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# Standard-Setting by the United Nations Commission on Human Rights: An Overview from its Inception in 1947 until the Creation of the Human Rights Council in 2006

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# STANDARD-SETTING BY THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS

## An Overview from its Inception in 1947 until the Creation of the Human Rights Council in 2006

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### Introduction

In 1990, the Secretary-General of the United Nations observed that the UN had “from its very inception ... engaged itself in elaborating human rights instruments and establishing bench marks against which standards of behavior can be measured.”<sup>1</sup> In 2005, his successor claimed that “... the body of international human rights norms developed to date by the Commission is, perhaps, its greatest legacy.”<sup>2</sup> Some observers assert that the Commission’s primary standard-setting activities were limited to a few years at the inception of the organization (1947-1954)<sup>3</sup> but others disagree<sup>4</sup> and the first view is not supported by an examination of the practice of the organization. In fact, the Commission could not avoid being continually engaged in standard-setting from its creation until its demise.<sup>5</sup> As the International Commission of Jurists has noted,

“... law-making, whether at the domestic or international level, is necessarily a never-ending process. Human rights law must keep pace with the changing nature of human needs and aspirations, and with new forms of rights violations and understandings reached about their causes”.<sup>6</sup>

This article presents an overview of human rights standard-setting by the Commission and Sub-Commission from their inception until the creation of the Human Rights Council. Covering this lengthy period of time makes it impossible to address every normative text considered by the two bodies, even leaving aside those that were proposed and not adopted, and the examples given are illustrative rather than exhaustive. In addition to the sources cited in the footnotes, see also the additional suggestions for further reading.\*\*

The review that was undertaken has indicated that while the Human Rights Commission was an important locus of standard-setting from its first session, it was not the exclusive body engaged in this process, nor was it the origin of most standard-setting projects. The Commission, instead, most often reviewed, debated and adopted initiatives originating in the Sub-Commission or General Assembly, from NGOs and, occasionally, from within the Secretariat. In addition, as will be seen below, quite a few major human rights instruments were concluded without any input from the Commission. Topics falling within the

mandate of a specialized agency, such as labor rights and education, understandably have been dealt with by the relevant agency, but it is also apparent that, in other instances, states or UN bodies chose to bypass the Commission and initiate the drafting and adoption of new standards in another UN body, including the General Assembly, the Economic and Social Council (ECOSOC), or the Commission on the Status of Women.

Even when the Human Rights Commission on rare occasions did initiate projects, the Charter entrusts the final elaboration and adoption of instruments to the ECOSOC and the General Assembly.<sup>7</sup> The General Assembly, especially in its Third Committee, often made substantial revisions before giving final approval to the completed texts, even after the Commission had engaged in lengthy substantive negotiations. If there was a “silent partner” in the process, it was ECOSOC, which usually sent through Commission texts without comment or change.<sup>8</sup>

Overall, the review concludes that the Commission did more standard-setting than its detractors admit, but less than its advocates claim. As just stated, however,

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This article is part of a series of presentations contributed to the Potsdam Colloquy (see above at p. 1).

\*\* For further reading, in addition to the sources cited infra see: Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 58 (1963); Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights* 556 (1973).

<sup>1</sup> Secretary-General, *Report on the Work of the Organization*, 1990, A/45/1, p. 10.

<sup>2</sup> *Explanatory note by the Secretary-General to the President of the General Assembly*, 13 April 2005, UN Doc. A/59/2005/Add.1, para. 11.

<sup>3</sup> Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* 3 (1995), citing J.-B. Marie, *La Commission des droits de l'homme de l'O.N.U.* (1975).

<sup>4</sup> See International Commission of Jurists, *Reforming the Human Rights System: A Chance for the United Nations to Fulfill its Promise* (2005), 19-20.

<sup>5</sup> Philip Alston, “The Commission on Human Rights”, in Alston, *supra* note 3, at 131.

<sup>6</sup> International Commission of Jurists, *supra* note 4, at 20. See also the remarks of Louise Arbour, UN High Commissioner for Human Rights, delivered at the opening of the 61<sup>st</sup> session of the Commission on Human Rights, March 14, 2005 (suggesting that the process of articulating the contours of rights “can never be complete.”)

<sup>7</sup> Art. 62(3), Charter of the United Nations, signed June 26, 1945, entered into force October 24, 1945, 59 Stat. 1031, T.S. No. 933 (1945).

<sup>8</sup> For example, ECOSOC devoted only two meetings to consideration of the Universal Declaration of Human Rights (UDHR), August 25 and 26, 1948, before transmitting it to the General Assembly for adoption. See *Report of the Economic and Social Council to the General Assembly 1947-1948*, GAOR, 3<sup>rd</sup> Sess. Supp. No. 3 (A/625), Sept. 1948, 34-35.

Commission standard-setting usually did not originate in the Commission itself, but was the result of direction coming from the General Assembly or ECOSOC, or resulted from studies and proposals presented by the Sub-Commission. States sitting on the Commission rarely initiated a project; when one did, the state's leadership often ensured the adoption of a normative text or texts on the issue.

The process of elaborating standards involved numerous actors, including states taking leadership on an issue, the Sub-Commission,<sup>9</sup> specialized agencies, NGOs, the General Assembly (especially in the Third and Sixth Committees), and the Secretariat. Original authorship normally cannot be attributed to a single entity and even less to an individual. The multiplicity of actors with different viewpoints participating in the drafting process had both a positive and a negative dimension. On the negative side, the desire for consensus sometimes led to vague, weakened, and, some claim, inconsistent obligations. On the positive side, the process invested states in the final product, often producing positive changes in national laws and practices even before the text was finalized. Thus, the politics of the negotiations were not always detrimental to human rights. While an analysis of the impact of Commission standard-setting is beyond the scope of this article, it is obviously a necessary part of assessing the overall contribution of the Commission to promotion and protection of human rights. Such research as has been done indicates that the international standards adopted by the Commission have had a significant impact on state practice.<sup>10</sup>

### 1. The Mandate of the Commission

When the San Francisco conference that adopted the UN Charter ended without concluding an international bill of rights to be ratified with the Charter,<sup>11</sup> the issue did not disappear. A group of states remained insistent on the need to articulate a catalogue of the human rights to which the Charter referred.<sup>12</sup> The Preparatory Commission of the United Nations recommended that the Economic and Social Council immediately establish a Commission on Human Rights<sup>13</sup> and direct it to formulate an "international bill of rights" and to prepare studies and recommendations which "would encourage the acceptance of higher standards in this field and help to check and eliminate discrimination and other abuses".<sup>14</sup> The recommendation was approved by the General Assembly on February 12, 1946<sup>15</sup> and four days later ECOSOC created the Commission on Human Rights.<sup>16</sup> A subsequent ECOSOC resolution conferred on the Commission the mandate to submit to the Council "proposals, recommendations and reports" regarding

- (a) an international bill of rights;
- (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;
- (c) the protection of minorities;
- (d) the prevention of discrimination on grounds of race, sex, language or religion; and
- (e) any other matter concerning human rights not covered by other items.<sup>17</sup>

Standard-setting, in particular formulation of an international bill of rights, was thus to be the focus of the Commission's work.<sup>18</sup> The Commission's functions were not limited to standard-setting, however, and during its tenure it had to determine its priorities among a number of different matters. Nonetheless, at least during its first twenty years, standard-setting was its main role. Indeed, in 1948 the Commission's Chairwoman Eleanor Roosevelt

wrote that the work of the Commission should be directed "for years to come" to drafting "many conventions on special subjects."<sup>19</sup> Alston has likened this role to that of the International Law Commission, but restricted to matters of human rights.<sup>20</sup> Others, like Humphrey, criticize the Commission for its focus on standard-setting, rather than preventing and responding to violations.<sup>21</sup>

### 2. The Lasting Monument: The Universal Declaration of Human Rights<sup>22</sup>

The Commission can rightly claim most of the credit for the UDHR, completing the text during two sessions over less than 18 months and having the General Assembly proclaim it some six months later. The Commission's work was aided by having more than a dozen drafts submitted by governments, NGOs and individuals, many coming in even before its first session.<sup>23</sup> These drafts were compiled

<sup>9</sup> At the outset of its work, ECOSOC authorized the Commission on Human Rights to create three sub-commissions. ECOSOC Res. 9 (II) of June 21, 1946. . The Sub-Commission on Freedom of Information and the Press met only between 1947 and 1950 while the proposed Sub-Commission on Women was instead established as a full Commission. The sole Sub-Commission that was created and continued to function throughout the life of the Commission was the Sub-Commission on Prevention of Discrimination and Protection of Minorities, later renamed the Commission on the Promotion and Protection of Human Rights. It is referred to hereinafter as the Sub-Commission.

