The Role of the Special Rapporteurs


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Introduction

From the 1980s onwards the United Nations Commission on Human Rights established a number of thematic and country mandates to examine, monitor, advise and publically report on human rights situations in specific countries and on particular human rights issues. The special procedures have been assumed by the Human Rights Council which was given the task of subjecting the special procedures to ‘review, rationalisation and improvement’. The number of mandates holders and their roles in monitoring human rights violations have been subject to change and have gained in significance and controversy. The activities of the Special Rapporteurs are increasingly objected to by those states subject to country mandates. The role has developed a quasi-judicial aspect with Special Procedures mandate holders receiving information on allegations of human rights violations and requesting governments for clarification of the facts. The role also has an advisory capacity with Rapporteurs producing their findings and recommendations following country visits. The importance of the Special Rapporteur system is taken for granted, yet there is no consensus on good or best practice in the way that mandates should be carried out or the extent or limits of the responsibilities of governments to assist Special Rapporteurs. Moreover, there is limited systematic scholarly examination of the nature and impact of the role of the Special Rapporteur in international law. It is then timely to examine the role of the Special Rapporteurs in the development and promotion of international human rights norms.

The research workshop brought together existing and previous Special Rapporteurs, civil society actors and academics working in this area to examine the role (or roles) of the Special Rapporteur. The discussions focused on the following issues:

- The importance of the role of the Special Rapporteurs;
- The relationship between the Human Rights Council and Special Rapporteurs;
- The working methods and effectiveness of Special Rapporteurs in carrying out their functions;
- The role of country mandate holders;
- The role of Special Rapporteurs in developing international law.
Part I: Keynote address

Professor Paulo Sérgio Pinheiro, Further musings of a UN special rapporteur on human rights.¹

The research workshop began with a paper by Professor Paulo Sérgio Pinheiro, in which he updated his thoughts on the issues outlined in Paulo Sérgio Pinheiro, ‘Musings of a UN special rapporteur on human rights’ 9 Global Governance (2003) 7.

Pinheiro observed that the United Nations Commission on Human Rights (CHR) only appointed its first special rapporteur in 1979 to report on abuses in Chile under the Augusto Pinochet dictatorship. In 1982, for the first time, a thematic rapporteurship was set up to examine summary and arbitrary executions. In May 2010, there were in total 35 country and thematic rapporteurs. The selection process for special rapporteurs in the CHR was somewhat unpredictable, inscrutable, and perhaps even byzantine. It was entirely controlled by the chair of the CHR. Through direct consultations with the members of the bureau, the chair appointed the mandate holders. It was extremely unlikely² to assign special rapporteurs who do not have at least the acquiescence of their own governments.

Undeniably, after the establishment of the Human Rights Council (HRC), the experience and expertise of the candidates now have a greater weight thanks the enhanced criteria. Greater transparency has been introduced with the new system of appointing mandate-holders from a shortlist recommended to the President of the Council by the Consultative Group established under resolution 5/1, based on a Public List of candidates maintained and updated by the OHCHR.

After thirteen years in the job of Special Rapporteur and Independent Expert, the work of special rapporteurs remains a powerful tool for the powerless. Reports ask member states for clarifications about allegations, request responses to specific problems, expose perpetrators, develop analyses, and propose recommendations. They may not produce immediate changes, but they do contribute to the struggle for human rights; they increase transparency and accountability. There is no doubt that rapporteurs after assessing the situation of human rights are supposed to convey to the national governments or the international community their recommendation to improve the protection of human rights. The major problem is the inexistence of any follow up by the CHR and now by the HRC or the OHCHR, that just recently has begun to consolidate the recommendations, thanks to the exercise of the Universal Periodic Review (UPR) at the HRC.

There is a clear need to improve the follow up of the recommendations of the special procedures and most particularly these coming from resolutions of the special sessions, undeniably a good innovation of the HRC. Perhaps to go beyond this frustrating situation, ways and means should be found to manage the follow up of the recommendations of the special procedures and also of the UPR through, for example, the establishment of some sort of clearing houses where all stakeholders particularly the OHCHR, UN departments and specialized agencies would be represented.

¹ Professor Sao Paulo and Brown Universities, Commissioner and Rapporteur on Children, Inter-American Commission on Human Rights, formerly Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Burundi from 1995 to 1998 and on Myanmar from 2000 to 2008), Professor Paulo presents what he says are his candid impressions about 14 years as UN special rapporteur.
² This continues to be true.
Part II: The Human Rights Council and the Special Rapporteurs

In the face of expected Review by the Human Rights Council in 2011 of the Special Procedures System, the relationship between the Council and the Special Procedures is an important one. The relationship between the Council and the Special Rapporteurs both defines the nature of the roles the Special Rapporteurs and conditions their effectiveness in promoting the protection of human rights and developing international ‘soft law’ norms. The relationship is defined in the mandate of the Special Rapporteur, and the flexible nature has allowed Special Rapporteurs to respond to changing needs in specific problem areas. The Code of Conduct suggests an attempt to restrict the activities of the special procedures. Key questions here include the following: What is the relationship between the Human Rights Council and the Special Rapporteurs; What is the evidence that the relationship has become ‘politicised’; How are the decisions made to appoint (and remove) a Special Rapporteur; What are the requirements for a good working relationship between the state and the Special Rapporteur; How important is it that Special Rapporteurs can act in a way that is seen to be independent; Is there an argument for separating the Special Procedures framework from the Human Rights Council; What implications would this have for the Council?

Professor Lyal S. Sunga, UN Human Rights Special Procedures, Treaty Bodies and Field Presences in Relation to ICC Fact-Finding.

