Abstract

Some States, having gained increased weight in the United Nations [UN] human rights machinery, pushed through reforms of the Charter-bodies designed to limit their powers of investigation. This paper focuses on the impact of these views in relation to the methods of work developed by special procedures. However, it also highlights how the limits imposed on the freedom enjoyed so far by mandate-holders in the performance of their functions may have provided the most powerful arguments to overcome their brittle legal foundations, and to provide a sound legal basis to the most intrusive activities of such procedures. The approval of a Code of Conduct appears to endorse a practice that subverts the traditional requirement of State consent when monitoring activities result in a final assessment based on international law as to the existence of a violation.

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1 It is not possible, without violating the principles of equality and State reciprocity, to impose on States Parties to the Covenant an obligation to give an account to an organ of the United Nations of the manner in which they fulfil their obligations deriving from that Covenant. This is due to the fact that States who are not a party to the treaty will then get to play unilaterally the role of the controller, and never that of the controlled. [author’s translation] Covenant refers here to the draft treaty that became two separate instruments: the Covenant on Civil and Political rights and the Covenant on Economic, Social and Cultural Rights.
Keywords: Commission on Human Rights; competence of international monitoring mechanisms; Human Rights Council; special procedures

1. INTRODUCTION

The working methods developed by special procedures of the former UN Commission on Human Rights, and continued under the auspices of the Human Rights Council, have raised questions as to their legality on the grounds that without a clear legal basis they subvert the traditional requirement of State consent to monitoring. Paradoxically, the constant attempt by some States to limit the special procedures’ independence and freedom has resulted in one unintended positive outcome – the establishment of a clear legal basis to exercise their most exceptional powers. These powers involve conducting assessments based on international law, into the existence of breaches of human rights law in specific contexts, without having to obtain governmental consent or complying with traditional admissibility requirements pertaining to individual petitioners’ access to international bodies. The developments which are the subject of this paper unfolded in the context of UN Reform launched by Kofi Annan during his tenure as UN Secretary-General.2 While aspiring to transform the UN entirely, the most salient achievement of the reforms was the creation of the Human Rights Council in 2006.3 Commentators have questioned the appropriateness of using human rights issues to disguise what they regard as the latest effort to reform the Security Council.4 Others have argued that the outcome of the reform was not overtly significant in terms of the efficacy of the global human rights regime,5 and may more appropriately be


3 GA Res. 60/251, 15 March 2006. Established by joint resolution of the UN Security Council and the General Assembly (SC 1645/2005-GA 60/180 of 20 December 2005) the Peacebuilding Commission is another important sub-product of the reforms.


viewed as yet another symptom of the ‘reformitis’ syndrome of the UN. Nonetheless, the discussions, attendant to the implementation of the reforms, provide a lens through which to study the attitudes of certain States towards human rights monitoring, and its likely impact on human rights protection. These perspectives are particularly informative as some of the States that were vocal in articulating their views on the reforms are now among the major global economic powers, a status accompanied by increased representation within the UN human rights machinery.

The Asian and African Group have been the principal instigators for reforming special procedures. The proposals they tabled were particularly antagonistic toward the special procedures’ established methods of work, as they considered these, for the most part, to be excessively intrusive on national sovereignty. The end of the Cold War has exposed a reality hitherto obscured by the camouflage of confrontation between the socialist and capitalist blocks, namely that many States continue to remain firm adherents to the rule of sovereignty and vigorously oppose confrontational strategies to promote and protect human rights. Two particular innovations instigated by these groups of States were likely to have a significant impact on the future of the UN special procedures. The first was the introduction of a tightly controlled mechanism for the appointment of mandate-holders; the second, the adoption of a Code of Conduct for special procedures. This paper will address the second of these ‘innovations’ and argue that this Code of Conduct inadvertently provides the legal basis for the most intrusive activities of special procedures.

The paper is divided into three parts. In order to understand their fragile legal background, Part II outlines the historic and political co-ordinates within which a system of special procedures has been developed. This is followed by a review, in Part III, of the difficult situation faced by special procedures in 2005 following a reform process instigated by those States that had consistently attempted to undermine the limited progress the special procedures had achieved. Part IV examines the question as to the extent to which ‘settled’ public international law can be unravelled by States who are so minded. The paper concludes with the argument that the reform of the human rights machinery has had positive outcomes that have been largely ignored or not comprehensibly understood and appreciated by commentators.

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7 Joint resolution of the SC 1645/2005 and the GA 60/180 of 20 December 2005.


2. THE STEP-BY-STEP CREATION OF A ‘SYSTEM’ OF SPECIAL PROCEDURES

2.1. FROM COMMISSION TO COUNCIL

Until 2006, the Commission on Human Rights (henceforth ‘the Commission’) was the main policy-making organ of the UN addressing human rights issues. Created in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC), the Commission consisted of representatives of 53 States and met publicly once a year in Geneva for a six-week session. On 15 March 2006, the Commission was replaced by the Human Rights Council (henceforth ‘the Council’) as the only inter-governmental body of the system of the UN devoted exclusively to the promotion and protection of human rights. The Council has been created as a subsidiary organ of the UN General Assembly and its membership has been reduced, consisting of representatives of 47 different countries. The decrease in numbers was accompanied by a re-alignment of seats to fulfil the criteria of equitable geographical distribution. This reduced representation for western and Latin-American States in favour of a larger representation for Asian States. As explained below, the antagonistic attitude of this regional group towards special procedures has raised well-founded fears of the impact of this new composition of the Council on the future of these mechanisms.

Unlike the Commission, the Council meets no fewer than three times every year for a total period of no less than ten weeks. Other new features of the Council include a reduced ratio of States required to convene special sessions when an emergency situation arises (one-third instead of a majority), the creation of a periodic review mechanism to evaluate the fulfilment of human rights obligations by all States (the so-called Universal Periodic Review), and a better selection process of members. Like its predecessor, the Council’s mandate includes promotional and protective human rights powers. Its meetings are public and any Member State, observers and NGOs with consultative status can participate in the discussions. As an inter-governmental body, the Council works under political principles. Consequently, its work may result in conclusions that are openly contrary to the legal principle of equal

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10 Originally composed of 18 Member States [ECOSOC Res. 5(I) of 16 February 1946 and 9(II) of 21 June 1946], there were successive enlargement of memberships throughout the years to respond to the increase number of UN members and to guarantee equitable geographical representation [21 members by ECOSOC Res. 845(XXXII) of 3 August 1961; 32 members, ECOSOC Res. 1147(XLI) of 4 Aug. 1966; 43 members ECOSOC Res. 1979/36, 10 May 1979; and 53 members by ECOSOC Res. 1990/48, 25 May 1990].

