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UN Special Procedures and the Implementation of International Human Rights Law

Let me begin by applauding the UNA-Westminster for the work you do in advancing the goals and aims of the United Nations Charter and for raising awareness about the importance of those goals, aims and related activities.

When I was invited to deliver an international law lecture, I had to check myself a bit. I am not a lawyer by training. My academic studies have all been in international relations and then I embarked on a career in diplomacy, which for the past dozen or so years had increasingly pulled me into the advocacy of international human rights standards. I was not sure if I would have anything useful to say; and then I read up on Ruth Steinkrause Cohen's admiration for Hugo Grotius, the father of international law. For Grotius, it would not be unreasonable to say, that international law was part of international relations, for he wrote about the law of nations. And this interdisciplinary partnership, one could say, speaking in perhaps rather loose fashion, lasted through to the twenty-years' crisis which E H Carr famously wrote about. In fact, when the very first school of international relations in the entire world was established in 1919, at Aberystywth, which is where I ended up for my first degree straight from the sandy beaches of the Maldives, it was clear that international law and international politics had much common ground. This bond was broken in the

years leading up to the second world war, with the dominance of the Realist School in international relations. And this gap did not start narrowing until after the cold war, and in the high tide of human rights. Viewed from this perspective, I really had to accept this very generous invitation to this prestigious event. More so, when I read that Ruth Steinkrause Cohen had also observed that, in her words, “from the atom to cruelty in zoos, there’s a UN body paying attention to it ...there is a universality to it.” These words resonate with the UN Special Procedures system that I wish to speak about tonight: universality is the hallmark of their work; and with 53 mandates, they do cover a wide-range of human rights topics. And, to recall Grotius, and the interdisciplinary links between law and politics, I also want to point out that the art of promoting and protecting human rights within the UN system, is a highly political enterprise, grounded in international human rights law.

So before I proceed further, please allow me to thank UNA-Westminster for inviting me to give a talk on the challenges facing the UN Special Procedures. I am delighted to be here tonight, and flattered by the attentive audience. I do look forward to the interactive segment after my talk.

Tonight I will be talking about the challenges of implementing international human rights law from the perspective of the United Nations special procedures system; the role and functions of the special procedures; their contributions to the implementation of human rights; the limitations and the challenges they face; and the prospects to address these challenges. I will conclude by examining the potential for making greater use of the special procedures system, including in the context of the Rights Up Front initiative outlined by the UN Secretary General at the end of 2013, which is still very much a work-in-progress. In the past few days, I have been engaged in not only trying to prevent and impending execution of a juvenile offender in Iran, but also to engage my

colleagues in the Special Procedures system and others, on the human rights violations currently taking place in my home country, the Maldives. If Iran is too big, too rich and too powerful to listen to a UN mandate-holder, surely the Maldives is neither big, nor rich, nor powerful to resist international pressure to observe its human rights obligations. But as you can see, the challenges of human rights implementation can be very daunting, and it may not always be easy to put human rights up front.

But first, before I get to the challenges of human rights implementation, let me begin with the UN Special Procedures: who are the special procedures, what are their powers and where do they come from?

The first thing I want to note is the great diversity within the system of special procedures. What we today call the UN Special Procedures mechanisms carry a variety of titles, cover a very wide range of subjects, may consist of individuals or groups, and may examine a particular country or human rights related theme globally. The total number of mechanisms today is 53; and the number of experts who work in these mechanisms, and I should add, all work pro bono, is 77. They are of two broad types—country mandates and thematic mandates, the latter of which may be entrusted to individuals or to working groups of 5 individuals each representing one of the 5 geographic regions classified in the UN to encourage equitable geographic representation. There are 6 such Working Groups.