The focus of this presentation was UN human rights fact-finding in relation to International Criminal Court (ICC) investigations and prosecutions. In particular, how special procedures can act as precursors to criminal investigations with regard to particularly severe or widespread violations. The classic special rapporteurs’ working methods of gathering information from Governments, intergovernmental organizations, the ICRC, NGOs, individual victims and witnesses, and other reliable sources, together with in situ visits, urgent action appeals and public reporting to the Human Rights Council (and sometimes the media), constituted essential means by which to pressure the Government on the basis of State responsibility to abide by international human rights law.

Situations involving genocide, war crimes or crimes against humanity, might require a stronger response from the international community, and in this connection, special procedures fact-finding should focus more on the eventuality of international or domestic criminal prosecutions. Sunga made the point that UN special procedures fact-finding on the one hand, should not be ignored by international criminal investigations and prosecutions, and on the other hand, it could not substitute for diligent and careful international criminal investigation because human rights fact-finding serves a valuable, broader purpose that cannot and should not be completely subsumed within criminal investigations.

Drawing on his UN experience with the Rwanda (1994-1998) and Darfur situations (2007), Sunga pointed out that regular and systematic information flow from special procedures to international criminal investigative bodies in some situations could avoid loss of valuable information relevant to eventual prosecutions. Sunga then approached the question from the angle of the ICC’s critical need for information and he

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3 Visiting Professor, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden.
argued that the ICC Prosecutor seemed to have relied far too much on second hand human rights reports, rather than conducting first hand criminal investigations in the territory of Darfur and other parts of the Sudan. He also drew attention to key differences between human rights fact-finding and ICC fact-finding, ultimately concluding that while one cannot and should not substitute for the other, in particular egregious situations involving genocide, war crimes or crimes against humanity, special procedures can act as precursors to criminal investigations, and should therefore be designed and implemented in such a way as to facilitate a smooth transition from special procedures fact-finding to criminal investigations, in particular, to ensure that information is properly collected, organized, stored and transmitted to ensure a secure and unbroken chain of custody with a view to enhancing its probative value and admissibility in eventual criminal proceedings.

Professor Rhona Smith, The Possibilities of an Independent Special Rapporteur Scheme

This paper focused on one of the workshop themes: the possibilities of an independent special rapporteur scheme. Inevitably any discussion on independence requires agreement on the definition deployed – international human rights texts were thus used as a benchmark with additional UN requirements of gender balance and geographical spread. Taking a strict doctrinal analysis, it is clear that the special rapporteurs generally satisfy the former tests of independence, less so the latter, although there is an argument that too rigorous an application of the requirements could restrict the power of the Council to appoint highly experienced and eminent experts. A balance should therefore be sought. Ultimately, the rhetoric of independence is tempered by the reality of a system which is intrinsically linked to the Human Rights Council, a body which, by definition, is political, being comprised of States.

What then is the relationship between the special rapporteurs and the Human Rights Council. Obviously the Human Rights Council appoints, approves, considers and terminates the mandates/mandate-holders. The President of the Council appoints the mandate-holder, drawing on the public list compiled in light of the criteria specified in the HRC resolution 5/1. Emerging evidence suggests the Council is beginning to consider renewal of special rapporteur’s mandates in light of his/her perceived compliance with HRC resolution 5/2 (Code of Conduct). This gives credence to claims that politicisation, perhaps inevitably, is characterising the tenure of rapporteurs, especially those with country mandates (subject to annual renewal). Nevertheless, the Human Rights Council uses the work of rapporteurs, both as part of Universal Periodic Review and as a contribution to its Special Sessions. The work of rapporteurs is also increasingly cited within Council debates, by NGOs and civil society, States, and treaty monitoring bodies.

Of course, discussion on the possibilities of independence must also consider the alternatives: if special rapporteurs continue outwith the Human Rights Council, where would they sit? The General Assembly, if their work can be reconciled with that of the Third committee; the Security Council, but some States may be uncomfortable with this and the spectre of the veto could influence appointments; the Secretary-General, though there are obvious issues on follow-ups and authority; NGOs, civil society and States

4 Professor, Northumbria University.
obviously appoint and use their own experts? Perhaps the more viable option is the Office of the High Commissioner for Human Rights. However, that body is already arguably under-funded and overstretched and consideration would need to be given to the use made of reports submitted to it.

A final point to consider removing the Special Rapporteurs from the Human Rights Council would arguably undermine the Council’s role of according human rights ‘a more authoritative position’ (*In Larger Freedom*, para 183) and place the Council in breach of GA Res 60/251. Moreover, it would add substance to claims of politicisation, similar claims of which arguably sealed the fate of the Commission on Human Rights. In conclusion, while the abstract concept of an independent special rapporteur scheme may have appeal, it would be ill-advised not to fully analyse the many implications thereof.
Part III: The Working Methods of a Special Rapporteur

The focus of this panel was the effectiveness of the Special Rapporteurs in carrying out their functions and the authority and legitimacy of the role, which provides individual actors a key function in the promotion of human rights in the international system. The scheme depends on the independence of the mandate holder; yet Special Rapporteurs cannot act without reference to relevant international law norms or the telos of the role – the promotion of human rights. How then is a Special Rapporteur to understand their role, and what are the requirements for effectively undertaking that role? Key questions here were as follows: How should the independence of the Special Rapporteurs scheme be understood (independence from what and to do what); What administrative support is required for Special Rapporteurs (and how does this effect their independence and neutrality); What or who are the Special Rapporteurs responsible to; What are the standards of responsibility and what are the consequences where a Special Rapporteur fails to act in accordance with those standards; What international law (and other materials) should they rely on in undertaking their role; What factual information (and from what sources) are Special Rapporteurs able to rely on; What is the ‘judicial’ role of the Special Rapporteurs in ‘judging’ allegations of human rights violations; Is the ‘judicial’ role inherent in the work of the Special Rapporteur, or should the role be defined and limited by the mandate; To what extent should the states be involved in the text of the final reports (ie. do they have a right of notice and comment); How important is transparency to the system; What is the position of witnesses under the Special Rapporteur scheme, what rights and protection do witnesses have, and what obligations do witnesses have to provide honest testimony; In the construction of the role of the Special Rapporteurs, how is the role defined; How important is the international human rights system, the personality of the mandate holder, the mandate, the instruments adopted by the Council (including the Code of Conduct for Special Procedures Mandate-holders and Manual of Operations of the Special Procedures of the Human Rights Council)?