<sup>10</sup> See, e.g., Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", 26 *Georgia Journal of Int'l & Comp. L.* 289 (1995/1996).

<sup>11</sup> Russell & Muther, *A History of the United Nations Charter* (1958), 327.

<sup>12</sup> Panama, Mexico and Uruguay were among the leading states pressing for an international bill of rights. See Howard Tolley, Jr., *The U.N. Commission on Human Rights*, 5 (1987).

<sup>13</sup> Article 68 of the UN Charter provides that "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." (emphasis added).

<sup>14</sup> United Nations, *Report of the Preparatory Commission of the United Nations* (London, 1946), 28, 36.

<sup>15</sup> GA Res. 7 (I), Feb. 12, 1946; GAOR 1<sup>st</sup> Sess., Pt. I, Resolutions (A/64), 12.

<sup>16</sup> Economic and Social Council, Res. 5 (I), Feb. 16, 1946, ECOSOC OR, 1<sup>st</sup> Sess. 163, creating a "nuclear Commission."

<sup>17</sup> Economic and Social Council, Res. 9 (II), June 21, 1946, ECOSOC OR, 2<sup>nd</sup> Sess.

<sup>18</sup> *Report of the Preparatory Commission of the United Nations*, PC/20, chap. 3, sect. 4, paras. 14-16 (1945).

<sup>19</sup> Eleanor Roosevelt, "The Promise of Human Rights", 26 *Foreign Aff.* 475 (1948).

<sup>20</sup> Philip Alston, "The Commission on Human Rights", in Alston *supra* note 3, at 129.

<sup>21</sup> John Humphrey, "The United Nations Commission on Human Rights and its Parent Body", in René Cassin: *Amicorum Discipulorumque Liber I*, 111 (1969).

<sup>22</sup> Universal Declaration of Human Rights, adopted by GA Res. 217A (III).

<sup>23</sup> Among the many histories of the UDHR drafting process, see Tolley, *supra* note 12, at 19-24; Louis Sohn, "International Instruments Concerning Human Rights", in *Commission to Study the Organization of Peace, The United Nations and Human Rights* 59-72 (1968); John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984); Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999).

into a single Secretariat text by the director of the human rights division, John Humphrey.<sup>24</sup> In June 1947 the Commission's drafting committee<sup>25</sup> reviewed the detailed Secretariat outline. French representative René Cassin was given responsibility for revising the Secretariat outline and preparing a draft Declaration.<sup>26</sup> The full drafting committee spent two weeks debating the resulting text before adjourning.

Prior to the next Commission session in December 1947, the Sub-Commission made its contribution to the UDHR, submitting proposals for two articles: a draft article on minority rights, which failed to be adopted, and a rather weak provision on the right to seek asylum, which was adopted.

During its two week session of December 1947, the Commission completed the text of the Declaration and referred it to ECOSOC, member governments, and other UN bodies for review. The Commission's drafting committee reconvened in May 1948 to consider the replies from governments. On June 18, the Commission adopted the Declaration with a vote of 12 in favor, none opposed, and four Eastern European members abstaining.

ECOSOC made no changes in the text and forwarded it to the GA's Third Committee, then headed by Charles Malik, one of the members of the Commission's drafting committee. He steered the Declaration through the committee over eighty-one meetings that considered some 68 proposed amendments. The Committee voted approval on December 8 and the full General Assembly followed two days later.

Political and ideological differences over rights were evident from the beginning of the drafting process. First, states were divided between those who wanted a declaration only and those who sought binding obligations in a treaty or covenant.<sup>27</sup> Ultimately, the two sides agreed that both types of instrument should be prepared and submitted to the General Assembly. Other problems were less amenable to compromise: several delegations sought explicitly to guarantee the right to life "from the time of conception."<sup>28</sup> Some Arab states objected to including the right to change religion.<sup>29</sup> Soviet bloc countries, along with Asian states and the few independent African states, supported self-determination and minority rights, proposals that clashed with the views of colonial powers.<sup>30</sup> The East-West divide over civil and political rights and economic, social and cultural rights affected the drafting of the Declaration, though it came fully to the forefront when it came time to convert the Declaration into a binding treaty or treaties. Throughout the drafting process, governments devoted nearly as much time debating the legal status of the Declaration as they did its contents.<sup>31</sup>

### 3. The Role of the Commission in Drafting Human Rights Treaties

With the adoption of the UDHR, the Commission's attention turned to completing the international bill of rights, by negotiating what became the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The precedent this action set – of first adopting a declaration, then concluding a treaty on the same topic – was one followed with some consistency during the Commission's tenure. On subjects of particular controversy, mentioned below, a declaration often proved to be the only text on which states could agree. In a few instances, even an anon-binding set of standards proved unacceptable.

#### A. The Covenants

The Covenants, like the Universal Declaration, are predominantly a product of the Commission's drafting work, but with input from the Sub-Commission, the General Assembly, the Secretariat, and several specialized agencies.<sup>32</sup> At the outset, however, the work was almost entirely the Commission's. It is often forgotten that the Commission originally forwarded a draft covenant to ECOSOC in 1947, at the same time as the Declaration. The text originated in the Commission's Drafting Committee, which produced a text entitled "Convention on Human Rights" that was largely based on a proposal from the UK.<sup>33</sup> The Commission changed the name to Covenant on Human Rights in December 1947 and approved twenty-seven articles, most of them defining civil and political rights.<sup>34</sup> The Drafting Committee revised the Covenant in May 1948 in the light of comments from governments and transmitted the new draft to the Commission, which lacked time to examine it and thus forwarded it to ECOSOC without changes.<sup>35</sup> ECOSOC in turn sent it to the General Assembly without comment.<sup>36</sup> The General Assembly, on the same day it adopted the UDHR, requested ECOSOC to ask the Commission to continue to make drafting the Covenant a priority in its work.<sup>37</sup>

<sup>24</sup> 1947 *Yearbook on Human Rights*, UN pub. Sales No. 49.XIV.1, 484. The Secretariat also transmitted over 400 pages of documentation to members of the Commission.

<sup>25</sup> In January 1947, the Commission appointed a three member drafting committee of its officers, Eleanor Roosevelt (U.S.A.), Charles Malik (Lebanon), and P.C. Chang (China). The Committee was later enlarged to include five additional members from the USSR, the UK, France, Australia and Chile.

<sup>26</sup> Considerable debate has arisen over the authorship of the first draft of the Declaration. Humphrey asserts that Cassin revised, reorganized and translated the Secretariat outline, while the French government has presented Cassin's draft as the original version of the UDHR. See Humphrey, *supra* note 23, at 42-43. Considering the dozen or more texts previously submitted by states, NGOs and individuals, it is impossible to identify a single author.

<sup>27</sup> See Commission on Human Rights, *Report of the Drafting Committee on an International Bill of Human Rights: First Session*, UN Doc. E/CN.4/21, July 1, 1947, 3, 6.

<sup>28</sup> See, e.g. E/CN.4/21/Annex F for the proposal of the Chilean delegation and Humphrey, *supra* note 23, p. 60 for the proposal of Lebanon. The same issue arose in drafting Art. 6 of the Covenant on Civil and Political Rights. See 12 GAOR Annexes, UN Doc. A/3764 at 12-13 (1957).

<sup>29</sup> Tolley, *supra* note 12, at 22.

<sup>30</sup> See Morsink, *supra* note 23, at 96-101.

<sup>31</sup> See, especially Sohn, *supra* note 23.

<sup>32</sup> For a complete drafting history of the Covenant on Civil and Political Rights, see Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> revised ed. 2005).

<sup>33</sup> Commission on Human Rights, *Report of the Drafting Committee on an International Bill of Human Rights: First Session*, U.N. Doc. E/CN.4/21, July 1, 1947, 3, 6.

<sup>34</sup> Commission on Human Rights, *Report to the Economic and Social Council on the Second Session*, ECOSOC OR, 6<sup>th</sup> Sess., Supp.1, E/600, Dec. 17, 1947, 5, 24-30.

<sup>35</sup> Commission on Human Rights, *Report to the Economic and Social Council on the Third Session*, ECOSOC OR, 7<sup>th</sup> Sess., Supp. 2, UN Doc E/800, June 28, 1948, 5, 12-28.

<sup>36</sup> Economic and Social Council, Res. 151 (VII), Aug. 26, 1948, UN Doc. E/1065, Aug. 30, 1948, 15.

<sup>37</sup> GA Res. 217 E (III), Dec. 10, 1948.

