence of the Committee to take effect.

[184] See "Summary of the regulations of the bodies of human rights treaties", doc. HRI/GEN/3/Rev.3 of 28 May 2008, 222 p., accessible at www.ohchr.org
It was subsequently published the following: regulations: CRPD rules, doc. A/66/55 (2011), Annex VI: the revised rules of CRC, doc. CRC/C/4/Rev.2 of 9 December 2010, 22 p.; CCPR revised regulations, doc. CCPR/C/3/Rev.9 of 13 January 2011, 26 p.; and the revised rules of CAT, doc. CAT/C/3/Rev.5, of 21 February 2011, 39 p.

common to the eight Committees in force, has eight common elements[185], namely:

Firstly, the procedure is **optional** since it is necessary that the State Party has expressly accepted the Committees competence to receive individual complaints through the acceptance of the optional clauses established in the Conventions or in the optional protocols. This feature of voluntarism jeopardizes the potential universality of the procedure, being accepted by a reduced number of States compared with the 193 Member States of the Organization.

Secondly, the procedure is **regulated and compulsory**. That is, once voluntarily accepted by the State, the Committees will process each and every individual complaint they have received and addressed against that State. *Regulated*, because it is entirely developed in writing, according to the applicable rules of procedure, in which there is no oral hearing of the interested parties (except in the case of CAT, according to Article 117.4 of its rules). The procedure is also *compulsory* to States parties since they may not be the target of reservations.

Thirdly, all procedural steps are carried out in the strictest **confidentiality**. However, this does not prevent the victim or his representative to be aware of the handling of his/her complaint, since they are actively involved in the procedure. In principle, **decisions** on admissibility and the **opinions** or views on the merits of the Committees are also confidential. However, this rule has been relaxed in practice, because the Committees always decided to make public both, their **decisions** on inadmissibility and their **opinions** on the merits, in the site of the respective Committee at the OHCHR web site and through their annual reports to the GA, once notified to the parties in the proceedings (i.e., responsible State and victim or his/her representative).

Fourthly, the procedure is **contradictory** and contentious or judicial in appearance, but without the benefit of the judicial nature in the strict sense. This explains why the individual complaints are qualified as "quasi-contentious" or “quasi-jurisdictional” procedure. The contradictory character implies that the parties to the proceedings will challenge each other before the relevant Committee subsequently defending on writing their positions. To decide on the merits of the case, the Committees will take into account the facts considered as proven from the information provided by both parties to the proceedings under the principle of equality of arms.

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185 VILLÁN DURÁN, C., Curso de Derecho internacional de los derechos humanos, cit, pp. 455-456. See also MOLLER, Jakob Th.: “Eight UN Petitions Procedures: A Comparative Analysis”, *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston, Nijhoff, 2011, pp.135-157.

Fifthly, the Committees **decisions** on the admissibility of a complaint are final and binding on the parties in the proceedings. They can only be reviewed if the State or the victim would submit to the Committees new relevant facts so important that the Committees could change their decision.

In addition, a decision of inadmissibility will be taken if the same matter is being examined by another international complaints procedure (principle *ne bis in idem*); if the complaint is incompatible with the Convention; if it was not filed within the given deadline after the exhaustion of internal remedies[186]; or if it refers to facts prior to the date on which the State acknowledged the Committee's competence to receive individual complaints.

Sixthly, the Committees *views* on the merits of the case (**opinions**) are written in the form of a judicial decision in which the Committees decide on whether there has been violation or not, of any right recognized in the respective Convention. In an affirmative case, the Committee shall indicate the measures of reparation and compensation to the victim that the responsible State should comply with. As already stated, the views are not strictly judicial decisions that could be binding and enforceable upon the State. However, the practice reveals that States feel themselves bound by the views of the Committees and look seriously at the indicated reparations in 30% of the cases.

Seventhly, the adoption of both *decisions* on the admissibility and *views* on the merits, allows the Committees to go an in-depth analysis and **interpretation** of the meaning and scope of the articles of the Conventions in question, in addition to internationally protect the rights violated in the person of the victim. In fact, the complaints procedure aims to the protection of rights of the victim/s that are the subject of the complaint.

Finally, eighthly, the purpose of this procedure is strictly to **protect** and has an ex post facto nature, i.e. it can be used once the violation happened. Therefore, it has not a preventive effect, except in the case of the request for **interim** measures or the already known hypothesis of Articles 3 of CAT and 7 of ICCPR.

Some scholars and many CSO have proposed to merge the competences of the eight Committees receiving individual complaints and to entrust such competences to a new *World Court of Human Rights*, which should be permanent and whose jurisdiction would cover all individual complaints of violation of human rights universally accepted. Such complaints should be addressed against the State under whose jurisdiction the alleged violation was committed. The advantage would be obvious: the decisions of the future World Court would be a court ruling binding on States. It is hoped that such judicial protection mechanism becomes a reality as soon as possible.

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[186] See Articles 14.5, 3.2.a CERD and the Optional Protocol to the ICESCR, as well as art. 96.c of the regulations of CCPR.

3.- Procedure on individual complaints

We will focus our discussion on the **Human Rights Committee** (ICCPR) since it has developed an extensive jurisprudence since 1977, in which it developed its rules of procedure and its opinions on substantive issues that help to interpret the content and scope of the substantive provisions of the ICCPR. At the end of 2012 there were 2.239 individual complaints registered concerning 88 States Parties to the First Optional Protocol. In 804 cases it concluded the existence of violation of the Covenant. In other 608 cases it declared the complaints inadmissible, and 329 cases were pending for review[187].

Individual complaints should be submitted in writing to the Secretariat of the HR Committee in the Office of the United Nations High Commissioner for Human Rights in Geneva[188] . They will be processed in accordance with the procedure established by the Optional Protocol to the ICCPR and related provisions of the internal rules of the HR Committee[189].

The procedural rules governing the handling of any complaint before the HR Committee can be grouped, for merely didactic purposes, into seven main steps that are outlined in the Sections below: **establishment of competence; decision on admissibility; interim measures; internal handling of the complaint**; **views on the merits; publication; and follow up.**

As stated, the procedure is entirely written. The HR Committee and its subsidiary bodies (working groups, special rapporteurs, etc.) conduct the procedure with the assistance of the Secretariat. The procedure is activated whenever the Secretariat (Petitions Section of UNOHCHR) receives a complaint addressed against one of the States that have accepted the HR Committee's competence on this matter.

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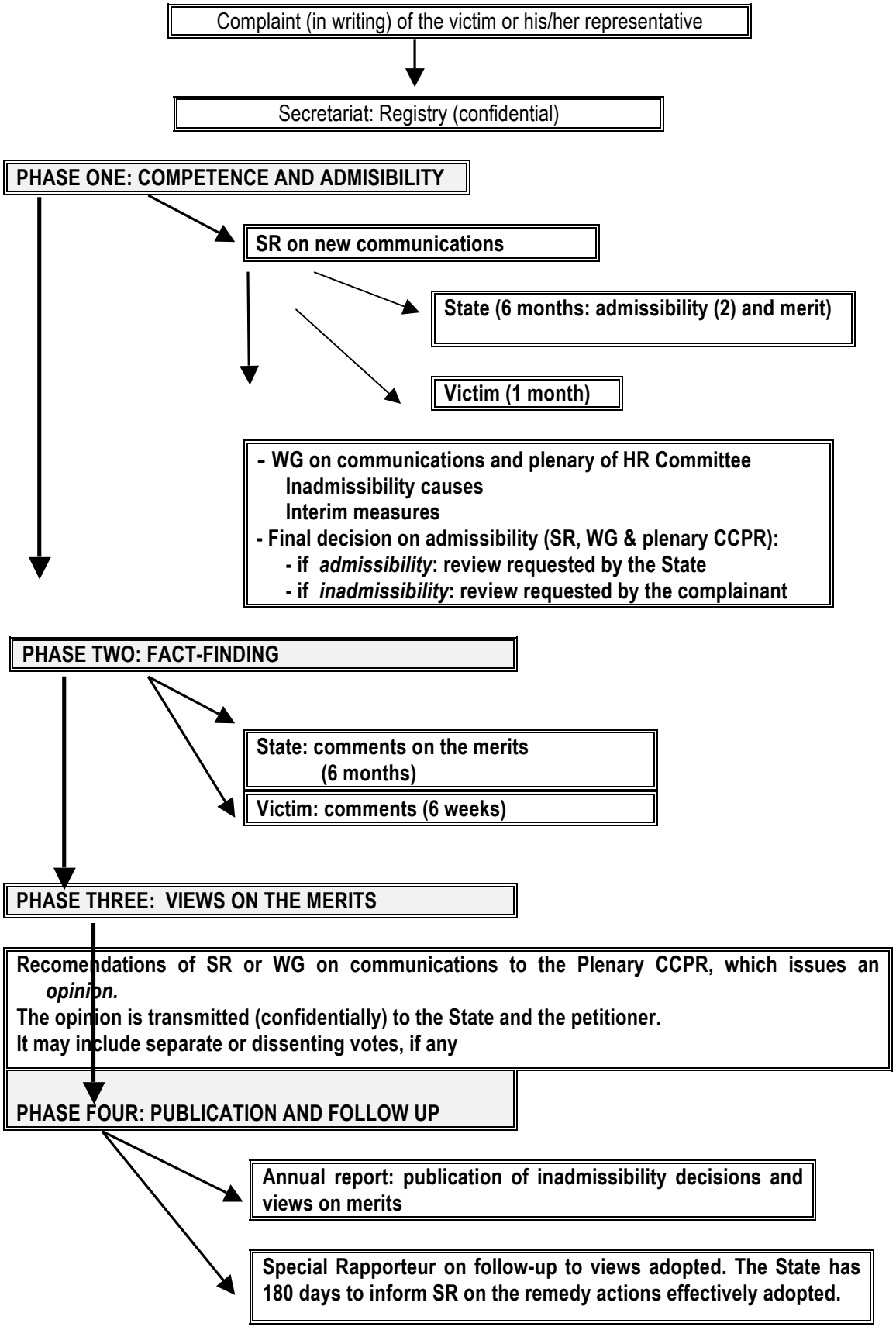
[187] *Cfr.* A/68/40 (Vol. I) (2013), HR Committee report to the General Assembly, Chapter V.

[188] Address: Office of the High Commissioner for Human Rights, Palais Wilson, Rue des Paquis 52, 1201 Geneva, Switzerland, tel. (004122) 917 90 00, fax (004122) 917 02 12. It can also be sent complaints by email to the following address: tb-petitions@ohchr.org . In this case, the complaint submitted electronically must be followed by the paper version signed by the complainant.

[189] Arts. 84-104 of the rules, adopted in its final version during the 71th session of the HR Committee. See doc. CCPR/C/3/Rev.9 of 13 January 2011, 26 p. (to be found at www.ohchr.org). For a more complete analysis of individual complaints see VILLÁN DURÁN, C., Curso de Derecho internacional de los derechos humanos, cit, pp. 453-489. A selection of CCPR decisions and views may be found in VILLÁN DURÁN, C. and FALEH PÉREZ, Carmelo, Prácticas de Derecho internacional de los derechos humanos. Madrid, Dilex, 2006, 773 p., *at* 188-534.

TABLE 4. Human Rights Committee:

Individual complaints against States



(a) Competence

Once a complaint is received, the HR Committee will have to establish its *competence* in terms of the four classical criteria of attribution of competence in any judicial proceeding:

1. Ratione temporis: The facts alleged must have occurred after the Covenant and the OP 1 had entered into force for the State against which the complaint has been filed, "unless the effects persist and constitute in themselves a violation of a right protected by the Covenant"[190]. It should not take more than five years in filing the complaint after the exhaustion of domestic remedies. Otherwise, it could be decided that it was an abusive exercise of the right to complain (Art. 96. c of the Rules)[191].

2. Ratione personae: The complainant must be the direct victim of the alleged violation, a natural person, or his duly authorized legal representative. The HR Committee also accepts the concepts of "indirect victim" (a relative of the victim) or "potential" victim (anyone who can prove that a law that has been declared contrary to the Covenant can be imminently applied to her/him or may constitute a violation of the Covenant)). However, the potential victim must prove that the State, by action or omission, "has already impeded the exercise of this right or that such undermining is imminent, basing his argument, for example, in laws in force or in a decision or in a judicial or administrative practice[192]";

3. Ratione loci: the facts must have occurred in a place under the jurisdiction of the responsible State, either inside or outside the country;

4. Ratione materiae: the right whose violation is alleged must be enshrined in Part III of the ICCPR (Arts. 6-27). Therefore, there is no room for complaints for alleged violation of right to self-determination of peoples referred to in Article 1 of the Covenant[193]. The HR Committee also rejected a complaint alleging a violation of Article 50 of the Covenant[194] and other

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[190] A/66/40, Vol. I, cit., para. 113. It is the paradigmatic case of the forced disappearance of persons. See cases 1536/2006 (Cifuentes Elgueta v. Chile); and 1748/2008 (Bergauer et al. v. Czech Republic). On a contrary way, case 2027/2011 (Kusherbaev v. Kazajstán).

[191] Cases 1583/2007 (Jahelka et al. v. Republic Check); and 1532/2006 (Sedljar y Lavrov v. Estonia).

[192] A/65/40 (Vol. I), para. 97. Case 1868/2009 (Andersen v. Denmark).

[193] Case 1134/2002 (Gorji-Dinka v. Cameroon).

[194] Case 958/2000 (Jazairi v. Canada).

alleging violation of Article 2 of the Covenant having no connection with another substantive right recognized in Part III of the Covenant[195].

The nature of the procedure means that both parties in the proceedings (the State and the victim or his/her representative) will challenge each other before the HR Committee in writing to defend their positions, first on the admissibility of the complaint and then on the merits. However, in practice the HR Committee usually studies simultaneously the issues of admissibility and merits.

(b) Admissibility

Upon receipt of the complaint at the Secretariat, it will be registered and included in the list of complaints filed before the HR Committee with a brief summary of its content to be distributed regularly to members of the Committee (Article 85.1 of the Rules). However, the Secretariat may ask the complainant to complete a form requesting basic information to identify the author, the victim and the allegations, meeting the admissibility requirements and the measures taken to date (Art. 86).

Every single complaint is the subject of a summary by the Secretariat, which shall contain the relevant information obtained. The summary of the information will be distributed to all members of the HR Committee (Art. 87).

All complaints should be reviewed during the admissibility stage and shall conclude with a *decision* in which the HR Committee shall declare them admissible or not in terms of fulfilling six formal requirements provided for in Article 96 of the Rules of the HR Committee, namely:

Firstly, the complaint must be submitted **in writing**, shall not be anonymous and will be signed by the **victim** (or his/her representative) the one who formally files the complaint before the HR Committee. It is also possible for a group of individuals claiming to be victims of violations to file a complaint. In any case, the facts should have been occurred under the jurisdiction of the State against who the complaint is addressed.

Secondly, the **complainant** shall be, as general rule, the **victim** of the violation, or his/her representative legally authorized. Therefore, the actio popularis is not admitted. A complaint on behalf of the victim can only be filed when "it appears that the victim is not in conditions of personally submitting the communication" (Article 96.b of the Rules). As mentioned above, along with the **direct** victim of violation the HR Committee also accepts as *indirect* victim a family member of the victim; and as *potential* victim any person who may be affected by a general provision (for example, a law) that is contrary to a provision of the ICCPR.

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[195] Case 1192/2003 (Guillen v. Spain). Similarly, case 1521/2006 (Y.D. v. Russian Federation).

The attorney eventually representing the victim must show proper authorization from the victim (or from the immediate family member) to act on their behalf, or that there were circumstances that prevented him/she from receiving such authorization, or that given the close pre-existing relationship between the alleged victim and his/her lawyer, it is reasonable to assume that the victim did indeed authorized him/her to address the complaint to the HR Committee[196].

The victim has to be exclusively an individual. Therefore, the HR Committee will reject any complaint of *legal persons* (corporations) pretending to be victims of a violation of any rights under the Covenant[197].

The complainant must present sufficient evidence to support its complaint to prevent it from been declared **groundless**, since any *complaint* is an allegation supported by a certain amount of evidence. Thus, in two cases against Jamaica, the HR Committee decided on their inadmissibility because the complainants had not proved the occurrence of additional circumstances that the jurisprudence of the Committee requires to qualify as cruel, inhuman or degrading treatment -according to Arts. 7 and 10.1 of ICCPR- imprisonment of the complainants in the death row for a long period of time [198].

It is also considered as "**groundless**" the complaint tending to replace with the HR Committee's opinion the decisions of domestic courts "on the assessment of facts and evidence in a given case, unless the assessment is manifestly arbitrary or amounts to a denial of justice."[199]

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[196] Case 772/1997 (C. McDonald & N. Poynder v. Australia*)*. Inadmissibility decision of 17 July 2000. See A/55/540, vol. II, p. 203, para. 6.3. Se also case 2120/2011 *(*Kovaleva *et al.* v. Belarus).

[197] Cases 737/1997 (Lamagna v. Australia) and 1371/2005 (Mariategui v. Argentina).

[198] Cases 611/1995 (W. Morrison v. Jamaica), decision of 31 July 1998, para. 6.5, and 640/1995 (McIntosh v. Jamaica), decision of 7 November 1997, para. 6.2. See doc. A/53/40, vol. II, pp. 268-272 and 258-262. It was also found no basis or justification, among others, in cases 698/1996 (Bonelo Sanchez v. Spain), 758/1997 (Gómez Navarro v. Spain), 718/1996 (Perez-Vargas v. Chile), 669/1995 (Malik v. Germany), 850/1999 (Hankala v. Finland), 860/1999 (Álvarez Fernández v. Spain), 1092/2002 (Guillen v. Spain), 1329/2004 and 1330/2004 (Perez and Hernandez v. Spain), 1356/2005 (Parra v. Spain), 1389/2005 (Bertelli v. Spain), 1471/2006 (Rodríguez Domínguez *et al.* v. Spain), 1473/2006 (Tornel Morales v. Spain), 1489/2006 (Rodríguez Rodríguez v. Spain), 1490/2006 (Pindado Martinez v. Spain), 1511/2006 (García Perea v. Spain), 1550/2007 (Brian Hill v. Spain), 1869/2009 (Sanjuan v. Spain) , 1871/2009 (Vaid. v. Canada), 1617/2007 (LGM v. Spain), 1622/2007 (LDLP v. Spain); 1814/2008 (Levinov v. Belarus); 1827/2008 (S.V. v. Canada): 1834/2008 (A.P. v. Ukraine); 1857/2008 (A.P. v. Russian Federation); 1891/2009 & 1892/2009 (J.A.B.G. & J.J.U.B. v. Spain).

[199] A/60/40, para. 126. For this reason, the HR Committee declared inadmissible, inter alia,

Thirdly, the complaint must not be **incompatible** with the rules of the ICCPR (Article 96.d of the Rules). It means that the complaint should be well founded in law because the facts constitute a violation of any of the rights provided in Articles 6- 27 of ICCPR.

The incompatibility occurs when the complaint is based on an erroneous interpretation of the ICCPR, or the alleged facts do not raise issues concerning the rights enshrined in the ICCPR. For this reason, the HR Committee should not be considered as an appeals chamber aiming to review or overturn decisions taken by national courts.[200]

Fourthly, the complaint must not constitute an **abuse of the right to complain** (art. 96. c of the Rules), so it must be written in correct terms and not insulting to the authorities of the responsible State. Since the OP is not setting a **deadline** to file the complaint after the exhaustion of domestic remedies, the length of time will not be considered as an abuse of the right to complain[201]. However, if the author files a quite late complaint and does not prove that could not do it before, s/he may incur in abuse of the right to complain[202].

Art. 96.c) of the Rules was reviewed on 1rst January 2012 to state that it may constitute abuse of the right of filing a complaint if more than "**five years** have elapsed after the exhaustion of domestic remedies," or "**three years** have elapsed after the conclusion of another international investigation procedure or international settlement, unless the delay is justified due to the circumstances of the communication."

Fifthly, the principle **ne bis in idem** or prohibition of filing the same complaint with two or more international procedures. The principle applies when the complaint has already been submitted to another procedure of international investigation or settlement, of an **equivalent** legal nature *–lis*

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cases 1095/2002 (Gomariz v. Spain), 1097/2002 (Martinez v. Spain), 1099/2002 (Marin v. Spain), 1399/2005 (Cuartero v. Spain), 1624/2007 (Seto Martinez v. Spain), 1794/2008 (Barrionuevo & Bernabe v. Spain), 1404/2005 (NZ v. Ukraine).), 1994/2010 (L. S. v. Belarus); 1904/2009 (D.T.T. v. Colombia); and 1943/2010 (H.P.M. v. Spain).

[200] Cases 579/1994 (Werenbeck v. Australia), 658/1995 (Van Oord v. Netherlands), 761/1997 (Singh v. Canada), 724/1996 (Jakes v. Czech R.) 830/1998 (Bethel v. Trinidad and Tobago), 963/2001 (Uebergang v. Australia), 1572/2007 (Mathioudakis v. Greece) and 1624/2007 (Seto Martinez v. Spain).

[201] Cases 1101/2002 (Alba Cabriada v. Spain), 1134/2002 (Gorji-Dinka v. Cameroon), 1479/2006 (Persan v. Czech Republic.), 1506/2006 (Shergill et al v. Canada); 1574/2007 (Slezak v. Czech Republic), 1618/2007 (Brychta v. Czech Republic) and 1532/2006 (Sedljar et al. v. Estonia).

[202] Cases 958/2000 (Jazairi v. Canada), 1583/2007 (Jahelka v. Czech Republic).

pendens- (Art. 96. e of the Rules). The rule applies only if there is a **quadruple identity:** the complainant or victim, the allegations, the rights that have been violated, and the legal nature of the international bodies that have come into collision.[203]

In a recent case, the HR Committee reiterated its jurisprudence in relation to the expression "same matter". It should be understood as "the same claim related with the same individual, filed by him or by any other person authorized to act on his behalf, before the other international body."[204] In the case, the authors were different from other groups of parents who had filed a complaint with the European Court of Human Rights (ECHR), and chose to file their complaint with the HR Committee, so that nothing prevented the Committee from reviewing it.[205]

In addition, the Committee will apply the rule ne bis in idem when it comes to matters that are pending before the ECHR[206] or when the State has made a reservation excluding the competence of the HR Committee to examine an issue that has been previously examined in another equivalent procedure[207].

Therefore, the rule ne bis in idem shall not be applied in the case of two international protection bodies which have a different *legal nature*. Consequently, it is compatible to file the same complaint first with the extra-conventional mechanisms of protection established by the Human Rights Council (working groups and special rapporteurs on extrajudicial executions, torture, disappearances, arbitrary detention, etc.) And, subsequently, after having exhausted domestic remedies, bring the complaint before one of the Committees established in international human rights treaties, or to a regional court on human rights (European, American or African).

And, ***sixthly***, the **exhaustion of all domestic remedies** (Article 5.2.b of the Optional Protocol to the ICCPR; and Article 96.f, of the HR Committee's Rules). It is undoubtedly the most feared admissibility requirement and has

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[203] Cases 744/1997 (Linderholm v. Croatia), 808/1998 (Rogl v. Germany) and 834/1998 (Kheled v. Germany). Several European States have made reservations to exclude CCPR competence to examine cases that have already been considered by the European Court of Human Rights: Cases 1490/2006 (Pindado Martinez v. Spain) and 1510/2006 (Vojnovic v. Croatia). But if the substantive provisions differ from the ECHR and HR Committee demonstrates that the difference is substantial, the complaint does not incur the double jeopardy prohibition. See A/64/40 (Vol. I), p. 96.

[204] A/60/40, para. 137. Vid. case 860/1999 (Alvarez Fernandez v. Spain).

[205] See also case 1155/2003 (Leirvag et al. v Norway).

[206] Case 1572/2007 (Sroub v. Czech Republic).

[207] Cases 1754/2008 (Loth v. Germany) and 1793/2008 (Marin v. France).

generated considerable case-law in the HR Committee. Thus, clearly it is about "effective" and "available" remedies because they actually exist in the domestic sphere and because they have a reasonable chance of success[208]. In one of its decisions on admissibility, the HR Committee said that the State should have proved "... that there was a reasonable likelihood that such remedies would be effective."[209]

For its part, the complainant must provide "at least one well-founded argument that seems to corroborate his/her opinion and justify the reasons why s/he believed the remedy would not be effective"[210] or that domestic remedies were exhausted "with the necessary diligence".[211]

On the contrary, the HR Committee noted that the complainants must exercise due diligence to benefit from the resources available, so that **mere doubts** about the effectiveness of legal domestic remedies available do not relieve the complainant from the obligation to exhausting them, in order for his/her complaint to be admissible by the Committee.[212] The obligation to exhaust all regular administrative and judicial remedies, including effective constitutional remedies[213] will persist even if the action is "highly technical, lengthy and costly."[214]

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[208] Case Francisco and Ramon Amador Amador v. Spain, decision of the Committee of 4 July 2005, paragraph 6.4; 1471/2006 (Rodriguez Dominguez v. Spain); 1555/2007 (Ramonet Suils v. Spain); and 1633/2007 (Avadanov v. Azerbaijan).

[209] Cases 4 / 1977 (William Torres Ramirez v. Uruguay). Accordingly, vid. 751/1997 cases (Pasla v. Australia), 670/1995 (Schlosser v. Czech Republic), 741/1997 (Cziklin v. Canada), 1326/2004 (Mazon and Morote v. Spain), 1356/2005 (Parra v. Spain) and 1389/2005 (Bertelli v. Spain). See also A/60/40, paragraph 139. And cases 1779/2008 (Mezine v. Argelia), 1753/2008 (Guezout v. Argelia), 1791/2008 (Boudjemai v. Argelia), 1806/2008 (Saadoun v. Argelia) and 1807/2008 (Mechani v. Argelia),

[210] A/60/40, paragraph 140. See also cases 918/2000 (Vedeneyeva v. Russian Federation); 1802/2008 (L.O.P. v. Spain), decision of 31 October 2011; and 1822/2008 to 1826/2008 (J.B.R. *et al.* v. Colombia).

[211] Case 1959/2010 (Warsame v. Canada).