Professor Sir Nigel Rodley, The responsibility of Special Rapporteurs

Referring to a number of high-profile acts over the years by Special Rapporteurs that indicated a lack of sense of institutional ethos in discharging their functions as appointees of a United Nations body, Professor Sir Nigel Rodley felt it important to acknowledge the responsibilities of Special Rapporteurs as well as their rights. Of course discussion in the Human Rights Council of a code of conduct were originally motivated by an attempt to make it harder for the Special Rapporteurs to discharge their traditional role. This was particularly so in light of the fact that there was already a code of conduct for experts on mission, the content of which had reflected the concerns of the special procedures. However, in fact there was little in the code as it eventually emerged that did not conform to responsible functioning of Special Rapporteurs. The main setback had been the restriction of communications with governments through ‘diplomatic channels’, thus undermining the practice of sending urgent appeals directly to the capitals of member states. Areas of responsibility include:

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5 Professor University of Essex, formerly Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment.
(1) Complying with agreed general standards. For example it was important for Special Rapporteurs to always insist on respect for the terms of reference for special procedures on mission to states. The fact that one special procedure had failed to do this in respect of one country had then made it harder for the Special Rapporteur on the question of torture to insist on respect for those terms of reference, even though these were especially important for that mandate. The disagreement led to several years’ stand-off before the Special Rapporteur’s successor—but-one was invited to the country in question on the basis of the Terms of Reference. This principled position then made it possible for a group of Special Rapporteurs to decline to visit Guantanamo Bay without (unsupervised) access to detainees.

(2) Complying with mandate-specific standards. For many years the obligation to discharge the mandate ‘with discretion’ had been part of the mandate of the Special Rapporteur on Torture (it has since been incorporated into the code of conduct for all special procedures). The fact that the Special Rapporteur on Torture interpreted this to mean that he should not make public statements before sharing them with a member state had been found to be no obstacle to being transparent in his work and accessible to the media. Also, not everything that happened, say, on mission, needed to be put into the public domain. It might be possible to seek subsequent cooperative behaviour by a state by not publicising an incident of non-cooperation with a Special Rapporteur.

(3) Complying with specific mandates of the Commission on Human Rights/Human Rights Council. In principle this is necessary and appropriate. The Special Rapporteur is a creature of that body. At the same time, where such an instruction does not correspond to the overall integrity of the mandate, e.g. a request to visit a country in respect of which the mandate holder has received no relevant information, then failure to comply may be appropriate, in defence of the mandate as a whole, even if it would then be within the power of the appointing body to remove or at least not reappoint the mandate-holder to the position.

(4) Apply general standards rather than treaties. In general, the Special Rapporteur should be relying on established international standards rather than on specific treaties that may be relevant to a particular state. After all, it is for the treaty body to apply the treaty. On the other hand, the supplementary uncontroversial invocation of relevant treaty provisions in respect of states party to a mandate-relevant treaty can strengthen a given initiative.

Despite the above elements of professional deontology, it remained troubling that there was discussion in the Council of a separate complaints procedure against Special Procedures. Even though the code had not been adopted by the Special Procedures themselves, they had effectively embraced it, insofar as they had established a complaints procedure under their coordination committee, which had not yet even been used. It was hard to accept the good faith of a regulatory initiative that had not even given a chance to a mechanism of self-regulation. It seemed more like a means of intimidating Special Rapporteurs.

The paper reflected on the paucity of literature examining the effectiveness of the UN Special Procedures on human rights and their contribution to the promotion and protection of human rights at the national level. A close examination of the main working tools of the Special Procedures – country visits and letters of communications to member states – over a five-year time period reveals that, in fact, the Special Procedures have had an important and, in a few cases, major influence on both macro-level policy and legal reforms and micro-level victim cases. While cooperation from some states remains a major obstacle to achieving impact, the Special Procedures mechanism has proven to be a valuable component of the UN human rights system.

The very fact of a country visit by an independent UN expert on human rights generally has a salutary impact on the human rights situation in a country. Country visits by Special Procedures elevate human rights on to the national agenda; garner attention and access at the highest levels of government; mobilize civil society before, during and after a visit to articulate and assert their demands; validate allegations of human rights violations in a credible way; bring public attention and debate through the media; provide direct support to victims and human rights defenders; and create pressure on a state to improve its human rights performance. Communications, in the form of letters of allegation and urgent appeals, have generated positive action by states approximately 20 percent of the time, but are ignored over half the time, another indication of the low level of state cooperation with the UN human rights system.

In addition to the problem of state cooperation, the Special Procedures system faces a number of other challenges. There is virtually no systematic follow-up to their visits and communications. Resources to prepare and carry out their work are grossly inadequate. Proper training of the independent experts on the skills needed to make the most of their mandate is also insufficient. And states opposed to international involvement in internal affairs have created a hostile environment for mandate holders through adoption and, in some cases, abuse of a new Code of Conduct. Many of these problems are surmountable with sufficient political will and resources from member states. The five-year review of the Human Rights Council in 2011 offers an important opportunity not only to protect the independence of the Special Procedures but also to strengthen them, building on past success.


