

A NEW CHAPTER FOR HUMAN RIGHTS

A handbook on issues of transition
from the Commission on Human Rights
to the Human Rights Council

**FRIEDRICH
EBERT**
STIFTUNG



International
Service for
Human Rights

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FOREWORD

After 60 years the Commission on Human Rights is no more. There is a new international mechanism for the promotion and protection of human rights, the Human Rights Council (the Council).

For exactly 60 years, since 1946, the Commission on Human Rights (the Commission) was the principal human rights body within the United Nations system. It produced the enormous body of international human rights law and standards that now governs the conduct of States. It developed a system of independent experts to assist in the development of human rights norms and law and to advise, monitor, investigate, report, and make recommendations on the performance by States and others in terms of their implementation of human rights. It supported the important roles of human rights defenders and advocates in the work of promoting full respect for human rights. In the end, however, international politics and the competing interests of States undermined it and marginalised it. Nonetheless its achievements provide the basis on which its successor, the Human Rights Council, is being developed.

Under the Resolution passed almost unanimously by the United Nations General Assembly on 15 March 2006, the Commission was abolished on 16 June and three days later, on 19 June, the Council began its work. The Resolution recognises the achievements of the Commission, its mandates, mechanisms, functions and responsibilities, and carries them forward to the new Council. It also sets an ambitious program of work for the Council's first year, including:

- reviewing and maintaining a system of special procedures;
- reviewing, improving, and rationalising the existing mandates and mechanisms;
- establishing and implementing a new system of universal periodic review to which all States will be subjected;
- developing its program of work, its schedule of meetings, agenda, rules of procedure, and working methods; and

- continuing the important work of protecting and promoting human rights, especially where those rights are being violated or at risk.

All those committed to the promotion of human rights have a role to play in this decisive first year. While the 47 member States of the new Council will be the ultimate decision-makers, other States, international organisations, non-governmental organisations and national human rights institutions are essential participants too. Human rights victims and defenders in particular have experiences, knowledge, expertise, and perspectives that must be contributed to the Council and taken into account in the Council's work.

This handbook has been produced to support all those wanting to participate in the new Council. It is intended primarily for human rights defenders and advocates but will no doubt be of assistance to representatives of States and international officials too. It looks at what the Commission has passed on to the Council, what the Council needs to consider and do during its first year, and what choices lie before it. It also reviews the Commission in terms of its achievements and shortcomings with the aim of stimulating ideas and debate. We hope that the questions raised in each chapter will help explore opportunities and open up options so that the best possible approaches are adopted for the Council's work.

We present this handbook at a crucial time of transition to assist human rights defenders and advocates and others to play effective roles in shaping and defining the new Human Rights Council. We hope that it could also support and encourage representatives of States in their efforts to develop a strong and effective Human Rights Council.

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I

INTRODUCTION

WHAT WAS THE COMMISSION ON HUMAN RIGHTS?

The Commission on Human Rights (the Commission) was the main body set up to address human rights issues in the United Nations (UN) system¹. The Commission was a subsidiary body of the Economic and Social Council (ECOSOC), made up of 53 States elected for three-year terms by ECOSOC with a balance of representation from the UN's five regional groups². The major roles of the Commission were standard-setting in the field of human rights and monitoring of compliance with human rights standards. The Commission was also the main forum for non-governmental organisations (NGOs) to raise human rights concerns with States and to lobby for the creation of new standards or action on situations in countries. NGOs accredited by ECOSOC could participate in the Commission's session and make oral and written statements.

The Commission set up various mechanisms, all together called special procedures, that were authorised to examine, monitor, and publicly report on the human rights situation in specific countries or on major themes of human rights violations³. The Commission also had a complaint procedure referred to as the 1503 procedure⁴, under which it could receive communications about human rights violations occurring in any country. The Sub-Commission on the Promotion and Protection of Human Rights⁵ (the Sub-

1 The Commission was a body created under the terms of the *United Nations Charter*. Its functions did not extend to regulating the work of treaty bodies, which are created under specific human rights treaties, but some mechanisms created by the Commission do have close interaction with treaty bodies.

2 Countries are organised into five regional groups African; Asian; Western European and Others Group (WEOG); Eastern European; and Group of Latin American and Caribbean (GRULAC). However, these groups are not entirely based on geography. For example, the WEOG is comprised of Western European States, the United States of America (the USA), Canada, Australia, Israel, and New Zealand.

3 Further information is available in the chapter on special procedures.

4 Named after the resolution by which it was created, Economic and Social Council *Resolution 1503* of 27 May 1970. Further information is available in the chapter on complaint procedure.

5 Further information is available in the chapter on the Sub-Commission and system of expert advice.

Commission) was a subsidiary body of the Commission and acted as a ‘think tank’ by undertaking in-depth research and analysis into particular human rights issues.

The Commission met annually in Geneva in March and April for six weeks. This session was attended by members of the Commission, other States, NGOs, and National Human Rights Institutions (NHRIs). The Commission’s work was organised under agenda Items, focusing on specific thematic areas and a few dealing with procedural matters related to the Commission’s functioning. Over a thousand statements were made at the 61st session of the Commission in 2005 by States, NGOs, NHRIs, and representatives of international organisations. The Commission took action by adopting decisions or resolutions and approved hundreds of resolutions related to human rights every year.

REFORM OF THE COMMISSION ON HUMAN RIGHTS

In the last few years the Commission increasingly came under criticism for its double standards and selectivity in the treatment of country situations and failure to address severe human rights violations occurring in many countries. The election of States with extremely poor human rights records as members of the Commission weakened its credibility. Furthermore, **its institutional culture, which was characterised by excessive politicisation, regional alliances, and block voting, and the use of procedural devices to prevent debate on proposed action against countries and on controversial issues weakened its functioning and ability to react to important human rights situations and fulfil its mandate.**

These criticisms came to a head in the report of the UN Secretary-General’s High-level Panel on Threats, Challenges and Change⁶, and in the reform proposals put forward by the Secretary-General himself in his report, *In Larger Freedom: towards development, security and human rights for all*⁷. **The Secretary-General identified the declining credibility and lack of professionalism within the Commission as its main defects, and recommended the replacement of the Commission by a smaller, standing body – a Human Rights Council – to be elected by the General Assembly by a two-thirds major-**

6 *A More Secure World: Our Shared Responsibility*, A/59/565, (2 December 2004), p. 74. The High-level Panel stated that the credibility and professionalism of the Commission had been declining as a result of States seeking membership not to advance human rights, but to avoid criticism and to criticise others. It recommended that the Commission should have universal membership.

7 A/59/2005, (21 March 2005), p. 45.

ity vote⁸. While addressing the Commission at its 61st session the Secretary-General expanded on these proposals and suggested that the Human Rights Council (the Council) should be mandated to undertake periodic peer review of the fulfilment by all States of all their human rights obligations. The Secretary-General also recommended that the Human Rights Council should at all times be able to draw the attention of the international community to massive and gross human rights violations⁹.

At the World Summit, held in September 2005, States agreed to the establishment of a Human Rights Council. Details of the nature and composition of the Council were deferred to further discussions at the General Assembly. It took over five months of negotiations for States to work out these details¹⁰, which were presented by General Assembly President Jan Eliasson in a draft resolution¹¹ at the end of February 2006. The proposal put forward by Mr. Eliasson only took up some of the Secretary-General's recommendations that States agreed with and tried to reach the best compromise possible between different States' positions. As the United States of America (USA) still had objections to the suggested compromise text proposed by Mr. Eliasson, it called for a vote when the Resolution was tabled at the General Assembly¹². **The General Assembly voted for the adoption of the Resolution creating the Council 13 on 15 March 2006 by 170 votes in favour, four against (Israel, Marshall Islands, Palau, the USA), and three abstentions (Belarus, Iran, Venezuela)**¹⁴.

The Commission on Human Right was supposed to begin its 62nd session on 13 March 2006. The weeks leading up to the session were a period of uncertainty over whether the Council would be created and if the Commission would meet, for how long, and what its last session would focus on. The Commission was adjourned twice, first to wait for the General Assembly's decision on the Council and then after the Resolution was adopted, to work out its agenda. The Commission ultimately met for a short session of three hours on 27 March 2006 and adopted a procedural resolution transferring all the reports that were pending before it to the Human Rights Council for consider-

8 Further details on these reports and recommendations are available at www.ishr.ch/About%20UN/Reports%20and%20Analysis/UN-Reform/UN-Reform-Contents2.htm.

9 See www.ohchr.org/english/bodies/chr/docs/61chr/sgchr.doc.

10 See www.ishr.ch/hrm/UNreform/NewsBulletin/contents.htm for bulletins describing the various negotiations.

11 See www.ishr.ch/About%20UN/Reports%20and%20Analysis/UN-Reform/GAPresidentResolutionText-24Feb.pdf.

12 Ambassador John Bolton stated that the USA's objections were based on the failure to retain exclusionary criteria suggested by the USA to keep gross abusers of human rights off the Council such as excluding States against which measures are in effect under Chapter VII of the *UN Charter* related to human rights abuses or acts of terrorism. See explanation of vote on the Human Rights Council draft resolution, available at: www.state.gov/p/io/rls/rm/63143.htm.

13 General Assembly *Resolution 60/251*.

14 See International Service for Human Rights (ISHR), *News Bulletin – UN Reform: The Human Rights Council*, (15 March 2006), available at www.ishr.ch/About%20UN/Reports%20and%20Analysis/UN-Reform/IsshrNewsBulletin15March.pdf.

ation at its first session in June ¹⁵. It did not address any of the urgent matters that it had to take action on, such as taking decisions on pending standard-setting initiatives ¹⁶; considering key documents and reports; listening to reports of special procedure mandates; extending mandates of special procedure that were up for renewal; and appointing special procedure mandate holders and Sub-Commission members whose terms were expiring. It did not take the opportunity to reflect on its achievements and shortcomings in its 60 years of functioning in order to better inform the work of the Council.

THE HUMAN RIGHTS COUNCIL: A NEW CHAPTER

Under the terms of General Assembly *Resolution 60/251*, the Human Rights Council is a subsidiary body of the General Assembly that will report directly to the General Assembly instead of ECOSOC. It is composed of 47 member States elected in a secret ballot by an absolute majority of the General Assembly, taking into account candidates' contribution to the promotion and protection of human rights and voluntary pledges and commitments ¹⁷, and according to equitable geographic distribution amongst the five regional groups ¹⁸. After serving two consecutive terms, members will not be re-eligible for election for one year. Any member that commits gross and systematic violations of human rights can be suspended by the General Assembly by a two-thirds majority ¹⁹. Unlike the Commission that met once a year, the Council will meet for a minimum of three sessions for a total of no less than ten weeks per year, with the ability to convene additional sessions at the request of any member and supported by one third of the membership of the Council ²⁰.

The responsibilities of the Council, as set out in the General Assembly Resolution, are to ²¹:

- Undertake a Universal Periodic Review (UPR), based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States;
- Address situations of violations of human rights, including gross and systematic violations, and make recommendations;

¹⁵ Commission on Human Rights *Resolution 2006/1*.

¹⁶ See chapter on pending standard-setting for further details.

¹⁷ Para 8, General Assembly *Resolution 60/251*.

¹⁸ 13 States from the African Group, 13 from the Asian Group; six from the Eastern European Group, eight from GRULAC, and seven from WEOG. For a list of members see www.un.org/ga/60/elect/hrc/.

¹⁹ Para 8.

²⁰ Para 10.

²¹ Paras 2, 3, 5.

- Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
- Serve as a forum for dialogue on thematic issues on all human rights;
- Make recommendations with regard to the promotion and protection of human rights;
- Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- Work in close cooperation in the field of human rights with governments, regional organisations, NHRIs, and civil society;
- Assume the role and responsibilities of the Commission relating to the work of the Office of the United Nations High Commissioner for Human Rights (OHCHR);
- Promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;
- Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- Promote human rights education and learning as well as advisory services, technical assistance, and capacity-building, to be provided in consultation with and with the consent of the States concerned;
- Promote the effective coordination and the mainstreaming of human rights within the UN system.

The Council will assume all the mandates, mechanisms, functions, and responsibilities of the Commission and is required to maintain a system of special procedures, expert advice, and a complaint procedure. It is expected to review these mandates, mechanisms, functions, and responsibilities in order to improve and, where necessary, rationalise them²². The arrangements and practices of the Commission on NGO and NHRI participation are carried over to the Council, which is expected to ensure their most effective contribution²³. The Council will submit an annual report to the General Assembly, which is also required to review the status of the Council within five years of its creation. The Council will meet for the first time on 19 June 2006.

The Council represents a new chapter for human rights. The Council has a number of new features, such as longer and more frequent meetings, the ability to report directly to the General Assembly, a requirement to periodically review all States instead of a selected few, and a better election process, that provide greater opportunities for it to be a stronger and more effective mechanism than the Commission. While there is no doubt that States could

²² Para 6.

²³ Para 11.

have strengthened the Council further in the reform process, the system that has been set up holds the promise of being more effective and more credible if States are willing to make it so. **The powers and functions of the Council are only a part of the reform process, the largest determinant of which will be the willingness of States to change their own culture of functioning and to empower the Council to act in accordance with its mandate.**

The ways that NGOs could potentially use the greater opportunities offered by the new system have been illustrated by the extensive campaigns that were carried out in the lead-up to the Council's first elections on 9 May 2006. NGOs were able to lobby States to make public pledges and include concrete commitments in their election pledges and to scrutinise and publicise the human rights records of States that were standing for election. Eventually all the candidates made pledges of some form and some of the countries, whose election to the Commission had weakened their credibility, were deterred from standing for election or were defeated.

The Council will be reviewing the various mechanisms of the Commission in its first year of functioning. This period will be extremely significant for all stakeholders to ensure that the review process is used to strengthen the system of protection of human rights rather than weaken existing mechanisms. This handbook has been developed to facilitate the participation of NGOs and human rights defenders in these processes.

THE SCOPE OF THE HANDBOOK

This handbook highlights the major issues of transition from the Commission to the Council. It briefly describes the old system under the Commission, what the Council needs to consider and do during its first year, and some of the key issues, existing suggestions, and choices. The handbook also identifies the main questions around each of these issues to generate more discussion and reflection on what NGOs and defenders hope can be achieved through the system, what features they think would be useful, and better options.

How is the handbook structured?

The handbook is organised around the major issues and activities that the Council will need to undertake:

- Review of the agenda and rules of procedure (chapter 2);
- Review of the special procedures (chapter 3);
- Review of the Sub-Commission, and the system of expert advice (chapter 4);
- Review of the 1503 procedure, and the complaint procedure (chapter 5);

- Setting up the modalities of the new Universal Periodic Review mechanism (chapter 6);
- Ensuring the participation of NGOs and NHRIs (chapter 7);
- Taking action on pending standard-setting (chapter 8).

In chapter 9, we have briefly discussed two important substantive issues that the Council needs to address: human rights and sexual orientation and gender identity, and human rights and business. There are other substantive issues that the Council needs to address but these are two illustrative issues that have been selected on the basis of our own organisational priorities. They are issues that have been raised but not adequately dealt with during the last years of the Commission. The handbook does not discuss the election procedures or the results of the first elections to the Human Rights Council.

Where to find additional information and updates

This publication is based on the extremely limited information and documentation that was available before the first session of the Council. ISHR and FES will update this information by providing links to key reports and documents, as they are produced, on ISHR's website at www.ishr.ch/handbook.

There are a series of annexes with key documents, compilations, and tables of information that have been prepared to accompany the handbook. These annexes are available on ISHR's website at www.ishr.ch/handbook and on a CD-Rom which is distributed along with this handbook or can be made available for organisations and human rights defenders that have difficulty downloading information from the Internet.

2

AGENDA AND RULES OF PROCEDURE

WHAT RULES OF PROCEDURE WILL THE HUMAN RIGHTS COUNCIL USE?

The General Assembly Resolution that created the Human Rights Council (the Council) provided that the Council “shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council”¹. The Resolution also provided requirements for the working methods of the Council: “the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms”². In terms of participation of States that are not members of the Council, NGOs, NHRIs and other observers, the Resolution carried over the arrangements and practices of the Commission on Human Rights (the Commission) to the Council, while asking the Council to ensure “the most effective contribution of these entities”³.

The Rules of Procedure of the General Assembly that are applicable to committees⁴ are quite similar to the Rules of Procedure for the functional commissions of the Economic and Social Council (ECOSOC), which applied to the work of the Commission in the past, and provide for virtually the same arrangements for discussion of substantive issues and voting. The Rules of Procedure of the General Assembly however provide for slightly different

¹ Para 11, General Assembly *Resolution 60/251*.

² Para 12.

³ Para 11, General Assembly *Resolution 60/251*. Issues concerning the participation of NGOs and NHRIs are discussed in greater detail in the chapter on NGO and NHRI participation.

⁴ Rules 96 to 133 and Rule 45 and 60 of the Rules of Procedure of the General Assembly apply to committees. These Rules are available in A/520/Rev. 15 and at: www.ohchr.org/english/bodies/hrcouncil/docs/gaA.520.Rev.15_En.pdf.

procedures to elect the Bureau, draft the agenda, and regarding the quorum⁵ for the meeting⁶.

The Rules of Procedure of the General Assembly only create a skeletal framework for the Council's functioning, which will need to be fleshed out in the working methods and additional rules of procedure adopted by the Council. The challenge for the Council will be to ensure that its working methods comply with the requirements set out in the General Assembly Resolution, and to avoid replicating aspects of the institutional culture and working methods of the Commission that impaired its functioning.

What will happen at the first session of the Council?

Resolution 60/251 provides that the Council "shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks"⁷ and that "the first meeting of the Council shall be convened on 19 June 2006"⁸. The Council is expected to address a number of issues in its first session in June 2006. These include the tasks set out for the Council in the General Assembly Resolution (setting up the Universal Periodic Review (UPR) and the process for the review of the special procedures and other mechanisms that it has assumed from the Commission), as well as the pending work carried from the Commission's last session (pending standard-setting initiatives; outstanding reports and dialogues with special procedures; and mandates that were up for renewal)⁹. The Council will have to elect its bureau and decide on its methods of work for the first session, and set up a process for defining its rules of procedure and working methods for future sessions. The Council will also be expected to address substantive human rights issues and critical country situations while it is attending to these procedural matters. Since the first session of the Council will last only for two weeks¹⁰ and the first few days may be spent in a

5 The minimum number of members that have to be present in order to begin conducting official business or to take decisions.

6 The procedure for electing the Bureau and drafting the program of work set out in the Rules of Procedure of the General Assembly are discussed below. The Rules of Procedure for the General Assembly provide that the meeting can be opened only when a quarter of the members are present (Rule 108) and that the presence of a majority of members is required to take a decision. Rule 40 of the Rules of Procedure for the functional commissions of ECOSOC provides that a majority of representatives would constitute a quorum. See annex 2.1 for a table comparing the two sets of rules of procedure and additional Commission practices, available on the CD-Rom and on www.ishr.ch/handbook.

7 Para 10.

8 Para 15.

9 Please see the chapter on background for additional details.

10 The Council will meet from 19 June to 30 June 2006.

high-level segment¹¹, the Council will have to define an agenda and program of work not only for its first session but its first year, indicating how all these tasks will be distributed throughout the year.

How should the agenda of the Council be organised and how should it be developed?

The Rules of Procedure of the General Assembly empower the Council to “adopt its own priorities and meet as may be necessary to complete the consideration of items referred to it”. The Rules also provide that the Council should adopt a program of work at the beginning of the session “indicating, if possible, a target date for the conclusion of its work, the approximate dates of consideration of items and the number of meetings to be allocated to each item”¹². The Rules therefore give the Council considerable flexibility to define its agenda and program of work, without establishing a rigid procedure for doing so and merely set out a requirement for setting up a clear schedule of work.

Flexible or rigid? Narrow or broad?

The Commission had a fairly rigid, inflexible, and broad agenda and the main ‘agenda Items’, which were arrived at after detailed political negotiations¹³, remained virtually unchanged from 1999 to 2006. As the agenda Items were broad enough to cover a range of sub-issues¹⁴, NGOs and States were able to raise a wide variety of issues of concern in their statements under the different Items. The main strengths of the agenda were that it ensured that the Commission had to give some time to each of these agenda Items, or human rights themes, every year. As the broad agenda was pre-determined, States were not able to exclude these subjects for political or ideological reasons. Its predictability allowed NGOs to plan their participation; its breadth gave diverse NGOs the platform to make public statements on a wide range of issues of concern to

11 The first week of the Commission’s annual session was taken up by a ‘high-level segment’ in which dignitaries from States and intergovernmental organisations addressed the session. At the informal consultations organised by Norway, Chile, India, South Africa and Russia on 3 May 2005, various States expressed the need for a high-level segment for the first session of the Council to highlight its importance, but many also stressed the need for this segment to be shorter and more dynamic.

12 Rule 99, Rules of Procedure of the General Assembly.

13 The agenda was adopted under Commission on Human Rights *Resolution 1998/84*. A copy of the agenda is available at: <http://daccessdds.un.org/doc/UNDOC/GEN/Go4/164/11/PDF/Go416411.pdf?OpenElement>. See also See J. Bauer, *Report on the United Nations Commission on Human Rights Fifty Fourth Session*, available at: www.hri.ca/uninfo/unchr98/functioning.shtml.

14 The agenda could be divided into procedural agenda Items, agenda Items dealing with specific human rights themes, and those dealing with the human rights situation in countries.

them, even if they were restricted to a three-minute time limit. On the downside however, the lack of prioritisation in the agenda and the multiplicity of issues covered meant that very few issues were discussed in an in-depth manner. As there was a large volume of NGO statements compressed in a short time¹⁵, there was no guarantee that the statements were adequately listened to, discussed, or acted upon. There were limited opportunities for a genuine dialogue between States, special procedures, and NGOs, and there was duplication of concerns and issues between the different agenda Items.

The debate under any agenda Item was in many ways disconnected from the political decision-making process that was dependent on member States tabling a resolution or decision, and negotiations took place in meetings or consultations outside of the plenary. The formal listing of Items on the agenda therefore provided “no indication of the real, as opposed to nominal, importance attached to different issues”¹⁶. The agenda also mushroomed as sub-issues were arbitrarily allocated to some agenda Items on the basis of States making statements or tabling resolutions under that Item for political or logistical reasons, rather than the agenda Item that they more logically fell under¹⁷.

The rigidity of the agenda, combined with the practice of the Commission of mainly taking action on country situations under three agenda Items¹⁸, led to the arbitrary classification of issues, and to the excessive politicisation of certain agenda Items. It moved the focus away from what action should be taken to what Item the action was taken under. This has particularly been the case for country-specific discussions and resolutions, with States blocking attempts to have countries considered under Item 9 of the agenda¹⁹ and only agreeing, if at all, to action under Item 19 of the agenda²⁰ because of a perception of lesser stigma attached to the latter. Some States have spoken

15 NGOs made 476 individual statements and 61 joint statements over a six-week period at the 61st session of the Commission. *Statistics relating to the 61st session of the Commission on Human Rights*, E/CN.4/2006/8, (17 January 2006), p. 5.

16 P. Alston, ‘The Commission on Human Rights’, in P. Alston (ed.), *The United Nations and Human Rights*, (Clarendon Press, 1995), p. 196.

17 For instance, the special procedure mandate on human rights and counter-terrorism was created under Item 17, promotion and protection of human rights, rather than Item 11, civil and political rights. Similarly, the Commission took action on some country situations, e.g. Colombia and the Sudan under Item 3, organisation of the work of the Commission rather than Item 9, human rights in any part of the world.

18 Item 3, organisation of the work of the Commission; Item 9, human rights in any part of the world; and Item 19, advisory services and technical cooperation in the field of human rights. In addition there was a specific agenda Item focused on human rights violations in the Occupied Arab Territories, including Palestine, and country-specific resolutions were also adopted under this Item. In addition to resolutions, the Commission also began to adopt statements by the Chairman, addressing situations of concern, under Item 3 from 1991 onwards. An example of this is the Chairman’s statement on Colombia under which OHCHR was requested to set up an office in Colombia. For further information see M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (Institute for Human Rights, Åbo Akademi University, 2005), pp. 346-349.

