



# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "*

## A Future Expert Body for the Human Rights Council

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### 1. The General Assembly Resolution & the future of the Sub-Commission

In Resolution 60/251 establishing the Human Rights Council, the General Assembly decided in paragraph 6 that:

"The Council will assume, review, and where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain ... *expert advice*" (italics added)

Although the resolution refers to maintaining "expert advice" rather than explicitly an "expert body", it is implicitly referring to the question of the future of the Sub-Commission on the Promotion and Protection of Human Rights (the "Sub-Commission").

The former Commission on Human Rights (the "Commission") always had a sub-body of independent experts. Although its mandate evolved over the almost 60 years of its existence, it always maintained its essential role of providing expert advice to the Commission. The Sub-Commission played a "think-tank" function, with 26 experts from different regions and backgrounds elected by the Commission. The key function of the Sub-Commission was to prepare working papers and studies on conceptual human rights questions, which were submitted to the Commission for consideration. Therefore, in deciding the form of future expert advice for the new Human Rights Council, there should be a dispassionate assessment of the strengths and weaknesses and past experience of the Sub-Commission, as well as a fresh look at the needs of the Council.

The International Commission of Jurists (ICJ) believes that human rights issues are dynamic, and evolve as the world changes and develops. Long-standing themes remain unaddressed or unresolved, while new challenges and thematic issues emerge. To provide adequate responses, the Human Rights Council will need to commission and draw on expert studies to help member states understand the issues, as well as recommendations for action, including recommendations for the possible drafting of new international human rights treaties or other standards or the creation of new mechanisms such as special procedures. This will require a sound, stable and expert source of advice.

## **2. Background and learning from the past**

Over a 60-year period the Sub-Commission played a central and important role. Several of the expert mechanisms created by the Commission (special rapporteurs and working groups that make up the system of “special procedures”), originated in studies and recommendations of the Sub-Commission. These include the Working Group on enforced or involuntary disappearances, the Working Group on arbitrary detention and the Special Rapporteur on the independence of judges and lawyers.

Several United Nations human rights standards also originated with the Sub-Commission, including the following:

- Declaration on the Protection of All Persons from Enforced Disappearance;
- Declaration on Human Rights Defenders;
- Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law;
- Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity;
- Basic Principles on the Independence of the Judiciary;
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Many of the Sub-Commission’s studies are cited by courts and national authorities, as well as by regional human rights bodies.

Over many years the Sub-Commission was also able to examine and take action on country situations, but between 2000 and 2004 the Commission progressively prohibited the Sub-Commission from acting on countries.<sup>1</sup>

One of the main weaknesses of the Sub-Commission was the deficiency in the level of expertise and independence of its members. Some members even sat on national delegations or held other governmental posts, while they were members of the Sub-Commission. There were also a small number of members who served for decades, which was unhealthy for a body that needed vibrant and fresh thinking.

## **3. Creating a new collegial, expert body for the Human Rights Council**

The ICJ believes that the Human Rights Council should retain an independent, expert and collegial body, with a mandate focused on studying unexplored, new challenges and areas of human rights, addressing or clarifying specific thematic issues and formulating proposed new human rights standards. In this way, the expert body would operate as a “think-tank”. In deciding the form of its future “expert advice”, the Human Rights Council should separate out criticisms of the old Sub-Commission from the more fundamental question of whether, objectively, it

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<sup>1</sup> Decision 2000/109, Resolution 2001/60 and Resolution 2004/60 of the Commission of the Humans Rights

needs such a collective expert body and how to ensure it has the necessary structure and quality.

**a) A collegial and generalist body**

Some have voiced the suggestion that there should be no expert body as such, and that the functions played by the Sub-Commission should be taken up through the appointment of independent experts on specific tasks as the need arises. This approach, it is argued, would help to rationalize the work of the Council and ensure stricter quality control. The ICJ is unconvinced by this argument. There is great value that comes from a process of collegial and collective deliberation by a group of independent experts, which is absent when a single expert or even when a small working group takes up a subject. Moreover, such a collegial body should consist of a large enough number of experts (15 members) to ensure broad representation from all regions of the world and all legal systems, with experts from different professional backgrounds.