11 GA Res. 60/251 of 15 March 2006.

12 The seats of the Commission were distributed according to the following pattern: 15 members from African States; 12 from Asian States; 11 from Latin American and Caribbean States [GRULAC]; 10 members from Western European and Other States [WEOG]; 5 Eastern European States. The regional distribution of seats of the Human Rights Council [HRC] are: African Group, 13; Asian Group, 13; GRULAC, 8; and WEOG, 7; Eastern Group, 6.
treatment for the same facts. Against this drawback, its governmental composition assures that human rights issues remain on the political agenda of States.

In addition to public discussions, the Council’s scope of activities include the approval of resolutions and decisions with different purposes, including: (a) to make general recommendations with regard to the promotion and protection of human rights, including to the General Assembly, aimed at approving new human rights standards that may be conceived within the Council; (b) to determine the provision of advisory services, technical assistance and capacity-building; and (c) to create subsidiary bodies to assist the Council in performing its tasks. The Council has inherited the main mechanisms to monitor human rights performance from the Commission, among them, a confidential complaint procedure, and special procedures.

2.2. RE-SHAPING THE SPECIAL PROCEDURES OF THE COUNCIL

Special procedures originated in 1967 when the Commission abandoned its self-imposed doctrine of ‘no-power’ concerning communications on human rights violations. The competence to address such communications was officially granted with the adoption of ECOSOC Resolution 1235(XII) of 6 June 1967, on the ‘Question of the violation of human rights and fundamental freedoms, including politics of racial discrimination and of segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories’.

This general competence of the Commission to examine and carry out studies regarding information relevant to gross violations of human right provided legal foundation for two kinds of human rights monitoring mechanisms. First, this new understanding about its competence served as the immediate legal grounds in facilitating the Commission to establish, in 1967, the Ad Hoc Working Group of Experts on Human Rights in South Africa with the mandate to investigate human rights violations in that country, and to report publicly on its finding to the Commission. This was the first public special procedure. It soon became evident that many States, often led by the Soviet Union, objected to the competence of the Commission to

14 ECOSOC Res. 75(V) of 5 August 1947 endorsing the ‘no power’ doctrine declared by the Commission (see *Report of First Session of the UN Commission on Human Rights*, UN Doc. E/259 (1946) para. 22).
15 See also, ECOSOC Res. 1102 (XL) of 4 March 1966 and 1164 (XLI) of 5 August 1966 reinforced by the UN GA Resolution 2144 A (XXI) of 26 October 1966.
16 ECOSOC Res. 1235 (XLI) paras. 2 and 3.
subject States to public scrutiny in cases other than the specific situation outlines in Resolution 1235, which concerned South Africa. Therefore, when the Commission had to address situations in Greece and Haiti in 1967, it decided to design a confidential procedure to address such information, which was derived from non-official sources. This procedure came to be known as the '1503 procedure' and was renamed as ‘complaint procedure’ after the 2006 reform. Only consistent patterns of gross and reliably attested to violations of human rights and fundamental freedoms occurring in any part of the world are addressed under this procedure. It is not the purpose of this article to discuss the role of this procedure, which, despite its highly controversial history due to its secretiveness and perceived lack of efficiency, has survived for four decades.

This attempt to restrict public discussion of human rights situations to those cited in Res. 1235 (XlII), namely, politics of racial discrimination, segregation and apartheid with reference to colonial and other dependent territories, was not successful. When the Commission decided to establish a working group to investigate the situation in Chile, after the 1973 military coup, (by a majority vote) it became clear that the other situations of human rights violations would be investigated by a subsidiary organ appointed by the Commission. A number of States have since been scrutinized by special procedures.

In 1980, when it became apparent that robust Argentinean diplomacy was erecting a major obstacle to pass a resolution creating a special procedure to investigate the ‘dirty war’ in Argentina, a more imaginative route was experimented with. Instead of the creation of a special procedure on Argentina, a Working Group on Enforced

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21 This procedure owes its name to its founding resolution, ECOSOC Res. 1503 (XLVIII) of 27 May 1970.

22 The reforms to this procedure were established in 1997 by the HRC Res. 5/1 of 18 June 2007 entitled *UN Human Rights Council: Institution Building*, Resolution 5/1 (2007).


24 UN Commission of Human Rights, Study of reported violations of human rights in Chile, with particular reference to torture and other cruel, inhuman and degrading treatment or punishment. Resolution 8 (XXXI) (1975).

25 This is well documented in Guest, Ian, *Behind the Disappearances. Argentina’s Dirty war against human rights and the United Nations*, University of Pennsylvania Press, Philadelphia, 1990. See also,
and Involuntary Disappearances was established, with a mandate to investigate the phenomenon of political disappearances worldwide.  

Often linked to situations in specific countries, other such thematic procedures were established, and by the end of the life of the Commission, about 30 such mandates were in force. The creation and evolution of these procedures were not planned, nor was a coherent approach followed in their installation. Both geographic and thematic procedures had Resolution 1235 as their ultimate legal basis, supplemented by the resolution establishing or renewing the mandate itself. The product of political negotiations, normally aiming to pass the resolution by consensus had, most of the time, the effect of creating ambiguous mandates, with mandate-holders given the freedom to develop their own working methods and principles. This left mandate-holders in a vulnerable position against criticisms of their work based on the source of their competence or their approaches to the mandate.

While their mandates and working methods differ, it is possible to define special procedures as the mechanisms established by the Commission, subsumed by the Council, to address either specific country situations or thematic issues in all parts of the world. Special procedures are essentially Charter-based human rights monitoring mechanisms which, since 1967, have been delegated to individual experts (‘Working Groups’, ‘Special Rapporteurs’, ‘Special Representatives’ and ‘Independent Experts’), whose common goal is the investigation of and reporting on human rights situations either in specific territories (country mandates) or with regard to a phenomena of violations (thematic mandates). These procedures, in their current manifestation, owe their existence to resolutions adopted by majority in the Council, and are thus not subject to specific State consent. The scope of the thematic special procedure action is universal: they monitor how all States uphold their human rights obligations, addressing civil, political, economic, social and cultural rights as well as ‘rights of solidarity’ related to development and the environment. Individual as well as collective rights are under scrutiny. Mandate-holders have developed flexible working methods, and their activities extend beyond mere reportage of their activities and findings. Most accept complaints of human rights violations to which they react through ‘letters of allegations’ or expeditiously through ‘urgent appeals’. Mandate-holders carry out country visits to investigate the situation of human rights in given domestic contexts. While these visits require the consent of the State, once the State

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27 Examples of these attacks and their impact on the work of special procedures are discussed below in section 4.2.

