



**INTERNATIONAL
COMMISSION
OF JURISTS**

**THE APPLICATION OF PROCEDURES AND MECHANISMS
OF THE HUMAN RIGHTS COUNCIL
AS ESTABLISHED IN JUNE 2007**

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INTERNATIONAL COMMISSION OF JURISTS

Founded in Berlin in 1952, the ICJ is a global network of judges, lawyers and human rights defenders united by international law and rule of law principles that advance human rights. Using our expertise in law, justice systems and advocacy, we work for victims to obtain remedies, for those responsible for abuses to be held accountable and for justice systems to be independent and active protectors of human rights. We work to change law and policy at the national and international levels when they do not adequately protect people from human rights violations.

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1. Introduction

On 18 June 2007, the United Nations Human Rights Council established its new institutional architecture, approving a resolution, which outlines in broad terms the basic parameters of the mechanisms and procedures available to it some of which were inherited from its predecessor, the Commission on Human Rights.

The adoption of the resolution follows a yearlong process of negotiation on the Council's procedures and mechanisms, which encountered repeated attempts by governments to shackle the Council and limit its ability to enhance human rights protection. For example some governments sought to limit the Council's ability to respond to specific human rights situations by confining the Council's mandate to dialogue and cooperation, or by placing stringent conditions on when and how the Council could address particular situations. The double standards of many governments on human rights issues that hampered the Commission on Human Rights were no justification for these attempts to weaken the human rights machinery. On the contrary, it is necessary for the new institution to possess the tools to both ensure the equal and objective scrutiny of all situations of human rights violations, and to respond to particularly urgent situations.

Views on the outcome of the negotiations differ. Some view the process as having a positive outcome, as the key tools empowering the Council to protect human rights were retained despite considerable attempts to weaken it. Others consider it disappointing that despite a mandate from the United Nations General Assembly to build upon the strengths and overcome the weaknesses of the UN Commission on Human Rights and the lengthy negotiations the tools available to the Council were not significantly strengthened in comparison with those of its predecessor. Moreover some of the detrimental proposals were eventually accepted.

On the one hand, the establishment of the new Universal Periodic Review mechanism, which provides for the regular scrutiny of the human rights records of all United Nations Member States, is perceived as an improvement, whereas the working methods of the independent human rights experts known as Special Procedures have been limited in flexibility. The mandate of the new Advisory Committee, to function as an expert think-tank replacing the former Sub-Commission, is also more curtailed in scope than that of its predecessor.

At this juncture it is essential to make the procedures and mechanisms, which were established in June fully and swiftly operational. Governments must break out of restrictive regional or other blocks and work together across continents to build on the architecture they have put in place and turn the potential of the Council into an institution of meaningful human rights protection. The Council must be allowed to live up to the mandate given to it by the General Assembly to protect and promote human rights, on an equal basis and in all States, employing the tools available to it such as the Universal Periodic Review mechanism, the Special Procedures, the Advisory Committee, the revised Complaint Procedure. The real test of the Council's effectiveness will be whether it can impact in a positive manner the situation of victims of human rights violations. This will be largely dependent on the resolve of United Nations Member States to safeguard the protection of human rights in chronic and urgent situations and to

engage in dialogue and cooperation to promote human rights as one essential part of preventing violations.

In the coming months it will be important to address and resolve the ambiguities and discrepancies which remain in relation to aspects of the Council's procedures and mechanisms. In some instances, relevant parts of the resolution adopted in June 2007 need specific interpretation and procedural steps must be adopted to set the new system in motion.

Below the International Commission of Jurists (ICJ) outlines its interpretation of the way in which the Council's institutional architecture must function in order to ensure the Council can fulfil its mandate to protect and promote human rights worldwide. Some of the clarification and detail, which is required, will need to be reflected in relevant decisions that the Council is expected to take during its forthcoming September Session. In particular, the ICJ believes these decisions should stipulate guidelines for the submission of background materials during the UPR and should outline technical and objective requirements for the nomination of candidates for election as Special Procedures, and as members of the Advisory Committee, the future Working Group on Communications and the Working Groups of the former Sub-Commission.