19 Which dealt with human rights violations in the world.

20 Which dealt with advisory services and technical assistance.

out in favour of a simpler and more flexible agenda that would allow the Council to be more responsive²¹. Others have highlighted the need for a balance between flexibility and predictability to give enough notice to nationally based NGOs to participate at the Council's sessions²². In this regard, there has also been discussion about what should be the role of the 'main session' that the Council is expected to hold.

Key questions include:

- What should be the main functions of the Council's sessions (forum for highlighting concerns, discussion on thematic issues²³ and implementation, development of international law²⁴, action on country situations and follow-up)? How should these different roles be reflected in the agenda?
- What should the Council's agenda for each session include²⁵? Should there be a different agenda for the main session?
- Should the agenda continue to be organised on thematic lines with some procedural Items or in a different way?
- How should country situations be dealt with in the agenda? Should there be a provision to consider crucial country situations in every session?
- Should the Council's agenda for each session be broad or narrow? If narrow, how can NGOs continue to raise a broad range of concerns before the Council?
- Should the agenda be flexible or fixed or a combination of the two with certain fixed Items and some degree of flexibility?
- How should the agenda balance procedural tasks with substantive issues, particularly in the first year of the Council's functioning?
- How much time should be allocated to the UPR in the agenda for each session or should it be undertaken outside the regular sessions?
- Should the sessions²⁶ be fixed for particular times of the year? If so, when? How should work be distributed between the three sessions to facilitate NGO participation?
- How much notice do NGOs need of the issues that will be covered in a particular session to be able to participate in the session?
- How much information about the agenda do NGOs need to participate in the session?

21 Austria, Australia, and the United Kingdom among others, expressed these views at the informal consultations organised by Norway, Chile, India, South Africa and the Russian Federation on 3 May 2005.

22 Rachel Brett from the Quakers UN office and Mexico expressed these views at the informal consultations organised by Norway, Chile, India, South Africa and the Russian Federation on 3 May 2005.

23 Para 5 (b), General Assembly *Resolution 60/251*.

24 Para 5 (c), General Assembly *Resolution 60/251*.

25 Some have suggested the inclusion of a separate agenda Item on follow-up and the creation of a special segment for interaction with special procedures.

26 The Council has to have a minimum of three sessions every year, and meet for at least ten weeks in total in the year.

Process of drafting the agenda

The process by which the agenda of the Council will be developed is still undefined as the Rules of Procedure of the General Assembly do not address this issue in detail. It may be dealt with by an open-ended working group or other another process of consultation to develop the working methods of the Council and its rules of procedure, but this and other issues may only be decided once the Council meets in June. The Rules of Procedure for the functional commissions of ECOSOC enabled the Sub-Commission, UN specialised agencies, and NGOs that met certain conditions to propose Items for the provisional agenda of the Commission. There is insufficient information on the extent to which NGOs were able to use this provision in the past but it may be important to create a provision for NGO input into the agenda of the Council. It is also important that the process of developing the agenda be an open and transparent one.

Key questions include:

- What should be the process through which the Council develops its agenda?
- Should there be criteria for the inclusion or exclusion of certain issues?
- Who should be involved in this process?
- How can we ensure that the process is open and transparent?
- Should there be a way for NGOs and NHRIs to suggest issues or countries that should be taken up on the agenda?
- Should there be a way for special procedures and treaty bodies to suggest issues or countries that should be taken up on the agenda?

What issues should the Council address while developing its rules of procedure and what should be the process?

The Rules of Procedure of the General Assembly set out some basic guidelines for the organisation of the work of the Council²⁷; representation of members²⁸; election of officers²⁹; functions of the Chairman³⁰; conduct of business including procedural motions, setting of time limits of speeches, and submission of proposals and amendments³¹; and voting³². As mentioned earlier in this chapter, the Council has considerable leeway to define its

²⁷ Rule 99.

²⁸ Rule 100.

²⁹ Rule 103.

³⁰ Rule 106.

³¹ Rules 108–123.

³² Rules 124–133.

working methods and expand on these Rules of Procedure. Perhaps the biggest challenge not only for the Council but also all stakeholders, including States, OHCHR, and NGOs will be to avoid recreating the Commission's working methods and institutional culture because of reasons of familiarity and habit. We have described below some of the key choices and issues that the Council may need to address but this is not an exhaustive list.

Meeting the requirements set out under the General Assembly Resolution

The General Assembly has set out a requirement that “the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms”³³. The Council will have to translate this into reality while developing its working methods and will need to move away from some of the working methods of the Commission, which failed to meet these goals. Working methods to establish a ‘genuine debate’ will have to overcome both the formalism and divisions which dominated the Commission’s work, and the Council will have to think of innovative mechanisms and processes that will help members and others engage in comprehensive and constructive discussions. The Council will also have to devote time and efforts to ensure that discussions on implementation and a ‘substantive interaction with special procedures and mechanisms’ are placed at the heart of its agenda and rules of procedure.

Key questions include:

- How can the Council’s working methods meet the requirements set out under the General Assembly Resolution?
- What steps would the Council take to establish a genuine dialogue on key issues?
- How should policy discussions be structured to ensure a genuine dialogue?
- How can the working methods of the Council provide for ‘subsequent follow-up discussions to recommendations and their implementation’?
- How can the working methods of the Council provide for a ‘substantive interaction with special procedures and mechanisms’?

Bureau or expanded bureau?

The Rules of Procedure of the General Assembly require the Council to elect a chairman (referred to as the president), two vice-chairmen (referred to as

³³ Para. 12, General Assembly *Resolution 60/251*.

vice-presidents) and a rapporteur³⁴. The Commission had evolved a practice of selecting a chairperson by rotation amongst the regional groups and choosing three vice-chairmen and a rapporteur from the other four regional groups who all together formed the 'Bureau' of the Commission. In the late 1990s, the Commission also set up an Expanded Bureau comprising, in addition to the officers of the Bureau, the co-ordinators of the five regional groups³⁵. The last few years of the Commission's functioning saw the Expanded Bureau supplanting the Bureau and taking over its functions of organising the work of the Commission. The last session of the Commission however amply demonstrated the paralysing effect this structure could have on the Commission, as it was extremely difficult to get all the regional groups, consulted through the regional coordinators, to agree to the agenda for the session. In principle, the regional groupings were meant to serve as an administrative tool for organising the work of the United Nations; in practice at the Commission, these groupings have increasingly led to 'block positions' and divisions that have severely impaired the functioning of the Commission. The Rules of Procedure of the General Assembly do not require selection on a regional basis and specify instead that "these officers shall be elected on the basis of equitable geographical distribution, experience and personal competence"³⁶. It is therefore essential that the Council and its membership reflect more closely on the role of the Bureau and how it can be elected to manage the work of the Council most effectively.

The members of the Council have been holding informal consultations to prepare for the first session³⁷. **As of the last consultations held on 23 May 2006, it has been decided that an expanded bureau will not be set up.** It has been also agreed that Ambassador Luis Alfonso de Alba, Mexico's Permanent Representative to International Organisations in Geneva, will hold the president's (chairperson's) position for the first year and that the bureau will consist of four vice-presidents (vice-chairmen), selected from the other four regional groups, one of whom shall serve as the rapporteur. The position of the president will follow the principle of rotation amongst the regional groups. The method for the election of the president and vice-presidents may be discussed further when the Council discusses its rules of procedure and working methods.

Key questions include:

- What should be the role of the bureau? What kind of a structure would facilitate the bureau to carry out this role most effectively?

³⁴ Rule 103.

³⁵ A. Almeida, *Backgrounder on the Reform of the UN Commission on Human Rights*, (Rights & Democracy, 2005), p. 20.

³⁶ Rule 103.

³⁷ The schedule for the informal consultations is available at: www.ohchr.org/english/bodies/hrcouncil/docs/informal_consultations.doc. ISHR is publishing news bulletins on the discussions at each of these informal consultations, available at: www.ishr.ch/hrm/UNreform/NewsBulletin/contents.htm.

- Should the chairman and bureau be elected individually from a pool of suitable candidates instead of selected on regional lines?
- Does relying on the regional group structure advance the work of the Council?
- Are there alternative way in which the bureau could be structured that could help organise the work of the Council in a more effective manner ³⁸?

Consideration of country situations ³⁹

Action only under certain agenda Items and selectivity

The consideration of the human rights situation in countries has been one of the most controversial issues in the Commission's functioning. The Commission has been accused of selectivity and double standards in responding to situations of severe human rights violations ⁴⁰. **It has failed to even consider or discuss the human rights situations in certain countries despite information about the occurrence of human rights violations on a massive scale ⁴¹.** When situations are considered, action has often been obstructed by the use of procedural devices and block voting (discussed below) based on regional divisions and political considerations rather than on the merits of the proposed action. As described earlier, the Commission's working methods for taking decisions also meant that the Commission worked "largely on the basis of draft resolutions presented by governments, without first, routinely, reviewing the situation in a particular country in an objective manner" ⁴². The initial practice of tabling resolutions on country situations largely only under Item 9 ⁴³ may have also led to excessive politicisation of that Item.

The Council will need to dedicate its efforts to evolving "transparent,

³⁸ Some suggestions in this regard include rotating the chairperson's position amongst the bureau at periodic intervals or rotation by countries on an alphabetical basis with the present, former, and future chairperson forming the bureau (in line with the practice of the Security Council).

³⁹ See paras 3 and 5 of General Assembly *Resolution 60/251* that empower the Council to consider country situations.

⁴⁰ Amnesty International, *Meeting the challenge: Transforming the Commission on Human Rights into a Human Rights Council*, (Amnesty International, 2005), p. 6.

⁴¹ *Ibid.*, p. 6. See also M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (n. 18 above), pp. 147–158.

⁴² Amnesty International, *Meeting the challenge: Transforming the Commission on Human Rights into a Human Rights Council*, (Amnesty International, 2005), p. 7.

⁴³ There was a shift in the last few sessions of the Commission to tabling country resolutions under Item 19, advisory services and technical cooperation, because of the emphasis on technical assistance, which was perceived as casting less blame on the concerned country. Amnesty International described the attempts to consider the human rights situation in Darfur, the Sudan, under Item 19 as only contributing "to the Commission's 'credibility deficit'". See ISHR, *Report on the 61st session of the Commission on Human Rights: Item 19*, available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR61/Items%20-%20Analytical%20Reports/Report-item%2019.pdf.

fair and impartial”⁴⁴ working methods for dealing with country situations. As the Council is a political body made up of governments, it may not be possible or perhaps even desirable⁴⁵ to eliminate political considerations altogether from its work but its working methods have to be designed to prevent decisions on the human rights situation in a country being viewed solely as “political victories or losses”⁴⁶. In this context, the methods evolved to carry out the UPR⁴⁷ will be a key factor in establishing the credibility of the Council but methods will also have to be developed to deal with acute and chronic human rights situations. The Council will also have to consider whether and how it considers countries outside the UPR process.

Use of procedural devices to block debate

Members of the Commission increasingly used ‘no action motions’, which are procedural devices⁴⁸ to prevent a vote on proposals to take action on particular countries. These procedural devices ensured that the subject matter of the proposed resolution was not even debated by the Commission and effectively blocked the Commission’s examination of some country situations⁴⁹. The Rules of Procedure of the General Assembly have similar procedural provisions, which would allow members to ask for the closure of the debate on the Item under discussion⁵⁰ or adjournment of the debate⁵¹. The procedure to close the debate is meant to govern situations where there is more than one proposal on the same issue, or when amendments are added to an existing text⁵². The motion to adjourn is intended to cover situations where the body

44 Para. 12, General Assembly *Resolution 60/251*.

45 See M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (n. 18 above), pp. 3-4.

46 Statement by Louise Arbour, the High Commissioner for Human Rights, on the closure of the 61st session of the Commission, 22 April 2005, in which she said “I put it to you that it is a discredit to this Commission to view these decisions as political victories or losses. I say this in the full knowledge, and with all due respect for the fact that yours is an inter-governmental body. To suggest it should be apolitical is somewhat akin to criticizing spring for coming after winter. But political considerations should not be allowed to by-pass entirely the substance of the work entrusted to the Commission”. available at: www.unhcr.ch/hurricane/hurricane.nsf/view01/Bo848560A2465272C1256FEB0052A975?opendocument.

47 Please see the chapter on UPR for a further discussion on main issues and questions.

48 Rule 50 of the Rules of Procedure for the functional commissions of ECOSOC allows a member to ask for the closure of the debate on the Item under discussion. This request is put to vote and is carried through if the majority vote in favour of the proposal to close the debate. Rule 49 also allows a member to ask for an adjournment of the debate on the Item under discussion. While Rule 49 has less harmful impact than Rule 50, it can also be used to stall action on a country situation.

49 See M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (n. 18 above), pp. 159–167 and Annex 3 to his book on p. 461 listing instances of the use of procedural motions from 1967 to 2004.

50 Rule 117. See Amnesty International, ‘UN: Amnesty International Concerned that General Assembly may Block Country Action’, (Amnesty International Public Statement, 17 November 2005), available at: <http://web.amnesty.org/library/Index/ENGIOR410702005?open&of=ENG-317>.

51 Rule 116.

52 Human Rights Watch, ‘Commission should Uphold Free Debate’, - footnote carries over to the next page -

is not in a position to consider the issue under discussion for time reasons or because it is waiting for further information. These Rules could however be misused, as they were in the Commission and General Assembly in the past, and **the Council may wish to prescribe limits on the use of these procedural devices so that they could only be invoked in limited and specified situations, and interpret these provisions strictly.** As this is also a matter of institutional culture rather than rules alone, all the members of the Council should exercise self-restraint and also put pressure on peers to restrict the use of such procedural devices.

Block positions and voting

The capacity of the Commission to take action on country situations was impaired by an increase in voting in blocks by regional and other groups⁵³ rather than through independent voting by individual members on resolutions. The creation of block positions also meant that regional groups were held to ransom by their most extreme members. “That member effectively dictates the policy of the whole Group and then, because of group solidarity, every member or almost every member of the Group votes as part of that block”⁵⁴. Block voting is not restricted to the five regional groups alone. The States of the European Union (EU) for instance were a rigid block when it came to voting because of the commitment to increased coordination amongst EU members on foreign policy objectives. The African Group’s insistence that only it should be able to propose resolutions dealing with African States, coupled with its internal requirement that the affected State consent to the resolution, also effectively reduced the Commission’s action on any African country to one that the State itself was willing to agree to⁵⁵.

This is a difficult issue for the Council to address in its working methods as it relates more closely to institutional culture and practices adopted by member States. **The Council could consider methods by which the regional group structure is not reinforced as the model for decision-making and coordination.** There is also a need for leadership from individual States or groups of States to change these practices.

(Human Rights Watch Press Release, 21 April 1999), available at: http://hrw.org/english/docs/1999/04/21/china848_txt.htm.

53 See *Report of the United Nations High Commissioner for Human Rights*, General Assembly, 59th Session, A/59/36 (27 September 2004), p. 3. Examples of block voting include voting on draft resolutions on the Sudan, Zimbabwe, and Guantánamo in the 60th and 61st sessions of the Commission.

54 ISHR, *Overview of the 61st session of the Commission on Human Rights*, available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR61/Items%20-%20Analytical%20Reports/Report-overview.pdf.

55 See also M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (n. 18 above), pp. 173–175.

Key questions include:

- How should the Council deal with country situations and what working methods should it develop to do this most effectively?
- What steps should be taken to ensure that the working methods of the Council for dealing with country situations are “transparent, fair and impartial”?
- Should the Council develop procedures to first review the situation in a country, before looking at political responses to the problem? If so, how should this review or discussion be carried out?
- Should there be a link between the findings and recommendations of the thematic and country special procedure mandates and the selection and consideration of country situations by the Council? If so, how should this be reflected in the working methods?
- What working methods and rules of procedure should be developed to ensure that the Council takes timely and adequate action on urgent country situations?
- Should action be taken on specific countries as a result of the consideration of thematic issues?
- How can the Council limit the use of procedural devices to prevent debate on country situations?
- How can the Council limit the use of block voting and positions on country situations?
- How can the Council ensure that the consideration of country situations is not excessively politicised?

Resolutions or something new?

At the 61st session of the Commission, 114 draft resolutions and decisions were tabled, totalling up to over 600 pages of documentation. 22 hours and 39 minutes were spent on voting including statements made during voting⁵⁶. Many of these were resolutions that “change very little from one year to the next”⁵⁷ but considering the number of resolutions tabled and their volume, the Council may need to consider whether the lengthy and formal resolution process is the only way through which decisions can be taken in the new body, or whether newer methods can be adopted, which are more “results oriented”⁵⁸. The Council will undertake a diverse range of activities, such as discussion on policy and thematic issues, standard-setting, and monitoring of country situations and implementation, and may need to identify a series of tools and processes that could be used for decision-making. These could include: short decisions with clearly identified recommendations and procedure for follow-up; recommendations and concluding observations; adopting policies which

⁵⁶ *Statistics relating to the 61st session of the Commission on Human Rights*, E/CN.4/2006/8, (17 January 2006), pp. 7-8.

⁵⁷ P. Alston, ‘The Commission on Human Rights’, (n. 16 above), p. 196.

⁵⁸ Para 12, General Assembly *Resolution 60/251*.

are reviewed periodically; letters to States from the bureau, etc. The Council also needs to consider the process by which decisions are adopted and whether this will be based on consensus or voting. The drive for consensus, though useful in some situations to build international support, ended up paralysing the Commission or catering to the lowest common denominator in many situations.

Key questions include:

- What should be the process for making decisions and how should outcomes of decisions be communicated?
- How can the decision-making process of the Council and its outcomes be more 'results oriented'?
- Should the Council continue to use resolutions as its primary decision-making tool? If not, when and what should resolutions be used for?
- What other types of instruments could the Council develop to communicate its decisions?
- Should the Council adopt policy decisions or guidelines for thematic issues?
- Should the Council aim for consensus in decision-making? If so, in what situations and how can the Council ensure that the drive for consensus does not prevent it from taking action or adopting the weakest course of action?
- How should the Council's decisions be publicised?

Special and additional sessions

The Commission could call for special sessions to deal with urgent human rights situations⁵⁹ following the procedure set out in *ECOSOC Resolution 1990/48* but this procedure was criticised for being slow and inflexible. *The General Assembly Resolution creating the Council empowers it to hold special sessions "when needed, at the request of a member of the Council with the support of one third of the membership of the Council"*⁶⁰. The Council will have to expand on the procedure to hold special sessions in its rules of procedure or working methods, particularly to determine how quickly it can convene the meeting from the time of the request, and whether the request for the meeting could also be made by other stakeholders such as other States, special procedures, treaty bodies, the High Commissioner, NGOs, and NHRIs.

Key questions include:

- What should be the rules of procedure for holding special or additional sessions?

⁵⁹ The Commission has held five special sessions to discuss the situation in former Yugoslavia (August and December 1992); Rwanda (1994); East Timor (1999); and violations of the human rights of the Palestinian people by Israel (2000).

⁶⁰ Para. 10, General Assembly *Resolution 60/251*.

- How quickly should a session be convened from the time that a request is made?
- Should the Council develop criteria for holding special sessions?
- Should other stakeholders such as other States, special procedures, the High Commissioner, treaty bodies, NGOs, and NHRIs be able to request a special or additional session of the Council?

Process

The process through which the rules of procedure and working methods of the Council will be developed is still undefined. Some suggestions in this regard include setting up an open-ended working group or through consultations organised by the Chairperson, but this and other issues may only be decided once the Council meets in June. Essential elements for this process may include that it be carried out in an open, transparent, and public manner and with the participation of all stakeholders, such as other States, special procedures and other mechanisms, OHCHR, NGOs, and NHRIs.

3

SPECIAL PROCEDURES

BACKGROUND TO SPECIAL PROCEDURES

What are special procedures?

The Commission on Human Rights (the Commission), in its initial years of existence, concentrated its efforts on the creation of international human rights standards and did not monitor the human rights situation in specific countries. In 1967, the Commission was authorised by the Economic and Social Council (ECOSOC) to examine information regarding “gross violations of human rights” and study “situations which reveal a consistent pattern of violations of human rights”¹. From this point the Commission also took on a human rights monitoring role, which expanded over the years to become its major activity. **To fulfil its human rights monitoring role, the Commission set up various procedures and mechanisms that examine, monitor, and publicly report on human rights situations in specific countries or on specific human rights and issues.** These procedures are all together referred to as the ‘special procedures’ of the Commission.

Special procedures are normally entrusted to individuals who are independent human rights experts², or occasionally to a group of independent human rights experts³. They are appointed by the Chairperson of the Commission⁴ after consultation with the five regional groups⁵, consisting of

- 1 ECOSOC *Resolution 1235 (XLII)*.
- 2 Referred to as special rapporteurs, special representatives, personal representatives or independent experts, based on the title given to the specific mandate in the resolution that created the mandate. All these mandates perform similar roles.
- 3 Referred to as a working group.
- 4 Representatives of the Secretary-General and some independent experts are selected by the Secretary-General based on recommendations by the UN High Commissioner for Human Rights (the High Commissioner). Two independent experts, the Personal Representative on Cuba and the Independent Expert on Minorities are appointed by the High Commissioner.
- 5 Commission on Human Rights *Decision 2000/109*. Countries are organised into five regional groups: African; Asian; Western European and Others Group (WEOG); Eastern European; and Group of Latin American and Caribbean (GRULAC). However, these groups - footnote carries over to the next page -

member States of the Commission. All individuals appointed to special procedures are expected to be independent, are not paid, and serve in a personal capacity for a maximum of six years.

What is the role of special procedures and what are the tools at their disposal?

Special procedures are at the very core of the UN human rights system. They represent one of the principal achievements of the Commission and are among the “most innovative, responsive and flexible tools of the human rights machinery”⁶. The International Commission of Jurists (ICJ) states that special procedures “have provided valuable conceptual analysis on key human rights themes; have served as a mechanism of last resort for victims; have sometimes prevented serious abuses, and even saved lives, through urgent appeals; have served as an early-warning mechanism to draw attention to human rights crises; and have frequently provided high-quality diagnoses of individual country situations, including by carrying out country missions”⁷.

Special procedures can:

1) Undertake fact-finding missions to countries

Special procedures carry out country missions, in which they meet with local authorities, non-governmental organisations (NGOs), human rights defenders, national human rights institutions (NHRIs), communities, individuals, and other stakeholders, and visit relevant facilities such as prisons, detention centres, sites of evictions, etc. Based on the findings of the mission, they make recommendations for action by the concerned government, the Commission, and the international community. These interactions can give NGOs and communities a chance to raise issues and highlight violations, and help set up dialogues with governments on key issues. Media coverage of country visits can help place human rights issues within the public eye. Special procedures are also often able to obtain direct relief for victims during their country visits. For instance, in 1992 the Special Rapporteur on Afghanistan was able to obtain a presidential decision to commute the death sentence of some 114 persons into a 20-year prison sentence during his country mission⁸.

are not entirely based on geography. For example, the WEOG is comprised of Western European States, the United States of America (the USA), Canada, Australia, Israel, and New Zealand.

6 Amnesty International, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection*, (Amnesty International, 2005), p. 5.

7 ICJ, *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (ICJ, 2005), p. 4. See also I. Nifosi, *The UN Special Procedures in the Field of Human Rights*, (Intersentia, 2005), pp. 125-154 where she discusses the extent of the impact of the special procedures.

8 Office of the High Commissioner for Human Rights (OHCHR), - footnote carries over to the next page -

2) Issue communications and urgent appeals to governments

Special procedures can respond to credible information received from NGOs, individuals, and others about a human rights violation by sending communications to the concerned government setting out the alleged facts, and requesting the government to respond to the allegation and to take corrective action. Communications are not an accusatory or judicial proceeding but are a tool used by special procedures to seek clarification on alleged violations in order to ensure the protection of human rights. In 2005, special procedures sent 1,049 communications to 137 States, addressing 2,545 cases. 53% of these communications were issued jointly by a number of special procedures⁹. The very fact that a particular situation has been taken up by a UN human rights mechanism can trigger a response from national authorities, prevent or halt violations, or ensure other corrective action. For instance, in October 2004 a joint communication was sent by four special procedures concerning the cases of two girls sentenced to death by stoning following trials, which were considered as unfair by their legal representatives. The special procedures received follow-up information confirming that both girls had been discharged and acquitted of the death sentence¹⁰.