[212] See decisions on cases 262/1987 (RT v. France), of 30 March 1989,para. 7.4; 224/1987 (A. and SN v. Norway), of 9 March 1987, para. 6.2; 1511/2006 (García Perea v. Spain); 1768/2008 (Pingault-Parkinson v. France); 1633/2007 (Avadanov v. Azerbaiyan); and 1959/2010 (Warsame v. Canada).

[213] Cases 1188/2003 (Riedl-Riedenstein et al. v. Germany) and 1747/2008 (Bibaud v. Canada).

[214] Cases 296/1988 (JRC v. Costa Rica) of March 30, 1989, p. 6, para. 8.3, and 1576/2007 (Kly v. Canada); and 1921/2009 (K.S. v. Australia).

However, the limit appears "when the exhaustion of remedies was unreasonably prolonged," according to article 5, para. 2. b) of the Optional Protocol.[215] But if the State limits the right of appeal to the fulfillment of certain procedural requirements, the complainant must comply with before domestic remedies are considered being exhausted.[216]

Linked to the exhaustion of domestic remedies is the fact that the complainant has to invoke before domestic courts the "substantive rights" under the Covenant, although s/he does not need to make reference to "specific articles of the Covenant."[217]

Finally, with regard to the **burden of proof**, it should be recalled that the HR Committee bases its views on all written information submitted by the parties in the proceedings, so that if a State does not respond to the complainant's allegations, "the Committee shall take them into account as long as they have been substantiated"[218]. This rule underlines the quasi-contentious nature of the procedure, in which the **principle of equality of arms** of the parties in the proceedings requires to equally value the information and evidence provided before the HR Committee by both the complainant and the State Party.

In a case involving allegations of torture, violation and intimidation of the complainant's son, the HR Committee reaffirmed that "the burden of proof could not rest on the author of the communication, especially as the author and the State party do not always enjoy the same access to proving evidence and that often the State Party was the only part who had the necessary information available".[219]

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[215] Cases 1432/2005 (Gunaratna v. Sri Lanka), 1619/2007 (Tab v. Philippines), 1761/2008 (Giri v. Nepal) and 1813/2008 (Akwanga v. Cameroon); and 1303/2004 (Chiti v. Zambia).

[216] Cases 1235/2003 (Celal v. Greece) and 1550/2007 (Brian Hill v. Spain).

[217] See cases 273/1988 (BDB *et al.* v. Netherlands), of 30 March 1989, para. 6.3; 1483/2006 (Basongo v. Democratic Republic of Congo); and 1587/2007 (Mamour v. Central African Republic).

[218] A/60/40, cit., para. 144. Accordingly, cases 971/2001 (Arutyuniantz v. Uzbekistan), 973/2001 (Khalilova v. Tajikistan), 1128/2002 (Marques de Morais v. Angola), 1134/2002 (Gorji-Dinka v. Cameroon) and 1401 / 2005 (Kirpo v. Tajikistan).

[219] Cases 1284/2004 (Kodirov v. Uzbekistan); and 1402/2005 (Krasnova v. Kirguistan).

c) Interim measures

In the procedural stage of admissibility and before ruling on the merits, the HR Committee or the **Special Rapporteur on New Communications** may request the State to adopt **interim measures** "to prevent irreparable harm to the victim of the alleged violation" (Art. 92 of the Rules). When a State is requested to adopt such interim measures, this does not imply "a determination on the merits" of the complaint.

In particular, the HR Committee has invoked Article 92 of the Rules to require States to abstain from carrying out death sentences until the Committee adopts a final decision in those cases, in which it was alleged that the complainants were deprived of a fair trial[220]. In addition, the Committee had appointed one of its members as Special Rapporteur for capital punishments, with authority to take decisions on behalf of the Committee and under the framework of Article 92 of the Rules.

Moreover, interim measures have been used to prevent cases of imminent deportation or extradition that could expose the complainant to a real risk of violation of the rights protected by the ICCPR[221], or to request the State to take measures to protect the complainant from intimidation and threats.[222]

In a more recent case, the HR Committee requested the State to refrain from conducting logging activities affecting reindeer husbandry practiced by the complainants, while the Committee examined the case[223]. In another case in which the complainant informed the HR Committee that he had been threatened with death unless he withdrew his complaint before the Committee, it requested the State to take all necessary measures "to protect the life, safety and personal integrity of the author and his family and to inform the Committee within 30 days of the measures taken."[224]

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[220] Case 1018/2001 (NG v. Uzbekistan) 1163/2003 (Isaev et al v. Uzbekistan), 1195/2003 (Dunaev v. Tajikistan), 1200/2003 (Sattorov v. Tajikistan); 1263/2004 and 1264/2004 (Khuseynov and Butaev v. Tajikistan); and 2120/2011 (Kovaleva *et al.* v. Belarus).

[221] Cases 558/1993 (Canepa v. Canada). Doc A/52/240, vol. II, Annex VI. Similarly, cases 1455/2006 (Kaur v. Canada), 1540/2007 (Nakrash and Liu v. Sweden), 1554/2007 (El-Hichou v. Denmark), 1872/2009 (DJDG *et al* v. Canada), 1449/2006 (Umarov v. Uzbekistan), 1763/2008 (Pillai *et al.* v. Canada) and 1959/2010 (Warsame v. Canada).

[222] Vid. 1432/2005 event (Gunaratna v. Sri Lanka). Doc A/64/40, pp. 194 et seq.

[223] Case 1023/2001 (Lansman III v. Finland).

[224] Case 1189/2003 (Fernando v. Sri Lanka). Similarly, if 1432/2005 (Gunaratna v. Sri Lanka).

The failure of a State to implement an *interim measure* involves a violation of the obligations imposed by the Optional Protocol to the State. In a case where the complainant's son was executed, the State ignored the HR Committee's interim measure which had requested the suspension of the enforcement of the sentence while the case was pending before the international body. The Committee recalled that the interim measures "were essential" to fulfill its functions under the OP and that any violation of its internal rules "undermines the protection of the rights" set forth in the Covenant.[225]

It is clear that compliance with *interim measures* requested by the HR Committee depends on the political willingness of the State to comply with measures which, although not envisaged in the OP, do not prejudge the merits of the individual complaint, but they make sense to not depriving the Committee's decision of the useful effects -preventing irreparable damage-. Furthermore, legally speaking, it should be recalled the States obligation to cooperate in **good faith** with the HR Committee to facilitate the exercise of the functions recognized by ratifying the Optional Protocol.

From a legal point of view, in this matter stands the State's obligation to cooperate in good faith with the HR Committee. In the case Idiev v. Tayikistan, the HR Committee stressed that the State is in violation of the OP Protocol "while executing the alleged victim before the Committee could conclude its consideration and review of the case and formulate, adopt and communicate their observations. [...] The Committee notes that interim measures taken under Article 92 of regulation [...], approved in accordance with Article 39 of the Covenant, are essential for the Committee to fulfill its role under the Protocol. Any violation of the regulation, especially by irreversible measures such as the enforcement of the death penalty, undermines the protection of the rights enshrined in the Covenant through the Optional Protocol."[226]

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[225] Case 973/2001 (Khalilova v. Tajikistan). In similar terms, cases 1276/2004 (Idiev v. Tajikistan); 1280/2004 (Tolipkhuzhaev v. Uzbekistan); and 2120/2011 (Kovaleva *et al* v. Belarus). This case-law has been confirmed by the HR Committee in GC no. 33, doc. CCPR/C/GC/33, of 25 June 2009, paragraph 19.

[226] Paras. 7.2 to 7.4 of the HR Committee's opinion in the case 1276/2004 (Idiev v. Tajikistan), of 31 March 2009. See doc. A/64/40 (2009), pp. 74-75.

(d) Internal handling of the complaint

Each new case registered is sent by the Secretariat to the **Special Rapporteur on New Communications**[227], an institution created in 1990, after it has been noted with alarm at that time, that 135 complaints were pending of review. The above SR instructs the Secretariat on the registration of complaints and its subsequent transmission to the State Party after having carried out a preliminary analysis of admissibility requirements for the communication. The SR is entitled to request the State comments on the admissibility and merits of the complaint. As mentioned above, it can also request for *interim measures* of protection under Article 92 of the Rules.

Since 1995 the HR Committee trusts each complaint to one of its members, acting as special rapporteur to the working group and the plenary of the Committee "to assist in the handling of communications" (Article 95.3 of the Rules). In addition, the HR Committee "may establish one or several working groups to make recommendations regarding compliance with the admissibility conditions" (Art. 95.1 of the Rules).

To accelerate its work, the HR Committee will seek, as a general rule, at the same time the admissibility and merits of a complaint. For this purpose, the State concerned shall have a period of six months to submit to the HR Committee written explanations concerning both the *admissibility* and the *merits* of the communication, including any corrective action taken in relation to the matter (Art. 97.2 of the Rules).

An exception is the case in which the HR Committee, its working group or the SR on new communications, "because of the exceptional nature of the case has decided to request a written reply that relates only to the question of admissibility." Although this does not exempt the State from its obligation to respond within six months to both the admissibility and the merits of the complaint (Article 97.2 in fine of Rules).

For its part, the State shall have the first two months of the term above mentioned to request in writing that the communication is rejected as inadmissible, stating the reasons on which it bases the request. This will not extend the initial term of six months, unless the HR Committee, its WG or SR, decides to extend the deadline for submission of the State's response due to special circumstances, until the Committee has ruled on admissibility (Article 97.3 of the Rules).

If necessary, both the HR Committee and its WG or SR can set a new deadline to request to the parties additional information or observations in writing, relevant to admissibility or merits (Art. 97.4 of the Rules). Each party to the proceedings will have the opportunity to make observations to the comments submitted by the other party (Article 97.6 of the Rules).

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[227] Currently holds the position the expert Walter Kalin (Switzerland).

The admissibility procedural phase culminates after receiving the observations of the State on admissibility, with the adoption of a **decision** by the HR Committee on the admissibility or not of the complaint.

The SR on new communications may declare new communications admissible, taking a decision in this regard on behalf of the HR Committee. The advantage of the existence of the SR is that it helps to speed up the process considerably, as it ensures the continuity of work when the WG or the full Committee are not in session, as they hold no more than three sessions per year, during three weeks each (a fourth week is dedicated to the WG).

If, however, the SR on new communications believes that the complaint is inadmissible, it shall make proposals in this regard to the **Working Group on Communications** (composed of at least five experts) who can take a decision (of admissibility or not) unanimously (Article 93.2 and 3 of the Rules). If there is no unanimity within the WG, it will make recommendations to the plenary of the HR Committee (18 members), in which case the plenary shall be competent to take a final decision on the admissibility of the complaint.

In case the WG on communications unanimously decides that the complaint is **inadmissible**, it shall communicate this decision to the plenary of the HR Committee, which may confirm it without further discussion. But if a member of the HR Committee requests a debate in the plenary, it will re-examine the complaint and take a decision (Article 93.3 *in fine* of the Rules)

The decision of **inadmissibility** of the complaint is, in principle, final and it is communicated to the parties in the proceedings and it concludes the procedure. While there is not an appeal procedure, the decision of inadmissibility may be **reviewed** by the HR Committee "if the individual concerned or a person acting on his behalf presents a written request indicating that reasons for inadmissibility are no longer given" (Article 98.2 of the Rules).[228] However, if the admissibility decision is positive, the State may challenge it when the HR Committee is in the procedural phase of determining the facts, prior to its legal assessment.

[228] Case 735/1997 (Lazar Kalaba v. Hungary), decision of 7 November 1997, para. 10. b. See doc A/53/40, vol. II. cit., pp. 263-267.

(e) Merits. Views

Following a positive decision on admissibility, the HR Committee forwards it to the State concerned, which will have another six months to respond to the substantive issues raised in the communication already declared admissible. It must submit written clarifications and corrective action that eventually has been taken in this regard (Article 99.2 of the Rules).

According to an opinion of the HR Committee, this period of six months may be waived with the agreement of the State concerned that has already made its comments on the merits in the previous phase of admissibility.[229]

However, the HR Committee will also require the agreement of the complainant before deciding to go directly to examine the merits. To examine the States new allegations and to reply to the Committee, the complainant shall have a period of time to be set by the Committee (Article 99.3 of the Rules).

The HR Committee will determine what facts are considered as proven on the basis of all available information received from both the individual and the State concerned. In this exercise the Committee may be assisted by both the WG on communications and the SR entrusted with the complaint (Article 100.1 of the Rules).

As noted above, at this stage the State may ask the HR Committee to review its previous decision of admissibility and the Committee may react in the light of explanations submitted by the State concerned (Article 99.4 of the Rules). If the Committee decides at this time that the complaint is inadmissible, the procedure will be finalized.

Once declared the complaint definitely admissible and the facts of the case are established, the HR Committee should be prepared to give its opinion on the merits (views), in light of all written information made available to it by both the complainant and the State concerned. The Committee ensures the principle of equality of arms in the burden of proof, so that if the State does not challenge the complainant's allegations that have been well substantiated, the Committee shall duly take them into consideration.[230]

As stated, for the preparation of its opinion, the HR Committee may refer the complaint back to the WG on communications or to a special rapporteur to make recommendations (Art. 100.1 of the Rules).

Both the HR Committee and its subsidiary bodies will analyze the facts considered as proven and will make the legal assessment in accordance with

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[229] Case 198/1985 (R. D. Stalla Costa v. Uruguay).

[230] Case 821/1998 (Kongwa v. Zambia); 839-841/1998 (Mauzarai et al v. Sierra Leone) and 857/1999 (Blazed and others v. Czech Republic). See *supra*, exhaustion of domestic remedies.

the provisions of the ICCPR. All comments on the merits of the case are summarized in the **opinion** or views by which the HR Committee shall conclude whether there has been or not violation of any rights under the ICCPR, what is the violation about and why. Although the Committee seeks to adopt its decisions by consensus, Article 104 of the Rules authorizes members in minority to issue individual opinions, concurring or dissenting, on both admissibility decisions and opinions on the merits.

Having found a violation, the HR Committee shall state in its opinion the **remedies** that the State must take to redress the violation. Among these measures, the Committee often requests the State the reform of a law or practice in force that has been the source of the violation, to prevent similar violations to happen in the future and to offer guarantees of non-repetition[231].

In relation to the victim, the HR Committee has requested his immediate release (in the case of illegal or arbitrary detention), or making a new trial with due process, the commutation of a death sentence (imposed illegally) and compensation. It has also pointed out remedial actions, such as compensation and rehabilitation of the victim that the State should provide with (in cases of torture or ill-treatment); the revocation and review of an unlawful deportation order; the review of sentences imposed in criminal proceedings that had not allowed the right of appeal; the restitution of property; compensation for unlawful arrest and detention, etc.[232]

In the case of a person deceased in custody, the HR Committee noted the State's obligation to provide the widow with "an effective remedy, including a compensation and the opening of criminal proceedings against all those responsible for the treatment" received by her husband and herself (torture).[233]

In cases of summary executions, disappearances and/or torture, the HR Committee recalls the State obligation to thoroughly investigate the disappearance or torture; the immediate release of the disappeared if found alive; adequate compensation; and prosecute, try and punish those held responsible for such violations.[234]

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[231] Cases 1621/2007 (Raihman v. Letonia); 1642 to 1741/2007 (Jeong *et al.* c. R. of Korea); 1876/2009 (Singh v. France); 1410/2005 (Yevdokimov y Rezanov v. Russian Federation); 1581/2007 (Drda v. Check Republic); and 1586/2007 (Langue v. Check Republic).

[232] Vid. A/60/40, paragraphs 206-223, and A/65/40 (Vol. I), paras. 180-181.

[233] Vid. A/63/40 (Vol. I), cit., para. 171. Similarly, A/64/40 (Vol. I), para. 217, and A/65/40 (Vol. I), para. 182.

[234] A/63/40 (Vol. I), supra, para. 177. Similarly, A/64/40 (Vol. I), supra, paras. 219 and 227, and A/65/40 (Vol. I), para. 191; and A/68/40 (Vol. I) (2013), pp. 144-148. See also cases 1811/2008 (Chiboub v. Argelia), views of 31 October 2011, doc. CCPR/C/103/D/1811/2008, of 24 January 2012; 1458/2006 (González v. Argentina); 1556/2007 (Novakovic v. Serbia); 1304/2004 (Khoroshenko v. Russian Federation); 1503/2006 (Akhadov v. Kirguistán); 1751/2008 (Aboussedra c. J.A. Libya); 1945/2010 (Achabal v. Spain); 1753/2008 (Guezout v. Argelia) and

In another case in which the HR Committee found violation of Article 26 of ICCPR as a result of police verification of the identity of people based on racial criteria, considered that Spain was compelled to offer the victim an effective remedy that provides a public expression of apology and to take steps to ensure that State officials receive instructions of not committing similar acts to that case.[235]

To all these reparation measures, the HR Committee's established practice in recent years sets a deadline of 180 days to the State, in which it must inform on the measures taken, given that the State has undertaken to guarantee the rights recognized in the Covenant (Article 2) "and to provide an effective and enforceable remedy where a violation is found."[236] The State Party is also requested to publish the opinion of the Committee.[237]

Once adopted its view or opinion on the merits, the HR Committee shall transmit it to the State Party and then to the victim, thus concluding the confidential treatment of individual complaints before the Committee (Art. 100.3 of the Rules).

(f) Publication

Oral deliberations, summary records and working documents of the HR Committee when it is dealing with individual complaints are confidential (Article 102, paragraphs 1 and 2 of the Rules). However, this "will not affect the right of the author of a communication or the State Party concerned to make public any submissions or information regarding the proceedings" unless the HR Committee, its WG or SR request the parties "to keep confidential in whole or in part, any such submissions or information "(Art. 102.3 of the Rules).

As a rule, the Committee's decisions on inadmissibility, the merits or decisions to discontinue the consideration of a communication, shall be made public (Art. 102.5 of the Rules). In practice, the HR Committee has always ordered the publication of its *decisions* (on admissibility or otherwise), interim measures and its *opinions* (on the merits). They get immediately upload to the site of the HR Committee within the OHCHR web site.

Furthermore, the texts will be collected in the HR Committee's annual report to the General Assembly. The publication is here, once again, a means of moral and political "punishment" at the international level to the State which

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1779/2008 (Mezinet v. Argelia).

[235] Case 1493/2006 (Lecraft Williams v. Spain). See A/64/40 (Vol. I), *supra,* para. 224.

[236] See docs. A/60/40, cit., para. 205 and A/63/40 (Vol. I), cit., para. 168.

[237] A/64/40 (Vol. I), para. 205 *in fine.*

has committed a violation of the ICCPR. The Secretariat is responsible for the distribution of final decisions of the Committee (Art. 102.6 of the Rules).

(g) Follow-up

Decisions on admissibility will be legally binding on the parties to the proceedings, as well as any interim measure and other provisions of the Rules of the HR Committee.

By contrast, neither the Covenant nor the Optional Protocol adopt a position on the legal value of the **opinions** on the merits, so that traditionally it has been considered that such opinions are not binding on States. The HR Committee was aware of this fact and decided 1990 to establish the **Special Rapporteur to follow-up views**, "to know the steps that States Parties were taken to give effect to the Committee's opinion" (Art. 101.1 of the Rules).[238]

To this purpose, the SR on following-up establishes appropriate contacts and requests information from all States that have been condemned. The SR may also make recommendations to the HR Committee to adopt new measures that are necessary (Art. 101.2). The SR "shall periodically inform the Committee about the following-up activities" (Art. 101.3) and the Committee "shall include in its annual report information on following-up activities" (Art. 101.4). Consequently, the information provided by the parties in relation to follow-up would not have confidential basis, as the Committee's decisions on this matter, unless otherwise decided (Art. 103).

The SR practice reveals that States abide by the condemning views satisfactorily in **30 percent** of cases. In other cases, States are reluctant to accept the obligation or challenge the content of the views. The States also claim not been able to give effect to these views, because it is not envisaged in their law or internal practice. In these cases, the HR Committee proceeds to make it public in its annual report, while offering the State concerned that the SR visit the country to find out the difficulties of the State on accepting the opinions and offering solutions. This has already been done in relation to Jamaica[239]. But the SR has not been able to travel to all States with difficulties that would have wished, due to lack of financial resources that have been spared to this core activity of the HR Committee.

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[238] Currently holds the position the expert Mr. Yuji Iwasawa (Japan).

[239] See Special Rapporteur's reports on follow-up to the opinions in docs. A/57/40, vol. I, chap. VI; A/58/40, vol. I, chap. VI; A/59/40, vol. I, chap. VI; A/60/40, vol. I, chap. VI; A/63/40 (Vol. I), Chap. VI; A/64/40 (Vol. I), Chap. VI; A/65/40 (Vol. I), Chap. VI; CCPR/C/100/3, of 5 January 2011, 16 p.; and A/66/40, Vol. I, Chap. VI.
See also OHCHR, Follow up to UN recommendations on human rights. Practical guide to civil society. Geneva, 2013, 60 p. Available at:
http://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendationsSP.pdf

The HR Committee recently recalled in its General Comment no. 33 that its opinions are "authorized pronouncement of a body established under the Covenant and responsible for the interpretation of that instrument."[240] And also recalled "the obligation of States parties to act in good faith"[241] in complying with their treaty obligations.[242]

The same applies to the interim measures that the HR Committee may adopt pursuant to Article 92 of its Rules: "Any State Party that fails to take such measures ... violates the obligation to comply in good faith with the individual communications procedure under the Optional Protocol".[243]

In short, the Committee takes care of its views on the merits that should be abide by the States concerned, even the most reluctant to accept them. So we are at the *beginning of a practice of States*, initiated by the HR Committee, which is setting valuable precedents in favor of a gradual acceptance of the **obligatory nature** of its opinions.

If such behavior favorable to the observance of the opinions is widespread accepted in the future (reaching favorable conduct of States at least in 75% of cases), it would be witnessing the emergence of a *new rule of international customary law*, according to which the States would have a legal obligation to abide by the views on the merits of the HR Committee, although the ICCPR does not expressly say so.

4. Efficacy of the procedure

The quasi-contentious procedure that has been examined is only in effect in **eight treaties** of the UN system that provide for the competence of the respective Committees to deal with individual complaints, namely: HR Committee, CERD, CEDAW, CAT, CRPD, CED, Committee on ESCR[244] and Committee on the Rights of the Child (CRC)[245]. Other treaty extends this competence to its Committee (Committee on Migrant Workers, CMW) but it is not yet in force.

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240 GC no. 33 of CCPR: "States parties' obligations under the Optional Protocol to the International Covenant on Civil and Political Rights". Doc CCPR/C/GC/33 of 25 June 2009, para. 13.

241 *Ibid*, paragraph 15.

242 See Section 26 of the Vienna Convention on the Law of Treaties, 1969.

243 GO 33, cit., para. 19. See ULFSTEIN, Geir: "The Legal Status of Views Adopted by the Human Rights Committee - From Genesis to Adoption of General Comment No. 33", in EIDE (A.) et al. (Editors), Making Peoples heard. Essays on Human Rights in Honor of Gudmundur Alfredsson. Leiden / Boston, Nijhoff, 2011, pp. 159-166.

244 In force as from 5 April 2013.

245 In force as from 14 April 2014.

In general terms, the real efficacy of the procedure is severely conditioned by eight negative factors, namely:

Firstly, the optional nature significantly reduces the **universality** of the procedure, since victims may complain against States having accepted the optional mechanisms. The universality of the procedure will depend on the political will of States.

Secondly, access to the procedure remains seriously hampered by the existence of rigorous rules on **inadmissibility** often insurmountable for victims, such as the previous exhaustion of domestic remedies.

Thirdly, the procedure suffers from a **procedural unbalance** in favor of the State, as a result of the predominance of State sovereignty in the entire international law, which is particularly evident in the unequal distribution of delays between the parties to comply with the orders of the Committees. Fortunately, the principle of *equality of arms* ensures equitable treatment of the parties with respect to the burden of proof.

Fourthly, the Committees' **investigation** power is very limited because it relies entirely on the written information that the parties voluntarily supply to the Committees. They cannot dispatch fact-finding missions to the State concerned.

Fifthly, all the Committees except CAT, cannot hold **hearings** of the parties and witnesses, in an oral stage that could boost the standard of proof.

Sixthly, the procedure is written and confidential through all its phases and it is **slow**. Each case lasts an average of 3,5 years, which is not acceptable because it generates defenselessness of the victim who has already had to endure excessive delays in the exhaustion of domestic remedies. Although Committees have made efforts to speed-up the procedure by amending their Rules to simplify the legal proceedings, these are still clearly insufficient and would require much more radical reforms.

Seventhly, the technical sophistication of international procedural mechanisms, the necessity of exhaustion of domestic remedies and the practical difficulties that victims encounter to access these procedures, although no court costs are imposed, led to their **under-utilization**. This is evidenced by the fact that the HR Committee has only registered in 33 years (1977-2012) **2.239 individual complaints** relating to 85 States, having determined the existence of violation in 809 cases and declaring 608 complaints inadmissible[246]. For its part, CAT registered between 1989 and 2012 **546 complaints** relating to 31 countries, of which only 76 ended up finding that it had violated the Convention[247]. CERD has registered **52**

[246] A/68/40 (Vol. I) (2013), p. 116.

[247] A/68/44 (2013), párr. 111.

complaints and has identified 13 breaches of CEDR[248]; and CEDAW has registered 28 complaints having found violations in five of them.[249] These figures highlight the shortcomings of the quasi-contentious procedure of individual complaints in the conventional framework. And,

Eighthly, the large number of **pending** cases of review (355 cases from the HR Committee and 110 cases from CAT at the end of 2012) highlights that the Secretariat of both Committees do not have the necessary **resources** –both human and material- to avoid such accumulation of cases, further delaying their processing[250]. As stated, the Committees do not have resources to improve their follow-up to views to facilitate the SR *in loco* visits, with the purpose of dealing with the concerned States on modalities for the implementation of their opinions.[251]

To this purpose the High Commissioner proposed in 2012 to establish a unique working group on communications grouping the eight committees' WG receiving individual complaints. The new WG shall be composed of a member per Committee. Rules of procedure shall be common and reparation measures indicated in favor of victims will be more concrete. Friendly settlement of the controversies will be generalized and a database of case-law of all Committees will be established, including follow-up measures. However, the report does not provide for an increase of resources to properly coop with this essential functions of the Committees[252]. The HR Committee showed its objections to the proposed common working group, since there are important normative and procedural differences among the eight Committees[253].

