IN DEFENCE OF SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL:

AN ALTERNATIVE NARRATIVE FROM THE SOUTH

by
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GENEVA CENTRE FOR HUMAN RIGHTS
ADVANCEMENT AND GLOBAL DIALOGUE

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FOREWORD

On the eve of the celebration of the seventieth anniversary of the United Nations, the Geneva Centre for Human Rights Advancement and Global Dialogue is pleased to publish this study devoted to one of the oldest and most important international human rights mechanisms ever established within the framework of the universal Organization, nowadays better known as the "*Special Procedures*".

Not too many studies have so far been devoted to this unique and important mechanism, which emerged on 6th March 1967 with the setting-up of the Working Group of Experts on Southern Africa and over time became a machinery currently involving 79 Special Rapporteurs, Independent Experts and members of Working Groups, for a total of 55 thematic and country mandates.

Very few, if any, of these studies have been reflecting the views and concerns of the South. Therefore, the Geneva Centre deemed it necessary to provide national and international human rights stakeholders with this study as a contribution to the ongoing debate on the strengthening of this unique human rights mechanism.

The Geneva Centre is indeed functioning as a platform of exchange and cooperation between all actors involved in the full realization of all human rights. It is founded on the belief that global dialogue on issues of common concern is not yet optimal and needs to be constantly fostered. The mission of the Centre is, in particular, to provide alternative insights and approaches to enrich the human rights dialogue and strengthen the existing international human rights mechanisms. We indeed believe that advancing human rights is a long-term process that can only be achieved through the cross-fertilization of ideas and the gradual widening of political consensus on matters of common interest and concern. Assisting countries of certain regions of the world in making their voice better heard in international fora, so that their concerns and views be taken into account, undoubtedly contributes to fostering genuine and constructive dialogue. It is precisely in this spirit that the present study has been commissioned.

This research, inspired by practice and permeated with practical policy implications, in many aspects departs from conventional wisdom. It essentially aims at enhancing dialogue and cooperation between all human rights stakeholders by proposing concrete steps and measures to be taken by the latter to reach the objectives laid down in the relevant mandates, while preserving in all circumstances the principles of independence, impartiality and universality. We thus hope that this contribution will inspire all segments of the human rights community and prompt them to take similar initiatives aimed at furthering the ongoing discussions.

Dr. Hanif Hassan Ali Al-Qassim
Chairman of the Board of Management

ACRONYMS

CCSP: Coordination Committee of Special Procedures

CHR: United Nations Commission on Human Rights

CoC: Code of Conduct of Special Procedures Mandate-Holders of the Human Rights Council

GA Res.: United Nations General Assembly resolution

HRC: United Nations Human Rights Council

IB text: Resolution 5/1 of the Human Rights Council entitled "Institution-building of the United Nations Human Rights Council"

IE: Independent expert

MOSP: Manual of Operations of Special Procedures of the Human Rights Council

NAM: Non-Aligned Movement

NHRI: National Human Rights Institution

OHCHR: Office of the High Commissioner for Human Rights

OIC: Organization of Islamic Cooperation

o.p.: operative paragraph

para.: paragraph

res: Resolution

RRI: Review, Rationalization and Improvement of mandates

SP: Special Procedures

SPB: Special Procedures Branch

SPMH: Special Procedures Mandate-Holder

SR: Special Rapporteur

WEOG: Western European and Others Group

INTRODUCTION

1. The present study is offered as a tribute from the South to the mechanism of the Special Procedures Mandate-Holders (SPMHs) of the United Nations (UN), whether they operate as individuals or in Working Groups, whether coming from a Western or from another background[1]. The SPMHs deserve our deep appreciation for having provided over the years, ever since 1967, their valuable and indeed valued services, in the form of voluntary work, to advance the cause of human rights worldwide.

2. Developing countries are mindful of the fact that they themselves took the initiative of reversing in 1965[2] the decision of the United Nations Commission on Human Rights (CHR)[3] taken in 1947 and approved by the Economic and Social Council of the United Nations (ECOSOC) that 'it had no power to take any action in regard to any complaints concerning human rights"[4]. They, and not the Western countries, were the ones to act resolutely to set up the first Special Procedures (SPs). They therefore have a sense of ownership of this mechanism and have expressed their commitment to it long since.

3. SPMHs have learnt over time to understand that what may be clear and obvious in the West in terms of full enjoyment of human rights for all segments of the population may not be as evident yet for poorer countries. In the latter, the shortage of human and financial resources, governance deficiencies and the challenges of holding together countries in early stages of nationhood, may require undue centralization of power. They, as indeed all of us, now witness in the Middle East and North Africa region how easy it is to throw out the baby of national unity with the bathwater of authoritarianism.

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[1] For an early assessment of this special mechanism, see for example, Agnès Dormenval, *Procédures onusiennes de mise en œuvre des droits de l'homme: limites ou défauts ?*, PUF, Paris, Publications de l'Institut Universitaire de Hautes Etudes Internationales, Genève, 1991, 274 pp., and Fatma Zohra Ksentini, *Les procédures onusiennes de protection des droits de l'homme – Recours et détours*, Editions Publisud, Paris, 1994, 246 pp.

[2] Indeed, it was the UN Committee on Decolonization which, in June 1965, called on the CHR to consider individual petitions concerning human rights.

[3] For a comprehensive study on the history and prerogatives of the Commission on Human Rights, see Jean-Bernard Marie, *La Commission des droits de l'homme de l'ONU*, Editions Pedone, Paris, 1975, 352 pp.

[4] ECOSOC Res. 75 (V) of 5 August 1947 and CHR decision at its first session the same year.

4. Indeed, SPMHs have come to realize better than other observers that while all peoples, rich and poor, from the North and from the South, aspire to democracy, development and respect for human rights, each one feels entitled to choose the specific economic, social and cultural systems that are best suited to them in the pursuit of these common aspirations. Developing countries must be allowed to arrive at shared human rights objectives while coming from itineraries different from the industrialized world. And this is just as well since it took several centuries for developed countries to arrive at where they are today in terms of the level of enjoyment of human rights, with great leaps backwards during the colonial past of many of them. Developing countries are challenged to make human rights prevail nationally in a much shorter time span.

5. The South wants to pay tribute to the SPs in its own way. It does not want to do that by being content to echo the approach of rich industrial countries and just advocate that they be given a free rein to do what they think fit, taking governments of developing countries to task whenever they deem it appropriate. This SPs may do, of course, within the limits of their mandates.

6. What the South wants to do in this tribute is to give the SPMHs its critical support so that they can achieve in the developing world the maximum impact at the minimum cost in terms of goodwill of targeted countries as much as in financial terms. The most successful mandate-holders in the developing world have been those who have advanced the situation of human rights on the ground, understood the constraints of concerned governments and helped them overcome these constraints, not necessarily those that have been the most vocal or vociferous.

7. Representatives of developing countries, expressing in good faith a different perspective from that of advanced countries on the enhancement of the effectiveness of SPMHs, have been criticized for allegedly having the ulterior motive of undermining the independence of mandate-holders. This has turned out to be the ultimate blanket statement to discredit views other than one's own without having to develop a rational counter-argument in a free exchange of opinions. The present study warns against the rise of human rights fundamentalism in the HRC and counts on the SPs to uphold the freedom of opinion and expression of all, including when the exercise of this freedom applies

to the assessment of the implementation of the mandates and of methods of work of SPMHs themselves.

8. This study argues that for SPs to work as a "system", the rules of engagement with States at one and the same time have to uphold the mandates of SPs and to respect the sovereignty, constitutional processes and dignity of States targeted, the overriding concern remaining the protection of victims of human rights violations. SPs' independence in the discharge of their mandate is absolute. On procedural and non-substance issues, differences of perception may occur with States that can be solved through formal or informal understandings without either side acting as judge and jury.

9. Developing countries do appreciate how delicate the task of SPs can be. The present study suggests alternative approaches to "foster a constructive dialogue"[5] between SPs and States so as to improve the responsiveness of the latter who are mostly from developing regions and also to enhance follow-up to SP recommendations. It does not consider that exceptional extreme cases of State-sponsored violations of human rights should be the guide for action of SPs towards the overwhelming majority of developing countries. Such exceptions had better be dealt with through *ad hoc* procedures and measures.

10. Developing countries are way behind advanced countries in terms of ensuring the enjoyment of human rights for all (although there are worrying developments in Europe as a result of populist party action to promote xenophobia and religious intolerance). It is therefore most likely that the focus of SP action will continue to be on developing countries. Under such circumstances, the South has a special interest in making the SP mechanism, which is yet to become a "system", work as effectively and as harmoniously as possible.

11. This study is an encouragement to SPMHs to "continue to foster a constructive dialogue with States"[6]. It is about providing the ultimate catalyst to make this happen: trust.

[5] GA Res. 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 25.

[6] *Ibid*., para. 25.

12. SPs are the mechanism through which the HRC assesses the situation of human rights on the ground. They can call States to account on the basis of specific internationally recognized principles which the mandate-holders are empowered to consider at implementation stage[7]. In order for SPs to discharge their mandate effectively, developing countries were the first to insist from 1965 onward that the mandate-holders should enjoy absolute independence within the confines of their mandate. Developed countries now echo this need for absolute independence of mandate-holders but tend to stress that it should not be limited by anything except by the conscience of these officials themselves. It has been alleged that the developing countries aim at undermining the SPs independence. This is a controversial claim that the present study also proposes to address.

13. While SPs are accountable *de jure* to the HRC, as per article 15 of the Code of Conduct of Special Procedures of the Human Rights Council (CoC), any mechanism to translate this accountability in practice is viewed by many developed countries and many western headquartered NGOs as undermining the independence of mandate-holders.

14. The developing countries who advocate giving concrete expression to such accountability are at times suspected of wanting to whitewash human rights violations, having in particular their own internal situation in mind. In reality, these countries are, in most cases, anxious to reconcile their interest in having an effective mechanism of SPs with the concern to preserve their sovereignty under international law. In the same way as they strive to promote a system of checks and balances at the national level, they call for a similar system at the multilateral level when it comes to the exercise by UN experts of their prerogatives which sometimes lead them to "intervene" in the internal affairs of a State. This stance is criticized as an "attack" on SPs that causes OECD countries and their NGOs to rise in "defence" of SPs. Yet, there are no "attackers".

15. SPs can deal with the human rights situation in countries, essentially of the South, concerning individual cases of human rights violations, irrespective of the

[7] For a variety of reasons (political instability, national cohesion still a process under way), developing countries have difficulty ensuring general enjoyment of human rights at lower levels of national and per capita income, (lack of experienced NGOs rooted in the country itself and not dependent on foreign funding, susceptibility to outside pressure for overseas development aid recipients, etc…). The untrammeled strengthening of SPs is the preferred way to bring countries to fall into line from the viewpoint of some advanced countries. At the same time major powers and donors do not need, as weaker countries do, formal mechanisms to ascertain that SPs do not go against what they perceive as their national interests.

status of each case in national Courts of Law and of the ratification or non-ratification by the State concerned of relevant international conventions or protocols thereto allowing for individual complaints to be submitted to Treaty Bodies. This requires from the SPMHs, in addition to legal savvy, a lot of tact, patience and perseverance as to how to advance the interests of victims while keeping open the channels of communications with the concerned State.

16. There is no question that in these conditions the independence of the SPMH is of the essence, meaning the independence from any source which might attempt to influence her/his assessment of a human rights situation requiring her/his involvement, as well as independence of her/his own judgment from any pre-conceived views. Impartiality is therefore also central to the concept of independence of SPMHs.

17. Asserting the paramount importance of the independence of the SPMHs is not tantamount to considering that the latter are being delivered a blank cheque by the HRC. The independence referred to is limited by the bounds of the SPs mandates, that of the HRC, the scope of the UN Charter as well as by the obligation of the mandate-holders to respect the laws of the countries they visit.

18. On most of the issues that will be reviewed in this study, the Western European and Others' Group in the HRC (WEOG) and like-minded countries tend to advocate the untrammeled exercise of prerogatives for the SPs while the Non-Aligned Movement (NAM), the Organization of Islamic Cooperation (OIC) and the African and Arab group members in the HRC, in particular, are in favour of clear rules of engagement and greater transparency all round. This is part of the North-South *problématique* specific to the UN and which has enabled the universal organization to identify both with the rich and the poor countries as well as the strong and the weaker ones worldwide. Voices have claimed in the Council that this North-South divide was a remnant of the past that should be jettisoned. However, none of the WEOG countries have broken rank with their group to support a position of the developing countries that their own group opposes. The call to do away with this North-South divide is essentially an invitation to individual developing countries to break with their group and join a WEOG position on a case-by-case basis. This is called "bridging the gap" between North and South in the Council but it tends to be a "bridge with a one-

way street". The developing countries would readily overcome this division if the bridge one day becomes open to "two-way traffic".

CHAPTER I

THE GENESIS: AS NUMBERS INCREASE, SPECIAL PROCEDURES NO MORE "SPECIAL", *i.e.* "EXCEPTIONAL", BUT STILL "VERY SPECIAL" TO HRC

19. It was thanks to the enduring pressure of the developing countries to address the violations of human rights in Southern Africa[8] and Palestine[9] that country mandates started being established in the late 'sixties. It took the developing and other friendly countries a further seven years to obtain the creation of another mandate by the Commission on Human Rights, this time to monitor the situation of human rights in Chile[10]. The process gained momentum after the establishment in 1980 of the Working Group on enforced disappearances initially to address the gross violations of human rights in Argentina[11]. This working group was perpetuated thereafter to address enforced disappearances in other countries, becoming the first of a long series of thematic mandates dealing mainly with civil and political rights[12]. After the Vienna Conference on Human Rights of 1993, mandates on economic, social and cultural rights started to be introduced. This process accelerated from year 2000 onward.

20. The SPMHs, which have all been established on an *ad hoc* basis, have a confusing number of different titles[13] including "Special Rapporteur" (SR), "Independent Expert" (IE), "Special Representative" (SRep.) and, until recently, "Special Representative of the Secretary-General". The latter was replaced by the

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[8] The mandate of the Ad-Hoc Working Group of Experts on Southern Africa was established on 6 March 1967 by Resolution 2 (XXIII) of the Commission on Human Rights, at its 23th Ordinary Session; the mandate of the Special Rapporteur on Apartheid was for its part created by Resolution 7 (XXIII), adopted on 16 March 1967, during the same session.

[9] Resolution 6 (XXV) of the Commission on Human Rights, adopted on 4 March 1969, at its 25th Ordinary Session.

[10] Resolution 8 (XXXI) of the Commission on Human Rights, adopted on 27 February 1975, at its 31st Ordinary Session.

[11] The Working Group on Enforced Disappearances was created on 29 February 1980 by Resolution 20 (XXXVI), *Question of missing and disappeared persons*.