Work continued in the drafting committee and Commission in 1949. By this point, several states had strongly advocated including economic, social and cultural rights in the Covenant.<sup>38</sup> The Commission rejected this, however, agreeing only to consider in the future "additional covenants and measures dealing with economic, social, cultural, political and other categories of human rights."<sup>39</sup> The Economic and Social Council, having received the text after the Commission completed the first reading, sent it to the General Assembly for "basic policy decisions."<sup>40</sup>

The General Assembly took an active role from this point. First, it directed the Commission to draft a single covenant containing economic, social, cultural, civil and political rights, concluding that the draft that was forwarded did not contain "certain of the most elementary rights" and that economic, social and cultural rights should be included "in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant."<sup>41</sup> Second, it said that the wording of some articles "should be improved to protect more effectively the rights to which they refer."<sup>42</sup> Finally, it said that both the rights and any limitations on them should be defined with the greatest possible precision.<sup>43</sup> The Commission took up this mandate at its 1951 session and drafted articles on economic, social and cultural rights, expanding the Covenant to some seventy-three articles.

When ECOSOC received the 1951 report of the Commission it recommended, by a vote of 11 to 7, that the General Assembly reconsider its decision on including all rights in a single covenant because of fundamental differences of opinion among states on the various rights, especially concerning implementation and monitoring mechanisms.<sup>44</sup> The General Assembly was even more divided, agreeing on a vote of 29 to 25, with 4 abstentions, to separate civil and political rights from economic, social and cultural rights, after the western representatives agreed that the two covenants could be approved and opened for signature at the same time.<sup>45</sup> The General Assembly also decided to make another substantive contribution to the drafting process. Based on a proposal from Arab states, the General Assembly decided that the Commission should include an article on self-determination, which became common article 1 to the Covenants after lengthy debate and controversy.<sup>46</sup> The General Assembly later added provisions on the rights of children<sup>47</sup> and the duty to ensure the equal rights of men and women,<sup>48</sup> and it also was responsible for proposing, drafting and adopting the first Optional Protocol to the Covenant on Civil and Political Rights.<sup>49</sup>

Other parts of the UN system, besides the General Assembly and its committees, contributed to the drafting. The Sub-Commission submitted what became Article 27 on minority rights. Officials from the Secretariat suggested implementation measures. ECOSOC played a limited role, mostly in debating the right of self-determination. Specialized agencies participated in negotiations for the Economic and Social Covenant, proposing specific provisions. The International Labor Organization addressed labor rights, UNESCO the right to education, and WHO the right to health. The FAO succeeded in obtaining a reference to the "fundamental right to freedom from hunger."

In addition to adding rights that were not mentioned in the Declaration, the negotiating process led to omitting or modifying some UDHR guarantees. Debate over property rights concluded with a decision that disagreement was so great that no reference to the right to property should be

included in the Covenants. The right to seek asylum and a prohibition on arbitrary exile were also omitted, despite being included in the UDHR.

The Commission on Human Rights completed drafting the two Covenants during its next three sessions (1952-54) and presented them to ECOSOC and the General Assembly in 1954, where negotiations took another twelve years.

## B. Other Treaties on Human Rights

In contrast to the Covenants, the Commission was not the starting point for drafting the Convention on the Elimination of All Forms of Racial Discrimination. In 1960, the International League for the Rights of Man presented the Sub-Commission with a report on an outbreak of anti-Semitism in Europe. The Sub-Commission condemned such activities, asked the Secretariat to obtain further information, and reported to the Commission. The Commission in turn asked the Sub-Commission to evaluate the information gathered and to make recommendations.

In 1962, the General Assembly responded to reports on the issue by directing the preparation of declarations and conventions on racial discrimination and religious

<sup>38</sup> Australia, the Soviet Union and Yugoslavia proposed including economic rights in the Covenant at the Commission's 1949 session. Commission on Human Rights, *Report of the Sixth Session*, ECOSOC OR, 11<sup>th</sup> Sess., Supp. 5, UN Doc. E/1681, May 29, 1950, 26-28.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> Economic and Social Council, Res. 303 I (XI), Aug. 9, 1950, ECOSOC OR, 11<sup>th</sup> Sess. Supp. 1, UN Doc. E/1849, Aug. 31, 1950, 29.

<sup>41</sup> GA Res. 421 (V), Dec. 4, 1950, GAOR, 5<sup>th</sup> Sess., Supp. 20, UN Doc. A/1775, 42-43.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> ECOSOC Res. 384 (XIII), Aug. 29, 1951, UN Doc E/2152, ECOSOC OR 13<sup>th</sup> Sess., Supp. 1, 35-36.

<sup>45</sup> GA Res. 543 (VI), Feb. 5, 1952, UN Doc. A/2119, GAOR 6<sup>th</sup> Sess., Supp. 20, 36.

<sup>46</sup> GA Res. 545 (VI), Feb. 5, 1952, *id.* One year earlier, the General Assembly had instructed ECOSOC to request the Commission to study "ways and means which would ensure the rights of peoples and nations to self-determination, and to prepare recommendations for consideration by the General Assembly at its sixth session." F.A. Res. 421-E, 5 GAOR Supp. 20, UN Doc. A/1775 part D. When nothing was forthcoming from the Commission, the Assembly adopted Res. 545, deciding that the Covenant should include an article stating "All peoples shall have the right of self-determination." The Assembly also instructed that the article was to stipulate that all states, including those responsible for the administration of non-self-governing territories, should promote the realization of that right. Earlier in the drafting, in 1949, the Soviet Union had made an unaccepted proposal to include a right of self-determination, applicable to colonial countries only. See 9 ESCOR Supp. 10, UN Docs. E/1371, E/CN.4/350 at 47 (1949).

<sup>47</sup> Poland, joined by several other states, proposed to the GA an article on the rights of the child. The proposal became Art. 24. 18 GAOR Annexes, UN Doc. A/5655, paras. 68-73, 77-82 (1963). Art. 24. 18 GAOR Annexes, UN Doc. A/5655, paras. 68-73, 77-82 (1963).

<sup>48</sup> CCPR, Art. 3. See Vratislav Pechota, "Development of the Covenant", in Louis Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights* 32, 46 (1981).

<sup>49</sup> UN Doc. A/6546, Dec. 13, 1966, 9-17, 119-23.

intolerance. The Commission conferred the drafting task on the Sub-Commission, which drafted and recommended a declaration on racial discrimination in 1963. The Commission appointed a working group to consider the draft and in a single session approved a revised version,<sup>50</sup> which the General Assembly adopted on November 20, 1963.<sup>51</sup> A year later, the Sub-Commission completed a draft convention on racial discrimination as well as a draft declaration on religious intolerance. The Commission amended the convention<sup>52</sup> and forwarded it to the General Assembly. As with the UDHR, the speedy drafting and adoption of the Racial Declaration and Convention indicate considerable consensus surrounding the need for standards on this topic.

The General Assembly made some revisions to the text sent by the Commission and in 1965 approved the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>53</sup> The major revision approved by the General Assembly altered the text on hate speech, from the Commission's language that would have made incitement to racial discrimination a criminal offense only when it resulted in an act of violence. The approved text, now in the Convention, requires states parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons."<sup>54</sup> States with broader concerns for freedom of expression insisted on adding "with due regard to the principles embodied in the Universal Declaration of Human Rights" and to rights listed in Article 5 of the Convention.<sup>55</sup>

In contrast to the speed with which the Racial Declaration and Convention were adopted, work on the parallel declaration on religious intolerance progressed slowly and stalled repeatedly. The Commission undertook negotiations on a Sub-Commission draft declaration on religious intolerance between 1964 and 1967 and again between 1974 and 1981, when the completed text was forwarded to and adopted by the General Assembly,<sup>56</sup> some twenty-five years after the Sub-Commission first studied the issue. No convention on the topic has been adopted.

Another outcome of the neo-Nazi activities of the early 1960s was a proposal to eliminate statutes of limitations for war crimes and crimes against humanity. Poland proposed to the Commission a treaty on the topic and in 1965 the Commission asked the Secretariat to prepare a draft convention. The Commission revised the Secretariat draft, but was unable to reach any agreement on a final version by 1967. The incomplete text was then submitted to a joint working group of the General Assembly's Third and Sixth Committees, which prepared the final text over the next two years. The Commission followed this practice relatively often, sending incomplete texts to the General Assembly with bracketed language indicating unresolved issues. In 1968, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>57</sup>

The number of states on the Commission substantially increased in 1967, when ECOSOC added 11 new seats to the existing 21 member states,<sup>58</sup> to take into account the expanding membership of the UN resulting from decolonization. The new members brought their priorities to the standard-setting process, especially their focus on ending apartheid. Among the initiatives taken, a group of states in 1971 introduced in the Third Committee a draft convention on apartheid as an international crime. The

Committee referred the draft to the Commission for comment, but held onto the drafting itself. The Commission conducted a general discussion, but undertook no drafting or revisions. In 1973, the General Assembly adopted the International Convention for the Suppression and Punishment for the Crime of Apartheid.<sup>59</sup>

The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment<sup>60</sup> was largely drafted by a Working Group of the Commission but the origins of the Convention are considerably more diverse. In 1973, Amnesty International began a campaign against torture, supported by the International Commission of Jurists, the International Committee of the Red Cross [ICRC], the Swiss Committee against Torture, and the World Council of Churches Commission on International Affairs. Two years later, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended to the General Assembly a draft Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The General Assembly approved the text in 1975;<sup>61</sup> the Commission was not part of the process.