3) Issue press releases or statements

In cases of severe human rights violations, special procedures may also issue public statements and press releases highlighting their concern about the situation and call on the concerned government to stop these violations and take appropriate measures to correct the situation. These statements and press releases are a powerful tool to draw the attention of the media, and the public and international community to a situation of concern. For instance, ten special procedure mandate holders made a joint statement expressing their concern on the mass forced evictions in Zimbabwe in 2005¹¹. This statement was widely reported in the press and helped build international awareness and action, leading to a mission by the UN Secretary-General's Special Envoy to Zimbabwe.

4) Identify trends or emerging issues

Special procedures undertake studies on specific topics falling within their mandate to gather a better understanding of a problem, explore cross-linkages between issues, and suggest solutions. In their annual reports they also

Fact Sheet N. 27: *Seventeen Frequently Asked Questions about United Nations Special Procedures*, available at: www.ohchr.org/english/about/publications/docs/factsheet27.pdf.

9 OHCHR, *Special Procedures Bulletin*, (January – April 2006), available at www.ohchr.org/english/bodies/chr/special/BulletinJan-Apr2006.pdf.

10 OHCHR, *Special Procedures of the Commission on Human Rights: Facts and Figures on 2004 Communications*, available at: <http://www.ohchr.org/english/bodies/chr/special/Facts%20and%20figures%20on%202004%20Special%20Procedures%20Communications.pdf>

11 Available at: www.unhcr.ch/hurricane/hurricane.nsf/view01/C32FD8329AF35B43C125702D00507AEA?opendocument.

analyse trends in human rights protection or violations as well as emerging issues. These reports can be extremely influential in placing violations against a particular group or a certain phenomenon on the international agenda. The reports of the Special Rapporteur on Extra-Judicial Executions have for instance helped draw attention to the killing of individuals because of their sexual orientation or gender identity¹².

5) Contribute to the elaboration of human rights standards falling within their mandate

Special procedures often elaborate on the content or application of human rights standards by studying the application of these standards to specific issues or groups, and providing guidance to States on the implementation of human rights standards. For example, the Special Representative of the Secretary-General on internally displaced persons developed the *Guiding Principles on Internal Displacement*.

6) Submit reports to the Commission and in some instances the General Assembly

Special procedures submit annual reports to the Commission, and in some cases the General Assembly¹³, covering the activities relating to their mandates, in which they highlight situations of concern, individual cases of human rights violations, trends and emerging issues, and make recommendations for action. Special procedures also brief the Commission, and in some cases the General Assembly, on their findings and recommendations and participate in an interactive dialogue with States. The annual reports as well as the briefings help draw the attention of the Commission and the international community to human rights violations occurring in a particular country or against a particular group, or significant issues affecting the implementation of human rights. They may also serve as an early-warning system on the severe deterioration of the human rights situation in a particular country.

¹² See *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions*, (58th session of the Commission on Human Rights), E/CN.4/2002/74, (9 January 2002), pp. 21, 42.

¹³ About one third of the mandates report to the General Assembly according to OHCHR, *Fact Sheet N. 27: Seventeen Frequently Asked Questions about United Nations Special Procedures*, available at: www.ohchr.org/english/about/publications/docs/factsheet27.pdf. Under the 'Arria formula', an informal arrangement that allows the Security Council to meet with experts, representatives of non-State entities and NGOs, some special procedure mandate holders have also briefed members of the Security Council on specific country situations, e.g. the Democratic Republic of Congo.

What are the different types of special procedures?

Country or thematic mandates?

Special procedures are broadly divided into mechanisms that focus on country-specific situations (referred to as country mandates or mechanisms), and those that focus on thematic human rights issues (referred to as thematic mandates or mechanisms).

Country mandates:

The first special procedure set up by the Commission in 1967 was a country mandate, the Ad-hoc Working Group of Experts on Southern Africa¹⁴. Until 1980, all the special procedures set up by the Commission were focused on country situations but currently there are only 13 country mandates¹⁵ out of the 41 total special procedure mandates. Country mandates are asked to examine the 'situation of human rights' in a particular country and are generally set up for a one-year period after which they are reviewed annually by the Commission, though some have been set up for longer periods or an indefinite duration¹⁶. The number of country mandates set up or renewed by the Commission has decreased in recent years because of a lack of political will to address country situations and resistance to country-specific resolutions (there were 26 country mandates in 1998 while there are only 13 in 2006).

Thematic mandates:

The Commission created the first thematic mandate in 1980, the Working Group on Enforced or Involuntary Disappearances¹⁷. Thematic mandates are responsible for monitoring and examining a particular human right or issue across all countries¹⁸ in contrast to country mandates, which focus on all issues in a particular country. There are currently 28 thematic mandates¹⁹,

¹⁴ Initially called the Ad-hoc Working Group of Experts to investigate charges of torture and ill-treatment of prisoners, detainees or persons in police custody in South Africa, set up under Commission on Human Rights *Resolution 2 (XXXIII)*.

¹⁵ Further information on the country mandates is available at www.ohchr.org/english/bodies/chr/special/countries.htm. See also annex 3.1 which has one-page descriptions of each special procedure mandate, explaining its areas of focus, state of cooperation with the government and key developments, available on the CD-Rom and on www.ishr.ch/handbook.

¹⁶ The mandate of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967 will be in force "until the end of the Israeli occupation".

¹⁷ Commission on Human Rights *Resolution 20 (XXXVI)*.

¹⁸ Special procedures, as monitoring mechanisms of the Commission, can examine the situation of human rights in all UN member States.

¹⁹ Further information on these thematic mandates is available - footnote carries over to the next page -

which cover civil and political rights and economic, social and cultural rights as well as particular groups that are vulnerable to human rights violations. Since 1995, an increasing number of mandates have been set up on economic, social and cultural rights issues. Thematic mandates are generally created for a three-year period, after which they are renewed periodically.

Working group or rapporteur?

Almost all special procedures are composed of individual human rights experts (special rapporteurs, special representatives or independent experts), and only four are working groups²⁰, composed of five human rights experts each. **The working group format is considered to be more suitable when a collegiate body is required, either to promote wider discussions or to render opinions on cases with participation of experts from different legal backgrounds.** The working group model is also favoured by some because of the representation from all five regional groups.

REVIEW OF THE SYSTEM OF SPECIAL PROCEDURES

What will happen to the special procedures after the creation of the Human Rights Council?

General Assembly Resolution and review of special procedures

The General Assembly Resolution creating the Human Rights Council (the Council) provided that the Council would “assume ... all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures...”²¹. The special

at www.ohchr.org/english/bodies/chr/special/themes.htm. See also annex 3.1 which has one-page descriptions of each special procedure mandate, explaining its areas of focus, and listing country missions, pending reports and thematic reports, available on the CD-Rom and on www.ishr.ch/handbook.

²⁰ The Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearances, Working Group of experts on people of African Descent, and Working Group on Mercenaries. The Working Group on Arbitrary Detention adopts opinions on individual cases and has more of a semi-judicial character than other special procedures. The Working Group on Enforced Disappearances is also unique because it is concerned with determining what happened to and the location of disappeared persons rather than legal responsibility for individual cases of disappearances.

²¹ Para 6, General Assembly *Resolution 60/251*.

procedures are therefore carried over to the Human Rights Council, and the Resolution requires that the Council continue to maintain a system of special procedures.

The General Assembly Resolution specifies that the Human Rights Council shall “review and, where necessary, improve and rationalize all mandates” and that “the Council shall complete this review within one year after the holding of its first session”²². **The Council will therefore be expected to review all special procedure mandates within one year of its first session.** This clause read along with the requirement that the Council ‘maintain a system of special procedures’ indicates that the Council is not obligated to retain all the special procedure mandates that currently exist but rather a system of special procedures, and has the authority, if the review indicates this is necessary, to modify mandates, and to increase or decrease the number of mandates.

The review of the special procedures will be a crucial process with considerable implications for the UN system of human rights protection and for the credibility of the Council. All concerned actors will have to direct their efforts to ensuring that the review is not used to weaken or terminate special procedure mandates for politically motivated reasons. They will have to make sure that the process is used to strengthen special procedures and address issues that have hampered their functioning, particularly at a political level.

Mandates up for renewal and expiring terms of mandate holders

While all special procedures have been transferred to the Human Rights Council, special procedure mandates that were up for renewal at the March 2006 session of the Commission as well as those where the mandate holders’ term was coming up for renewal²³ are in a peculiar situation: under one possible interpretation of the General Assembly Resolution, these mandates will come to an end in July 2006 unless explicitly renewed before then. The Commission could have renewed these mandates, extended the terms of the mandate holders, or appointed new mandate holders but took the view that these mechanisms had been transferred to the Council by the General Assembly Resolution, and that it did not have the authority to address these issues. **To ensure that there is no gap in the protection of human rights²⁴ and that the system continues to function for victims of human rights violations, the Human Rights Council should clarify this issue as a matter of priority by confirming the continuation of these mandates and of the terms of the mandate holders as soon as it meets in its first session.** It is likely that it may do so

²² Ibid.

²³ For a list of these mandates and mandate holders, see www.ishr.ch/hrm/chr62/SPstatus.pdf.

²⁴ When a mandate is renewed or set up, the program budget implications (PBIs) or the estimated costs of the activities expected to be carried out by the mandate holder under his or her mandate are calculated and attached to the resolution so that these costs can be approved in the budgeting process.

using an ‘omnibus’ resolution²⁵ or decision, which affirms the extension of all mandates and existing mandate holders until the completion of the review. There is a risk however that the Council could delay acting on this matter or take politically motivated action against certain mandates. If this appears likely, NGOs and other actors will have to push for the omnibus resolution ensuring the extension of all mandates in a manner which also guarantees the extension of the terms of mandate holders until the completion of the review process (rather than one year, in the event that review process spills beyond the year specified by the General Assembly Resolution).

Outstanding reports

In its last session, the Commission did not hear the reports of the special procedures and has transferred them to the Human Rights Council for further consideration at its first session in June 2006²⁶. As many of these reports contain important information on country situations and recommendations that need to be followed up, **it is essential that the Council gives an opportunity to the special procedures to present their reports and discuss their findings and recommendations as early as possible.** The Council should therefore start receiving the outstanding reports at its first session in June and conclude the process at its second session in September.

What will be the scope of the review?

The idea of a review of special procedures did not develop in a vacuum. It has been preceded by two broad processes that will be extremely relevant to the review and will shape its outcomes. In the last few years, there has been an increasing number of attacks²⁷ on the special procedures that have tried to limit the independence or working methods of special procedures. These have included suggestions such as regional nominations, non-appointment

25 An omnibus resolution is a resolution that covers many issues together. An example of this kind of a resolution is the annual omnibus resolution on economic, social and cultural rights issues, see Commission on Human Rights *Resolution 2005/22*.

26 Commission on Human Rights *Resolution 2006/1*.

27 See International Service for Human Rights (ISHR), *Overview of the 61st Session of the Commission on Human Rights*, available at www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR61/Items%20-%20Analytical%20Reports/Report-overview.pdf and ISHR, *Overview of the 60th Session of the Commission on Human Rights*, available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR60/CHR60-Overview.pdf. See also M. Lempinen, *Challenges Facing the System of Special Procedure of the United Nations Commission on Human Rights*, (Institute for Human Rights, Åbo Akademi University, 2001), pp. 248–259 where he describes attempts to review the special procedures from early 1990s onwards and the conflicting interests of groups who wanted to review the special procedures because they were regarded as “too effective and thus a threat for governments which still consider human rights to be an internal affair of states” and those who wanted to “make them more effective and enhance their relevance”.

of people working for NGOs, and exhaustion of domestic remedies before communications can be taken up (some of these are discussed below). If this trend is manifested in the review, the special procedures could be greatly weakened and NGOs will have to take steps to counter what we could loosely call the 'negative reform agenda' and defend the current system to retain its current strengths and functions. The second process has been going on for a longer period and involves a number of discussions, studies, and suggestions by special procedures themselves, UN bodies, States, OHCHR, and NGOs identifying the major challenges and limitations faced by special procedures and steps that need to be taken to strengthen the system²⁸. For the Human Rights Council to be credible and to make the review an effective process that strengthens the special procedures, the review process will need to address these challenges and limitations and find solutions for them. We can call this the 'positive reform agenda'. This would involve using the opportunities afforded by the creation of the new Human Rights Council to improve the current system, strengthen the role of special procedures, and enhance their functioning and impact.

At this stage, it is unclear what the exact scope of the review will be and how it will be undertaken. This chapter explores some of the key issues, which could be taken up during the review in relation to both a negative and positive reform agenda, setting out some background information on each of these issues to facilitate discussions and work on these areas²⁹. The focus is also on issues that require political decisions rather than on those that could be resolved by the special procedures themselves or within OHCHR.

Issues that may be addressed in the review

Rationalisation of mandates

Historically, special procedures were not developed as a coherent system and

28 Since the World Conference on Human Rights, 1993, various attempts have been made to review the special procedures and to enhance their functioning. These include a working group set up by the Third Committee on the follow-up to the *Vienna Declaration*, and the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights, which submitted its report to the 56th session of the Commission, E/CN.4/2000/112, (16 February 2000). For further details see: M. Lempinen, *Challenges Facing the System of Special Procedure of the United Nations Commission on Human Rights*, *ibid.*, pp. 249-258. Measures to enhance the special procedures have also been raised in the Secretary-General's report on *Strengthening of the United Nations: an Agenda for Further Change*, A/57/387, (9 September 2002), p. 13.

29 For further information on suggestions put forward by NGOs and States, please see documents submitted as part of the Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005, available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL. See also annex 3.2 summarising the main issues and suggestions put forward in the seminar, available on the CD-Rom and on www.ishr.ch/handbook.

the Commission set up mandates on a case-by-case basis. Each mandate was envisaged as an individual procedure rather than a mechanism that was part of a larger system with mutually reinforcing activities and an overall framework. There has also been a rapid increase in the number of mandates in recent years³⁰. This has led to some States and bodies calling for the consolidation or reduction of mandates³¹ for reasons of: 1) overlap; 2) resources; and 3) a perception that the current number of mandates is unmanageable in terms of the Commission's workload. Counter arguments have been put forward for each of these concerns. For instance, it has been pointed out that overlaps between mandates are being managed by the special procedures themselves through greater co-ordination; that overlaps exist because of the overlapping nature of human rights issues; and that as special procedures are the main monitoring mechanism of the Commission, they need to be prioritised in its work.

There is a concern that the review process could be used to terminate mandates that are considered by some States to be too effective at what they do, or to arbitrarily choose between mandates. As each of the mandates performs a role that was considered to be important and emerged as a result of detailed political negotiations, it is suggested the review should: focus its attention on how the current system can be made more coherent; reflect more closely on the role and purpose of the special procedures; and then accordingly define criteria for selection of new mandates rather than pick and choose between the existing mandates.

While the Commission has rarely terminated thematic mandates in the past, country mandates have seen more variations with mandates being established selectively to address only some country situations when others with similar problems exist and then being terminated despite the persistence of severe human rights problems in the concerned State. **Both thematic and country mandates however are subject to uncertainty and the prevailing political currents as they have to be renewed on a three-year or annual basis respectively.** While looking at adopting criteria for the creation of new thematic and country mandates, the Council should also consider measures that could give the system more certainty and permanence.

Key questions include:

- What is the central role and function of the special procedures system within the UN human rights system?
- **As the main monitoring mechanism of the Human Rights Council, are the**

³⁰ The number of mandates has increased from 29 in 1997 to 41 in 2006, see Amnesty International, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection*, (Amnesty International, 2005), p. 9.

³¹ Some arguments have been advanced that to overcome the 'excessive proliferation of mandates' the Council should re-establish only a few mandates afresh, or, in a more radical scheme, should dispense with the special procedures system entirely and transfer their functions to a peer review process, or even to OHCHR. See ICJ, *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (ICJ, 2005), p. 4.

- current mandates able to perform this role sufficiently or should they be extended to cover other key rights, issues, and groups? If yes, what are the other rights, issues and groups that should be covered?
- Is there an optimum number of mandates? If so, what is the number and how should it be identified?
 - How should concerns about overlaps between mandates, and the issue of limited financial and human resources be addressed?
 - What should be the criteria for the creation of new thematic and country mandates ³²? Should these criteria be made public?
 - Who should be involved in identifying new mandates ³³? Should this process be made public?
 - Should thematic mandates be made permanent or set up for longer durations and should country mandates be set up for a minimum of three years, instead of one?
 - What should be the criteria for terminating country and thematic mandates?
 - What other steps could be taken at a political level to ensure that the special procedures work as a coherent system ³⁴?

Working methods

Various attempts have been made to limit the independence of special procedures by defining their working methods in a way that would restrict their functioning and, in particular, their ability to take up communications, meet with NGOs in countries, and publicise their findings. These include proposals ³⁵ suggesting criteria for admissibility of communications such as the

32 The Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights suggested the following criteria for rationalisation of mandates: mandates should offer a clear prospect of an increased level of human rights protection and promotion; equal importance of civil and political and economic, social and cultural rights; avoiding unnecessary duplication; whether the structure of the mechanism is the most effective one, with regard to the content and predominant functions of each mandate as well as workload of mandate holders; and periodic review of all mandates. See E/CN.4/2000/112, (16 February 2000), p. 6.

33 Some suggestions in this regard are OHCHR, existing special procedures, and input from NGOs and NHRIs.

34 Some steps that have already been taken in this regard by special procedures and OHCHR include: the creation of a co-ordination committee composed of five mandate holders to increase coordination; the establishment of a quick response desk to centralise communications; the creation of a database to produce statistics on communications and trends of situations of concern; and annual meetings. For further details see OHCHR, 'Background Paper on the role and functions of the special procedure system', (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

35 Initial discussion paper on 'Enhancing the effectiveness of the special mechanisms of the commission on human rights' prepared by the Asian Group, (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

exhaustion of domestic remedies³⁶; limits on the ability of special procedures to carry out country missions by requiring them to coordinate with the receiving States on itinerary, activities, and interviews; and adoption of guidelines for interaction with the media. Implementing suggestions like these would have serious implications for the work of special procedures and would greatly limit their efficacy. The review process should not be used as an opportunity to limit the tools available to special procedures.

NGOs and some States³⁷ have emphasised that **the weakness of the special procedures system derives not from their working methods but from the failure of States to cooperate with this mechanism, especially with regard to replies to communications or access to carry out a country mission**³⁸. They have raised the issue of adequate opportunities for special procedures to brief the Council on their findings and recommendations, and the need for more regular reporting and follow-up on communications. NGOs and special procedures themselves have also suggested that the special procedures should have a key role in acting as an early-warning system³⁹.

Key questions on working methods include:

- What other tools should be available to special procedures to improve their efficacy?
- How should reports and communications be discussed with the Council and at what frequency⁴⁰?
- How could special procedures act more effectively as an early-warning system, against the occurrence of severe human rights violations in a country, and what powers should they be given to fulfil this role⁴¹?
- Should special procedures have more contact with the General Assembly now that the Council is a subsidiary body of the General Assembly?

³⁶ Amnesty International has reacted to this proposal pointing out that "Any such requirement would be antithetical to the objective of an urgent action system which aims at rapid action by the Special Procedures to prevent irreparable harm. A requirement of exhaustion of domestic remedies would prevent the Special Procedures from responding effectively to human rights violations". See Amnesty International, 'Item II: Working Methods of Mandate Holders', (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

³⁷ See the Position Paper of the European Union (the EU) as well as the paper presented jointly by Argentina, Brazil, Costa Rica, Chile, the Dominican Republic, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, and Uruguay, (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

³⁸ This issue is discussed in greater detail below.

³⁹ *Report of the open-ended seminar on enhancing and strengthening the effectiveness of the special procedures of the Commission on Human Rights*, E/CN.4/2006/116, (12 December 2005).

⁴⁰ Some suggestions include: creating a specific segment within the Council's agenda for special procedures to discuss their reports; more regular briefings and updates on communications and country missions; and participation of NGOs in the interactive dialogue between special procedures and States.

⁴¹ For instance, special procedures could request that an emergency session of the Council be held to discuss an urgent country situation and be given greater access to the Security Council.

Selection and appointment of mandate holders

Some States have suggested that the appointment procedure for special procedure mandate holders should be based on the principle of geographical rotation, and that each regional group should, when its turn arrives, nominate its candidate for a specific mandate to fill that post⁴². Other suggestions include selecting candidates from a list of candidates submitted by different regional groups⁴³ and disqualifying salaried members of NGOs or a member of the governing bodies of advocacy groups in the area of the mandate for appointment. There have also been suggestions for moving towards working groups with representation from all five regional groups rather than individual special rapporteurs⁴⁴. The selection process for special procedure mandate holders is crucial in ensuring that independent individuals with sufficient expertise in the relevant area are selected for each mandate. **If this process is handed over to a regional process of selection, the independence of the procedures would be seriously compromised** and these kinds of proposals will have to be carefully monitored if they emerge during the review process.

NGOs have identified a need to access a wider pool of candidates⁴⁵ and a more transparent selection process. They support the idea of a roster⁴⁶ of suitable candidates and endorsed the High Commissioner for Human Rights' (the High Commissioner) proposal to appoint an advisory panel, composed of experts from all regions, to help identify the most knowledgeable experts for special procedure nominations⁴⁷. Some have also highlighted the limitations of special procedure mandate holders working in a part-time voluntary capacity without receiving any financial remuneration⁴⁸. Special procedures themselves have stressed that one of the key criterion for mandate

42 Initial discussion paper on 'Enhancing the effectiveness of the special mechanisms of the commission on human rights' prepared by the Asian Group, (n. 35 above).

43 Observations of the African Group on the initial discussion paper prepared by the Asian Group, (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

44 The decision of the 61st session of the Commission to replace the Special Rapporteur on Mercenaries with a five-member working group may be seen as a precedent for this.

45 Quaker United Nations Office, 'Enhancing and strengthening the effectiveness of the Special Procedures of the UN Commission on Human Rights', (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: www.quino.org/geneva/pdf/humanrights/Special-Procedures20051013.pdf.

46 See ICJ, *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (ICJ, 2005), p. 6. See also OHCHR, *Strengthening the Special Procedures: The Way Forward*, p. 3, available at: <http://www.ohchr.org/english/bodies/docs/special-paper.doc>.

47 Human Rights Watch, 'Session I: The role and functions of the Special Procedures system', (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL. See also OHCHR, 'Background Paper on the role and functions of the special procedure system', (n. 34 above).

48 Quaker United Nations Office, 'Enhancing and strengthening the effectiveness of the Special Procedures of the UN Commission on Human Rights', (n. 45 above). In contrast, others have expressed concerns that paying any remuneration to special procedure could lead to a situation where their independence is threatened.

holders should be that they are not in government decision-making positions and that there should be no link between a given region and any particular mandate⁴⁹. Issues of maintaining geographical and gender balance have also been highlighted.

Key questions include:

- How should appointments be made for special procedures to ensure that candidates have the required independence and expertise for their positions?
- Should there be any involvement of the regional groups in this process?
- How can the process be transparent and open?
- How can the pool of candidates be widened to get a more diverse range of expertise and experience and geographical and gender balance?
- Should there be a roster of candidates and how should this be maintained to get increased civil society input?
- Should mandate holders continue to work in a part-time voluntary capacity or should they be made full time and/or given some remuneration?

State cooperation with special procedures

As mentioned earlier, various NGOs and the special procedures have highlighted that the lack of cooperation from States greatly weakens the special procedures and represents the biggest barrier to their functioning. A review process that is committed to a positive reform agenda needs to address this issue as a matter of priority.