[12] For an elaborate Western view on the thematic mandates, see Olivier de Frouville, *Les procédures thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme*, Editions Pedone, Paris, 1996, 135 pp.

[13] See HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 59.

title of "Special Rapporteur" in 2006. To these should be added the Members of the various Working Groups.

21. In its written statement filed before the International Court of Justice, relating to the request for advisory opinion on the «Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations», the Legal Counsel of the United Nations indicated that a special rapporteur, as distinguished from a rapporteur, is a person designated to carry out studies or reports having financial implications needing to be approved by the inter-governmental human rights body concerned[14].

22. This is a progress on the initial definition of "Special Rapporteur" by ECOSOC, which meant a rapporteur with a special mission that would not constitute a precedent for the future. Such a cautious position of avoiding to create a precedent was dictated by the initial reluctance of the CHR to get involved in the examination of individual complaints concerning human rights in UN Member States. Despite this "caution", initial special procedures did set a precedent that led to the formation of the impressive mechanism that exists today.

23. One might surmise that the "Special Rapporteur" has a grass-roots investigative function while the "Independent Expert" would be more engaged in cross-cutting thematic issues. This is not the case. Referring to country mandates however, the designation of an Independent Expert indicates that her/his mandate has been established with the approval of the country concerned while the designation of a Special Rapporteur refers to the holder of a country mandate that is adopted in the HRC without the consent of the country concerned.

24. It appears therefore that the main explanation for the maintenance of these diverse denominations is the desire of the countries having initiated the mandates to keep the mandate titles in their pristine state.

[14] «It appears that in the practice of the Sub-Commission, there is no essential distinction between "rapporteurs" and "special rapporteurs", though often persons designated to undertake studies or reports with financial implications and which therefore must be endorsed by the parent bodies (the Commission or the ECOSOC) are designated as "special rapporteurs" while those who prepare reports that have no financial implications are called "rapporteurs"», «Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations», 1989, *International Court of Justice: Pleadings, Oral Arguments, Documents,* p. 172, para 72.

25. It remains that "these different titles do not point to a hierarchy nor do they indicate the powers entrusted to the expert. They are simply the outcome of political negotiations"[15].

26. The Review, Rationalization and Improvement of mandates (RRI) called for by a resolution of the UN General Assembly[16] involves political issues which require inter-governmental negotiations. That notwithstanding, it is desirable to rename the function of SPMHs to make their titles meaningful in a way that does not imply a change in the scope of mandates. A first step has been taken through the elimination by the HRC of the title of "Special Representative of the Secretary-General" from the special mandate titles. This task needs to be pursued. The HRC could require the High Commissioner for Human Rights, based exclusively on the mandates as now formulated, to report on this matter and propose to the Council a standardization of titles of SPMHs according to whether they have a thematic or country mandate. If they have a country mandate, the titles could indicate, as they do now, whether the mandate is set up with the approval of the country concerned or not and whether it is primarily investigative or whether it aims to provide technical assistance and capacity-building or both. For thematic mandates, titles could differ according to whether the mandate-holders have the prerogative (1) to promote human rights by carrying out cross-cutting studies worldwide, (2) to promote and to protect human rights through investigating individual complaints, (3) to contribute to norm setting, (4) to draw up legal instruments, or (5) to carry out more than one of these functions. Alternatively, one could give the same title to all SPMHs or differentiate just between thematic and country mandates.

27. The HRC would take a decision to standardize mandate-holders' titles in light of the above-mentioned report of the High Commissioner. This would comply with the "Institutional Building Text" (IB text) which calls for "a uniform nomenclature of mandate-holders, titles of mandates [...]"[17].

28. After the early initiatives of the developing countries to set up SPMHs as indicated above, the action was relayed by developed countries. This occurred

[15] OHCHR, *Human Rights Fact Sheet No. 27*, p. 9.

[16] GA Res. 60/251 of 15 March 2006, *Human Rights Council*, operative paragraph 6.

[17] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 59.

first against the backdrop of the East-West rivalry. After this ideological contest ended in the 'late eighties-early nineties', the focus of interest of advanced countries shifted to the human rights situation in developing countries. There followed an increase in the number of country mandates and a proliferation of thematic mandates in the CHR. These were carried over to the HRC which added even more mandates to the list.

29. As of 5 December 2014, there were 39 thematic mandates involving 6 working groups of 5 experts each and 33 individuals of which 28 are SRs and 5 are IEs, which in practice is no different[18].

30. The number of country mandates increased to over 15 under the CHR and then fell to 12 at the time the mandates were taken over by the HRC. As of 3 December 2014, there were 14 country mandates. Of this group, 8 are SRs, appointed therefore without the approval of the country concerned, while 6 are IEs, appointed with the approval of the countries concerned[19].

31. It follows from the above that 77 individuals are involved in Special Procedures as of 5 December 2014. A reasonable geographic balance has now been achieved among SPMHs. About half of the mandate-holders are currently from developing countries. However, the balance within this group is not ideal. Thus, in 2014, only 7,5% of these officials are from Muslim countries[20], as against 25% up to 2013. This therefore reflects only partially the guidelines of the Council that "due consideration be given" *inter alia* to "an appropriate representation of different legal systems"[21]. As far as gender balance is concerned, it is currently out of kilter since only 39% of the mandate-holders are women.

[18] OHCHR Website consulted on 18 December 2014: http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx.

[19] OHCHR Website consulted on 18 December 2014: http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx.

[20] In particular, there are currently only 6 Arab mandate-holders: 1 from each of the following countries Lebanon, Tunisia, Sudan and Yemen, and 2 from Morocco, as compared to, *e.g.*, 6 from USA and 5 from South Africa.

[21] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 40.

32. While referred to in official documents as being part of a "system"[22], the number of SPs keeps growing without any apparent kind of global logic[23], with limited concern for gaps, duplication or recouping and without any effective adjustment mechanism to a shifting reality on the ground. New mandates are thus being added at an increasing pace despite an average annual budget required of 300 000 US$ per mandate[24], regardless of the long-standing concern for the funding of these procedures which is becoming ever more problematic. This issue will be referred to further in Chapter III.

Conclusions

33. It follows from this overview of the genesis of the Special Procedures (SPs) that all regional groups participated in their establishment and that, consequently, all these groups have a stake in enhancing their effectiveness. Therefore, groups of developing countries which, in addition, were the initial movers of these mechanisms, partake in their ownership and have no less of an entitlement than others to come forward with initiatives they consider appropriate in this regard. What stands out from the overview of the SPs genesis is that the latter have been introduced on a case-by-case basis as a result of fluctuating circumstances, without therefore benefiting from a pre-defined framework that could justify calling the mechanisms a "system". The Institutional Building text has directed the Council to correct this situation. In this spirit, the present study outlines options as to how the review, rationalization and improvement of mandates (RRI) could be pursued further, from the point of view of developing countries. Should negotiations on the substance of RRI not be resumed in the near future, it is suggested that, in compliance with paragraph 59 of the Annex to HRC resolution 5/1, a uniform nomenclature of mandate-holders be approved by the HRC without delay. The Council could thus request the High Commissioner to submit

[22] GA Res. 60/251 of 15 March 2006, *Human Rights Council,* operative paragraph 6.

[23] On this issue, see a well-researched, though on occasion disingenuous western view point by two staff members of Amnesty International, Tania Baldwin-Pask & Patrizia Scannella, describing this growth as "haphazard", "The Unfinished Business of a Special Procedures System" *in* Cherif Bassiouni & William Schabas (Eds), *New Challenges for the UN Human Rights Machinery - What Future for the UN Treaty Body System and the Human Rights Council Procedures?,* Intersentia, Cambridge/Antwerp/Portland, 2011, Chapter 7, p. 422.

[24] This figure is derived from the 2013 annual budget of the OHCHR. It does not include amounts that may be directly fund-raised by SPMHs in cash or in kind, for which no reporting to OHCHR is required.

to it a report with proposals for a uniform nomenclature of mandate-holders without affecting in any way the content of mandates. It could direct that mandates remain of two kinds as is currently the case, *i.e.* country mandates and thematic mandates, but that titles of mandate-holders be harmonized to reflect the nature of their mission:

a) if a country mandate-holder: in this case the titles could be the same for all mandate-holders in this category or they could differ according to whether they were approved by the country concerned and included an important technical assistance component or whether the mandate was adopted without this country approval.

b) if a thematic mandate-holder: in this case the titles could be the same for all mandate-holders in this category or they could differ according to whether the mandates focus on the promotion of human rights, the setting of norms and the elaboration of international instruments or whether they include the full range of promotion and protection of human rights including addressing individual complaints.

CHAPTER II

THE PROCESS OF SELECTION OF MANDATE-HOLDERS: TOWARDS GREATER TRANSPARENCY

34. Mandate-holders under the CHR were appointed by the Chairperson of the Commission. While this official would consult Bureau members she/he did not have to seek the approval of all or any of them before appointment. Since the Chair rotated between the five regional groups of the Commission, those who benefited from this rather opaque process of appointment alleged that this would give each region its chance to appoint mandate-holders. The developing countries however considered this method of appointment to be detrimental to them, invoking the backroom dealings with major donors which they suspected preceded such appointments. They raised the issue during the discussion of the IB text in the Working Group on the implementation of operative paragraph 6 of GA Res. 60/251. They insisted on a more transparent and democratic selection procedure. The outcome of this debate is set out in Section II.A of the IB text relating to "Selection and Appointment of Mandate-Holders"[25].

35. All agreed in the Council on setting out clear criteria for the selection of nominees and appointees including expertise and experience in the mandate area, integrity, impartiality, objectivity, with due consideration being given to gender balance and equitable representation of geographic regions and legal systems. The notion of independence was paramount for States from North and South although there was a different understanding between them on the practical implications of this concept. For instance, SPMHs, when on field visits, are free to contact whom they want, outside scheduled visits with Government officials and with the UN local office. However, when SPMHs, routinely, only contact European Union or other Western missions in the country visited but not those of developing countries represented or their groupings, the South is concerned that this may end up undermining the impartiality and independence of SPMHs. The North, which benefits from this implicit bias, thinks otherwise of course.

[25] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, paras. 39 to 53. For a Western viewpoint on the selection and appointment of mandate-holders, this subject see an excellent paper by Ambassador Tomas Husak, "In Defence of the UN Special Procedures", *in* Lars Müller (Ed.), *The First 365 Days of the United Nations Human Rights Council,* 2007, pp. 90-96.

36. There was also some convergence between North and South on the necessity to avoid conflicts of interest in the selection of appointees, as emphasized in the selection and appointment procedure of the IB text[26].

37. However, the conflict of interest clause refers to "individuals holding decision-making positions in Government or any other organization or entity", which might give rise to such a conflict of interest. While the exclusion of decision-makers in Government is explicit, it is not clear what is referred to by the expression "any other organization or entity". It would seem that the appointment of NGO activists who have taken a position on a theme, which is not necessarily that of the UN and can clash with the views of a large part of the membership, would also be concerned by this clause on conflict of interest. Looking at the profile of current mandate-holders, as brought out in an independent study on the subject[27], indeed there are no Government decision-makers among SPMHs. However, according to this study, a quarter of the membership seems to be composed of people in NGOs and in National Human Rights Institution (NHRI). While the participation of NHRIs is incontrovertible, the inclusion of NGO activists advocating, in their other day job, positions which may be incompatible with the objectivity required from a mandate-holder, might cause a conflict of interest. This would deserve some clarification. The conflict of interest may be compounded if the SPMH is accompanied in field visits by an NGO activist acting as her/his assistant[28].

38. There was likewise some convergence between North and South, during the discussion of the IB text, on the necessity to move away from the opaque appointment process of SPs as practised under the CHR. It was agreed that the selection process should be opened up. However, WEOG and like-minded countries wanted the pre-screening and pre-selection of candidates to be carried out by the Coordination Committee and by the High Commissioner, leaving the rest of the procedure unchanged. Developing countries considered that mandate-

[26] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 46: "Individuals holding decision-making positions in Government or any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to the mandate shall be excluded".

[27] This refers to the thoughtful study authored by Marc Limon & Ted Piccone, *Human Rights Special Procedures: Determinants of Influence – Understanding and Strengthening the Effectiveness of the UN's Independent Human Rights Experts*, Policy Report, Universal Rights Group and Foreign Policy at Brookings, 2014, p. 14, fig 2: *Profile of current mandate-holders*.

[28] A Geneva-based Permanent Representative from a UN Member State reported this anomaly to the author.

holders were SPs **"of"** the Council and that the mandate-holders should therefore be nominated and appointed effectively **"by"** the Council and not be co-opted by SPMHs themselves who are members of the CCSP.

39. This group of States saw no reason why mandate-holders meeting the required criteria could not be appointed democratically by voting in the Council as is the case for Treaty bodies the members of which are elected by States parties to the relevant treaties.

40. In view of the opposition of the WEOG countries, the Working Group elaborating the IB text had to settle on a compromise: a group of five diplomats[29] would be appointed by each of the five regions, to participate in a Consultative Group (CG). The Group would make proposals for each mandate-holder vacancy and would submit all of these to the President of the Council. It remained unclear whether there was to be more than one proposal per vacancy. If so, it was even less clear from the agreement reached whether the President should pick appointees in the order of priority in which they were proposed by the CG. The President would then proceed to the appointments after consulting the Bureau and regional groups and the list of appointments would thereafter be submitted to the Council for endorsement.

41. This compromise was still not clear-cut. It led to a problem in 2010. At that time, strong objections were levelled by some members of the Bureau and by some regional groups from developing countries against the selection made by the President of two nominees, including one NGO activist, from these countries' own region but whose names had been put forward by developed countries. At the same time, the developing countries members of the CG had proposed some other experts from their region who were unanimously supported by the regional groups of developing countries. The latter therefore complained that in proposing endorsement of nationals from their region, the President discarded their unanimous support to nominees also included in the list of the CG. Therefore, the two proposals of the President for the SR on freedom of religion and for the IE on the situation of human rights in Burundi were challenged in the plenary

[29] The two Amnesty staff, referred to above (footnote 23), claim mistakenly that "there was no intention in resolution 5/1 to restrict membership of the Consultative Group to diplomats", Tania Baldwin-Pask & Patrizia Scannella, *op. cit*., p. 455. However the WEOG Facilitator for the Review of Mandates group stated "that while some opted for the Coordinating Committee of Special Procedures and for the OHCHR members, others opted for a state controlled Consultative Group. The latter option materialized as the outcome solution", in *The First 355 Days of the UNHRC, op. cit*, p. 90, para. 3.

session of the Council. The meeting had to be suspended and the Bureau and Group representatives from the five regions met informally. The agreement reached between them was to accept one of the CG nominees from Africa that was supported by developing countries. As a counterpart, the nominee from an OIC country supported by the WEOG but objected to by the groups of developing countries for failing to meet the test of impartiality[30], was replaced by a Western nominee that was acceptable to the OIC.