The paper focused on the experiences of the UN Special Rapporteur on Freedom of Religion. In June 2010, the UN Human Rights Council appointed a new UN Special Rapporteur on Freedom of Religion, a German Philosophy Professor Heiner Bielefeldt (replacing Asma Jahangir at the end of her term). However, in a highly charged and politicised appointing process, the Council failed to uphold the nominations of the Malaysian candidate Ambiga Sreenevasan who was deemed unsuitable by several Muslim countries due to her sometimes critical stance on Islam, and similarly Dr Nazila

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6 Senior Fellow and Deputy Director for Foreign Policy, The Brookings Institution, Washington, DC.
7 Professor of Law, Brunel University London; Rapporteur ILA Committee on Islamic Law and International Law.
Ghanea was voted down because of serious opposition from the Organisation of Islamic Conference block within the Council. The appointment process of the Special Rapporteur reflects tensions in not only the continued politicisation of the processes involved in the appointment of Special Rapporteur, but also the inherent tensions and sensitivities in the subject of freedom of religion and protection of human rights.

The paper explored broadly the complexities in the subject of freedom of religion and to consider the role of the Special Rapporteur in light of these tensions and complexities. After the introductory comments, it examined the difficulties in conceptualising ‘Religion’ or ‘Belief’ in international law. It observed that the international community has thus far failed in reaching consensus on defining or conceptualising ‘Religion or Belief’. In its survey of the various international instruments the paper identified the serious debates and dissensions that emerged during attempts to articulate ‘religion or belief’. One consequence of this inability has been the failure of the global community is that there is as yet no binding international instrument on discrimination on religious grounds. In a critical mode, the paper highlighted that while it has been possible to establish treaties tackling discrimination on the basis of race or gender, no treaty has emerged which focuses on prohibiting discrimination based on religion or belief. The limited international consensus on the subject is reflected in the rather attenuated UN General Assembly Declaration on the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief (1981). It is also rather unfortunate that there are no immediate prospects of adoption of a binding human rights treaty focused on freedom of religion or discrimination against religion or belief.

The paper went on to examine the position of Special Rapporteur on Freedom of Religion or Belief (formerly, known as Special Rapporteur on Religious intolerance). The paper analysed the significant role played by the Rapporteur inter alia in

• Analysing broader human rights violations related to religious intolerance and discrimination
• Violations of individuals and communities by States and taking steps to prevent such violations and abuse.
• Using the system of urgent appeals (where the threat to the individual or communities is imminent).
• Relying heavily on in situ visits and follow-up to these visits.
• Using joint communications and visits with other Rapporteurs.

The mandate and role of the Special Rapporteur on Freedom of Religion remains critical to the protection of religious freedom, and attempts at ending religious-based discrimination and violence at the global level. In the absence of specific or sufficiently robust international mechanisms, the final substantive section of the paper considered various ways in which the role, authority and prestige of the Special Rapporteur on Freedom of Religion can be enhanced.
Part IV: The role of Country Mandate Holders

The country mandate is perhaps the most controversial aspect of the Special Rapporteur, the mere fact of being subject to a mandate is an implicit criticism, and comments and reports of Special Rapporteurs can be seen as a ‘judgment’ of the human rights record of the state concerned. In order to be effective, country mandate holders must be allowed access to the state, its people, the government, opposition and civil society actors. It also suggests a standard against which the state should be ‘judged’, but given the fragmentation of international human rights law it is not evident what that standard should be (or the extent to which Special Rapporteurs should replicate the work of other UN institutions (such as the Human Rights Committee)).

Key questions here concern the role of Special Rapporteurs in promoting human rights in a way that can be seen as independent and consistent with their mandate and role. They include: the requirements for the effective conduct of the role, including pre-visit information; the right of access to the state and to all parts of the state; engagement with individuals and civil society actors within the state; the rights and expectations of individuals who meet with the Special Rapporteur; access to senior government members, including those responsible for the protection of human rights; publicity about any visit; the possibility of the Special Rapporteur promoting domestic debate on human rights issues; the fact-finding aspect of any visit and status of any comment on the facts; and the necessary requirements for the effective gathering of information.

There is also a need to examine the responsibilities of states and evaluate the impact of Special Rapporteurs: what are the duties of cooperation here (and what is the experience); what are the requirements for the Special Rapporteurs to carry out their role effectively; what is the role of non-state actors, including civil society and the media; what follow-up mechanisms are required? What responsibilities do member states have to cooperate with SPs? In this context, a set of guidelines of best practice may be appropriate.

Professor Vitit Muntharborn, ‘The Role of the UN Special Procedures (Special Rapporteur et al): Challenges of a Country Mandate’

The rapporteur to the research workshop reflected that the presentation by Professor Muntharborn highlighted the experiences of the speaker in relation to the country mandate for Democratic People’s Republic of Korea (DPRK or North Korea), which did not consent to its establishment and does not engage with the Special Rapporteur. Nonetheless, the Special Rapporteur is transparent in his workings to the government of North Korea. The speaker emphasised the importance of the independence of a country Rapporteur and the value in the role in providing a voice for refugees and victims. Methodologically, whilst the Special Rapporteur has no presence in North Korea, the reports of the United Nations and other NGO reports are of assistance. Visits to neighbouring states are also important, in particular to meet with refugees and those seeking asylum. In all cases, the Special Rapporteur must be sensitive to the position of victims. The speaker emphasised the importance of good and transparent relations with all interested parties and for the holder to earn credibility and trust; and also to make very cautious statements. The relevant international law standards are those accepted

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8 Professor Chulalongkorn University, Bangkok and Special Rapporteur for North Korea, previously Special Rapporteur on the sale of children, child prostitution and child pornography.
by the state in the form of treaty obligations. In compiling the reports, the speaker recommended clear and brief recommendations. Joint communications with thematic mandate holders works-positively and cooperation with other UN entities was commended.