Despite its limitations and under-utilization, the quasi-contentious procedure for the protection of human rights is important and useful. It should be considered, for example, that decisions or opinions of this kind allow relevant Committees to analyze and interpret the scope of the rights

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[248] A/68/18 (2013), párr. 64.

[249] See doc. HRI/ICM/WGFU/2011/3 of 16 December 2010 ("Procedures for monitoring individual complaints." Note by the Secretariat), p. 2.

[250] On resources of the HR Committee see A/68/40, pp. 5-7.

[251] Committees often complain of lack of resources to perform their functions. See by all the statements of President of the Subcommittee for the Prevention of Torture (SPT) in doc. CAT/C/SR.889 of 16 October 2009, paras. 3, 5 and 8.

[252] PILLAY, Navanethem, Strengthening the United Nations human rights treaty body system. A report by the United Nations High Commissioner for Human Rights. Geneva, OHCHR, June 2012, pp. 68-72.

[253] Declaration of the HR Committee of 12 July 2012, para. 8. See doc. A/68/40 (Vol. I) (2013), p. 11.

enshrined in the Conventions, while internationally protecting the rights of individual victims. It would significantly increase their effectiveness if Rules reforms were introduced to alleviate some procedural obstacles and if the OHCHR significantly increases the budget allocated to the quasi-contentious procedure, which is unique in international law.

However, the quasi-contentious conventional model that has been examined is characterized for being **subsidiary** to the domestic legal system of States. This rule is acceptable while there is a national rule of law that properly exercises protection of human rights. However, as it shall be discussed in the **Second Part**, this model is overwhelmed in cases of massive and systematic violations of human rights, or general collapse of legality or the rule of law or the democratic regime itself.

5. Claims at the specialized agencies

(a) International Labor Organization

Arts. 24 and 25 of the ILO Constitution empower **professional organizations** of employers and workers (unions) to file their **claims** against a State (and not "complaints", a term reserved at the ILO for interstate *complaints*), which has violated an international labor convention that had ratified.[254]

The **professional organization** (not the affected person) will address the claim in writing to the International Labor Office. Under the 1980 regulations[255], the procedure consists of three phases, namely: admissibility, merits and publication. The first two are confidential.

(i) Admissibility

The Bureau of the Governing Body will review the admissibility requirements of any claim based on the following rules (Art. 2 of the Regulations):

- The claim must be communicated in writing to the International Labor Office;
- It must come from a professional organization of employers or workers (unions);
- It should make specific reference to Article 24 of the Constitution;
- It must refer to an ILO member State, or who has been but remains Party to the convention in dispute (Art. 11 of the Regulations);
- It must refer to a convention ratified by the State against whom the claim has been raised;
- It must indicate in what respect is alleged that the State does not guarantee effective implementation of the convention.

With these criteria, the Bureau of the Governing Body shall prepare a confidential report to be sent to the Governing Body, in which it will recommend whether or not to declare admissible the pertinent claim (Art. 2.3 of the Regulations).

In light of the report of the Bureau, the Governing Body shall decide in favor or against the admissibility of the claim, but avoiding ruling on the merits (Art. 2.4 of the Regulations).

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[254] Spain has received four *claims* under Art. 24 of the ILO Constitution. See at: http://www.ilo.org/ilolex/spanish/repframeS.htm

[255] Regulation on the procedure for the examination of claims filed under Arts. 24 and 25 of the ILO Constitution, approved by the ILO Governing Body at its 212th meeting. (March 1980).

(ii) Merits

If the decision on admissibility of the Governing Body is positive, it shall appoint a Committee to examine the merits of the claim. If such claim was related to *union rights*, the merits of the case will be considered by an existing Committee of the Governing Body: the *Committee on Freedom of Association*[256] (Art. 3.2 of the Regulations).

The ad hoc **Committee** appointed to study every admissible claim shall consist of three members of the Governing Body, with due respect to the ILO tripartite membership (representatives of governments, employers and workers). In addition, it may not be a member of that Committee any national of the State against who the claim has been filed, nor a representative of the professional organization that submitted the claim (Art. 3.1 of the Regulations).

During consideration of the claim, the **Committee** may request additional information from both parties, within the term that it shall be established. It is also expected that both parties made oral statements before the Committee (Art. 4 of the Regulations).

With the consent of the State concerned a country visit may be undertaken in order to establish **direct contacts** through which investigate the facts and attempt conciliation. However, direct contacts and visits made to the State will not be made by members of the ILO tripartite Committee, but by ILO officials representing the Director General (Art. 5 of the Regulations). The officials (members of the Secretariat) shall report to that Committee.

After the examination of the merits of the claim, the Committee shall **report** to the Governing Body, which shall detail the measures taken to address the claim by presenting its conclusions on the issues raised in the claim and making its **recommendations** on the merits decision to be taken by the Governing Body (Article 6 of the Regulations).

The ILO Governing Body shall deliberate behind closed doors on both the issues of admissibility and merits of the case in the presence of a representative of the State concerned, who may take the floor in the same conditions as members of the Council do, but it is not entitled to vote (Art. 26.5 of the Constitution and Article 7.2 of the regulations).

B. Publication

According to Article 25 of the Constitution, the Governing Body may publish the claim of the professional organization if, after a period deemed reasonable, has not received any response from the government concerned on the subject matter of claim, or if such a response is not considered satisfactory.

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[256] See *infra*, Part Two, E.1.(a): *Special procedure on freedom of association.*

The Governing Body may also decide to publish the response received from the government concerned, and its own decisions on the matter (Art. 8 of the Regulations).

The publication will close the procedure provided in Arts. 24 and 25 of the Constitution. For its part, the Governing Body can always act on its own, according to Article 26.4 of the ILO Constitution, if a claim is submitted by any delegate of the International Labor Conference (ILC), following in that case the procedure provided for in Arts. 26 and following of the ILO Constitution for treatment of **interstate complaints** (Art. 10 of the Regulations).

This mechanism has been used on rare occasions, because the organizations of employers and workers prefer to file similar claims against States using the possibilities offered by the **Committee of Experts on the Application of Conventions and Recommendations** (body of independent experts) under consideration of **periodic reports** of States on the implementation of international labor conventions ratified[257]. Curiously, this mechanism offers more flexibility and efficiency than the **claims procedure** of Arts. 24 and 25 of the ILO Constitution, which is under the control of intergovernmental bodies.

Therefore, an international mechanism for protection of human rights based on the classical technique of **periodic reports** of States will not be less effective than the most sophisticated of the "individual communications" in a quasi-contentious context. The effectiveness will depend on several factors:

- The development degree achieved by the periodic reporting procedure;
- The procedural facilities offered by the complaints procedure to the individual or labor organization, that seeks a prompt and fair compensation for their rights violated;
- The immediate adoption of interim measures that make impossible the repetition of human rights violations as reported, and
- The effectiveness of the monitoring body, which the more independent and experts are the members, the greater effective will be the procedure.

Essential readings:

- UNOHCHR, *Individual Complaint Procedures under the United Nations Human Rights Treaties.* UN, Geneva, May 2013, Fact Sheet number 7/2, 47 p. Available at http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf

- The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by GA resolution 63/117 of 10 December 2008. It is available at: http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf

[257] See *supra*, Section A.2: *International Labor Organization.*

The (third) Optional Protocol to the Convention on the Rights of the Child was adopted by GA resolution 66/138 of 19 December 2011. It is available online at:
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/165/78/PDF/G1116578.pdf?OpenElement
pp. 15-22.

Rules of procedure of the Human Rights Committee, Rules 84-104: CCPR/3/Rev.9, of 13 January 2011. Available at:
http://www2.ohchr.org/english/bodies/hrc/index.htm

Further readings:

- MOLLER (Jakob Th.) and ZAYAS (A. de): United Nations Human Rights Committee Case Law (1977-2008). A Handbook. Kehl am Rhein: N.P. Engel Publisher, 2009, 604 p.

- Australian Human Rights Commission: Mechanisms for advancing women's human rights: A guide to using the Optional Protocol to CEDAW and other international complaint mechanisms. AHRC, 2011, 108 p. Available at:
http://www.hreoc.gov.au/sex_discrimination/publication/mechanisms/opcedaw.pdf

- MOLLER, Jakob Th.: "Eight UN Petitions Procedures: A Comparative Analysis", *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston: Nijhoff, 2011, pp.135-157.

Issues

1. Differences between the *individual complaints* and the *periodic reports* procedures.
2. Identify potential interim measures to be requested to the HR Committee.
3. Rules on admissibility. *Decisions* on admissibility. Are they compulsory?
4. *Views* on merits. Are they enforceable?
5. Identify reparation measures requested by the HR Committee.
6. Follow up to views. The role of the Special Rapporteur.
7. Evaluate the *individual complaints* procedure. The future World Court on Human Rights.
8. Particularities of ILO complaints procedure.

SECOND PART

EXTRACONVENTIONAL PROTECTION OF HUMAN RIGHTS

Introduction

Despite its undoubted importance, *conventional* mechanisms of international protection of human rights (i.e., the Committees established in international human rights treaties) have not been designed to deal with most individual allegations of human rights violation reaching the United Nations, so that for many years those allegations were ignored.

Indeed, conventional mechanisms have extremely limited powers in relation to the mass of individual communications or complaints constantly coming to the Office of the High Commissioner for Human Rights (OHCHR), as the admissibility criteria to be met by the individual complaints (including the consent of the State and the exhaustion of domestic remedies) prevent most of the complaints to be accepted by the Committees. For example, between 1972 and 1988, the Secretariat had received 350,000 complaints from individuals[258]. In contrast, the number of complaints that have been processed by the conventional procedures from 1976 until today was less than 3,000, putting together the activities of eight existing Committees.

The international community was provided with no procedural mechanism to handling individual complaints until 1967, which came under extra-conventional basis of the then Commission on Human Rights (CHR). This was seen as a reaction to the slow development and entry into force (in 1976) of the first conventional mechanism, that of the HR Committee. Although today there are eight conventional Committees that may receive individual complaints (HR Committee, CERD, CAT, CEDAW, CRPD, CED Committee on ESCR and Committee on the Rights of the Child, CRC) and, within ILO, there is a constitutional mechanism (Articles 24-25) to receive claims from workers' organizations, their effectiveness is limited since there are not universal in their acceptance by the States and since they are governed by very strict rules of admissibility, as it has been studied.

Nor are fully operational the judicial mechanisms of protection in the international human rights law, as only at regional level is allowed that the victim of violation may sue the State directly, after having exhausted domestic remedies, before a regional court (ECHR, Inter-American Court of Human Rights, African Court on Human and Peoples Rights) that, in the best case, will order the State to compensate the victim. More recently was developed within regional jurisprudence the State's obligation to punish those officials

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[258] See UNITED NATIONS: Communications Procedures. Human Rights Fact Sheet no. 7. Geneva, UN, 1992, p. 7.

who committed the violation, as a necessary measure to combat the impunity of those responsible.

Aware of this situation, the international community has developed over the years a number of *extra-conventional* mechanisms for the promotion and protection of human rights by addressing the shortcomings of the conventional mechanisms, while providing a collective response -although imperfect- to extremely serious cases in the field of human rights, calling for a collective response.

In this context were taking place valuable initiatives of the Security Council and the General Assembly and the former United Nations Commission on Human Rights. In regard to the **Security Council**, it should be recalled the human rights verification missions that were established in the nineties in the context of maintenance of peace, after long negotiations of peace regarding internal conflicts, under United Nations mediation (El Salvador, Cambodia). Furthermore, given events of the magnitude of the genocide, the SC decided the establishment of *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, which was followed by mixed Tribunals (Cambodia, Sierra Leone, Liberia, Lebanon). Finally, in 2004 the SC authorized the establishment of the "International Commission of Inquiry on Darfur" (Sudan)[259] and gave its consent to the constitution of the "Commission of Inquiry on Côte d'Ivoire".[260]

For its part, the **General Assembly** established permanent intergovernmental bodies for the promotion and protection of human rights in various sectors. Thus, the Special Committee on non-autonomous Territories (1961 - ...), the Committee against Apartheid (1962-1990), the United Nations Council for Namibia (1967-1990) and the Committee on the Exercise of the Inalienable Rights of the Palestinian people (1975 - ...). In the nineties, temporary missions of human rights observation were implemented to accompany the process of political negotiation for the settlement of serious internal conflicts under mediation of the United Nations (Haiti, Guatemala). The GA also established subsidiary bodies for the promotion of children's rights (UNICEF, 1946 - ...), the protection of refugees (UNHCR, 1949 - ...) and, above all, the High Commissioner for Human Rights (1993 - ...), which was entrusted with the mandate to ensure the promotion, protection and prevention of violations of all human rights all over the world, including the right to development.

But the most striking developments in the extra-conventional field have had as main actor the then United Nations **Commission on Human**

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[259] SC res. 1564 (2004). The Investigation Commission reported back to SG on 25 January 2005.

[260] As a result of the Linas-Marcoussis Agreement, at the request of the Government of Côte d'Ivoire. See SC Chairman's statement, doc. S/PREST/2004/17 of 25 May 2004.

Rights[261]. In 1967 the **1235 ECOSOC** resolution, authorized the Commission on Human Rights to receive individual complaints that may amount to a *situation* revealing the existence of a **consistent pattern of gross, massive and systematic human rights violations in a country** or specific regional area, where **colonial domination, racial discrimination, segregation or apartheid persist.**

Under these *situations* the Commission on Human Rights may receive individual complaints without the exhaustion of domestic remedies, and without the consent of the concerned State. In addition, the Commission on HR was authorized by ECOSOC to establish a special procedure (SP) to investigate a *situation* without the consent of the concerned State. The mandate of the new SP included to submit public reports to the Commission on Human Rights and eventually to the General Assembly on the situation of human rights in a particular country or region.

The first special procedures established under ECOSOC res. 1235 were the **Working Group of Experts on Southern Africa** of the Commission on Human Rights (1967-1995) and the **Special Committee of the GA on Israeli practices** affecting the human rights of the Palestinian People and Other Arabs of the Occupied Territories (1968 - ...).

In 1975, following the bloody military coup of General Pinochet in **Chile**, the Commission on HR extended its practice to establish the ***ad hoc* Working Group** to investigate the human rights situation in Chile. In this case the reference was human rights as recognized in the Universal Declaration on Human Rights of 1948. Since then there have been many geographical special procedures established to study situations of massive violations of human rights in certain countries, regardless of whether or not there are situations of colonial domination and racial discrimination.

As of 1980, the thematic special procedures joined, addressing a particular issue (disappearances, summary executions, torture, arbitrary detention, etc.), globally considered in all Member States of the United Nations. At the same time, the WGEID was authorized to deal with individual complaints from an initially humanitarian perspective and established the **urgent action** procedure under which complaints shall be treated with flexibility and promptness, without regard to admissibility requirements such as the exhaustion of domestic remedies or the consent of the State.

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[261] For 40 years the Commission on Human Rights has been the centerpiece in the development of extra-conventional mechanisms. Under paragraph 13 of resolution 60/251 of the General Assembly of 15 March 2006, the Commission on Human Rights was replaced by the **Human Rights Council** as of 16 June 2006.

A. The Public procedure of individual complaints ("1235 Procedure"): The Human Rights Council special procedures system.

We understand by "special procedures system" of the Human Rights Council (formerly the Commission on Human Rights), also known as a "special rapporteurs system":

The range of special fact-finding bodies on situations of serious, massive and flagrant violations of human rights, whether geographical or thematic, of different denomination, which have been established by the Commission on Human Rights since 1967 on an extra-conventional basis. Their aim was offering to the victims procedural means through which address their complaints with an original purpose of promoting human rights through the analytical reports of such bodies. Since 1980 the most representative bodies have gradually assumed competences to protect individual victims, based predominantly on ***humanitarian grounds****. Since 1990 they preferably invoke in their urgent actions and letters of communications to the Governments the implementation of the international* ***legal standards*** *in the field of human rights*[262]*. In 2007 the Human Rights Council authorized all its special procedures –both geographical and thematic- to transmit letters of* ***communications*** *to the States and make* ***urgent appeals.***

The system of special procedures (hereinafter: SP) includes special fact-finding bodies that have received different names and mandates, which is a consequence of the incipient but progressive integration system [263]. In turn, they may focus on the situation of all human rights in a specific country or regional area (**geographic** procedures: there are currently **fifteen**), or on a specific topic (disappearances, summary executions, torture, arbitrary detention, and so on) in all Member States of the United Nations in which this issue has a consistent gravity (**thematic** procedures: there are currently **38**).

The Commission on Human Rights established new SP with the proper authorization of ECOSOC, on a strictly extra-conventional basis (resolutions and decisions). Since 2006 the **Human Rights Council** (with the eventual authorization of the GA) takes decisions on this matter. From the procedural point of view, the SP system has overcome the rigidity of **quasi-contentious**

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[262] Cfr. VILLÁN DURÁN, C., Curso de Derecho internacional de los derechos humanos, cit, pp. 645 & seq.

[263] The integration is facilitated by the annual meetings of rapporteurs and special representatives, independent experts and chairpersons of working groups of the special procedures. The 20th meeting was held in Vienna from 24 to 29 June 2013. See doc. A/HRC/24/55, of 22 July 2013, 21 p. The co-ordination between meetings is ensured by the Co-ordination Committee of the Special Procedures, composed by six experts to be elected every year.

procedures at the conventional level to receive individual complaints. As already discussed, such procedures will be in force only with the consent of the State, as well as after the exhaustion of domestic remedies.

Similarly, when dealing with special procedures based on ECOSOC resolution 1235 of 1967, those are of public nature in their constitution, since they prepare public reports to the Human Rights Council and the General Assembly to enable them to discuss and take decisions in the political bodies based on an independent investigation carried out by the SP. This transparency in their working methods makes possible the active participation of CSO/NGO and national human rights institutions in all phases of the procedure.

Both the nature and mandate of the special procedures have been refined over the time, so that the original purpose of general promotion of human rights was supplemented with the **protection** of rights of the individual victims. This change occurred after 1980 and is evident in the oldest and most emblematic **thematic** mandates of the Commission on Human Rights (disappearances, summary executions, torture ...).

Moreover, while the **protection** was initially performed by predominantly **humanitarian** reasons, since 1990 the emblematic **thematic** mandates put more emphasis on the international human rights standards relevant to each mandates.

Furthermore, since 1991 the Working Group on Arbitrary Detention adopted **opinions** on each individual complaint received, which are of a legal nature equivalent to the opinions/views adopted by the Committees established by international treaties. Indeed, after a contradictory procedure that respects the principle of equality of arms between the complainant and the State, the WGAD summarizes the facts proven and assesses in its opinion whether the detention of the victim has been arbitrary or not according to the rules of IHRL.

In addition, it has been widespread among the extra-conventional mechanisms the **urgent action** procedure which has a preventive primary purpose, that is, to prevent an imminent violation from occurring or if it has been produced to cease it. In this context, urgent actions are equivalent to interim measures that may be adopted by the Committees under the individual complaints procedure.

Reports that the various rapporteurs or experts regularly present to the Human Rights Council and the GA, are then considered by the international community as reliable sources of information, although with varying degree of success. However, the **International Court of Justice (ICJ)** has paid justice in its opinion of 9 July 2004 on the *illegality of the wall built by Israel in the occupied Palestinian territories*, basing much of its argument in the respective reports of the Special Rapporteur and the Special Committee on the human rights situation in the occupied territories, as well as the report of the in loco visit of the Special Rapporteur on the right to food. In fact, these reports led

the ICJ to conclude that the construction of the wall illegally restricted freedom of movement of the inhabitants of these territories, as well as the exercise of labor, health, education rights and an adequate standard of living of such persons.[264]

The heightened politicization and the absolute majority of which now have African and Asian States within the **Human Rights Council** (26 votes out of 47 Member States), led to fear for the future of the valuable system of special rapporteurs and working groups of the former Commission on Human Rights. The same happened with the individual complaints procedure, patiently built in the extra-conventional protection field, linked to the practice of the various special rapporteurs and working groups, thematic in particular, inspired by the effective work of the Working Group on Arbitrary Detention.

In 2007 the Human Rights Council adopted a controversial **Code of Conduct** for the mandate holders of special procedures[265] that is imposed on the Manual that experts concerned had drafted. In 2011 the HR Council noted that "the integrity and independence of special procedures and the principles of cooperation, transparency and responsibility are essential to ensure a solid system of special procedures that gives the Council greater ability to cope with the situation of human rights on the ground".[266]

However, the HR Council also remembered in 2011 that the special procedures "will continue to promote constructive dialogue with States" by making recommendations aimed at the needs of "technical assistance and capacity-building of States in the thematic reports and country missions to perform."[267] NHRIs were granted the right to intervene "immediately after the country under review in the interactive dialogue held following the reporting of the mandate holders of special procedures on the countries missions."[268]

On the positive side, the Code of Conduct ruled, inter alia, the **individual complaints** procedures, which, as reiterated shall not require the prior exhaustion of domestic remedies (Art. 9); and the **urgent appeals** "in the cases where the alleged violations require immediate measures in terms of involving loss of human life, life-threatening situations or either imminent or ongoing damage of a very serious nature to victims..." (Art.10). Both

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[264] ICJ, *Legal consequences of building a wall in the occupied Palestinian territory*, opinion of 9 July 2004, paras. 132-134.

[265] Resolution 5/2 of the Human Rights Council, adopted on 18 June 2007.

[266] HR Council res.16/21 of 25 March 2011, Annex, para. 24 (review of the work and functioning of the Council). It was approved by the General Assembly in its resolution 65/281 on the outcome of the review.

[267] *Ibid,* para. 25.

[268] *Ibid id.,* para. 28.

procedures are thereafter generalized to the whole system of special procedures, both geographic (15) and thematic (38).

The Code also addressed *in loco* visits by SP, which are subject to obtaining the express consent of the State concerned, even if it had signed a standing invitation to thematic SR system. Such visits are developed according to an official program and modalities of the visit that SP must agree upon with the government concerned (interviews with competent national authorities, freedom of movement, access to detention places and confidential interviews with persons selected by the experts, guarantee of no reprisals, etc.). In addition, a private program that SP and the Secretariat shall arrange with the most relevant NGO/CSO in the country, victims of violations, and other representatives of civil society, etc. (Art . 11).

Similarly, the Human Rights Council in 2007 adopted new rules on the **selection and appointment** of SP mandate holders and **Advisory Committee** members[269]. The latter is a reduced version of the former Sub-Commission on the Promotion and Protection of Human Rights because it reduced the number of experts to 18, the sessions are shorter, and limits its powers to carry out studies and research only at the request and precise instructions received from the HR Council.

In particular, nominating candidates for SP mandate holders may be done by States, IO, CSO and other human rights bodies as national institutions complying with the Paris Principles[270]. Individual candidates must submit an application and a brief cover letter. A Consultative Group (representatives from five States) will interview the candidates included in the short list and make a proposal to the President, who shall explain the reasons if it changes the priority order proposed by the Consultative Group[271].

As for the Advisory Committee, only States may nominate candidates from their own region, but, in selecting their candidates, "States should ask their national human rights institutions and civil society organizations...."[272]

In conclusion, the protection provided by extra-conventional mechanisms is no longer merely political or humanitarian, but it falls squarely within the realm of law, the prelude to the future demand for international responsibility of States for violation of international human rights standards.

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[269] Resolution 5/1, paras. 39-53, Annexes II and III and decision 6/102 of the Human Rights Council, adopted on September 27, 2007.

[270] The prerogative of NHRI in this area is confirmed by the HR Council resolution 16/21 of 25 March 2011, Annex, para. 22.a).

[271] *Ibidem*, paras. 22.c) & d).

[272] Resolution 5/1, cit. paras. 42 & 66.

This would be decisively if States would decide to convene a conference of plenipotentiaries to examine the draft articles on State responsibility for internationally wrongful acts, which had been approved by the *International Law Commission* in August 2001[273], with a view to conclude a convention on the subject.

Meanwhile, the Commission on Human Rights adopted in 2005 the "Basic Principles and guidelines on the rights of victims of gross violations of international human rights standards and grave infringement of international humanitarian law to redress and reparation."[274]

1. Geographical procedures

In 1967 the then Commission on Human Rights, whose membership had just increased as a result of access to independence of a fair number of territories previously under colonial domination in Africa and Asia, chose to imagine an alternative way, unconventional, for processing individual complaints of human rights violations that would be easier for the victims.

To do this, the State consent should not be so decisive, as it was under the regime of the ratification of treaties; the admissibility requirements of the individual communication should be gradually soften, particularly the rule of exhaustion of domestic remedies; and the point of reference for the applicable substantive law would not be one or several treaties, but the principles established in the Universal Declaration of Human Rights.

With these features comes **1235 Procedure** of the Commission on Human Rights, which finds its basis in ECOSOC resolution 1235 (XLII), dated 6 June 1967, and has been consolidated by the subsequent practice of States at the Commission on HR and the HR Council.

In this design a price had to be paid: **individual communications** initially did not receive a personalized treatment, but were instrumentalized according to their acuteness and importance, to constitute a **situation** which reveals the existence of "a consistent pattern of violations of human rights" in a specific country or regional area.

Therefore, the initial focus was to empower the Commission on Human Rights to create special procedures to carry out the study of **situations** of massive violations of human rights in specific countries, provided that such violations were related to issues of decolonization, racial discrimination, segregation or apartheid. The purpose of the procedure was to assist the

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[273] See the text adopted at the ILC's report to the GA on its 53rd session (2001), doc. A/56/10, pp. 10-405.

[274] Commission on HR res. 2005/35, Annex, adopted on 19 April 2005 by 40 votes in favor, 0 against and 13 abstentions. These Principles were confirmed by ECOSOC and the GA in late 2005.

State to overcome its difficulties in terms of human rights within the framework of international cooperation under the UN Charter. In this context, individual complaints were diluted into the global "situation".

Thus, the Commission on Human Rights in 1967 established the first special procedure to investigate a **situation** of geographical nature: the *Working Group of Experts on Southern Africa*[275], entrusted to investigate and report annually to the General Assembly and the Commission on HR on the effects of apartheid policy in Southern Africa[276]. Under this procedure, individual communications were received without regard to the traditional cumbersome admissibility requirements of the conventional system, not even the prior exhaustion of domestic remedies was needed, and the Commission on HR decided the establishment of the WGE on SA without the consent of the concerned States.