42. This episode is an expression of the political underpinnings of the appointment of mandate-holders which have always existed but had hitherto been played out behind the scenes. The only difference this time was that the issue came out in the open because the Chair of the African Group challenged the President in plenary. A group of ambassadors from all sides engaged in tough negotiations to achieve an acceptable outcome. That may have been an unusual situation for the more influential ambassadors who, until then, were believed to have access to less public channels to make their views prevail. But it was a healthy outcome.

43. This predicament would not have occurred had the option of the straight and direct election of SPs by the Council, advocated by developed countries, been adopted in HRC resolution 5/1.

44. In the event, developing countries were able to include in the outcome of the review of the work and functioning of the Human Rights Council adopted by the General Assembly in 2011 a clarification of the selection procedure whereby the President will have to justify choosing to propose to the Council appointees that do not follow the order of priority proposed by the CG[31].

45. This is precisely what happened at the September 2011 session of the Council when the President explained her ultimate decision not to follow the order of priority proposed by the CG by considerations relating *inter alia* to "equitable geographic representation" while taking into account at the same time

[30] This is an illustration of possible conflict of interest of an NGO activist candidate to a special mandate position as referred to earlier in this chapter.

[31] GA Res. 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, Section II, Special Procedures. A. Selection and appointment of mandate-holders, para. 22 (d).

the qualifications of candidates as well as the specific requirements of each mandate[32].

46. The African Group in this case did not support the South African/US nominee put first on the priority-list of the CG, (whose members serve in their "personal capacity")[33], if only because there were several South African mandate-holders among SPMHs already in office while there was a fully qualified West African nominee from an unrepresented country, listed in the second place by the CG. Contrary to the situation which arose in 2010 when the President did not take account of the concerns of the Groups of developing countries that had been clearly expressed to him, in 2011 the President responded to the African group's objections and submitted to the Council an amended list of appointees which was unanimously endorsed.

47. While there is no legal or statutory entitlement for any regional group to have to approve the appointment of mandate-holders from their own region, these two examples constitute a guide in establishing that the President cannot easily appoint as mandate-holder a national from a particular region, especially if it is for a position ascribed to that region in a working group, against the explicit and unanimous objection of the regional group concerned and possibly of other groups.

48. During the same review exercise, measures were adopted to enhance the role of NHRIs of category A that meet the "Paris principles" to separate them further from "other accredited" NHRIs. In paragraph 22 (a) of the document, "Outcome of the review of the work and functioning of the Human Rights Council", annexed to the 17 June 2011 General Assembly Resolution[34], it is indeed stipulated that "in addition to entities specified in paragraph 42 of the annex to Council resolution 5/1, national human rights institutions in compliance with the Paris principles may also nominate candidates to Special Procedures Mandate-Holders". It is hard to understand what this new provision adds to the HRC resolution 5/1 which already allows other human rights bodies in general

[32] Statement of the President under the item of «Appointment of special procedures mandate-holders» at the 18th session of Human Rights Council.

[33] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 49.

[34] GA Res 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*.

to nominate candidates[35]. It is not likely that the new provisions of paragraph 22 (a) above would lead to limiting this entitlement to nominate candidates to category A NHRIs since paragraph 22 (a) referred to above, unambiguously states that NHRIs in compliance with the "Paris Principles" were being **"added"** to the entities specified in the IB text and did not replace the latter.

49. Finally, during the 2011 Review process, Western countries who are keen on reinforcing country mandates suggested that the duration of their term be extended to two or three years instead of having to be renewed on an annual basis, possibly equating their term with that of thematic mandates. Developing countries have resisted these proposals because of the sensitivity of country mandates, especially in positions occupied by SRs and also in view of the need to closely adjust these mandates to rapidly evolving situations. The discussion was inconclusive and mandate duration remained of one year while terms were maintained as set out in the IB text. The latter states that tenure of SPMHs in a given function should not exceed six years[36].

Conclusions

50. The main themes which were developed during the elaboration of the IB text in 2006-2007 and of the report on the Review of the work and functioning of the HRC on the selection and appointment of mandate-holders in 2010-2011 have brought out much common ground between WEOG and developing countries. There is full recognition on both sides of the need for more transparency in the process of appointment of mandate-holders. Nor is there any dissent on the qualifications required for these positions.

51. However, it might be helpful to clarify the meaning of "conflict of interest" as it applies to NGO activists if indeed it is applicable to them.

[35] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, para. 42 (e).

[36] *Ibid*., para.45.

52. Likewise there is unanimity on the fact that the independence of SPMHs is absolute. Their prerogatives are however not boundless by virtue of their independence.

53. "Independence" should not be equated with "unaccountability" to the institution which has appointed the mandate-holder. Independence together with objectivity relate to the opinion of the mandate-holder as expressed publicly and in writing as well as to her/his actions which should be within the limits of her/his mandate, that of the Council and in respect of the principles of the UN Charter, the principle of State sovereignty in particular. This delicate balance requires discernment from a mandate-holder. If this approach continues to enjoy recognition, it will further improve a cooperative climate in the Council and during field visits by mandate-holders.

54. Equitable geographic representation, gender balance, and an appropriate representation of different legal systems, while stressed by many, specially developing States, during the discussion of Special Procedures, are to some extent currently achieved in the distribution of mandates[37].

55. The challenge is to continue to ensure full objectivity of the mandate-holders whether they come from advanced or developing countries. The latter countries have contended that some mandate-holders, whose nationalities may include one from a State of their constituent regions but who are put forward by developed countries against the will of these regions, acquire a loyalty to their new sponsors in the pursuit of what is often a very sensitive mandate. Be that as it may, there may be a similar tendency among advanced and developing countries, as well as among major NGOs headquartered in the North, to consider as "objective" those candidates that hold views similar to their own. For the sake of transparency, the 2010-2011 review process has included the requirement that candidates send a "motivation letter" with their application[38]. This could be made to include a plan of action of each candidate for her/his prospective mandate, thus dispelling any ambiguity on the applicant's view of the job.

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[37] See *supra*, para. 31.

[38] HRC Res. 16/21 of 25 March 2011, *Review of the work and functioning of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 22 (b); GA Res 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 22 (b).

56. It can be seen from the foregoing that the President has a key role in finding and reflecting a consensus of the Council on the appointment of mandate-holders. It is therefore a sign of wisdom and maturity of the Council to have required the President either to follow the priorities established by the CG, composed of appointees from the five regions that compose the Council (admittedly acting in their individual capacity), or to change that order of priority only by providing justification. Therefore, judging by the IB text[39], such changes can only result from broad consultations that the President engages in, in particular with the regional coordinators, before issuing the first list of appointments proposed for endorsement by the Council and if necessary by issuing a revised list thereafter for presentation to the Council's approval.

57. The successful outcome of this process is a consensus endorsement of the President's list. This entails the necessity for the President to ensure that there are no "broadly shared" objections to his proposals. The expression of "broadly shared" could be taken to mean shared by one or more regional groups.

58. On the pre-screening of the list of candidates, a minor ambiguity has been introduced in the understanding of the "public list" of candidates. Initially, this list was a global one including all **"eligible"** candidates to SPMHs. This is what is expressed in the IB text[40]. It was the task of the OHCHR to establish this list in the standardized format. The Review outcome however[41] has changed this global list into a series of public lists for each vacancy. In this new version, the High Commissioner does not prepare a public list of **"eligible"** candidates but of "candidates who applied for each vacancy"[42].

59. It might be advisable therefore to clarify what the future practice will be. If the OHCHR continues to select eligible candidates for this list, then the suggestion made in the Review process by developing countries to draw up further criteria for selecting these eligible candidates would be in order. If not,

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[39] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, paras. 52 & 53.

[40] HRC Res. 5/1, *Institution-building of the United Nations Human Rights Council,* para. 43.

[41] HRC Res. 16/21 of 25 March 2011, *Review of the work and functioning of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 22 (b); GA Res. 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 22 (b).

[42] GA Res. 65/281, Annex, para. 22 (b).

the public lists to be submitted to the Consultative Group for the more politically sensitive mandates, might be exceedingly long.

60. Finally, an issue could be raised concerning term limits for SPMHs whether one refers to thematic mandates that have three-year terms renewable once or to country mandates which have one-year terms renewable five times. At the expiry of the six years, the mandate-holders cannot be renewed in the same position. In order to promote some rotation amongst the mandate-holders, a three-year "cooling-off period", instead of the current one-year gap, might be applied before any reappointment, whether for the same mandate or for another mandate. This was a suggestion listed in the annex to document A/HRC/3/4, I (1) by the Facilitator on the Review of the mandates during the IB discussions in 2006[43].

[43] *Inter-sessional open-ended intergovernmental Working Group on the implementation of operative paragraph 6 of General Assembly resolution 60/251, established pursuant of Human Rights Council decision 1/104 - Special Procedures, Preliminary Conclusions by the Facilitator on the review of mandates, Amb. Tomas Husak (Czech Republic),* Doc. A/HRC/3/4, Annex, *Topics for discussion*, para. I (1), document reproduced in *The First 365 Days of the United Nations Human Rights Council, op.cit*, pp. 261-266.

CHAPTER III

THE SPECIAL PROCEDURES MANDATES AND THE REVIEW, RATIONALIZATION AND IMPROVEMENT OF MANDATES: MISSION INCOMPLETE

61. When the HRC at its creation took over or "assumed"[44] the SPs of the CHR there were 28 thematic procedures, including 4 working groups and 24 individual mandate-holders[45]. In December 2014, the number of thematic procedures had grown to 39 including 6 working groups and 33 individual mandate-holders[46].

62. This was achieved first by adding ten individual mandate-holders:

- the SR on contemporary forms of slavery including its causes and its consequences (2007),

- the SR on the human right to safe drinking water and sanitation (2008),

- the SR in the field of cultural rights (2009),

- the SR on the rights of peaceful assembly and of association (2010),

- the IE on the promotion of a democratic and equitable international order (2011),

- the SR on the promotion of truth, justice, reparation and guarantees of non-recurrence (2011),

- the IE on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment (2012),

- the IE on the enjoyment of all human rights by older persons (2013),

- the SR on the rights of persons with disabilities (2014),

- the SR on the negative impact of the unilateral coercive measures on the enjoyment of human rights (2014).

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[44] GA Res. 60/251 of 15 March 2006, *Human Rights Council,* operative paragraph 6.

[45] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Appendix I, *Renewed mandates until they could be considered by the Human Rights Council according to its annual programme of work*.

[46] See *supra*, footnote 19; the list is reproduced in Annex I of the present study.

63. This was also achieved by replacing in 2011 the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises by a working group with the same mandate[47].

64. To the four initial thematic working groups[48] were added the abovementioned working group on the issue of human rights and transnational corporations and other business enterprises and a working group on the issue of discrimination against women in law and in practice.

65. As for country mandates, they were durably maintained at the level of 12 during the last years of the Commission on Human Rights and were still in place at the time the HRC was set up. The targets of SRs with country mandates were, with one exception (Belarus), developing countries. IEs with country mandates focus on capacity-building (*e.g.* the former IE on technical cooperation and advisory services to Liberia) or on a blend of monitoring and capacity-building (*e.g.* the IE on the situation of human rights in Haiti). Developing countries in the HRC, invoking the argument of politicization, succeeded in getting Council support to remove two country mandates, those for Belarus and for Cuba. Later, three others were discontinued by the Council. These are:

- the mandate on the situation in Burundi which, as decided by the HRC, was to end when the NHRI would be set up in this country, which effectively occurred in 2011 (although this was disputed by some WEOG countries who considered that the mandate should have been extended: they alleged that, although the National Commission had been established by decree, it had not at the time physically started to function);

- the mandate on technical cooperation and advisory services in Liberia terminated in 2008;

- the mandate on the situation of human rights in the Democratic Republic of Congo also terminated in 2008.

[47] HRC Res. 17/4 of 16 June 2011.

[48] WG of Experts on People of African Descent, WG on Arbitrary Detention, WG on Enforced or Involuntary Disappearances, WG on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

66. The seven other country mandates were maintained by the HRC[49]. As from 2011, the trend towards the reduction of country mandates was reversed in the context of a loss of cohesion of developing countries. Thus seven other country mandates were added:

- the SR on the situation of human rights in the Syrian Arab Republic,

- the SR on the situation of human rights in the Islamic Republic of Iran,

- the IE on the situation of human rights in Côte d'Ivoire,

- the SR on the situation of human rights in Eritrea,

- the SR on the situation of human rights in Belarus (a mandate which was reintroduced after having been previously discontinued by the Council),

- the IE on the situation of human rights in Mali,

- the IE on the situation of human rights in the Central African Republic.

At present, there are 14 country mandates and about two-thirds of them relate to African and OIC member States.

67. When one reviews the changes introduced in the list, titles and mandates of SPs since the creation of the HRC, it is hard to claim that the Council has fully implemented operative paragraph 6 of GA Res. 60/251 which directed it to "where necessary, improve and rationalize all mandates [...] in order to maintain a **system** of special procedures [...]" (emphasis added).

68. Thus, for the thematic mandates, there is an obvious link between the mandate of the IE on the effects of foreign debt, that of the IE on the promotion of a democratic and equitable international order and that of the IE dealing with human rights and international solidarity.

69. Likewise, one cannot ignore in good faith the relationship between the mandates on trafficking in persons, especially women and children, the one on

[49] The IE on the situation of human rights in Haiti, the IE on the situation of human rights in Somalia, the IE on the situation of human rights in the Sudan, the SR on the situation of human rights in Myanmar, the SR on the situation of human rights in the Democratic People's Republic of Korea, the SR on the situation of human rights in the Palestinian territories occupied since 1967, and the SR on the situation of human rights in Cambodia.

contemporary forms of slavery, including its causes and consequences, and the mandate on the sale of children, child prostitution and pornography.

70. The Committee on the Elimination of Discrimination against Women (CEDAW) having defined violence against women as a form of discrimination[50], one also pains to understand why there should be two separate mandates in this regard, that of a SR on violence against women, its causes and consequences**, and** a Working Group on the issue of discrimination against women in law and in practice.

71. To some extent, there also seems to be a close relationship between the mandate on freedom of opinion and expression and that on freedom of peaceful assembly and association, the latter covering practical ways of exercising one's freedom of opinion and expression.

72. It might also be argued that the mandate of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment is not unrelated to the one on the environmentally sound management and disposal of hazardous substances and wastes.

73. Finally, most thematic mandate-holders include under their communications remit the right to interrogate Governments and to seek and obtain a timely implementation of recommendations concerning alleged violations of human rights. These responsibilities include *inter alia,* according to the Manual of Operations of the Special Procedures of the HRC (MOSP)[51], the prerogative of mandate-holders to request from States if allegations are true, measures to investigate and punish perpetrators, to compensate, protect or assist victims, and to take legislative, administrative, and other steps to avoid the recurrence of such violations. This is a remit shared by most thematic mandate-holders let alone country mandate-holders. Yet the Council has recently created a new mandate on the promotion of truth, justice, reparation, and guarantees of

[50] CEDAW, *General Recommendation, No. 19*.