In 1977, the General Assembly took further action on the subject by accepting a Swedish proposal to confer on the Commission the mandate to draft a treaty against torture. The Commission established an open-ended Working Group which met during the 1978 session, but made little progress. The Working Group was able to draw upon two drafts, one prepared by Sweden and the other submitted by the International Association of Penal Law. Both were referred to governments for comment before the Working Group began drafting the convention. Subsequent meetings were held before each Commission

<sup>50</sup> Commission on Human Rights, *Report on the Nineteenth Session*, UN Doc. E/3743 (1963), paras. 89-145.

<sup>51</sup> GA Res. 1904 (XVIII), 1963.

<sup>52</sup> Commission on Human Rights, *Report on the Twentieth Session*, E/3873 (1964), paras. 16-288.

<sup>53</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature by GA Res. 2106 (XX), Dec. 21, 1965.

<sup>54</sup> *Id.* art. 4(a).

<sup>55</sup> *Id.* art. 4, *chapeau*.

<sup>56</sup> Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55 (1981).

<sup>57</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature, ratification and accession by GA Res. 2391 (XXIII), Nov. 26, 1968.

<sup>58</sup> The original Commission consisted of 18 states; in 1962, the number of states increased to 21. ECOSOC further expanded the Commission over time, eventually settling on a body with 53 member states.

<sup>59</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature and ratification by GA Res. 3068 (XXVIII) of Nov. 30, 1970.

<sup>60</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature by GA Res. 39/46, Dec. 10, 1984.

<sup>61</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by GA Res. 3452 (XXX) of Dec. 9, 1975.



session. Experts from Amnesty International and the ICRC provided technical advice during the negotiations and made substantive proposals during the drafting. In 1980 Costa Rica introduced a draft optional protocol on implementation that had been recommended by the International Commission of Jurists and the Swiss Committee against Torture. Various areas of disagreement among the participating states lessened, but could not be overcome during the negotiations and in 1984 a text with several provisions in brackets was sent to the Third Committee, which paid attention only to unresolved issues about the implementation machinery and functioning, and succeeded in finalizing the text by December 10, 1984. The Committee then approved and the General Assembly adopted the Convention.<sup>62</sup>

In 1979, while work was proceeding on the Torture Convention, Poland introduced at the Commission a draft convention on the rights of the child. The same process was used to negotiate this convention as was used for the Torture Convention, with a pre-sessional open-ended working group seeking consensus on each provision. By 1986, the group had agreed on nineteen articles, but remained divided on others. The Convention eventually was completed and adopted in 1989,<sup>63</sup> exactly thirty years after the Declaration on the same topic.<sup>64</sup> While the length of the negotiations reflects the many difficult issues addressed, the process also helped create a consensus evidenced by the almost universal ratification of the agreement.

Finally, following its earlier successful efforts to enact detailed norms against torture, Amnesty International conducted a second campaign, against capital punishment, that had an impact on Commission standard-setting. Taking up the issue, West Germany proposed that the Commission adopt a second optional protocol to the ICCPR. The Commission, in Res. 1985/46, referred the matter for study to an expert of the Sub-Commission, Marc Bossuyt, who prepared the draft of the protocol. It is one of the rare instances when an individual author can be identified.

### C. Where the Commission was Absent

Perhaps due to its focus on drafting the UDHR and the Covenants, the Commission was not engaged in the elaboration of other human rights treaties in its early years. The first example was the Genocide Convention of 1948, which was prepared by a special drafting committee reporting to the Economic and Social Council, pursuant to a resolution of the General Assembly adopted at its first session in 1946.<sup>65</sup> The resolution, declaring genocide to be a crime under international law, requested ECOSOC to "undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly." The UN Secretary-General, as well as the United States, suggested that the Commission on Human Rights would be an appropriate place to assign drafting responsibility,<sup>66</sup> but others objected that the Commission's program was full. ECOSOC then turned the matter over to the Secretariat, whose human rights division, in consultation with experts, prepared the first draft, which was sent to the GA's Sixth Committee, which referred it back to ECOSOC for further work. ECOSOC appointed an *ad hoc* committee which prepared a revised draft, which ECOSOC reviewed and transmitted to the General Assembly for adoption in the fall of 1948.<sup>67</sup> Throughout the drafting, the Commission made no comments.

The Commission also made no contribution to drafting

several conventions on the rights of women, including the Convention on the Elimination of All Forms of Discrimination against Women.<sup>68</sup> Instead, negotiations took place within the Commission on the Status of Women.<sup>69</sup> Other examples include the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,<sup>70</sup> drafted solely by the UN Social Commission, and the 1956 Supplementary Convention on the Abolition of Slavery,<sup>71</sup> adopted after negotiations taking place during an international conference convened by ECOSOC.<sup>72</sup> ECOSOC has also taken the lead on drafting instruments related to science and education.<sup>73</sup>

In some instances, certain issues were left aside, seemingly because they were either too controversial or political for the Commission to take up. It had no role in the drafting of various instruments relating to freedom of information and freedom of the press, although they were prominent matters for ECOSOC, the Sub-Commission on Freedom of Information and the Press, and a 1948 UN Conference on Freedom of Information. A draft

<sup>62</sup> Convention against Torture, *supra* note 60.

<sup>63</sup> Convention on the Rights of the Child, adopted by GA Res. 44/25 of Nov. 20, 1989.

<sup>64</sup> Declaration of the Rights of the Child, proclaimed by GA Res. 1386 (XIV) of Nov. 20, 1959.

<sup>65</sup> GA Res. 96 (I), Dec. 11, 1946.

<sup>66</sup> UN Docs. E/330 and 342.

<sup>67</sup> For a more detailed review of the drafting history, see William Schabas, *Genocide in International Law* (2000).

<sup>68</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature by GA Res. 34/180, Dec. 18, 1979.

<sup>69</sup> In 1972, the Secretary-General of the United Nations asked the Commission on the Status of Women to request the views of member states regarding the form and content of a possible international instrument on the human rights of women. The following year, the Economic and Social Council appointed a working group to consider the elaboration of such a convention. In 1974, the Commission on the Status of Women began drafting the convention. The results of the 1975 World Conference of International Women's Year gave impetus to the drafting. A Plan of Action adopted at the Conference called for a "convention on the elimination of discrimination against women, with effective procedures for its implementation". For the next few years, the process of elaborating a convention continued within the Commission. In 1977, the General Assembly appointed a special working group to finalize the draft submitted to it by the Commission.

<sup>70</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by GA Res. 317 (IV) of Dec. 2, 1949.

<sup>71</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by ECOSOC Res. 608 (XXI) of April 30, 1956, done at Geneva on Sept. 7, 1956.

<sup>72</sup> Alston, *supra* note 3, at 132.

<sup>73</sup> See e.g., Convention against Discrimination in Education, Dec. 14, 1960 and more recently, the Universal Declaration on the Human Genome and the Human Rights, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twenty-ninth session on 11 November 1997; endorsed by General Assembly Resolution 53/152 of 9 December 1998.

convention on freedom of information was considered by the General Assembly, but it was never concluded despite being on the agenda from 1950 to 1980.<sup>74</sup>

More recently, the 1990 International Convention on the Rights of Migrant Workers and their Families was drafted by a sessional open-ended General Assembly Working Group meeting at the beginning of the Third Committee's session and between sessions. The process was criticized for having limited delegate involvement, lack of secretariat technical support, and even greater lack of expertise in the drafting.<sup>75</sup> The Sub-Commission had studied the problems of trafficking and ill-treatment of migrant workers and the issue was discussed in the Commission, but the General Assembly was still chosen as the negotiating forum. In the end, the Assembly transmitted the draft Migrant Workers Convention to the Commission only for a "technical review."<sup>76</sup>

The General Assembly also conducted negotiations for the Convention on Disability Rights, following an initiative introduced by the government of Mexico, creating an Ad Hoc Committee<sup>77</sup> which in turn established a Working Group to draft the first text of the Convention. The General Assembly directed that the process involve persons with disabilities, representatives of disability organizations and experts in the process, and urged governments to include persons with disabilities in their delegations.<sup>78</sup> In response, over half the Working Group of 40 members consisted of persons with disabilities. The Group also had 12 NGO members.<sup>79</sup>

It is difficult to see a pattern in respect to those instruments drafted by the Commission and those where treaties were negotiated elsewhere, apart from those where specialized bodies like the ILO or the Commission on the Status of Women were deemed more appropriate because of their expertise. At the outset, the work of the Commission on the UDHR and the Covenants may explain why the Genocide Convention was assigned elsewhere, but the same cannot be said for instruments adopted after 1954, when the Commission had completed its work on the Covenants. It may be that some states preferred to proceed directly to the General Assembly on the assumption that the drafting process would be more rapid if the Commission and ECOSOC were by-passed. If this was the assumption, it was not necessarily supported by experience: the Commission completed its work on the Covenants in three years – the General Assembly took another twelve to complete its review. In later years, the diminishing reputation of the Commission may account for the decisions to undertake negotiations on the rights of migrant workers and the disabled in other venues.