**b) Mandate and functions: addressing thematic issues**

The ICJ believes that an independent, expert and collegial body should be retained, and that its mandate should be concentrated on studies and recommendations related to thematic issues: new challenges and new standards, identifying gaps and clarifying conceptually difficult areas of human rights.

*i. Research, study and expert function.* Building on the “think-tank” function exercised by the former Sub-Commission, the Human Rights Council’s expert body should be action-oriented, with concrete goals and a clear timetable to provide recommendations to the Council for action on particular themes. The expert body should be able to develop continuity in its research and studies on long-standing and emerging human rights problems, in developing and refining the interpretation and understanding of existing human rights law, in identifying legal gaps and in recommending special procedures or other mechanisms the Council should establish.

*ii. Standard-setting.* As stated above, the Council should take into account that the Sub-Commission prepared the first draft of several of today’s human rights standards. States of course negotiate and adopt new human rights standards and it is essential that states have a good conceptual understanding of, and can provide political support for, various standard-setting initiatives. However, the experience of the Commission, as well as comparative experiences of other bodies such as the International Labour Organisation, is that the quality of standard setting would be improved through greater input of independent expertise into the process.

*iii. Space for initiative.* In the last year of the Commission, the Sub-Commission was prohibited from undertaking any initiative without the Commission’s prior authorization<sup>2</sup>. If such a prohibition had been in force in earlier

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<sup>2</sup> As provided in CHR Resolution 2005/53, para. 8 (c): “the Sub-Commission should not undertake any new activity without the Commission’s approval, with the exception of the preparation of studies and research”.

years it would have prevented the emergence of significant standards or mechanisms that are now accepted as important parts of the human rights system. An independent expert body should be granted sufficient flexibility both to follow mandates entrusted by the Council and to initiate activity on its own expert assessment of gaps. Collective decision-making is a check and balance on the deliberations of the body.

The Council will, of course, always retain the discretion whether or not to make use of or accept the role of the Sub-Commission. There is a clear distinction between the technical work of an independent expert body to address legal and other human rights issues, and the political responsibility of its parent, intergovernmental body, to decide whether or not to consciously make a new international human rights legal instrument, as only states are able to make international human rights law.

### **c) A body of independent experts**

The Human Rights Council necessarily plays a political decision-making role. But this needs to be complemented with an independent expert voice, as a source of objective advice, on the basis of which states can make decisions. To carry out its mandate effectively, the expert body will need to be free from political pressure from states. The advisory and technical nature of the work requires that the members of the expert body should be indisputably independent and with a high level of expertise. The procedure for the appointment of the experts must guarantee this independence. This is a key lesson from the experience of the Sub-Commission. The ICJ believes that the method by which members of the Sub-Commission were selected should not be followed, as it failed to guarantee both the independence and expertise of all members.

The ICJ considers that the experts should be selected from a roster, put together, maintained and regularly updated by the OHCHR. While the OHCHR already has a roster of experts, it appears not to be updated and is seldom used even for identifying candidates to fill special procedure mandates. Governmental and non-governmental sources, as well as the OHCHR itself, could submit names and *curriculum vitae* of experts to be considered for future rounds of appointments. It would be the responsibility of the High Commissioner to vet all nominees so as to filter out manifestly unqualified candidates that lack expertise or independence. In this vetting process, the High Commissioner would use clear criteria, such as whether the person is serving actively in any executive or legislative position (or put in another way, whether they are subject to the hierarchical power of the executive or legislature), as such positions would impair or give the appearance of impairing independence. The High Commissioner would also follow a standard verification procedure, which could include interviews and if necessary, written tests on particular human rights subjects. The Human Rights Council would still elect the members, but would select candidates from the official, transparent roster. Terms of membership should be limited, as they are for special procedures, to a maximum of two three-year terms.