[51] MOSP, August 2008, adopted by the mandate-holders in June 2008 at the 15th Annual Meeting of Special Procedures, para. 47. One might suggest that this Manual which has been made to comply with the CoC included in Res 5/2 of HRC, could in the future be discussed, even if only informally, with the HRC only for parts where the Code is not adequately reflected and which have to do with relations between SPMs and States. There might even be a case for formalizing the status of the Coordination Committee of SPs with the Council and considering some kind of more formal interaction between them on agreed subjects.

non-recurrence. This is in addition to the Complaint Procedure[52]. Admittedly the new mandate would have a cross-cutting mega-approach but would not have to reinvent its components already identified through the Communications Procedure of thematic mandates and of country mandates as well as through the Complaint Procedure.

74. A detailed examination of each mandate brings out the need for further adjustments.

75. The superimpositions introduced by the HRC to the list of thematic mandates as detailed above do not add up to a "rationalization and improvement of a system of special procedures" as requested in operative paragraph 6 of GA Res. 60/251.

76. Several suggestions have been made in the HRC to fine-tune the kind of outcome that the WEOG Facilitator on the Review of mandates had envisioned and that he described as follows: "The review may end with merging or dismantling certain mandates while at the same time it is necessary to ensure that all the rights contained in the Universal Declaration of Human Rights and other human rights instruments will be properly covered"[53].

77. During the intergovernmental review that took place at the end of the first five years of operation of the HRC, some developed countries such as Japan suggested that one should refrain from creating new procedures in an unrestrained manner[54]. Most developing countries held a similar view, cautioning against the anarchic proliferation and duplication of mandates. Such was the position expressed by India, the Philippines and Algeria in particular[55]. Algeria emphasized that the rapid increase in joint communications of SPs, whether for letters of allegations or urgent appeals, was a good proxy indicator of the

[52] HRC Res. 5/1 of 18 June 2007, *Institution-building of the United Nations Human Rights Council*, Annex, Section IV.

[53] *Inter-sessional open-ended intergovernmental Working Group on the implementation of operative paragraph 6 of General Assembly resolution 60/251, established pursuant of Human Rights Council decision 1/104 - Special Procedures, Preliminary Conclusions by the Facilitator of the review of mandates, Amb. Tomas Husak (Czech Republic), op.cit*. para. 17.

[54] *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, Doc. A/HRC/WG.8/2/1, 4 May 2011, Annex IV, *Compilation of State proposals*, p. 59.

[55] *Id*., pp. 58 & 61.

duplication between mandates. In this regard, the share of joint communications in the correspondence of mandate-holders to States has jumped from 53% of total SP correspondence in 2005 to 74% in 2012 with "no empirical evidence of joint communications being more effective in terms of soliciting governments or securing remedy"[56]. Algeria also suggested to the Council that the establishment of a new mandate be subordinated to a cost/benefit analysis to ascertain that there are no alternative and cheaper ways of achieving the objective pursued, that is, by following the directions put forward by HRC Res. 5/1, para. 58.

78. Many States expressed concern about current trends in the growth of mandates that could lead to an accumulation, at the present rate, of as many as a hundred mandates, and therefore of many more mandate-holders[57] in fifteen years' time[58].

79. The Review, Rationalization and Improvement of the mandates (RRI) is a theme that has been emphasized by all relevant GA and HRC resolutions. The supportive view of the WEOG Facilitator in charge[59] was shared broadly in the open-ended Working Group considering this matter[60].

80. This was therefore a legitimate concern. Yet it has been the target of polarization and politicization which have at times a tendency to overwhelm the HRC as they had previously the CHR[61].

81. While some Western NGOs have complained about this unfortunate trend, they may in fact have contributed to it. Thus the fact that developing countries expressed the above position on the RRI has been denounced by staff from one influential London-headquartered NGO. They assert in particular that "several

[56] Marc Limon & Ted Piccone, *op.cit.*, p. 29, para. 4.

[57] When taking into account the five experts that would compose each of the future working groups.

[58] See Marc Limon & Ted Piccone, *op. cit.,* pp. 8-9, Fig. 1: *Growth of mandates*.

[59] See *Inter-sessional open-ended intergovernmental Working Group on the implementation of operative paragraph 6 of General Assembly resolution 60/251, Preliminary Conclusions by the Facilitator of the review of mandates, Amb. Tomas Husak (Czech Republic), op. cit.*, para. 17.

[60] See *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council, op. cit*., pp. 55-63.

[61] This despite the fact that the Council was set up in the first place to break away from the over politicized Commission.

delegations made the **exaggerated** claim that there was a problem of duplication and overlap among mandates which could be solved through merging or transforming mandates. It soon became clear that calls for "rationalization" were motivated more by the prospect of reducing the number of mandates than by assessing any overlaps that might hinder their effectiveness"[62] (emphasis added).

82. Merging and transforming mandates as much as adding new mandates where indispensable to cover gaps is what the RRI is about. This is what the WEOG Facilitator himself asserted[63]. So the fact that developing countries like Algeria or India were articulating their support to the rationalization of mandates, their merger or transformation as needed does not justify this accusation of ulterior motives. By such standards, only initiatives advocated by WEOG or inspired by their sources seem to be legitimate. Any others are dubbed "attacks on the independence of special procedures" that should be silenced.[64] The spirit of such comments is remote from that of "constructive international dialogue and cooperation"[65] which was to be the hallmark of the HRC after the demise of the CHR.

83. As already mentioned, some country mandates were adopted by vote in the HRC over the objections of the countries concerned. Such country mandates have been a subject of politicization. WEOG and like-minded countries are keen to increase resort to these mechanisms headed by SRs whenever an opportunity arises. Developing countries see such mandates, when not approved by a large majority of votes in the Council, as usually confrontational and caution against their use or suggest that formulations be found to broaden the basis of support.

84. The case of the situation of human rights in the Palestinian Occupied Territories cannot easily be lumped with other country mandates as it is the only one which addresses a universally recognized collective human right, that of the

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[62] Tania Baldwin-Pask & Patrizia Scannella, *op.cit.,* p. 425.

[63] See *Inter-sessional open-ended intergovernmental Working Group on the implementation of operative paragraph 6 of General Assembly resolution 60/251, Preliminary Conclusions by the Facilitator of the review of mandates, Amb. Tomas Husak (Czech Republic, op. cit.*, para. 17.

[64] The same argument has been made about the African initiative which led to the adoption of the CoC (see HRC Res. 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*).

[65] GA Res. 60/251 of 15 March 2006, *Human Rights Council,* operative paragraph 4.

victims of foreign occupation who are prevented from exercising their right to self-determination[66].

85. Some WEOG countries and Western NGOs have emphasized the investigative function of mandate-holders, their right to exact redress from States on behalf of victims and to claim corrective administrative and legislative action. They consider that mandate-holders and in particular those having a country mandate should be empowered to call for a special session of HRC, and more generally to serve as an early-warning mechanism for the Council. The developed countries also advocate greater involvement of Special Procedures in other mechanisms of the Council including the UPR.

86. Developed countries often include human rights as an instrument of their foreign policy whose purpose, as for all countries, remains however, the furtherance of their national interest. They are aware that much as they increase the powers of SPs, they themselves are unlikely to be affected as only 12% of the activities of these procedures target them while the rest focuses overwhelmingly on developing countries[67].

87. Developing countries are more cautious because they realize that Special Procedures essentially target them and to a lesser extent few East European countries that have not joined the West. Most countries of the South advocate limiting the creation of new country mandates to cases where there are no fundamental objections to the mandate by the country or the region concerned except for extremely grave situations recognized as such by the regional group to which a country belongs. They are also opposed to greater direct involvement of mandate-holders in the UPR process which they see essentially as being intergovernmental in nature. They consider that information from Special Procedures on countries under UPR will already be incorporated in the

[66] One can wonder in light of the high rate of Palestinian casualties in the summer of 2014 attack on the territory of the occupied State of Palestine, particularly Gaza, especially children in UN schools, whether all the HRC and UN member States which pioneer action against human rights violations in Africa and Asia, have complied with their commitment under paragraph 3 of the Vienna Declaration on Human Rights which reads as follows: "Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation and effective legal protection against violation of their human rights should be provided in accordance with human rights norms and International Law, particularly the Geneva Convention relating to the Protection of Civilian Person in Time of War".

[67] This figure is derived from data relating to the intensity of country visits requests by mandate-holders, see Marc Limon & Ted Piccone, *op.cit*, p. 24, Fig. 5: *Cooperation with country visit request by regional group & standing invitations*.

compilation of the OHCHR which is a background document for the UPR. A few developing countries have even questioned the utility of country mandates imposed by simple majority of the HRC, after the introduction of the UPR.

88. Other developing countries have raised the possibility of adding the appointment of SPMHs from each region in coordination with regional intergovernmental human rights organizations, that would report annually to the HRC and to the highest-level regional meetings (regional Summits where they exist) on the development of the human rights situation in their region; SPMHs would also suggest measures to address such a situation as required. This kind of regional mandate was suggested in some form or other by South Africa and Costa Rica. In taking such an initiative, South Africa may have believed that even if country mandates were maintained with some limitation to their current use, this initiative would reduce the "naming and shaming" implications of country mandates and the selectivity of the present practice. In view of the persisting difference in perceptions on the issue of country mandates between developing and developed countries and pending the restoration of the cooperative spirit which prevailed in the first years of the life of the HRC, it is improbable that much progress can be achieved on this score.

Conclusions

89. It is recommended to set up an international open-ended working group of the HRC to resume the RRI process and to make recommendations to the Council thereon. The working group would hold one session every three years. All stakeholders would be invited to send in specific and actionable suggestions in this regard to be accompanied by comments from the SPMHs themselves. The OHCHR would be responsible for compiling proposals and for submitting them to member States at least fifteen days before the working group session. The working group would be particularly guided by the provisions of Section B of the IB text on the Review, Rationalization, and Improvement of mandates.

90. The aims of the working group would be twofold:

1) To draw up a list of questions or criteria to be addressed by initiators for the creation of a new Special Procedure including the following:

• is there no other part of the UN system or another UN human rights mechanism which fully addresses the issue contemplated?

• is there not an existing Special Procedure which covers a related subject?

• if so, why would it not be appropriate to adjust the existing mandate to also address the initiators' concerns?

• could the new mandate not replace an existing mandate whose terms of reference could be subsumed under it (such as the replacement that has already occurred of the special mandate on structural adjustment by the IE on the effects of foreign debt)?

2) To review the detailed mandate of thematic Special Procedures with five objectives in mind:

• to ascertain coherence between the content of the mandate and its title and propose adjustments to one or the other if needed,

• to promote greater coherence between mandates which seem to be closely linked to one another,

• to avoid duplication between mandates,

• to determine protection gaps within the HRC mandate for which: (1) there might be a need for a new mandate, (2) an existing mandate might have to be amended so as to cover the gap,

• to determine whether, in light of the political sensitivity of a theme and of the interconnectedness with related themes, a given mandate could best be addressed by an individual mandate-holder or by a working group. The latter, which includes experts from the five HRC regions, might be helpful to enhance objectivity, comprehensiveness, as well as acceptability by States.

3) To consider whether complementary standards should be drawn up and be implemented either by amending an existing mandate or by creating a new mandate.

CHAPTER IV

COOPERATION BETWEEN STATES AND SPECIAL PROCEDURES: STANDARD SETTINGS NOT TO BE DERAILED BY EXTREME CASES

91. In order to avoid the double-standards and politicization of the CHR, GA Res. 60/251 put emphasis on the principle of "constructive international dialogue and cooperation" in two operative paragraphs[68]. This again is stressed in article 11 (e) of the CoC which stipulates that this is "a shared obligation of mandate-holders, States, and the said stakeholders"[69]. The document entitled "Outcome of the review of the work and functioning of the Human Rights Council", annexed to GA Res. 65/281 adopted on 17 June 2011, reiterates the same point even more emphatically by focusing on the obligation incumbent on SPMHs; it asserts the following: "The Special Procedures Mandate-Holders ***shall*** continue to foster a constructive dialogue with States"[70] (emphasis added).

92. The MOSP actually echoes this provision in the following way: "The aim of the communications procedure is to ensure a constructive dialogue with Governments in order to promote respect for human rights"[71]. However, the Manual gives a shallow content to this obligation to ensure a constructive dialogue with Governments, when it states: "It is thus appropriate that reminders be sent to Governments in relation to an unanswered correspondence. Similarly, where it would enhance the quality of the dialogue and understanding of the situation, mandate-holders can follow up on replies provided by the Governments in order to request further clarification or information"[72].

93. One cannot disagree that sending reminders and seeking further clarifications is part of the remit of SPMHs. But one fails to see how a mere

[68] GA Res. 60/251 of 15 March 2006, *Human Rights Council*, paras. 4 & 5 (f).

[69] HRC Res. 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, Annex, *Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, article 11 (e).

[70] GA Res. 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, para. 25.

[71] MOSP, August 2008, para. 94.

[72] *Id.*

decision to remind a State that it has not replied in time or indicating that its reply is insufficient and calling for additional clarifications, is all an SPMH can do to enhance dialogue and cooperation with this State.

94. Surely, enhancing dialogue is more than sending one or two official letters. This in no way belittles the importance for this correspondence to be sent or the responsibility of States to provide, in good time, adequate responses, complete answers, as well as necessary assurances and follow-up on recommendations. If they do so, they have then done their part to enhance dialogue and cooperation. But the definition of the way mandate-holders can promote this aim in the field of communications could be more imaginative.

95. Should they discuss with States what can reasonably be expected from them and make their best effort to enlist a positive response through direct contacts or contacts with Permanent Missions in Geneva? Should they identify resource gaps in the said States and try to obtain funding for technical assistance or capacity-building? No indication is provided as to how best the SPMHs can contribute to cooperation and dialogue in this or in any other respect.

96. Thus in paragraph 94 of the Manual, the self-regulatory function of the CCSP has not really translated adequately the full thrust of the GA and HRC resolutions including the CoC. Yet, article 2.2 of the CoC states that the provisions of the Manual should be made to coincide with the Code. Of course the "promotion of dialogue and cooperation" referred to in the Code **is** in paragraph 94 of the Manual **but** the content of paragraph 94 stops short of giving substance to the provision which was solemnly reaffirmed by the founding texts of the Council.

97. WEOG and like-minded countries regularly complain, for good reason, about the insufficient cooperation with SPMHs of States in the developing world and of a few other countries. This has been echoed by Western NGOs and SPMHs. Beyond the North-South politics involved in this criticism, it is correct that the "system" of Special Procedures, if indeed one can call it that, is not sufficiently effective and that States targeted by it have a responsibility, as indeed do the SPMHs, to make it work better.