2. Universal Periodic Review

The newly established UPR mechanism offers the Council the opportunity to strengthen the promotion and protection of human rights, by providing for the equal and regular scrutiny of all UN Member States' human rights records in four-year cycles. The four-year period of the review will enable flexible and timely considerations and follow up. The ICJ believes that a predictable timetable setting out a list of which countries will be reviewed and when, should be made available several years ahead of the review, in order to enhance the quality of preparations for each review and the dialogue with the concerned country.

The UPR will be an asset to the Council's human rights protection tools if the political dialogue envisaged by the review reinforces, and contributes to the implementation of, the relevant recommendations of the specialized human rights machinery, such as the Special Procedures or Treaty Monitoring Bodies. This must be done in a manner, which does not interfere with the mandates of these mechanisms and their established follow up procedures. The recommendations of such expert bodies should therefore serve as one of the bases for the review, without alterations to the substance of the recommendations or the follow up decided on by the relevant body.

The UPR will involve a dialogue with each UN Member State on the implementation of its human rights obligations, as reflected in the human rights instruments to which it is a party, the Universal Declaration of Human Rights, and customary international law. The ICJ considers that in follow up to each review States should accede to or ratify relevant human rights instruments which precisely and predictably define the contents of the legal obligations. International humanitarian law will also be, to the extent it is applicable, an important basis for consideration during the UPR. Civil society, including NGOs, should

be given the opportunity to assist in each case with the identification of the applicable human rights standards and norms.

The government of the country under review, the OHCHR and other stakeholders, such as NGOs, national human rights institutions or academics, may provide background information for consideration during each review, both at the Working Group stage and in the plenary discussion. Information provided by the concerned governments should reflect a fair assessment of the human rights situation in the country, and should include analysis of the ways in which the government will enhance its implementation of recommendations made by human rights bodies and experts. The UPR will only be meaningful, if state reports provide information on crosscutting human rights issues, as identified by the UPR's country-rapporteurs with assistance from the OHCHR. Efforts to identify crosscutting or structural issues, including those addressed by multiple national human rights initiatives or by the monitoring bodies, should not duplicate pre-existing recommendations from expert bodies.

In order to ensure the effectiveness of the UPR, reports submitted by the concerned government should not be given precedence over other sources of information. The ICJ considers that the criteria for the content of reports, which is to be outlined by the OHCHR, should require that a comprehensive picture be presented to the Council about the state's implementation of its international obligations, including treaty and customary obligations. As such, information on the state's implementation of treaty monitoring bodies' and other human rights experts' recommendations and on its cooperation with the Special Procedures, other human rights mechanisms and NGOs should form part of the government's report. Lastly, the state's report should also outline the government's view of the resources available to it and of the challenges to human rights implementation it has encountered.

Material provided by NGOs is an equally important source of information, which needs to be available throughout the entire review process. The contribution to the UPR by non-state stakeholders, including NGOs, must not be limited to a passive presence at the Working Group stage of the review, without the possibility to present information or ask questions during this phase. The criteria on reports to be elaborated by the OHCHR should also provide for the compilation and dissemination of comprehensive background materials provided by NGOs on the state's fulfilment of all its human rights obligations, and on its implementation of recommendations by expert bodies.

The Working Group would also benefit from the inclusion of independent experts among its members, nominated by Member States of the Council. The Working Group must guarantee both the independence and expertise of all its members. The independent expert members of the Working Group should also serve as the country-rapporteurs, in order to prevent politicisation of the review. Among other things such country-rapporteurs would be expected to facilitate the preparation of the concerned government's report through compiling a list of crosscutting issues.

During the plenary stage of the review, before and after the adoption by the Council of the review's outcome, the representatives of the concerned state, other states, and other stakeholders, including NGOs, will be allowed to express their views. This should be

done without unnecessary repetition of proceedings during the Working Group stage. Restrictions, such as speaking time limits for those that have taken part in earlier rounds of discussion, may be introduced.

It is essential that the outcome of the review be adopted by vote in a plenary session of the Council, and that the concerned state is not afforded a veto. Moreover the right of the concerned country to comment must not be allowed to enable a country to indirectly veto particular recommendations through making reservations. All the recommendations, which form part of the adopted outcome, must be subject to follow-up and implementation, for which the concerned state will have primary responsibility. This follow-up should be assessed when the concerned country is again subject to review in a subsequent round. Between reviews cycles all the relevant human rights mechanisms, and in particular the Special Procedures, should follow, and keep track of, the concerned country's implementation of the UPR outcome. As the concerned state will be primarily responsible for the implementation of the outcome recommendations, recommendations, which are made in relation to technical cooperation, should be considered to be of a complementary nature to the required national efforts. In order not to overburden the OHCHR recommendations on technical cooperation should be addressed to the UN as a whole.