#### 4. Non-Binding Normative Instruments: Declarations, Guidelines and Codes of Conduct

As noted earlier, the Commission's practice from the beginning was generally to adopt non-binding declarations before negotiating a binding agreement. In addition, the Commission and Sub-Commission have adopted numerous declarations, resolutions, guidelines and codes of conduct that have not been succeeded by treaties. The latter category mainly consists of new and sometimes controversial topics.

One of the first declarations adopted by the Commission after it completed drafting the UDHR and the Covenants was the Declaration of the Rights of the Child.<sup>80</sup> The Declaration was based on a draft submitted to the Commission in 1949 by the UN Social Commission. The Commission did nothing with the draft until 1957, when it sought comments from governments. In 1959, the

Commission revised the text and transmitted it to the Third Committee, which made changes before sending it on to the Assembly for approval the same year.

The Commission's work on the Children's Declaration was pressed by Poland. Other individual states also took the lead in the Commission on specific issues. France, for example, proposed a declaration on the right to asylum in 1956; the declaration was drafted by the Commission and adopted in 1959.<sup>81</sup> The issue proved contentious, however, and the Third and Sixth Committees spent seven years reviewing and revising the text before the General Assembly adopted the Declaration on Territorial Asylum in 1967.

From 1972, the right to development joined the Commission's agenda under the sponsorship of African nations, in particular Senegal, and by 1977 development was proclaimed as a human right, over the objection of Western nations. The first formal proclamation came in a resolution requesting the Secretary-General to study its international dimensions.<sup>82</sup> In 1981 the Commission gave high priority to drafting an international instrument on the right to development, creating a working group and calling for it to meet between Commission sessions. The group held two to three sessions a year between 1982 and 1985,<sup>83</sup> when a partial draft was sent to the Assembly for completion.<sup>84</sup> The Assembly failed to adopt the declaration in 1985, but did so in 1986.<sup>85</sup> In the meantime, the Commission called on the working group to recommend activities to promote the right.

As the standard-setting work of the Commission moved beyond the rights expressly mentioned in the UDHR, a relatively consistent practice developed for addressing the new matters. Often a single government or a group of governments would make a specific proposal to pronounce a new right. If the Commission accepted the proposal, it would commonly request the Sub-Commission or Secretariat to study its dimensions, on the basis of which it would either draft or recommend that the Sub-Commission draft a set of principles, a declaration or a convention. Most of these were negotiated in pre-session working groups of the Commission. Working groups were

<sup>74</sup> *Id.*

<sup>75</sup> See John Quinn, "The General Assembly into the 1990s", in Alston, *supra* note 3, at 66.

<sup>76</sup> GA Res. 44/155, para. 2.

<sup>77</sup> Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, 3<sup>rd</sup> Comm., 56<sup>th</sup> Sess., Agenda Item 119(b), U.N. Doc. A/C.3/56/L.67/Rev.1 (2001).

<sup>78</sup> GA Res. 57/229 of Dec. 18, 2002, paras. 10, 12, 13, and 14.

<sup>79</sup> Report of the Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, A/58/118 and Corr.1. See also Janet E. Lord, "NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities", 10 ILSA [International Law Students Association, Chicago] J. Int'l & Comp. L. 311 (2004).

<sup>80</sup> Declaration of the Rights of the Child, *supra* note 64.

<sup>81</sup> Commission on Human Rights, *Report on the Sixteenth Session*, UN Doc. E/3335 (1960), paras. 63-147.

<sup>82</sup> UN Commission on Human Rights, Res. 4 (XXXIII), 1977.

<sup>83</sup> See UN Doc. E/CN.4/1489 (1982), E/CN.4/1983/11, E/CN.4/1984/13.

<sup>84</sup> Commission on Human Rights Res. 1985/43.

<sup>85</sup> Declaration on the Right to Development, GA Res. 41/28, Dec. 4, 1986.



used not only to draft the declaration on the right to development, but also for draft declarations on minorities, the rights of human rights defenders and the rights of mental patients.<sup>86</sup> In 1992, a working group was established to draft a declaration on disappearances, which completed its work rapidly, sending for adoption by the General Assembly the Declaration on the Protection of All Persons from Enforced Disappearances.<sup>87</sup>

Declarations became a normal precursor to a convention, but sometimes became the sole product, due to political disagreements over the topic. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,<sup>88</sup> for example, was adopted by a divided vote in the Commission and passed by the General Assembly without a vote, after a compromise was negotiated on the right to change one's religion.

The process of adopting normative resolutions did not differ greatly from that used to conclude treaties, although fewer Commission resolutions have been subject to major modification after being submitted to the Third Committee. Indeed, the Committee often simply repeats the language of the Commission text. However, the Committee and the General Assembly have played important roles when the Commission has been unable to reach agreement on a text. The report of the Commission's Working Group on a Declaration on the Right to Development, for example, was sent to the General Assembly to break a political impasse in the Group. The Assembly succeeded in resolving the major concerns and adopted the Declaration in 1986, with only the United States voting against the text.

The General Assembly has also on occasion failed to adopt Commission or Sub-Commission standard-setting instruments. The Sub-Commission, for example, unanimously approved a set of principles on the rights of detainees, which the Commission sent to ECOSOC with request that the text be forwarded to the General Assembly. The Sixth Committee discussed the principles for years without result. The Sub-Commission's principles on discrimination in education, approved in 1957, were also unsuccessful, but they were transmitted to UNESCO and used as the basis of the 1960 UNESCO Convention on the topic.

In a few instances, regional standard-setting may have stimulated the final approval of languishing texts. For example, the General Assembly finally adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992,<sup>89</sup> twenty years after the Sub-Commission first took up the topic, the same year that the Council of Europe adopted its European Charter for Regional and Minority Languages.<sup>90</sup> The Balkans conflict with its "ethnic cleansing" probably also had an impact on the adoption of the regional and the global instruments. As with the earlier Racial Convention, standard-setting was reactive to events.

Other bodies have also been important actors in non-binding standard-setting, often bypassing the Commission. For example, the UN Congresses on the Prevention of Crime and Treatment of Offenders brought several normative instruments to ECOSOC or the General Assembly for endorsement, including, notably, the Standard Minimum Rules for the Treatment of Prisoners, the Declaration on Victims of Crime and Abuse of Power,<sup>91</sup> the Beijing Rules on the Treatment of Juvenile Offenders,<sup>92</sup> and the UN Standard Minimum Rules for Non-Custodial Measures.<sup>93</sup> The Assembly requested the

Commission to take up work on the rights of detainees in 1975, but the Commission transmitted the mandate to the Sub-Commission, approving its work three years later.<sup>94</sup> The General Assembly itself produced the 1985 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, after some five years of negotiations in a Working Group of the Assembly. It also was the source of the Declaration on the Elimination of Violence against Women.<sup>95</sup>

Throughout its tenure, the Sub-Commission was a key part of the Commission's standard-setting process, especially for non-binding instruments. Its working papers and studies provided the background for issues under consideration and often were the impetus for standard-setting by the Commission. In some instances the Sub-Commission prepared the first drafts of normative texts,<sup>96</sup> although the Commission did not always accept the Sub-Commission's drafts<sup>97</sup> and even sought to limit the latter's standard setting activities in its later years.<sup>98</sup>

<sup>86</sup> The Sub-Commission's and the Commission's work on this issue resulted in adoption of the Principles for the protection of persons with mental illness and the improvement of mental health care, adopted by General Assembly Resolution 46/119 of 17 December 1991. The General Assembly also adopted a text in 1971 on the rights of the mentally retarded. See Declaration on the Rights of the Mentally Retarded, proclaimed by General Assembly Resolution 2856 (XXVI) of 20 December 1971.