98. Is it just that developing and the few other countries referred to are the "villains" whose regimes might have to be changed? Are SPs to contribute to regime changes?

99. First, all States, whether developed or developing, whose actions either target innocent civilians and not just combatants or terrorists or which aid and abet such States, are the villains. Yet, only the developing and few other countries referred to above are called to account despite the UPR which was supposed to put all States on a par.

100. Second, Special Procedures cannot be an effective element of an externally directed regime-change strategy. If such changes are not entirely and exclusively impelled from within countries, the aftermath can be dire in terms of a worsening human rights situation that will befall their peoples.

101. This is why, except in very extreme cases, some of which have been witnessed recently[73], the effectiveness of the action of SPMHs will require from both sides a willingness to cooperate. This cooperation is predicated on the respect of the SPMHs' independence within their area of prerogatives and on the respect of the sovereignty of the State.

102. One must seek to understand why the record of responses to visit requests by SPMHs is still poor, though it is improving. One should also find explanations as to why some mandate-holders do not reply or reply very belatedly to invitations by States for them to visit and in particular why the CCSP does not always solve this problem. This last issue was raised several times in the HRC in particular by Algeria who was an inviting country but this issue was met by an embarrassed silence.

103. An effort should also be made to seek explanations as to why recommendations of visiting SPMHs have a poor rate of follow-up. One must keep in mind that contrary to allegations of non-compliance in the context of a Treaty Body, the SPMH may intervene on a claim relating to a treaty provision that the State concerned has not ratified. The SPMH is also entitled to intervene in a complaint on an issue which is *sub judiciae* and on which the government

[73] In such extreme cases, the HRC has been able to take appropriate action resorting to *ad hoc* measures as needed. One should guard therefore against framing rules of engagement of SPMHs with other (usually developing) States on a routine basis in light of what would be required to address extreme cases.

has no power to prejudge the judicial outcome or to anticipate the criminal court sanction on the alleged offender. Likewise, the government may not be in control of its legislative body to commit to the adoption of specific laws to prevent the recurrence of a similar claim.

104. Yet, the MOSP indicates that the SPMH may require the government to punish alleged perpetrators, provide compensation, protection, and assistance to alleged victims and to see to the adoption, *inter alia*, of legislative measures to avoid the recurrence of human rights violations alleged to have taken place. Furthermore, the government may be expected to report to the SPMH on the action taken to follow up on the latter's recommendations in this respect, within two months[74] or within days in case of an urgent procedure. This can be a tall order for many developing States.

105. The percentage of total visit requests of SPMHs still outstanding since 1998 to the end of 2013 is 39%[75] and that for communications not having been replied to stands at 53%[76].

106. If it is disaggregated, this figure shows a higher rate of delinquency in Asian and especially in African countries, but then, the latter receive many more requests for visits and communications than others, especially those of the WEOG region.

107. Will the resort to pressure on States or even to threats to block their future application to membership of the HRC be the best way to address this issue with the overwhelming majority of delinquent member States? Several developed countries and Western NGOs favor this option. The HRC might however also consider another approach with such States which, rather than being confrontational, could be cooperative as intended by paragraph 4 of GA Res. 60/251[77].

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[74] MOSP, August 2008, para. 47.

[75] OHCHR Website: country and other visits by SPMHs since 1998 to December 2013.

[76] *Communications report of Special Procedures - Communications sent, 1 March 2013 to 31 May 2013; Replies received, 1 May to 31 July 2013*, Doc. A/HRC/24/21, pp. 7-8.

[77] Operative paragraph 4 of UN GA Res. 60/251 of 15 March 2006, *Human Rights Council*: «[...] constructive international dialogue and cooperation [...]».

108. Developed countries and their NGOs have always advocated a strengthening of the monitoring and remedial role of SPs. Developing countries have laid emphasis on the mission of SPs to assist the non-compliant States in the field of capacity-building and technical assistance. This latter option is a forlorn hope for developing countries in the absence of a credible multilateral source of funding to give concrete expression to such an option. If the wherewithal becomes available, a blend of the two options might be the best fit.

109. In light of the very real problem that a large number of developing countries encounter in replying to an increasing number of communications from SPMHs, there is need to address the issue with an open mind and in close consultation with countries in difficulty, except for the extreme cases mentioned earlier. In other words, one should give the benefit of the doubt to the majority of targeted States and seek harder to find a cooperative way out of a dire human rights situation.

Conclusions

110. The way forward might be to recapitulate in an exhaustive and graphic manner all the cases of non-replies to visit requests and to letters of allegations and to seek clarifications from the defaulting States as to the reasons for their non-compliance, giving them a reasonable time to respond. The initiative would come this time, not from the SPMHs but from the HRC itself. The Council would also appeal to all concerned States to address the issue with maximum diligence.

111. The replies would be compiled by the OHCHR in tabular form. The CCSP would be requested to draw up its comments on the responses received from States. An open-ended working group would then review the two documents and draw up recommendations for the Council on the way forward.

112. As for the unbalanced presentation in paragraph 94 of the MOSP, on the responsibility also incumbent on Special Procedures to foster a constructive dialogue with States on the issue of communications, the solution might be to invite the CCSP to hold meetings with the five regional representatives in the HRC to put paragraph 94 of the Manual in coherence not only in form but also

in substance with the effort to be made on dialogue and cooperation as mentioned in the relevant provisions of HRC and GA resolutions.

CHAPTER V

ACCOUNTABILITY OF MANDATE-HOLDERS: "HOBBLING THE MONITORS"?

113. The present chapter addresses the notion of accountability for SPMHs. How does this notion apply if at all? The Australian SPMH Philip Alston published an article in 2011 with the following inspiring title: "*Hobbling Monitors: Should UN Monitors be Accountable?*"[78].

114. The answer to this question which comes to mind is that there is no responsibility without accountability. Accountability is a principle that applies in all social organizations. Where there is hierarchy, the subordinate is accountable to his supervisor. Where individuals are not part of a hierarchy as is the case for SPMHs, they are accountable to the institution which has endorsed their appointment, therefore, in the present case, to the HRC. This is clearly asserted in article 15 of the CoC[79] which states quite unambiguously the following: "In the fulfillment of their mandate, mandate-holders are accountable to the Council". This means that they take their guidance from the Council and report to it according to the mandate given to them. Their very title of Special Procedures "of the HRC" indicates that they are a subsidiary body of the Council and that they therefore have to report to it on all their activities. This is not to say, of course, that they are in any way accountable to any individual State; they are not, not even to their own State of origin. However, to claim that they could be responsible without being accountable would open the way to arbitrariness.

115. Accountability requires standards for this concept to become effective. The standards are included in the CoC. Without standards there can be no accountability. This is what inspired the African group, chaired at the time by Algeria, to put forward a draft CoC with the support of Egypt in the name of the NAM and of Pakistan in that of the OIC group. That was in 2006 in the context of the HRC institution-building exercise.

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[78] Philip Alston, "Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?" *Harvard International Law Journal*, Vol. 52, No. 2, Summer 2011, pp. 543-649.

[79] HRC Resolution 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council.*

116. The initiative was bitterly opposed by some WEOG countries and their NGOs. For want of a better argument, they claimed that this initiative aimed at "undermining the independence of mandate-holders". The hostile comments by some Western NGOs about what turned out to be a successful initiative, continue unabated to this day. Thus, the two Amnesty International staff who authored the abovementioned chapter entitled "*The Unfinished Business of a Special Procedures System*"[80], did not shrink from making the following inflammatory statement: "[...] this overall context saw these same States [*Note from the present author*: this refers to the African group also criticized for their initiative under RRI[81]] maintain their attack not only through the review and rationalization of the mandates, but also through proposals to limit the Special Procedures' independence or ability to develop their own working methods. The epitome of this was the highly contentious proposal to impose a Code of Conduct on the mandate-holders"[82] [*Note from the present author*: why is it that when Western countries come up with an initiative in the Council they are said to ***propose*** it and when developing countries come up with an initiative they are said to ***impose*** it?]. Further on, the authors added that "the real motivation behind the proposal of a code of conduct was to render the SPs blunt and ineffective by placing limitations on their actions"[83].

117. This intolerant language ascribes, purely gratuitously to a group of States largely representing the developing world, heinous ulterior motives. This gives a measure of the condescension of some Western activists towards a large number of developing countries having taken this broad-based initiative. Such worrying developments are indicative of a necessity to eschew intolerance and to accept to engage with developing countries in a discussion of all proposals on the basis of merit and logical arguments to reach a compromise outcome. This is what ultimately happened for the CoC which was later adopted successively by HRC and by the GA as part of the IB text[84]. In retrospect, it was particularly unfair to claim that such a code would "limit the Special Procedures' independence", since

[80] Tania Baldwin-Pask & Patrizia Scannella, *op.cit,* pp. 419-478.

[81] *Ibid.*, p. 425.

[82] *Id.*

[83] *Ibid*. p. 464.

[84] HRC Resolution 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*.

a code is the set of standards necessary to give effect to the concept of accountability of SPs to the Council which itself is coterminous with responsibility. Without such standards there can be no accountability[85] and therefore no responsibility. Opposing a code as an attack on SPs' independence implies that the independence of these mechanisms is so broad as to not make them accountable even to the body that has endorsed their appointment. Fortunately, no worldly authority has this power.

118. The claim that SPs did not need the CoC since they already had the MOSP, as the same authors assert, is not founded. It would mean that the subsidiary mechanism is entitled to set for itself the standards of accountability applicable to its relations with its supervisory body. This would only be conceivable if the HRC were accountable to the SPs and not the reverse since it is the body to which the accountability is due that sets the standards of accountability of its subsidiary bodies or appointees.

119. One WEOG country proposed, further to the adoption of the CoC for SPs, that another such document apply this time to States[86], which should establish reciprocal obligations of the latter in the area of cooperation with SPs. It might be objected that Special Procedures and States are not two sparring partners or two football teams in a stadium. The former are independent experts with a mission for which they are accountable to the HRC. The latter are sovereign entities and their status with the Council, as UN member States, is to be part of the governance. Their relations with the Council are therefore of a different nature. Thus, States' position here has nothing to do with the accountability obligation of a subsidiary body to an institution that has appointed it.

120. This in no way implies that States have no obligations towards the HRC or towards SPs. But their obligations cannot be framed in the same way. States'

[85] "Accountability refers to the obligation of those in authority to take responsibility for their actions, to answer for them by explaining and justifying them to those affected, and to be subject to some form of enforceable sanction if their conduct or explanation for it is found wanting. Much of the literature on accountability in development converges around these three constituent elements: responsibility, answerability and enforceability", John M. Ackermann, "Social accountability in the public sector: a conceptual discussion", *Social Development Working Papers*, No. 82, Washington, D.C., World Bank, 2005; see also Anne-Marie Goetz and Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development*, Palgrave Macmillan, Basingstoke, United Kingdom, 2005, p. 8.

[86] See *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, Doc. A/HRC/WG. 8/2/1, 4 May 2011, Annex IV, *Compilation of State Proposals*, Section II Special Procedures, p. 76, 11th bullet-point.

obligations are in particular set out in the IB text itself and in subsequent resolutions. Theirs is a broad policy commitment whose assessment in the Council is political in nature, though it should not be politicized.

121. The CoC deals with mandatory ethical behavior and professional conduct which apply to a subsidiary mechanism, the SPs, in its relation with the supervisory body *i.e.* the Council. Hence, the decision of the framers of the Code to differentiate between SPMHs who are the object of the Code, and States, who are addressed outside the Code, in the covering resolution which urges them to cooperate and provide information[87].

122. After seven years of operation, the CoC has contributed to an improvement in relations between States and mandate-holders as can be measured by the progress of the, admittedly still low, rate of reply by States to requests for invitations to visits and to communications. In 2013, on 528 communications sent to 117 States, the rate of reply by States was 45%[88]. In comparison, in 2012, 603 communications were sent to 127 States and the rate of reply was slightly lower: 40,1%[89].

123. Contrary to allegations leveled against developing countries having initiated the CoC, the independence of SPs was in no way affected. Nor were their activities and capacities in anyway "blunted" by the Code. Their prestige was in fact enhanced by the added trust that States feel towards SPs intervening in often delicate internal affairs in a context where the Westphalian concept of sovereignty remains obdurate.

124. During the prolonged Intergovernmental Working Group discussions on the Review of the work and functioning of the HRC in 2011[90], not a single criticism or proposal for change in the CoC was put forward by States while many developing countries reiterated their support to it. This does not bear out the claim

[87] HRC Resolution 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council.*, operative paragraph 1.

[88] OHCHR, *United Nations Special Procedures, Facts and Figures 2013*, p 10.

[89] OHCHR, *United Nations Special Procedures, Facts and Figures 2015*, p 10.

[90] *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, Doc. A/HRC/WG.8/2/1, 4 May 2011, Annex IV, *Compilation of State Proposals*.

of some Western NGOs concerning the "general misuse of the CoC" since its adoption five years earlier[91].

125. This is another confirmation that, despite the dark forebodings of prophets of doom and gloom should such a code be adopted, despite also unfair questioning of the motivations of the developing countries having initiated it[92], the CoC is now part of the institutional build-up of the HRC and is serving its purpose.

126. This grueling experience has not unfortunately raised the threshold of tolerance for initiatives from the South in human rights matters. There continues to be an expectation that, notwithstanding the fact that developing countries initiated the mechanisms of SPs in the first place, rules governing the activities of mandate-holders or their relationship with States should either be determined by the SPs themselves or be either driven or inspired by Western countries.

127. As detailed above, initiatives by developing countries in this field are seen as "trespassing" and are discredited as aiming at undermining the independence of SPs or at blurring their mission.

128. Thus, during the 2011 Review of the work and functioning of the HRC, the Council was not able to agree on, *inter alia,* a new initiative of developing countries[93]. This had to do with entrusting to independent legal expertise the task of advising the parties or the Council on any subject of disagreement between States and mandate-holders concerning the implementation of the CoC. There was no readiness by developed countries to engage on its discussion despite the unanimous support that the proposal enjoyed from the African group, the OIC and the NAM.

129. Western countries and their NGOs opposed the very idea of such independent expertise to advise the Council, calling it an "Ethics Committee". The arguments put forward are similar to those directed previously against the CoC.

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[91] See Tania Baldwin-Pask & Patrizia Scannella, *op.cit*., p. 468, para. 2.

[92] The French language has the eloquent but untranslatable expression of "procès d'intention".

[93] See Comments of Algeria in *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, *op. cit*., pp. 15-16.

130. The above-mentioned proposal was made by developing countries as a result of a discussion with an experienced mandate-holder, Philip Alston, who was elaborating on the need to protect SPs from politically motivated attacks in the Council on charges of procedure or mandate overreach. The idea was that SPs could also be assisted in settling disagreements thereon through an independent legal mechanism giving its advice to both parties and possibly to the Council. While some developed countries averred that such issues should be settled by the CCSP, developing countries preferred an independent group of jurists whose views could be taken into account by both sides. The above-mentioned mandate-holder and the Algerian initiator of this proposal in the Council concurred that in a dispute between an SP and a State, mechanisms representing only one of the two parties would lack credibility through being judge and jury at the same time[94].