The failure to cooperate is especially marked in two areas:

1) Communications – States often do not respond to communications sent to them by the special procedures at all or send standardised or inadequate responses that do not investigate the allegations highlighted in the communications. The Special Rapporteur on Violence Against Women has highlighted in her most recent report to the Commission that she has only received replies from governments for 26% of the communications sent in 2005⁵⁰.

2) Country missions – As special procedures can only carry out a country mission with the consent of the concerned State, States can block missions by: refusing to grant permission to the special procedure to visit their territory; not replying to invitations sent to them by special procedures for missions; or agreeing to the mission but then setting arbitrary conditions

49 *Report of the 12th Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme*, E/CN.4/2006/4, (3 August 2005), p. 22.

50 E/CN.4/2006/61/Add.1, (27 March 2006), p. 4.

or denying special procedures access to key facilities and people. In the case of some country mandates, States have refused to recognise the mandate⁵¹ and have consistently denied the mandate holder access to the country. As of 11 October 2005, only 53 States have issued standing invitations (open invitations to visit their countries) to special procedures⁵². In some cases despite having issued a standing invitation, States do not respond favourably to a request for a visit by a particular special procedure mandate holder. 89 countries have outstanding requests for visits from 1998 onwards despite 11 of these countries having issued standing invitations. 54 countries out of these 89 have two or more outstanding requests for visits. 64 countries have not received a visit since 1998, 23 of which have received a request for an invitation by at least one mandate holder⁵³.

Various suggestions have been made in this regard. These include: granting an automatic right of access to special procedures; a follow-up mechanism for non-cooperation with special procedures on communications and country visits; and linking cooperation and follow-up to membership of the Council⁵⁴.

Key questions include:

- Should special procedures have an automatic right of access to all countries? If not all, then to States that are members of the Human Rights Council?
- What measures can the Council take to increase cooperation between special procedures and States?
- What action should be taken for failure to respond to communications?
- What action should be taken for failure to respond to invitations for country mission or to cooperate during the mission, or in situations where requests have been outstanding for many years?
- What should be done in the situation that a State refuses to recognise a country mandate?
- Should cooperation be linked to membership or other benefits?
- Should the Council refer States, which have consistently refused to cooperate with special procedures despite the persistence of serious human rights violations in their countries, to the General Assembly or Security Council with recommendations for action?

51 For instance both Cuba and the Democratic People's Republic of Korea (the DPRK) refuse to recognise the mandates of the Special Rapporteurs on Cuba and the DPRK.

52 For details see www.ohchr.org/english/bodies/chr/special/invitations.htm.

53 For details of visits, invitations, and requests for individual countries see www.ohchr.org/english/bodies/chr/special/countryvisitsa-e.htm.

54 Human Rights Watch, 'Session I: The role and functions of the Special Procedures system', (n. 47 above).

Follow-up of findings and recommendations

Linked with cooperation is the crucial issue of follow-up to the findings and recommendations of the special procedures, which should be taken up during the review.

The issue of follow-up comes up at two levels:

1) International level – The Commission often failed to follow up adequately on the findings and recommendations made by special procedures. These were often not discussed sufficiently, and recommendations for action were ignored or did not form the basis of resolutions or decisions in many cases. For the special procedures to be an effective monitoring and protection mechanism, States need to be willing to act on their findings. The Human Rights Council needs to develop mechanisms to have an in-depth discussion on the findings of special procedures and to take action on the basis of their recommendations. States should also be asked to report back to the Council on the follow-up action taken, at least on the most significant issues identified by the special procedures, and obstacles faced by them in implementation.

2) National level – States do not adequately follow up on the recommendations of special procedures and on communications at the national level. Some suggestions to facilitate follow-up include: formulation of clear, concise recommendations by special procedures that indicate priorities and recognise financial implications; greater dissemination of the recommendations and findings of the special procedures within the country (a role for OHCHR and UN country teams has also been suggested in this regard); greater involvement of national NGOs, NHRIs, and parliaments in the follow-up process, accompanied by greater accountability for implementation at the political level at the United Nations⁵⁵.

Key questions include:

- What mechanisms should the Council set up to ensure that the findings and recommendations of the special procedures are adequately discussed and acted on at the international level?
- Should mechanisms be set up for States to report back on implementation and follow-up? If so, what kinds of mechanisms should be set up?
- How should States be held accountable for a failure to adequately implement and follow up on recommendations?
- What mechanisms and processes would contribute to better follow-up at the national level?

⁵⁵ *Report of the Open-ended Seminar on Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights*, E/CN.4/2006/116, (12 December 2005), pp. 16-17. See also ISHR, 'Item 2: Working Methods of Mandate-Holders', (Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL.

- How can NGOs, NHRIs, and parliaments be more involved in ensuring follow-up?

Link with the Universal Periodic Review

One possible way to ensure better cooperation and follow-up would be to link the work of special procedures with the new Universal Periodic Review (UPR) mechanism that the Council will set up⁵⁶. There are a number of ways in which this could be done, for instance by requiring that the examination of States in the UPR process is preceded by missions to that country by selected special procedures; asking States to report on implementation and follow-up of special procedures recommendations for the UPR; asking NGOs and NHRIs to submit information on the extent to which recommendations have been followed up; and raising issues of cooperation and follow-up in the discussion, and developing concrete action points at the conclusion of the process. Amnesty International has recommended that the work of special procedures must be a primary source of information⁵⁷ for the UPR. The 12th annual meeting of special procedures also recommended that the reports emanating from the special procedures system should be an integral part of the UPR⁵⁸.

Key questions include:

- Should there be a link between special procedures and the UPR?
- What should be the role of special procedures within the UPR?
- Should the UPR of any country be preceded by country missions by selected special procedures? How many special procedures should visit the country and how should they be selected?
- How should the UPR process be used to ensure better follow-up and implementation of special procedures' recommendations?
- How can NGOs and NHRIs be involved in this process?

What will be the process of the review?

At present there is very little information on how the review will be carried out and who will undertake it. Some States have suggested that the Council should set up an open-ended working group to carry out the review⁵⁹. Whatever structure or process the Council adopts to carry out the review, it is impor-

⁵⁶ The chapter on Universal Periodic Review discusses this mechanism and related issues in detail.

⁵⁷ Amnesty International, *United Nations Special Procedures: Building on a Cornerstone of Human Rights Protection*, (Amnesty International, 2005), p. 6.

⁵⁸ E/CN.4/2006/4, (3 August 2005), p. 24.

⁵⁹ ISHR, *Report on Consultations and Exchanges of Views on Preparations for the First Session of the Human Rights Council, Geneva, 21 April 2006*, available at: www.ishr.ch/hrm/UNreform/NewsBulletin/FImpConsultations21Aprilo6.pdf.

tant that there be clear terms of reference for the review defining its scope, working methods, and aims, and that it be carried out through a transparent, open, and public process. The Council should make a clear provision for the participation of all stakeholders such as other States, the special procedures themselves, OHCHR, NGOs, and NHRIs in the process. The Council also has to ensure that the special procedures system continues to function during the review process to avoid any gaps in protection.

4

SUB-COMMISSION AND SYSTEM OF EXPERT ADVICE

BACKGROUND TO THE SUB-COMMISSION

What was the role of the Sub-Commission?

The Sub-Commission on the Promotion and Protection of Human Rights¹ (the Sub-Commission) was the main subsidiary body of the Commission on Human Rights (the Commission). **The Sub-Commission was set up in 1947 with an initial mandate to recommend standards for the protection of minorities and prevention of discrimination**². The mandate and functions of the Sub-Commission expanded over the years to allow it to take on a far wider range of tasks and human rights issues. The Sub-Commission was authorised by the Economic and Social Council (ECOSOC) in 1967 to “examine information relevant to gross violations of human rights and fundamental freedoms”³ in all countries in the world.

The Sub-Commission’s role is often described as being a ‘think tank’ for the Commission⁴. Its main functions were to undertake research on key human rights; contribute to the development of international human rights standards; give guidance on the interpretation of international standards; monitor violations of human rights; monitor and examine issues of implementation of human rights; and perform any other tasks delegated to it by the Commission or ECOSOC. The Sub-Commission was made up of 26 independent human rights experts, with a balance of representation from the UN’s five regional groups⁵, elected by the Commission. All the individuals

1 This body was formerly known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It was renamed the Sub-Commission on the Promotion and Protection of Human Rights in 1999.

2 See A. Eide, ‘The Sub-Commission on Prevention of Discrimination and Protection of Minorities’, in P. Alston, *The United Nations and Human Rights*, (Clarendon Press, 1995), pp. 211.

3 Para 2, ECOSOC *Resolution 1235 (XLII)*, adopted 6 June 1967.

4 See www.ohchr.org/english/bodies/subcom/index.htm.

5 As of 2005, there were seven experts from Africa, five from Asia, five from Latin America (GRULAC), three from Eastern Europe, and six from Western Europe and other States (WEOG). For a list of members of the Sub-Commission see: www.ohchr.org/english/bodies/subcom/membership.htm.

who are elected to serve as members of the Sub-Commission are expected to be independent, are not paid, and serve in a personal capacity.

How did the Sub-Commission work?

The Sub-Commission met once every year for three weeks in July and August. **The Sub-Commission organised its work by appointing special rapporteurs or setting up working groups amongst its members to undertake certain tasks.** Special rapporteurs were mandated to prepare studies on various issues and to submit a report with their findings and recommendations to the Sub-Commission for discussion at its annual session⁶. The Sub-Commission also set up working groups, made up of at least one member from each of the UN's five regional groups, to discuss or examine particular issues. The working groups could operate either during the annual session or inter-sessionally (prior to the Sub-Commission's annual session)⁷ and helped facilitate discussions amongst Sub-Commission members, NGOs, and States⁸. The Sub-Commission discussed country situations and adopted country resolutions. The Commission decided in 2000 that the Sub-Commission could continue to discuss country situations that were not being considered by the Commission and could forward the summary record of its discussions but could not adopt country-specific resolutions or thematic resolutions containing references to specific countries⁹. The Sub-Commission's powers were further restricted when the Commission decided that it should not undertake any new activity without the Commission's approval, with the exception of the preparation of studies and research¹⁰.

During its annual session, the Sub-Commission would consider various reports and studies submitted by special rapporteurs and working groups, discuss and debate substantive issues, listen to statements made by NGOs and States, and adopt resolutions and decisions on human rights issues and its own work. **As with the Commission, the discussions in the Sub-Commission's**

6 For a list of special rapporteurs and status of various studies, please see annex 4.1 available on the CD-Rom and on www.ishr.ch/handbook.

7 The Sub-Commission had eight working groups in 2005. The five working groups that met prior to the Sub-Commission's annual session were the working groups on minorities; contemporary forms of slavery; indigenous populations; and the Social Forum (which was a two-day meeting of a working group which served as a forum on economic, social and cultural rights) The three working groups that met during the Sub-Commission's annual session were the working groups on transnational corporations; administration of justice; and the Working Group to develop detailed principles and guidelines concerning the promotion and protection of human rights when combating terrorism. The Working Group on Communications met after the Sub-Commission's annual session.

8 The Working Group on Communications is the exception as it met in private to consider complaints submitted by individuals as part of the Commission's 1503 procedure. Further details on this procedure and the working group can be found in the chapter on the complaint procedure.

9 Commission on Human Rights *Decision 2000/109* and Commission on Human Rights *Resolution 2003/59*.

10 Commission on Human Rights *Resolution 2005/53*.

annual session were structured around agenda Items and the Rules of Procedure for the functional commissions of ECOSOC regulated its activities. NGOs with ECOSOC accreditation could attend the annual session and make oral and written statements. States also attended the session and made statements. The Sub-Commission submitted a detailed report on the session to the Commission. The Chairperson of the Sub-Commission also submitted a short report on the session summarising the main activities and listing any new mandates or other matters that had financial implications that required the approval of the Commission.

What were the strengths and weaknesses of the Sub-Commission?

A large number of human rights standards adopted by the Commission were initiated by the Sub-Commission¹¹. The Sub-Commission has also played an important role in highlighting new and emerging areas of human rights concerns¹² and other gaps in the system of human rights protection, and provided guidance on the interpretation and implementation of human rights standards. Many of the Sub-Commission's working groups have adopted more flexible procedures for NGO participation, which has allowed NGOs without ECOSOC accreditation to participate in their proceedings and acted as an important channel for wider NGO input into the UN system. The working groups on minorities and indigenous populations, in particular, represent two of the most accessible forums for minority groups and indigenous peoples¹³.

The greatest weakness of the Sub-Commission has probably been the system of election of members as implemented by the Commission. The Commission elected some members who have failed to meet requirements of quality and independence by virtue of conflicts caused by their occupying certain roles within their governments, the absence of any limits on the total term of membership, and/or lack of expertise. This has weakened the functioning of the body as a whole and led to its work being politicised in some instances. The Sub-Commission's functioning has also been weakened by the Commission, which restricted its capacity to consider country situations, limited its ability to take initiatives without the Commission's approval, and marginalised its work.

11 Examples include the *UN Declaration on Human Rights Defenders* and the *Principles and Guidelines on the Right to a Remedy*.

12 Such as human rights issues in relation to the functioning of transnational corporations, please see the chapter on issues for a further discussion.

13 See www.iwgia.org/sw8632.asp.

A SYSTEM OF EXPERT ADVICE

Will the Council maintain the Sub-Commission or set up another system of expert advice?

General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council), provides that the Council shall “maintain a system of ... expert advice”¹⁴. The use of the term ‘system of expert advice’ and the absence of any reference to the continuation of the Sub-Commission means that the Council is not required, under the terms of the Resolution, to retain the Sub-Commission and can set up a new system of expert advice. As with special procedures and the 1503 procedure, the Council is required to “review, and where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission” including the Sub-Commission “within one year after the holding of its first session”¹⁵.

The Secretary-General’s High-level Panel on Threats, Challenges and Change¹⁶ recommended that the Commission should be supported in its work by an advisory council or panel consisting of 15 individual experts who would give advice on country-specific issues and rationalisation of some thematic special procedure mandates. They recommended that the advisory panel could carry out some of the current special procedure mandates dealing with research, standard-setting, and definitions. It has also been suggested that instead of maintaining a permanent expert body, the Council should appoint independent experts as the need arises to undertake specific tasks¹⁷. **The Sub-Commission at its 57th session highlighted the “clear need for a collegial independent expert body within the United Nations human rights machinery because certain essential functions within the United Nations human rights machinery can best be fulfilled by such a body”¹⁸.** The International Commission of Jurists (ICJ) has endorsed the need for a collective, collegial, independent expert body and stated that “there is great value that comes from a process of collegial and collective deliberation by independent experts that may be absent when a single expert or small working group takes up a subject”¹⁹. The Council will therefore have to decide whether it retains the Sub-Commission or sets up another expert body. It will also have to decide whether it should set

¹⁴ Para 6.

¹⁵ Ibid.

¹⁶ A/59/565, (2 December 2004), p. 74.

¹⁷ International Commission of Jurists (ICJ), *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (ICJ, 2005), p. 23.

¹⁸ Sub-Commission *Decision 2005/114*, para 2 of the annex.

¹⁹ ICJ, *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (n. 17 above), p. 23.

up a standing expert body or more than one standing expert body, each with a thematic or other distinct function, or appoint independent experts on an ad hoc basis.

Key questions include:

- What kind of a system of expert advice should the Council have?
- What should be the essential features of any system of expert advice or expert body created or maintained by the Council?
- Should the Council retain the Sub-Commission, use it as a foundation and improve it, or set up a new system of expert advice?
- Should the Council set up a collective, collegial, independent expert body or appoint independent experts as the need arises? If it sets up an expert body, should it appoint more than one body to carry out particular thematic or other functions?

What will happen to the Sub-Commission's pending and ongoing work?

There is uncertainty as to whether the Sub-Commission will meet as it normally does in July and August in 2006 and if it does meet, what the focus of that meeting will be. The Commission was supposed to hold elections at its 62nd session as the terms of membership of 13 Sub-Commission members, half the membership of the Sub-Commission, expire in 2006. For the Sub-Commission to meet in 2006, the Council will have to either hold elections or extend the mandate of these 13 members for an additional year. **Based on discussions at the informal consultations that have been held in April and May 2006, it appears likely that the Council may extend the mandates of members whose terms are expiring for an additional year, possibly in the same omnibus resolution which also extends the terms of other mandate holders**²⁰.

The Sub-Commission's report containing details of its activities at the 57th session was submitted to the Commission for consideration at its 62nd session. In addition to a report on its activities, this report includes requests for approval of mandates and other matters that have financial implications, and recommendations for resolutions to be adopted and other action to be taken by the Commission. Since the Commission transferred this report, along with others, to the Council for consideration at its first session in June²¹, the Council will have to receive it and make decisions on some of these issues. If not, the Sub-Commission will not be able to continue with its work. **If the Council decides to terminate the mandate of the Sub-Commission and create a new**

20 See the chapter on special procedures for a further discussion on the possible omnibus resolution and extension of special procedure mandate holders' terms and extension of mandates.

21 Para 1, Commission on Human Rights *Resolution 2006/1*.

expert body, some provision will have to be made for the ongoing studies and reports that are currently being prepared as well as those that were submitted to the Commission for action. The Council may have to decide which activities are transferred to the new body or other human rights bodies and those it will request members of the Sub-Commission to complete in a given period of time and submit to it or to the new body for discussion. Some have suggested that the Council ask the Sub-Commission to hold a short final session to wrap up its pending work, make recommendations on work that is in progress, and express its views on the kind of system that the Council should set up²².

Others have highlighted concerns about the future of the Sub-Commission's working groups and the negative impact that terminating the Sub-Commission's mandate could have on the participation of indigenous peoples and minority groups. The Council will have to ensure that whatever process is adopted, important initiatives are not lost or sidelined in any transition process, and make adequate provision to transfer the arrangements for the participation of indigenous peoples, minority groups, and NGOs without ECOSOC accreditation to the expert body itself or create another suitable forum.

Key questions include:

- What arrangements should the Council make for the Sub-Commission's pending and ongoing work?
- If the Council decides to terminate the mandate of the Sub-Commission, how should the transition between the Sub-Commission and any new system or body be managed?
- If the Sub-Commission meets for its final session in July or August 2006, what should this final session focus on?
- How should the Council ensure that important initiatives and activities are not lost or sidelined in a transition process?
- How can the Council ensure the continuation of arrangements for the participation of NGOs without ECOSOC accreditation?
- How can the Council ensure the continued participation of indigenous peoples and minority groups?

What should be the role and functions of an expert body and how should it operate?

The Sub-Commission has highlighted the need for a "representative independent expert body that is able to think collectively, free from specialized mandate constraints and political considerations, in order to initiate and pursue new

²² See in this regard, N. Howen, 'Architecture of the Human Rights Council: Role of the Chair and Bureau & the role of "experts"', p. 15, (Seminar on the Human Rights Council, Lausanne, 15 May 2006), available at: www.eda.admin.ch/geneva_miss/e/home/confonu/ccdh.ContentPar.0010.UpFile.tmp/xy_yym-mdd_0123456789_1.pdf.

and innovative thinking in human rights standards and implementation”²³. According to the Sub-Commission, some of the tasks and functions that should be performed by such a body include: 1) policy initiatives; 2) standard-setting with regard to a) new norms, and b) guidelines relating to implementation; 3) identifying gaps in standards and methods of monitoring; and 4) identifying good practice. It has also stressed the continued need for primary standard-setting that can arise because of new developments that have implications for human rights, changes in factual situations, and identification of gaps in standards or methods of monitoring²⁴. Dr. Ibrahim Salama, a member of the Sub-Commission, has suggested that the advisory body act as a ‘research department’, be able to interact in its consultative capacity with all parts of the human rights system and not just the Council, and should have a ‘clear duty of initiative’ expressly stipulated in its mandate²⁵. The ICJ has suggested that the body should not have authority to consider country situations, as this in its opinion is clearly the role of the Council²⁶. The Council will have to decide the role and functions of the expert body, if one is set up, and the extent to which it will be able to initiate studies and other activities on its own in addition to those requested by the Council.

The Council will also have to decide how the body or system operates, especially on how often the experts meet and how their meetings will be organised. For instance, should the body be able to meet more frequently, than the Sub-Commission did, to mirror the increasing frequency of the Council’s sessions? Should the expert body move away from the formal and bureaucratic procedures that applied to the Sub-Commission to a more informal seminar or other discussion-oriented format to facilitate exchanges of views between experts, States, and NGOs? The issue of NGO and NHRI participation will also have to be addressed, and the Council should ensure that NGOs continue to have at least the same level of participation in the new expert body or system that they did at the Sub-Commission.

Key questions include:

- What is the role of the expert body? What needs should it meet?
- What should be the main functions of the expert body?
- Should the expert body be able to undertake studies and other activities on its own initiative?

23 Sub-Commission *Decision 2005/114*, para 6 of the annex.

24 *Ibid.*, see paras 3–5.

25 I. Salama, ‘Horizons for Enhanced Human Rights Protection Under the “New” Council: Proposals for the Unfinished Business’, (Seminar on the Human Rights Council, Lausanne, 15 May 2006), p. 20, available at: www.eda.admin.ch/geneva_miss/e/home/confonu/ccdh.ContentPar.0010.UpFile.tmp/xy_yymmdd_0123456789_1.pdf.

26 N. Howen, ‘Architecture of the Human Rights Council: Role of the Chair and Bureau & the role of “experts”’, (n. 22 above), p. 15.

- Should the expert body play a role in the Council's Universal Periodic Review²⁷ mechanism?
- Should the expert body be able to consider country situations more generally?
- How often should the expert body meet?
- How should its meetings be organised?
- How should NGOs and NHRIs participate in the work of the expert body and its meetings?

What should be the composition of the expert body or components of the system of expert advice?

The Sub-Commission has suggested that members of the expert body should be elected rather than appointed and that the “body must be sufficiently large in number to represent not only different regions but differences within regions”²⁸. It states that its experience suggests that a membership of about 25, 26, or even larger works best²⁹. The ICJ on the other hand has suggested that experts be selected from a roster maintained and regularly updated by OHCHR, with all candidates vetted for competence and independence by the High Commissioner. The criterion for independence would be whether the candidate is “serving actively in any executive or legislative government position that would impair or give the appearance of impairing independence”³⁰. It has also suggested that terms of membership should be limited to a maximum of two three-year terms³¹. Others have suggested that the number of experts could be limited perhaps to 15-20, with the ability to call in other experts for short periods on very specific issues where necessary³². The Council could also consider setting up multiple smaller bodies with distinct functions or pick experts as needed to carry out certain tasks.

Key questions include:

- What should be the composition of the expert body, if one is set up?
- What should be the method of appointment of experts?
- How many experts should be appointed and what should be the criteria for eligibility?

²⁷ Please see chapter on the Universal Periodic Review for further details about this mechanism.

²⁸ Sub-Commission *Decision 2005/114*, para 7 of the annex.

²⁹ *Ibid.*

³⁰ ICJ, *Reforming the Human Rights System: A Chance for the United Nations to Fulfil its Promise*, (n. 17 above), pp. 23, 6.

³¹ *Ibid.*, p. 24.

³² N. Howen, ‘Architecture of the Human Rights Council: Role of the Chair and Bureau & the role of “experts”’, (n. 22 above), p. 15.

- How can the expertise and independence of the individuals be ensured?
- Should the expert body be able to involve other experts in its work for short periods as necessary?
- Should the Council appoint more than one body to carry out particular thematic or other functions?

Process of the review

The process through which the Council will review the Sub-Commission, as with special procedures and the Universal Periodic Review, is still undefined. It seems likely that the Council will set up an open-ended working group or some other form of consultations by the president, but this and other issues may only be decided once the Council meets in June. Essential elements for this process include that it be carried out in an open, transparent, and public manner and with the participation of all stakeholders, such as other States, special procedures, OHCHR, NGOs, and NHRIs. It would also be useful for the Sub-Commission to contribute to this process, highlighting the strengths and weaknesses of its past functioning and its suggestions for the essential elements for an expert advisory body or system.