<sup>87</sup> GA Res. 47/133, Dec. 18, 1992. A treaty on the same issue was concluded and opened for signature on Dec. 20, 2006, UN Doc. A/RES/61/177.

<sup>88</sup> GA Res. 36/55 (1981). The first study on Discrimination in the Matter of Religious Rights and Practices was undertaken in the Sub-Commission in 1960. See Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, E/CN.4/Sub.2/200/Rev.1 (1960).

<sup>89</sup> GA Res. 47/135, 18 December 1992, A/RES/47/135.

<sup>90</sup> European Charter for Regional and Minority Languages 1992, ETS No. 148.

<sup>91</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1955, approved by ECOSOC Res. 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>92</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by GA Res. 40/33, Nov. 29, 1985.

<sup>93</sup> United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) adopted by GA Res. 45/110 of Dec. 14, 1990.

<sup>94</sup> Report on the Thirty-Fifth Session, E/1979/36, paras. 184-86.

<sup>95</sup> GA Res. 48/104, UN GAOR, 48th Sess., Supp. No. 49, at 217, UN Doc. A/48/49 (1993).

<sup>96</sup> The Declaration on Human Rights Defenders, the Declaration on the Protection of all Persons from Forced Disappearance, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

<sup>97</sup> See, e.g., the Norms on Transnational Corporations, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>98</sup> See Commission on Human Rights Resolution 2005/83, para. 8(c).

One of the first Sub-Commission mandates was to prepare the declarations on racial discrimination and religious intolerance. The first proved to have considerable support and quickly was followed by the 1965 Racial Convention, as discussed above. The draft declaration on religious intolerance, however, ran into political difficulties. Although the Sub-Commission submitted the draft to the Commission in 1960, the Commission held only preliminary discussions until 1964, when it began intensive drafting and substantially revised the Sub-Commission's text, sending an incomplete version to the General Assembly in 1967. The Assembly recommended that the Commission take up the issue again in 1974, which it did, creating a working group,<sup>99</sup> which produced a text finally adopted in 1981.

A good example of the lengthy negotiating process based on consensus is the effort within the UN Sub-Commission and the Commission to elaborate international principles on reparation for victims of human rights violations. The Sub-Commission began its work on reparations with resolution 1988/11 of 1 September 1988, which recognized that all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, fair and just compensation, and the means for as full a rehabilitation as possible for any damage suffered.<sup>100</sup> In 1989 it appointed Theodoor van Boven to study "the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms"<sup>101</sup> and examine the possibility of developing basic principles and guidelines on remedies.<sup>102</sup> The Sub-Commission discussions reflected a concern for ensuring that rights are coupled with effective remedies based on principles developed at the international level.

Theo van Boven's work resulted in a preliminary report in 1990 on reparations for gross violations of human rights, followed by progress reports, and a 1993 final report to which he annexed draft principles on restitution, compensation, and rehabilitation.<sup>103</sup> In his final report, van Boven concluded that gross violations of human rights are by their nature irreparable and any remedy or redress will fail to be proportional to the grave injury inflicted, particularly when the violations have been committed on a massive scale. The remedies thus must focus on the restoration of rights and the accountability of wrongdoers, because it is "an imperative norm of justice that the responsibility of perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent."<sup>104</sup> The report also indicated that revelation of the truth is a fundamental requirement of justice.<sup>105</sup>

The Commission reviewed the report and called the study and proposed basic principles and guidelines "a useful basis" for giving priority to the question of restitution, compensation and rehabilitation.<sup>106</sup> At the same time it made clear that revisions were necessary and Mr. van Boven submitted revised draft basic principles and guidelines to the Sub-Commission in 1996<sup>107</sup> and 1997.<sup>108</sup> The revised versions began with articulating state duties before setting forth principles on the right to a remedy and who may claim reparation. There was little change in the substance of the provisions from 1993 to 1997, but some specific examples and details were eliminated, such as a non-exclusive list of gross violations of human rights.

In 1998, by resolution 1998/43, the Commission replaced the special rapporteur with an independent expert, Mr. Cherif Bassiouni, and asked him to prepare another

revised version of the draft basic principles and guidelines, "taking into account the views and comments provided by States, intergovernmental and non-governmental organizations. Mr. Bassiouni submitted a report in 1999<sup>109</sup> and a final report in 2000 to which he appended the third revision of the draft principles and guidelines."<sup>110</sup>

The Office of the High Commissioner circulated the Bassiouni draft for comment and in 2002, pursuant to Commission resolution 2002/44, the Office convened, with the cooperation of the Government of Chile, an international consultation in Geneva for States, intergovernmental and non-governmental organizations.

<sup>99</sup> The Commission devoted one session to drafting five articles for a declaration, based on the Sub-Commission's draft, but then set aside the work for a decade.

<sup>100</sup> Members of the Sub-Commission introduced the topic for study after attending a conference in Canada on the issue of World War II claims against Japan by persons used as forced laborers who had never received reparations. Communication from Theodoor Van Boven, May 4, 2004, on file with the author.

<sup>101</sup> Resolution 1989/13.

<sup>102</sup> United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1989/13 of 31 August 1989. The Human Rights Commission authorized the study by Resolution 1990/35 of 2 March 1990, and the Economic and Social Council approved by Resolution 1990/36 of 25 May 1990. In his reports, Mr. Van Boven noted that there is no definition of "gross violations of human right" but that the work of the International Law Commission regarding the draft Code of Crimes against the Peace and Security of Mankind as well as common Article 3 of the Geneva Conventions of 12 August 1949 provide guidance for both the serious character of the violations and also the type of human right that is being violated. He also cited section 702 of the Restatement (Third) of the Foreign Relations Law of the United States, concluding that "while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender." E/CN.4/Sub.2/1993/8 at 7-8. After criticism of this approach, efforts were dropped to define gross violations in the draft principles.

<sup>103</sup> *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Preliminary report submitted by Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1990/10, 26 July 1990; *Progress reports*, E/CN.4/Sub.2/1991/7 and E/CN.4/Sub.2/1992/8; *Final report*, E/CN.4/Sub.2/1993/8. The final van Boven report was sent to the U.N. Commission on Human Rights for consideration at its 1994 session. The Sub-Commission also retained the item on its agenda for further examination of the proposed basic principles and guidelines, creating a sessional working group for the purpose. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1993/29 of 25 August 1993, E/CN.4/Sub.2/1993/45, 69-70. Governments and non-governmental organizations were asked to comment.

<sup>104</sup> *Final Report*, *id.*, at 53.

<sup>105</sup> *Id.*

<sup>106</sup> E/CN.4/1994/35, E/CN.4/1996/35 of 19 April 1996.

<sup>107</sup> E/CN.4/Sub.2/1996/17 of 24 May 1996.

<sup>108</sup> E/CN.4/1997/104, Annex, of 16 January 1997 submitted in accordance with Sub-Commission Resolution 1996/28.

<sup>109</sup> E/CN.4/1999/65 of 8 February 1999.

<sup>110</sup> E/CN.4/2000/62.

Van Boven and Bassiouni were both present at the meeting. The Chilean chairman of the consultation, Alejandro Salinas, submitted the results of the meeting to the Commission in 2003.<sup>111</sup> The Commission conferred on Salinas the mandate to prepare yet another revision of the basic principles and guidelines, in cooperation with Van Boven and Bassiouni and to hold a second consultative meeting.<sup>112</sup> The fourth revised version was completed August 15, 2003. The participants in the second consultation considered the revised version of the Principles and Guidelines and commented on the text. The Chairperson-Rapporteur then circulated a further revised version of the Principles and Guidelines, dated 23 October 2003, as well as a proposal put forward by himself and the independent experts that arose out of informal consultations held on 22 October 2003 (hereinafter "the Proposal").

The October 24 proposal addressed some of the most contentious issues that had arisen in discussions on the draft and suggested two major changes. The first was to delete all references to humanitarian law in the draft and to thus change the title to "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law." The second would follow from the first and include a definition of gross violations of international law.