131. Contrary to the sequence set out in the study by the two Amnesty International staff, Philip Alston's proposal on a Committee of Jurists did not first fail to secure the support of his fellow mandate-holders to be "subsequently introduced into the Working Group Review by the ambassador of Algeria"[95]. The latter and Professor Alston first exchanged views informally on the subject. Thereafter, Algeria's Permanent Representative, with the support of the various groups of developing countries, put forward a related, but not identical, proposal for discussion in the Intergovernmental Working Group. It was ***after*** the issue was raised by the Algerian diplomat and others in this Working Group, that Philip Alston's "fellow-mandate-holders" indicated to the CCSP that they did not support even his more consensual proposals in this regard. The sequence is important because the Algerian initiative was inspired by ideas exchanged with a respected mandate-holder whose voice is especially listened to in Western circles. Yet, it seemed as though the very support of developing countries to an initiative converging with a reasonable idea of a mandate-holder, made the whole idea look suspicious to these Western circles.

132. Thus, an opportunity was lost to rid the Council of procedural discussions on SP reports to the detriment of their substantial content concerning victims of human rights violations that should deserve priority consideration by the Council.

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[94] Such mechanisms, to use the expression of Professor Alston, would otherwise be reminiscent of "kangaroo courts", an apt comparison for an Australian!

[95] See Tania Baldwin-Pask & Patrizia Scannella*, op.cit.*, pp. 419-478.

It was therefore decided through a Presidential Statement[96] that the Council will take it upon itself, without advice from independent jurists, to follow up on the implementation of the CoC. The only action that could be taken in case of persistent non-compliance with the Code by mandate-holders is not to renew the official's tenure at the end of her or his on-going term.

133. In view of the lack of a political will to engage on constructive negotiations on the suggested initiative that would have further improved the climate of cooperation between States and SPs, the Council was therefore left with an adversarial disciplinary procedure that hopefully will never, or hardly ever, be resorted to.

134. In the absence of the independent and non-politicized advice of a body of jurists, as supported by developing countries, it became impossible to find a consensual outcome in the Council on contentious issues such as the following three:

1) Soon after his appointment in 2008, the SR on the promotion and protection of the right to freedom of opinion and expression, made an unsolicited public statement and a comment in his report to the March 2008 session of the Council criticizing the OIC initiative in the HRC to sponsor a draft resolution on the theme of the "defamation of religion"[97].

As was to be expected, the OIC and other developing countries, which had tabled at the same 2008 session a draft resolution on combating the defamation of religion, objected to a mandate-holder taking a position without being asked to do so by the Council, on an issue under discussion in this very body.

They claimed that by so doing, the mandate-holder had exceeded his mandate as per article 7 of the CoC. There was no way to get independent advice on the

[96] *Terms of office of Special Procedures Mandate-Holders*, Doc. 8/PRST/2.

[97] The SPMH expressed the view that the "defamation of religion" was a reflection of a culture of discrimination but that this phenomenon could be solved not by regulations or censorship but by active policies of prevention of racism and discrimination on any basis be it national or religious or other. In his public pronouncement, he said that the expression "defamation of religions" could not be used because (a) "defamation" is a concept applied only in defence of the honour of individuals and (b) religions as well as philosophies, schools of thought, ideologies and conceptual issues can be the subject of open debate and even of criticism. This issue was laid to rest when the 2008 HRC Res. 7/9 on combating the defamation of religion was replaced by the 2012 HRC Res. 16/18 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.

legitimacy of his position if only to help guide future action. The CCSP, being a corporate grouping of SPMHs, could not credibly be judge and jury in such a case.

2) At the main session of the HRC of March 2010, the SR on the promotion and protection of human rights while countering terrorism was due to present to the Council a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism including their oversight[98]. Instead of this, the SP joined with colleagues in presenting to the HRC at that session a group study on global practices in relation to secret detention[99]. Developing countries were caught back-footed by this change in programme on which the Council had not been previously consulted. These countries recognized that SPs were free to initiate studies for the Council at their own discretion. However, they considered that the SPs' accountability to the Council required them first to comply with their mandatory obligation and not to replace a report requested for presentation at a given session by a study, however valuable it might be, on another subject without the previous consent of the Council, or at least, of its Bureau.

Western NGOs, expressing the view of some WEOG countries, regretted that "States spent more time questioning the legitimacy of the report [*Note from the present author:* in reality a study and not a report[100]] on the grounds no mandate had been given to the authors to undertake this joint initiative, than actually debating the content of the report [*sic*] itself"[101].

In the absence of an independent legal opinion, the Council had to take this issue directly in its own hands after a long and acrimonious debate. It expressed its displeasure at the fact that the Special Rapporteur did not comply with its request, by including in a paragraph of a formal resolution its "regrets that the SR did not submit the report as mandated by the HRC" and directed that it be presented at its

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[98] HRC Res. 10/15 of 26 March 2009, *Protection of human rights and fundamental freedoms while countering terrorism*, operative paragraph 12.

[99] Doc. HRC/13/42 of 19 February 2010, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development – Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other crual, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the Working Group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, 186 pp.

[100] It is suggested that henceforth a report be defined as a document submitted by an SPMH at the request of the Council, and a study be a document prepared and submitted by the SPMH at her/his own initiative.

[101] See Tania Baldwin-Pask & Patrizia Scannella, *op.cit.*, p. 452.

15th session. The Council decided then to postpone the review of the study initiated by the SR to its June 2010 session[102].

3) Another issue was raised, *inter alia*, by Algeria in the Working Group on the Review of the work and functioning of the HRC. This had to do with the reporting of SPs to the Council. Accountability by SPs to the Council also means reporting to the latter on their action and as the CoC stipulates, the Council should be "the first recipient of conclusions and recommendations" addressed to this body by SPs[103].

SPs may be mandated by the Council to report not only to itself but also to the GA on issues within their mandate. SPs have also been known to have presented reports or studies to the GA (3rd Committee) previous to their submission to the HRC, or to have presented to the former, studies on subjects different from those raised by them in the HRC[104] without informing the Council. Some SPMHs have also addressed ECOSOC meetings and in some rare cases, the Security Council[105]. SPs do not always report to the Council on these activities as they should; it has simply been said that their statements may be retrieved from the OHCHR.

However, it has been impossible so far, for lack of an independent advisory group of jurists, to find out whether SRs or IEs should not report to the Council on all their other UN activities by virtue of their reporting obligations to the Council and in order to give the latter an opportunity to comment thereon.

Furthermore, there seems to be a contradiction between the obligation incumbent on SPs to ensure that the Council is the first recipient of conclusions and recommendations addressed to this body and the fact that some high-profile commissions of inquiries (which come under SPs as well) appointed by the Council make their report public in New York before presenting it to the Council in Geneva or even to its Bureau if the Council is not in session[106]. Again, an

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[102] HRC Res. 13/26 of 26 March 2010, *Protection of human rights and fundamental freedoms while countering terrorism,* para. 12.

[103] HRC Resolution 5/2 of 18 June 2007, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council,* Annex, *Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council,* article 13 (c).

[104] *Ibid*., article 6 (d) implicitly extended by SPs to apply not only to the HRC but also to the GA.

[105] This is confirmed by the MOSP, August 2008, para. 89.

[106] Such was the case for the High Level Commission of Inquiry set out on 19 October 2000 by CHR Res. S-5/1 to investigate the violations by Israel, the occupying power, in the occupied Gaza Strip as a result of its military attacks.

independent advisory group of jurists could, through its legal opinion, have set such issues to rest.

Conclusions

135. At some stage, the initiative to re-launch the creation of an advisory body of independent jurists, building on, or amending as required, the content of Annex II herewith could be contemplated. Pending progress on this issue, it might be useful as an interim measure to decide on an annual joint meeting of the CCSP and of representatives of the five regional groups of the Council, to seek consensus on such issues as may arise from the implementation of the CoC. This could relate in particular to paragraphs 94, 102, and 105 of the MOSP, to foster a cooperative climate leading to greater efficiency of the mechanisms. Self-regulation by the CCSP with some form of interaction, however informal, with the States on issues concerning concrete ways to enhance dialogue and cooperation may even turn out to be sufficient if there is good will on both sides.

CHAPTER VI

THE "GREAT CONVERGENCE" ON FUNDING

136. Resources allocated to SPs have steadily increased since the HRC was created. The decisions taken in 2006 to double the budget allocated for human rights was fully implemented by 2011. In 2012, the total resources allocated to Special Procedures Branch (SPB) further increased to $18,805,463[107]. Despite the reduction in the overall UN budget in 2013, funding to the SPB from the regular budget further rose between the two years from $10,386,160 to $11,235,700 *i.e.* by over 8%. However, both the voluntary contributions freely useable for all SPs amounting to $3,353,185 in 2013 and those earmarked for specific mandates of an amount of $1,425,268 for the same year were 18.5% and 22.4% less, respectively, than the previous year's totals of $4.1 million and $1.8 million. OHCHR also reduced the amount available to SPs in 2013 by a net withdrawal of $353,462 to reimburse itself for un-earmarked funds previously allocated to the SPB from its own untied resources.

137. The net effect of the increase in regular budgetary funds and of reductions in voluntary contributions as well as of OHCHR levies, is an overall reduction of funding available to SPs in 2013 of 16.7% as compared to 2012.

138. This is a worrying situation in a context where, as already outlined, SPs costing an average of over $ 313,200 a year per mandate (or over US 211,630 per individual mandate-holder), are being added annually by the Council without identifying at the same time, except through a hypothetical PBI statement, the wherewithal to finance them. This has been described as a "haphazard"[108] evolution in the absence of a road map or of a framework which would at last justify calling the Special Procedures mechanism a "system" as mentioned in the HRCs founding resolution[109].

139. In the document entitled "Outcome of the review of the work and functioning of the Human Rights Council", the HRC requested the Secretary-

[107] *OHCHR Report 2013*, pp. 160-161.

[108] Tania Baldwin-Pask & Patrizia Scannella, *op. cit*., p. 422.

[109] GA Res. 60/251 of 15 March 2006, *Human Rights Council,* operative paragraph 6.

General of the UN that he "ensure the availability of adequate resources within the regular budget [...] to support the full implementation by Special Procedures Mandate-Holders of their mandates". To be realistic, the HRC recognized "the continued need for extra-budgetary funding to support the work related to the Special Procedures", emphasizing however that those voluntary contributions "should be, to the extent possible, non-earmarked"[110].

140. With respect to sources of funding, the developing countries continue to express concern about the importance of voluntary funding in OHCHR activities which tend to give major donors, who are mainly Western developed countries, an influence on the focus and locus of OHCHR activities.

141. While voluntary funding still accounts for 56% of overall OHCHR resources in 2013[111], it stands at 42% of the funding of SPs[112]. This ratio is still disturbing. It includes however an amount of only 12% of the overall funding which is earmarked for specific SPs and, as is to be expected, this focuses on civil and political rights. One should not overlook the positive aspect of the situation which is that the rest of the voluntary funding is available to the procedures as a group.

142. The 2011 Review Outcome for its part recognizes the importance of having adequate and equitable funding for SPs "with equal priority accorded to civil and political rights and economic, social, and cultural rights"[113]. Unfortunately, the financial statements included in the OHCHR Report 2013 do not make it possible for all stakeholders to monitor how this decision is being applied. It would seem that OHCHR staff statements in the Council have been reassuring in this respect. This information should in the future be included in the financial statements of the OHCHR annual reports.

143. Because of the current resource stringency, some expedients have been found which are also a cause for concern. Thus, the thematic and country mandates were disseminated, for budgetary reasons, between different divisions

[110] GA Res. 65/281 of 17 June 2011, *Review of the Human Rights Council*, Annex, *Outcome of the review of the work and functioning of the Human Rights Council*, paras. 32 & 33.

[111] *OHCHR Report 2013*, Chapter on Management and Funding.

[112] *Ibid.*, Chapter on Financial Statements.

[113] GA Res. 65/281 of 17 June 2011, Annex, para. 31.

of the OHCHR and were not all regrouped as might be expected in the SPB. This clouds the transparency of funding of a very sensitive sector and could even undermine the independence of the SPs when their work priorities differ from those of the different divisions of the OHCHR to which they are assigned.

144. Again, for this reason of budgetary stringency, the CCSP considers in the MOSP that the independence of SPs is in no way inconsistent with mandate-holders' right "to seek information and financial and other support from a wide range of actors"[114]. This self-regulation of the CCSP conferring such a right on SPs to fund-raise resources "from a wide range of actors", including outside the UN without reporting thereon to the Council or disclosing the source of such support, is pushing the interpretation of "independence" one step too far as noted as follows by the UN Board of Auditors in its Report on the Biennium ending in December 2011: "While recognizing that currently, the mandate-holders do not have an obligation to disclose this funding or in-kind support, the Board considers that the absence of clear disclosures could put in doubt the perceived independence of mandate-holders"[115].

145. Not only is the lack of transparency related to sources of funding in cash or in kind a problem, but the very fact for an individual mandate-holder to be given leave to fund-raise broadly for his own UN-mandated activity is undignified and over-exposes this official to donor conditionality, thus further undermining the mandate-holder's independence.

146. These issues are of particular concern to developing countries that are the main focus of SP activities. The concern is also more broadly shared by other members of the HRC.

147. Other issues are less consensual. Thus, as mentioned earlier, developing countries put a lot of emphasis on the promotion of human rights and on the prevention of human rights violations. For this reason, they attach a lot of importance to the technical assistance and capacity-building that SPs could channel to them for enhancing their own policies of prevention of human rights violations and of protection of victims.

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[114] MOSP, August 2008, para. 11 on independence of SPs.

[115] *Financial report and audited financial statements for the biennium ended 31 December 2011 and the Report of the Board of Auditors*, UN Doc. A/67/5, Volume 1, p. 24, para. 68.

148. Developed countries, for their part, give priority to reinforcing the capacity of intervention of SPMHs to protect victims of such violations and to seek redress. Many, but there are some exceptions, are not enthused therefore by developing country proposals to set up a fund that could be drawn on by mandate-holders to support the technical assistance and capacity-building to empower States to better promote and protect human rights.

This issue therefore deserves further discussion.