28 For existing special procedures see: www2.ohchr.org/english/bodies/chr/special/index.htm.

29 Obviously this is not the case for country mandates whose competence is limited to the territory under study, although the usual practice is that any country mandate can monitor the situation of the country with regard to any human rights.
has consented, the visit is premised on complete freedom of movement and respect for
the immunity and independence of the experts.\textsuperscript{30}

3. SPECIAL PROCEDURES’ QUEST FOR SURVIVAL

The quest for reforming the former Commission, accompanied by proposals for
the creation of the Council as well as for an International Court of Human Rights,
was a recurrent issue in UN debates tracing back to 1950.\textsuperscript{31} The last wave of reform
placed an overwhelming emphasis on the weakness of the Commission, ignoring its
significant achievements. With the criticism reaching a crescendo in the context of
the proposals launched by the Secretary-General to reform the United Nations, the
demise of the Commission became inevitable. This situation was worsened with the
shameful manner in which the end finally came, namely with a procedural rather
than ceremonial session.\textsuperscript{32}

3.1. RE-REFORMING SPECIAL PROCEDURES

Resolution 60/251 created the Human Rights Council without resolving the significant
substantive question of the future of the subsidiary organs dependent on the former
Commission. Many crucial issues regarding special procedures were similarly not
addressed by the ‘Institution Building’ resolution in June 2007.\textsuperscript{33} Instead, they were
deferred until September 2007 when an agreement was reached on some imprecise
criteria for nominating candidates.\textsuperscript{34} The failure to agree on a standardised procedure
to review mandates of special procedures meant that these reviews were conducted on

\textsuperscript{30} The principles governing visits have been included in the non-officially approved ‘Manual of
Operations of the Special Procedures of the Council’, paras. 52–74 in Report of the 15th Meeting
of special procedures assumed by the Human Rights Council, from 23 to 27 June 2008, UN Doc.
A/HRC/10/24, November 2008. A former attempt to ‘codify’ the terms of references for country
visits was made in 1998 (Terms of Reference for Fact-Finding Missions by Special Rapporteurs/
Representatives of the Commission on Human Rights, UN Doc. E/CN.4/1999/104, 23 December
1998) but was not officially endorsed by the ECOSOC. While not formally approved, the terms
of reference for country-visits remain substantially the same as those outlined in the 1970s in
CN.4/1134 (1974). ECOSOC Res. 1870 (LVI) 17 May 1974 drew the attention of all experts to these
rules that have been since then generally followed.

\textsuperscript{31} See Lempinen, \textit{op. cit.} note 13, at pp. 31–34.

\textsuperscript{32} See Lauren, Paul Gordon, ‘To Preserve and Build on its Achievements and to Redress its
Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council’,
‘UN Commission on Human Rights ends on a disappointing note. New Council deserves a better

\textsuperscript{33} UN Doc. HRC R. 5/1, \textit{supra} note 22.

\textsuperscript{34} On possible criteria for the review of special procedures see Hannum, Hurst, ‘Reforming the Special
Vol. 7, No. 1, 2007, pp. 73–92 at pp. 79–82.
a case-by-case basis and resulted in the maintenance of all thematic procedures and the termination of several country-mandates. Resolution 60/251 also made clear that these arrangements would not be settled for long. Its operative paragraphs 1 and 16 called for a full review of the status, work and functioning of the Council in five years time, adding more uncertainties to the future of the human rights machinery depending on this body. However, the Council did not wait that long. On 1 October 2009, it established the first inter-governmental open-ended working group to carry out the review in order to complete the process rather than starting it by 2011. This process ended the review on the work and functioning of the Council in Geneva on 25 March 2011 when the Council adopted the outcome document prepared by second inter-governmental Working Group on the Human Rights Council, and suggested its endorsement by the General Assembly.

Subjecting procedures and mechanisms to regular and repeated reform undermines their credibility and potential impact. Inevitably, it also undermines their efficiency since a good part of their work, and a considerable proportion of already scarce resources, are directed towards reform activities instead of on substantive issues relating to the mandates. The creation of the Council reopened the question of reforming the special procedures and other subsidiary bodies of the former Commission just a few years after subjecting these same procedures to a lengthy two year ‘rationalization’ process that culminated in 2000. On that occasion, the reform of the mechanisms of the erstwhile Commission resulted in minor modifications to the 1503 procedure, and a reduction of competences of the now also defunct Sub-Commission for the Promotion and Protection of Human Rights. This curtailment of the Sub-Commission’s mandate was considered a lesser evil than conceding to the implementation of other proposals advanced, mainly by Asian States and those grouped under the Like Minded Group (LMG) of States, which sought to

35 See, Development of the Human Rights Council since June 2008, Note by the Secretariat distributed during the 16th Meeting of special procedures, 29 June-3 July 2009 at www2.ohchr.org/english/bodies/chr/special/annual_meetings/16th.htm.


42 In 2005, Mr SHA Zukang (representative of China) identified the LMG States as: Algeria, Bangladesh, Belarus, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, Viet Nam and Zimbabwe, Summary record of the 2nd meeting
significantly undermine the competences and independence of special procedures.\textsuperscript{43} However, despite the completion of this rationalization process it was clear that those States, whose objective consisted of weakening the powers of special procedures,\textsuperscript{44} were unwilling to concede defeat. At the last substantial session of the Commission, the Asian Group reopened the question of the review of the special procedures and proposed a seminar on ‘Enhancing and strengthening the effectiveness of the special procedures of the CHR’. Despite the role played in the past by these States to undermine such procedures,\textsuperscript{45} with the support of the LMG,\textsuperscript{46} the Commission approved this initiative.\textsuperscript{47} Furthermore, it was agreed that the seminar, held in October 2005,
would be based on a non-paper presented by the same group of States. With the full support of the LMG and somewhat restrained support of the African Group, the Asian Group once again advocated changes in their non-paper that threatened the future of the special procedures including the introduction of strict criteria for nominating mandate-holders and the approval of a Code of Conduct that would, inter alia, set unprecedented limits to the ‘principle of publicity’ that had governed their activities thus far. The non-paper also recommended the adoption of criteria for admissibility of communications such as the need for personal signatures in letters of allegation of human rights violations.