In terms of the review of the special rapporteurs system, the speaker emphasised the following: the need for mandate holders to engage proactively with the process; the beneficial aspects of the UPR; need for full integration of the special rapporteurs system in the United Nations; and the importance of the scheme in providing access to the international system to victims.

Professor Surya Subedi, 'The Experience of the UN Special Rapporteur in a Country in Transition: A Case Study of Cambodia'¹⁹

The speaker reported that Cambodia is a country which still is coming to terms with a tragic past. The legal, constitutional and political system had to be rebuilt effectively from scratch when the country began to pull itself together in the aftermath of the conflict lasting for nearly three decades, including the period during which the Khmer Rouge were in power. The country has witnessed a period of political stability in the recent past. This has allowed rapid economic development in recent years thereby bringing more and more people out of poverty and into a position to better enjoy their human rights, including economic, social and cultural rights. However, the Government has not been successful in achieving a balance between economic development and human rights protection and the international community including the United Nations human rights machinery have stepped in to help the Government. The appointment of the Special Rapporteur on the situation of human rights by the UN Human Rights Council is one such measure.

The challenge for a Cambodia is to continue with the process of reform and democratization and to implement the provisions of international human rights treaties most of which are now part of Cambodian law. In spite of the progress that Cambodia has achieved in so many areas of human activity and especially in the area of economic development, the culture of democracy remains weak. For instance, the practice of filing criminal lawsuits against opposition party political leaders, journalists, and human rights defenders has not stopped. This legal offensive mounted by the Government has raised questions about the process of reform and democratisation in Cambodia. The degree of separation of powers required to make the judiciary independent has not been achieved. The challenge is to instil confidence in the public in the independence and effectiveness of the judiciary. People’s access to land is perhaps the most important human rights issue in Cambodia today. Most of the issues concerning land management and evictions of people from land are the result one of the most horrendous human tragedies of modern times, i.e. the movement of people in big numbers from east to west and north to south in search of sanctuary during the conflict in Cambodia. Millions of people were forced to leave the capital city and other cities and towns during the rule of the Khmer Rouge period and many other millions traumatised by the conflict fled from their homes to save their lives. When relative peace returned to Cambodia people began to return to their homes, making the task of land management and land titling a mammoth one in the country. The manner in which authorities have dealt with the

¹⁹ Professor, Leeds University and Special Rapporteur for Cambodia.
urban poor, those on the margins of the society and the indigenous communities has been a haphazard one. The government is in the process of developing a proper housing policy or proper national guidelines on land evictions and the UN and other development partners are helping the Government in this endeavour.

**Dr. Amrita Mukherjee, The Special Procedures in monitoring compliance through State missions: the example of the Special Rapporteur on Torture**

This paper focused on the role of the Special Rapporteur on Torture. The mandate of Special Rapporteur on Torture (SRT), which is flexible and broad-based, allows him (or her) the opportunity to visit states and conduct fact-finding on the levels of compliance with international human rights norms. Between them, the four SRTs have visited about 40 states over a 25 year period. The SRT is able to make recommendations based on on-site observations and also on the basis of other information he has received. The system is based on the cooperation extended by states. Before a visit may take place, the terms of reference for the visit must be decided. Some states have attempted to amend the terms of reference, which seek to ensure good practice, the independence of the Rapporteur and equal treatment of states visited. The SRT has remained firm in retaining the terms of reference and has cancelled country visits in which the terms have been contested. An example was in relation to an intended visit to Guantanamo Bay. The work of the SRT in relation to state missions is quasi-judicial in that he operates in according to fact-finding criteria that seeks to accord independence and may draw conclusions. The reports of the SRT reveal that the he has often been allowed unequalled access to places of detention, whether they be prison or police station cells and undeclared places of detention.

Given the depth of coverage of most of the state reports of the Rapporteurs, and the restrictions in resources, the questions have recently arisen as to what should be the focus of the SRT’s role. The special procedures were not meant to provide a supplementary inspection system but instead to essentially respond to allegations of violations of the prohibited. Therefore should the mandate be stretched beyond what was originally contemplated? Also, as follow up visits are not built into the terms of reference, the SRT may not determine independently and more fully, whether recommendations have been followed. Given that such mechanisms are beyond the reach of most human rights treaty bodies, follow up, may be an area that the SRT may develop, given the flexible mandate. International law is now developing on theories of state compliance and the effectiveness of human rights mechanisms and the work of the SRT will be subjected to further examination.