Why are they called special procedures? They are called special procedures because they were not a procedure provided for in the UN Charter or perhaps not even foreseen in the Charter. Article 68 of the UN Charter empowers the Economic and Social Council to set up various Commissions as may be necessary to carry out its duties in the fields of economic and social

development and human rights. The primary procedure for human rights that it set up was the Commission on Human Rights with a sub-commission on the protection of minorities. One would also add to this the Commission on the Status of Women. But all these bodies were composed of representatives of states, even if they had to be experts in certain fields, and had no requirement to be independent, which, however, is the hallmark of the subsequently created special procedures. Although not foreseen in the charter, Special Procedures are called charter-based bodies, because they derive their authority from the United Nations Charter, and are to be distinguished from the treaty-based bodies of experts who derive their mandate and authority from the terms of the treaty that created them. Of course the primary charter-based bodies for human rights today are the Human Rights Council including its Universal Periodic Review Mechanism and the Office of the High Commissioner for Human Rights. One also notes the human rights related components of the mandates of the General Assembly, the Economic and Social Council and the Security Council. Among all the Charter-bodies, the distinguishing trait of the special procedures is their independence from either state influence or bureaucratic attachment to an organisation.

If they are independent and unattached, where do they derive their authority from?

One would think that citing the authority of the UN charter for the work of the Special Procedures would be sufficient to establish their legitimacy. But this is not always the case, as the special procedures must operate in the space between Article 1 (3) of the UN Charter and Article 2(7) of the Charter. While article 1(3) identifies human rights as one of the basic aims and purposes of the United Nations, article 2(7) insulates states against interference in their internal affairs. Thus, whenever I step up to a UN podium to present my findings on the human rights situation in the Islamic Republic of Iran, there is a steady stream of

interventions from the delegations of, for example, Venezuela, Cuba, North Korea, Eritrea, Syria, and a few others, who remind me that the UN charter protects states from external interference in their internal affairs, just as delegations from the EU, the US, Canada, Australia and a lot more will reiterate the concerns expressed in my reports. More than that, the former group of countries will also assert that UN mandates that examine country situations are illegal or illegitimate or counterproductive for reasons related to article 2(7). I find these expressions quite interesting, not only because they conflict with the basic aims and purposes of the UN Charter, but also because they represent a switching of lanes by a number of countries in the evolution of the human rights discourse in the UN in general and in relation to the special procedures in particular.

The special procedures have a long history that dates back nearly 50 years. But to make a long story short: the origins of the special procedures system lie in the expansion of the membership of the Commission on Human Rights in the wake of decolonisation; and in the extent to which these new States, and their allies, were able to mobilise the UN system to oppose the policies of apartheid and racial discrimination in southern Africa. In 1947, the UN had, in fact, adopted the doctrine that it had no power to act to address human rights violations. In other words, the UN's mandate was to **promote** human rights, such as through normative development, and that it did not include a protective function, involving investigation of violations and advocacy of redress. This was a position that was contested even as it was adopted, but remained in force for the next 20 years. This changed in 1967, with the adoption of ECOSOC resolution 1235, by which the Commission instituted a procedure for the public scrutiny of situations of gross human rights violations. To do this, and to stress the focus on southern Africa, a working group of independent experts was established to enable the Commission to carry out this protective function. The

following year, the General Assembly utilised the same procedure to establish a working group to monitor the situation in the territories occupied after the 1967 Arab-Israeli war. There were declarations that these were unique situations that did not create precedents; and this lasted until 1975 when the next working group was set up, in the aftermath of the coup in Chile, which in effect became the first ever country specific mandate; and then in 1980, in the context of the Dirty War in Argentina the first thematic mandate with a global focus, the Working Group on Enforced and Involuntary Disappearance, which continues to function even today, was created. After 1980, the system rapidly built itself up, with rapporteurs covering country situations and physical integrity rights. And to complete the storyline here, from the 1993 World Conference on Human Rights onwards a great proliferation has occurred, especially with the creation of mandates covering economic, social and cultural rights. The growth continues today, with regular increase in the number of both country mandates and thematic mandates.