The Human Rights Council review process has ended so far without significant upheavals for special procedures. Still, proposals have resurfaced to increase oversight of mandate-holders and their work, to restart a ‘rationalization’ process of mandates and, among others, to bar the existence of country mandates unless established with the consent of the country concerned. Other proposals aimed at strengthening public procedures have also resurfaced. This includes an evaluation of

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48 In the practice of inter-governmental organisations, ‘non-papers’ are written proposals distributed unofficially, without nomenclature. The author of the proposal is identified and the papers are usually tabled to test if an idea ‘can fly’. Its non-official status facilitates its withdrawal if there is no consensus forthcoming. Their distribution is unrestricted and they are open to public discussion.

49 Initial discussion paper on enhancing the effectiveness of special mechanisms of the Commission on Human Rights/prepared by the Asian Group, ST/HR/SP/SEM.1/2005/1, October 2005.

50 See remarks by China (on behalf of the LMG) in UN Doc. E/CN.4/2005/SR.2, para. 49, supra note 42.


52 Recommendation 3.

53 Recommendation 8.

54 This was partially endorsed on 25 April 2003 when the CHR approved (by a narrow majority of 28 votes in favour, 24 against and 1 abstention) the decision 2003/113 requesting the High Commissioner for Human Rights ‘To ensure that communications received or urgent appeals issued under the special procedures system are forwarded to the country concerned with written authorization from the special rapporteurs, independent experts or working groups in accordance with the basic criteria and standards of admissibility existing in this connection’. See Domínguez-Redondo, Elvira, ‘UN Public Special Procedures under Damocles’ Sword’, Human Rights Law Journal, Vol. 29, Nos. 1–5, 2008, pp. 32–40.

55 See proposals for the establishment of a ‘Legal Committee on Compliance with the Code of Conduct’ or similar monitoring mechanism advanced by the Non Aligned Movement (NAM), the Organization of the Islamic Conference (OIC), Bolivia, Cuba, China, Algeria, Iran, Libya, Morocco and Russian Federation, UN Doc. A/HRC/WG.8/2/1 (Annex IV-Compilation of Proposals) supra note 38, at pp. 55–64. The full text of contributions by States and other observers is available at the HRC Extranet portal (http://portal.ohchr.org/portal/page/portal/OHCHRExtranet).

56 The African Group, Algeria, India, Azerbaijan, Sri Lanka and OIC proposed that the Council should periodically embark on the process of Review, Rationalization and Improvement (RRI) of mandates, ibidem.

57 African Group, Bangladesh, Democratic People’s Republic of Korea, Libya, OIC and NAM, ibidem.
cooperation by States with special procedures and ideas for allocation and monitoring of resources.\(^{58}\)

### 3.2. MAINTAINING ‘A’ SYSTEM OF SPECIAL PROCEDURES

One of the main bones of contention preventing States from reaching a definitive consensus on the text aimed at the creation of a Council was the chasm between those States that emphasized the importance of preserving ‘the’ existing system of special procedures, and those in favour of ‘a’ modified but as yet undefined system of special procedures. The fact that the resolution creating the Council contains an operative paragraph requiring it to undertake a review of all these procedures clearly indicates that, despite the proclamation of the importance of maintaining special procedures as the primary instrument of the former Commission, the formation of the Council has been used as a means to challenge the whole extant system of special procedures. Finally, the General Assembly resolution creating the Council instructed this organ to maintain ‘a’ system of special procedure subject to review and rationalization.\(^{59}\)

The true intent behind this apparently innocuous requirement is clear from the interpretation accorded to it by those who pushed for its introduction: ‘The General Assembly wisely decided to review and, where necessary, improve and rationalize all mandates in order to maintain a system of special procedures. The GA resolution does not endorse the current system of special procedures as it is.’\(^{60}\)

The growing influence of the group of countries opposed to naming and shaming strategies is evident in their success in imposing measures that border on censorship, rendering special procedures not so ‘public’ and experts in charge of mandates less independent.\(^{61}\) This reality was reflected in the negotiations pertaining to the Council’s review of special procedures, and has re-emerged during the Human Rights Council

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\(^{59}\) UN Doc. GA Res. 60/251, para. 6.


review, with the following three issues residing at their core: (1) the procedure for the appointment of mandate-holders; (2) the maintenance of geographic procedures and the associated dispute over the maintenance of ‘country resolutions’; and (3) the adoption of a Code of Conduct.

3.2.1. Appointment of mandate-holders

The procedure for selection and appointment of mandate-holders established by the Council’s resolution 5/1 is a complex one. It facilitates an unnecessarily long selection process with far greater potential for politicisation than previous arrangements.\(^{62}\) The ‘technical and objective requirements for eligible candidates to be mandate-holders’, approved on 27 September 2007,\(^ {63}\) did not clarify what these prerequisites are, beyond offering vague guidelines regarding qualifications, expertise, competence and flexibility required of the candidate. Against this, the fact that candidates can, for the first time, be nominated by governmental, non-governmental entities as well as individuals and national human rights institutions\(^ {64}\) has to be welcomed as an improvement on the old system. Although NGOs and the Office of the High Commissioner for Human Rights have been entitled to present candidates since 2000 this process was relatively obscure, with the failure of the OHCHR to comply with the requirement of keeping an up-to-date public list of candidates contributing to a lack of transparency around the process of appointment.\(^ {65}\) The reiteration of this aspect of the Office of the High Commissioners’ responsibilities in this regard\(^ {66}\) has resulted in improved compliance with this obligation.\(^ {67}\) As a result of the 2011 review of the Council referred to above, the selection and appointment process for mandate-holders will be altered, requiring mandate-specific application and a motivation letter from nominated candidates. The Consultative Group will interview shortlisted candidates and the President is required to justify his/her decision if it is decided not to follow the order of priority of the Consultative Group.\(^ {68}\) This is a welcome limitation to what has been perceived in the past as an unpredictable and inscrutable process completely controlled by the President.\(^ {69}\)

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\(^{63}\) HRC Decision 6/102.

\(^{64}\) National human rights institutions were not listed in HRC Res. 5/1, supra note 22, para. 42, but have been added to the list as one of the outcomes of the Council Review, HRC Res. 16/21 (2011), Annex, para. 22(a).


\(^{66}\) Resolution of the HRC 5/1, supra note 22, para. 43.

\(^{67}\) The list of candidates is available at: www2.ohchr.org/english/bodies/chr/special/nominations.htm.

\(^{68}\) HRC Res. 16/21, Annex, para. 22 (b) to (d).