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10 Lecturer. Leeds University.
Part V: The role of Special Rapporteurs in Developing International Law

The sources of international law are well known. This session examined the role of the special procedures mandate holders in shaping international norms. The focus was on the ways in which Special Rapporteurs have played a part in the emergence, acceptance and internalisation of international human rights norms. This development has emerged *inter alia* in the reports of the Special Rapporteurs on thematic trends in the protection of human rights, delivered in separate reports. There is a need to examine the impact of these reports on the body of international human rights law. The focus is on both the way in which Special Rapporteurs shape international soft law norms and the reliance by Special Rapporteurs on soft law instruments to evaluate the human rights situation in a particular state. The focus will be on both civil and political rights and economic and social rights (which often have a more indeterminate, or ‘softer’, quality). Key questions here include: What evidence is there that Special Rapporteurs have developed international human rights law; Which international courts and tribunals have relied on the reports of Special Rapporteurs; To what extent have other bodies and academics relied on the work of Special Rapporteurs; What ‘sources’ of international law do Special Rapporteurs rely on themselves; Given the fragmentation of international law and international human rights law, is the role of the Special Rapporteur consistent with a positivist analysis of global governance (identifying what states have willed), or can the Special Rapporteur system be seen as part of a ‘governance’ system, subjecting certain states to a set of values they have not accepted; To what extent are Special Rapporteurs part of the governance system of the international community, and is the role legitimate; If Special Rapporteurs are part of a system of public law governance what are the implications of this for the ways in which they carry out their mandate?

Christophe Golay, Claire Mahon and Ioana Cismas, *The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights*¹¹

In the context of the 2011 review of the Human Rights Council¹² an analysis of the impact of the UN Special Procedures on the development and implementation of economic, social and cultural rights (ESCR) appears highly opportune. The Leeds presentation has focused solely on the segment of the paper dealing with the development of international law.

During the last two decades ESCR have increasingly been repositioned on the same value plane as civil and political rights. Nonetheless, political challenges linger from the Cold War era. More importantly, the lack of justiciability argument continues to be charged against ESC rights, even if with less strength in recent years. While

¹¹ Dr. Christophe Golay and Ms. Claire Mahon are the Joint Coordinators of the Project on Economic, Social and Cultural Rights at the Geneva Academy of International Humanitarian Law and Human Rights. Ms. Ioana Cismas is a Researcher with the Project on Economic, Social and Cultural Rights. They worked for several years as advisors to Jean Ziegler, the Special Rapporteur on the right to food, 2000-2008, and currently, they offer legal support to Jean Ziegler’s mandate as Vice-President of the Advisory Committee of the UN Human Rights Council.

¹² A policy paper containing 25 proposals for ensuring a more effective use of expertise in the work of the UN Human Rights Council has been prepared under the auspices of the Geneva Academy of International Humanitarian Law and Human Rights to inform the review process for the Council, available online at [www.adh-geneva.ch](http://www.adh-geneva.ch)
representing relatively new additions to the UN human rights mechanism, special procedures with a mandate related to ESCR have in the last years contributed to demystifying and rejecting the non-justiciability charge against ESCR.

On the one hand, mandate-holders have attempted to define the content of different ESC rights and the corresponding states’ obligations. Several special rapporteurs and independent experts sought to fill normative gaps by developing analytical frameworks or clarifying aspects of a certain human right, including the specific application to particular groups such as women, children, indigenous people, prisoners, and people with disabilities. Examples include:

- the ‘4As’ scheme of Katarina Tomasevski, the first Special Rapporteur on the right to education according to which ‘governments are obliged to make education available, accessible, acceptable and adaptable’;
- the project of Catarina de Albuquerque, the Independent Expert on water and sanitation, to define sanitation from a human rights perspective, to clarify what obligations Governments carry under human rights law in respect to sanitation and interestingly what obligations they do not have.
- normative development in the areas of extraterritorial obligations and international cooperation and assistance, two aspects of particular importance for the implementation of ESC rights, were addressed by Jean Ziegler, the first Special Rapporteur on the right to food and Paul Hunt, the first Special Rapporteur on the right to health.

On the other hand, mandate-holders have tried to develop international standards and other soft law documents so as to respond to challenges posed by the implementation of these rights in current times. The involvement of the special procedures differs according to the type of process that led to the development or adoption of these instruments – process led by states; process led by the special-rapporteur; process fostering wide consultations with all stakeholders on an equal, quasi-equal footing. Soft-law instruments drafted by mandate-holders themselves appear to set higher standards than those ensuing from state-led processes. However, it would appear less likely that states themselves would use these instruments, as they are less widely embraced by the parties they seek to regulate. Nevertheless, if regularly employed by other actors – such as the Committee on ESC Rights and NGOs – a spillover effect can be

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13 While the Working Group on Enforced or Involuntary Disappearances was created in 1980, the first special rapporteur on an ESC right – the right to education – was not appointed until 1998. See OHCHR, Special Procedures assumed by the Human Rights Council, Thematic Mandates, updated on 15 December 2009, http://www2.ohchr.org/english/bodies/chr/special/themes.htm


17 See for example The Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, FAO, Rome 2005.


seen and the legitimization of the instrument can be expected, also among governments. Therefore, a key lesson to be learned is that a careful balance between transparency and participation and the independence of the mandate-holder must be sought.

Paul O’Connell, ‘Catalytic Conversers: The Role of Special Rapporteurs in Advancing Awareness, Understanding and Protection of Human Rights’, 20

The paper sought to address two questions: (i) what should Special Rapporteurs (SRs) do; (ii) and to answer this first question through an examination of the prior question of what it is SRs do at present. Through an examination of the work of the SRs on the rights to education, health and food, the paper concluded that SRs could perform a crucial role at a number of levels – educational, protective and normative – and that they could best do this through being catalytic agents in a series of ongoing dialogues with a disparate number of groups and individuals. The relative autonomy that SRs enjoy, gives them greater freedom to engage with a wider range of bodies and also to draw on a wide variety of information sources. This freedom means that SRs can engage with groups and individuals on their own terms – in the vernacular, without the (unnecessary) formality of invoking formal international legal provisions or concepts – thus bridging the gap between the ideal of international human rights, and approximating their realisation in real terms.