3. Special Procedures

During the negotiation period a large number of governments sought to impose controls on the Special Procedures, hampering their ability to issue early warnings, make recommendations in relation to remedies for violations, and subjecting them to increased monitoring by governments. These efforts, which resulted in the adoption of a Code of Conduct for Special Procedures, threaten to weaken the system of Special Procedures, which is an essential part of the Council's ability to protect human rights. The new appointment procedure for Special Procedures, the criteria for their accountability and the future extension of mandates remain sensitive issues which must be dealt with in such a way as to ensure no further limitation of the procedures' independence or interference with their expertise. It will be also essential to preserve the existence and integrity of country-mandates.

A fragile compromise has been reached regarding the selection of mandate-holders. Clear technical and objective requirements on the nomination of candidates will need to be adopted by the Council in September 2007. When elaborated, objective criteria for nominees should include: theoretical or practical experience in the field of the mandate's subject matter; established competence; research and fact-finding experience; objectivity; independence; impartiality; high-moral standing; exposure to a variety of legal, social and political issues, including to different legal systems and where necessary a relevant academic background. The technical criteria should address situations of both negative and positive conflicts of interest. The former category relates to those individuals who, despite relevant expertise or experience, are excluded from inclusion in the roster because they hold or have held certain decision-making functions, for example in a national executive or legislature. On the other hand, the latter category relates to situations beyond that category of persons automatically excluded due to a negative conflict of interest, where despite a conflict of interest an individual is not excluded from the roster

due to their exceptional expertise, which is deemed to outweigh the conflict of interest. Other technical criteria should include requirements that there be the widest possible consultation on government nominees at the national level, including with NGOs and national human rights institutions. Only those candidates that meet the criteria should be listed on the roster, which will be managed by the OHCHR. The roster should be accessible to the public through a searchable database, which provides clear indications of expertise and competence. As a general rule, Special Procedures should be chosen only from among those individuals included on the roster, with exceptions being made in the case of significant personalities (e.g. former UN SG or HCHR).

A Consultative Group will provide a list of those candidates with the highest qualifications to the President of the Council. The ICJ suggests that the Consultative Group puts forward more than one candidate per mandate in order to ensure the best expert is appointed. The President of the Council will appoint mandate-holders after which the Council should formally approve all the appointments together. The ICJ believes that including independent human rights experts among the members of the Consultative Group will help it to reach informed decisions without political interference. Although guarantees to this effect are not included in the text of the June resolution the ICJ encourages countries and regional groups to nominate independent experts instead of state representatives to the Consultative Group in order to ensure that the appointment of candidates is truly effective.

The ability of the Council to establish country mandates survived attempts during negotiations to abolish such mandates altogether. It must continue to be protected. Challenges to the ability of the Council to consider country-specific resolutions, in the form of proposals requiring quotas for tabling country initiatives (1/3 of the Members to cosponsor) and for their adoption (2/3 of the Members voting), were also averted. The final compromise language included in the rules of procedure adopted in June, which specifies that states proposing country-specific resolutions should secure the broadest possible support for their initiatives (preferably fifteen members), before action is taken in the Council, should be considered more as a guideline than a binding obligation. Indeed the compromise has to be seen in the light of the General Assembly resolution 60/251 that empowered the Council to consider country situations in all circumstances¹.

The decision in June to drop the country mandates on Cuba and Belarus was not taken on the basis of a human rights assessment but rather for political reasons and in order to allow a compromise to be reached on the Council's procedures and mechanisms as a whole. The human rights situation on the ground in Belarus and Cuba remains of serious concern, as the number of political prisoners targeted for exercising their civil and political rights remains undiminished. Similar political bargaining did not affect the country mandates on DPRK and Myanmar, which were extended along with a mandate on the human rights situation in the Occupied Palestinian Territories, and seven country mandates which provide the concerned countries with advisory services and technical cooperation. When these country mandates come-up for renewal, considerations of their future must be guided by a human rights assessment of the situation on the ground in the country concerned. Purely political considerations should not be allowed to take priority.