3.2.2. Future of country mandates

An important part of the activities of all special procedure mandate-holders is country-oriented. This includes thematic procedure mandate-holders who have adopted a methodology of work according to which violations of human rights relevant to their mandate are documented, analysed and publicized on a country-by-country basis in annual reports and through other means, including the mass media and country reports. Groups united under the LMG and other States from Asia, Africa and members of the Organisation of Islamic Conference have repeatedly called for the suppression of country-specific bodies, arguing that country condemnation inevitably leads to selectivity and double-standards on the part of political bodies. Ironically, the call for the suppression of country-specific mandates and resolutions is accompanied by the pledge to maintain those addressing the situation of the Palestinian territories occupied since 1967 on the basis of the rather tenuous contention that they are ‘thematic’ in nature. Other less radical alternatives, purportedly intended to reduce the politicisation of the Council around the approval of ‘country resolutions’ and the establishment of ‘country mandates’, were also tabled. Among these were proposals for the establishment of different rules for the creation of geographic mandates. In this regard it was proposed (by China) that country-specific resolutions on human rights situations should ‘be reformed to make sure that [they address] only widespread and gross violation of human rights’. In order to achieve this, a change in the rules of procedures for the approval of resolutions was proposed. Whereas all other resolutions of the Council are approved by majority vote, China argued that country mandates should meet the more stringent requirement of a two-third majority vote. Egypt (often representing the African Group) has been the most consistent advocate of the idea that country mandates should only be maintained or created with the consent

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71 See documents cited supra note 45 and 46.
72 Pakistan was the first country to advocate this idea eagerly supported by Saudi Arabia, China (on behalf of the LMG), Azerbaijan and Cuba. See International Service for Human Rights/Council Monitor, ‘Human Rights Council, 5th session’ Human Rights Monitor Series, Daily update, 14 June 2007.
74 Articles 19 and 20 of the ‘Rules of procedure of the Human Rights Council’ included as Part VII of HRC Res. 5/1, supra note 22; and article 125 of the Rules of Procedures of the GA or its Main Committees (UN Doc. A/520/Rev. 16, 2006).
of the concerned State. Others have proposed that all country mandates should incorporate programmes of technical assistance. Finally, it has been argued that country mandates could only be acceptable on the basis that selectivity and double standards are avoided, and that consequently all States should be investigated by such mechanisms. The creation of the Universal Periodic Review Mechanisms constitutes a partial response to this last demand. However, country-specific mandates and resolutions have not been terminated despite attempts during the creation of the Council, subsequent reviews of the mandates and the Human Rights Council review itself. An empirical study indicates that the practice of naming and shaming through political decisions has become increasingly prevalent following the end of the Cold War. It also suggests that the perception of selectivity and double standards associated with this practice is not completely justified. However, parallel to these developments, since 1992, there has been an evident trend towards the disappearance of country-specific special procedures, with some commentators concluding that, ‘calling for a special session is now the de facto way to generate Council action to protect human rights in specific countries’.


77 See summary of proposals discussed within the ‘Working Group on the review of mandates and mechanisms’ (First Session) in UN Doc. A/HRC/3/CRP.2, 30 November 2006, para. 34.

78 A summary of the proposals discussed within the ‘Working Group on the review of mandates and mechanisms’ (Second Session) can be found in the document prepared by the Secretariat A/HRC/4/CRP.4, 13 March 2007, paras. 28–34; also A/HRC/3/CRP.2, para. 24, 30 November 2006.


80 Similar proposals were also tabled in the context of this review. See supra note 57 for the list of countries advocating the need of consent for the establishment of country mandates. The introduction of a two-third majority requirement for the adoption of country resolutions or country mandates was advocated by Egypt, Iran and Sri Lanka, UN Doc. A/HRC/WG.8/2/1 (Annex IV) supra note 38, at pp. 55–64.


82 Domínguez-Redondo, op.cit. note 43 at pp. 103–160.

3.2.3. A Code of Conduct

The approval of a Code of Conduct for special procedure mandate-holders under resolution 5/2 of the Council, dated 18 June 2007, as an implicit component of the institution building package laid out by the Council resolution 5/1, represents an unprecedented success for countries opposed to the methods of work of special procedures. The introduction of limitations on their ability to publicize their activities and the imposition of admissibility criteria for the handling of individual communications were approved despite strong opposition on the part of the mandate-holders themselves, NGOs and certain States.

The power of the special procedures to address human rights violations and effect change is rooted in the publicity given to their work under the stamp of the UN: the debates, resolutions and decisions concerning these procedures are public. Furthermore the mandate-holders’ success in publicizing their work not only for the purpose of disseminating information but also as a tool to exert pressure over States and other concerned actors, is one of the most significant achievements of these mechanisms, particularly in the past 15 years. The external reputational cost remains even if States manage to control or eliminate the potential impact of these negative assessments when considered within the Council.

A number of years prior to the formation of the Council special procedure mandate-holders had discussed their relationship with the press and agreed that ‘no general rules could be established that would dictate when a press release would be issued’. They considered ‘that their ability to establish relations with the press and to use these to further their mandates was an aspect of their independence and their ability to determine their procedures and methods of work’. They concluded that in their interactions with the press ‘there should be no interference of any kind, nor any clearance procedures’. Several of the provisions of the newly approved Code of Conduct undermine this ‘principle of publicity’ governing the work of special procedures and some are specifically aimed at preventing the unfettered access of

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87 Ibidem, para. 22. See also paras. 24–27 and 69.

special procedure mandate-holders to the mass media. According to the new Code of Conduct, mandate-holders are required to be guided by the principle of discretion in their information-gathering activities. In addition mandate-holders are required to ‘show restraint, moderation and discretion’ in the implementation of their mandate. With the approval of the Code of Conduct mandate-holders are now requested to make the concerned government the first recipient of their conclusions and recommendations. This provision is particularly worrying given that one of the key practices that helped protect the independence of the special procedures and their reports has been the public announcement of their observations and conclusions following a country visit, prior to the submission of their final report. This has been of fundamental importance in preventing governments from applying pressure to change the contents of a report.

In addition, the Code of Conduct introduces ‘criteria of admissibility’ to be applied by all special procedures when handling allegations of breaches of human rights. Regrettably, mandate-holders are required to address all communication through diplomatic channels. This may have, inter alia, a negative impact on expediting the delivery of urgent appeals compared with the previous practice of transmitting time-sensitive cases directly to the Minister of Foreign Affairs of the State concerned, with a copy forwarded to the Permanent Missions before the UN.

The most important admissibility restriction introduced with these criteria is the requirement that communications can only be considered if they are submitted by victims of the human rights violations or by persons or groups ‘claiming to have direct or reliable knowledge of those violations substantiated by clear information’. This restriction is not necessarily negative. The nature, function and current practice of special procedures has changed, and increasingly corresponds to a ‘complaint-recourse-mechanism’ in addition to their established nature as a ‘complaint-information procedure’.