5

COMPLAINT PROCEDURE

BACKGROUND TO THE COMMISSION'S COMPLAINT PROCEDURE

What was the Commission's complaint procedure?

The Commission on Human Rights' (the Commission) main complaint procedure was the 1503 procedure¹, under which it could receive communications (complaints) from victims or others acting on behalf of the victims regarding situations which “reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”² in any country in the world. The Commission would not address violations of an individual's human rights under this procedure. The procedure was intended, instead, to bring situations of massive human rights violations to its attention³. The procedure applied to all countries, irrespective of whether they voted for the 1503 resolution⁴ or their ratifications of human rights treaties⁵. The 1503 procedure was confidential and the Commission considered ‘situations’ in countries that come up under the procedure in a closed meeting. Complainants were informed if their cases had been taken up for processing under the 1503 procedure but were not given any further information on the proceedings themselves or the outcomes. As described in the special procedures chapter, special procedure mandate holders appointed by the Commission can

1 Named after the resolution by which it was created: Economic and Social Council (ECOSOC) *Resolution 1503 (XLVIII)* of 27 May 1970.

2 Para 1.

3 A.F. Bayefsky, *How to Complain about Human Rights Treaty Violations: Choosing a Forum*, available at: www.bayefsky.com/complain/44_forum.php.

4 F.Z. Ksentini, *Les procédures onusiennes de protection des droits de l'homme*, (Publisud, 1994), p. 122.

5 G. Alfredsson and E. Ferrer, *Minority Rights: A Guide to United Nations Procedures and Institutions*, (Minority Rights Group International and Raoul Wallenberg Institute, 1998), p. 20.

also receive communications that they take up directly with the concerned governments.

How did the 1503 procedure work?

Individuals or groups who were victims of human rights violations, or any other person or group with direct and reliable knowledge of the violations, could submit a complaint to the Commission through the Office of the High Commissioner for Human Rights (OHCHR) ⁶. **Non-governmental organisations (NGOs) did not require ECOSOC accreditation to submit complaints but were required to be acting in good faith and in accordance with recognised principles of human rights** ⁷. The OHCHR secretariat would carry out an initial screening of all communications to exclude communications that were inadmissible because they did not meet the substantive or procedural requirements of the 1503 procedure. OHCHR processed between 5,000 and 220,000 communications every year ⁸.

Under the substantive requirements of the 1503 procedure, the complaint had to describe the facts that demonstrated the existence of a consistent pattern of gross human rights violations, accompanied by specific evidence ⁹. The complaint had to indicate the 'purpose of the petition', namely the kinds of action sought, and indicate the rights that were violated ¹⁰. A series of communications on violations in a country could, taken together, reveal a consistent pattern of violations ¹¹. The procedural requirements of the 1503 procedure included that 1) the complainant had exhausted all available remedies in his/her country and submitted the complaint within a reasonable time; 2) that the State against whom the complaint had been made was not being examined under any public procedure of the Commission; 3) the subject matter did not fall within the mandate of any of the Commission's special procedures; 4) it was not possible for the complainant to submit the complaint under an individual complaints mechanism set up by a treaty, which the State in question had ratified; 5) the complaint was not politically motivated or manifestly

6 Para 2, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Resolution 1 (XXIV)*. Now referred to as the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission).

7 Ibid.

8 World Federation of United Nations Associations (WFUNA), *Report of the Seminar on the Commission on Human Rights*, (July 2004), p. 19, available at: www.wfuna.org/docUploads/Final%20Report%202004%20Seminar%20%20Epdf.

9 OHCHR, *Fact Sheet No. 7: Complaints Procedure*, (OHCHR, Rev. 1), available at: www.ohchr.org/english/about/publications/docs/fs7.htm.

10 Para 3, Sub-Commission *Resolution 1 (XXIV)*.

11 N. Rodley and D. Weissbrodt, 'United Nations Nontreaty Procedures for Dealing with Human Rights Violations', in H. Hannum, *Guide to International Human Rights Practice*, (Transnational Publishers, 4th edn., 2004), p. 72.

unfounded or contained insulting references to the State; and 6) the complaint was not anonymous and did not rely exclusively on mass media reports¹².

Complaints that satisfied these requirements were forwarded to the concerned States, requesting them to reply within 12 weeks to the allegations contained in the complaint. **The complaint had to then go through two stages of review, and only a small number of situations in countries that made it through both stages were referred to the entire Commission¹³.** At the first stage, the complaints were reviewed by the Sub-Commission on the Promotion and Protection of Human Rights' (the Sub-Commission) Working Group on Communications¹⁴. The Working Group would review the complaint to assess whether it reliably attested to a consistent pattern of gross human rights violations and would only refer the complaints that it considered had satisfied the procedural and substantive requirements to the next stage of review. It could also keep some complaints pending till the following year to get more information. The second stage of the review would be carried out by the Commission's Working Group on Situations¹⁵. **The Working Group on Situations would decide which situations in countries, rather than complaints, the Commission should take up and make recommendations to the Commission on what course of action to take on each situation.** The process could take 18 months or longer from the time the complaint was submitted till it reached the Commission¹⁶. The concerned State would be informed that the situation had been transmitted to the Commission and would be invited to submit any additional information and participate in the proceedings at the Commission. The complainant was not informed or given any opportunity to submit information¹⁷.

The Commission would finally consider the situation in the countries referred to it by the Working Group on Situations in closed meetings during its annual session. The Commission could enter into a discussion with the concerned States, which could participate in the meeting and be present during the adoption of the final decision. **The recommendations of the Working Group on Situations were considered as the 'first proposal' but these recommendations could be amended and any member of the Commission could table new proposals¹⁸.** The Commission could decide on one of the following four courses of action¹⁹: 1) to discontinue reviewing the matter; 2) to keep

12 Paras 3–4, Sub-Commission *Resolution 1 (XXIV)*. See also M.F. Ize-Charrin, '1503: A Serious Procedure', in G. Alfredsson, J. Grimheden et. al. (eds.), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001), p. 297.

13 See ECOSOC *Resolution 1503* and ECOSOC *Resolution 2000/3*.

14 Made up of five members of the Sub-Commission, one from each of the UN's five regional groups.

15 Made up of five members of the Commission nominated by each regional group.

16 E. Miles, *A Conscientious Objector's Guide to the UN system*, (Quaker United Nations Office and War Resisters' International, 2000), p. 61, available at: www.wri-irg.org/pdf/co-guide-un.pdf.

17 See P. Alston, 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights*, (Clarendon Press, 1995), p. 147 where he also comments on the inequality of the procedure.

18 M.F. Ize-Charrin, '1503: A Serious Procedure', (n. 12 above), p. 302.

19 Para 7 (d) ECOSOC *Resolution 2000/3*. Para 6 (b) of ECOSOC - footnote carries over to the next page -

the situation under review and wait for further information from the State or which may reach it through the 1503 procedure; 3) keep the situation under review and appoint a country special procedure mandate²⁰ to monitor the situation and report back to the Commission; and 4) refer the matter to the public 1235 procedure, under which it could discuss the situation in the country publicly and take a variety of actions, such as adoption of a resolution, appointment of special procedure mandates, etc. The Commission could also make recommendations to ECOSOC. **The Commission did not provide any direct remedies or order the payment of compensation for the complainant or other victims under this procedure.**

After the initial notification that the communication was being processed under the 1503 procedure, the complainant did not receive any information about the proceedings or outcomes. The entire process of the consideration of complaints was confidential²¹. Since 1978, the Chairperson of the Commission started announcing the names of countries that had been examined under the 1503 procedure as well as those which had been discontinued but did not provide any other details of the discussions or outcomes. The Commission examined 84 countries under the procedure up to 2005²². It has dealt with a range of human rights violations including cases of mass killings, disappearances, torture, political detention, forced labour, violations of the right to self-determination, and religious persecution²³. The limited information that is available on the outcomes on specific country situations indicates that between 1989 and 2005, the Commission examined 55 States, of which the Commission discontinued reviewing 43. Nine States were transferred to the advisory services program, which was followed by the adoption of country resolutions regarding seven of these States. Three States were transferred directly to the public procedure²⁴.

Resolution 1503 provided that the Commission could set up an ad hoc committee to investigate the situation but this provision has never been used.

- 20 M. F. Ize-Charrin, '1503: A Serious Procedure', (n. 12 above), see p. 304 where Maria Ize-Charrin points out that special procedure mandates set up under the 1503 procedure followed the same guidelines as those set up under public proceedings. The major difference was that the reports of these mandates were only made public after a decision of the Commission. Examples of mandates set up under the 1503 procedure include the country special procedure mandates on Chad, Liberia, and Uzbekistan.
- 21 The Commission could however, at the request of the concerned government, make the documents relating to its examination public.
- 22 For the list of countries see www.ohchr.org/english/bodies/chr/stat1.htm. See also annex 5.1 for outcomes.
- 23 See H. Tolley, 'The Concealed Crack in the Citadel: The UN Commission on Human Rights' Response to Confidential Communications', (1984) 6 *Human Rights Quarterly* 420, pp. 448-449.
- 24 See annex 5.1 available on the CD-Rom and on www.ishr.ch/handbook for further details on the States examined and the outcomes, as well as the methodology used to collect this information.

What were the advantages and disadvantages of the 1503 procedure?

The 1503 procedure was a limited mechanism. Unlike most complaint procedures, it did not offer any direct relief for victims. Its main advantages were that 1) it acted as a channel through which any victim, NGO, or other individual could directly submit information to the Commission to bring their concerns about human rights violations to its attention²⁵; 2) the submission of information on particular violations under the 1503 procedure often helped lead to the Commission setting up a public procedure to deal with the issue²⁶; 3) it was part of an incremental technique for “placing gradually increasing pressure on offending governments”²⁷; 4) it was one of the few forums available to submit complaints regarding governments that have not ratified many human rights treaties or agreed to treaty bodies receiving communications; and 5) the prospect of being named under the 1503 procedure could be embarrassing for the concerned government.

Its main disadvantages were that: 1) the lack of remedies or even information about outcomes to victims; 2) “the Commission has only responded to violations of only a limited range of civil and political rights, which in turn has ensured that while Third World countries are disproportionately represented on the 1503 blacklist, developed countries (both West and East) have only very rarely been called into account”²⁸; 3) violations of economic, social and cultural rights have never been examined seriously²⁹; 4) at the level of both the Sub-Commission and Commission, political considerations have led to a failure to act on serious country situations and against some governments³⁰; 5) selectivity and double standards in the choice of countries that were referred and in its decisions led to the Commission investigating “political detention in one case while disregarding more egregious mass killings in another”³¹; 6) it was time-consuming, slow, had complex procedures, and gave unequal opportunities of participation to States in comparison to complainants; and 7) the secrecy of the proceedings worked to the advantage of the concerned

25 *Report of the Inter-Sessional Open-Ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, E/CN.4/2000/112, (16 February 2000), p. 11.

26 A commonly referred example is the establishment of the Working Group on Enforced or Involuntary Disappearances that was preceded by the «submission of thousands of cases recorded under the 1503 procedure». See M.F. Ize-Charrin, ‘1503: A Serious Procedure’, (n. 12 above), p. 306.

27 T. van Boven, *People Matter: Views on International Human Rights Policy*, (Meulenhoff, 1982), p. 65.

28 See P. Alston, ‘The Commission on Human Rights’, (n. 17 above), p. 151

29 *Ibid.*

30 See *Ibid.*, pp. 148–149 where Philip Alston describes the failure of the Commission to take action on Uganda during Idi Amin’s regime and the Sub-Commission’s reluctance to act on Greece, Iran, and Portugal.

31 H. Tolley, ‘The Concealed Crack in the Citadel: The UN Commission on Human Rights’ Response to Confidential Communications’, (n. 23 above), p. 453.

State and also shielded the members of the Commission from scrutiny of their decisions.

REVIEW OF THE COMPLAINT PROCEDURE

Will the Council maintain the 1503 procedure or set up another complaint procedure?

General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council), provides that the Council shall “maintain a complaint procedure”³². As in the case of special procedures, the Council is required to “review, and where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission” including the 1503 procedure “within one year after the holding of its first session”³³. The Council will review the 1503 procedure and may have to consider whether it retains this procedure as it is, improves and rationalises it, or sets up a new complaint procedure. The 1503 procedure is the oldest complaint procedure within the UN human rights system and was quite innovative at its time. **Complaint procedures have however developed considerably since the 1970s and the Council could consider various options to develop an easier to use, more effective, and stronger complaint procedure.** As with any reform process, the concern will be to ensure that the review is used to strengthen the existing system and not to erode it further.

Key questions include:

- Why does the Council need to maintain a complaint procedure?
- What kind of a procedure should the Council maintain to address complaints that are received by OHCHR that cannot be dealt with elsewhere in the UN human rights system?
- What were the strengths and weaknesses of the 1503 procedure?
- What should the review of the 1503 procedure focus on?
- Should the Council retain the 1503 procedure, use it as a foundation and improve it, or set up a new complaint procedure?
- If the Council retains the 1503 procedure, how, if at all, should it be improved?
- How can those who submit complaints be kept informed and participate in the Council’s complaint procedure?

³² Para 6.

³³ Ibid.

What should be the scope of the complaint procedure?

The 1503 procedure was one of a few complaint procedures which is not set up by or linked to a particular human rights or labour rights treaty³⁴. In the case of a complaint procedure that is set up by or linked to a particular treaty, 1) the scope of the complaint procedure is clearly defined and delimited to violations of rights set out under the treaty, and 2) the State signs up to a treaty or supplementary instrument setting up the complaint procedure and agrees to its jurisdiction. **Possibly the biggest strength of the 1503 procedure was the ability of the Commission to consider complaints in relation to all countries and all human rights irrespective of the ratification of human rights treaties. This wide scope was however counterbalanced by the high minimum threshold for intervention, which limited the application of the procedure to gross violations of human rights and was accompanied by various other procedural limitations, such as confidentiality.** The Council will have to consider what the scope of its complaint procedure should be. Should it cover all human rights or be restricted to certain rights agreed to by the State or which are applicable to all States? If the procedure has a wide scope and covers all rights, will the threshold for intervention be restricted to cases of severe violations or could the Council intervene in all violations, if certain other admissibility criteria are met? Linked to this issue, the Council will have to identify the role the complaint procedure plays in the Council's functioning. Will the complaint procedure be a channel of information for victims and others who cannot access the Council directly to trigger its action on country situations, will it serve as an early warning function, or a process through which the Council addresses individual violations?

The Council will also have to decide on the admissibility criteria for complaints, which would also impact the scope of the procedure. The 1503 procedure had very restrictive admissibility criteria, particularly in terms of overlap with special procedures, and this excluded a number of complaints. The Council may wish to consider whether it should revise these criteria to allow for a wider range of complaints to reach it.

Key questions include:

- What should be the scope of the complaint procedure?
- What should be the role of the complaint procedure in relation to the Council's functions?
- What would be the advantages and objectives of having a complaint procedure maintained by the Council, a political body made up of governments?
- What human rights violations should the complaints procedure cover?

³⁴ See annex 5.2 for a table comparing various international and regional complaint procedures, available on the CD-Rom and on www.ishr.ch/handbook.

- Should there be a minimum threshold for the Council's intervention such as the severity of violations?
- What should be the criteria for admissibility of complaints?
- If the subject matter of the complaint falls within the mandate of any special procedure, should it be excluded?
- How can the Council's complaint procedure complement other complaint procedures, set up under human rights or labour rights treaties?

What should be the composition of the body examining complaints?

The body that examines complaints could be a political body (made up of Council members), an expert body (made up of independent human rights experts³⁵), or mixed (with a two-stage procedure where the complaint is first examined by an expert body and then by a political body). The Council may wish to draw a distinction between a judicial examination phase and a political decision-making phase. Delegating the consideration of the complaint to an expert body with diverse human rights expertise would ensure that the determination of violations is undertaken on the merits of every complaint and that there is a reasoned decision along with recommendations for action by the Council; it would also reduce the pressure on the Council's time. The Council could then discuss the findings and recommendations of the expert body and decide on the action that it wishes to undertake.

Key questions include:

- What should be the composition of the body examining complaints?
- Should the body be a political body, an expert body, or mixed?
- If the body is made up of independent experts, how should the experts be chosen?
- How should the Council be involved in the consideration of a complaint?

Who should be able to submit complaints and what should be the process to consider complaints?

The 1503 procedure allowed victims, individuals with direct knowledge of the violations and all NGOs, not just those with ECOSOC accreditation, to submit complaints. As this feature was one of the main strengths of the 1503

³⁵ Possible models for selection include choosing five experts from a roster prepared by OHCHR while ensuring geographical balance, or to rely on the expert body if the Council sets one up to fulfil this task.

procedure, it is important that it be retained in any new system. The Council may however wish to revise the process of consideration of complaints, in particular the requirement of confidentiality and the lack of provision for victims to participate in the proceedings or get any information about the discussions or outcomes. The Council may also wish to decide whether there should be a provision for investigations to be carried out in the concerned country.

Key questions include:

- Who should be able to submit complaints?
- What should be the process to consider complaints? How long should it take?
- Should the entire process of considering complaints be public? If not, what parts should be confidential?
- How should victims and other complainants participate in the process?
- Should there be a provision to carry out investigations in the concerned country? Who should carry out these investigations?

What should be the outcomes of a successful complaint?

The 1503 procedure did not offer any direct relief to victims. It allowed the Commission to monitor and study the situation in a country by appointing a special procedure mandate, and to transfer the situation to its public proceedings for discussion and to take action. The Council will need to decide whether it should provide remedies to affected individuals, such as recommendations for action by the State and payment of compensation, and take interim measures for the protection of victims, if needed. It will also need to decide on the broader range of action it could take on the country situation. This may be in line with the tools it develops for dealing with country situations more generally and could include clear recommendations for action; setting up a monitoring mechanism or presence in the country; and/or referring the matter to other UN bodies³⁶. The Council could also consider how the complaint procedure relates to the Universal Periodic Review mechanism and what should be the follow-up process if the State fails to comply with its recommendations.

Key questions include:

- What should be the outcomes of a successful complaint?
- What kinds of recommendations and actions could the Council suggest?

³⁶ See the chapter on Universal Periodic Review for a more detailed discussion on possible outcomes on country situations.

- Should the Council provide remedies to victims? If so, what kinds of remedies should it be able to provide?
- Should there be a follow-up process if the State fails to comply with the Council's recommendations?

Process of the review

The process through which the Council will review the complaints procedure, as with special procedures and the Universal Periodic Review, is still undefined. It seems likely that the Council will set up an open-ended working group or some other form of consultation by the president, but this and other issues may only be decided once the Council meets in June. Essential elements for this process may include that it be carried out in an open, transparent, and public manner and with the participation of all stakeholders, such as other States, special procedures, OHCHR, NGOs, and NHRIs. It may also be useful for treaty bodies to provide input into this process on the ways in which the complaint procedure could complement and strengthen their work.

6

UNIVERSAL PERIODIC REVIEW

WHAT IS THE ‘UNIVERSAL PERIODIC REVIEW’?

The Universal Periodic Review (UPR) is a new mechanism that has been established under General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council). The Resolution provides that the Council shall “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies”¹. The Resolution does not set out the details of how the process will work but instead asks the Council to “develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session”². At present, there is no information on how the process will be undertaken but below we explore some of the key issues and options that the Council could consider while developing the modalities of the process.

WHAT ARE THE OBJECTIVES OF THE UPR?

The Commission on Human Rights (the Commission) had been criticised for selectivity and double standards in responding to the situation of human rights within countries. In response, the General Assembly created the new UPR mechanism under which *all* countries will be subject to a review. *Resolution 60/251* in paragraph 5 (e) sets out some of the objectives of the UPR. In

¹ Para 5 (e), General Assembly *Resolution 60/251*.

² *Ibid.*

addition to reviewing the fulfilment of each State of its human rights obligations and commitments, these include: universality of coverage and equal treatment of all States; a cooperative mechanism that gives consideration to a State's capacity-building needs; and complementing but not duplicating the work of treaty bodies. *Resolution 60/251* also details some other guidelines for the work of the Council, which will also be relevant for the UPR mechanism. The Resolution provides that the "work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights"³ and that "methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms"⁴. The Resolution also states that "the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon"⁵ and "contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies"⁶.

Key questions include:

- What should be the concrete objectives of the UPR?
- How can the Council comply with the principles identified by the General Assembly while developing the modalities for the UPR and carrying out the UPR?
- How can the UPR serve as a cooperative mechanism that gives consideration to a State's capacity-building needs while reviewing the State's fulfilment of its human rights obligations and commitments?
- What could be the advantages of having the Council, a political body made up of governments, undertaking or overseeing a review of States?

WHO UNDERTAKES THE UPR?

There is any number of options for who will carry out the UPR. **The most important decision to be made is whether the UPR should be undertaken entirely by the Council itself or with the assistance of individual or a group of human rights experts?** Some suggestions for the Council itself undertaking the entire review include setting up a panel made up of Council members

3 Para 4.

4 Para 12.

5 Para 3.

6 Para 5 (f).

which would hold an interactive dialogue with the State under review on the basis of a country dossier prepared by OHCHR on the most recent information already available⁷, or for multiple panels to be set up. In terms of involvement of independent human rights experts, some suggestions include appointing an independent session rapporteur for each State under review, selected among a roster of experts prepared by OHCHR. The independent session rapporteur would carry out a full visit to the State, prepare a background note on the human rights situation, and review summaries of information assembled by OHCHR in order to prepare written questions for the State to respond to in advance of the session⁸. Other possibilities could include appointing a group of experts to review the information on the State and suggest questions or recommendations, or relying on the expert body⁹, if one is set up by the Council, to perform these tasks.

The involvement of independent human rights experts in the process would have considerable advantages. It would allow for a more objective, consistent, and comprehensive analysis of the situation in the country; avoid political factors playing a role at the information collection and examination stages; and reduce the pressure on the Council's time. Relying on a group of experts from different countries and with expertise on a range of issues could also ensure a more balanced analysis.

Key questions include:

- What should be the composition of the body undertaking the UPR?
- Should the Council undertake the UPR entirely by itself? If so, how should it do so?
- Should experts be involved in the UPR? If so, how many experts should be involved and how should they be chosen?
- What parts of the UPR process should be delegated to experts?
- If different experts or panels of Council members undertake the UPR, how can consistency and equal treatment of States be ensured?

WHICH HUMAN RIGHTS OBLIGATIONS AND COMMITMENTS WILL BE REVIEWED?

Resolution 60/251 refers to a review of the “fulfilment by each State of its

⁷ Canada, *Human Rights Peer Review Mechanism – Non-paper version # 2*, available at: www.eyeontheun.org/assets/attachments/documents/hr_peer_review_mechanism_canada.pdf.

⁸ Human Rights Watch, *Human Rights Council: No More Business as Usual*, p. 4, available at: <http://hrw.org/backgrounder/un/uno506/uno506.pdf>.

⁹ See chapter on the Sub-Commission and system of expert advice for further discussion on a possible expert body.

human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”¹⁰. Different States have different human rights obligations and commitments based on the human rights treaties and other instruments that they have ratified. **The key question therefore is what standards will be used for the review and if these will vary with the State in question?** If different standards are used, some are concerned that this could defy the key purpose of consistency in the UPR¹¹. However, there would be legal issues about assessing a State’s compliance with treaties that it has not signed. Options for standards that could be applied are: human rights treaties ratified by the State; the *Charter of the United Nations*; the *Universal Declaration of Human Rights*, and other standards that have reached the status of customary international law¹² or *jus cogens*¹³; resolutions adopted by the Commission; and other commitments undertaken by the State through voluntary declarations and pledges¹⁴.

Key questions include:

- Which human rights standards should be used in the review process?
- How can concerns about consistency and common standards be addressed?
- How should potential overlaps with treaty bodies be addressed? How can the UPR strengthen and complement the work of treaty bodies?