This, then, is the “added value” of SRs, it is, the paper argued, more likely to see such normative development undertaken by thematic, as opposed to country specific, mandate holders. A final issue that was addressed was the extent to which (if at all) SRs should be seen as a form of adjudicative forum. The presentation was of the view that as, for the most part, there were numerous bodies within the UN who formally adjudicate on rights claims, it would not be ideal for SRs to claim this function, albeit somewhat augmented, for themselves. Instead the SRs more informal engagement with structural obstacles to the protection of human rights, and raising awareness and understanding of the existence and nature of such obstacles, was the really novel contribution SRs could make. The lessons learnt were as follows.

There is a glut of institutions, forums, instruments and interested parties involved in the global, regional and local protection of human rights. Relatively recently UN Special Rapporteurs have been added to this ensemble, and the question, ultimately “is the juice worth the squeeze?” – Or, to put it another way, do Special Rapporteurs bring anything “new” to the table. The paper concluded, drawing on the work of the Special Rapporteurs on the rights to education, health, shelter and food, that they do. A report by Amnesty International notes that the SRs are ‘at the core of the UN human rights machinery’ and ‘play a critical and often unique role in promoting and protecting human rights’. 21 Amongst the most important tools which the SRs use are: (i) annual reports, (ii) country visits and fact finding missions, and communicating complaints. 22 Of particular significance for present purposes, is the fact that most SRs use their annual reports to, among other things, ‘provide and overview of current and pressing issues, to

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20 University of Leicester.
systematize in some way the approach adopted to the mandate and the lessons learned, and to develop particular interpretations of the norms in question’.  

The former Special Rapporteur on the Right to Education, Katarina Tomaševski, notes how she taught herself ‘to explain what the right to education is in five minutes without mentioning any human rights treaty, but by conveying the underlying logic’. She notes that she ‘stopped explaining [treaty provisions and specialist reports etc] to people who do no know how, why, and where international treaties are forged … [and] do not want to know unless these are useful tools to vindicate human rights’. Instead, Tomaševski sought to translate key human rights norms and principles into the vernacular of disparate groups. Tomaševski also identifies three main functions which she performed while Special Rapporteur: (i) helping to mainstream human rights in global monitoring, (ii) translating human rights law into accessible vernacular; and (iii) assessing the human rights performance of governments, both those who had signed up to the ICESCR and those that had not (the US).

The Office of the High Commissioner acknowledges that SRs ‘constitute a unique link between governments, national institutions, and non-governmental and civil society organizations… They interact daily with actual and potential victims of human rights violations around the world and advocate vocally for the respect of their rights. Through the expertise they have developed over the years, the special procedures have advanced the discourse on human rights’. For example Miloon Kothari, former SR on the Right to Adequate Housing, in his final report, articulated ‘practical guidelines for States in development-based evictions and displacement’.

Abdelfattah Amor, the former Special Rapporteur responsible for monitoring implementation of the UN Declaration on the Elimination of All Forms of Discrimination and Intolerance Based on Religion and Belief, notes that the educational function of Special Rapporteurs is ‘absolutely fundamental’ to the mandate, because of the central role which education plays in establishing a culture of human rights protection.

Katarina Tomaševski notes that ‘One of the most useful things I did was to relentlessly challenge the World Bank until it changes its rhetoric. Now it opposes the charging of fees in primary education. My “dialogue” with the World Bank was an example of the need to expose and oppose abuses of power that obliterate the ability of many indebted and impoverished countries to meet any obligations except those servicing their debts’.

Amor, adopting a very expansive understanding of the mandate, held that it ‘covers anything which can have a positive or negative impact’ on the right or theme concerned, this can be one of the key strengths of the SRs. They are less constrained,

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23 Steiner et al at p.769.
25 Ibid.
26 Tomaševski at pp.709-710.
31 Amor at p.946.
by procedural, standing or time constraints, than most treaty monitoring bodies, and can thus receive and address information from numerous sources.\textsuperscript{32}

Special Rapporteurs can be seen as catalytic actors in a series of overlapping dialogues – with governments, civil society, individuals, academics and indeed the human rights machinery of the UN – which seek, cumulatively, to progress understanding of human rights . . . The SRs system remains chronically under-resourced, Amor certainly veers into the hyperbolic when he argues that we could say ‘that the Human Rights section of the United Nations is the Third World of it’,\textsuperscript{33} but this comment does highlight the general problem of insufficient resources undermining the work of SRs.\textsuperscript{34}


This paper focused on the role of the Special Procedures in developing international law in relation to the law on internal displacement. The role of Human Rights Council’s special procedures in the development of international law has been a distinctly neglected area of inquiry. The discussion on the formulation of the United Nations Guiding Principles on Internal Displacement, thus, serves a useful purpose. Developed under the auspices of the mandate of the UN Representative of the Secretary General on the human rights of internally displaced persons and endorsed by the former Human Rights Commission in 1998, the Guiding Principles brought together, in a comprehensive and systematic fashion, most of the salient rules of international law relevant to the protection of IDPS whose status under international law had not been settled. They also sought to fill certain ‘gaps’ and ‘grey areas’ under international law. The SRSG also elaborated additional soft-laws such as the Guidelines on Durable Solutions and the Operational Principles on Human Rights and Disasters.