1235 Procedure is improved as of 1975, when the Commission on Human Rights created the *ad hoc Working Group to investigate the human rights situation in Chile*, following the bloody coup of General Pinochet[277]. From the Chilean precedent, the Commission on Human Rights established special procedures of **geographical** nature to study situations of serious human rights violations, whether or not they were related to issues of decolonization, racial discrimination or apartheid. This trend was widely consolidated in the Commission on HR practice, which in 2006 had received reports of Special Rapporteurs, Representatives or Independent Experts concerning 17 countries or different regions.[278] This very positive balance was forwarded to the Human Rights Council.

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[275] Along the Group of Experts, the Commission established the same year a Special Rapporteur to investigate "the policy and practice of apartheid in all its manifestations." In 1970, the Commission on Human Rights abolished the SR and transferred its powers to the Group of Experts.

[276] Resolution 1995/8, of 17 February 1995, of the Commission on HR concluded the mandate of the Working Group, having achieved in 1990 the independence of Namibia and in 1994 the abolition of apartheid in South Africa.

[277] The special investigation procedure on the human rights situation in Chile became the Special Rapporteur in 1979 and was canceled in 1990, coinciding with the restoration of civilian government in the country, democratically elected.

[278] It was the Palestinian occupied territories by Israel, Afghanistan, Belarus, Burundi, Cambodia, Chad, Democratic People's Republic of Korea, Haiti, Liberia, Myanmar, Democratic Republic of Congo, Rwanda and Somalia. In 2005 the Commission added the Sudan but ended the mandates of Afghanistan and Chad. In addition, the High Commissioner reported annually to the Commission on Human Rights on the activities of her Office in Colombia and the Personal Representative of the High Commissioner on the situation in Cuba. Under the framework of "Procedure 1503 " or confidentially, the Commission on Human Rights also appointed an independent expert on the situation of human rights in Uzbekistan.

During its first five years of operation (2006-2011), the **Human Rights Council** has expressed increasing hostility to the maintenance of **geographical** mandates. Already in 2007 disappeared those related to Cuba and Belarus without any explanation[279] and subsequently the one on the Democratic Republic of Congo. However, in January 2014 there were **fifteen geographic** mandates, subject to annual extension by the HR Council with the exception of the SR on occupied territories whose mandate will be terminated when Israel withdraw from the Palestinian occupied territories. The name of the SP may change from special rapporteur to independent expert, in accordance with the grade of independence that the HR Council would like to give to the expert.

In addition, given the paralysis of the Security Council in many international crisis involving serious violations of human rights, the HR Council devoted 18 of its special sessions to study emergencies in particular countries or regions where massive human rights violations were reported in contexts of armed conflict. In some cases (**Libya, Cote d'Ivoire, Sudan/Darfur, Gaza, Syria,** etc.) the HR Council established **fact-finding independent commissions**, composed of experts, to report to the HR Council on the situation of human rights in these countries or regions. The Commission regarding Syria was asked to collect evidences of international crimes against human rights with a view to future criminal procedures against those responsible[280].

[279] Resolution 5/1 of the HR Council, of 18 June 2007, Appendix I (*Mandates renewed until the Human Rights Council to examine them in accordance with its annual working program*) and II (*Periods of service of mandate holders*).

[280] HR Council res. S-19/1, of 1 June 2012, para. 8.

Table 5:
Geographical mandates of the HR Council

1. Cambodia: Special Rapporteur[281].

2. R. P. D. of Korea: Special Rapporteur and Fact-Finding Commission[282].

3. Cóte d'Ivoire: Independent Expert[283].

4. Haiti: Independent Expert[284].

5. Iran (Islamic Republic of): Special Rapporteur[285].

6. Myanmar: Special Rapporteur[286].

7. Syrian Arab Repyblic: Fact-finding Commission[287] and Special Rapporteur[288] **.**

8. Palestinian Occupied Territories since 1967 by Israel: Special Rapporteur[289].

9. Implications of Israeli Settlements on human rights of Palestinian people: International Independent Fact-Finding Mission[290].

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[281] The SR's mandate was extended two years by HR Council res. 24/29, of 27 September 2013.

[282] The SR's mandate was extended one year by res. 22/13, of 21 March 2013. The Fact-Finding Commission was established for one year by same resolution. It is composed of three members, namely: The Special Rapporteur and two members appointed by the President of the HR Council. Its mandate is focused on crimes against humanity.

[283] HR Council res. 17/21, of 17 June 2011 y 20/19, of 6 July 2012.

[284] President's statements 19/2, of 23 March 2012 and 22/2, of 22 March 2013.

[285] Mandate extended one year in HR Council res. 22/23, of 22 March 2013, adopted by 26 votes against 2 y 17 abstentions.

[286] HR Council res. 19/21, of 23 March 2012.

[287] See HR Council res. 23/1 y 23/26, of 29 May and 14 June 2013. See the Commission's report in doc. A/HRC/24/46, of 16 August 2013, 44 p. See also res. 24/22, of 27 September 2013.

[288] The SR on Syria was established by HR Council res. S-18/1, of 2 December 2011. In principle, it should start functions after the termination of the Commission's mandate. Howeber, res. 19/22, of 23 March 2012, S-19/1, of 1 June 2012, and 21/26, of 28 September 2012, extended the mandate of the Inquiry Commission. See also res. 19/1, of 1 March 2012 and 20/22, of 6 July 2012.

[289] See also the report by the High Commissioner in doc. A/HRC/22/35, of 4 July 2013, 22 p.

[290] HR Council res. 19/17 of 22 March 2012 established the Mission to be designated by the President of the HR Council with a mandate to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem. Members appointed: Ms. Chistine Chanet (France), Unity Dow Bostwana) and Asma Jahangir (Pakistan). See the Mission report in doc. A/HRC/22/63 **.**

10. Somalia: Independent Expert[291].

11. Sudan: Independent Expert[292].

12. Belarus: Special Rapporteur[293].

13. **Eritrea**: Special Rapporteur[294].

14. **Republic of Mali**: Independent Expert[295].

15. Central African Republic: Independent Expert[296].

Source: doc. A/HRC/24/55, of 22 July 2013, Annex II, p. 21 and Author's update (on 20 January 2014).

The list of geographic mandates is incomplete, since it does not include all States with massive violations of human rights, thus showing a high degree of politization by HR Council when it has to decide if the human rights situation in a given country deserves to be studied by a special procedure or not. In many cases States use regional alliances within the HR Council to advance alternative practices to the special procedures, thus threatening the continuity of strong and independent geographic mandates. The following practices may be highlighted:

(a) Instruct the **United Nations High Commissioner for Human Rights** to study the human rights situation in a specific country (Afghanistan[297], Belarus[298], Chad, Cyprus, Colombia, Guatemala, Guinea[299], Irak, Kirguisthan[300], Libya[301], Mali[302], Mexico, D. R. of Congo[303], Rwanda and Yemen [304]). This practice is politically motivated because the High

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[291] Mandate extended **two years** (HR Council res. 24/30, of 27 September 2013).

[292] Mandate extended for one year by HR Council res. 24/28, of 27 September 2013.

[293] HR Council res.20/13, of 5 July 2012 (vote: 22/5/20). Extended one year by res. 23/15, of 13 June 2013 (vote: 26/3/18).

[294] HR Council res. 20/20, of 6 July 2012. Mandate extended one year by res. 23/21, of 14 June 2013.

[295] Established by HR Council res. 22/18, of 21 March 2013 (one year).

[296] HR Council res. 24/34, of 27 September 2013 and res. S-20/1, of 20 January 2014. See: http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=14186&LangID=E

[297] See HC report on Afghanistan in doc. A/HRC/19/47, of 18 January 2012, 21 p.

[298] HR Council res. 17/24, of 17 June 2011. In July 2012 a new Special Rapporteur was appointed for Belarus (see *supra*, Table 5).

[299] HR Council res. 19/30, of 23 March 2012.

[300] HR Council res. 17/20, of 17 June 2011.

[301] HR Council res. 19/39, of 23 March 2012. It reduced the mandate of the OHCHR to technical assistance, capacity building and cooperation with the transitional government of Libya (para. 9).

[302] HR Council res. 20/17, of 6 July 2012 and 21/25, of 28 September 2012.

[303] HR Council res. 16/35, of 25 March 2011. See the HC report in doc. A/HRC/24/33, of 12 July 2013, 19 p. See also res. 24/27, of 27 September 2013.

[304] HR Council res. 19/29, of 23 March 2012, and 21/22, of 27 September 2012. See HC report

Commissioner is not an independent expert, but a senior official under instructions of the Secretary-General, whose mandate is basically oriented towards the promotion of human rights[305]. The same happens with the 60 field offices of the OHCHR, as their functions are addressed to technical cooperation with the Governments and other public institutions at the expense of a thorough assessment of human rights violations.

(b) Request directly to the **Secretary-General** to conduct the study, in which case it will be assigned to an officer of the Department of Political Affairs of the Secretariat and not from the OHCHR, which will provide a report from a political and diplomatic approach rather than a human rights approach. This was the case of Iran[306] or Syria[307].

(c) On other occasions the States concerned manage to get a seat on the HR Council to ensure that it would not be appointed a SP to perform such an investigation in their own countries, which certainly would be needed. This was the case of Algeria, Cambodia[308], Center African Republic[309], Còte d'Ivore[310], China, Egypt, Equatorial Guinea[311], Indonesia, Libya, Malaysia, Morocco, Tunisia, South Sudan[312], Sri Lanka[313] and Syria[314].

(d) In any case, States with serious difficulties in terms of human rights, which are the majority in the HR Council, prefer to work with a mechanism for **promoting** human rights as is the **universal periodic review** (UPR)[315], which is closely controlled by the States, in detriment of the technical and legal protection bodies, both conventional and extra-conventional, composed of independent experts, because in both cases they are excluded from the purely intergovernmental debate taking place in the framework of UPR.

However, viewed the paralysis of the Security Council, eighteen of the 20 special sessions of the HR Council were devoted to study human rights

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on Yemen in doc. A/HRC/24/34, of 25 July 2013, 18 p. and res. 24/32, of 27 September 2013.

[305] See *infra*, Section B.3: *The UN High Commissioner for Human Rights*.

[306] SG report on the situation of human rights in the Islamic Republic of Iran, doc. A/HRC/19/82, of 23 May 2012, 19 p.

[307] SG report on the implementation of HR Council res. S-18/1, doc. A/HRC/19/80, of 12 March 2012, 8 p.

[308] Informe SG report on functions and achievements of the HC Office assisting Cambodia on the promotion and protection of human rights. Doc. A/HRC/21/35, of 20 September 2012, 19 p.

[309] HR Council res. 23/18, of 13 June 2013.

[310] HR Council res. 23/22, of 14 June 2013.

[311] HR Council res. 23/23, of 14 June 2013. See HC report on Guinea in doc. A/HRC/19/49, of 17 January 2012, 16 p.

[312] See HC report on technical assistance and capacity building in the field of human rights in this country in doc. A/HRC/21/34, of 29 August 2012 and res. 23/24, of 14 June 2013.

[313] HR Council res. 19/2, of 22 March 2012.

[314] SG report on the situation of human rights in the Arab Republic of Syria. Doc. A/HRC/21/32, of 25 September 2012, 19 p.

[315] See *infra*, Section B. 1: *The universal periodic review mechanism (UPR)*.

violations in the context of emergencies in a country or region where situations of armed conflict often happened. In several cases (Libya, Cote d'Ivoire, Sudan, Gaza, Syrian Arab Republic, etc.) the HR Council established commissions of independent experts to investigate massive human rights violations and to report back to the HR Council on their findings.

In short, the politicization that once was criticized to the former Commission on Human Rights and it was used as an argument to justify its dissolution in 2006, has not only increased in the new HR Council, clearly dominated by Ambassadors of its 47 Member States, but has also negatively impacted on the development of **geographical** mandates.

2. Thematic procedures

In 1980 the Commission on HR introduced another important initiative in its practice when it established special procedures around the world regarding a specific topic whose violation has particularly seriousness. Indeed, in that year the Commission on Human Rights appointed the **Working Group on Enforced or Involuntary Disappearances** (WGEID).

Since then, the Commission on HR has established many thematic special procedures, first in the area of civil and political rights and, more recently, in the field of economic, social and cultural rights, to the extent that in 2006 already had 31 thematic mandates in force, which were duly forwarded to the Human Rights Council.

In turn, the HR Council held in 2014, **38 thematic** mandates (working groups, special rapporteurs or independent experts) producing reports on the following issues:

Table 6

Thematic mandates of the HR Council

1. Working Group (WG) on enforced or involuntary disappearances;
2. Special Rapporteur (SR) on extrajudicial, summary or arbitrary executions;
3. SR on torture and other cruel, inhuman or degrading treatment or punishment;
4. SR on freedom of religion or believe[316];
5. WG on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination;
6. SR on sale of children, child prostitution and exploitation of children in the pornography;
7. WG on arbitrary detention[317];
8. SR on the human rights of internally displaced persons[318];

[316] Extended for 3 years in res. 22/20, of 22 March 2013.

[317] Established by the Commission on HR in its res. 1991/41, of 5 March 1991. See also HR Council res. 20/16, of 6 July 2012, extending the mandate for 3 years.

9. WG on the right to development;

10. SR on freedom of opinion and expression[319];

11. SR on contemporary forms of racism, racial discrimination, xenophobia and related intolerance;

12. SR on violence against women, its causes and consequences[320];

13. SR on independence of judges and lawyers[321];

14. SR on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes;

15. SR on human rights of migrants[322];

16. Independent Expert (IE) on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights[323];

17. SR on extreme poverty and human rights;

18. SR on the right to education;

19. SR on the right to food;

20. SR on adequate housing;

21. SR on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health[324];

22. SR on the situation of human rights defenders[325];

23. SR on the rights of indigenous peoples;

24. WG of Experts on people of African descent;

25. SR on the promotion and protection of human rights while countering terrorism;

26. SR on trafficking in persons, especially women and children[326];

27. SR on contemporary forms of slavery, including its causes and consequences;

28. IE on minority issues;

29. IE on human rights and international solidarity[327];

30. WG on the issue of human rights and transnational corporations and other business

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[318] HR Council res. 23/8, of 13 June 2013.
[319] HR Council res. 23/2, of 13 June 2013.
[320] Mandate extender for 3 years by res. 23/25, of 14 June 2013.
[321] HR Council res. 23/6, of 13 June 2013.
[322] HR Council res. 23/20, of 14 June 2013.
[323] Established by HR Council res. 16/14, of 24 March 2011. See also res. 20/10, of 5 July 2012, and 23/11, of 13 June 2013.
[324] HR Council res. 23/14, of 13 June 2013.
[325] HR Council res. 22/6, of 21 March 2013.
[326] HR Council resol. 23/5, of 13 June 2013.
[327] HR Council res. 23/12, of 13 June 2013.

enterprises[328];

31. SR on the human right to safe drinking water and sanitation;

32. SR in the field of cultural rights[329];

33. SR on the right to freedom of peaceful meeting and association;

34. WG on the issue of discrimination against women in law and in practice[330].

35. IE on the promotion of a democratic and equitable international order[331];

36. SR on the promotion of truth, justice, reparation and guarantees of non recurrence[332].

37. IE on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment[333].

38. IE on the enjoyment of all human rights by the elders[334].

Source: Doc. A/HRC/24/55, of 22 July 2013, Annex II and Author's elaboration (updated to 10 December 2013)[335].

The HR Council shall continue the review, rationalize and improve each thematic mandate "in the context of negotiations of the relevant resolutions"[336] that is, every three years, when the HR Council decides whether to renew or not the corresponding thematic mandate. Instead, the mandate holder should not remain in the position for more than six years.[337]

The list of thematic mandates is now so broad that it encompasses virtually all the rights protected under the International Covenant on Civil and

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[328] HR Council res. 17/4, of 16 June 2011, para. 6.

[329] HR Council res. 19/6, of 22 March 2012 and res. 23/10, of 13 June 2013.

[330] Mandate extended for 3 years by res. 23/7, of 13 June 2013.

[331] HR Council res. 18/6, of 29 September 2011.

[332] HR Council res.18/7, of 29 September 2011.

[333] HR Council res. 19/10, of 22 March 2012.

[334] HR Council res. 24/20, of 27 September 2013.

[335] To the current 38 thematic mandates of the HR Council, other four should be added, as they are experts appointed by the UN Secretary-General, as follows: the *special advisor on prevention of genocide*, Mr. Francis Deng (Sudan); the *special representative on violence against children*, Ms. Marta Santos Pais (Portugal); the *special representative on the question of children and armed conflicts*, Ms. Radhika Coomaraswamy (Pakistan); and the *special representative on sexual violence at conflicts*, Ms. Margot Wallstrom. Moreover, the Commission on Social Development appointed Mr. Shuaib Chalklen (South Africa) as *Special Rapporteur on the situation of disability*. All of them had participated in previous meetings of SP, but they were not invited to attend the last one, held in Vienna in 2013.

[336] *Ibid*, para. 55.

[337] President's statement 8/2, of 18 June 2008, para. 1.

Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the most serious issues of human rights violations.

Users (victims of violations, NGO, CSO and to a lesser extent NHRI) get their complaints, reports and requests to the system of special rapporteurs relatively easy. They cooperate with them in organizing *in loco* visits and participate in the monitoring that national authorities should make to **recommendations** contained in the (public) annual reports of the system of special rapporteurs, the mission reports to specific countries, as in the opinions or individual decisions regarding their respective countries (individual complaints and urgent actions).

The whole special procedures of serious human rights violations, whether geographical or thematic, whether special rapporteurs or working groups, is what is called the **system of special procedures (or special rapporteurs)**. Of course, in the current stage the system has consolidated the withdrawal of confidentiality in the treatment of the results of the investigation (the annual reports of those bodies to the HR Council are public[338]), since they constitute a development of **1235 procedure**. The reports will be widely discussed in the plenary of the HR Council, with the participation of representatives of CSO, human rights NGO and NHRI.

On the other hand, as it was established in 1967, **1235 procedure** does not require that the concerned State consents that the HR Council establish a new special procedure, be it geographic or thematic. Nor can a State oppose to an urgent action or a letter of allegations sent by a special procedure. Furthermore, the special procedure may conduct its study despite the opposition of the State concerned. In short, the authorization of the State concerned will only be required to carry out visits *in loco* by the special procedures.[339]

Finally, there is flexibility in the admission of individual communications; they are not subject to strict admissibility requirements, nor to the rule of prior exhaustion of domestic remedies. All communication may be declared

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[338] See doc. A/HRC/16/30, of 16 December 2010: conclusions and recommendations of special procedures, 9 p.

[339] At 1st December 2013, 106 States had partially waived this prerogative having extended *standing invitations* to all thematic procedures of the current HR Council. See the list of those States at http://www2.ohchr.org/english/bodies/chr/special/invitations.htm

However, each visit will require a specific agreement to be negotiated between the mandate-holder through the UNOHCHR and the State concerned. The SP system complained in 2011 about some States in the list that did not allow visits of mandate-holders (See A/HRC/18/41, cit., para. 36). In 2011 SP paid visits to 82 countries (doc. A/HRC/21/51, of 9 July 2012, para. 5). However, 30 States have never received a visit of any SP.

admissible by SP provided that they come from "reliable sources". In 2011 the SP sent 604 communications to States, 75% of them jointly, on individual cases or concrete situations. Unfortunately the replies received from States are still short: 35% of the communications deserve a reply[340].

Essential Readings:

Browse the web site of the Human Rights Council to learn about its procedures and methods of work:

http://www.ohchr.org/english/bodies/hrcouncil/

Browse also the special procedures web site:

http://www2.ohchr.org/english/bodies/chr/special/index.htm

Look at the work that the HR Council carried out at its 24th regular session and its twentieth special session (Central African Republic):

http://www2.ohchr.org/english/bodies/hrcouncil/24session/index.htm
http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=14186&LangID=E

Look at the special procedures Code of Conduct. Available at:

http://www2.ohchr.org/english/bodies/chr/special/docs/CodeofConduct_EN.pdf

Look at the Manual of the UN human rights special procedures. Available at www.ohchr.org/english/bodies/chr/special/manual.htm

Annual reports on fact-finding special procedures. Available online at:

http://www2.ohchr.org/english/bodies/chr/special/annual.htm

Reports on fact-finding country visits. Available online at:

http://www2.ohchr.org/english/bodies/chr/special/visits.htm

Further readings:

- RAMCHARAN, Bertrand G.: "The UN Human Rights Council: The Perennial Struggle between Realism and Idealism**",** *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston: Nijhoff, 2011, pp. 115-133.

- SCHMIDT, Markus G.: "Is the United Nations Human Rights Council Living Up to the International Community's Expectations**?",** *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston: Nijhoff, 2011, pp. 99-113.

- Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of

[340] Doc. A/HRC/21/51, of 9 July 2012, para. 5.

detention. (Report by the Special Rapporteur on torture Manfred Nowak). Doc. A/HRC/13/39/Add.5, of 5 February 2010, 71 p.

Issues:

1. Look at the list of *geographic* special procedures (15). Available at: http://www2.ohchr.org/english/bodies/chr/special/countries.htm

2. Look at the list of *thematic* special procedures (38). Available at: http://www2.ohchr.org/english/bodies/chr/special/themes.htm

3. Contribution of the SP mandate holders to the review of the HR Council. Available at: http://www2.ohchr.org/english/bodies/chr/special/docs/HRCreview-ContributionSPPP_en.pdf

4. Lights and shadows of the Human Rights Council five years later (2006-2011). Look at membership of the HR Council. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm

5. Follow up to special procedures recommendations.

3. Individual complaints

Since 1980 the Commission on Human Rights looked back to the origin of the process, that is, **individual complaints** or communications that had allowed to study a **situation**, and wondered if it should also be declared competent to make some kind of humanitarian action in favor of victims who complained, at individual level.

This step was crucial, since it meant that the Commission on Human Rights simultaneously enabled the SP system with a double competence: first, continue to be competent to deal with an issue of violation on a global basis (for example, enforced or involuntary disappearance of persons) or a situation of serious violation of human rights in a particular country. Second, the Commission on HR progressively authorized its thematic SP system to establish a mechanism to deal with individual complaints.

This mechanism originally had a markedly **humanitarian** approach due to the reluctance of some States, fearful of being "condemned" in the international arena for human rights violations, as in the former Commission on Human Rights often felt "watched" by NGO and other international actors.

Consolidation treatment of **individual complaints** quickly crystallized in relation to thematic procedures of universal scope related to civil and political rights, such as those that protect against enforced disappearances, torture, extrajudicial executions, arbitrary detention, freedom of religion or belief; death threats or reprisals against human rights defenders, the sale of

children, violence against women, freedom of expression, contemporary forms of racism, migrants, and independence of judges and lawyers.

In 2000 the Commission on Human Rights appointed for a period of three years a Special Rapporteur on the right to food with a mandate to respond to individual complaints[341], becoming the first thematic SR with this competence in the field of economic, social and cultural rights. Then the SR on the human rights of indigenous people, the SR on the right to health, housing and education, the SR on trafficking in persons, especially women and children, etc., were appointed. All of them were entrusted to respond to individual complaints received in the scope of their respective fields.

In the case of the **WG on Enforced or Involuntary Disappearances** (hereinafter: WGEID), which has been the pioneer in the treatment of individual complaints, the WGEID constitutes a bridge that facilitates contact between the families of the disappeared and the government in question. The State is compelled to investigate the fate of the disappeared and report the results of its investigation to the WGEID. This, in turn, transmits the results to the relatives of the victim. By having an essentially **humanitarian** mandate, the WGEID cannot take a position on the criminal responsibility of persons who may be responsible for the disappearance, neither on the international responsibility of the State[342]. Since its creation in 1980, the WGEID has transmitted more than 50,000 individual cases to governments of more than 90 countries.

In their relationship through the WGEID, the parties to the proceedings (i.e., family members or representatives of the victim and representatives of the State), are considered by the WGEID under the principle of **equality of arms** throughout the written and contradictory procedure set, which until then had been rare in the international law.[343]

On the other hand, complaints of disappearances are received without having to meet strict admissibility requirements, such as prior exhaustion of domestic remedies. Moreover, having the WGEID a universal and extra-conventional mandate, the consent of the concerned State will not be relevant for the WGEID to file an individual complaint. Finally, the WGEID will only declare the closure of a disappearance case based on the evidence provided by either one or the other party to the proceedings.

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341 The HR Commission asked the SR, among other things to "seek and receive information on all aspects of implementing the right to food, including the urgent necessity of eradicating hunger, and respond to that information" (res. 2000/10, para. 11.a).

342 Doc. E/CN.4/2006/56, para. 9.

343 Vid. DOMÍNGUEZ REDONDO, Elvira, Los procedimientos públicos especiales de la Comisión de Derechos Humanos de Naciones Unidas. Valencia, Tirant lo Blanch, 2005, 516 p., *at* 249-252.

The change of the **legal nature** of the individual complaint system has also been operated gradually. Thus, the most emblematic thematic procedures (enforced disappearances, extrajudicial executions, torture, arbitrary detention), address their communications to the States, and not for purely **humanitarian** reasons, but invoking relevant **international human rights standards** (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Standard Minimum Rules, etc.). As far as the SP are founding their requests to States on IHRL, they are leaving the initial humanitarian model to approach **international remedies** of legal nature.

In this direction, the **WG on Arbitrary Detention** (hereinafter: WGAD) has adopted working methods, approved by the Commission on HR, which allowed it to treat every complaint of arbitrary detention received, qualify the detention as arbitrary in accordance with legal standards (IHRL) and develop a contradictory procedure that culminates in the adoption of an **opinion** or views on each case individually considered. In its opinions the WGAD should decide whether the victim's detention was arbitrary or not, based on strict legal criteria and in accordance with applicable rules of international human rights law. If so, the WGAD would recommend the State **reparation** measures to be taken, for example, requesting the release of the person arbitrarily detained. In addition, the WGAD has developed some measures to **follow up** compliance by States with recommendations contained in the WGAD's opinions.

It is evident that the WGAD was the first precedent at the extra-conventional level, of adoption of **quasi-contentious opinions** on whether the detention was arbitrary or not following IHRL standards. In practical terms, the complaint filed with the WGAD is equivalent to a **writ of international habeas corpus** available to all alleged victim, regardless of their nationality and current location. Such action is also of immediate implementation, since it requires no prior acceptance of the procedure by the State concerned, nor needs to meet severe admissibility criteria such as prior exhaustion of domestic remedies.