Why has there been such a rapid expansion of special procedures mechanisms?

The expansion, I would argue, is based on the demonstrated usefulness of the special procedures, and on the increasing attention paid by the United Nations to the promotion and protection of human rights. It would be helpful to illustrate this point by reference to the work they do**.** Although there are significant differences in the manner in which the 53 mandates operate, by and large they fall into a common set of roles. Special Procedures study a specific human rights situation, be it a specific issue like torture or a particular country; they advise member states and the international community on steps that may be taken to address the issue; they advocate on behalf of alleged victims to seek redress; they provide early warning on impending violations and mobilise

international attention to prevent them or address them; and they maintain follow-up on the issues under study.

I argue that some of these functions point to the uniqueness of special procedures and therefore to what is really so special about them. Firstly, the ability to remain engaged on a specific country or theme continuously results in greater impact than the fleeting engagements countries have with some of the other human rights mechanisms such as the UPR or the treaty bodies. As Sir Nigel Rodley argues, this is an important reason why the treaty bodies and the UPR have not made the Special Procedures redundant. Secondly, the early warning function enables them to mobilise international attention with preventive options. Of course, not all early-warning had been heeded, such as the August 1993 report of the special rapporteur on summary executions which flagged a number of high risk factors for genocide in Rwanda months before the genocide that killed 800,000 people in that country. The ability to raise the alarm bell has earned them the label of being "the ears and eyes" of the Council. Thirdly, their independent fact-finding role also makes them a credible source of information for action by the United Nations and the human rights movement. Fourthly, the ability to extend the universality of human rights by holding countries to standards they may not have accepted by submission to a human rights treaty. For example, Iran has not signed on to UN Convention against Torture or to the UN Convention on the Elimination of Discrimination against Women. However, I would cite a mix of customary international law and soft law principles as standards by which assessments are made. Thus, the application of the UDHR as customary international law enables the Special Procedures to extend the reach of international standards. Fifthly, and this is very important from the point of view of the victim: the accessibility of the special procedures. One does not require the exhaustion of domestic remedy to engage a special procedures mandate-holder. And finally, the orchestration

function: the ability of special procedures to link up human rights defenders at the local level and those active at the international level, and to facilitate various interconnections among them is a very useful function. The processes and the mechanisms of socialisation and norm cascade identified in the so-called Spiral Model proposed by Thomas Risse, Stephen Ropp and Kathryn Sikkink illustrate the usefulness of this orchestration function. One of the things that a special procedures mandate-holder can do is to give voice to the voiceless, raise consciousness and contribute to norm cascade, even if in a limited fashion. This is in part related to the higher mobility and greater visibility of mandates compared to some of the other mechanisms.

Now these are all protective functions. In fact, the Special Procedures have also made significant contributions to the promotion of human rights, by clarifying various contours of specific rights, such as the work done by the Special Rapporteurs on Torture and on Freedom of Religion, or expand the application of existing standards, such as work done by the Special Rapporteur on Internally Displaced Persons, or the Special Rapporteur on Freedom, of Expression; or make conceptual and methodological contributions, such as those made by my Essex-based colleague, Professor Paul Hunt with his conceptual framework on human rights mainstreaming and impact assessment—what he calls the structure-process-outcome framework by which the effort made by states to implement human rights standards can be measured.

But achieving all this great output may not be always possible, and may even be my fantasy, given the modest tools and resources and other constraints faced by mandate holders. The basic working tools are the communications sent to states, primarily, the urgent appeal that tries to prevent an impending violation; and the

allegation letter, which seeks redress after the event. The poor response rate to these demonstrates their limits; on average a positive response is achieved in about 30% of cases or less. The other main working tool is the country visit, which would result in a report which is debated in the UN and, on occasion, a resolution by a UN body. Country visits can only take place with state consent, and a number of obstacles stand in the way of the Special Procedures being able to go to a country of their choice, on a programme of unrestricted access, and with guarantees of non-reprisals against those who give information to the mandate-holder. Notwithstanding **some** of these constraints, the country visit can catalyse human rights progress by highlighting issues, generating political will and identifying ways to improve capacity to implement human rights standards. Although not a tool of special procedures, the ability to engage with civil society, and also with National Human Rights Institutions can add value and impact to the work of special procedures, especially in the absence of state cooperation. And one other tool, generally applicable to the thematic mandates, is the convening of seminars and symposia, which essentially contributes to human rights promotion.