Conclusions

149. The following action could be considered:

- ensure full transparency of the funding of all SPs, taken individually;

- set a target and a time-path for achieving the objective of funding all SPs from UN budgetary resources;

- keep on hold the creation of new SPs not accompanied by a rationalization of the existing SPs in order to free the necessary resources, pending availability or increases in budgetary allocations or, in the short term, of extra-budgetary resources;

- make disclosure of funding sources mandatory, whether in cash or in kind, in a first stage and, subsequently, consider banning direct resource-raising by individual SPs, whether in cash or in kind, this function being wholly transferred to the OHCHR, and to modify paragraph 11 of the MOSP accordingly;

- regroup in a first stage all SPs in one OCHRC unit, preferably the SPB, and to put all their resources in a single fund; consider in a second stage this unit being set up as a separate body under OHCHR administrative supervision but with its own accounts and staff resources;

- consider the possibility to set up a fund to provide technical assistance and capacity-building where necessary, to help resource-deficient developing countries promote and protect human rights. In order to enlist support from developed countries, such a system could be packaged with agreed preventative and remedial national action to uphold human rights. This approach would

therefore blend the two opposing emphases put by developing and developed countries in this regard[116].

150. Financing is of course of the essence and it is fortunate that there is a possibility of achieving global convergence in negotiations related to the foregoing suggestions. The above conclusions could be helpful in underpinning it.

[116] See in particular the following proposal of the USA: "increase resources for SPs for staff and country visits and direct funding to support implementation of the SPs' recommendations", *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, Doc. A/HRC/WG.8/2/1, Annex IV, *Compilation of State Proposals,* Section II Special Procedures, p. 82.

CHAPTER VII

CONCLUDING REMARKS

151. Objectivity is an aim that many profess or aspire to, that fewer effectively strive towards but that fewer still can ever fully achieve.

152. Objectivity on such a hot subject as human rights is today even more problematic. All individuals are conditioned by, *inter alia*, who they are, where they grew up, where they live or where they work.

153. It is said that there is no relativity in human rights with respect to social or cultural diversity. Most States (bar some laggards) agree on most international human rights instruments and profess to support human rights worldwide. Yet, when one takes a specific instance of a crisis in a specific country, as of late, alliances come into play and even for countries in the forefront of the battle for human rights, related principles may yield to political expediency. Legal arguments will even be found to explain why in a particular crisis one votes against or abstains on a draft resolution condemning a violation of human rights that one denounces vigorously when a similar case occurs elsewhere.

154. Despite these conflicting signals they constantly receive from member States in an HRC to which they are accountable, SPs have held their own, doing an immense service to humanity deserving gratitude from all. Rather than just heap praise on these committed individuals, the present study has aimed at further enhancing their international standing, credibility and effectiveness in promoting and protecting human rights especially in developing countries to which they devote most of their time.

155. With such a broad-based and equitable geographic distribution of their members as prevails today, the SPs are ahead of the OHCHR Secretariat where WEOG nationals still hold the absolute majority of the positions in spite of the worthy efforts made by the High Commissioner to diversify the staff.

156. The ideal framework in the pursuit of objectivity for SPs is where mandate-holders join in a working group of five from the five regions of the world. For it is in these groups that five committed persons coming from different political,

social and cultural backgrounds can correct their differences in perception and reach, through mutual give-and-take, the highest degree of impartiality and wisdom.

157. Such a "framework for wisdom" should be encouraged. Of course, this option might be questioned in light of resource constraints. However, this concerned could be somewhat mitigated if the proposed review of mandates could lead to a merger or consolidation of some current individual mandates (see above, paras. 68-73).

158. The present study puts emphasis on genuine dialogue and cooperation between SPMHs and States. It emphasizes that most targeted developing States are not necessarily the "villains" but have to make at times very painful trade-offs between conflicting priorities, which can adversely affect human rights.

159. The approach followed in the present study is to try to find out how to get the best fit for inter-action between SPs and concerned States. As for "villains" that may be out there, they can be dealt with on an *ad hoc* basis by the Council as it has brilliantly demonstrated on several occasions. Some in the North push for ever more pressure on developing States to correct their human rights record. Reasonable pressure may be in order but there can be a backlash to excessive pressure which will not necessarily be helpful to victims of human rights violations.

160. By essence, the mechanisms of the HRC, and in particular the SPs, do not have an adjudicatory function. The HRC does not therefore have the instruments to compel States. It might be said that the HRC can however trigger a resort to force against non-complying States. It has indeed been asserted that there is an interconnection between the three pillars of peace, development and human rights as proclaimed by the 2005 UN World Summit. This interconnection has allegedly extended the remit of the Security Council which under chapter VII of the Charter has the right to resort to force only in cases of threats to peace or aggression, by extending its right to resort to force in cases of gross violations of human rights. But human rights are predicated on justice and the latter cannot be subordinated to vetoes.

161. Hence, the purpose of this study is to promote mutual accommodation between SPs and States wherever possible, without compromising on human rights promotion and protection.

162. This study could be accused of laying emphasis on improving SP mechanisms rather than addressing the real problems which lie in States themselves where violations of human rights are occurring. The study in no way minimizes the importance of the corrective action that has to be taken by governments, in developing countries of course, but also increasingly in developed countries as well as witnessed by the rise of populist parties and revival of racial hatred and xenophobia which already targeted in the past one ethnic group of population in Europe. The only difference this time round is that their venom is directed against other groups on the basis of the same sinister discrimination as the one which thrived between World War I and World War II.

163. Unsatisfactory though the human rights situation obviously is, this study does not claim to have all the answers as to how States can improve on it. This is not its remit. It limits itself to what the HRC can realistically do to improve the general human rights situation by enhancing its own effectiveness. SPs have a central role to play in this regard. The present study therefore suggests different avenues to improve their effectiveness. This does not mean that therein lies the whole solution to the situation of human rights abuses in the world. It is simply a recognition that the rapid expansion of SPs over the years is a response to the human rights challenges increasingly encountered worldwide. These procedures do make a difference in the field and their expansion must be nurtured and channeled to enhance their impact. To claim that what is important is to address human rights violations on the ground rather than just tinkering with SPs is tantamount to underestimating the value of these procedures and to denying their tremendous potential to influence human rights outcomes. It is the faith in this potential that has guided the present study to address ways of making full use thereof. Thus, Special Procedures are and will remain very special to the Council. The exponential growth of Special Procedures shows that the latter are no more "special" in the sense of exceptional, as conceived of initially, but more "special" than ever in providing an invaluable link between the deliberations of the HRC and the prevailing human rights situation on the ground.

164. Substantial progress has been achieved by the HRC in the promotion and the protection of human rights across the world. The support provided by the former High Commissioner, Ms. Navanethem Pillay, was outstanding. The designation of His Highness Prince Raad Bin Zaïd as new High Commissioner is the best guarantee that the Office will further enhance the cause of human rights through constructive international dialogue and cooperation.

165. Awareness of the issues of human rights was also promoted by human rights activists worldwide. In this regard, special tribute is deserved by Western NGOs who have backstopped the position of WEOG States in their efforts to promote their vision of human rights. Several mentions of their writings are referred to here because they deserve to be reflected upon. The expression of dissent in this study with some of their conclusions is in the name of the freedom of opinion and expression that they themselves advocate. May these NGOs increasingly pave the way for a constructive multilateral North-South dialogue on human rights issues.

166. Thanks to all these contributions, there is now a politically correct approach to the issue of human rights; any such success is however subject to new challenges. A broad-based acceptance of the prevailing view has led to questioning the loyalty to human rights of actors from developing countries that offer an alternative narrative to, *inter alia,* increasing the impact of SPs on the ground. This narrative, while aiming at enhancing effectiveness of action on human rights, also purports to address the concerns of developing countries that, on the one hand, their sovereignty, constitutional processes and dignity are respected, and that on the other, their contribution in the Council to the institutional development of human rights mechanisms is recognized, welcomed and given due consideration.

167. It is to the credit of the Geneva Centre for Human Rights Advancement and Global Dialogue to have supported and published this alternative narrative from the South in defence of the Special Procedures, which, to some extent, departs from conventional wisdom.

168. May this study encourage other free thinkers, from the South and also from the North, to join the fray and revive the discussion in the HRC and outside as to how best SPMHs and other mechanisms can be supported and guided to advance

the cause of human rights worldwide. To do this, there is a need to encourage thinking “out of the box”.

ANNEX I

LIST OF SPECIAL PROCEDURES MANDATE-HOLDERS OF THE HUMAN RIGHTS COUNCIL 2014

(Source: *OHCHR Report 2014*)

Country mandates

(list as of 3 December 2014)

Title / Mandate	Mandate established		Mandate extended		Name & country of origin of the mandate-holder(s)	Contact
	in	by	in	by		
Special Rapporteur on the situation of human rights in Belarus	2012	CHR Res 20/13 *(for 1 year)*	2013	HRC res 23/15	**Mr. Miklós HARASZTI***(Hungary)*	sr-belarus@ohchr.org
			2014	HRC res 26/25		
Special Rapporteur on the situation of human rights in Cambodia	1993	CHR res 1993/6	2013	HRC res 24/29 *(for 2 years)*	**Mr. Surya Prasad SUBEDI** *(Nepal)*	srcambodia@ohchr.org
Independent Expert on the situation of human rights in Central African Republic	2013	HRC res 24/34 *(for 1 year)* and res S-20/1	2014	HRC res 27/28	**Ms. Marie-Therese KEITA BOCOUM** *(Côte d'Ivoire)*	ie-car@ohchr.org
Independent Expert on capacity-building and technical cooperation with Côte d'Ivoire in the field of human rights	2014	HRC res 26/32			**Mr. Mohammed AYAT** *(Morocco)*	eicotedivoire@ohchr.org
Special Rapporteur on the situation of human rights in Eritrea	2012	HRC res 20/20	2014	HRC res 26/24	**Ms. Sheila B. KEETHARUTH** *(Mauritius)*	sr-eritrea@ohchr.org

Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea	2004	CHR res 2004/13	2014	HRC res 25/25 *(for 1 year)*	**Mr. Marzuki DARUSMAN** *(Indonesia)*	hr-dprk@ohchr.org
Independent Expert on the situation of human rights in Haiti	1995	CHR res 1995/70 *(duration of mandate not specified)*	2014	HRC President's statement PRST 25/1	**Mr. Gustavo GALLÓN** *(Colombia)*	ie-haiti@ohchr.org
Special Rapporteur on the situation of human rights in the Islamic Republic of Iran	2011	HRC res 16/9	2014	HRC res 25/24 *(for 1 year)*	**Mr. Ahmed SHAHEED** *(Maldives)*	sr-iran@ohchr.org
Independent Expert on the situation of human rights in Mali	2013	HRC res 22/18 (*for one year)*	2014	HRC resolution 25/36 (*for 1 year)*	**Mr. Suliman BALDO** *(Sudan)*	ie-mali@ohchr.org
Special Rapporteur on the situation of human rights in Myanmar	1992	CHR res 1992/58	2014	HRC res 25/26 (*for 1 year)*	**Ms. Yanghee LEE***(Republic of Korea)*	sr-myanmar@ohchr.org
Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	1993	CHR res 1993/2 A *("until the end of the Israeli occupation")*			**Mr. Makarim WIBISONO** *(Indonesia)*	sropt@ohchr.org
Independent Expert on the situation of human rights in Somalia	1993	CHR res 1993/86	2013	HRC res 24/30 *(for 2 years)*	**Mr. Bahame NYANDUGA** *(United Republic of Tanzania)*	ie-somalia@ohchr.org
Independent Expert on the situation of human rights in the Sudan	2009	HRC res 11/10	2014	HRC res 27/29 *(for 1 year)*	**Mr. Aristide NONONSI** *(Benin)*	iesudan@ohchr.org
Special Rapporteur on the situation of human rights in the Syrian Arab Republic	2011	HRC res S-18/1			**Mr. Paulo Sérgio PINHEIRO** *(Brazil) - will start once the mandate of the commission of inquiry ends*	srsyria@ohchr.org

Thematic mandates

(list as of 5 December 2014)

Title / Mandate	Mandate established		Mandate extended		Name & country of origin of the mandate-holder(s)	Contact
	in	by	in	by		
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context	2000	CHR res 2000/9	2007 2010 2013 2014	HRC res 6/27 HRC res 15/8 HRC res 24/115*(postponement of the renewal of the mandate)* HRC res 25/17	**Ms. Leilani FARHA***(Canada)*	srhousing@ohchr.org
Working Group of Experts on People of African Descent	2002	CHR res 2002/68	2003 2008 2011 2014	CHR res 2003/30 HRC res 9/14 HRC res 18/28 HRC res 27/25	**Ms. Mireille Fanon Mendes-France** *(France)* **Chair-Rapporteur** **Mr. Ricardo III SUNGA** *(the Philippines)* **Ms. Verene SHEPHERD** *(Jamaica)* **Mr. Sabelo GUMEDZE** *(South Africa)* **Ms. Michal BALCERZAK** *(Poland)*	africandescent@ohchr.org
Working Group on Arbitrary Detention	1991	CHR res 1991/42	1997 2010 2013	CHR res 1997/50 HRC res 15/18 HRC res 24/7	**Mr. Mads ANDENAS** (*Norway*) **Chair-Rapporteur** **Mr. Vladimir TOCHILOVSKY** (*Ukraine*) **Vice-Chair** **Mr. Seong-Phil HONG** *(Republic of Korea)* **Mr. José GUEVARA**	wgad@ohchr.org

					(Mexico) **Mr. Sètondji Roland Jean-Baptiste ADJOVI** *(Benin)*	
Special Rapporteur on the sale of children, child prostitution and child pornography	1990	CHR res 1990/68	2008 2011 2014	HRC res 7/13 HRC res 16/12 HRC res 25/6	**Ms. Maud De BOER-BUQUICCHIO** *(the Netherlands)*	srsaleofchildren@ohchr.org
Special Rapporteur in the field of cultural rights	2009	HRC res 10/23	2012	HRC res 19/6	**Ms. Farida SHAHEED** (*Pakistan*)	srculturalrights@ohchr.org
Independent expert on the promotion of a democratic and equitable international order	2011	HRC res 18/6	2014	HRC res 27/9	**Mr. Alfred de ZAYAS** *(USA)*	ie-internationalorder@ohchr.org
Special Rapporteur on the rights of persons with disabilities	2014	HRC res 26/20			**Ms. Catalina DEVANDAS AGUILAR** *(Costa Rica)*	sr.disabilities@ohchr.org
Special Rapporteur on the right to education	1998	CHR res 1998/33	2008 2011 2014	HRC res 8/4 HRC res 17/3 HRC res 26/17	**Mr. Kishore SINGH** (*India*)	sreducation@ohchr.org
Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment	2012	HRC res 19/10			**Mr. John KNOX** *(USA)*	ieenvironment@ohchr.org
Working Group on Enforced or Involuntary Disappearances	1980	CHR res 20 (XXXVI)	2007 2011	HRC res 7/12 HRC res 16/16	**Mr. Ariel DULITZKY** (*Argentina/United States of America)*	wgeid@ohchr.org