89 Article 8(a) and (d) ‘Sources of Information’.
90 Article 13(b) ‘Private opinions and the public nature of the mandate’. For a balanced analysis of the Code of Conduct in this regard, see Rodley, loc.cit. note 84, esp. p. 325.
91 Article 13(c).
92 On the ill-intentioned use of the Code of Conduct to undermine the work of special rapporteurs by some States, immediately after its approval, see Joosten, loc.cit. note 75 at pp. 26–27.
93 Article 14 of the Code of Conduct.
95 Article 9 (d) Code of Conduct.
that their case was being handled by an international human rights body. As argued elsewhere, probably with the exception of urgent appeals related to the imminent risk to the life or physical integrity of the victim, the prior practice, which was based on an implicit presumption of the ‘objective interest’ of the victim to have her/his case handled by special procedures, could have resulted in outcomes manifestly contrary to the principles informing due process, and in particular the principle of causing no harm. This is important as an alleged victim of a human rights violation whose case is handled by a special procedure mandate-holder may be subject to reprisals. Such a situation should not be allowed arise without the person’s prior informed consent.

4. BE CAREFUL WHAT YOU WISH FOR: HOW THE CODE OF CONDUCT PROVIDES LEGAL FOUNDATIONS FOR SPECIAL PROCEDURES’ MOST EXCEPTIONAL POWERS

4.1. UNWRAPPING THE LEGAL FOUNDATIONS OF POWERS TO PROMOTE AND PROTECT HUMAN RIGHTS BY UN ORGANS

There appears to be a global consensus regarding the legitimacy of States and international bodies to act in response to human rights violations regardless of where they take place. It remains impossible to find firm legal grounds to declare the existence of a legal obligation binding third countries to react when any human rights are not adequately protected or are clearly abused. However, according to a permissive customary rule now well established in international law, States and inter-governmental institutions are currently allowed to discuss, monitor and sometimes use non-consensual measures to protect the human rights of foreigners in foreign countries. States and inter-governmental organizations have utilized this prerogative widely. This is particularly true for actions at the UN level:

[...] UN practice has embodied a droit de regard in human rights matters in a series of institutions and mechanisms by which compliance of states with international standards

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98 Article 10 Code of Conduct.
99 This presumption of ‘objective interest’ has been advocated by Frouville, op. cit. note 44 at p. 48.
102 Lempinen, op. cit. note 13 at pp. 60–80.
is monitored irrespective of whether the target states have acceded to a particular human rights treaty. [...] I would submit that we are on safe ground in considering the entitlement of the UN to respond to violations of human rights in the ways indicated to be firmly established in present international law.  

The universal regime of promotion and protection of human rights has been conceived and grown under the auspices of the UN. At an institutional level, the competence to discuss the situation of human rights worldwide and take appropriate action, enjoyed by the Council and its subsidiary organs, demonstrates that States have accepted the legitimacy of discussing, reporting and monitoring their behaviour in relation to human rights. While this competence is contested by some States using State-sovereignty based arguments when opposing concrete actions, even these have expressly accepted the legitimate competence of the Council as the only human rights body with a universal and specific mandate to deal with human rights. The resolution of the UN General Assembly establishing this organ was approved by the vast majority of States worldwide, and expressly endorses this power, when it States that ‘the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon’. In addition, the Council has been endowed with the mandate to undertake a universal periodic review under which the fulfilment by every State of its human rights obligations and commitments is reviewed.  

More significantly, the most intrusive mechanisms, in terms of their actions (that is the special procedures as subsidiary organs of the Council) have been empowered to perform their activities in clear terms. The contrast between the ‘soft’ legal basis of some working methods developed by special procedures, and their de facto implementation, has raised well-constructed (although ill-intentioned) governmental criticisms on the lack of a normative basis through which these bodies exercise their protective monitoring activities. The overarching concern in relation to these criticisms is twofold: (a) the extent to which the position adopted by some States actively undermines progress in the context of the protection of human rights and (b) the wider question as to how ‘settled’ public international law can be unravelled by States acting


104 While the Commission denied this competence for its first twenty years of operations (ECOSOC Res. 75 (V) of 5 August 1947, E/573 at 20), the authorization to take actions regarding situations of violations of human rights, was endorsed by ECOSOC Res. 1235 (XLI) of 6 June 1967, E/4393 at 17. On this evolution, see Domínguez-Redondo, op.cit. note 43 at pp. 34–210; Lempinen, op.cit. note 13 at pp. 35–65.  

105 Only the United States of America, Israel, Palau and the Marshall Island voted against its adoption while Iran, Venezuela and Belarus abstained.  

106 GA Res. 60/251, 15 March 2006, para. 3.  

107 Ibidem, para. 5(e).
with this intent. To address these issues the following paragraphs examine the UN special procedures and how they have generated ‘settled’ law on human rights issues through the methodology of naming and shaming. A caveat worth bearing in mind is that the degree to which these mechanisms combine confrontational approaches with co-operative approaches depends largely on the personality of the mandate-holders:

[...] some have acted like examining magistrates, appraising testimony and the state’s replies in terms of human rights principles. At the opposite extreme, other special rapporteurs or envoys seemed to have regarded their task essentially as that of a psychologist using the technique of “positive reinforcement”.

Most mandate-holders combine both approaches since the terms of mandates are broadly framed. The discussion that follows will focus on the legal basis that supports the former more controversial ‘magistrate’ type approach. This aspect is important to address as challenges to the legality of the special procedures practices only arise when their monitoring activities result in assessments regarding violations of binding international law rules. In other words, these challenges are raised when their activities correspond to what has been called ‘control’ stricto sensu in which three different phases can be identified: (1) compilation of information about the behaviour of the State under control; (2) interpretation and application of the relevant norms to that behaviour; and (3) evaluation of the conformity of the behaviour to the rule of reference, leading to a conclusion about the violation in relation to binding norms.

The practice followed by the Working Group on Arbitrary Detention on the treatment of individual complaints of possible violations falling within its mandate is the most salient example of this development. The Working Group has adopted methods of work similar to treaty-based bodies dealing with individual complaints, complete with recommendations concerning the existence of a violation by the State concerned. Many have, as a result, labelled this procedure a quasi-judicial mechanism.