What are the main challenges?

Four are very important: the lack of state cooperation, the lack of resources; politicisation; and poor mainstreaming of human rights within the UN system. Lack of cooperation can have a debilitating impact on a country mandate while it may also prevent a thematic mandate from examining the most egregious cases. But in the age of the internet, access to information perhaps is not as difficult as it may have been, say, 30 years ago. A more serious challenge, therefore, is the lack of resources: simply because OHCHR does not get sufficient money to service all the mandates that have been created. The

OHCHR serves as the secretariat for the Special Procedures, but many mandates do not have even one full time staff assigned to them! This has compelled the mobilisation of resources from outside the UN system, again leading to questions of independence and politicisation.

Politicisation manifests in many ways. It results in selectivity in the creation of mandates and the manner in which state cooperation may be extended or in the choice of action within the United Nations. Human rights diplomacy cuts both ways: it may promote human rights; or it may marginalise human rights concerns. There are no triggers for the creation of mandates or for winding them down. The fact that country mandates are renewable each year, inhibits a strategic approach and encourages perennial efforts to terminate the mandate instead of responding to human rights deficits. Politicisation also threatens the independence of the mandate system as greater political control has been conceded such as in the procedure for the selection of mandate-holders. It is now very much a process run and controlled by member states, with all the politics that it entails. Politicisation may also be the reason for the continued creation of new mandates, often with overlapping subjects, while the efforts to rationalise the mandates have not succeeded. But the greatest manifestation of politicisation are the efforts undertaken to limit the independence of the mandate holders such as by the creation of a code of conduct that seeks to regulate the way mandate holders work, obtain and use information, and report on their findings. While many mandate holders believe the code has a chilling effect on them, one could argue that the jury is still out on this, with many other mandate-holders claiming that a clear code of conduct provides a shield against unfounded charges. In my own experience, Iran uses the code for misdirection in the interactive debates at the UN on its human rights practices. By claiming that a mandate-holder was in breach of the code of conduct, a country could deflect attention away from its human rights challenges. Iran points out that the

code requires mandate-holders to respect the laws of the country while on mission. I read this to mean things like, for example, observing traffic laws if I was driving in Tehran. I do not read the code to mean that I have to be silent on laws that I believe undermine women's human rights, for example.

A fourth limitation is insufficient mainstreaming of human rights within the UN system or in parts of the system at different times. Many mandate-holders claim that the UN country teams could make better use of the recommendations of the mandate holders especially after country visits, while many country teams also point out their consistent use of these recommendations in their follow-up work. But there are tensions that result from different priorities and differences in their modus operandi. The independent mandate holder could be seen as being overzealous in advocacy of human rights, upsetting relationships painstakingly cultivated with regimes that remain in office for the long haul, while the mandate-holder might argue that misplaced praise for country practices might get the government off the hook on human rights violations. My statements on Iran's drug policy have not always matched with statements made by some of the UN agencies speaking on the same subject. Fortunately, although both the UN Secretary- General and I submit separate reports on Iran's human rights situation to the same UN sessions, these two reports have not had any such discordant notes. But mainstreaming human rights and integrating the special procedures within the wider UN system is an issue that needs some attention. Other issues related to limited mainstreaming perhaps is the reluctance to share information that may be held in various parts of the UN or the inadequacies in the way such information may be shared.

And this brings me to what can be done.