This development opened the way towards a future individual complaints system under extra-conventional basis, which should crystallize in a truly **international remedy** (*amparo*, *habeas corpus*) aiming at providing legal protection to the victim. This model would leave far behind the limits of that action "strictly humanitarian" that Member States to the Commission on HR had imposed on the WGEID in 1980, then fearful of hypothetical "political condemnations".

Hopefully in the coming years there would be a consolidation and generalization of practices in the HR Council and its special procedures of the working methods of the WGAD in regard to the adoption of quasi-contentious opinions on individual complaints in the field of extra-conventional protection. This will complete the circle opened in 1967 by the Commission on Human Rights when it was empowered to receive individual complaints through extra-conventional mechanisms for the protection of human rights. In its final term,

this progress may involve the exercise of an actio popularis in the area of international protection of human rights.

4. Urgent actions

A new step in this path of progress is the institutionalization of the system of **urgent actions or appeals** as a flexible mechanism -equivalent to interim measures of the Committees - which allows the adoption of specific measures that formally ensure respect for human rights. Urgent actions by SP are addressed to States on writing by the fastest possible way (fax, Internet) to the head of the Permanent Mission of the State in Geneva, with copy to the Ministry of Foreign Affairs. Usually urgent actions request the authorities for their immediate intervention to stop or prevent the violation claimed, to eventually protect life, integrity or health of the victim, investigating the facts, and make accountable those who were responsible of the human rights violations.

The *urgent actions* system is presented, then, as essentially preventive and protective despite its initial focus strictly humanitarian, devoid of legal significance. Under this procedure, the communication is received with flexibility, without regard to admissibility requirements such as the exhaustion of domestic remedies, or previous consent of the State. It is, therefore, an action of **humanitarian** nature aiming at respond individually to requests received.

Furthermore, the process is extremely universal in the sense that it does not require the ratification of any international treaty that it could be applied, and finds its ultimate legal basis in the UN Charter, the Universal Declaration of Human Rights and in the basic obligation of Member States to cooperate in good faith, jointly or separately, in cooperation with the United Nations, to enforce respect for human rights and fundamental freedoms for all.

Since 2007 the system of urgent actions has been generalized to all geographical (15) and thematic mandates (38) of the current HR Council. According to the aforementioned Article 10 of the Code of Conduct, "the mandate-holders may resort to **urgent appeals** in cases where the alleged violations required urgent measures due to the possibility of causing loss of human life, situations that endanger life or a very severe imminent or ongoing damage for the victims.... "[344].

In the past the WGEID and the WGAD often used urgent actions, as well as special rapporteurs or independent experts on extrajudicial executions and torture, freedom of religion or belief, death threats or reprisals against human rights defenders; sale of children, violence against women, freedom of

[344] "Code of Conduct for Special Procedures Mandate holders of the Human Rights Council", adopted by res. 5/2 of the Human Rights Council, of 18 June 2007, Art. 10. Emphasis added.

opinion and expression; contemporary forms of racism; migrants; toxic wastes; and independence of judges and lawyers.

More recently, the SR on the right to food, indigenous human rights, trafficking in persons especially women and children, and the SR on the right to health, education and housing, receive individual complaints and send to States urgent actions (individual or joint) on their respective field. Since 2007 the HR Council extended the urgent action procedure to all special procedures, whether geographical or thematic.

In the specific case of the WGAD, it may use the **urgent action** procedure when the life or health of the detainee is in danger, or special circumstances so warrant. Having a humanitarian and preventive purpose, urgent actions will not prejudge the opinion that once may issue the WGAD on the arbitrary detention, unless the WGAD has already ruled on the issue in the regular procedure.[345]

In addition, urgent action procedure was gradually extended to some SP on human rights situations in certain countries, such as -in the past- Chile, Iran, Guatemala and Cuba. In these cases efforts were made equivalent to the traditional good offices, in which the success of the experts relied largely on the will of cooperation and response of the State concerned.

Urgent actions are essentially **preventive** in nature, since their main aim is to alert the State's authorities to investigate the allegations and take all necessary measures to cease the alleged violation that could be committed in the person of the victim. In this regard, urgent actions, in the extra-conventional protection field, is similar to **interim measures** that, as it was explained, may be taken by the treaty-bodies (Committees) in the conventional protection mechanisms.

[345] Paras. 22 and 23 of the revised working methods of the WGAD. See doc. A/HRC/16/47 of 19 January 2011, Annex, Section V.

5. Procedure on individual complaints

The common procedural rules to the system of special procedures are in resolutions 5/1 and 5/2 of the Human Rights Council[346]. Alternatively, it could be applied -to the extent they do not conflict with previously established- guidelines set forth in the Manual prepared by the special procedures mandate holders[347], as well as the working methods that each special procedure has been developed over the years in order to organize their activities.[348]

A comparative study of the procedural rules mentioned let us conclude that the processing of individual complaints before extra-conventional mechanisms of protection responds to a common procedure that may be grouped into five steps, namely: competence, admissibility, views on the merits (opinion), publication and follow up.

(a). Competence

After all, the special procedures, both geographical and thematic, should determine their competence in each case received by the Secretariat, according to the four classical rules establishing competence by any investigative judicial or quasi-jurisdictional body, namely: material, temporally, personal and place in which the violation occurred.

Ratione materiae the thematic SP will only be considered competent to receive complaints related to the category of violation that was entrusted with (disappearances, executions, torture, detention, etc.). Violations produced in the context of international armed conflicts[349] are excluded, as these cases

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346 Both adopted on 18 June 2007. See res. 5/1, Annex, Section II: "special procedures". See also res. 5/2, adopting the "Code of Conduct for Special Procedures Mandate holders of the Human Rights Council" The President's statement 8/2, of 18 June 2008, also stated that the President shall transmit to the HR Council all information received about "persistent non-compliance cases" with the Code of Conduct for mandate holders of special procedures, "especially in the period of renewal of their term of service" (paragraphs 2 and 3).

347 OHCHR, Handbook for special rapporteurs / representatives / experts and chairpersons of working groups of special procedures of the Human Rights Commission and the advisory services program. Doc HR/NONE/2006/158, June 2006, 29 p. And Annexes I, II and III. Available in www.ohchr.org/English/bodies/chr/special/manual.htm . Text updated in 2008.

348 The more complete working methods, which serve as a model to all special procedures were approved by the Working Group on Arbitrary Detention (WGAD). His latest review is in the doc. A/HRC//16/47, of 19 January 2011, Appendix.

349 Revised working methods of the WGEID, adopted on 14 November 2009, doc. A/HRC/13/31 of 21 December 2009, Annex I, para. 11.

recognize the primary competence of the International Committee of the Red Cross (ICRC) as a guarantor of the implementation of international humanitarian law, as established by the four Geneva Conventions of 1949 and their Additional Protocols of 1977.

However, as residual formula, if the detainees are denied the protection of the Geneva Conventions III and IV in the framework of an international armed conflict, the WGAD would declare its competence[350]. In 2011 the WGAD also declared itself competent to examine cases of detention in situations of armed conflict, given that governments should meet international standards of human rights that protect against arbitrary detention also in situations of armed conflict.[351]

Ratione temporis the thematic SP shall give priority to complaints received on events that occurred after its establishment. But this rule is not as rigid as in the conventional framework of protection, since the WGEID was considered competent to handle cases involving the seventies, despite having been created in 1980, and even cases post-establishment of the UN (1945). In practice, thematic mechanisms have been influenced by political opportunity and lack of resources made available by the Secretariat to effectively respond to complaints relating to events occurred before their constitution. The temporary rule, in any case, should be limited to a "reasonable term".

In this sense, the SSIHRL and other partner NGOs in 2008 reported to the WGEID that Spain had not investigated about 150,000 cases of disappearances, out of which 30,000 were children, that would happened during the civil war and Franco's subsequent repression (1936-1975), hiding behind the 1977 amnesty law and violating the victim's right to truth, justice and reparation[352]. The WGEID made an **observation** to remind Spain of its obligations under the *Declaration on the Protection of All Persons from Enforced Disappearance* (1992): any act of enforced disappearance shall be considered, under criminal law, a crime punishable by appropriate penalties, and the duty to conduct thorough and impartial investigations while the fate of the victim of an enforced disappearance has not been clarified.[353]

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[350] Doc E/CN.4/2006/7, para. 75. This happened in the case of Guantanamo Bay detention facilities ruled by USA in the context of "war against terror".

[351] Doc. A/HRC/16/47, cit., para. 51.

[352] *Vid.* doc A/HRC/13/31, cit, para. 481-484. For more detail please see VILLÁN DURÁN, C.: "Contribución de la AEDIDH al desarrollo de la justicia de transición en España", *in* RIPOL CARULLA (S.) y VILLÁN DURÁN (C.) (directores), Justicia de transición: el caso de España. Barcelona, ICIP, 2012, 243 p., *at* 9-25. Publicación electrónica disponible en http://www20.gencat.cat/docs/icip/Continguts/Publicacions/Documents%20i%20informes/Projectes%20de%20recerca/Justicia%20Ripol%2009-2012.pdf

[353] *Ibid*, para. 502.

Ratione personae thematic protection procedures may receive complaints concerning any individual and physical victim, but legal persons are excluded. The passive subject of the complaint will always be a State, so that the violations attributed to terrorist or insurgent groups fighting the government in its own territory, are excluded from the competence of the thematic procedures.[354]

However, the then Special Rapporteur on the question of torture decided to send urgent actions to non-official authorities, in response to the immediate **humanitarian** purposes of such urgent actions. He also considered that the minimum standards of humanitarian law are binding on all parties into the armed conflict, whether international or internal.[355]

Finally, ratione loci , the complaint may come from the territory of any Member State of the United Nations under whose jurisdiction the victim is (or was at the time the alleged violation was committed). In principle, the State is considered to be accountable since it was in its territory where the violation occurred, but if it is proved that the alleged facts involved officials from several countries, the thematic procedure then will address to the country where the violation occurred and to the countries of the nationalities of those officials.[356]

(b). Admissibility

Once positively determined its competence, the special procedure will analyze possible causes of inadmissibility, for formal reasons, of the individual complaints it receives. In this regard, unlike conventional procedures, extra-conventional procedures refer complaints to very flexible admissibility rules.

Thus, the extra-conventional SP have enshrined for the first time at the United Nations the rule of actio popularis that the Inter-American Commission on Human Rights already knew (Art. 44 of the American Convention on Human Rights) in the inter-American regional field. This means that **any person** or group of persons may file a complaint by having knowledge of the events reported, regardless of whether is the victim, family member or legal representative.

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[354] Revised working methods of the WGEID, cit., para. 6. Similarly, methods of work of SR on the question of torture, doc. E/CN.4/1997/7, Annex I, para. 9, the latter were expressly approved by the Commission on Human Rights in its res. 1999/32 of 26 April 1999, para. 21. The above methods of work were updated in the doc. E/CN.4/2003/68, of 17 December 2002, paras. 2-20.

[355] E/CN.4/2003/68, of 17 December 2002, para. 9.

[356] *Cfr.* revised working methods of the WGEID, cit, para. 16.

Even CSO or NGO, with or without consultative status with ECOSOC may submit complaints provided they are, to the eyes of the special procedure, a "reliable" source [357]. However, the WGEID adopted a restriction on the rule, since it now requires that if the complainant is not a member of the family of the victim, "must have the express consent of the family to present the case on their behalf and should be able to maintain contact with the relatives of the disappeared person concerning his/her fate."[358] Such requirement seems excessive at least in cases where there are no more relatives of the disappeared person.

The 2007 Code of Conduct required that the complainant must act "in good faith in accordance with the principles of human rights" and should not have "political reasons contrary to the provisions of the Charter of the United Nations." Likewise, the claimant must have "direct and reliable knowledge of those violations, substantiated by clear information." Therefore, the complaints "cannot be exclusively based on reports disseminated by the media."[359]

Moreover, complaints must be submitted under minimum formal requirements.[360] In this regard, they must be in writing, preferably following a standard form provided by the Secretariat and sent by the fastest possible means to the Secretariat (Office of the High Commissioner for Human Rights[361]), with the complete identification of the complainant and the alleged victim.

Similarly, the facts should be reported with data such as date, place and circumstances of facts, the identification of the State security forces that participated, or are presumed to have participated. In addition, the complaints "should not be manifestly unfounded or politically motivated" and the terms on which are written "should not be insulting."[362]

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[357] *Cfr.* revised working methods of the WGEID, cit., paras. 10 and 12 f). Similarly, revised working methods of the WGAD, cit, para. 12.

[358] Revised working methods of the WGEID, cit, paras. 10 in fine and 12 f).

[359] Article 9 d) and e) of the Code of Conduct.

[360] See revised working methods of the WGEID, cit., para. 12. Similarly, revised working methods of the WGAD, cit, paras. 9-10.

[361] The address of OHCHR is: Palais Wilson, rue des Paquis 52, CH-1201 Geneva (Switzerland). Tel. (4122) 917 90 00. Fax (4122) 917 02 12. Email: webadmin@ohchr.org
For more information, see in Internet www.ohchr.org page and click on "program", "communications" and "complaints".

[362] Article 9, a) and c) of the Code of Conduct.

It is also advisable to add a description of the internal measures taken in the country, including the use of internal remedies, both administrative and judicial. Such background information on the internal remedies are not requested for the purpose of verifying if they have been exhausted or not, but as evidence of the alleged violation and, where appropriate, "the results or the reasons why these measures were ineffective or were not taken." [363] Therefore, the rule of exhaustion of domestic remedies would never constitute a conditio sine qua non of admissibility of the complaint in the field of extra-conventional protection.

Once the complaint is declared admissible and referred the case to the State concerned for its defense, the thematic mechanism may decide to file it provided that the State's response gives a satisfactory explanation that makes unnecessary to continue with the processing of the case. Thus, in a recent case of arbitrary detention in Mexico, the WGAD decided to file it because the State reacted positively releasing the person who was unlawfully arrested.[364]

Other common rules of admissibility among conventional procedures are not required in the extra-conventional protection level. This applies, for example, to the principle ne bis in idem under which a single complaint cannot be submitted simultaneously to two or more international bodies of human rights protection. The principle only applies among international protection bodies of *similar legal nature*, that is, quasi-contentious and in the conventional framework.[365]

Thus, by way of example, a complaint for fear that a person may be being subjected to torture in Mexico, may only be submitted to one international protection body of conventional nature that such country has accepted, regardless of it is a universal or regional mechanism (i.e.: Human Rights Committee, Committee against Torture and Inter-American Commission/Court of Human Rights), since they are all incompatible with each other due to their equivalent legal nature.

However, the complaint may be filed with any of the conventional mechanisms accepted by the State and simultaneously with the most appropriate extra-conventional thematic procedure (in the case: the SR of the HR Council on the question of torture) of a non-quasi-contentious nature, because the incompatibility of rule *ne bis in idem* will not appear.

In practice, the complainant will first address the extra-conventional procedures since they are more readily accessible than conventional procedures and then, having exhausted domestic remedies, he will choose

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[363] *Cfr.* revised working methods of the WGAD, cit, para. 10.d).

[364] Opinion No. 25/2008 of the WGAD, Olivier Acuña Barba v. Mexico. The file of the case was in pursuance of paragraph 17 a) of the working methods of the WGAD.

[365] See revised working methods of the WGAD, para. 33.

the conventional one offering most benefits to the victim. If, however, the complainant filed its initial complaint to a conventional body and the case is still pending, the extra-conventional procedure shall decline its competence in favor of the conventional one, if the case refers to the same people and the same facts.[366]

The admissibility phase culminates with a decision or, at least, the assumption that the complaint meets the minimum formal requirements to be accepted. Otherwise, the Secretariat shall request to the complainant supplementary information necessary to continue processing the complaint.[367] Given the existing flexibility in the formal requirements, the stage of admissibility is decided at the minimum delay, with the understanding that the admissibility requirements must be met "as far as possible".[368]

(c). Merits. Views

The thematic procedure constitutes a permanent communication bridge between the complainant and the government authorities aiming at the immediate cease of the alleged violation, if it has occurred. Furthermore, at this stage the thematic procedure will receive the available information from all sources, including governmental ones, which will allow to establish the facts to reach a final conclusion on whether the violation has been effective or not.

For this purpose, according to standard procedure, thematic procedures transmit basic information they have received from the complainants to the governments concerned by a letter addressed to the Permanent Mission of the country accredited to the United Nations Office in Geneva. In the case of Working Groups, the President or the Vice President are authorized to transmit the letters to the governments[369] during the year, out of the sessions were the Group is meeting. At the request of the complainant, his identity will not be revealed to the government.

In cases of urgent action a shortened procedure by facsimile or email is set in motion. Thus, cases of disappearances occurred in the first three months are transmitted to the PM of the State in Geneva with copy to the Minister of Foreign Affairs and are brought to the attention of the complainant (the "source").[370]

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366 *Cfr.* revised working methods of the WGAD, cit, para. 33.d.ii).

367 See revised working methods of the WGEID, para. 13.

368 *Cfr.* revised working methods of the WGAD, cit, para. 10.

369 See revised working methods of the WGAD, cit, para. 14. Accordingly, revised working methods of the WGEID, cit., para. 8.

370 See revised working methods of the WGAD, cit, para. 7.

At the same time, the thematic procedure asks the concerned government to carry out the necessary investigations to clarify the content of the complaints and to keep it informed.

The thematic mechanism may also open ex-officio[371] (i.e. without any complaint) a case that appears to be a violation of any rights whose protection is concerned, or in connection with any of the additional issues, of thematic or geographical order, whose attention has been entrusted to the SP by the HR Council.

The thematic procedure will analyze the responses received from governments and communicate its findings to the complainant where appropriate, to receive his comments. If necessary, the dialogue may continue with the government[372] and, if appropriate, with the complainant.

Thus, the thematic procedure will perform an investigation of facts with the assistance of the parties in the proceedings. Such research shall be contradictory[373] and in writing, since the replies received from governments will be checked with the complainants, and vice versa.

The contradictory process is governed by the principle of **equality of arms**, in the sense that the thematic SP shall grant the same credibility to all information received, regardless that its source is the government or the complainant. It consolidates at the extra-conventional level the breaking of the IHRL with the traditional rule of international law, according to which the information provided by governments were presumed true.

In the case of not having gotten any response from the government concerned within **60 days** (extendable up to one month at the request of the government), the WGAD may take a decision on the basis of all data available[374]. If, however, is the complainant who does not respond within **six months** to the information provided by the government that help to clarify the case, it will be considered clarified[375], although the WGEID should find that

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371 The ability to initiate *ex-officio* an investigation was first recognized by the Commission on Human Rights concerning the WGAD in resolution 1993/36, para. 4. *Cfr.* revised working methods of the WGAD, cit, para. 13.

372 See working methods of the SR on the question of torture, cit, paras. 7 and 8.

373 *Cfr.* revised working methods of the WGAD, cit, paras. 15-16.

374 *Ibid*, para. 15 and 16.

375 See revised working methods of the WGEID, cit, para. 20. See also UNHCHR, Enforced or Involuntary Disappearances. Fact Sheet No. 6/Rev.3, Geneva 2009, pp. 20-23.

such investigations were conducted by the competent authorities of the State concerned.

At the end of this procedural stage pertaining to the merits, the thematic SP will be able to conclude on the basis of information available, whether the alleged violation has been proven or not. If not, it shall decide to close the case or to keep it under review pending of receiving additional information.

A case of disappearance will be considered as clarified by the WGEID when determining clearly the fate or whereabouts of the missing person, regardless of whether the person is alive or dead[376]. The WGEID may also decide to close a case when the State issues a declaration of missing or presumption of death and "family members and other stakeholders have freely expressed and without doubt, their wish not to continue investigating the case. These conditions must always respect the right to full compensation."[377]

In other exceptional circumstances, the WGEID "may decide to discontinue the examination of cases where families have expressed, freely and without doubt, their desire of not pursuing the case, or when the source no longer exists or is no longer able to take care of the case and the measures taken by the WGEID to contact other sources have not been successful."[378] But in all these scenarios the WGEID may reopen the case if complainants provide well-documented information proving that an error has occurred[379]. Furthermore, the fact that the WGEID declares a case clarified, close or suspended, shall not relieve the government of its obligation under the *Declaration on the Protection of All Persons from Enforced Disappearances* from "keep investigating it, bring the perpetrators to justice, provide appropriate compensation to the family of the missing person and take all necessary measures to prevent similar cases from occurring in the future."[380]

As for the WGAD, it will qualify the detention as arbitrary based on five legal categories:

a) When it is clearly impossible to invoke any legal basis to justify it (as when a person is kept in detention after the completion of his sentence or despite an amnesty law that may apply) (category I);

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[376] See revised working methods of the WGEID, cit, para. 21.

[377] *Ibid,* para. 22.

[378] *Ibid,* para. 23.

[379] *Ibid,* para. 24.

[380] *Cfr.* UNHCHR, Enforced or Involuntary Disappearances, cit., p. 21.

b) When imprisonment results from the exercise of rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and in addition, for States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

c) When total or partial failure to comply with international standards concerning the right to a fair trial set forth in the Universal Declaration of Human Rights and relevant international instruments accepted by the States concerned, is so serious that introduces to imprisonment an arbitrary nature (category III)[381];

d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative detention without the possibility of administrative and judicial appeal (category IV), and

e) When the imprisonment is a violation of international law because of discrimination based on birth, nationality, ethnic or social origin, language, religion, economic status, political or other opinion, gender, sexual orientation, disability or other status, and seeks to ignore human rights equality or may cause such a result (category V).[382]

If the arbitrary detention is considered proven, the WGAD adopts an **opinion** in legal terms, which will cover the facts found and the corresponding legal qualification. The opinion ends with a set of recommendations[383] that the WGAD addresses to the government concerned with the purpose of preventing the occurrence of new similar cases and to **compensate** the victim or his family for the violation, under the general rules of international human rights law.

The opinion is, in principle, final and it is forwarded to the State once adopted. Two weeks later, it is communicated to the source[384]. However, in

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[381] See opinion 32/2010 (Luis Williams Polo Rivera v. Perú), of 25 November 2010, doc. A/HRC/WGAD/2010/32, of 27 February 2012. Opinion 27/2011 (Marcos Michel Siervo Sabarsky v. República Bolivariana de Venezuela), of 30 August 2011, doc. A/HRC/WGAD/2011/27, of 29 February 2012. Opinion 36/2011 (Basilia Ucan Nah v. Mexico), of 1st September 2011, doc. A/HRC/WGAD/2011/36, of 29 February 2012; opinión 47/2011 (Carlos Federico Guardo v. Argentina), of 2 September 2011, doc. A/HRC/WGAD/2011/47, of 29 February 2012; opinion 62/2011 (Sabino Romero Izarra v. R.B. de Venezuela), of 22 November 2011, doc. A/HRC/WGAD/2011/62, of 12 June 2012; and opinion 65/2011 (Hernán José Sifontes Tovar, Ernesto Enrique Rangel Aguilera y Juan Carlos Carvallo Villegas v. R.B. de Venezuela), of 23 November 2011, doc. A/HRC/WGAD/2011/65, of 21 June 2012.

[382] Doc A/HRC/16/47, cit., Annex, para. 8.

[383] Para. 17 d) of the revised working methods of the WGAD.

[384] Para. 18 of the revised working methods of the WGAD. The views are later published in WGAD page on the website of OHCHR and identifies these opinions to the attention of the

exceptional circumstances, an request for **review** before the WGAD by both parties to the proceedings may be filed, provided that new events have appeared, until then unknown to the requesting party, which by their nature, may lead the WGAD to modify its opinion. If the request for review came from a State, it should have answered to the initial complaint in the deadline of 60 days.[385]

(d). Publication

The entire procedure is confidential until its conclusion. Therefore, the thematic SP shall notify the concerned State the content of its opinion once adopted, so at that time it will still be confidential. As mentioned above, two weeks later the opinion will be forwarded to the complainant.

However, the confidentiality of the proceedings does not prevent that the SP keeps a constant relationship with the complainant during the course of the procedure, because from his cooperation, as well as the government's cooperation, will depend the value of the information that may be collected, base of the facts that shall determine, to prove or not, the alleged violation.

Subsequently, the thematic SP will forward its opinion to the attention of the HR Council, through its annual report[386], which ensures the final publication of all WGAD opinions.

Only in very specific cases, it has been made public a specific action before its inclusion in the annual and regular report of the SP. This occurred, for example, when the SR on extrajudicial executions in cases involving South Africa, China and Nigeria sent to these countries a series of urgent actions that aimed at the suspension of the imminent execution of death sentences passed against political dissidents by the domestic courts of those countries, as part of highly politicized processes and regardless of judicial guarantees. In these exceptional cases the SR decided, wisely, to immediately make public the urgent actions, aware that advertising was an essential element of the intended effect.

Beyond the specific cases there is still no uniform pattern of action on issuing a press release on allegations. The SP had preferred to safeguard autonomy in this area, which will depend largely on the personality of each mandate holder. However, it seems that the most commonly followed

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Human Rights Council in the annual report of WGAD (ibid., paragraph 19). A list of all opinions approved by the WGAD in its last three sessions is in doc. A/HRC/19/57/Add.1, of 1st March 2012.

[385] Para. 21 of the revised working methods of the WGAD. See, mutatis mutandis, the revised working methods of the WGEID, cit, para. 24.

[386] Para. 19 of the revised working methods of the WGAD. Opinions of the WGAD are also accessible at www.unwgaddatabase.org

approach is to use press releases as a last resort to pressure on the government reluctant to cooperate with the SP.[387]

The Code of Conduct of 2007 warned that the mandate-holders should take care of "personal political opinions do not erode the performance of their mission." In carrying out their mandate, they should "show restraint, moderation and discretion to avoid impairing the recognition of the independence of the mandate or the necessary environment to properly discharge."[388]

(e). Follow-up

The HR Council regularly debates in public meetings of its sessions (three regular sessions a year of a maximum of 10 weeks, and special sessions as decided by one third of the Member States of the Council[389]) reports of its **thematic** SP, with a limited participation of CSO/NGO and NHRI.