SCHEDULING THE UPR

The Council is required to review all 191 member States of the UN at periodic intervals. For the UPR to be timely and relevant, the Council will have to ensure that these periodic intervals are not too widely spaced apart. However, **as reviewing 191 States will create immense pressure on the Council’s workload it will have to develop methods to balance a substantive review with managing its schedule and avoiding backlogs in the system.** Delegating at least the initial phases of the UPR to experts may help the Council in this balancing act.

¹⁰ Para 5 (e).

¹¹ International Council on Human Rights Policy, *UN Human Rights Reform*, (Flowerhill Exchange Note 5), p. 2, available at: www.ichrp.org/paper_files/130_w_01.doc.

¹² Customary international law is international law that has arisen from custom or usage and need not be codified or written down. Certain standards contained in legal instruments can also reach the status of customary international law if they create a general and consistent practice of States, arising out of a sense of legal obligation, even if particular States have not signed the instrument or standard.

¹³ *Jus cogens* refers to a fundamental norm of international law, which applies to all States and cannot be changed by a treaty.

¹⁴ Canada, *Human Rights Peer Review Mechanism – Non-paper version # 2*, available at: www.eyeontheun.org/assets/attachments/documents/hr_peer_review_mechanism_canada.pdf.

Canada has calculated that if the Council spends three hours in an interactive dialogue with each State under review, six weeks of time will be required to review 60 States per year¹⁵ and it will therefore take a little over three years to review all States. This calculation is based on time spent on interactive dialogue and does not factor in additional time that the Council may take to discuss the findings and recommendations emerging from the interactive dialogue. Human Rights Watch (HRW) has recommended that “if the UPR is to be meaningful, the HRC should devote at least one half-day session per country, and if it is to be timely, states should come up for UPR at least once every five years. This means that the HRC would have to review an average of almost forty countries per year, the equivalent of twenty working days. The UPR should be carried out in sessions additional to the minimum ten weeks called for in the G.A. resolution”¹⁶.

The Council will have to determine whether the same amount of time is spent on each State irrespective of its size and human rights situation or if it needs to develop criteria for allocation of time. The Council will also have to determine the order in which countries are reviewed – should this be alphabetical, starting with the members of the Council, or based on other criteria? It would be useful for the Council to consider how it could undertake emergency or fast track reviews in cases of human rights emergencies within States (discussed in more detail below).

Resolution 60/251 provides that the members of the Council shall be reviewed under the UPR mechanism during their term of membership¹⁷. The Council will therefore have to fit members into the schedule taking account of the staggered terms of membership. This will be a particular challenge for the 14 members that have drawn one-year terms in the first election and whose term limits will therefore expire before the end of the one-year period given to the Council to develop the modalities of the UPR process. The Council could test the system it develops with these countries and revise modalities after seeing how they work with these test cases.

Key questions include:

- How much time should the Council allocate to reviewing each State? Should it spend the same time on all States or should it develop criteria for allocation of priorities and time to different States based on the human rights situation and other factors?
- In what order should States be reviewed?
- At what intervals should States be reviewed?
- Should the UPR be carried out in additional sessions instead of during the Council’s three sessions totalling a minimum of ten weeks a year, identified by the General Assembly?

¹⁵ Ibid., p. 4.

¹⁶ Human Rights Watch, *Human Rights Council: No More Business as Usual*, (n. 8 above), p. 3.

¹⁷ Para 9.

- How should the Council review members who have drawn one-year terms in the first election?

WHAT WILL THE UPR PROCESS CONSIST OF?

The UPR could be a short or long process, conducted entirely within the session or through inter-sessional processes. It could consist of a substantive review process ending in an interactive dialogue with the State or consist of just the interactive dialogue with the State. **For the review to be substantive and meaningful, the Council will have to devote enough time to putting together and reviewing the information on each State, identifying key questions and issues for the interactive dialogue with the State, and producing clear and focused recommendations.** As the Council will have other tasks that it needs to balance along with the UPR, delegating many of the tasks of the UPR to independent experts and undertaking this work outside the regular sessions of the Council would be preferable.

In a draft concept and options paper on ‘peer review’, Canada studied two possible models and compared the advantages and disadvantages of each¹⁸. According to Canada, **the UPR could be an extensive, rigorous undertaking with emphasis on quantity and quality of information and assessment. At the other end of the spectrum, it could be a light process with emphasis on an open and frequent discussion among peers.**

The first model called the ‘comprehensive approach’, would borrow some of the features of peer reviews conducted by the Organisation for Economic Cooperation and Development (OECD)¹⁹, the African Peer Review Mechanism (APRM)²⁰, and the World Trade Organisation (WTO)²¹. The comprehensive approach could, according to Canada, include a choice or combination of 1) an expert group or panel of member States to conduct research and consider available information, and/or field trips and consultations with stakeholders in the country under review; 2) a questionnaire to be answered by the State under review; 3) a substantive and rigorous report, containing information, findings, and recommendations; 4) a formal open hearing, with a presentation or comments from the expert panel, the State under review, and other States; and 5) conclusions and recommendations. The advantages identified for this model were that the expert report would be an extensive, objective,

¹⁸ Canada, *Human Rights Peer Review: Draft Concept and Options Paper*, available at: www.eyeontheun.org/assets/attachments/documents/human_rights_peer_review_canada.pdf.

¹⁹ For further information see F. Pagani, *Peer Review: A Tool for Co-Operation and Change*, (OECD, 2002), available at: www.oecdobserver.org/news/fullstory.php/aid/881/peer-review.html.

²⁰ For further information on the APRM, see www.au2002.gov.za/docs/summit_council/aprm.htm.

²¹ For further information on the WTO’s trade policy review, see www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

and authoritative assessment of a country's human rights performance and the conclusions of the peer review would serve as authoritative guidance for follow-up and implementation by the State under review. The disadvantages were that the process would be labour-intensive and costly; the number of States subject to review every year would be rather limited and every State would come up for review at long intervals, possibly every five to eight years; and there was potential for significant overlap with the work of treaty bodies and other mechanisms. There was also a risk that the process would be so cumbersome that it would become difficult to launch and implement, with little results compared to the investment²².

The second, lighter model, which Canada called the 'interactive dialogue model' would consist of a three-hour session of interactive dialogue where the State under review would make a presentation on the state of human rights within the country, achievements, difficulties, challenges and plans, followed by comments and questions by other States and responses by the State under review. Before the interactive dialogue, OHCHR would provide information from the treaty bodies and the special procedures, and short summaries of this information; the State under review would publish a statement; and other States and civil society organisations could issue statements, submissions, or reports of their own. At the conclusion of the process, a rapporteur of the session would publish a summary of the dialogue and the State under review would make a voluntary statement, three to six months after the dialogue, outlining its reactions, plans, and commitments in light of the peer review. The advantages identified for this model were that it would be simple and light to launch, and that every State could come under review within short intervals, every two to three years. While there would be no authoritative or extensive reports or findings, the open debate would allow information from various sources to circulate freely in the international and possibly national arenas. The process would provide incentives, through peer advice and public opinion, for States to improve their human rights performance. The disadvantages and risk were that the process would not be as rigorous or objective as the review by an expert group and that the dialogue may be influenced by considerations other than the actual human rights situation of the country under review²³. In a second non-paper, Canada seemed to prefer the lighter, interactive dialogue approach, and set out the modalities of the process in line with this model²⁴. Human Rights Watch has suggested various steps for the UPR²⁵ that would be more in line with a comprehensive and substantive review. Essentially, the Council will have to decide whether the UPR will be a lighter and superficial process or a more substantive and comprehensive one. **The lighter process may be easier to administer but would raise fun-**

22 Canada, *Human Rights Peer Review: Draft Concept and Options Paper*, (n. 18 above).

23 Ibid.

24 Canada, *Human Rights Peer Review Mechanism – Non-paper version # 2*, available at: www.eyeontheun.org/assets/attachments/documents/hr_peer_review_mechanism_canada.pdf.

25 HRW, *Human Rights Council: No More Business as Usual*, (n. 8 above), pp. 3-4.

damental questions about the value added by the mechanism and whether such a process would allow for a genuine review of the State's obligations and commitments.

Key questions include:

- Should the UPR provide for a substantive and comprehensive review of States or a lighter review?
- What phases or steps should the UPR process consist of?
- Should there be a separate phase for assembling and reviewing information prior to the Council's meeting?
- Should a list of questions be sent to the State under review?
- How long should the entire process last?
- How can concerns about overlaps with treaty bodies be resolved?
- How can concerns about the potential human resources and financial costs be addressed? How can the Council ensure that these resources are not taken away from other human rights activities and programs?
- What should be the role of OHCHR in the UPR process?
- What should the Council do if a State refuses to cooperate with or participate in the UPR?

WHAT KIND OF INFORMATION WILL BE CONSIDERED?

Resolution 60/251 requires the Council to consider 'objective and reliable' information on the fulfilment by each State of its human rights obligations and commitments. This requirement would not be met if the UPR was undertaken solely on the basis of information provided by the State about itself. The Council should consider a variety of other information including: reports submitted by States to treaty bodies on the fulfilment of their human rights obligations under treaties they have ratified; concluding observations and recommendations made by treaty bodies; communications sent by special procedures as well as reports on country missions, if any, to the State; reports prepared by any other UN agency on the human rights situation in the State; and reports and information from NHRIs and NGOs. **The Council will have to decide whether it will work on available information or if it will give the opportunity to NGOs, NHRIs, OHCHR field presences, and UN specialised agencies to submit information specifically for the purposes of the UPR.** The latter option would allow for NGOs and agencies to submit targeted information on the issues that the Council will be focusing on and will also allow them to submit information that may not be available within existing publications.

The Council could also request selected special procedure mandates²⁶ to carry out missions to the State or designate another independent expert²⁷ to do so in advance of the UPR to ensure that there is sufficient detailed, objective, and reliable information on each State that is reviewed, collected by the main monitoring mechanisms of the Council itself.

It may be useful for the Council to develop guidelines for the submission of information, which could focus on the extent to which the State has followed up and implemented recommendations made by treaty bodies, special procedures, and the Commission as well as other data that would be relevant to determine the fulfilment by each State of its human rights obligations and commitments. The Council may also have to consider whether it will consider only documents or whether it would be possible for NGOs and agencies to submit audio testimonies, videos, and other kinds of information.

The Council will have to decide what kind of information the State itself will have to submit and in what detail. States already submit reports to treaty bodies in respect of the treaties they have ratified and have highlighted that this reporting burden is quite considerable. They may be reluctant to take on another detailed reporting requirement. The Council may therefore wish to consider whether States will have to submit a detailed report along the lines of what they submit to treaty bodies or whether they could instead be asked to submit information on targeted areas such as follow-up and implementation of recommendations made by various bodies, and factors limiting their ability to implement their obligations. In addition or alternatively, they could be asked to reply to a list of questions and issues identified by the Council or the expert(s) to whom this task is delegated. As some States have only ratified a limited number of treaties and/or had few or no visits from special procedures, there may be very little information available on the human rights situation in the State. NGOs located in the State and others who are monitoring the human rights situation will have a particularly important role in this regard. The Council may also need to develop guidelines for the collection of additional information in these kinds of situations.

Key questions include:

- What kinds of information should the Council consider to assess the fulfilment by each State of its human rights obligations and commitments?
- What are the main sources of information that the Council should consider for each State?

²⁶ Two or three special procedure mandate holders could be requested to carry out the mission to the State. These mandates could be chosen on the basis of: issues of particular concern in the State; balance between economic, social and cultural rights and civil and political rights monitoring; and the total number of missions planned for each mandate holder. The Council or special procedures themselves could choose which mandates visit each State. Where a country rapporteur exists for the State in question, he/she could be automatically selected to be part of the group.

²⁷ See the recommendation made by HRW in Human Rights Watch, *Human Rights Council: No More Business as Usual*, (n. 8 above), p. 4.

- Should the Council work with available information or give NGOs, NHRIs, and UN agencies and offices the opportunity to submit information specifically for the UPR?
- What kind of information should the State be asked to submit?
- Should treaty bodies submit information to the Council on priority areas of concern and follow-up, based on their most recent examination of the State?
- Should the UPR be preceded by missions to the State by special procedure mandates or another independent expert designated by the Council? How should these special procedure mandates or other independent experts be selected?
- Should the Council develop guidelines for the submission of information? What should these guidelines focus on?
- How can the Council ensure that the information it receives is objective and reliable?
- Should the Council also receive audio or video documentation in addition to paper documents?

INTERACTIVE DIALOGUE WITH THE STATE

The interactive dialogue with the State could consist of presentations by the State, expert(s) who have reviewed the information on the State, NHRIs, and NGOs, as well as questions by Council members and other States. If the Council intends to allocate half a day to the interactive dialogue, it will have to consider how this time can be best used. **If the dialogue is to be truly interactive, the Council may have to limit the number of presentations that could be made and the time for various speakers, and provide more time for questions and replies.** NHRIs and NGOs in particular would have to consider the trade-offs between using the dialogue as a forum to raise issues or using it to interact with and question the State. The latter option would limit the number of and time allocated for presentations, and may raise difficult questions about which NGOs could ask questions or how these questions would be selected.

Key questions include:

- How should the interactive dialogue be organised and what should be the format of the dialogue to make it more interactive and cooperative?
- How much time should be spent on the interactive dialogue?
- Who should be able to make presentations, what should the presentations focus on, and how long should they be?
- What should the State's presentation or statement focus on?
- How should time be divided between presentations and questions?
- Should special procedures be able to ask questions?

- Should NHRIs and NGOs be able to ask questions?
- How should the NGOs that can ask questions and the questions themselves be selected?
- Should there be a balance between questions from national, regional, and international NGOs?
- Should a fund be created or other initiatives set up to help smaller or less resourced NGOs participate in the Council's work?

OUTCOMES AND FOLLOW-UP

The outcomes of the UPR could be a detailed outcome document, which could contain findings of the experts or the Council and/or conclusions and recommendations and/or a decision/resolution. If the lighter model was adopted, the outcomes could be a summary of the dialogue and/or voluntary commitments or pledges by the State under review. **In addition to recommendations about steps to be taken by the State under review, the Council could recommend measures to build the capacity of the State to implement its human rights obligations, including through technical assistance programs.** The Council could also appoint a country rapporteur to monitor the situation in the State under review; ask for the establishment of an OHCHR office or presence in the country to monitor the situation and/or work with the State; and/or recommend action by other UN bodies or agencies such as the Security Council, the General Assembly, or UN specialised agencies.

As one of the weaknesses of the Commission was a lack of adequate follow-up to recommendations and resolutions, the Council may also wish to set up a system of follow-up to the UPR process. To achieve this, the recommendations and outcomes of the UPR should be framed in a clear manner, making it possible for the State and other actors to implement these recommendations. The Council could indicate areas of priority within its recommendations, i.e. which ones require immediate implementation and which are to be implemented in the medium or longer term. The Council could also institute a system of asking the State to report back on the extent to which it has been able to implement these recommendations and the obstacles, if any, faced by the State in implementation. Other stakeholders such as NHRIs, NGOs, OHCHR, and specialised agencies could also report back on the follow-up actions of the State. This information could be considered within the UPR schedule or within a broader agenda Item on follow-up if the Council creates such an Item. The failure of the State to take adequate follow-up action could lead to other action by the Council depending on the reasons behind this lack of follow-up, such as increased technical assistance, strengthening of monitoring, and/or recommendations for action by the General Assembly or Security Council.

Key questions include:

- What should be the outcomes of the UPR process?
- How should these outcomes be presented and communicated?
- What kinds of recommendations and actions could the Council suggest?
- What kinds of measures and steps could the Council take to build the capacity of the State?
- What kinds of technical assistance programs should the Council recommend to build the capacity of the State?
- Should the Council be able to adopt resolutions or other kinds of formal decisions as a result of the UPR?
- Should the Council be able to set up a country rapporteur or an OHCHR office or presence in the country if required? What should be the criteria for this?
- How should the Council follow up on the UPR process?
- Should there be a system for regular follow-up on recommendations and conclusions?
- How should States report back to the Council on follow-up and at what intervals?
- Should NGOs, NHRIs, and OHCHR be able to submit information on follow-up to the Council?
- What actions should the Council take if the State fails to follow up on its recommendations?

HOW WILL EMERGENCY SITUATIONS IN A COUNTRY BE DEALT WITH?

Resolution 60/251 provides that the Council should “contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies”²⁸. **The Council will have to develop processes by which it can address emergency situations in a country in a timely manner.** The Council could consider prioritising States in which early warning signs of human rights emergencies are prevalent. Especially when special procedures, treaty bodies, OHCHR, NHRIs, or NGOs draw the Council’s attention to these signs, it could carry out an emergency or fast track review of the State and make recommendations for essential actions by the State, strengthened monitoring, and involvement or action by other international bodies/States. This procedure should not in any way exclude the ability

²⁸ Para 5 (f).

of the Council to consider emergency situations as part of its regular proceedings or in emergency sessions, and the Council may wish to develop broader procedures and guidelines to deal with human rights emergencies outside the UPR process.

Key questions include:

- How should the Council deal with human rights emergencies in a State?
- Should the Council make provision for an emergency or fast track review within the UPR mechanism? What should be the criteria and process for this?
- Should NGOs, NHRIs, OHCHR, treaty bodies and/or special procedures be able to request an emergency or fast track review of a State?
- What action should the Council take when it believes that there are signs of a deteriorating human rights situation in a country or a political crisis that may lead to human rights emergencies?
- Should the Council deal with human rights emergencies outside the UPR process? What kinds of procedures and criteria should it develop to do so?

WILL COUNTRIES BE EXAMINED OUTSIDE THE UPR PROCESS?

Some States may argue that with the setting up of the UPR mechanisms, countries should no longer be examined outside the process. Some may also argue that country-specific resolutions should not be adopted outside this process or at all. The UPR is only one mechanism to examine States, and is at the moment an unknown and untested mechanism. The Council has a wide range of responsibilities²⁹ in relation to monitoring the situation of human rights and implementation, which cannot be exclusively met in the UPR process. It is essential that the Council retain the ability to address country situations outside the UPR process as required by the nature of the human rights situation in the country, its urgency, and the extent to which appropriate action can be taken within the UPR framework.

Key questions include:

- Should the Council be able to examine country situations outside the UPR process?
- When should the Council examine country situations outside the UPR process? Should it develop criteria and procedures for doing so?

²⁹ See paras 3 and 5 (a), (c), (e) and (f) of General Assembly *Resolution 60/251*.

- Should the Council adopt resolutions or other kinds of decisions on countries, outside the UPR process?

PROCESS OF DEVELOPING MODALITIES AND ALLOCATION OF TIME

The process through which the Council will develop the modalities and time allocation for the UPR is still undefined. It seems likely that the Council will set up an open-ended working group or some other form of consultations by the president to do so, but this and other issues may only be decided once the Council meets in June. Essential elements for this process include that it be carried out in an open, transparent, and public manner and with the participation of all stakeholders, such as other States, special procedures, OHCHR, NGOs, and NHRIs. It may also be useful for treaty bodies to provide input into this process on the ways in which the UPR could complement and strengthen their work and avoid duplication.

7

PARTICIPATION OF NGOs AND NHRIS

NON-GOVERNMENTAL ORGANISATIONS (NGOs)

How did NGOs participate in the work of the Commission?

NGOs have been active participants in all aspects of the work of the Commission on Human Rights (the Commission). The Commission's practices evolved over time to allow NGOs greater rights of participation than at any other United Nations (UN) body¹. While some States have tried to restrict NGO participation or attack it on various grounds², most States and the Commission as a body have acknowledged the role that NGOs have played in furthering the work of the Commission³.

NGOs accredited by the Economic and Social Council (ECOSOC) could attend all public sessions of the Commission, make oral statements under different agenda items, and submit written statements, which were circulated to members of the Commission and made available to all participants along with other UN documents. A practice also evolved at the Commission enabled NGOs to attend and participate in negotiations on resolutions, unless the negotiations were specifically designated as being open only to co-sponsors of the resolution or some other restricted group⁴. NGOs could organise

- 1 See the UN Secretary-General's Report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, (21 March 2005), p. 45, in which he states "The Commission's close engagement with hundreds of civil society organizations provides an opportunity for working with civil society that does not exist elsewhere".
- 2 See International Service for Human Rights (ISHR), *Report on the 61st Session of the Commission on Human Rights: Item 3*, available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR61/Items%20-%20Analytical%20Reports/Report-item3.pdf.
- 3 See also abstracts from pledges made by various States that stood for elections for membership of the Council on the subject of NGO participation at the Council, available at: www.wilpf.int.ch/human-rights/2006/ngoparticipation.htm.
- 4 P. Prove, *Re-commissioning the Commission on Human Rights: UN Reform and UN Human Rights Architecture*, p. 12, available at www.lutheranworld.org/What_We_Do/OIAHR/Issues_Events/UN_Reform-Human_Rights.pdf.

‘parallel events’⁵ to discuss human rights issues and situations. These parallel events served as forums to present and discuss information, highlight key concerns, and network with other organisations. NGOs also had a great amount of informal interaction with government delegations whom they could approach in the main plenary room or meet outside the plenary.

NGO participation at the Commission has been essential to its work. NGOs were able to use their expertise on thematic areas and countries to further the work of the Commission. They also communicated the voices of victims and their experiences. **NGO interventions have highlighted violations of human rights and issues of implementation; their lobbying and advocacy work has resulted in important resolutions, studies, and the creation of various special procedure mandates.** NGOs could also participate in working groups created by the Commission to develop international human rights standards or discuss particular thematic issues. NGOs have played a prominent role in the development of international human rights standards by highlighting the need for such standards, providing input into the content, and lobbying States to support these standards. All NGOs, not just those with ECOSOC accreditation, can submit information to the special procedures of the Commission. Diverse NGOs across the world have provided evidence of human rights violations to special procedures and supported their work on country and thematic issues.

How are NGOs accredited by ECOSOC?

Article 71 of the *Charter of the United Nations* sets out the legal basis for the participation of NGOs at the United Nations and empowers ECOSOC to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence”. ECOSOC has elaborated on the principles to be applied to these ‘consultative arrangements’ and the rights of participation of NGOs that are granted consultative status in *Resolution 1996/31*.

Resolution 1996/31 creates three categories for NGOs with different rights of participation for each category. These categories are based on the type of NGO, its membership, and the extent to which their activities are related to the work of ECOSOC (referred to as ‘the Council’ in the text of the Resolution):

1) General consultative status – NGOs that are “concerned with most of the activities of the Council and its subsidiary bodies ... and are closely involved with the economic and social life of the peoples of the areas they represent and whose membership, which should be considerable, is broadly representative of major segments of society in a large number of countries

⁵ Events such as seminars, talks, panel discussions, and briefings were organised by NGOs and occasionally States during the breaks between the morning and afternoon plenary sessions and as they were held in parallel to the official meetings, were described as parallel events.

in different regions of the world”⁶ are eligible for ‘general consultative status’ with ECOSOC. There were 136 NGOs with general consultative status in 2005⁷.

2) Special consultative status – NGOs that “have a special competence in, and are concerned specifically with, only a few of the fields of activity covered by the Council and its subsidiary bodies, and that are known within the fields for which they have or seek consultative status”⁸ are eligible for ‘special consultative status’ with ECOSOC. There were 1,639 NGOs with special consultative status in 2005.

3) NGOs on the Roster – NGOs that do not fit the requirements for general or special consultative status but which ECOSOC or the UN Secretary-General“⁹ considers can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies” can be included in a list, known as ‘the Roster’. They are known as ‘NGOs on the Roster’. NGOs in this category generally have a very specialised or technical focus in their work and include NGOs that have a formal status with UN specialised agencies, such as the World Health Organization (WHO). There were 944 NGOs on the Roster in 2005.

NGOs with general or special consultative status can designate authorised representatives to attend public meetings of ECOSOC and its subsidiary bodies, while those on the Roster can designate representatives to attend meetings related to their area of work¹⁰. NGOs with general or special consultative status can make oral statements at meetings¹¹ and NGOs in all three categories can submit written statements¹². In practice at the Commission though, little distinction has been made between NGOs in the three categories in terms of speaking rights¹³. NGOs in general consultative status can also propose Items for the drafting of provisional agendas of ECOSOC and its subsidiaries¹⁴ though this provision has been rarely used¹⁵.