At its 2004 session, the Commission again deferred action on the draft, calling for Mr. Salinas to hold a further consultative meeting, with both van Boven and Bassiouni, to prepare yet another revised version of the Draft, taking into account the views of governments and organizations.<sup>113</sup> In the resolution, the Commission affirmed that "victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation." The absence of reference to humanitarian law reflected the opposition of some states, such as the United States, to including the topic, which they view as more appropriately dealt with in other forums. Finally, the fifteen-year process culminated with the Commission's adoption in 2005 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.<sup>114</sup> The final text adopted is weaker than the original Van Boven draft, which went further than states were willing to go.<sup>115</sup>

Tension between the Sub-Commission and the Commission can be seen in respect to the Sub-Commission's draft on the responsibilities of transnational corporations, approved on August 13, 2003.<sup>116</sup> This text joined efforts by other bodies to adopt corporate codes of conduct. The UN itself sought to draft a code in the 1970s and 1980s.<sup>117</sup> The OCED adopted its first Guidelines for Multinational Enterprises in 1976.<sup>118</sup> In 1977, the ILO adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises.<sup>119</sup> It was not until 1997 that the Sub-Commission adopted a resolution asking one of its members to present a working document in 1998 on the issue of human rights and transnational corporations.<sup>120</sup> The following year, based on the working document, the Sub-Commission decided to establish for a three year period a sessional working group composed of five Sub-Commission members to examine the activities of transnational corporations [TNCs].<sup>121</sup>

The mandate of the working group was to identify issues, examine information about the impact of activities of TNCs on human rights, examine investment agreements for their compatibility with human rights agreements, and make recommendations regarding TNCs in order to

ensure the protection of human rights.<sup>122</sup> At its first session, however, the working group went further and asked David Weissbrodt to prepare a draft code of conduct for transnational corporations.<sup>123</sup> By its second session in 2000 the group had the first "Draft Code of Conduct for Companies."<sup>124</sup> The group decided it was necessary to consider issues of implementation as well as substantive standards and thus asked for further comments and input.

Following a March 2001 expert seminar that included members of the Working Group, NGOs, representatives of companies and unions, and academics, the Working Group considered a revised draft. That same year, the Sub-Commission renewed and revised the mandate of the Working Group, expressly conferring on it authority to draft norms and a monitoring mechanism for them. After a further revision in 2002, the Working Group adopted the Norms and Commentary in 2003 and forwarded them to the Sub-Commission,<sup>125</sup> which approved them and

<sup>111</sup> E/CN.4/2003/63.

<sup>112</sup> Commission Res. 2003/34.

<sup>113</sup> Commission Res. 2004/34.

<sup>114</sup> Commission on Human Rights, Res. 2005/35, April 19, 2005, approved by the General Assembly Dec. 16, 2005.

<sup>115</sup> See Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents", in De Feyter et al., eds., *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* 11 (2005).

<sup>116</sup> Sub-Comm'n, Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Comm'n Res. 2003/16, UN Doc.E/CN.4/Sub.2/2003/L.11, at 52 (2003).

<sup>117</sup> See Development and International Economic Cooperation: Transnational Corporations, UN Doc. E/1990/94; Draft United Nations Code of Conduct on Transnational Corporations, May 1983, 23 ILM 626 (1984).

<sup>118</sup> Organisation for Economic Cooperation and Development, Guidelines for Multinational Enterprises, June 21, 1976, 15 ILM 969 (1976). For the most recent version, see OECD Guidelines for Multinational Enterprises (Oct. 31, 2001).

<sup>119</sup> ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 ILM 422 (1978).

<sup>120</sup> Res. 1997/11, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Ninth Session, UN Doc. E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).

<sup>121</sup> Sub-Comm'n, The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, UN Doc.E/CN.4/Sub.2/RES/1998/8.

<sup>122</sup> *Id.*

<sup>123</sup> Sub-Comm'n, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its First Session, UN Doc. E/CN.4/Sub.2/1999/9.

<sup>124</sup> Sub-Comm'n, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Second Session, UN Doc. E/CN.4/Sub.2/2000/12. The name of the document changed several times as it was being considered, e.g: Draft Code of Conduct for Companies, Draft Universal Human Rights Guidelines for Companies, Draft Universal Human Rights Principles for Transnational Corporations and Other Business Enterprises.

<sup>125</sup> Sub-Comm'n, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations, UN Doc. E/CN.4/Sub.2/2003/13.

transmitted them to the Commission by Resolution 2003/16 of August 13, 2003.<sup>126</sup> While NGOs were elated,<sup>127</sup> the Commission was less than enthusiastic.<sup>128</sup>

Codes of conduct and guidelines, while not legally binding, nonetheless may influence national legislation and the interpretation of treaties. The 1955 Standard Minimum Rules for the Treatment of Prisoners has been the model for national laws and has been utilized by courts. The weight of the non-binding normative instruments often depends upon their reliance on or links to treaty sources or customary international law. As they codify and more specifically define international human rights law, they constitute a type of restatement of the law. In other instances, however, declarations may well be the beginning of a process of creating new standards. Important standard-setting declarations, in addition to those already mentioned, are:

- Declaration on the Rights of Disabled Persons, GA Res. 3447 (Dec. 9, 1975)
- Code of Conduct for Law Enforcement Officials, GA Res. 34/169 (Dec. 17, 1979)
- Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res. 1989/65 (May 24, 1989)
- Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133 (Dec. 18, 1992)
- Declaration on the Elimination of Violence against Women, GA Res. 48/104 (Dec. 20, 1993).

## 5. Other Forms of Standard-Setting:

### Commission Resolutions, Mandates of Rapporteurs

Resolutions provide the genesis of new rights. Well before the Migrant Worker Convention, for example, the Commission adopted resolutions calling on host governments to assure equal treatment of migrants, to adopt measures assuring civil, economic and social rights and to provide training, health, housing and educational benefits similar to those enjoyed by citizens.

Resolutions also may reinforce norms adopted earlier. During the 1970s, for example, Commission resolutions repeatedly reaffirmed principles contained in the General Assembly resolutions on granting independence to colonial peoples and permanent sovereignty over natural resources.

Some of the Commission's and Sub-Commission's resolutions, while not entitled Declaration or Norms, nonetheless set standards. The Sub-Commission's resolution on "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons," is one such text.<sup>129</sup> Similarly, the Commission adopted a normative resolution on Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS).<sup>130</sup>

Some of the thematic rapporteurs or working groups also developed standards within the scope of their mandates. The Working Group on Arbitrary Detention, for example, drafted the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>131</sup>

Finding the normative elements in the wealth of resolutions adopted each year by the Commission and Sub-Commission is not easy and what may look normative to one official or scholar, may appear *hortatory* to another. Repetition, further definition and elaboration help identify normative statements.

## 6. Further Elements in the Decision-making Process

In 1946, ECOSOC appointed a nine member nuclear Commission on Human Rights to consider the structure and mandate of the future Commission. The group, chaired by Eleanor Roosevelt, recommended a body of individual experts, but this was rejected in favor of a body composed of state representatives. The first eighteen persons who were elected by ECOSOC met later the same year to begin work on the first priority, elaboration of the Universal Declaration of Human Rights.

Philosophical and political differences affected the standard-setting work almost immediately after adoption of the Declaration. With increased membership over time, the Commission's regional groups became more important.<sup>132</sup> The first major impact of ideological and political differences came early, however, with the decision to separate the catalogue of rights in the

<sup>126</sup> Res. 2003/16, *supra* note 116.

<sup>127</sup> See David Weissbrodt and Muria Kruger, Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 97 AJIL 901, 906-07 (2003).

<sup>128</sup> In Res. 2004/116, *Responsibilities of transnational corporations and related business enterprises with regard to human rights*, the Commission took note of the Sub-Commission's work and expressed its appreciation for the work undertaken. It also noted that the Norms "contain useful elements and ideas for consideration by the Commission," and decided, without a vote, to recommend that the Economic and Social Council:

(a) Confirm the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights;

(b) Request the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, *inter alia*, the draft norms contained in the above-mentioned document and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations, and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation;

(c) Affirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.

<sup>129</sup> Sub-Comm'n, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons*, UN Doc.E/CN.4/Sub.2/RES/1998/26.

<sup>130</sup> Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), UN Doc. E/CN.4/RES/1997/33.

<sup>131</sup> UN Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum Seekers, UN Doc. E/CN.4/2000/4, Annex 2 (1999). An earlier declaration not focused on immigrants and asylum seekers was adopted by the General Assembly in GA Res. 43/173 (1988).

<sup>132</sup> For an analysis of a critical period in the Commission's history, see Howard Tolley, Jr., "Decision-Making at the United Nations Commission on Human Rights, 1979-82", 5 *Hum. Rts. Q.* 27 (1983).

Declaration into two groupings for purposes of drafting binding instruments. The result can be seen in the two International Covenants.

The agenda of the Commission's session became important because often the session ended before all scheduled items could be considered, sometimes postponing standard-setting on a particular topic. The crowded agenda is one reason the Commission began creating open-ended working groups during sessions to undertake some of the drafting work, e.g. the conventions on torture and rights of the child and the declaration on minority rights. Of course, normative resolutions could be drafted well in advance of the Commission session by member states or could emerge from studies of the Sub-Commission. In certain periods, individual states have taken a leadership role on specific topics.