After the interactive debate with mandate holders in the plenary of the HR Council and the corresponding informal negotiation process, one or more States shall submit to the plenary of the HR Council a draft resolution on each issue and the HR Council shall adopt the respective resolutions generally by consensus. For example, the HR Council may decide on the working methods of each of its thematic procedures and, eventually, decide on the extension of each thematic mandate, usually every three years.[390]

But it is an established practice that, in its resolutions on thematic mandates, both the former Commission on HR and the current HR Council systematically avoid mentioning or singling out the countries in which thematic SP have pointed the highest rates of violation of certain rights, thus avoiding a possible effect of international condemnation to the concerned country. Thus, the HR Council tacitly endorse the observations and recommendations addressed by SP to individual countries[391], as well as the opinions of the

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[387] *Cfr.* DOMINGUEZ REDONDO, Elvira, Los procedimientos públicos especiales…, cit., pp. 336-342.

[388] Article 12, a) and b) of the Code of Conduct approved by the HR Council in its res. 5/2 of 18 June 2007.

[389] The Human Rights Council has held 24 regular sessions and 20 special sessions.

[390] In 2014, there were 38 thematic mandates in force appointed by the HR Council, four appointed by the Secretary-General and one by the Commission on Social Development.
See also OHCHR, Follow up to UN recommendations on human rights. Practical guide to civil society. Geneva, 2013, 60 p. Available at:
http://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendationsSP.pdf

[391] In addition to the thematic and geographical individualized reports, the Secretariat publishes a list of all reports of special procedures, including mission reports made in the period, specifying the paragraphs that contain the conclusions and recommendations. See the list

WGAD, while the general recommendations of thematic SP, on preventive measures and eventual sanctions, shall be expressly approved by the HR Council in the appropriate resolution.

In terms of its 15 **geographical** mandates, the HR Council must annually decide their renewal. The clear trend is to reduce them, therefore, the practices developed in the framework of the Commission on HR[392] has been deteriorated. Indeed, the HR Council has been replacing the geographic mandates for reports of the High Commissioner or the Secretary-General. In addition, States have shown a clear preference for the **universal periodic review** (UPR) under which, as we shall see, the HR Council plenary merely takes note of the review performed by the States, without expressing an opinion on the human rights situation in the country under review.

Consequently, apart from the 15 geographical mandates, the HR Council rarely adopts public resolutions on any country in the world where it is established that there are practices of systematic human rights violations. Resolutions adopted as a result of special sessions of the HR Council are exceptions, since they are often devoted to specific geographic human rights violations where the Security Council was paralysed by the veto of P5 (e.g., Myanmar, Sri Lanka, Haiti, Gaza, Sudan, Libya, Syria, Central African Republic, etc.). In several cases the HR Council decided to establish commissions of independent experts to investigate human rights violations and to inform back to the HR Council on their findings.

For its part, the most emblematic **thematic** mechanisms (summary executions, torture, disappearances, arbitrary detention) have developed some follow-up procedures of States that have received opinions or recommendations after an *in loco* visit.

Thus, the WGAD expects to take all appropriate measures to have governments and other sources informing the WGAD of actions taken on the recommendations of its views and reports, in order to, in turn, keep the HR Council informed "of the progress made or difficulties encountered in implementing the recommendations and, where appropriate, the deficiencies found."[393]

However, the effectiveness of follow-up to individual cases is limited due to two factors, namely: firstly, because governments respond inadequately to complaints released by the thematic procedures.[394] Secondly,

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published in the doc. A/HRC/16/30, of 16 December 2010, 9 p.

[392] In 2014 there are still 15 geographical mandates (special rapporteurs or independent experts).

[393] Para. 20 of the revised working methods of the WGAD.

[394] In 2007, 1003 complaints were sent to 128 countries relating to 2294 individual cases. Governments responded to 52% of these complaints, often unsatisfactory.

the Secretariat (OHCHR) does not allocate sufficient human and material resources to develop a systematic follow-up procedure to support the work of the thematic SP.[395]

Despite its limitations, the WGEID has considered since 1980 some 50,000 individual cases of nearly 80 countries. 20% of cases have been clarified, especially in the context of urgent actions, and is supposed to have prevented many more from happening.[396]

Essential readings:

WG on Arbitrary Detention working methods. Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement Annex, pp. 21-28.

Browse the WG on Arbitrary Detention data base, select one *opinion* and prepare your assessment: http://www.unwgaddatabase.org/un/Default.aspx?LangType=1033

WG on Enforced or Involuntary Disappearances working methods. Available at: http://www.ohchr.org/Documents/Issues/Disappearances/MOW2009_en.pdf

SR on the question of Torture working methods. Available at: http://www.ohchr.org/Documents/Issues/SRTorture/methodswork.pdf

Further readings:

- SCHEININ, Martin: "Winter Break 2010: A Week in the Life of a Special Rapporteur"**,** *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston: Nijhoff, 2011, pp.167-178.

- AMNESTY INTERNATIONAL and THE LAW SOCIETY, The United Nations Thematic Mechanisms 2002. An overview of their work and mandates. London: Amnesty International, 2002, 92 p.

- KAMMINGA, Menno T.: "The Thematic Procedures of the UN Commission on Human Rights", Netherlands International Law Review, no. 3, 1987, pp 299-323.

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[395] The 17th meeting of special procedures (2010) highlighted the lack of resources, undermining its efforts to monitor and support that the NGO/CSO should receive locally. See doc. A/HRC/15/44, of 19 July 2010, paras. 13 and 46.

[396] *Cfr.* UNHCHR, Enforced or Involuntary Disappearances, cit., p. 22.

Issues:

1. Assess admissibility criteria. *Actio popularis*?
2. Assess the relevance of the State consent.
3. Assess the scope of the rule *ne bis in idem*.
4. The exhaustion of domestic remedies. Is it a compulsory rule?
5. Views on the merits. Assess their legal nature following the WGAD practice.
6. Measures of reparation requested by the WGAD and the WGEID.
7. Follow up to recommendations.
8. Particularities of the extra-conventional complaints procedure before ILO and UNESCO.

B. Other mechanisms to promote human rights at the Human Rights Council

Introduction

The second Summit of Heads of State, held in the framework of the General Assembly of the United Nations, approved on 16 September 2005 the creation of a "Human Rights Council" (hereinafter: HR Council) to "promote universal respect for the protection of all human rights and fundamental freedoms of all persons, without distinction of any kind and in a fair and equitable way"; examine the situation of "serious and systematic violations" of human rights as well as "making recommendations in this regard" and promote "effective coordination and mainstreaming of human rights into the United Nations system".[397]

On 15 March 2006 General Assembly established the first rules of procedure of the HR Council[398] on the basis of a minimum and provisional agreement because the statute of the HR Council must be reviewed "within five years after its creation,"[399] which occurred in 2011. Indeed, based on the report of the intergovernmental WG on the review of the work and functioning of the HR Council[400], which adopted resolution 16/21, of 25 March 2011, the Annex contained some modest proposals to reform the functioning of HR Council, the UPR, Special Procedures, the Advisory Committee, and methods of work and regulations of the HR Council. The new measures relating to the UPR were completed with the HR Council decision 17/119, of 17 June 2011.

However, the decision of more political significance in 2011 has been the establishment of the Office of the President of the HR Council[401] to support the President in the performance of his tasks and to improve efficiency and institutional memory of the body. The four staff to serve on the Board shall be selected by the President, and they will be under his/her supervision for a period of one year, renewable.

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[397] GA res. 60/1 of 16 September 2005, entitled "Final Document of the 2005 World Summit", paras. 157-159.

[398] GA res. 60/25, of 15 March 2006, adopted by 170 votes in favor, 4 against (United States, Israel, Marshall Islands and Palau) and 3 abstentions (Belarus, Iran and Venezuela).

[399] *Ibid*, paragraph 1 *in fine*. The HR Council will also "review its work and functioning five years after its establishment and report thereon to the General Assembly" (paragraph 16).

[400] Doc A/HRC/WG.8/2/1, of 4 May 2011, 173 p.

[401] HR Council decision 17/118, of 17 June 2011. Proposals to reform the HR Council were approved by the General Assembly in its resolution 65/281.

The HR Council was set up as a *subsidiary* body of the General Assembly[402] meeting in Geneva. It is not permanent, since it "will meet regularly throughout the year and schedule at least three sessions per year ... for a total duration of ten weeks."[403] Furthermore, as was the case with the Commission on HR, the HR Council may hold special sessions, but now "at the request of a member of the Council with the support of one third of the members."[404]

It is unfortunate that the HR Council cannot directly report to the Security Council on its activities, since there is a close relationship between massive violations of human rights and the maintenance of international peace and security[405]. In fact, 18 of the 20 special sessions held by the HR Council were in response to the inaction of the Security Council dealing with urgent crises on human rights which had a clear impact on the maintenance of international peace and security (Libya, Syria, Cote d'Ivoire, Mali, Central Africa Republic, etc.).

The HR Council is **composed of 47 States**, respecting an equitable geographical distribution[406]. They are elected for three years by secret ballot by a majority of the members of the General Assembly. No member of the HR Council shall be eligible for immediate re-election after two consecutive terms.

Although participation in the HR Council is open to all Member States of the United Nations, the above mentioned resolution innovated by

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[402] Paragraph 1 of GA res. 60/251.

[403] Paragraph 10 of GA res. 60/251. However, this represents a certain progress in relation to the former Commission on Human Rights, which was authorized to meet during one regular session a year of six weeks. The HR Council already held 24 regular sessions.

[404] *Ibid* paragraph 10 *in fine*. It has held 20 special sessions, 18 on geographical situations and two on thematic issues.

[405] As recognized by preambular paragraph 6 of GA res. 60/251: "Recognizing that peace and security, development and human rights are the pillars of the United Nations system and the foundations of collective security and welfare and that development, peace and security and human rights are interlinked and reinforce each other".

[406] Paragraph 7 of GA res.60/251 establishes the geographical distribution. The HR Council is composed as from 1st January 2014 as follows: Group of **African** States: 13 posts (Algeria, Benin, Botswana, Burkina Faso, Congo, Cote d'Ivore, Ethiopia, Gabon, Kenya, Morocco, Namibia, Sierra Leone and South Africa); Group of **Asia**: 13 posts (China, United Arab Emirates, India, Indonesia, Japan, Khazajstan, Kuwait, Maldives, Pakistan, Philippines, Republic of Korea, Saudi Arabia and Viet Nam); Group of **Eastern European** States: 6 posts (Czech Republic, Estonia, Macedonia (Former Y.R. of), Montenegro, Romania and Russian Federation); Group of **Latin American** and Caribbean: 8 seats (Argentina, Brazil, Chile, Costa Rica, Cuba, Mexico, Peru and R.B. of Venezuela), Group of **Western European and other** States: 7 seats (Austria, France, Germany, Ireland, Italy, United Kingdom and United States).

introducing three corrective criteria aiming to correct the problems of excessive politicization in the composition of the former Commission on Human Rights, but ineffective in light of the results of successive elections.[407]

Firstly, to be elected members of the HR Council "Member States shall take into account the contribution of candidates to the promotion and protection of human rights and voluntary pledges and commitments made thereto."[408] This clause was worded too ambiguous[409], since it was the result of long negotiations during which NGO proposed more objective and defined criteria, such as requiring that the candidate States have ratified the core human rights treaties.[410]

Secondly, the GA may suspend for two-thirds majority any member of the HR Council "that commits gross and systematic human rights violations."[411] Although the clause is innovative, only once[412] had practical effects, because it relies on a qualified majority of the GA -very difficult to achieve- to determine whether a State has committed or not systematic violations of human rights. It would be preferable that this determination be trusted to the opinion of an independent expert (geographical SP), which would avoid the inevitable politicization that a vote of this nature produces within the GA. By contrast, in the current composition of the HR Council it could be checked at least 25 States where systematic violations of human rights occur[413].

Thirdly, members of the HR Council "shall uphold the highest standards in the promotion and protection of human rights, fully cooperate with the Council and be reviewed under the universal periodic review (UPR)

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407 *Vid.* RAMCHARAN, Bertrand G.: "The UN Human Rights Council: The Perennial Struggle between Realism and Idealism**",** *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston, Nijhoff, 2011, pp. 115-133.

408 Paragraph 8 of GA res. 60/251.

409 Ambiguity that is used by the candidates at successive elections, because they simply advertise their "achievements" in human rights and make general promises.

410 *Cfr.* VILLÀN DURÀN, C.: "Luces y sombras del nuevo Consejo de Derechos Humanos de las Naciones Unidas", *in* ALMQVIST (J.) y GÓMEZ ISA (F.) (eds.), El Consejo de Derechos Humanos: Oportunidades y Desafíos. Bilbao, Universidad de Deusto, 2006, 234 p., *at* 23-35.

411 *Paragraph* 8 *in fine* of GA res. 60/251.

412 On 1st March 2011 the General Assembly (resolution 65/265), at the HR Council's proposal, suspended the membership of the Libyan Arab Jamahiriya in the HR Council, due to massive violations of human rights. It was reinstated with the name of Libya on 29 September 2011 (see HR Council res. 18/9).

413 See *supra* footnote number 406.

mechanism during their term as member."[414] In fact, this clause is redundant, since it imposes on Member States of the HR Council the same generic behavior obligations that all States already have by virtue of being members of the United Nations. Furthermore, as highlighted in the following section, the universal periodic review mechanism offers little added value, since it is a purely rhetorical examination conducted among peers (the States), with a very reduced participation of UN experts and CSO/NGO.

1. The universal periodic review mechanism (UPR)

The General Assembly decided in 2006 that the States members of the HR Council were the ones to examine the fulfillment by each State of its obligations and commitments in the field of human rights. The so-called **universal periodic review mechanism** (UPR) is "based on objective and reliable information", made by the States and will ensure "the universality of review and equal treatment for all States." It is based on an "interactive dialogue with the full involvement of the country concerned and taking into account its needs in relation to capacity promotion."[415]

Subsequently, the HR Council specified that the review will be based on the United Nations Charter, the Universal Declaration of Human Rights, international human rights law instruments and international humanitarian law conventions in which the State is Party, and the promises and commitments that the State had voluntarily assumed, including those made in their candidacy to the HR Council.[416]

Among the principles underlying the mechanism, it is noteworthy that it is "an *intergovernmental* process led by members of the United Nations and it is also action-oriented": it should "supplement and not duplicate the work of other human rights mechanisms, thus providing added value" and "develop in an objective way, transparent, non-selective and constructive, that prevents confrontation and politicization." It must also ensure participation of all relevant stakeholders, including the "national human rights institutions."[417]

Among its objectives, "to improve the human rights situation on the ground"; "the fulfillment of obligations and commitments of the State regarding human rights and assessment of progress and challenges faced"; and

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[414] GA res. 60/251, paragraph 9.

[415] GA res. 60/251, para. 5.e). The HR Council developed the modalities of the UPR in its resolution 5/1. In addition, see Annex I, of 18 June 2007, and the general guidelines for the preparation of the information regarding each State in its decision 6/102 of 27 September 2007, Annex I. All documents cited are available on www.ohchr.org .

[416] HR Council res. 5/1, of 18 June 2007 (*universal periodic review mechanism*), paras. 1 and 2 of Annex I.

[417] *Ibid*, para. 3.

"strengthening State's capacity and technical assistance, in consultation and with the consent of the reviewed State."[418]

In the first cycle periodicity of the review was four years. This involved the review of 48 States per year during three sessions of the Working Group of two weeks each[419]. The second cycle began in January 2012 and retained the same order of review of the States as in the first cycle. Spain will hold the position 117.[420]

The examine is performed based on the 20-page **report** submitted by each State following the **general guidelines** adopted on 27 September 2007[421] and comprises: a description of the methodology and the broad consultation process followed for the preparation of the information; regulation and institutional background of the country in the field of human rights, including existing NHRI, the application of international human rights obligations involving the State; identification of achievements, challenges and difficulties found, priorities and commitments that the State wishes undertake to overcome obstacles and to improve human rights situation on the ground; and expectations of the State in terms of capacity building and technical assistance in the field of human rights.

These guidelines were reiterated at the beginning of the second cycle of review (January 2012), which should focus on the implementation of accepted recommendations in the first cycle and the evolution of the human rights situation in the State reviewed.[422]

Additionally, the Office of the United Nations High Commissioner for Human Rights (UNOHCHR) prepare a **compilation** of 10 pages devoted to information on the country under review, contained in the reports of treaty bodies, special procedures and other official documents of the United Nations.

Finally, the same Office prepares a **summary** of 10 pages of "additional credible and reliable information provided by other relevant stakeholders to the UPR."[423] It is understood that the term "other partners" includes NHRI and CSO/NGO[424], which can also make joint presentations.

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[418] *Ibid*, para. 4.

[419] On 21 September 2007 the HR Council proceeded to draw for the order of consideration of States in the first cycle, having matched the turn of Spain in June 2010.

[420] HR Council decision 17/119, of 17 June 2011, Annex I.

[421] Decision 6/102 of the HR Council.

[422] HR Council decision 17/119, cit., Section II.

[423] Resolution 5/1 of the HR Council, para. 15. c).

[424] The information of the civil society should be sent to the following address:

All these documents must be submitted six weeks prior to consideration by the Working Group, which is to provide the HR Council (composed of 47 members and State observers as wished), so documents can be distributed simultaneously in the six official languages of the United Nations.

(a) Steps of the procedure

In the review of each State, including the interactive dialogue, only States will intervene (members and observers). Other "interested stakeholders" (including CSO/NGO) can only "assist" to the review of the report of the State, but may not participate in it.

The work of the UPR is organized into three phases:

A. Appointment of a troika of three States.

Before the Working Group meets, the HR Council would have designated a troika of three States for each of the States that shall be reviewed in the UPR. The country under consideration "may request that one of the three rapporteurs be from its own regional group, and may also request, only once, to replace a rapporteur."[425]

The troika acts as a rapporteur to merely collect and systematize, with the assistance of the Secretariat, the questions that States wish to submit to the State under review. Once the report of the troika is made, it will be forwarded to the State under review ten days prior to the meeting of the Working Group. Then, it will also be distributed to all other Member States and observers. The State under review will decide what questions would like to answer.[426]

B. The Working Group of the Human Rights Council.

A Working Group of the HR Council, open-ended, articulates interactive dialogue of the UPR, which will be three hours and a half as of the second cycle. The Working Group will continue to meet three times a year for two weeks each time and should review 48 countries per year.

The State concerned shall dedicate the first 70 minutes to paraphrase its report and answer to chosen questions from those contained in the troika report. The following dialog opens exclusively between States, following the

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UPRsubmissions@ohchr.org .

[425] Res. 5/1, *supra*, paras. 18.c), d) and 19.

[426] President's declaration 8/1, of 9 April 2008, Section I. It is anticipated that the troika report is not sent to other international actors other than States listed.

order established in the list of speakers. Member States may speak for a maximum of three minutes and observers for two minutes[427]. In such a short period of time States are limited to making recommendations, since there is no time for a real debate with the reviewed State.[428]

At the end of the so-called "interactive dialogue", the troika will prepare the report of the WG on the State under review with the assistance of the Secretariat, noting the recommendations which have been accepted by the reviewed State. In case of disagreement, the opinion of the reviewed State will be collected. It is understood that the State is committed to undertake follow-up action only in regards of the recommendations it has accepted, and on its own pledges and voluntary commitments.[429]

B.Plenary of the Human Rights Council

The HR Council receives the report of the WG and the views of the State under review concerning recommendations accepted and voluntary commitments. In its final standard decision, the HR Council just takes note of the report without commenting on it.[430]

(b). Efficacy of the UPR

This mechanism was launched in April 2008. It completed the first round four years later (late 2011). The evaluation of its efficacy shows a disappointing result[431] for the following reasons:

1) It is a highly political exercise, since the review of the human rights situation in each country is trusted to its peers (the HR Council Member **States**, represented by their Ambassadors accredited in Geneva), and not, as would be desirable, to a mechanism of independent experts. It means that the HR Council has decided to return to a procedure similar to that established in the seventies by the ECOSOC, which was abandoned as obsolete. This means a net set back in standards of protection that had reached the former

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[427] HR Council decision 17/119, cit., Sections III and IV.

[428] *Cfr.* SCHMIDT, Markus G.: "Is the United Nations Human Rights Council Living up to the International Community's Expectations?", *in* EIDE (A.) *et al.* (Editors), *Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson*. Leiden/Boston, Nijhoff, 2011, pp.103-104 y 112.

[429] President's statement 8/1, cit., Sections II and III.

[430] *Ibid*, Section IV.

[431] *Vid*. SCHMIDT, Markus G.: "Is the United Nations Human Rights Council Living Up to the International Community's Expectations**?",** *loc. cit.,* pp. 99-113.

Commission on Human Rights, with no apparent positive effect in the State under review;[432]

2) The evaluation is based on three documents: (i) The State's **report** (20 p.), (ii) The **compilation** by the OHCHR (and not, as would be desirable, drafted by a committee of experts), based on the recommendations made to the State by the Committees established on human rights treaties and the special procedures of the HR Council (10 p.); and (iii) A **summary**, also in charge of the OHCHR, of the information received from non-governmental sources (10 p.), this narrow space been equally divided between NHRI and NGO/CSO;

3) Therefore, the written contribution of **CSO/NGO to** the UPR is reduced to **five pages** per country, to be summarized by the OHCHR. It is clearly insufficient if compared with the written reports (unlimited pages) that NGO/CSO can directly submit to the Committees established by treaties in the context of periodic reports, as to all special procedures of the HR Council established under ECOSOC resolution 1235 -both geographical and thematic.

4) The nature of **intergovernmental** review of the UPR at all procedural stages (Troika, Working Group, Plenary of the HR Council), is accentuated by the fact that the system of independent experts (special rapporteurs, members of working groups and Committees members established in treaties) are not even allowed to "assist" the examination of the country under review in the HR Council Working Group set for that purpose, nor in the plenary of the HR Council, despite having repeatedly demanded it to HR Council;

5) Both **CSO and NGO** are allowed *to attend* the review of the country, but may not *participate* in the debates. They could only "make general comments before the plenary adopts the outcome of the review."[433] In practice, the statements that can be made by the CSO are purely testimonial, very limited in time (**two minutes each**) and out of time, as they are made after the recommendations have been negotiated and adopted within the Intergovernmental Working Group;

6) The same happened with **NHRI** during the first cycle of the UPR. In the second cycle, they were allowed to "intervene immediately after the State concerned for the adoption of the outcome of the review by the HR Council in plenary."[434]

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[432] *Vid.* SWEENEY (Gareth) and SAITO (Yuri), "An NGO Assessment of the New Mechanisms of the UN Human Rights Council", Human Rights Law Review, 9:2, 2009, pp. 203-223, *at* 218-219.

[433] *Ibid*, res. 5/1, para. 31.

[434] HR Council res.16/21 of 25 March 2011, Annex, para. 13.

7) The UPR mechanism is less favorable than the conventional **periodic reports** procedure in a conventional basis, as in the latter case the examination of reports (from both the States and any other reliable sources including CSOs/NGOs, with no limit of pages) always corresponds to a Committee of independent experts, in dialog with representatives of States;

8) Recommendations adopted by consensus within a Committee of independent experts are much deeper and have much more **legal authority.** This is the case **of** final observations in the framework of periodic reports, or even those recommendations made by the special procedures of the HR Council, which are of legal nature and not *political* recommendations as those contained in the report of the WG of the UPR. In the latter case, besides being made by representatives of States, those are not even approved by consensus of the WG. Indeed, next to each accepted recommendation is the name of the State that produced it and is expressly said that it is not binding the WG but to that State; and

9) The primary purpose of periodic review among peers should be to **assess** the human rights situation in each country and, alternatively, indicate appropriate technical training and institutional development measures[435]. In practice, however, States grant more importance to issues of **technical assistance** than to the assessment of the situation of human rights.

10) The HR Council plenary takes a standard final decision to "approve the outcome of the universal periodic review" of each State reviewed, without making any judgment or comment.[436]

At the beginning of the second cycle of the UPR the HR Council decided to continue the same procedure, without taking any corrective measure of importance. Only NHRI are now authorized to take the floor after the State under review. It also confirmed that only States can join the list of speakers for the Working Group on the UPR.[437]

Therefore, a negative assessment of the UPR may be concluded[438], which is borne out by the practice. In this sense, reference may be done to

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[435] *Cfr.* VILLÁN DURÁN, C.: "Luces y sombras del nuevo Consejo de Derechos Humanos de las Naciones Unidas", *loc. cit*., pp. 23-35. On the contrary, other authors consider that UPR should be a co-operation mechanism among States to avoid confrontation among them. See ABEBE, Allehone Mulugeta, "Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council", Human Rights Law Review, 9:1, 2009, pp. 1-35, *passim.*

[436] See for all decision 15/104 of 21 September 2010 on Spain.

[437] HR Council res.16/21, cit., Appendix, p. 11.

[438] This critical assessment is also widely shared by THÉVENOT-WERNER, Anne-Marie: « L'examen périodique universel du Conseil des droits de l'homme des Nations Unies au

the paradigmatic case of **Spain**, which was reviewed by the UPR Working Group in 2009. The recommendations made by several States individually within the WG[439] cannot be compared to the recommendations contained in the concluding observations of the **seven Committees** established in treaties that have reviewed in recent years periodic reports of Spain. Nor are comparable to the findings and recommendations reached by the **eleven thematic procedures** of the HR Council, who visited the country and investigated in depth the situation of human rights within their respective mandates.

The Working Group gathered in its report many recommendations made by States individually. Of these, Spain postponed its decision on accepting or not in 34 recommendations and rejected eighteen[440]. In a subsequent document Spain finally **rejected** the following recommendations: ban the sale of arms to countries violators of human rights; ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; bring into the Criminal Code the definition of torture in Art.1 of the Convention against Torture; to investigate, punish and compensate victims of forced disappearances occurred during the Franco regime; improve the regime for refugees and asylum seekers; ensure equal treatment of migrants in regular or irregular situation; punish dissemination of messages that incite hatred, xenophobia, discrimination and violence; establish an independent mechanism for investigating complaints against the police for human rights violations, including torture; review detention under no communication regime; strengthen due process for people charged with terrorist acts; establish a mechanism to identify victims of trafficking and sexual exploitation; regularizing irregular migrants; implement the recommendations made to Spain by the SR on human rights while countering terrorism[441]; and investigate delivery cases of suspected terrorists to other States[442]. For its part, the HR Council simply approved the outcome of the examination in a standard decision, without entering into any assessment.