The Resolution also sets out additional criteria for eligibility¹⁶. **NGOs wishing to be accredited in any of the three categories have to submit applications to the ECOSOC Committee on NGOs¹⁷**. The Committee, made up of 19 State representatives¹⁸, reviews applications annually and forwards

6 Para 22.

7 www.un.org/esa/coordination/ngo/slides/ngochart_01.pdf.

8 Para 23.

9 Para 24.

10 Paras 29 and 35.

11 Paras 32 and 38.

12 Paras 30 and 37. Subsidiary bodies of ECOSOC have to invite NGOs on the Roster to submit written statements.

13 P. Prove, *Re-commissioning the Commission on Human Rights*, (n. 4 above), p. 11.

14 Paras 28 and 34, ECOSOC *Resolution 1996/31*.

15 See the chapter on agenda and rules of procedure for further details.

16 Paras 8-13.

17 Paras 60-63.

18 The current membership includes representatives from Cameroon, Chile, China, Colombia, Côte d'Ivoire, Cuba, France, Germany, India, Iran, Pakistan, Peru, - footnote carries over to the next page -

a list of NGOs recommended for accreditation for final approval to ECOSOC. The consultative status of NGOs can be withdrawn or suspended if the organisation abuses its status, receives funds from criminal activities, or does not make any positive or effective contribution to the work of the UN within any three-year period¹⁹. NGOs also have to submit ‘quadrennial reports’, a brief report submitted every four years, on their activities and contribution to the work of the UN. **The accreditation process has been criticised because of the ability of governments to block and grant applications for political reasons, and because it is costly and resource intensive²⁰.**

What rules will govern the participation of NGOs at the Council?

The General Assembly Resolution that created the Human Rights Council (the Council), provides that “the participation of and consultation with observers ... including national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities”²¹. NGOs under this provision are therefore entitled to the same rights of participation that they had at the Commission and these practices and arrangements are transferred to the Council. However, **the key issues in this regard are what aspects of NGO participation qualify as ‘arrangements’ and ‘practices observed by the Commission’ and how these will be determined?** Some of the rules and arrangements regarding NGO participation are clearly recorded in ECOSOC *Resolution 1996/31* and in the decisions taken by the Commission concerning its working methods, e.g. rights to make oral and written statements. Others such as NGO attendance and participation at negotiations on resolutions are ‘practices’ that were recognised by government delegates and were widely observed though not formally recorded in a decision or document.

As the rights of participation of NGOs described above are all either based on formal ‘arrangements’ or ‘practices’ that have been recognised by government delegates and observed for some time, they should all be transferred to the Council. **It is essential that any future attempts to codify these**

Romania, the Russian Federation, Senegal, the Sudan, Turkey, the USA, and Zimbabwe. See www.un.org/esa/coordination/ngo/.

¹⁹ Paras 55–59.

²⁰ See *Report of the Panel of Eminent Persons on United Nations-Civil Society Relations*, A/58/817, (11 June 2004), pp. 52–53. An example of the blocking of application for political or other reasons is the refusal of the ECOSOC NGO committee to grant ECOSOC accreditation to at least four groups working on Lesbian, Gay, Bisexual, and Transgender (LGBT) issues in 2006 alone including one rejection during the May 2006 session, see www.un.org/News/Press/docs/2006/ecosoc6202.doc.htm.

²¹ Para 11, General Assembly *Resolution 60/251*.

practices or rights of participation comprehensively reflect all the arrangements and practices that were observed by the Commission in relation to NGOs and not be restricted to those that were formally recorded in Commission decisions or documents. The president of the Council and the Bureau will also have to ensure that NGOs can participate at the Council, from its first session onwards, at least at the same level that they did at the Commission and in any activities that may be undertaken between sessions, such as review of rules, through working groups, etc.

What are some of the key issues and avenues for NGO participation?

Review of rules of procedure and mechanisms

The Council can review and revise the rules for the participation of NGOs just as it can change other rules of procedure. It will not be possible for the Council to do this before the first session but it could do so in the future. Rules for NGO participation may be reviewed along with other rules of procedure and working methods of the Council, possibly through the creation of an open-ended working group to review these rules or some form of consultation organised by the Chairperson²². Any modifications that are made to rules for NGO participation should 'ensure the most effective contribution' of NGOs as stipulated by the General Assembly Resolution. **The rules should also enhance the participation of NGOs and build on the practices of the Commission as a minimum baseline in an innovative manner, rather than reducing or limiting the participation of NGOs in any way.** NGOs should also have the opportunity to participate in any review of rules or practices, propose ways in which their participation could be made more effective, and comment on any proposed modifications.

The Council will also undertake a review of the special procedures and other mechanisms of the Commission, such as the Sub-Commission and the 1503 procedure in its first year of functioning²³. The outcomes of these processes will shape the work of the Council for many years and it will therefore be essential for NGOs, as key stakeholders in the work of the Council, to participate in these processes. The lack of information on the way the first session of the Council in June 2006 will be organised could already pose a problem for NGO participation and input as NGOs, especially those outside Geneva, may not be able to attend the session. The Council will therefore have to broadly publicise any decisions that it takes on the way that the review

²² The chapter on agenda and rules of procedure discusses these issues in greater detail.

²³ Discussed in greater detail in the chapters on special procedures, sub-commission, and complaint procedure.

processes will be carried out. The Council will also have to make provision for NGOs that are unable to attend meetings, in which the reviews are undertaken, to provide input into the processes.

Key questions include:

- What were the positive features of the Commission's practices on NGO participation? How should these be strengthened by the Council?
- What were the limitations on NGO participation at the Commission? How can these be corrected by the Council?
- How can NGO participation be made more effective?
- If there is a review of the rules of procedure or working methods providing for NGO participation, what should be the process and criteria for the review? How should NGOs be involved in the process?
- How should any decisions taken on the review processes be publicised? What are some of the ways through which NGOs that are unable to attend the sessions can provide input on the review processes?

Statements or diverse platforms for engagement?

NGOs could submit information to the Commission by making short oral statements²⁴ or submitting written statements. While the Commission's agenda was broad enough to allow NGOs to raise a wide variety of issues, the large volume of NGO statements compressed into a short time²⁵ meant that there was no guarantee that the statements were adequately listened to, discussed, or acted upon. The formal way in which the Commission's sessions were organised, with a succession of individual statements and limited replies from States²⁶, also left little time or opportunity for a genuine discussion between States and NGOs or between special procedures, States, and NGOs. Though some NGO representatives consider the three-minute statements to be of limited value and stress the need to develop more innovative and meaningful forms of intervention and interaction, others have stated that even these limited statements provide them with a useful platform to communicate information about violations in their countries in an international public forum.

NGOs themselves and the Council will have to reflect on the different

24 NGOs were allowed to make six statements totally of three minutes each but could get additional time if they were making statements jointly with other NGOs. See www.ohchr.org/english/bodies/chr/docs/61chr/speakingtime61.doc.

25 NGOs made 476 individual statements and 61 joint statements over a six-week period at the 61st session of the Commission. *Statistics relating to the 61st session of the Commission on Human Rights*, E/CN.4/2006/8, p. 5.

26 There were a total of 1,427 statements made at the 61st session of the Commission, totalling 83 hours 45 minutes of speaking time. *Ibid.*

ways in which NGOs and the Council can interact and the goals of each type of interaction. The notion, inherited from the Commission, that statements are the primary vehicle for NGO participation needs to be re-examined. **It will also be a challenge for the Council to achieve a balance between creating space for more substantive and meaningful interaction and serving as a platform for diverse NGOs to raise issues of concern, which may cover a variety of subjects.** The Council may need to work out a range of types of interaction and forms of intervention that NGOs could make, rather than a standardised formula for all situations, and organise its sessions in a way that allows for different kinds of NGO input. For instance, NGOs could explore whether they can organise a pre-session forum with roundtables and opportunities for statements on a wide variety of issues that they want the Council to take up on its agenda. This could be complemented by opportunities for more targeted, substantive contributions such as NGOs could suggest questions for the interactive dialogue with special procedures, or give input into policy discussions or debates on action on a particular situation. NGOs were able to attend and participate in negotiations on resolutions at the Commission. It is essential that this be maintained for the Council and extended to other decision-making processes that may be adopted.

NGOs will have to reflect on ways in which their engagement with the Council can be more strategic. They may also have to identify aspects of NGO culture and interaction with the Commission that they wish to change if they hope to change the institutional culture of the new Council and the behaviour of States. For instance, NGOs cannot effectively ask for doing away with the regional group structure if they continue to reinforce it by interacting with regional groups rather than individual States for their advocacy activities.

Key issues include:

- What are the different ways in which NGOs could interact with the Council?
- How can NGO engagement with the Council be more strategic?
- What aspects of NGO engagement and culture also need to change if NGOs hope to change the way the Council and States function?
- Should the Council develop a range of interventions that NGOs could make in addition to oral statements? If so, what kinds of intervention should NGOs be able to make?
- How could the Council strike a balance between creating space for more substantive and meaningful interaction and serving as a platform for a large number of interventions on diverse issues?
- How could NGOs participate in policy discussions?
- Should NGOs be able to participate in the interactive dialogue with special procedures²⁷? What should be the format of such a dialogue and how should the NGOs that can ask questions be selected?

²⁷ See chapter on special procedures for more information on the interactive dialogue as it currently exists.

- Should there be a pre- or post-sessional forum where NGO can raise a wide variety of issues that they want the Council to address/include on its agenda?
- Should there be greater voluntary coordination between NGOs on statements and other interventions? How should this kind of coordination take place?
- How can the written statements submitted by NGOs be put to better use? For instance, should there be compilations prepared of the key points made in submissions categorised by countries or thematic issues, and should they be circulated sufficiently in advance of the preparation of the agenda/any discussions?
- How could NGOs be involved in decision-making processes?

New avenues of participation

The new Universal Periodic Review²⁸ process (UPR) could potentially serve as a very important mechanism for NGOs to submit information on countries, communicate voices of victims, highlight violations, and ask for concrete action and follow-up on recommendations of special procedures, treaty bodies, prior Commission resolutions, and the recommendations of the UPR itself. NGOs will therefore have to lobby the Council to create an effective UPR mechanism and also to ensure that NGOs are able to participate effectively in the process of the UPR itself.

The Council will hold a minimum of three sessions of at least ten weeks in total, spread across the year²⁹. The longer meeting time and the more frequent meetings could create greater opportunities for monitoring country situations at regular intervals throughout a year and follow up on the Council's recommendations on thematic issues and country situations. NGOs could therefore lobby for the creation of better mechanisms for follow-up, possibly through the creation of a separate agenda Item on follow-up which the Council discusses in every session³⁰, or by ensuring that a particular issue or situation is also scheduled to be taken up at a subsequent session. They could also contribute information on the level of implementation of recommendations and the evolution of a human rights situation on a more regular basis to the Council. The increased number of sessions could however have financial and resource implications for smaller NGOs, discussed under the section on broadening participation below.

²⁸ See the chapter on universal periodic review for further details and information on this proposed mechanism.

²⁹ The Commission held a single session of six weeks every year.

³⁰ See chapter on agenda and rules of procedure for more discussion on ways in which the agenda could be organised.

Key question include:

- What role should NGOs play in the UPR? How should they be involved in the development of modalities?
- How could the NGOs use the increased number of sessions to ensure better follow-up and monitoring of country situations and implementation of recommendations?
- Are there other new avenues of participation for NGOs?

Broadening participation

It was difficult for many NGOs from developing countries or even for smaller NGOs from developed countries to participate in the Commission's sessions because of the complicated process of accreditation, costs of travel and stay in Geneva, the complicated and opaque working methods of the Commission and difficulty of judging how the Commission could be useful to their work. International NGOs have traditionally been in a much better position to participate in and use the different opportunities presented by the Commission³¹ because of their knowledge and familiarity with the system but also because many of them have an office in Geneva. The increased number of sessions of the Council, while creating new avenues for follow-up, may also put a greater strain on the financial and human resources of NGOs outside Geneva who wish to participate in the work of the Council.

The establishment of the new Council should be used to broaden participation of NGOs, especially NGOs that in the past had difficulties accessing the system. Important issues that will have to be addressed to accomplish this would be, among others: an agenda and program of work which enables NGOs to plan their participation effectively; the creation of a fund or other initiatives to help smaller NGOs participate in the Council's work; more transparent working methods that allow NGOs to better use the system; and training on using the Council. The Council could also explore the use of technological innovations that would enable more NGOs to follow the Council's proceedings or contribute to its work, such as web casting its sessions; doing radio broadcasts; allowing NGOs to participate in discussions through regional or national tele-conferences; and allowing NGOs to submit video or audio testimonies, etc.

³¹ For instance, ISHR analysed NGO organisation of parallel events as one important facet of their participation at the 61st session of the Commission. ISHR's analysis indicated that only a small selection of NGOs (37%, 91 out of the 261 NGOs accredited at the Commission) hosted parallel events. Eight out of the ten NGOs that organised the most events had Geneva offices. All the NGOs that organised parallel events also shared a number of common characteristics which included membership of Geneva-based NGO networks; regular liaison with OHCHR and the secretariat of the Commission; an international focus to their work; and familiarity with the UN system and the operation of the Commission. See ISHR, *ISHR's Analysis of Parallel Events at the 61st Commission on Human Rights*, available at: www.ishr.ch/hrm/chr62/NGO/CHR61Analysis.pdf.

Key questions include:

- How can the participation of NGOs from developing countries or smaller NGOs from developed countries be increased?
- What concrete measures could the Council adopt to facilitate the participation of a wider group of NGOs and to make this participation more effective?
- What technological innovations could the Council use to make its work more accessible and to facilitate participation of NGOs?

Accreditation

As the General Assembly Resolution specifically refers to ECOSOC *Resolution 1996/31*, accreditation arrangements under this procedure will be applicable to the Council, unless and until it decides to set up another accreditation system or modify the current system. As the Council is a subsidiary body of the General Assembly, there is also speculation as to whether the accreditation system needs to shift to a General Assembly-based rather than ECOSOC system. While NGOs enjoy informal access to the General Assembly, it does not have a formal system of inviting NGOs to participate in its work or an equivalent accreditation system. Though there have been calls for setting up a formal, more inclusive system of participation and accreditation for NGOs, at the moment there is no equivalent General Assembly system that the Council could shift to. **A central issue that needs greater consideration is whether ECOSOC accreditation should be required for all levels of participation of NGOs at the new Council? Should all or some NGOs, which fulfil some basic criteria, be able to participate at least in some aspects of the Council's work?** For instance, should accreditation be required for submitting information to the Council generally or for the Universal Periodic Review, and could additional NGOs be accredited on a meeting-by-meeting basis if they have particular competence or interest in the issue under discussion ³²?

Any attempts to change the system of accreditation would have to maintain the access of NGOs that are already accredited, should they wish to continue to participate in its proceedings. There is a good case to be made for a simpler and less politicised system of accreditation of NGOs that addresses the weaknesses in the current ECOSOC system but should be located within the context of developing a better accreditation system for the UN as a whole and not just the Council. Some suggestions in this regard include setting up an 'ECOSOC+ system' that uses the current accreditation system as a base and incorporates gradual improvements, replacing government representatives with independent experts, or NGO representation in the ECOSOC NGO committee, and greater involvement of NGOs in the accreditation process. The

³² The Permanent Forum on Indigenous Issues and the Ad Hoc Committee on the Disability Convention are examples of this kind of accreditation and also of other innovative structures and practices for NGO participation.

Council may also need to address the issue of the accreditation and participation of government-operated NGOs (GONGOs), which has been an issue of concern in the Commission's functioning. GONGOs take up the space and time reserved for NGOs, can try to intimidate national NGOs to control the content of their statements and participation, and often behave in an inappropriate manner which leads to calls to restrict the participation of all NGOs.

Key questions include:

- Should ECOSOC accreditation be required for NGOs to be able to participate in the Council's work? If so, should accreditation be required for all levels of participation and activities or only for some?
- How, if at all, should the current system of ECOSOC accreditation be modified?
- How can the system of accreditation be depoliticised, based on objective criteria and made more accessible?
- How can there be greater NGO involvement in this process?
- How can GONGOs be filtered out through the accreditation system? What other measures could be taken to prevent GONGOs from taking up the space and time reserved for NGOs?

NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS) ³³

How did NHRIs participate in the Commission?

The legal status of NHRIs in their relations with UN human rights bodies has been less clearly defined than NGOs ³⁴ but NHRIs have gained increasing

³³ A national human rights institution (NHRI) can be defined as “a body which is established by a Government under the constitution, by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights”, see *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, (United Nations, Professional Training Series No. 4, 1995), p. 6. The term can be used to refer to a broad category of institutions. For a description of the essential elements of an NHRI and classification of different types of institutions, see B. Lindsnaes and L. Lindholt, ‘National Human Rights Institutions – Standard Setting and Achievements’, in B. Lindsnaes, L. Lindholt and K. Yigen (eds.), *National Human Rights Institutions: Articles and Working Papers*, (Danish Centre for Human Rights, 2001), pp. 1–48.

³⁴ The basis of participation of NGOs has been laid down in the *UN Charter* itself in Article 71 giving a strong legal foundation to their relations with the UN. This has also been elaborated in ECOSOC *Resolution 1996/31* and in the Rules of Procedure of the functional commissions of ECOSOC. In contrast, the relations of NHRIs with various UN bodies are not contained - footnote carries over to the next page -

rights of participation at various international bodies, including the Commission over the last 13 years. NHRIs were allowed to make oral statements at the Commission from 1998³⁵ but these statements were restricted to one agenda Item³⁶, the effective functioning of human rights mechanisms. In 2005, the Commission granted rights to NHRIs to make oral statements under all agenda Items³⁷. The modalities for this arrangement were to be finalised by the Chairperson in the 62nd session of the Commission. As the session was reduced to a short three-hour meeting, the Chairperson did not work out these details and NHRIs did not get an opportunity to speak at the session. NHRIs were also able to submit documents to the Commission that were circulated under their own document series numbers³⁸. NHRIs have close interaction with special procedures and many NHRIs provide information and other support to special procedures during their country missions. NHRIs also have a key role in disseminating and following up on the findings and recommendations of special procedures.

What rules will govern the participation of NHRIs at the Council?

The General Assembly Resolution that created the Council provides for the participation of NHRIs in a similar fashion to NGOs and other observers; “the participation of and consultation with observers ... including national human rights institutions, ... shall be based on arrangements, ... and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities”³⁹. The rights of NHRIs to attend the proceedings are clear, however a key issue in this regard will be how to implement the decision of the Commission in Resolution 2005/74⁴⁰ permitting

in the Rules of Procedure of ECOSOC or the General Assembly and have been set out in resolutions and decisions that are dependent on the support of a political majority. There is extensive support for their existence and for their cooperation with international bodies in various General Assembly and Commission resolutions and in treaty body recommendations. See M. Qafisheh, *Defining the Role of National Human Rights Institutions with Regard to the United Nations*, (The Palestinian Independent Commission for Citizens Rights, Legal Report Series 36, 2004), pp. 22, 39-40.

35 Commission on Human Rights Resolutions 1998/55 and 1999/72. See M. Kjaerum, *National Human Rights Institutions Implementing Human Rights*, (Danish Institute for Human Rights, 2003), p. 17.

36 Agenda Item 18 (b). There were 53 statements made by NHRIs at the 61st session of the Commission in 2005, highlighting a range of concerns.

37 Commission on Human Rights Resolution 2005/74.

38 Documents submitted by NHRIs were circulated in the format E/CN.4/(Year)/NI/(Document Number).

39 Para 11, General Assembly Resolution 60/251.

40 Resolution 2005/74 in para 11 requested “the Chairperson of the sixty-first session, in consultation with all relevant stakeholders, to finalize, by the sixty-second session, the modalities for: (a) Permitting national institutions that are accredited by the Accreditation Subcommittee of the International Coordinating Committee of National Institutions under the auspices of the Office of the High Commissioner, and coordinating committees - footnote carries over to the next page -

NHRIs to make oral statements under all agenda Items. As the modalities for this arrangement were not finalised by the Chairperson in the 62nd session of the Commission, the president (chairperson) of the Council will have to finalise these details and ensure that NHRIs are able to participate fully in the work of the Council, from its first session onwards.

What are some of the key issues and avenues for NHRI participation?

Role of NHRIs and kinds of contribution they could make

NHRIs have often been treated as NGOs or as part of governments whereas in reality they are neither⁴¹ and have a unique status as independent expert organisations that are focused on national implementation of human rights. There needs to be greater reflection on the role that NHRIs could play within the Council and the contributions that they could make given their unique status and expertise. It has been highlighted that NHRIs could play an indispensable role in relation to documenting national human rights situations; providing expertise on national protection systems, including key national institutions; advocating and advising the State on the scope and implementation of its human rights obligations; and assisting in follow-up to recommendations of UN bodies⁴²

NHRIs could provide information to the Council on the human rights situation in a country examined under the Universal Periodic Review⁴³, and in other instances where a particular country situation is considered or discussed. They could also play an important role in following up on the

of such institutions, to speak, as outlined in the report, within their mandates, under all items of the Commission's agenda, while stressing the need to maintain present good practices of management of the agenda and speaking times in the Commission, to allocate dedicated seating to national institutions for this purpose, and supporting their engagement with all the subsidiary bodies of the Commission; (b) Continuing the practice of issuing documents from national institutions under their own symbol numbers"

41 NHRIs are created by the State and often have an official mandate to investigate the government's actions related to human rights unlike NGOs, which are set up and operate separately from the State. However NHRIs are not a part of the government and are expected to be independent in their functioning. See M. Qafisheh, *Defining the Role of National Human Rights Institutions with Regard to the United Nations*, (n. 34 above), p. 21.

42 'Discussion Paper on NHRIs in the UN Reform Process', (17th Session of the International Coordinating Committee of NHRIs, 12 – 13 April 2006), available at: www.nhri.net/pdf/Agenda_item_9a-d_UN_reform.pdf.

43 The discussion paper has also suggested that NHRIs should be allowed to speak in the envisaged interactive dialogue with the concerned country and if country missions are to be undertaken in relation to the UPR, NHRIs should be included in the agenda and submit information on the human rights obligations. *Ibid.*, p. 3.

recommendations/decisions of the Council both in terms of promoting this information nationally and in terms of monitoring and reporting back on implementation and follow-up. This would be similar to the activities that they are already carrying out with UN treaty bodies⁴⁴. In addition, NHRIs could make contributions to discussions on thematic issues. Some other suggestions made in a discussion paper on NHRIs in the UN reform process at the last International Coordinating Committee of National Institutions⁴⁵ (ICC) meeting include the establishment of a mechanism enabling NHRIs to raise issues of special concern with the Council, and greater interaction with special procedures on issues of concern and in relation to individual countries⁴⁶.

A particular advantage associated with NHRI submissions is that “with the special status of national institutions, their positions are more difficult to sideline than those of NGOs”⁴⁷. NHRIs could also however, in some circumstances, come under attack from the State on the positions that they adopt or information that they submit. The nature of their relationship with the State may make them vulnerable to political regime changes, changes in legislation or appointment processes, or threats of a financial or physical nature. It may be important therefore to reflect on possible constraints on NHRI participation in certain circumstances and how these could be overcome. This is discussed under the section on accreditation below.

There is also a number of overlapping issues that would affect both NGOs and NHRIs. These include NHRI participation in any review of the rules of procedure or working methods, especially those that would affect their participation, and review of special procedures and other mechanisms of the Commission.

Key questions include:

- What could be the role of NHRIs within the work of the Council?
- What are some of the main areas in which NHRIs could contribute to the work of the Council?
- What role should NHRIs play in the UPR process or in other proceedings where countries are reviewed or considered?
- How should NHRIs be involved in policy or thematic discussions?
- What role should NHRIs play in the follow-up of the Council's resolutions or recommendations?