To proceed in the order that I raised some of these challenges: first, there must be greater insistence on genuine state cooperation. Nearly 116 countries are listed as countries giving standing invitations to Special Rapporteurs, but many like Iran, do not practice it. A greater exposure of the abuse of this system could be made.

There must be greater resources spent on processing communications: right now, the OHCHR accepts petitions in only three languages, and the bulk of the complaints received are not even officially logged into system--- a function of serious staff shortage. More transparency in country responses to communications can also be attained, and this has in fact being done recently.

On resources I agree with Professor Michael O'Flaherty that the funding situation of OHCHR is a global scandal: it gets about 3% of the UN's regular budget and the total budget of the OHCHR at around 295 million dollars is far less than the budget of Amnesty International. Clearly, the third pillar of the United Nations need to look more like a pillar than a stump.

On politicisation: greater professionalism must certainly be encouraged amongst mandate holders and greater accountability established for non-cooperation by states. Should there be trigger points for creation of mandates, to escalation to commissions of inquiry, to downgrade mandates from protection to capacity - building, and to winding them down? But would that be sufficient to end complaints of selectivity and politicisation? I don't pretend to have the answer to that question.

And finally, utilising the Rights Up Front Initiative to secure greater operationalization of human rights through mainstreaming. The Rights Up Front initiative was formulated in the aftermath of the civil war in Sri Lanka when an Internal Review Panel characterised UN's conduct as demonstrating systemic failure to protect human rights. It identified the problems with priorities, flow

of information and communication, capacity and inadequate responses: somewhat similar to the kinds of mainstreaming deficits that many special procedures complain about.

The Joint Inspection Unit of the United Nations, in the first ever full scope review of the management and administration of OHCHR in over a decade, have made an interesting and important recommendation in this regard:

Recommendation no. 6 says:

The Secretary-General should, in the context of the Human Rights Up Front initiative, review, as appropriate the mandates, activities and work of different entities with human rights mandates with a view to **streamlining** their work, **mainstreaming human rights** across the United Nations system and **enhancing synergies**. The results of the review should be submitted, along with …recommendations, to the General Assembly for consideration at its seventy-first session.

It is very interesting that the Joint Inspectors invoked the Rights Up Front Initiative in the context of the challenges faced by OHCHR in supporting the various human rights mechanisms and in strengthening its capacity to function more effectively.

This is a report that is just out and which will be debated in March this year in Geneva, and recommendations are to made to the UN GA in 2016. I wish to advance the relevance to the special procedures of the key management concepts specified in the recommendation: streamlining work; mainstreaming human rights; and enhancing synergies.

Reforms that advance these goals should contribute to the rationalisation of mandates, and can temper the tendency to overload the overstretched special procedures system by the continued creation of new mandates. They would also

facilitate better coordination between various parts of the UN system and the special procedures, and enable a more integrated use of the early warning function of the special procedures. There is a precedent but not a practice of special rapporteurs briefing the Security Council: would the new reforms provide for that? Human rights mainstreaming of course provides a tool to operationalize human rights across the UN system, and can be the vehicle by which the special procedures are more fully integrated into the UN system. For several years now, there has existed a special procedures coordination committee, a team of 5 mandate-holders elected from among themselves and who act as the institutional link between the special procedures and the wider UN. The Committee is well placed to be the platform to secure greater synergies by which the Rights Up Front Plan of Action integrates the Special Procedures into a more effective role in promoting and protecting human rights.

This will still not address all the issues of politicisation, resource constraints, and state non-cooperation, but a mainstreamed, synergistic and streamlined use of the mechanism will mean a far sharper tool than is the case now.

But then to return to the puzzle that I alluded to earlier: would strengthening the special procedures system or even the other UN mechanisms be sufficient to address the puzzle that no country appears to be too small, too poor or too insignificant to be unable to resist international pressure to observe its human rights obligations? Would a sharper tool result in greater political will?

Perhaps this is a good point, as any, to end my talk, and look forward to your comments and questions.

Thank you.