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Others have spoken of special procedures’ actions on behalf of individual victims of human rights violations, particularly in relation to the handling of ‘urgent appeals’ as international habeas corpus.\footnote{Rodley, Nigel, ‘United Nations Action Procedures against Disappearances, Summary or Arbitrary Executions, and Torture’, Human Rights Quarterly, Vol. 8, No. 4, 1986, pp. 700–730, p. 700; Simma, loc.cit. note 103 at p. 273; Tolley, Howard, The UN Commission on Human Rights, Westview Press, Boulder/London, 1987, p. 105.} Scholars have engaged a variety of theoretical approaches in their efforts to provide justifiable bases for the existing and evolving competences of international human rights bodies. Though significant studies have examined the effect of human rights law on State sovereignty, these studies have not adequately addressed how limitations on such sovereignty are interpreted by those institutional mechanisms with the competence to monitor compliance with human rights standards. The work of special procedures, and in particular their ‘jurisdictional development’, therefore raises interesting theoretical questions. Is it possible to find the legal basis for this development in the UN Charter? Are we confronted with a practice of fait accompli accompanied by an emerging opinio juris gradually sanctioning monitoring organs of international organizations to develop their practices based on their own will in areas arguably outside those originally identified as their zones of competence?\footnote{Decaux, Emmanuele, ‘Avant-Propos’ in Frouville, op.cit. note 44 at p. 7.} Addressing these questions and providing the legal foundations supporting the activities developed by special procedures has required the invocation of complex legal arguments drawn from the theory of implicit powers, the legal value of ‘self-executing’ resolutions, the prima facie validity of acts of subsidiary organs in international inter-governmental organizations, ‘ad hoc’ consent, and the obligation of States to cooperate for the promotion and protection of human rights.\footnote{These grounds are analysed in some detail in Domínguez-Redondo, Elvira, Los procedimientos públicos especiales de la Comisión de Derechos Humanos de Naciones Unidas. Evolución, Naturaleza y Fundamentación Jurídica [Special Procedures of the Commission on Human Rights: Evolution, Nature and Legal Foundations] Universidad Carlos III de Madrid, Madrid, 2003, pp. 720–778 [available in the Library of Universidad Carlos III de Madrid (Spain)].} Beyond the academic discussion concerning the legal nature of the activities developed by special procedures,\footnote{Domínguez-Redondo, op.cit. note 43 at pp. 208–390.} contentious and dangerous arguments aimed at restricting their activities and limiting their effectiveness by questioning their legitimacy have proliferated in recent years. These questions arise from politically motivated criticisms by States, often engineered to shield themselves from the scrutiny of such bodies. The criticisms take the shape of well-constructed normative arguments that undermine new and traditional powers of human rights mechanisms. Many of those attempting to limit the activities of mandate-holders have done so when faced with allegations of violations. Providing an effective channel for raising these allegations is probably the most significant achievement of the special procedures but it is also the most difficult to justify using arguments based on international law.
4.2. A BLESSING IN DISGUISE? REVISITING THE IMPLICATIONS OF THE APPROVAL OF A CODE OF CONDUCT

The composition of the newly formed primary human rights organ of the UN, which obtained the overt support of States belonging to the Asian and African Group, serves as a forewarning of significant changes in how human rights implementation might proceed in the twenty-first century. The review of the special procedures initiated under the Council is an example of this. This review saw the first ever implementation of key aspects of long standing proposals supported by States whose primary objective has been the curtailment of the special procedures’ competences. Among the most damaging and regressive elements adopted by these proposals was a Code of Conduct for special procedures.116 While some of the reforms introduced may respond to a ‘negative reform agenda’117 they could also result in unanticipated outcomes that may, paradoxically, contribute to a strengthening of special procedures.

The ‘success’ of those who opposed the well-established working methods developed by special procedure mandate-holders can, in part, be attributed to their reliance on the fact that a crucial technical legal question supporting the work of the mandate-holders remains unanswered. That question concerns the legal basis for the development of the competence of human rights monitoring bodies of international organizations and how this competence interacts with, conditions, or impinges traditional notions of State sovereignty. The fact that this technical question remains open has meant that it has been difficult to rebut arguments raised highlighting a lack of normative basis for the work of special procedures in handling individual communications of human rights violations. Failure to provide a sound legal basis acceptable to Member States of the Council for some working methods of mandate-holders of special procedures has resulted in forced change of practices. For instance, under pressure from governments, such Cuba and China,118 as well as from some non-State actors,119 the Working Group on Arbitrary Detention had to change its terminology when evaluating the legality of a detention. Since 1997, this Working Group issues ‘views’ instead of its former practice of taking ‘decisions’120 in order to


clarify the non-binding nature of its opinions, and to emphasize that governments ‘are not legally compelled to respond to its communications or recommendations’.\textsuperscript{121}

More significantly, since 1996, again due to pressure from States led by Cuba and China, UN Special Rapporteurs and Working Groups are prohibited from referring to treaties as normative bases from which to draw conclusions on human rights violations where the scrutinized State is not a party to the treaties in question.\textsuperscript{122} The erstwhile Commission had decided to endorse this position thereby limiting the application of conventional standards by special procedures to State Parties of a given treaty.\textsuperscript{123} The Code of Conduct of special procedures has formally reproduced this rule in its operative paragraph 6(c) requiring all mandate-holders to ‘[e]valuate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the State concerned is a party’. This concession to States that are reticent to accept interferences in their sovereignty has merited strident criticism as a backward step and a threat for the system of special procedures.\textsuperscript{124}

This decision is also controversial for a number of technical reasons. It is contrary to the traditional consent requirement associated with the endowment of an international organ with the authority to monitor compliance of internationally agreed standards. According to well-established principles of international law, the consent required to be bound by a treaty is different from the consent needed to endow an international organ with power to monitor compliance of that treaty or any other international legal norm,\textsuperscript{125} as was specifically highlighted in governmental discussions at the time of designing the 1503 procedure.\textsuperscript{126} Nonetheless, State acceptance of the authority of non-treaty based UN organs to review situations pertaining to their conventional human rights obligations has also been reinforced by the creation of the Universal Periodic Review which includes treaties to which States are parties, as one of the criteria under which they are reviewed.\textsuperscript{127}

Intriguingly, the introduction of admissibility criteria provides the work of special procedures with an unprecedented normative basis for their treatment of allegations

\textsuperscript{121}Genser and Witerkorn-Meikle, \textit{loc.cit.} note 111 at p. 704.


\textsuperscript{123}Commission on Human Rights Res. 1996/28, 19 April 1996, para. 5.

\textsuperscript{124}Frouville, \textit{op.cit.} note 44 at p. 59.