¹ See operative paragraph 3 of the General Assembly Resolution 60/251

The question remains as to what tools the Council will use in the future to address the poor human rights record of Cuba and Belarus. The review of mandates must be guided by equitable and standardised conditions for the functioning of country and thematic mandates, and the length of both types of mandate should be harmonised, with all mandates lasting two years. At the same time, it should be borne in mind that establishing formal equality in relation to the servicing of all mandates might not be sufficient, as latent inequality between mandates pervades the system of special procedures, due to long-term prioritisation of certain issues over others, or because of varying degrees of research on different topics. The ICJ considers that the OHCHR should provide suggestions on how best to address this.

The future review of each mandate should be carried out on the basis of the individual resolution establishing the mandate in question. The traditional authors in accordance with the Programme of Work will present each resolution. The ICJ encourages the main sponsors of each resolution to work in a way which prevents a continuous and artificial review of mandates that would result in a return to the paralysis often encountered by the Commission on Human Rights and which the Council avoided during its initial institution-building year. Numerous improvements to the system of special procedures are needed, in order to allow all mandates to benefit from balanced administrative and financial support, to facilitate mandate holders' objective evaluation of facts by providing them with information from a variety of sources, to improve their ability to conduct country visits at the invitation of governments and to enhance governments' implementation of their findings and recommendations. Moreover, the ICJ believes that closer cooperation between country and thematic mandates would be encouraged if there were a streamlining of working methods and flexible division of labour, as well as a specific focus on addressing identified protection gaps.

4. Code of Conduct

The Code of Conduct adopted in June, that stipulates standards of ethical behaviour for mandate holders, constitutes a major failure in the institution-building process, as it makes the mandate holders responsible for enhancing cooperation with governments, without emphasising the responsibility of governments to implement the Special Procedures' findings and recommendations.

When interpreting the Code of Conduct, governments should consider that they also have obligations in relation to enhanced cooperation, specifically to facilitate country visits and implement Special Procedures recommendations.

There are several elements in the Code of Conduct, which seriously risk hampering the work of the human rights Special Procedures. These include: stricter admissibility criteria for letters alleging human rights violations; stringent conditions on when and how urgent appeals can be issued; requirements that governments be allowed to submit reactions before any public statement is made on an issue by mandate holders, and a general obligation on mandate holders "not to undermine the environment for the promotion and protection of human rights." The ICJ considers that all of these negative elements must be interpreted in a narrow manner consistent with the overriding responsibility of governments to enhance the promotion and protection of human rights through dialogue,

active cooperation and follow-up to recommendations. This interpretation must be adhered to even though the Code of Conduct does not specifically refer to governments' obligations.

Moreover as urgent appeals are an essential tool available to Special Procedures in their efforts to safeguard the protection of human rights and prevent human rights violations, they must be allowed to issue urgent appeals in relation to violations of all human rights, be they civil, economic, cultural, political or social rights.

5. Human Rights Advisory Committee

The Human Rights Advisory Committee was established as a collective think-tank to provide the Council with expertise and research at the Council's request.

In order for the Advisory Committee to function effectively, its members should be individuals with the highest possible level of expertise. Although the substantive and technical criteria for the nomination of members of the Committee, which will be outlined by the Council, may be similar to those which will be outlined in relation to the selection of Special Procedure mandate-holders, the candidates for election to the Advisory Committee should have, as a rule, an expert, research or academic background. A broad consultative process on nominees will need to be undertaken at the national level, and in order to ensure the independence and expertise of candidates, nominees should be put forward by human rights specialists, academics, research institutes and NGOs, with the support of governments.

If the Advisory Committee is to function effectively, it must operate on a substantive, and not a political, basis. The Advisory Committee's composition which provides for an unequal division of seats between nationals of different regional groups, and which follows the model of a political body rather than an expert body, must not be at the expense of Committee's substantive work.

Uncertainty remains in relation to the right of initiative of the members of the Advisory Committee and in relation to whether it can carry out work focused on country situations. The Council has been expressly mandated to formally request or approve Advisory Committee proposals. At the same time, the right of members of the Committee to take initiatives is essential to enhancing human rights protection beyond the horizons initially envisaged by the Council. Moreover although it has been established that the Advisory Committee cannot take decisions on country situations, the Committee will need to consider country situations and examples in the context of thematic work, as a focus on the human rights situation in different countries is very often an inherent part of work on thematic issues.