			2014	HRC decision 25/116 HRC res 27/1	**Chair-Rapporteur** **Mr. Bernard DUHAIME** *(Canada)* **Ms. Jasminka DZUMHUR** (*Bosnia and Herzegovina*) **Ms. Houria ES SLAMI** *(Morocco)* **Mr. Osman EL-HAJJE** *(Lebanon)*	
Special Rapporteur on extrajudicial, summary or arbitrary executions	1982	CHR res 1982/35	2011 2014	HRC res 17/5 HRC res 26/12	**Mr. Christof HEYNS** (*South Africa*)	eje@ohchr.org
Special Rapporteur on extreme poverty and human rights	1998	CHR res 1998/25	2011 2014	HRC res 17/13 HRC res 26/3	**Mr. Philip ALSTON** *(Australia)*	srextremepoverty@ohchr.org
Special Rapporteur on the right to food	2000	CHR res 2000/10	2010 2013	HRC res 13/4 HRC res 22/9	**Ms. Hilal ELVER** *(Turkey)*	srfood@ohchr.org
Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights	2000	CHR res 2000/82	2008 2011 2014	HRC res 7/4 HRC res 16/14 HRC res 25/16	**Mr. Juan BOHOSLAVSKY** *(Argentina)*	ieforeigndebt@ohchr.org
Special Rapporteur on the rights to freedom of peaceful assembly and of association	2010	HRC res 15/21	2013	HRC res 24/5	**Mr. Maina KIAI** (*Kenya*)	freeassembly@ohchr.org
Special Rapporteur on	1993	CHR res 1993/45	2008	HRC res 7/36	**Mr. David KAYE** *(USA)*	freedex@ohchr.org

the promotion and protection of the right to freedom of opinion and expression			2011 2014	HRC res 16/4 HRC res 25/2		
Special Rapporteur on freedom of religion or belief	1986	CHR res 1986/20	2007 2010 2013	HRC res 6/37 HRC res 14/11 HRC res 22/20	**Mr. Heiner BIELEFELDT** *(Germany)*	freedomofreligion@ohchr.org
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	2002	CHR res 2002/31	2010 2013	HRC res 15/22 HRC res 24/6	**Mr. Dainius Pūras** *(Lithuania)*	srhealth@ohchr.org
Special Rapporteur on the situation of human rights defenders	2000	CHR res 2000/61	2008 2011 2014	HRC res 7/8 HRC res 16/5 HRC res 25/18	**Mr. Michel FORST***(France)*	defenders@ohchr.org
Special Rapporteur on the independence of judges and lawyers	1994	CHR res 1994/41	2008 2011 2014	HRC res 8/6 HRC res 17/2 HRC res 26/7	**Ms. Gabriela KNAUL** *(Brazil)*	srindependencejl@ohchr.org
Special Rapporteur on the rights of indigenous peoples	2001	CHR res 2001/57	2010 2013	HRC res 15/14 HRC res 24/9	**Ms. Victoria Lucia TAULI-CORPUZ** *(the Philippines)*	indigenous@ohchr.org
Special Rapporteur on the human rights of internally displaced persons	2004	CHR res 2004/55	2010 2013	HRC res 14/6 HRC res 23/8	**Mr. Chaloka BEYANI** *(Zambia)*	idp@ohchr.org
Working Group on the use of mercenaries	2005	CHR res 2005/2	2010	HRC res 15/12	**Ms. Elzbieta KARSKA** *(Poland)* ***Chair-***	mercenaries@ohchr.org

as a means of violating human rights and impeding the exercise of the right of peoples to self-determination			2013	HRC res 24/13	***Rapporteur*** **Ms. Patricia ARIAS** *(Chile)* **Mr. Anton KATZ** *(South Africa)* **Mr. Gabor RONA** *(USA/Hungary)* **Mr. Saeed MOKBIL** *(Yemen)*	
Special Rapporteur on the human rights of migrants	1999	CHR res 1999/44	2008 2011 2014	HRC res 8/10 HRC res 17/12 HRC res 26/19	**Mr. François CRÉPEAU** *(Canada)*	migrant@ohchr.org
Special Rapporteur on minority issues	2005	CHR res 2005/79	2008 2011 2014	HRC res 7/6 HRC res 16/6 HRC res 25/5	**Ms. Rita IZSÁK** (*Hungary*)	minorityissues@ohchr.org
Independent Expert on the enjoyment of all human rights by older persons	2013	HRC res 24/20			**Ms. Rosa KORNFELD-MATTE** *(Chile)*	olderpersons@ohchr.org
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence	2011	HRC res 18/7	2014	HRC res 27/3	**Mr. Pablo De GREIFF** *(Colombia)*	srtruth@ohchr.org
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	1993	CHR res 1993/20	2008 2011 2014	HRC res 7/34 HRC res 16/33 HRC res 25/32	**Mr. Mutuma RUTEERE** *(Kenya)*	racism@ohchr.org
Special Rapporteur on contemporary forms of slavery, including its causes and its consequences	2007	HRC res 6/14	2010 2013	HRC res 15/2 HRC res 24/3	**Ms. Urmila BHOOLA** *(South Africa)*	srslavery@ohchr.org

Independent Expert on human rights and international solidarity	2005	CHR res 2005/55	2008 2011 2014	HRC res 7/5 HRC res 17/6 HRC res 26/6	**Ms. Virginia DANDAN** *(Philippines)*	iesolidarity@ohchr.org
Special Rapporteur on the promotion and protection of human rights while countering terrorism	2005	CHR res 2005/80	2010 2013	HRC res 15/15 HRC res 22/8	**Mr. Ben EMMERSON** (*United Kingdom of Great Britain and Northern Ireland*)	srct@ohchr.org
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	1985	CHR res 1985/33	2008 2011 2014	HRC res 8/8 HRC res 16/23 HRC res 25/13	**Mr. Juan Ernesto MENDEZ** *(Argentina)*	sr-torture@ohchr.org
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes	1995	CHR res 1995/81	2011 2012 2014	HRC res 18/11 HRC res 21/17 HRC res 27/23	**Mr. Baskut TUNCAK** *(Turkey)*	srtoxicwaste@ohchr.org
Special Rapporteur on trafficking in persons, especially women and children	2004	CHR res 2004/110	2008 2011 2014	HRC res 8/12 HRC res 17/1 HRC res 26/8	**Ms. Maria Grazia GIAMMARINARO** *(Italy)*	srtrafficking@ohchr.org
Working Group on the issue of human rights and transnational corporations and other business enterprises	2011	HRC res 17/4	2014	HRC res 26/22	**Mr. Michael K. ADDO** *(Ghana)* **Chair-Rapporteur** **Mr. Puvan J. SELVANATHAN** *(Malaysia)* **Ms. Alexandra GUAQUETA** *(Colombia/USA)* **Mr. Pavel SULYANDZIGA** *(Russian*	wg-business@ohchr.org

					Federation) **Ms. Margaret JUNGK** *(USA)*	
Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights	2014	HRC res 27/21			**Mr. Idriss JAZAIRY** *(Algeria)*	
Special Rapporteur on the human right to safe drinking water and sanitation	2008	HRC res 7/22	2011 2013	HRC res 16/2 HRC res 24/18	**Mr. Léo HELLER** *(Brazil)*	srwatsan@ohchr.org
Working Group on the issue of discrimination against women in law and in practice	2010	HRC res 15/23	2013	HRC res 23/7	**Ms. Frances RADAY** *(Israel/United Kingdom)* **Chair-Rapporteur** **Ms. Emna AOUIJ** *(Tunisia)* **Ms. Eleonora ZIELINSKA** *(Poland)* **Ms. Kamala CHANDRAKIRANA** *(Indonesia)* **Ms. Alda FACIO** *(Costa Rica)*	wgdiscriminationwomen@ohchr.org
Special Rapporteur on violence against women, its causes and consequences	1994	CHR res 1994/45	2008 2011 2013	HRC res 7/24 HRC res 16/7 HRC res 23/25	**Ms. Rashida MANJOO** *(South Africa)*	vaw@ohchr.org

ANNEX II

ELEMENTS FOR A DRAFT RESOLUTION ON THE SETTING-UP OF A CONSULTATIVE LEGAL COMMITTEE OF THE HUMAN RIGHTS COUNCIL ON THE IMPLEMENTATION OF THE CODE OF CONDUCT FOR SPECIAL PROCEDURES MANDATE-HOLDERS

The Human Rights Council,

Recalling resolution 5/2 of 8 June 2007 relating to the adoption of the code of conduct for Special Procedures Mandate-Holders of the Human Rights Council (thereafter referred to as "the Code of Conduct"),

Recalling that in its resolution 60/251 of 15 March 2006, entitled "Human Rights Council", the General Assembly has, *inter alia,* decided that the activities of the Council shall be guided by the principles of universality, impartiality, objectivity, and non-selectivity, constructive dialogue and cooperation at the international level and that the methods of work of the Council shall be transparent, equitable, impartial and supportive of true dialogue,

Aspiring to pursue of the process of review, improvement and rationalization provided for in this resolution and which aims, *inter alia,* to reinforce the cooperation between Governments and mandate-holders, which is essential for the system to operate efficiently,

Bearing in mind article 15 of the Code of Conduct which provides that mandate-holders are accountable to the Council in the implementation of their mandate,

Having reviewed the draft text on the creation of a Consultative Legal Committee on the implementation of the Code of Conduct, submitted by the President of the Council,

Adopts the draft text entitled "Creation of a Consultative Legal Committee on the implementation of the Code of Conduct for Special Procedures Mandate-Holders", which is annexed to the present resolution,

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Creation of a Consultative Legal Committee on the Implementation of the Code of Conduct for Special Procedures Mandate-Holders

1. A Consultative Legal Committee on the Implementation of the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council (hereinafter referred to as "the Committee") shall be established.

2. The Committee shall constitute a subsidiary body of the Council whose composition, mandate and functioning are governed by the provisions set out hereunder:

A. Composition

3. The Committee shall be composed of five independent and impartial experts of a high moral standard.

4. The Members of the Committee shall deliberate in their personal capacity.

a) Nomination

5. The UN Members States, mandate-holders, national human rights institutions, international organizations or their offices (the UN High Commissioner for Human Rights, for instance) and non-governmental organizations shall be entitled to propose or support candidates.

6. For the purpose of the nomination, the above-mentioned entities shall bear in mind the reputed competence and experience of the candidates in the jurisdictional and human rights domain, their integrity as well as their independence and impartiality.

7. Persons being entrusted with senior responsibilities in a government or in any other organization or entity that could give rise to a conflict of interest with the responsibilities inherent to these functions shall be excluded.

8. The principle of non-accumulation of functions in the field of human rights, in particular that of mandate-holders, shall be observed.

b) Election

9. The Council shall elect the members of the Committee, by secret ballot, from the list of candidates whose names shall have been presented in accordance with the agreed requirements.

10. The list of candidates shall be closed two months prior to the election date. The Secretariat shall make available the list of candidates and relevant information to Member States and to the public at least one month prior to the election.

11. Due consideration should be given to gender balance and appropriate representation of different legal systems.

12. The geographic distribution will be as follows:

African States: 1;

Asian States: 1;

Eastern European States: 1;

Latin American and Caribbean States: 1;

Western European and other States: 1.

13. The members of the Committee shall serve for three years, and shall be eligible for re-election once. However, in the first term, the mandate of three of the elected members shall expire at the end of two years; immediately after the first election, the name of these three members would be drawn by lot by the President of the Council.

14. Before assuming his/her functions, every member of the Committee shall give, in open committee, the solemn undertaking to perform his/her functions impartially and conscientiously.

B. Attributions

15. The function of the Committee shall be to ensure the successful implementation of the Code of Conduct for the Human Rights Council Special Procedures Mandate-Holders.

16. The Committee shall, in particular, ensure compliance with the standards of ethical and professional conduct that Special Procedures Mandate-Holders shall respect while discharging their mandate, as provided by articles 3 and 7 of the Code of Conduct.

17. The Committee shall also ensure that mandate-holders exercise their functions in full independence, free from any kind of extraneous influence,

incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever.

C. Functions

18. The Committee shall elect its Bureau for a period of two years.

19. It shall establish its own rules of procedure.

20. The Committee shall meet once a year, before the main session of the Council, for a maximum duration of 5 working days. Additional sessions may be scheduled on an ad hoc basis with prior approval of the Council.

21. Should any Member State or mandate-holder consider that the prescriptions in the Code of Conduct are not respected, the matter may be brought to the attention of the Committee by means of a written communication.

22. A copy of the communication shall be immediately sent by the Secretariat to the party concerned.

23. The submission of the above-mentioned communication shall not, in any case, delay or suspend the presentation of any report by the mandate-holder to the Council.

24. The Committee, or its Chairperson, may exclude any communication that he/she may consider as manifestly ill-founded.

25. Communications shall be examined by the Committee during closed meetings.

26. The Committee, or its Chairperson, may proceed to make its good offices available to the parties concerned with a view to an amicable resolution of

the matter based on the respect of the code of conduct and of the mandate conferred to the mandate-holder.

27. The Committee shall present to the Council a detailed report on the matter within six months starting from the day it has received the communication referred to in paragraph 21; it shall not adjudicate the case.

28. Should a solution be found in accordance with the provisions set out in paragraph 26 above, the report by the Committee shall be no more than a brief statement of facts and of the solution agreed upon.

29. Should a solution not be found in accordance with the provisions set out in paragraph 26, the Committee shall include, in its report to the Council, a brief statement of facts as well as its views on the matter submitted to its attention and its recommendations; the text of written statements as well as the record of oral statements made by the parties concerned shall be attached to the report.

30. The report shall be submitted to the Council and to the parties concerned.

31. The Committee shall submit an annual report on its activities to the Council.

32. In the above-mentioned report, the Committee may propose, for consideration and approval by the Council, suggestions for improving the efficiency of the Code of Conduct.

About the author:

Idriss Jazairy is a national of Algeria. He is a graduate of Oxford University (UK), of the École Nationale d'Administration (France) and of the Graduate School of Public Administration of Harvard University (USA). Idriss Jazairy is an experienced diplomat, international administrator and NGO leader. He has indeed been Algeria's Ambassador to Belgium, the USA, the Holy See, and Permanent Representative to the UN Office in Geneva. As a representative of Algeria, he was in particular a founding member of UNC TAD and the Human Rights Council. In 1984, he was elected president of IFAD, a Rome-based UN Specialized Agency. He was thereafter Executive Director of ACORD, an international consortium of NGOs (including Oxfam, Novib, CCFD, etc.), then headquartered in London and devoted to the protection and empowerment of victims of poverty and civil strife in Africa. In the 1990s, he was also a member of the board of CARE/USA. He has authored or co-authored several publications, including a book entitled *The State of World Rural Poverty: An Inquiry into its Causes and Consequences* (New York University Press, 1992, 570 pages) and a chapter entitled "The Role of Regional Groups and Coordinators: A Case Study – The African Group", in Lars Müller (Ed.), *The First 365 Days of the United Nations Human Rights Council*, 2007.