Despite their ‘unorthodox’ development outside of an inter-governmental negotiation, the Principles have now been widely accepted and are considered as authoritative norms. They have been used as a basis for the development of soft-laws by other special procedures. They inspired further developments of international, regional and domestic laws. The Human Rights Council recognised them as important international framework for the protection of and assistance to IDPs. Similar resolutions have been adopted by the General Assembly including in the 2005 General Assembly Outcome Document. The seminal 2005 ICRC customary law study identifies the guiding principles as sources of international customary law. ILC is currently studying them for its work on the protection of persons during disasters. More significantly, their provisions were used for the drafting of the African Union Convention on IDPs and the Great Lakes Protocol on IDPs in 2009 and 2006 respectively. Both instruments recognise the Guiding Principles as sources of law. Numerous states have also adopted legislations based on the Guiding Principles, or as is

\textsuperscript{32} Amor gives the examples of receiving information from ‘states … nongovernmental organizations … universities … research institutes … people involved in academic life, and from people involved in the political arena’ as well as from victims of rights violations, p.946 and AI note that SRs have consistently been ‘undermined by chronic under-funding’ at p.3.

\textsuperscript{33} Amor at p.947.

\textsuperscript{34} As Steiner, Alston and Goodman note, SRs ‘have long complained of the gross inadequacy of the assistance available to them as a result of chronic financial and staff shortages within the OHCHR’ at p.767.

\textsuperscript{35} First Secretary, Ethiopian mission to the United Nations in Geneva and PhD student University of Bern.
the case in Sierra Leone endorsed the Guiding Principles as a binding instrument directly applicable in the domestic legal system.

The success of the SRSG in formulating the Guiding Principles and the profound impact of the latter is rooted in the distinctive challenges internal displacement continues to present, the particular working environment of the two mandate holders appointed to the position so far, the personal commitment and skills of the mandate holders; the extremely positive reception to the instrument by UN system to the Guiding Principles and the unique working method the mandate holder pursued in mobilising the resources of ‘new actors’ in international standard setting. During its 14th session, the Human Rights Council renewed the mandate of and core-functions the SRSG and his unique collaboration with UN agencies, *albeit* with a new title of special rapporteur.
Conclusions, reflections, recommendations

During the discussions that followed the papers and in the final session (‘Conclusions, reflections, recommendations’) a number of important themes emerged in relation to issues that should inform any review of the workings of the Special Rapporteurs scheme and areas for further research. The discussions highlighted the following:

1. There is a need for transparency and the elaboration of objective criteria in the selection of Special Rapporteurs. Selection should be undertaken on the basis of the expertise and experience of candidates;

2. The relationship between the Human Rights Council and Special Rapporteurs is of crucial importance to the effective execution of the role and responsibilities of Special Rapporteurs. Whilst the participants accepted that the Council is by definition a ‘political’ body (being comprised of states), it is necessary for the Human Rights Council and Special Rapporteurs to frame their relationship in a way that does not undermine the possibility of promoting the promotion of human rights.

3. The importance of proper funding and administrative support for Special Rapporteurs was emphasized;

4. The workshop accepted the requirement for Special Rapporteurs to be accountable for their actions, but expressed concern that any new or reformed mechanisms of accountability should not undermine the independence of Special Rapporteurs or their ability to promote human rights;

5. The discussions emphasized the importance of the role of Special Rapporteurs in providing a voice for victims of human rights abuses, who have few opportunities to be heard in the international system;

6. The independence of the role is key to the effectiveness of the Special Rapporteur schemes. Whilst engagement with states is essential for the carrying out of the relevant functions (in terms of access to information and particular places), the relationship with the State should not undermine the ability of the Rapporteur to provide an objective judgment of the situation;

7. The production of accurate reports with clear recommendations is an important element in the role of Special Rapporteurs. Good practice suggests that Special Rapporteurs should allow the State to see a report before it is made public in order to correct any factual errors and provide a considered response to recommendations;

8. The workshop highlighted the importance of ‘follow-up’ mechanisms and the difficulty for Special Rapporteurs undertaking the role; it also noted the importance of the Universal Periodic Review in this regard;
9. The workshop highlighted the importance of engagement at the national level and with domestic political actors (including the government and opposition); The importance of engaging with the people and civil society through the local media was emphasized;

10. Special Rapporteurs should be guided by the provisions of general or customary international law (binding on all states); the commitments accepted by a particular state through acceptance of international treaty obligations; and the normative commitments contained in other documents adopted by the United Nations (in particular the UN General Assembly);

11. Where Special Rapporteurs evaluate the actions of states against international law standards, there is a requirement to ensure as far as possible the factual accuracy of any information and allow the government the opportunity to present its understanding of the situation;

12. The research workshop highlight the positive role that Special Rapporteurs play in the codification and elaboration of existing international law norms.
Annex: Speakers and participants

Allehone Mulugeta Abebe, First Secretary, Ethiopian mission to the United Nations in Geneva and PhD student University of Bern.

Paul O’Connell, University of Leicester.

Ioana Cismas, Geneva Academy of International Humanitarian Law and Human Rights.

Dr. Amrita Mukherjee, University of Leeds.

Professor Vitit Munharborn, Chulalongkorn University, Bangkok and Special Rapporteur for North Korea, previously Special Rapporteur on the sale of children, child prostitution and child pornography.

Ted Piccone, Senior Fellow and Deputy Director of Foreign Policy Studies at Brookings Institution, Washington, DC.


Professor Javaid Rehman, University of Brunel.

Professor Sir Nigel Rodley, Chair of the Human Rights Centre, University of Essex and member of the UN Human Rights Committee; formerly Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment.

Professor Rhona Smith, University of Northumbria and RWI Visiting Professor in Human Rights, Peking University Law School, China.

Professor Surya Subedi, University of Leeds and Special Rapporteur for Cambodia.

Professor Sunga, Visiting Professor, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden.

Professor Steven Wheatley, Director of the Centre of International Governance, University of Leeds.

Ms Sylvia Ngane, Rapporteur, PhD Student, University of Leeds.