6. Complaint Procedure

The Complaint Procedure was established to enable the Council address consistent patterns of reliably attested gross violations of all human rights occurring in any part of the world and in all circumstances. The ICJ believes that repeated intrusions over time into the rights of individual should be deemed to constitute consistent patterns of

violations for the purposes of falling within the remit of the complaints procedure, even if the violations are not necessarily happening on a widespread basis. The way in which the admissibility criteria will be interpreted is central to ensuring the procedure's effectiveness. For the violations to be reliably attested the complaint must contain factual descriptions of the situation concerned, and must specify the rights allegedly violated. The ICJ considers that the authors of complaints do not have to have direct knowledge of the alleged victims. Rather, complainants must have direct and reliable knowledge of the nature and occurrence of the alleged violations. The ICJ believes that the requirement that domestic remedies be exhausted can be fulfilled by the pursuit of remedies providing for effective and timely recourse to justice. Judicial remedies are not the only such remedies. The Council should accept specific steps taken by victims to remedy the violations they have suffered as exhausting domestic remedies. This is particularly true in circumstances where the exhaustion of available remedies has been unduly prolonged, would be ineffective, or would require the victim to follow convoluted, complex or expensive procedures. Equally, the Council should consider that in some circumstances remedies may be inconclusive or their pursuit may be prevented by threats or pressure. Lastly, there may be situations in which remedies will not be available. The Council needs to take these situations into account so that the most vulnerable are not excluded from international protection.

Two distinct Working Groups have been established to examine the communications received. Both are intended to operate on the basis of consensus, and to avoid political bargaining. It is important that an interim solution is found in relation to fulfilling the functions of the Working group on Communications before the Advisory Committee will formally appoint the WGC, as that will take place only after February 2008. Those independent experts who are appointed to the WGC are expected to have experience working with judicial or quasi-judicial procedures, which address human rights violations. In light of the large numbers of communications received the Council Secretariat should assist the WGC in the initial screening process, which involves applying the established admissibility criteria. The WGC may dismiss a case only as inadmissible, not on the merits.

The Member States of the Council should nominate independent experts for appointment in their personal capacity by the Regional Groups to the Working Group on Situations. The WGS will assess the communications received in relation to admissibility and on the merits. The WGS may only dismiss the communication on substance if so justified and in the course of its decision it should have regard to relevant reports of other human rights mechanisms.

An important improvement in the complaint procedure is that the complainant is now entitled to regular information on the status of deliberations on the complaint submitted. For this entitlement to be meaningful, the government, which is the subject of the complaint, must adhere to the three-month deadline for its submission of information. The effectiveness of the complaints procedure will also depend on the overall timeliness. Each complaint process should be concluded, as a rule, within 24 months from the time the complaint is shared with the concerned state. A further improvement in the procedure would be for both working groups to meet before each Council session and for the Council to consider their reports at each session.

If the Working Group on Situations or the Council so decides, the confidentiality requirement may be lifted in relation to any given situation, and the situation dealt with publicly by the Council.

In order for the procedure to effectively contribute to the protection of human rights and prevention of violations, and because it is based on complaints received in relation to violations suffered by individuals, where appropriate the concluding decision on the merits of a complaint should provide for the granting of a remedy to the victim.

Finally, information submitted in the context of the complaint procedure on situations which are deemed not to meet the threshold of consistent patterns of reliably attested gross human rights violations might be shared with other relevant UN human rights bodies and organs.

7. Agenda and Programme of Work

It is essential that the Council's Agenda and Programme of Work be implemented in a way, which sets a flexible and yet predictable framework for the Council to fulfil its mandate by regular consideration of substantive issues. Important human rights questions such as the consideration of the human rights situation in the Occupied Palestinian Territories or Racism must not be allowed to eclipse consideration at each session of more general issues of civil, cultural, economic, political and social rights.

The ICJ believes that the Council should take up the agenda item on urgent human rights situations at every Council session through consideration of the High-Commissioner's reports and through dialogue among States on urgent country situations. This would allow the Council to fulfil the mandate vested upon it by the General Assembly².

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² See operative paragraph 3 of the General Assembly Resolution 60/251

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