Therefore, it may be concluded that the UPR has not helped to improve the human rights situation in Spain. Nor has it brought new diagnoses on the situation in the country, or recommendations that had not been made earlier and more legally accurate by the United Nations human rights protection mechanisms.

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regard du Droit international – Entre politisation et normativité », *Journal du Droit International* (JDI), vol. 139, n° 4, 2012, pp. 1243-1279.

439 Doc A/HRC/11/27 of 29 May 2009.

440 See doc. A/HRC/15/6, of 16 June 2010, pp. 19-29.

441 *Ibid*, pp. 99-100.

442 See doc. A/HRC/15/6/Add.1, of 13 September 2010, 17 p.

By contrast, the UPR requires the OHCHR to spend large sums of money and staff resources to its bureaucratic functioning. Paradoxically, OHCHR does not meet the repeated demands for resources that the Committees, working groups and other special procedures[443] of the HR Council require, which would allow them to operate much more effectively, improve their internal follow-up procedures and, thus, assist to victims of human rights violations. A real and effective improvement of the human rights situation in the field could be obtained if the United Nations would give up UPR and reinforce the protection mechanisms of human rights.

Finally, the UPR not only does not promote human rights effectively between Member States, but it weakens the protection system of human rights of the United Nations. Given the choice, the State concerned will be tempted to pay more attention to the *political* recommendations proposed by its peers within the UPR and it has voluntarily agreed, than to meet its *legal* obligations to comply with the recommendations of the protection mechanisms that have been empowered by the international human rights law[444]. It proves once again that in international law *intergovernmental* mechanisms to promote human rights always produce worse results than the mechanisms of promotion and protection of human rights consisting of *independent experts*.

Essential readings:

Browse the Universal Periodic Review web site:
http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx

- THÉVENOT-WERNER, Anne-Marie: « L'examen périodique universel du Conseil des droits de l'homme des Nations Unies au regard du Droit international – Entre politisation et normativité », *Journal du Droit International* (JDI), vol. 139, n° 4, 2012, pp. 1243-1279.
- SCHMIDT, Markus G.: "Is the United Nations Human Rights Council Living up to the International Community's Expectations?", *in* EIDE (A.) *et al.* (Editors), *Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson*. Leiden/Boston, Nijhoff, 2011, pp.103-104 y 112.

Further readings:

SWEENEY (Gareth) and SAITO (Yuri), "An NGO Assessment of the New Mechanisms of the UN Human Rights Council", Human Rights Law Review, 9:2, 2009, pp. 203-223, *at* 218-219.

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[443] The concern of the SP by the scarcity of resources that the OHCHR makes available to them and the lack of transparency in its administration were openly reiterated during the 2011 meeting of SP. See doc. A/HRC/18/41, cit., pp. 2 and 12.

[444] Situation alleged by the SP, since the States may "subtract strength to the recommendations of the special procedures that the State concerned has not consented." See A/HRC/18/41, cit., para. 17.

ABEBE, Allehone Mulugeta, “Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council”, Human Rights Law Review, 9:1, 2009, pp. 1-35.

RAMCHARAN, Bertrand G.: “The UN Human Rights Council: The Perennial Struggle between Realism and Idealism**”,** *in* EIDE (A.) *et al.* (Editors), Making Peoples heard. Essays on Human Rights in Honour of Gudmundur Alfredsson. Leiden/Boston, Nijhoff, 2011, pp. 115-133.

Issues:

1. Assess relevance of the State consent under UPR procedure.
2. Assess follow up to recommendations by UPR procedure.
3. Compare the participation of CSO and other international actors at the special procedures and UPR mechanism.
4. Compare UPR and special procedures/treaty bodies recommendations addressed to a given State.

2. The confidential procedure of individual complaints ("1503 Procedure")

The HR Council decided in 2007 to maintain the confidential procedure to deal with individual communications, which had been established by the Economic and Social Council (ECOSOC) in 1970[445], although it is now advertised as an "impartial, objective, efficient, victims-oriented and timely complaint procedure".[446]

However, individual complaints under this procedure are **confidentially** treated and exclusively used to "address consistent patterns of gross and reliably proven violations of all human rights and all fundamental freedoms occurring in any part of the world in any circumstances."[447]

Furthermore, unlike the "1235 procedure" by which the HR Council has developed special procedures already studied, the allegations in "1503 procedure", which is entirely confidentially, are subject to five strict admissibility rules, as follows:

Firstly, the author of the complaint must be a person or group of persons claiming to be **victims** of violations of human rights and fundamental

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[445] Economic and Social Council res.1503 (XLVIII), of 27 May 1970, revised by ECOSOC res. 2000/3, of 19 June 2000.

[446] HR Council res. 5/1, of 18 June 2007, Annex IV ("Complaint Procedure"), para. 86.

[447] *Ibid*, para. 85.

freedoms. Similarly, the complainant may be an individual or NGO acting "in good faith in accordance with the principles of human rights" and hold "to have direct and reliable knowledge of such violations." If the information provided was obtained from second hand, it must be accompanied by "clear evidence".[448]

Secondly, the complaint must not be manifestly **politically** motivated and its object must be "consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights."[449]

Thirdly, the complaint must contain "a factual description of the alleged violations, including the rights alleged of having been violated."[450] The facts must be based on clear **evidence**, as complaints based "solely on reports disseminated by the media" are rejected[451]. Regarding the formalities, the complaint should not use "insulting" language that, if any, will be deleted.

Fourthly, **ne bis in idem** principle is applied in the sense that the complaint should not refer to a case that "is already taking care by a special procedure, a body created under a treaty or other similar complaint procedures, of the United Nations or regional level, in the field of human rights."[452]

And fifthly, the complaint shall be only admissible if the **domestic remedies** have been **exhausted** "unless it appears that such remedies would be ineffective or unreasonably prolonged."[453]

Always inspired by the "1503 procedure" of 1970, the HR Council established a confidential procedure, lengthy and expensive, to review complaints that may amount to a consistent pattern of gross and reliably violations of human rights and fundamental freedoms. The process must involve two working groups and the plenary HR Council[454]. For this purpose three stages in the procedure will be distinguished:

a. The Working Group on Communications

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[448] *Ibid,* para. 87 d).

[449] Res. 5/1, cit, para. 87 a).

[450] *Ibid*, para. 87 b).

[451] *Ibid*, para. 87 e).

[452] *Ibid*, para. 87 f).

[453] *Ibid*, para. 87 g).

[454] *Ibid*, para. 89-109.

Composed of five experts appointed by the HR Council's Advisory Committee, one from each geographical region and taking into account gender balance. The term of office will last three years, renewable once.

The President of WG will be responsible to perform the initial review of complaints received with the assistance of the Secretariat, before transmitting them to the State concerned. Thus, based on the admissibility criteria described above, the President of the WG will manifestly reject unfounded or anonymous complaints and will inform the members of the WG, with a statement of the reasons that led to rejection.

All complaints that have not been rejected by the President shall be forwarded to the State concerned to seek its views on them.

The WG on Communications shall adopt by consensus or absolute majority of its members a **decision** on the admissibility of the claims and would analyze the merits of these allegations to determine whether the claims alone or in combination, appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

The WG on Communications may decide to keep a case under review until its next session; to request additional information to the State concerned; to dismiss the case; or to declare it admissible. All decisions will be based on the admissibility criteria, they shall be adequately justified, and forward to the WG on Situations.

b. The Working Group on Situations

It is composed of five representatives of Member States of the HR Council, appointed by the regional groups for a year, with possibility of one renewal if the State continues to be a member of the HR Council. WG members would serve in their personal capacity.

Based on informations and recommendations received from the WG on Communications, the WG on Situations "will have to submit a report to the Council on consistent patterns of gross and reliably attested human rights and fundamental freedoms."[455]

The recommendations of the WG will have the form of a draft resolution or decision on the situation referred to it. It may decide to keep a case under review until its next session, request additional information, or dismiss a case.

The decisions of the WG on Situations shall be justified, stating the reason for the termination of examination of a situation or action recommended thereon. Any decision to discontinue consideration of a matter should be taken by consensus or, if not possible, by simple majority vote.

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[455] Res. 5/1, cit, para. 98.

Both WGs will meet at least twice a year for five working days each session to examine the complaints received and the responses of States and situations, which are already taking care by the HR Council as part of this complaint procedure.

As for the States concerned, they shall cooperate in this complaint procedure providing substantive responses to each request received within three months, to be extended at the request of the State.

c. Plenary of the Human Rights Council

Two weeks prior to the plenary, the Secretariat shall make available to members of the HR Council **confidential** files of the complaint procedure.

At least once a year the HR Council will confidentially review consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms that the WG on Situations has brought to its attention.

Exceptionally, the HR Council will consider a situation in a public meeting if so recommended by the WG on Situations, particularly in case of manifest and unequivocal lack of cooperation of the State concerned.

The period of time between transmission of a complaint to the State concerned and consideration by the HR Council shall not exceed, in principle, **24 months**.

Both the complainant and the State concerned will be **informed** of the proceedings in the following circumstances:

- When the WG on Communications declares a communication **inadmissible**;
- When the case proceed to consideration by the WG on Situations;
- When one of the WG or the HR Council decides to keep the complaint pending; and,
- When the **final outcome** is adopted.

Furthermore, the complainant shall be informed that its complaint is **recorded** in the complaints procedure. If the complainant requests not to give out his/her identity, it shall not be disclosed to the State concerned.

At the end of the procedure the HR Council may take one of these measures:

- To discontinue considering the situation when it appears no longer justified its consideration or further action;
- To keep the situation under review and request the State concerned to provide further information within a reasonable time;
- To keep the situation under review and appoint an **independent expert** and highly qualified to monitor the situation and report thereon to the HR Council, but confidentially;

- To discontinue reviewing the matter under the confidential complaint procedure to proceed with its public exam; or
- To recommend OHCHR to provide technical cooperation assistance for capacity building or advisory services to the State concerned.[456]

In conclusion, despite the updates provided in 2007, "1503 procedure" is still outdated compared to current developments of "1235 procedure", because it does not allow treating individual complaints of violations of human rights beyond been considered as an instrument to prove the eventual existence of a "situation" of mass violations. In addition, admissibility requirements, especially the exhaustion of domestic remedies, will make impracticable most of the complaints. The procedure is too long (up to 24 months), confidential and therefore lacking of transparency.[457]

In this situation, it is logical to assume that victims of human rights violations or their representatives would prefer to bring their complaints to "1235 procedure" or public procedure, since it offers increased flexibility, transparency and efficiency proceedings (allegation letters or urgent actions or appeals of all special procedures, as well as individual opinions on specific cases of arbitrary detention).

ESSENTIAL READING:

VALENCIA VILLA, Alejandro: La situación de derechos humanos del Paraguay entre 1978 y 1990: el procedimiento confidencial 1503 de las Naciones Unidas. Asunción, Defensoría del Pueblo, 2010, 611 p.

ISSUES:

1. Assess admissibility criteria under 1503 procedure
2. Assess relevance of the State consent under 1503 procedure.
3. Assess the exhaustion of domestic remedies under 1503 procedure.
4. Assess follow up measures to 1503 procedure.

[456] Res. 5/1, cit, para. 109.

[457] A critical study on the ineffectiveness of the 1503 applied to Paraguay is at VALENCIA VILLA, Alejandro: La situación de derechos humanos del Paraguay entre 1978 y 1990: el procedimiento confidencial 1503 de las Naciones Unidas. Asunción, Defensoría del Pueblo, 2010, 611 p., especialmente pp. 62-64.

3. The United Nations High Commissioner for Human Rights

For a long time, NGO/CSO had hoped that the *High Commissioner for Human Rights* embody the institutionalization of the actio popularis of the international community in cases of massive violations of human rights. In this sense, the High Commissioner would be the institutional mechanism of the international community to respond urgently and ideally to any eventuality that might occur in the world, regardless of the various human rights bodies are or not in session.

For these reasons the High Commissioner's project had been identified in the past as an independent expert who directed his/her activities under strictly humanitarian and technical criteria. Finally, the General Assembly in 1993 established the institution of the High Commissioner for Human Rights, which was endowed with different competences from those designed in previous projects. Indeed, the main functions of the current High Commissioner, who is a senior official of the Organization under the authority of the Secretary-General, are three: the promotion and protection of all human rights, prevention of their violations throughout the world, and coordination of the activities of the entire United Nations system in this area.[458]

Despite the character at once broad and ambiguous of its functions (result of a difficult consensus among the States), the key to this institution is the actual degree of coordination to be achieved within the United Nations system. In this sense, we must distinguish between coordination *ad extra* and coordination *ad intra.*

Ad extra coordination means to ensure the presence and real integration of human rights in all activities of the Organization, especially development assistance projects and the maintenance and consolidation of peace operations. All specialized agencies, programs and funds of the United Nations (i.e. UNESCO, ILO, FAO, UNICEF, UNHCR, UNDP, WFP, International Financial Institutions –IFIs- such as the World Bank and International Monetary Fund), should work with the High Commissioner to introduce human rights approach in their activities. In addition, the High Commissioner is a key player in the practical implementation of the universality of human rights, ensuring effective coordination between the universal and regional systems of international protection for human rights.

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[458] GA res.48/141, adopted on 20 December 1993, paragraph 4. Since then, at proposal of the Secretary-General, the General Assembly has appointed six successive High Commissioners: Jose Ayala Lasso (Ecuador) (1994-1997); Mary Robinson (Ireland) (1997-2002); Sergio Vieira de Melo (Brazil) (2002-2003, it will be recalled that he died in Baghdad victim of a terrorist attack in August 2003). He was replaced ad interim by B. G. RAMCHARAN (2003-2004); Louise Arbour (Canada) (2004-2008); and N. Pillay (South Africa) (2008-2012); her mandate was extended for two additional years on 24 May 2012.

In terms of coordination *ad intra*, it means that the High Commissioner heads the Office of the High Commissioner for Human Rights, which is the department of the Organization in Geneva that brings together most of the activities in the field of human rights. From this institutional platform the High Commissioner should facilitate the internal cohesion of the different bodies for the promotion and protection of human rights of the Organization[459], but not replacing them. In this regard, her role will be crucial for the consolidation of the extra-conventional human rights protection system. This would be facilitated through action in two directions:

First, the current High Commissioner should take the initiative for its Office to provide assistance to a committee or working group of independent experts who have the responsibility to present to the General Assembly and the HR Council annual reports on the **situation of human rights in the world**, analyzing the situation in each one of the 193 Member States of the Organization. This would overcome situations of excessive politicization and selectivity that marred the work of the Commission on Human Rights and continue to hamper those of the HR Council, when deciding which countries deserve or not the attention of the international community through the establishment of a geographical special procedure. This report would also provide more objective information for the promotion of human rights among the States through the universal periodic review mechanism (UPR) under the HR Council, should it decide to continue with the UPR.

Second, the High Commissioner should have a greater role in the institutional consolidation of the treatment of **individual complaints** and **urgent actions** under extra-conventional procedures. In this regard, it should enhance the cohesion of the system of special procedures of the HR Council, both geographical and thematic, so that all of them should have working methods similar to those of the WG on Arbitrary Detention which is empowered to adopt quasi-contentious opinions on individual complaints of arbitrary detention.

At a later stage, it should be obtained from the General Assembly the recognition as **independent expert** of the person holding the position of High Commissioner, not subject to instructions from the Secretary General or the Member States. In this way, it could become the highest authority of the Organization, independent, to whom any petition for the alleged violation of human rights, whatever the nature of the right violated, could be addressed in the extra-conventional field of protection. Ultimately, the High Commissioner would become a sort of **international Ombudsman** under whose coordination it will be optimized the effectiveness of the various components of the HR Council special procedures and treaty-bodies system.

Unfortunately, the record maintained by the different personalities that have so far played the responsibility of the High Commissioner has not met the above designed expectations. By contrast, the HC have done little to

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[459] This was urged, for example, by the Commission on Human Rights res. 2004/76, of 21 April 2004, para. 11.

strengthen and coordinate the protection mechanisms for human rights composed of independent experts, both conventional and extra-conventional, constantly refusing to them basic resources for the honorable performance of their duties.

Instead, efforts have focused on increasing in human and material resources for the OHCHR and its 60 field presences, with a strong orientation on promotional activities as advocacy, technical cooperation and legal assistance to States, while assistance provided to NHRI and civil society organizations has been very residually.

In fact, the High Commissioner remains a qualified official, but dependent on the instructions of the Secretary-General and the pressures received from the governments of 193 Member States. The most influential are logically developed States that provide to the Office voluntary contributions that allow it to work. Almost all these resources are consumed by technical cooperation activities that some States want to receive and others want to fund, but no one seems to evaluate seriously their results.[460]

It is even more serious the marked tendency of the High Commissioner to gradually replace with her Office and field presences geographical special procedures, composed of independent experts. We have seen how the Member States of the HR Council refuse to establish special rapporteurs in many countries, where they are really needed and, instead, rely upon the High Commissioner and her Office in the field to study the human rights situation and reporting thereof[461]. The governments concerned are well aware that a High Commissioner's Office in their countries is much more manageable in political and diplomatic terms that an independent expert. Only in Latin America are paradigmatic the cases of Colombia, Mexico, Guatemala, El Salvador, Honduras, and so on[462].

Additionally, the Office of the High Commissioner devoted enormous resources from the regular budget to meet bureaucratic needs of the universal periodic review mechanism (UPR), which little practical effect as it has already been emphasized, since it is a promotion mechanism controlled at all stages by States[463]. In contrast, the UPR contributes to further weaken both the system of special procedures and the treaty-bodies system.

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460 See doc. A/HRC/16/66, of 8 February 2011 ("Advisory services and technical cooperation in the field of human rights"), 26 p.

461 See *supra*, paragraph A. 1: *Geographical procedures*.

462 *Cfr*. VILLÁN DURÁN, C.: "El Alto Comisionado de las Naciones Unidas para los Derechos Humanos: ¿Un mecanismo de protección eficaz de los derechos humanos? *», in* ESCUELA DIPLOMÁTICA, La protección de los derechos humanos. Cuaderno 34. Madrid, 2008, 158 p, *at* 71-97.

463 See *supra*, paragraph B.1.b: *Effectiveness of the UPR*.

Fortunately, the current High Commissioner established as the Office's strategic priorities for 2010-2011 the followings: migrations, discrimination, armed conflicts, impunity, protection of ESC rights, reinforce protection mechanisms and progressive development of international human rights law[464]. The goals were laudable, but operational changes have not been perceived in late 2011, needed to be implemented within the OHCHR[465]. The result is that there has not been significant progress in any of the supposedly priority areas.

Resistance to change is found in the management staff of the OHCHR which is only inclined to adopt operative measures accepted by developed States, because they are financing most of the voluntary contributions the OHCHR needs to complete a regular budget which is always insufficient.

The HR Council has denounced the important unbalance persisting in the geographical distribution of the OHCHR, since one region has half of the Office's posts[466]. Therefore, it requested the HC to increase the geographic diversity in the composition of the Office's staff, particularly the representation of developing countries and regions and stopping hiring staff from countries and regions over-represented, in particular at the high level and the management[467].

Member States of the HR Council also realized on the importance of the redistribution of the budget within OHCHR to achieve real changes in the strategic priorities of the OHCHR. While the HC was resistant to share relevant information with the HR Council on this matter, finally on 3 May 2010 reported on financial issues to the HR Council, which still invited the HC to report on the OHCHR's draft budget on time to receive opinions from States and other stakeholders[468].

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464 *Cfr.* CCPR/C/SR.2656 of 27 July 2010, paras. 2 and 13 *in fine*.

465 See doc. A/HRC/16/20 of 30 December 2010 (report by the High Commissioner).

466 HR Council res. 19/3, of 22 March 2012, para.1.

467 *Ibidem*, paras. 5 and 8. This resolution was adopted with 12 votes against from developed States.

468 President's statement 15/2, of 1st October 2010, para. 2.

One year later, the HR Council thanked the HC for her annual report in which she had included information on sources and assignment of founds within the OHCHR. It also requested the HC to include information separate on regular budget and the voluntary contributions received, whether earmarked or general, with a view to examine it in a place mutually agreed upon[469].

ESSENTIAL READING:

- VILLÁN DURÁN, C.: "El Alto Comisionado de las Naciones Unidas para los Derechos Humanos: ¿Un mecanismo de protección eficaz de los derechos humanos? *», in* ESCUELA DIPLOMÁTICA, La protección de los derechos humanos. Cuaderno 34. Madrid, 2008, 158 p, *at* 71-97.

ISSUES:

1. Assess the human rights promotion/protection functions of the High Commissioner's Office.
2. Assess ways to improve the expert bodies for protection of human rights.
3. Assess the distribution of the budget of the High Commissioner's Office and how the financial requirements of expert bodies could be met.
4. Imagine the role of the High Commissioner as independent expert.

[469] President's statement of 30 September 2011.

C. The extra-conventional protection at the United Nations specialized agencies

1. International Labor Organization (ILO)

In the practice of the ILO three extra-conventional mechanisms were developed for the protection of certain rights, namely: the protection of the principle of **freedom of association**, the procedure relating to **discrimination** in access to employment or profession, and conducting *ad hoc* **studies** and **research**. For all other labor and union rights, even though within the jurisdiction of this specialized agency, it has not developed any extra-conventional mechanisms of protection.

(a) Special procedure on freedom of association

This procedure applies to States that have ratified the relevant international labor conventions on freedom of association (primarily Convention 87 on *Freedom of Association and Protection of the Right to Organize*, 1948[470] and Convention 98 on the *Right to Organize and Collective Bargaining Convention,* 1949[471]), and to States who have not done it yet, but they are Member States of the Organization.

This is because the above procedure finds its legal basis in the Preamble of the Constitution of the ILO[472], which considers the **principle of freedom of association** of employers and workers organizations as part of the working conditions that all States must respect to achieve social justice, which in turn is the basis of "universal and lasting peace." Thus, freedom of association is a significant driver of social justice and a sound basis for achieving a lasting peace.

Moreover, the Declaration of Philadelphia annexed to the Constitution of the ILO reaffirmed as a fundamental principle of the Organization, among others, "freedom of expression and association," that permanent peace can only be based on social justice, for what all human beings have the right to pursue their well-being in conditions of freedom and dignity; and should be promoted among all nations the recognition of the right to collective bargaining.[473]

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[470] Ratified by 150 States.

[471] Ratified by 160 States.

[472] The Constitution of the ILO is from 1919 and has since undergone minor amendments, the last of which is from 1986, still pending of entering into force.

[473] "Declaration concerning the aims and objectives of the International Labor Organization," of

In furtherance of the constitutional principle of freedom of association, the ILO Governing Body held negotiations with the United Nations Economic and Social Council (ECOSOC), culminating in January 1950 when the ILO Governing Body decided to establish the **Investigation and Conciliation Commission on Freedom of Association**, composed of nine independent members designated by the Governing Body.

Then, in February 1950, ECOSOC took note of this decision and agreed on behalf of the UN, that the ILO[474] services its Investigation and Conciliation Commission of Freedom of Association. As a result, the established procedure, which was completed in 1953, by which the ECOSOC would refer to the ILO complaints received by the UN on alleged violations of trade union rights addressed against the UN Member States that are also part of ILO.

Under this procedure, the Commission receives complaints for violation of trade union rights that have been submitted to the Governing Body of the ILO by governments and by organizations of workers and employers.

Complaints may be directed both against States that have ratified the International Labor Conventions on freedom of association, as against the States that have not ratified, although in the latter case, the consent of the State concerned will be required. The Commission may also receive complaints against States that are members of the UN but not of the ILO, whenever so requested by ECOSOC and has the consent of the State concerned[475].

The Commission will follow a procedure similar to that of the Commission of inquiry under Art. 26 of ILO Constitution. Upon receipt of the complaint, the Commission requests additional information from the parties (complainant organizations and government concerned) and to national and international organizations of workers and employers. The Secretariat will prepare an analysis of the relevant legislation.

The procedure provides for a hearing, as the Commission may hold hearings with representatives of the parties and witnesses proposed by them or automatically by the Commission. Similarly, the Commission may decide to visit the country in question, in which case it may interview any person, committing the government to refrain from taking any form of retaliation against it.

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10 May 1944.

474 ECOSOC res.277(X), of 17 February 1950.

475 INTERNATIONAL LABOUR OFFICE: Freedom of association. Digest of decisions and principles of the Freedom of Association of Governing Body of the ILO. 5th ed. revised, Geneva, ILO, 2006, 291 p., at 2. See resolution also cited in previous note.

Once the visit has been made and the investigation phase exhausted, the Commission shall make preliminary suggestions to the parties in order to reach **conciliation** among them. Finally, it will submit to the Governing Body a report on the case, which will include its findings and **recommendations** to address the issues raised in the initial complaint.

However, in practice it has rarely been effective (nine occasions) the Investigation and Conciliation Commission on Freedom of Association, due to the need for **consent** of the State concerned so the Commission may consider a complaint.

To overcome this difficulty, the ILO Governing Body established in 1951 a **Committee on Freedom of Association** that, as the Governing Body itself, has a tripartite membership (government representatives, employers and workers). In total, the Committee consists of nine members and their alternates, plus an independent president[476].

The Committee's original mandate was to examine complaints of violation of freedom of association from a formal point of view, in order to inform the Governing Body on whether it had sufficient grounds for consideration by the Investigation and Conciliation Commission. But soon the Committee started to consider also the merits of the claims, formulating its own conclusions and recommendations that the Governing Body could, in turn, transfer to the government concerned.

Over the years the Committee has examined more than 2,500 cases. Frequently received complaints refer to arrest and prosecution of trade unionists and other human rights violations thereof, such as the right to life, physical integrity, security and freedom of movement, freedom of opinion and expression; and rights of assembly and demonstration.

As for the unions, they often report improper interference in the freedom of creation, suspension and dissolution of unions or union federations, interference in the election and dismissal of union leaders, prohibition of strikes, demonstrations and union meetings, union discrimination and prohibition of collective bargaining.

The Committee's practice has developed a procedure that may be divided into two phases: admissibility and merits.

(1) Admissibility

The individual per se has no locus standing for filing a complaint with the Committee, but the associations of employers and workers. In particular, complaints filed by a national organization directly interested in the matter will be admissible. Claims may be filed also by an international organization of

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476 Between 1961 and 1995 served as President the Italian internationalist Roberto Ago, who was able to contribute decisively to the Committee's work.

workers or employers with consultative status with the ILO[477], or any other international organization of workers or employers, if the allegations relate to issues that directly affect one of its member associations.