⁴⁴ See M. Kjaerum, *National Human Rights Institutions Implementing Human Rights*, (n. 35 above), p. 18.

⁴⁵ The International Coordinating Committee of National Institutions, (ICC) is a voluntary association of NHRIs, which assesses the conformity of each NHRI with the *Paris Principles*, encourages NHRIs to comply with the Principles and also serves as a forum for joint activities. The ICC has been endorsed since 1994 by the Commission and has also been recognised by ECOSOC and the General Assembly as the coordinating body for NHRIs. The ICC conducts annual meetings parallel to the Commission's session in March-April with the support of OHCHR.

⁴⁶ 'Discussion Paper on NHRIs in the UN Reform Process', (17th Session of the International Coordinating Committee of NHRIs, 12 – 13 April 2006), available at: www.nhri.net/pdf/Agenda_item_9a-d_UN_reform.pdf.

⁴⁷ M. Kjaerum, *National Human Rights Institutions Implementing Human Rights*, (n. 35 above), p. 17.

- Should there be a mechanism set up for NHRIs to raise issues of special concern with the Council?

Accreditation and overcoming possible constraints on NHRI participation

The process of accreditation of NHRIs has evolved over the years. A limited number of NHRIs initially participated in the Commission's sessions as part of government delegations; NHRIs then moved on to participating in their own right from a special section of the floor⁴⁸, and finally to a requirement of accreditation by the ICC to be able to speak under all agenda Items⁴⁹. The ICC has an accreditation sub-committee that accredits NHRIs⁵⁰ based on whether they comply with the *Paris Principles*⁵¹. The *Paris Principles* set out minimum criteria for the composition, working methods, funding, and other functions of NHRIs to ensure their independent and autonomous functioning. Where the circumstances of any NHRI change in a manner that may affect its compliance with the *Paris Principles*⁵², the NHRI is expected to inform the Chairperson of the ICC of those changes, and its accreditation will subsequently be reviewed by the Accreditation Sub-Committee. The Chairperson or the Accreditation Sub-Committee can also independently initiate a review of the NHRI's accreditation if it appears to them that such a change in circumstances has occurred⁵³. There are currently 51 NHRIs accredited by the ICC.

⁴⁸ See E/CN.4/1999/95, (3 February 1999), p. 12.

⁴⁹ Para 11, Commission on Human Rights *Resolution 2005/74*.

⁵⁰ Four classifications of accreditation are used by the Sub-Committee: a) compliance with the *Paris Principles*; b) accreditation with reserve – granted where preliminary analysis indicates compliance with the Principles but insufficient documentation is submitted to confer status; c) observer status – not fully in compliance with the *Paris Principles* or insufficient information provided to make a determination; and d) non-compliant with the *Paris Principles*. Accreditation with reservation has also been used where there has been a minor area of non-compliance that the institution undertakes to correct within a short time. The reservation then is withdrawn when the deficiency is corrected.

⁵¹ Adopted by Commission on Human Rights *Resolution 1992/54* and General Assembly *Resolution 48/134*.

⁵² Changes which could affect an NHRI's compliance with the *Paris Principles* include: fundamental limitations to the working climate of the NHRI because of national repressive regimes or coups; adoption of new legal framework, amendment of existing legal framework or legal challenges to elements of the legal framework; discrepancies between the legal framework and actual implementation, including in relation to appointment procedures of NHRI members; and repeated or gross biased statements by NHRIs in favour of particular interests or against specific groups. See 'Draft Proposal for ICC Re-accreditation Procedures for NHRIs', (17th Session of the International Coordinating Committee of NHRIs, 12 – 13 April 2006), available at: www.nhri.net/pdf/Agenda_item_9f_Accreditation.pdf.

⁵³ E/CN.4/2006/102, (25 January 2006), p. 4.

The Commission asked the Secretary-General to report on the accreditation process used by the ICC and to ensure that the process is strengthened by an appropriate periodic review⁵⁴. The ICC has therefore developed possible criteria for reviewing and re-accrediting all previously accredited NHRIs and for a regular period accreditation review process⁵⁵. The Council may have to decide whether it will continue to rely on the accreditation system of the ICC for the participation of NHRIs, develop another system of accreditation, or do away with the requirement of accreditation. It may be better for the Council to rely on the ICC system and strengthen it as needed, because the Commission has supported the work of the ICC in assessing NHRIs' conformity with the *Paris Principles* for many years and it would be set back if the accreditation system was shifted to another body. Some form of accreditation may also be necessary to ensure that only independent and legitimate NHRIs are able to contribute information to the Council because of the credibility that may be accorded to this information. Whatever decision is taken in this regard, **the Council will have to ensure that NHRI accreditation is linked to conformity with the *Paris Principles* and that the process is independent, objective, and transparent.** NHRIs should also be able to participate in any review of the accreditation system.

NHRIs, through the ICC or individually, may also wish to give input to the Council on working methods that could safeguard the participation of NHRIs that may come under threat for submitting information to the Council. Some suggestions could be for more vulnerable NHRIs to submit information through the ICC or on a confidential basis and for the Special Representative on Human Rights Defenders⁵⁶ and the Council to be informed of any threats or reprisals against an NHRI or its members.

Key questions include:

- Should accreditation be required for NHRIs to be able to participate in the Council's work?
- Should the current system of ICC accreditation be retained? How, if at all, should it be modified?
- Should the procedures for review of NHRIs be strengthened? How?
- Should NGOs be able to submit information to the ICC about any particular NHRI's non-compliance with the *Paris Principles*?
- Should the Council develop working methods or safeguards that would enable more vulnerable NHRIs to submit information to the Council and to deal with any threats or reprisals against NHRIs?

⁵⁴ Para 22, Commission on Human Rights *Resolution 2005/74*.

⁵⁵ 'Draft Proposal for ICC Re-accreditation Procedures for NHRIs', (n. 52 above), pp. 2–3.

⁵⁶ The Special Representative on Human Rights Defenders is a special procedure mandate holder who monitors the situation of human rights defenders, all over the world. The Special Representative has taken up cases of threats or attacks against NHRIs as part of her mandate, e.g. her urgent appeal on Sri Lanka, E/CN.4/2006/95/Add.1, (22 March 2006), p. 207.

8

PENDING STANDARD-SETTING

WHAT WAS THE COMMISSION'S ROLE IN DEVELOPING HUMAN RIGHTS STANDARDS?

The Commission on Human Rights (the Commission) was involved in the development of human rights standards from the time of its creation. This work probably represents the Commission's greatest achievement. The Commission was responsible for drafting the *Universal Declaration of Human Rights* as well as most of the major human rights treaties including the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *Convention on the Rights of the Child* (CRC). In addition to treaties, the Commission also developed other key international instruments in the form of declarations, principles, and guidelines¹ on a variety of human rights issues, such as rights of minorities and human rights defenders².

The Commission normally set up an open-ended working group³ with the mandate to draft a particular instrument. States that were not members of the Commission and non-governmental organisations (NGOs) could also participate in these working groups, which typically met between the Commission's sessions. A large number of human rights standards originated in the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission), which sent these texts to the Commission for discussion and adoption. Many of the working groups were also preceded by studies undertaken by independent experts who would be tasked with examining

1 These are 'soft law' instruments that do not impose binding legal obligations on States like treaties but do provide practical guidance to States in their conduct and have considerable moral force.

2 For a list of key international instruments and standards see: www.ohchr.org/english/law/index.htm. For a greater discussion of the Commission's standard-setting role across the years see P. Alston 'The Commission on Human Rights', in P. Alston (ed.), *The United Nations and Human Rights*, (Clarendon Press, 1995), pp. 131–138.

3 An open-ended working group was a working group in which all UN member and observer States, inter-governmental organisations and NGOs with ECOSOC consultative status could participate in its public meetings.

the need for a particular standard. Once the text was finalised by the working group, it would be forwarded to the Commission for discussion, which would adopt it if the instrument had the support of a majority of members. The Commission would then forward the instrument to the General Assembly for discussion and adoption, and if it was a treaty, it would then be opened to States for signature and ratification or accession ⁴.

WHAT ARE THE MAIN PENDING STANDARD-SETTING INITIATIVES THAT THE COUNCIL NEEDS TO ACT ON?

The three initiatives described below have been transferred from the Commission to the Council and as all three of them are extremely significant and represent years of effort by States and NGOs, it is hoped that they will be dealt with by the Council at its first session in June.

Draft international convention for the protection of all persons from enforced disappearances

The Commission established an inter-sessional open-ended working group (the Working Group) at its 58th session in 2004 to draft a legally binding international instrument for the protection of all persons from enforced disappearances. The Working Group met from 2003 to 2005 and submitted a completed draft text of an 'international convention for the protection of all persons from enforced disappearances' (the draft Convention) to the Commission for its approval at its 62nd session. The draft Convention has now been transferred to the Council for its approval. The draft Convention, once approved by the Council, will have to be forwarded to the General Assembly for adoption. Only then can it be opened for signature and ratification or accession by States, and brought into force.

The Convention would create comprehensive international legal

⁴ By signing a treaty, a State indicates that it has preliminarily endorsed the instrument and is examining it domestically to consider ratifying it. Even signing the treaty obliges the State to refrain from acts that would defeat or undermine the treaty's objective and purpose. Ratification or accession signifies an agreement to be legally bound by the terms of the treaty but involve different procedures. States that ratify a treaty sign it first, whereas those that accede do so directly without the preliminary signature stage. The formal procedures for ratification or accession also vary according to the national legal system of each State.

standards and a mechanism for dealing with enforced disappearances⁵. The draft Convention defines widespread or systematic enforced disappearance as a crime against humanity⁶. It recognises the right of all persons not to be subjected to enforced disappearances and provides that enforced disappearances can not be justified even in exceptional circumstances, including war, threat of war, political instability, or public emergency⁷. It also recognises the right of victims, which includes the disappeared person and their families and others who suffer harm as a result of the enforced disappearance, to know the truth regarding the circumstances of the enforced disappearances, the fate of the disappeared person, and the progress and results of the investigation⁸. State parties to the Convention must incorporate a specific crime of ‘enforced disappearance’ in their national laws⁹. They must investigate complaints and reports of enforced disappearance and bring those responsible to justice¹⁰, including suspected perpetrators from other countries who are present in their territory¹¹. States must also provide safeguards against enforced disappearances, judicial remedies, and reparation and compensation¹². The draft Convention also provides for an international treaty-monitoring body made up of independent experts who would have the power to follow up on individual cases of disappearances at the request of the relatives or other persons, and make recommendations to the State on measures to locate and protect the disappeared person¹³; monitor States’ implementation of the Convention¹⁴; and hear complaints from individuals alleging that their rights under the Convention have been violated¹⁵.

The draft Convention has been prepared after years of campaigning by families of disappeared persons and NGOs to create an international standard that would address this grave crime. NGOs have called on the Council to adopt the draft Convention at its first session in June and forward it to the General Assembly for approval¹⁶. They have also highlighted that “postponing the adoption of such an important text ... would be an act of betrayal for

5 Article 2 of the draft Convention defines enforced disappearances as “arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

6 Article 5.

7 Article 1.

8 Article 24.

9 Article 4.

10 Article 3.

11 Article 9. See Amnesty International, ‘New UN treaty set to combat ‘disappearances’ worldwide’, *The Wire*, (September 2004), available at: http://web.amnesty.org/wire/September2004/UN_treaty.

12 Article 24.

13 Article 30.

14 Article 26.

15 Article 31.

16 Amnesty International, ‘UN Human Rights Council: A New Beginning for Human Rights’, available at <http://web.amnesty.org/pages/un-index-eng>.

the families of victims that have been working for the adoption of the text for many years”¹⁷.

Draft United Nations declaration on the rights of indigenous peoples

The Commission established an open-ended inter-sessional working group to elaborate a draft declaration on the rights of indigenous peoples (the Working Group) in 1995, which met from 1995 to 2006. The Working Group was asked to consider the text of the draft declaration that had been initially prepared by the Working Group on Indigenous Populations and adopted by the Sub-Commission in 1994. **After ten years of slow negotiations, States agreed to the majority of articles in the draft declaration. The Working Group did not reach consensus on several provisions related to self-determination, lands, territories, and resources**¹⁸ but most States reached broad agreement on the approach to be adopted. The Chairperson of the Working Group therefore submitted a Chairman’s proposal to the 62nd session of the Commission, which contained articles that had been provisionally agreed on as well as his proposals on outstanding issues, based on the broad agreement reached between most States during the discussions¹⁹. Indigenous groups, other NGOs, and some States are lobbying for the adoption of the draft declaration by the Council at its first session²⁰. A few States however have taken the position that there are still outstanding issues that need to be resolved and that the declaration can not be adopted in its current form²¹.

There is a significant gap in existing international human rights law in relation to the protection of individual and collective rights of indigenous peoples. The draft declaration would go a long way towards filling this gap by affirming indigenous peoples’ rights to language; nationality; develop their political, economic and social systems or institutions; protection and security

17 See ‘ICJ, FIDH and HRW call on Member States to adopt Draft Convention on Enforced Disappearances at the 62nd Commission on Human Rights’, available at www.icj.org/news.php3?id_article=3873&lang=en.

18 See International Service for Human Rights (ISHR), *Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples*, (11th Session, Geneva, 5 – 16 December 2005 and 30 January – 3 February 2006), available at www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHRWG/WGD-DIP/WGDDIP-11thSessionFullReport.pdf.

19 See E/CN.4/2006/79, (22 March 2006), p. 7. The revised Chairman’s summary and proposal is annexed in pp. 8–77.

20 See V. Taliman, ‘Indigenous Rights Declaration Moves to Human Rights Council’, *Indian Country Today*, (31 March 2006), available at: <http://www.indiancountry.com/content.cfm?id=1096412750>.

21 See statement made by Australia, New Zealand and the United States of America (the USA) on the *Declaration on the Rights of Indigenous Peoples*, (Permanent Forum on Indigenous Issues, 17 May 2006), available at: <http://www.mfat.govt.nz/speech/minispeeches/17may06a.html>, where they stated that the there is no agreement on most of the crucial provisions of the draft declaration and expressed their opposition to the provisions dealing with self-determination, right to consent to administrative or legislative measures that affect them, lands and resources, and collective rights.

in times of armed conflict; life, physical security and liberty; the collective right to live in freedom, peace and security as distinct peoples and not to be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group; protection and conservation of the environment; education; participation in decision-making; self-government; cultural expression; and to own, use and develop lands, territories, and resources, which they have traditionally owned, occupied, used, or acquired²². The declaration will provide practical guidance to States in their conduct and have considerable moral force. **It has been a work in progress for over 23 years and the Council will need to ensure that the momentum built up over all these years is not lost and that the declaration is adopted by the Council and forwarded to the General Assembly for approval before the end of 2006.**

Options for an optional protocol to the *International Covenant on Economic, Social and Cultural Rights*

The Commission established an open-ended working group (the Working Group) in 2003 “with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights”²³. **An optional protocol would create an individual complaints procedure whereby individual victims and possibly others acting on their behalf could complain about violations of their rights under the ICESCR to the Committee on Economic, Social and Cultural Rights (the Committee).** States would have to sign and ratify or accede to the optional protocol to recognise the competence of the Committee to receive complaints against them. The Working Group met from 2004 to 2006 and during its last session a majority of States expressed support for the mandate to be changed to a drafting one and for the Working Group to begin drafting a comprehensive optional protocol to the *International Covenant on Economic, Social and Cultural Rights*. Many States requested the Chairperson to prepare the draft text for discussion at the Working Group’s next session. A small group of States said that they had concerns about certain issues, which were still unresolved, but they did not want to block the process. They proposed that instead of producing a draft text, the Chairperson prepare a working document containing textual elements, reflecting the different views of many States and different approaches outlined in her elements paper. They stressed the importance of consensus in order to move forward²⁴.

22 See revised Chairman’s summary and proposal, E/CN.4/2006/79, (22 March 2006), pp. 8–77.

23 Commission on Human Rights *Resolution 2003/18*.

24 See ISHR, *Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (3rd Session, Geneva, 6 – 17 February), available at: www.ishr.ch/hrm/WGOPICESCR/3rdSession.pdf.

The Council will have to extend the mandate of the Working Group and empower it to begin drafting an optional protocol in 2006-2007. The positive momentum towards drafting of the instrument could be delayed or lost if this is not done. The adoption of the optional protocol would correct the current imbalance in the international human rights system whereby individuals can submit complaints about violations of civil and political rights but not for economic, social and cultural rights. It would also help correct the misperception that economic, social and cultural rights are merely broad goals rather than substantive rights, which are justiciable before courts, give an important forum for victims, and lend support to national, regional, and international initiatives to improve the implementation of economic, social and cultural rights.

9

ISSUES

In this chapter we discuss two substantive issues that the Human Rights Council (the Council) needs to take up. There are other substantive issues that the Council needs to address but these are two illustrative issues that have been selected on the basis of our own organisational priorities. They are also issues that have been raised but not adequately dealt with during the last years of the Commission.

SEXUAL ORIENTATION AND GENDER IDENTITY

Across the world, people continue to face widespread and severe forms of discrimination based on their sexual orientation and/or gender identity¹. These range from violations of the right to life, including executions and hate-induced violence, to being tortured, ill-treated, and detained solely on the basis of feeling and acting contrary to social norms and expectations. More than half the countries in the world still criminalise sexual relations between persons of the same sex. Lesbian, gay, bisexual, and transgender (LGBT) people also face discrimination in the areas of housing, employment, education, right to freedom of association, right to family life, and other key civil and political, and economic, social and cultural rights. **Repressive and discriminatory national laws, policies and practices have led to homophobia, hate crimes and prejudice, and a climate of impunity for human rights violations based on sexual orientation and gender identity.**

United Nations human rights mechanisms, both treaty bodies and the Commission on Human Rights' (the Commission) special procedures are increasingly trying to address these violations. Various treaty bodies have

¹ 'Sexual orientation' refers to the way in which a person's sexual and emotional desires are directed. The common categories of sexual orientation are heterosexual, gay, lesbian and bisexual. 'Gender identity' refers to a person's deeply felt, internal sense of belonging to a particular gender, which need not be the gender they were assigned at birth. These are profoundly rooted, fundamental aspects of the human personality and of human dignity. See Human Rights Watch (HRW), *Sexual Orientation and Gender Identity: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights*, available at: <http://hrw.org/english/docs/2005/03/10/global10303.htm>. See also International Commission of Jurists (ICJ), *International human rights references to human rights violations on the grounds of sexual orientation and gender identity*, (ICJ, March-April 2005), p. 4.

confirmed that sexual orientation is a prohibited ground of discrimination under the non-discrimination clauses contained in human rights treaties². A number of special procedure mandates are also monitoring and highlighting violations experienced by LGBT people³. The work of the Special Rapporteur on extra-judicial, summary or arbitrary executions has led to the Commission adopting a resolution calling on States to protect the right to life of all persons and investigate promptly and thoroughly all killings committed for any discriminatory reason, including sexual orientation, and another resolution asking States to ensure that the death penalty is not imposed for sexual relations between consenting adults⁴. However, **there is still no comprehensive international instrument addressing all aspects of human rights violations on the grounds of sexual orientation and gender identity**. At the 59th session of the Commission in 2003, Brazil tabled the first comprehensive resolution on human rights and sexual orientation (but not including gender identity). After a series of strategic maneuvers by opponents of the resolution, including a no-action motion and more than 50 amendments to complicate and frustrate the debate, Brazil decided to defer the resolution until the following session. At the 60th and 61st sessions of the Commission, Brazil did not pursue its resolution and no other State was prepared to take it up. LGBT groups and other human rights NGOs were extremely visible and active during this period in lobbying the Commission to take this issue forward. At the 61st session, more than 30 States from four of the five UN geographical regions made a joint statement calling for the Commission to address these issues⁵.

It is up to the Council now to take action on this neglected and important area of human rights violations and to adopt a comprehensive approach addressing all aspects of human rights in relation to sexual orientation and gender identity, including mainstreaming these issues into its work through more systematic monitoring and discussion. This approach, whether implemented through a resolution or some other type of decision, would support the struggles of LGBT activists all around the world and the work of UN human rights mechanisms.

2 See for instance General Comments 14 and 15 adopted by the Committee on Economic, Social and Cultural Rights.

3 These include, among others, special rapporteurs on health, torture, violence against women, and adequate housing. See ICJ, *International human rights references to human rights violations on the grounds of sexual orientation and gender identity*, (n. 1 above).

4 Para 6, Commission on Human Rights *Resolution 2002/36* and para 4 (f), Commission on Human Rights *Resolution 2004/67*.

5 Statement made by New Zealand on behalf of 32 States under Item 17, promotion and protection of human rights.

HUMAN RIGHTS AND BUSINESS

The need to address the issue of human rights and business has been raised by NGOs and others for many years. In a globalised world, businesses have increasing power both within their own countries and, as transnational corporations (TNCs), across many countries through their increased operations and economic growth. There are significant questions about the positive and negative elements of the relationship between business and human rights. Positively, business can promote the enjoyment of human rights especially economic, social and cultural rights. However, **issues of concern range from corporate involvement in severe human rights violations to ensuring compliance with human rights and labour rights in corporations' treatment of workers, management of supply chains, manufacturing, purchasing and sub-contracting methods, and other aspects of their operations.** In some situations these concerns are worsened by the reduced capacity of the State to regulate large TNCs. Various initiatives have been adopted to address these issues. These include: voluntary codes of conduct adopted by companies; labelling schemes; development of industry-wide or sector-specific codes of conduct or standards; international voluntary principles such as the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises* and the UN's Global Compact⁶; attempts to develop extra-territorial legislation to hold domestic companies responsible for human rights violations in other countries; and identification of core labour standards by the International Labour Organization (ILO).

While these initiatives are positive developments, they do not take away the need for a more comprehensive international human rights framework for regulation of companies to make them comply with human rights standards and ensure accountability for human rights violations. This is exacerbated by confusion about the international norms and standards that are applicable to companies. These international human rights standards were originally developed to regulate the conduct of States, and only to a limited extent of non-State actors. A significant step forward was taken in 2003 when the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) adopted the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) at its 55th session. The Norms were developed to compile in one document all the international human rights standards that are applicable to businesses. The Norms also include a 'commentary', which provides useful, authoritative guidance on the meaning of specific terms, the scope of particular provisions, and the legal basis for different obligations⁷.

6 The UN Global Compact is a voluntary initiative involving the UN, companies, and NGOs to advance ten principles in the areas of human rights, labour, environment, and anti-corruption, identified by the Global Compact. For more information see www.unglobalcompact.org.

7 Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, (Amnesty International, 2004), p. 6. See also N. Rosemann, - footnote carries over to the next page -

The Norms are controversial, however, with many States and business representatives challenging the claim that they are based on existing international law. The Commission has also stated that the Norms, as a draft proposal, have no legal standing and that the Sub-Commission “should not perform any monitoring function in this regard”⁸.

In 2005, the Commission created the mandate of a special procedure, the Special Representative of the Secretary-General on human rights and transnational corporations (the Special Representative), for a two-year period⁹. The Special Representative has been mandated to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. The Special Representative does not have a mandate to monitor human rights violations by TNCs. He has submitted an interim report in which he has described his initial activities. He has analysed the Norms and raised various concerns about them including that “if the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so”¹⁰. Amnesty International has responded to this report highlighting many positive aspects in it but stating its concern that the approach of “principled pragmatism” referred to in the report “may lead to underestimating the need for binding legal principles and guidelines as well as the state of applicable international law”¹¹.

The Council will need to follow up on these issues and ensure that it clarifies the application of existing standards. It should, where needed, create other international standards to address corporate responsibility and accountability for human rights, and set up a system for more comprehensive monitoring of businesses so that human rights are not left to voluntary self-regulation alone.

The UN Norms on Corporate Human Rights Responsibilities, (FES, Occasional Papers No. 20, 2005).

8 Commission on Human Rights *Decision 2004/116*.

9 Commission on Human Rights *Resolution 2005/69*.

10 P. 15, E/CN.4/2006/97.

11 See <http://web.amnesty.org/library/index/engior500022006>.