The Commission, like other UN bodies, preferred that resolutions be adopted by consensus. Sponsors sometimes accepted weakened statements of rights or obligations in order to obtain support. At the same time, the Commission was singularly unsuccessful in achieving consensus. Between 1979 and 1982, for example, some two-thirds of the resolutions were adopted by a divided vote. While the votes have often been viewed as reflecting the Cold War and the East-West divide, they more often reflected North-South divisions. Proclamation of the New International Economic Order, the Convention on Apartheid, and resolutions on transboundary movement of hazardous wastes and products as a human rights violation, were all adopted by a divided vote, with "northern" states opposed or abstaining.

## 7. Evaluation

While there has been much attention focused on the process of standard-setting it is also important to consider the results. The website for the Office of the High Commissioner for Human Rights lists nine "core" treaties, some of which are supplemented by optional protocols.<sup>133</sup> It also posts a listing of more than ninety other standard-setting instruments. There clearly is little reason to complain about the quantity of human rights standard-setting by the UN as a whole, especially if one adds the specialized agencies to the list. Indeed, there is a risk of devaluing the currency if too many new rights are added.<sup>134</sup>

As early as 1986, the General Assembly adopted a resolution to exercise some degree of quality control over the production of new standards.<sup>135</sup> Commentators also have examined UN standard-setting and proposed standards for standards.<sup>136</sup> In part the concern stems from the link between quantity and quality, with a fear that an increase in the former inevitably results in a decline in the latter. Another concern is with the capacity of states to comply with the multitude of norms and standards now in place.

It is possible to suggest that the problem of normative proliferation is a consequence of too many standard-setting bodies. As noted earlier, the Commission itself was not responsible for or even involved in drafting many of the major human rights treaties and declarations. Instead, numerous other bodies throughout the UN system became the source of human rights instruments. Overlapping jurisdiction, with numerous bodies engaged in adopting human rights norms, can produce synergies, but can also mean overlapping or inconsistent norms, a lack of expert involvement, and a lack of continuity in the drafting process.

Another critique of the standard-setting process concerns the length of time involved in concluding normative texts, despite a decision by the Commission that

"in most instances the established time-frame should in principle not exceed five years."<sup>137</sup> Some instruments required a decade or more to negotiate, becoming less demanding in the process. Examples include the Declaration on Human Rights Defenders,<sup>138</sup> the Declaration on the Protection of all Persons from Forced Disappearance,<sup>139</sup> the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>140</sup> the Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>141</sup> and the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.<sup>142</sup> The draft Declaration on Human Rights and the

<sup>133</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965; International Covenant on Civil and Political Rights, 16 Dec. 1966; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966; Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984; Convention on the Rights of the Child, 20 Nov. 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990; International Convention for the Protection of All Persons from Enforced Disappearance (not yet into force); Convention on the Rights of Persons with Disabilities (not yet into force). Several of the treaties are supplemented by optional protocols: Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 Dec. 1989; Optional Protocol to the Convention on the Elimination of Discrimination against Women, 10 Dec. 1999; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000; Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 Dec. 2002; Optional Protocol to the Convention on the Rights of Persons with Disabilities (not yet into force).

<sup>134</sup> See Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" 33 *Rutgers L. Rev.* 435 (1981), Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control", 78 *Am. J. Int'l L.* 607 (1984); Theodor Meron, *Human Rights Law-Making in the United Nations* (1986).

<sup>135</sup> GA Res. 41/120, 4 December 1986, A/RES/41/120 recommends principles to guide states in developing new international human rights instruments. They suggest that proposed new texts should (a) be consistent with existing norms; (b) be "of fundamental character," (c) be "sufficiently precise to give rise to identifiable and practicable rights and obligations; and (d) provide "realistic and effective implementation machinery." *Id.* at para. 4.

<sup>136</sup> See Philip Alston, *supra* note 134; Theodor Meron "Reform of Law-Making in the United Nations: The Human Rights Instance", 79 *AJIL* 664 (1985); Bertram Ramcharan, "Standard-setting: Future Perspectives," in Meron, ed., *Human Rights: Thirty Years after the Universal Declaration* (1979), 107.

<sup>137</sup> UN Commission on Human Rights, Decision 2000/109, Annex, para. 60.

<sup>138</sup> GA Res. 53/144, UN Doc. A/RES/53/144 of March 8, 1999.

<sup>139</sup> GA Res. 47/133, UN Doc. A/RES/47/133 of Dec. 18, 1992.

<sup>140</sup> GA Res. 47/135, UN Doc. A/RES/47/135 of Dec. 18, 1992.

<sup>141</sup> Commission on Human Rights, Res. 2005/35, UN Doc. E/CN.4/RES/2005/35 of April 19, 2005.

<sup>142</sup> Commission on Human Rights, Res. 2005/81, UN Doc. E/CN.4/RES/2005/81 of April 21, 2005.

Environment was submitted to the Commission by the Special Rapporteur on the topic in 1994 and was still under study when the Commission ceased to function (in 2006).

The lengthy process of negotiation may result in texts that are poorly drafted, inconsistent or overlapping with other normative texts. The Government of Spain linked this poor quality to problems of implementation, noting that “the legal inadequacies of many of the treaties adopted recently [is] a situation which in turn creates major problems in terms of the interpretation and application of such treaties.”<sup>143</sup> Of course, a level of generality may be necessary to achieve consensus. It also allows normative instruments to evolve to respond to contemporary needs. With increasing numbers of human rights bodies hearing cases, interpretive jurisprudence can give guidance to states on the meaning of rights and the scope of their obligations, but it also shifts standard-setting away from states to small quasi-judicial bodies.

The practices described also raise the question of whether non-action is a form of action. Several normative texts drafted by the Commission or Sub-Commission or recommended for drafting have never been approved, for example a treaty on religious intolerance, the draft declaration on human rights and the environment. The Declaration on the Rights of Indigenous Peoples initially suffered a setback as well, albeit after the demise of the Commission.<sup>144</sup>

Clearly, the Commission’s position between the Sub-Commission and the Assembly led to variable practices in standard-setting. Some drafting was done by each of the three bodies. The Assembly sometimes insisted on retaining exclusivity over the negotiations. When the Sub-Commission engaged in standard-setting it was often with considerably more input from NGOs than was the case at the Commission. Indeed, some resolutions and drafts were jointly written by one or more members of the Sub-Commission with NGO representatives. When the product became too progressive, the Commission or ECOSOC would circumscribe the Sub-Commission’s activities.

Undoubtedly, standard-setting by the Commission was a political activity. This should not come as a surprise or be taken as a criticism – law-making in every society is a political activity. One may disagree with the political choices made or question the disinterest and neutrality of the law-maker, but it is impossible to view law-making as anything other than a political process. The replacement of the Commission by the Council will not change this fact, but unfortunately it may remove some of the checks and mitigating factors that most encouraged standard-setting by the Commission. In particular, the presence of an independent expert body, the Sub-Commission, working closely with NGOs and civil society, was indispensable in revealing many of the serious human rights problems that needed attention and required the adoption of international standards. Without such an expert body, there is a risk that the Council will lack the expert advice or stimulus to act. As has been seen, most of the standard-setting initiatives during the Commission’s tenure did not originate in the Commission, and many of them did emerge from studies in the Sub-Commission. Retaining or recreating a body of independent experts thus should be a priority matter for those concerned with the future of human rights in the UN system.

<sup>143</sup> Review of the Multilateral Treaty-Making Process, UN Doc. ST/LEG/SER.B/21 (1982), 43. See also Richard Lillich, “Civil Rights” in I *Human Rights in International Law: Legal and Policy Issues* 115, 121 (T. Meron, ed. 1984).

<sup>144</sup> In Res. 61/178 of Dec. 20, 2006, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, the General Assembly “took note” of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples, but decided “to defer consideration of and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon.” UN Doc. A/61/178 of March 6, 2007.

ORIGINS AND HISTORY OF UN SPECIAL PROCEDURES  
An Overview from Their Inception to June 2007

by Christian Tomuschat, Berlin

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I. The Origins

Special procedures in the field of human rights, namely mechanisms designed to address the human rights situation in specific countries (country mandates) or specific across-the-board issues (thematic or topical mandates) were not originally a component element of the UN system for the promotion and protection of human rights. For many decades, the view prevailed that Article 2 (7) of the UN Charter debarred the General Assembly (GA) and the

Commission on Human Rights (CHR) from scrutinizing the actual human rights situation in a given State. Generally, the UN confined itself to standard-setting activities. It was particularly the socialist States which maintained that consideration of the practice of human rights in a member of the World Organization amounted to unlawful interference with sovereign rights under the protection of the *domaine réservé*.

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