The Committee is sovereign to qualify an organization as "association of employers or workers" in the sense intended in the Constitution of the ILO. To do this, it will not be bound by any national definition of the term, not even the fact that an organization is in exile, or that has been dissolved or has not been officially recognized. On the contrary, the Committee will not recognize as "professional organizations" assemblies or meetings that are no permanent or lack a clear direction.

Complaints must be in writing, duly signed by a representative of the professional organization and supported by evidence in support of the specific violation of union rights reported.

As noted, the complaint may be directed against any Member State of the ILO, whether or not it has ratified the ILO Conventions on freedom of association, paying attention to the constitutional nature of the principle of freedom of association.

Because of the subject, the Committee will only accept complaints concerning freedom of association in general and trade union rights in particular. Also, it will declare admissible complaints about violations of civil and political rights that are directly related to trade union rights.

As the usual requirement of exhaustion of domestic remedies, it is not considered essential by the Committee to accept the admissibility of a complaint, although it may take into account the fact that there are instances of internal remedies or the case is pending before a domestic court provided that it is independent and has appropriate procedural safeguards.

Once submitted the complaint, the complainant has a month to send to the Committee any additional information it may wish to add in justification of the complaint.

The Committee has scheduled an **urgent** procedure to deal with priority issues on which life or freedom of certain individuals are endangered. Also, in cases where the situation compromises the freedom of action of the union movement as a whole, or if it is decided the dissolution of an organization. Similarly, the procedure of urgency will be applied if the complaint has been filed during the extended term of a state of emergency declaration in the country, which has produced the alleged violation of the principle of freedom of association. Finally, the urgent procedure will be

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[477] Five international organizations of employers and workers have consultative status with the ILO: The International Organization of Employers, the International Confederation of Free Trade Unions, World Confederation of Labor, the Federation of Trade Unions and the Organization of African Trade Union Unity.

applied in cases for which the Committee has already submitted a report to the Governing Body.

(2) Merits

Once the complaint is declared admissible, the Committee will consider all arguments and determine whether or not the complaint violates the principle of freedom of association for workers and employers, avoiding accusations against the government concerned. In other words, the Committee establishes in each case whether or not the government guarantees the free exercise of trade union rights in its territory.

To reach its conclusions, the Committee shall transmit the complaint to the government concerned, who shall respond in writing to the allegations. The Committee will forward the government's response to the complainant if there is any contradiction between the two parties, for its comments to be submitted within a reasonable timeframe.

If the government does not cooperate with the Committee providing information requested within the deadline, the Committee may make an **urgent appeal** to the government to accelerate the delivery of such information. It can also authorize the President of the Committee or an officer of the Secretariat to take direct contacts with representatives of that country, which will examine the causes of the delay.

If the government persists in its non-cooperative attitude, the Committee may consider the merits of the complaint and even recommend, exceptionally, to publish the allegations contained in the complaint that could not have been contrasted with the government.

After gathering all possible written information from the parties, the Committee may open a **hearing** period, especially if both parties have made contradictory statements on the merits. It may also be useful to conduct the hearing of the parties to better appreciate the factual situation or to try conciliation between them, founded on the principle of freedom of association. Finally, the Committee requests the hearing of the government in cases where it has not complied with the terms recommended by the Committee on matters discussed above.

The Committee meets three times a year and submits written reports to the Governing Body. In each case under study, it will make **conclusions** that will be provisional if the procedure is still pending. It may also recommend closure of the cases that do not deserve further study, such as whether the facts alleged do not constitute a violation of the exercise of trade union rights, or if the allegations are totally political or too vague.

Finally, in cases that have received a thorough study and discussion between the parties, the Committee will submit a written report of its findings and recommendations to the Governing Body, with emphasis on the

measures the State should take in fulfilling its obligation to respect the constitutional principle of freedom of association. The report shall be published in the Official Gazette of the ILO.

Usually the Governing Body takes note of the report and accepts the conclusions and recommendations of its Committee on Freedom of Association. If the Committee so requests, the Governing Body will seek the consent of the State to raise the case to the Investigation and Conciliation Commission on Freedom of Association. In case of failure to achieve the consent of the State within a period of four months, the Committee may then recommend to the Governing Body the adoption of "appropriate alternative measures" considered convenient.

In addition, some steps to follow-up on recommendations of the Governing Body have been taken. If it were States that have ratified the relevant conventions on freedom of association, monitoring is entrusted to the Committee of Experts on the Application of Conventions and Recommendations, which will determine whether or not discrepancies persist between legislation or State practice with provisions of these conventions.

Instead, recommendations addressed to countries that have not ratified the Conventions on freedom of association, will be monitored by the Committee on Freedom of Association. In these cases, the Committee may request the Director General of the ILO to bring the matter to the government concerned at appropriate intervals, for the purpose of obtaining information about the action taken on these recommendations. The Committee will also regularly report on the developments in that country.

(b) Special procedure on discrimination

It is under the responsibility of another tripartite Committee of the Governing Body of the ILO, the **Committee on Discrimination**, which was established in 1973 to deal with complaints about discriminatory practices prohibited by the Convention No. 111. According to Article 1.1. (a), of this convention, it is discrimination

> "any distinction, exclusion or preference made on the basis of race, color, sex, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation…"

States, employers or workers organizations and non-governmental organizations that have suffered directly from the alleged discrimination may file complaints on these grounds if they have consultative status with the ILO.

The Committee on Discrimination, with the consent of the concerned State, should conduct a "special study" of the case, by experts appointed by the Director General of the ILO. In the absence of such consent, the Committee will report to the Governing Body suggesting recommendations that it will try to have them accepted by the concerned State.

Interestingly, this extra-conventional procedure has been used rarely, because the organizations prefer to go to the **Committee of Experts** which supervises the States' "periodic reports" on ratified conventions, taking advantage of the widespread ratification that has had the Convention No. 111 and the greater effectiveness of the Commission of Experts. But the advantage of this extra-conventional procedure is that it is potentially applicable to States not parties to the Convention No. 111.

(c) Ad hoc studies and investigations

Based on article 10 of the Constitution, the International Labor Organization has performed some ad hoc studies on the situation of freedom of association in a number of countries (Spain, Argentina, Chile, Poland), or on employment discrimination on the Palestinian territories occupied by Israel and during the apartheid regime in South Africa.

Abolished the apartheid regime, remains today the practice of submitting annually to the consideration of the International Labor Conference a report prepared by the Secretariat on employment discrimination on the **Palestinian and Arab territories occupied** by Israel.

On the other hand, under Article 19 of the Constitution, the Committee of Experts publishes every year since 1985 a thorough *general study* on the legislation and practice in Member States, on a topic chosen by the Governing Body. General studies are performed mainly based on reports received from Member States and the information provided by the organizations of employers and workers. This information will allow the Commission of Experts to examine the impact of conventions and recommendations, analysis of difficulties and obstacles to implement that issue by governments pointed out and identification of ways to overcome these obstacles. The 2012 study was devoted to fundamental Conventions.

In conclusion, extra-conventional mechanisms for the protection of human rights in the framework of the ILO only cover trade union rights and those arising from the principles of freedom of association and non-discrimination in access to employment or profession. As for other human rights issues relating to labor and trade union are not subject to protection by extra-conventional mechanisms that have been studied.

In this sense, is open on the Governing Body of the ILO, a debate whose aim is to develop all the fundamental rights that are mentioned in the Constitution and the Declaration of Philadelphia and considered to be inherent in the membership of the ILO, regardless of whether that State has ratified or not international labor agreements containing human rights standards. In this context, it has been mentioned the protection against forced labor or exploitation of child labor.

In view of the Director General of the ILO, once defined the basis and subject to the obligations inherent to the status of member in human rights matters, the procedures for monitoring and enforcement in the extra-conventional framework should be specified. In this regard, the experience of the Organization in regard to extra-conventional protection of freedom of association will be a valuable precedent to consider.[478]

2. United Nations Organization for Education, Science and Culture (UNESCO)

UNESCO has developed extra-conventional procedures for the protection of **educational** rights, which have been regulated in Decision 104 EX/3.3, of 3 March 1978, of the Executive Board of UNESCO. In fact, the Decision established two different mechanisms, depending on whether it has received individual complaints or complaints on global situations of systematic violations of educational rights.

(a) Individual complaints

International human rights law only has available one extra-conventional procedure to receive individual complaints at the level of UNESCO, although its nature is more conciliatory and of good offices than an investigative mechanism of the alleged violation and, where appropriate, to sanction the concerned State.

According to the procedure established in Decision 104 EX/3.3 of UNESCO's Executive Council, an individual complaint for alleged violation of educational rights shall be filed in writing, in a letter addressed to the Director General of UNESCO. The Secretariat (UNESCO's Office of International Standards and Legal Affairs) acknowledges receipt of the letter and shall send the author a form that must be completed and signed, with the acceptance that it will be forwarded to the government concerned and the name of the author shall be disclosed.

Upon receipt of the signed form, the Secretariat shall register it and assign it a number. From that moment every individual "communication" is sent to the government concerned for its comments, having a period of one month to respond to formal and substance issues present in the complaint. The government's response, also written, will be sent to the **Committee on Conventions and Recommendations** of the Executive Council for consideration.

The Secretariat is also preparing summaries of each case and sends them to the members of the Committee, a political body composed of 25 representatives of States. The Committee meets twice a year (April-May and

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[478] INTERNATIONAL LABOUR OFFICE: The ILO standard setting in the era of globalization. Report of the Director General of the International Labor Conference at its 85th meeting. Geneva, ILO, 1997, 86 p., at 22.

August-September). The proceedings before the Committee, which is entirely **confidential**, consist of two phases: admissibility and merits.

(1) Admissibility

The Committee on Conventions and Recommendations will consider the admissibility of the individual complaints in terms of the following ten rules, set forth in paragraph 14 (a) of the Decision of the Executive Council:

First, anonymous complaints will not be accepted, since they must be submitted in writing and duly signed by the complainant.

Second, locus standi to file a complaint is with individuals who consider themselves victims of the reported violation. Also groups of people who consider themselves victims. In addition, complaints may be filed by both individuals and nongovernmental organizations that have a direct and reliable knowledge of the alleged violation.

Third, the complaint must relate, in view of the matter, on the alleged violation of human rights protected within the sphere of competence of UNESCO, that is, on matters relating to education, science, culture and information. Thus, complaints related to the following matters will be accepted: education rights, participation in scientific progress, freely participation in cultural life and right to information, including freedom of conscience and expression.

In addition, freedom of thought, conscience and religion are considered as relevant; seek, receive and send information through any means regardless of borders; the protection of moral and material interests resulting from any scientific, literary or artistic production, and the right to freedom of assembly and association for purposes related to education, science, culture and information.

Fourth, the complaint must be drafted in a manner that is consistent with the principles underlying UNESCO, the United Nations Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights.

Fifth, the complaint must not be manifestly ill-funded, since it must be based on facts, duly proven in the written complaint.

Sixth, the use of this mechanism should not constitute an abuse of the right to file a complaint. Therefore, the complaint must be written in non-offensive terms that would be unacceptable for the government against which the complaint is directed. In practice, the Committee automatically deletes apparently offensive parts of the complaints to continue processing them.

Seventh, the complaint must be based on first-hand and reliable information. Therefore, the Committee rejected complaints that were based solely on media reports.

Eighth, the complaint must be filed within a reasonable time (determined by the Committee) from the date the reported event occurred or either the date the facts were known.

Ninth, the complaint cannot fall under the prohibition provided in the principle ne bis in idem. Consequently, the complaints pertaining to denounces that have already been subject of settlement of the States, according to the principles underlying the Universal Declaration of Human Rights and the International Covenants on Human Rights will not be admitted. If the case is pending before another international body, it will not be considered as ground if inadmissibility.

Finally, tenth, the question of exhaustion of domestic remedies. The Committee does not apply this rule in absolute terms, since it has been subject of a flexible interpretation in the sense that the complainant must state, at least, that has attempted to exhaust domestic remedies and what was the outcome. It is therefore not necessary to prove that all internal remedies of the State have effectively been exhausted.

After studying the possible causes for rejecting the complaint, the Director General shall request from the author his authorization to forward it, with its name, to the government concerned, who shall have a month to respond to formal and substantive matters set forth in the complaint. The government's response, also in writing, will be sent to the Committee for consideration.

Ultimately, the Committee shall decide on the admissibility of the complaint, which shall be communicated to the parties. This decision is, in principle, final, but may be revised in light of new information that may reach the Committee when considering the merits of the complaint. Other alternatives for the Committee are to declare the suspension of the study of the complaint awaiting further information, or postpone its study for practical or technical reasons.

(2) Merits

Declared admissible the complaint and communicated that decision to the parties, the Committee assists them in finding an amicable settlement of the matter in the context of promoting human rights within the competence of UNESCO (paragraph 14 K of Decision 104).

The Government concerned may attend meetings of the Committee and provide any oral or written information that may be required, both on questions of admissibility as on the merits of the complaint. Although paragraph 14 g) of Decision of 1978 allows the Committee in "exceptional circumstances" to request authorization from the Executive Council to receive in a hearing other qualified persons (such as the complainant, victim or other witnesses of the events), it has never made use of this procedural mechanism.

Under paragraph 15 of that Decision, the Committee shall draw up a confidential report summarizing the subject matter of the complaint and will make recommendations.

The confidential report is addressed to the Executive Council of UNESCO, who may decide in private actions to be taken, which usually involve endorsing the proposals made by its Committee on Conventions and Recommendations. In turn, reports made public by the Executive Council on the activities of its Committee on Conventions and Recommendations, sometimes have vague recommendations, and always avoid mentioning specific countries, so that the confidentiality of the mechanism continues until the end.

Pursuant to paragraphs 8 and 9 of Decision 104, the Director General of UNESCO has the prerogative to confidentially intervene in the matter at any procedural stage of the procedure for humanitarian reasons[479], to offer its good offices to the parties on finding a solution to urgent problems related to human rights of the alleged victim. In case of success in the efforts of the Director General, the procedure is considered terminated.

For its part, the Committee may propose to the parties, through the Executive Council, the adoption of specific measures under the amicable settlement of the matter. It may also suggest to the Director General, through the Executive Council, the adoption of any initiative to facilitate the amicable settlement of the matter.

In practice, the Committee has received complaints about violations of the right to education, freedom of opinion, expression, research, information and freedom of conscience. Moreover, violations of the right to participate in scientific and cultural life. There have also been reported violations of freedoms of assembly and association with educational, cultural and informative purposes.

In relation to the direct victims of the violations, the Committee has received complaints about detention, ill treatment, disappearances, exile, suspension or dismissal of teaching professionals, college students expulsion, suppression of jobs in teaching and relegation (internal exile) of intellectuals, artists and teachers.

It has also been raised before the Committee the right of children to special protection in education, the rights of minorities to exercise their own culture, religion and language, and the rights of peoples to self-determination in the context of their cultural development.

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[479] Prerogative that also acknowledges to Director General the resolution 19 C/12.1 of the General Conference of UNESCO.

The Committee has studied in the period between 1978 and 2007 a total of 545 cases. Of these, the Committee has resolved 344 cases[480] upon the following matters: 211 people were released; 21 people were allowed to leave the country in which they were subjected to political persecution; 35 exiled for political reasons were allowed to return to their country of origin; 29 people were able to reinstate their jobs in education; and 14 people recovered a publication or radio station that had been banned as a result of politically motivated censorship, etc.

The procedure suffers, however, some shortcomings that have no presented any added value in the practice. Thus, it should be noted that the Committee on Conventions and Recommendations of the UNESCO Executive Council is composed of 29 representatives of governments and not independent experts, which subtract independence and credibility to the protection mechanism.

Also, it should be recalled that the proceedings before the Committee are confidential and that the rules of admissibility are classic, but that one referred to the exhaustion of domestic remedies is interpreted with some flexibility in the practice of the Committee.

The fundamental obstacle is that the Committee should seek an amicable settlement between the parties, and has no powers to investigate the facts independently. In addition, the excessive secrecy that seems to practice the Secretariat not to disclose even the rules of procedure of the Committee, has made non-governmental organizations reluctant in the use of this procedure.

To overcome these deficiencies it is suggested that the Committee strengthen its independence by changing the composition of the Government members to independent experts, including reduction of their number to five[481].

Furthermore, the Committee should have investigative powers of the facts alleged in the proceedings that are contradictory, so that the parties be guaranteed the principle of equality of arms. Under this principle, the information provided by Governments to the Committee should not enjoy the benefit of the doubt on evidence, but must be equally balanced with those supplied by the complainant.

Likewise, any adversarial proceedings should ensure equal opportunities for the parties in formulating arguments and presenting evidence in his defense before the Committee. In this regard, the Committee could improve its procedures by enforcing competence, no matter if it is exceptional,

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[480] By contrast, 201 complaints were deemed inadmissible or were pending for a decision.

[481] WEISSBRODT (David) & FARLEY (Rose): "The UNESCO Human Rights Procedure: An Evaluation", Human Rights Quarterly, vol. 16, number 2, May 1994, pp. 391-414, *at* 411-412.

to hold hearings of witnesses brought by the victim or the complainant, in addition to those hearings already granted to the State concerned.

It would also be desirable for the Committee to adopt interim measures in order to prevent further harm to the victim, without prejudging the merits. On the other hand, the Committee's working methods should be revised to allow making public the results of its work, which would facilitate the monitoring of its activities and would encourage victims to complaint before the Committee.[482]

The truth is that, given the lack of transparency of the procedure, non-governmental organizations have been losing confidence in it. According to S. MARKS, it has never been published, not even, the internal regulations of the Committee, because so far it has prevailed the tendency to confuse confidentiality of the procedure with absolute secrecy[483].

In short, the procedure designed in 1978 by Decision 104 of UNESCO's Executive Council to address individual complaints of violation of educational rights, was based closely on confidential terms of the procedure that had been established in the UN system. Indeed, resolution 1503 of 1970 of ECOSOC, launched a confidential procedure for handling individual complaints that may qualify a situation of massive and flagrant violations of human rights in a particular country which the Commission on HR could investigate.

But, as it was seen, the "1503 procedure" was quickly surpassed in the practice of the Commission on Human Rights by the development of the "1235 procedure" or public, founded in ECOSOC resolution 1235 of 1967. In this context, the former Commission on HR established - and the current HR Council has continued this practice- a large number of special public procedures (working groups and special rapporteurs) to investigate human rights violations in a particular country or a particular topic worldwide (extrajudicial executions, torture, disappearances, arbitrary detention, etc.).

In turn, these special procedures have been entitled to receive and address individual complaints within their respective spheres of competence, without need to have exhausted domestic remedies, under the international human rights standards relevant to the Universal Declaration of Human Rights, other general rules of international law and international treaties that the State concerned has ratified.

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[482] The 2011 Committee report makes no mention of its activities in the period in respect of individual complaints. Vid. http://unesdoc.unesco.org/images/0021/002122/212202s.pdf

[483] MARKS, Stephen P.: "The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization" in HANNUM, Hurst (ed.): Guide to International Human Rights Practice. 2nd. ed. Philadelphia, University of Pennsylvania Press, 1992, 308 p., *at* 86-98, particularly 96-97.

We are therefore in the presence of a new model of legal protection of victims of human rights violations in the extra-conventional level. Of all its activities, the special procedures system presents an annual public report to the Human Rights Council.[484]

In conclusion, the procedure based on the 1978 Decision of the Executive Council of UNESCO was useful in the seventies, as was then the "1503 procedure" or confidential procedure from the Commission on HR. But to remain valid today, it should be urgently reviewed in light of the practice developed by the former Commission on Human Rights and the Human Rights Council under the "1235 procedure" or public procedure.

b) Complaints on situations of systematic violations to the right to education

The notion of "systematic violation" of human rights in a country comes from the ECOSOC resolution 1235 of 1967, which established the public procedures to study situations of gross and massive violations of human rights in a particular country. As seen in the previous section, the notion of "situations" was continued by ECOSOC resolution 1503 of 1970, which in turn created the confidential investigation of flagrant and massive human rights violations in a particular country, on the basis of individual complaints received.

In the case of the right to education, UNESCO has established a specific mechanism in 1978 to handle systematic violations of human rights and educational in particular. This mechanism, governed by paragraphs 10 and 18 of Decision 104 EX/3.3, of 3 March 1978, the Executive Council of UNESCO provides for matters of massive, systematic or flagrant violations of human rights, such as policies of aggression, interference in internal affairs, occupation of the territory of another State, colonialism, genocide, apartheid, racism and national or social oppression.

There are, therefore, complaints about State policies that are clearly contrary to the rules of jus cogens of human rights and that the sum of individual cases over the same country constitute a flagrant and massive violation of human rights in that country, including rights protected in the area of UNESCO.

Unlike the confidential mechanism that has been studied in the previous section to deal with individual complaints by the Committee on Conventions and Recommendations, complaints of systematic violations of human rights are theoretically studied by the Executive Council and General Conference of UNESCO in public session. In light of the information available, these bodies determine the measures to be taken in such situations.

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[484] See *supra*, paragraph A: *The public procedure of individual complaints ("Procedure 1235"): the system of special procedures of the Human Rights Council*.

However, before both the Executive Council and the General Conference of UNESCO may study allegations of systematic violations of human rights, the Committee on Conventions and Recommendations of the Executive Council would have previously intervened, having in these proceedings a double competence of a confidential nature:

First, the Committee conducts a detailed examination of the merits of the issues reported, to determine what deserves to be processed by the Committee (admissibility stage).

Second, once identified the issues that deserve its attention, the Committee will attempt an amicable settlement between the parties (conciliation stage).

Only if either party does not accept the proposed amicable settlement, the Committee may inform the Executive Council and the General Conference of UNESCO, who in turn will discuss in open session such issues.

But in practice it has been observed that the Committee has only considered nine issues of systematic violations of human rights and has not transmitted any of them to the Executive Council. Therefore, this mechanism has not been fully used.

Instead, the Committee has preferred to reconsider such communications by way of "individual communications" and therefore again covered by the cloak of confidentiality.

It is obvious, therefore, that the possibilities of UNESCO in matters of massive violations of human rights are not sufficiently developed to date, due to an obvious lack of political will by its Member States.

This is clearly an unsatisfactory situation. Therefore, it is urgent that UNESCO be inspired by "1235 procedure" of ECOSOC, to develop consistently the potential of its procedure dealing with "situations" of massive violations of human rights. In effect, the public procedure of the HR Council provides multiple models for the investigation of situations of massive violations of human rights within UNESCO.

Among other initiatives, the General Conference may request the Director-General to send fact-finding missions to countries where there are situations of massive and systematic violations of human rights and in particular of educational rights.

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4. Useful Internet addresses

- Thematic table of substantive human rights norms (both international and Spanish law) including indexes by rights and by issues:

http://www.fundacionpdh.org/normativa/cuadronormativo.htm

- General Web site of the Organization of the United Nations:

www.un.org

- All United Nations documents on human rights can be found on the web site of the Office of the High Commissioner for Human Rights:

www.ohchr.org

- The United Nations documents on human rights for Spain are accessible at: http://www.ohchr.org/SP/Countries/LACRegion/Pages/VEIndex.aspx

- The main international human rights instruments (conventions, protocols, etc.) are available at http://www2.ohchr.org/English/law/

- News on all international human rights treaties (entry into force, States Parties, reservations, declarations, objections, etc.) may be checked at:
http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en

- Universal Index of Human Rights (OHCHR): http://uhri.ohchr.org/about#_Toc301507543 Contains CO of Committees and recommendations by SP of HR Council, grouped by countries. It also refers to recommendations by UPR procedure and replies by States.

- OHCHR: Working with the United Nations Development Programme in the field of Human Rights. A Handbook for civil society. New York and Geneva, 2008, 194 p. Available at: www.ohchr.org/civilsocietyhandbook/

-OHCHR, Follow up to UN recommendations on human rights. Practical guide to civil society. Geneva, 2013, 60 p. Available at:
http://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendationsSP.pdf
- individual complaints addressed to Committees (treaty-bodies) should be sent to:
tb-petitions@ohchr.org

- Requests of **urgent action** under Art. 30 of the International Convention for the Protection of All Persons from Enforced Disappearance may be sent to:
ced@ohchr.org

- Information regarding the universal periodic review mechanism **(UPR)** of the Human Rights Council should be sent to the following address: UPRsubmissions@ohchr.org

- The database of **special procedures** on Venezuela is at: http://ap.ohchr.org/documents/dpage_s.aspx?c=203&su=202

- Complaints addressed to any **extra-conventional mechanism** of protection can be sent to the following address:

webadmin@ohchr.org

- Complaints addressed to the Working Group on **Arbitrary Detention** of Human Rights Council should be sent to:

wgad@ohchr.org

- Opinions by WGAD may be checked at:

www.unwgaddatabase.org

- Complaints addressed to the Working Group on Enforced or Involuntary **Disappearances** of the Human Rights Council should be sent to:

wgeid@ohchr.org

- **Urgent action** requests directed to any extra-conventional mechanisms of protection, both geographically and thematically, must be submitted to:

urgent-action@ohchr.org

- Information addressed to UPR should be sent to:
UPRsubmissions@ohchr.org

NOTES:

1. Complaints sent electronically to **conventional** protection mechanisms must be followed by hard copy duly signed by the complainant (the victim or his/her representative).

2. There are **forms** to submit individual complaints before four **Committees** established by treaties and eleven **thematic procedures** of the Human Rights Council. See

www.ohchr.org/civilsocietyhandbook/ pp. 155-176.

3. The Committee on the Rights of Persons with Disabilities has published a brochure (doc. CRPD/C/5/2 of 15 June 2011, 2 p.); its guidelines for individual complaints are in doc. CRPD/C/5/3 of 15 June 2011, 3 p.; CRPD internal rules can be found in doc. A/66/55 (2011), Annex VI, pp. 43-70); and CRPD working methods in doc. CRPD/C/5/4 of 2 September 2011, 11 p. Available at:

http://www:ohchr.org/sp/HRBodies/crpd/Pages/CRPDindex.aspx

4. The **Committee on Enforced Disappearances** made public its guidelines and form to request urgent actions under Art. 30 of the Convention: see doc. A/67/56 (2012), Annex V. See also guidelines and form to submit individual complaints ("communications") under Art. 31 of the Convention in same doc., Annex VI.

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