\textsuperscript{125}Jean Charpentier, \textit{loc.cit.} note 110, pp. 147–245.


of human rights violations. Prior to its approval, it was difficult to justify, in pure legal terms, the competence of (at least some of) the special procedures and their working methods regarding communications. The Working Group on Arbitrary Detention was the first special procedure to be explicitly endowed with the power of ‘investigating cases’ falling within its mandate.\textsuperscript{128} Since then, many other mandate-holders have received competence to deal with cases of human rights violations.\textsuperscript{129} However, the intervention in individual cases was well-established by the time the Working Group on Arbitrary Detention was created. For instance, inspired by the practice of Amnesty International,\textsuperscript{130} the Commission began to send ‘urgent appeals’ in individual cases in the 1970s,\textsuperscript{131} subsequently delegating this competence to one of its special procedures, the Working Group on South Africa, in 1979.\textsuperscript{132} It has since been further developed by a range of mandate-holders, both those with and without specific mandates to do so. This initial context and evolving practice in relation to dealing with individual cases has been described as ‘a legal imperfection at the time of the creation of the mechanisms [but] […] legalized by acquiescence and subsequent confirmation’.\textsuperscript{133} However, it is difficult to demonstrate that such a confirmation was indeed granted when, in the history of special procedures only once, and for a temporary period, were the methods of work of a mandate formally approved.\textsuperscript{134}

The formalized approval of admissibility criteria included in the Code of Conduct overwhelmingly attests the competence of all mandate-holders to deal with

\textsuperscript{128} Resolution 1991/42, 5 March 1991.

\textsuperscript{129} Some commentators have made a classification between special procedures with that competence or those without it. See Frouville, \textit{op.cit.} note 44 at pp.16–17 and Rudolf \textit{loc.cit.} note 111, pp. 290–291.


\textsuperscript{131} A compilation of urgent appeals by the Commission between 1967 and 1980 can be found in Ramcharan, \textit{op.cit.} note 101 at pp. 84–86.

\textsuperscript{132} Commission on Human Rights Res. 12 (XXXV) of 6 March 1979.


\textsuperscript{134} The mandate on the question on torture enjoyed the privilege of an explicit approval of its methods of work (for the first time in Res. 1994/37, 4 March 1994, para. 13 and subsequent resolutions referred to this mandate until 2003), although the opposition of the Organization of the Islamic Conference and Cuba to this explicit approval was a serious obstacle for the approval of Commission on Human Rights Res. 2001/62 of 25 April 2001, see summary discussions on UN Doc. E/CN.4/2001/SR.43 (2001), paras. 74 and 77 and Amnesty International, ‘Report on the 57th session of the United Nations Commission on Human Rights, 2001’ AI:IOR 41/023/2001 at p. 37. The changes in methods of work introduced by the new mandate-holder, Theo van Boven (UN Doc. E/CN.4/2003/68 (2003), paras. 12–21) seemed to have been ignored by the Commission (Res. 2004/41, 19 April 2004 at para. 29) which recalled methods of work of the former mandate. The Human Rights Council has discontinued the approval of this mandate’s methods of works.
communications, albeit indirectly. Instead of express recognition of the competence of mandate-holders to handle, investigate or reach conclusions over potential human rights violations, this competence is deduced from the setting of admissibility criteria by the Council. Therefore, it is argued that the Council and its special procedures have been endorsed with the power of reacting to human rights violations without the specific consent of the State concerned, not only for the case of situations of human rights violations, but also in relation to individual complaints.

Despite the existence of an authoritative doctrine to the contrary, resolutions, such as the one establishing the Code of Conduct of the Council and those of the former Commission cannot be analysed exclusively through political lenses. Neither can they be analysed using the traditional rationale of assessing normative resolutions of organs of international organizations as sources of international law. The Council’s resolutions referred to here are not normative but ‘self-executing’. They apply and are valid as long as no superior organ within the organisation contradicts them. While the legal implications of a normative resolution are derived from a pattern of votes, declarations of States and subsequent practice confirming the emergence of opinion juris, the purpose of the decision regarding the methods of work and competence of special procedures is fulfilled through its adoption. In this regard, resolutions concerning the competence of special procedures share something in common with negative resolutions passed by the Council or the General Assembly on the situation of human rights in a given country. The purpose of the latter – to criticise that State – is also fulfilled with its mere approval. However, they differ in terms of effects. The effects of such negative resolutions are purely political while resolutions on methods of work and competence have legal effects.


If the Council issues a resolution authorizing its subsidiary organs to handle individual complaints and to monitor the compliance of international conventional standards, a legal activity of control *stricto sensu* is involved. From a legal perspective, there is no real difference between the views taken by the Working Group on Arbitrary Detention or other mandate-holders of special procedures on the violation of human rights norms, and the opinions issued by treaty bodies. None of them are 'binding' and they share the same underlying purpose: to incite a change of States' attitude based on the 'mobilisation of shame'. The real difference lies in the clear legal foundation of this competence for treaty bodies, which has been largely missing in the case of special procedures until the approval of the Code of Conduct. Some commentators therefore prefer to speak about 'effects' (legal or political) of resolutions instead of their legal nature, while others distinguish between 'operational resolutions' and normative resolutions, arguing that the former do not belong to the normative facet of the UN but to its structural dimension.

There is thus an interesting continuum. The special procedures were born in the 1960s to overcome the compliance gap and the associated lacuna within international human rights bodies. They appear to have survived the creation of designated treaty

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141 The provision that the creation of treaty-bodies would mean the end of charter-bodies is reflected in ECOSOC Res. 1235 (XXII) origin of public special procedures, which foresaw the revision of this competence after the entry into force of the International Covenant on Human Rights (para. 4). When the 1966 Covenants entered into force, the revision only resulted in the publication of several documents describing the different procedures within the UN without revising their competency. See Secretary General Doc. E/CN.4/1317 (1979), *Analysis of existing United Nations procedures for dealing with communications concerning violations of human rights* Comments from governments were provided in UN Doc. E/CN.4/1273, and Addenda 1–5. See also van Boven, Theo, 'Creative and Dynamic Strategies for Using United Nations Institutions and Procedures: The Frank
bodies endowed with stronger legal competence flowing from their creation through State consent. They have faced constant critique and opposition, but when this critique resulted in the creation of a Code of Conduct, rather than weakening the procedures, this process actually had the effect of placing them on a similar standing to treaty monitoring bodies. Ironically, those States that proposed the Code of Conduct did so in an effort to avoid assessments based on norms found in treaties to which they were not a party. They argued that such assessments by special procedures violated principles of State sovereignty and of obtaining their consent to be assessed and controlled in relation to these norms.

In proposing the Code of Conduct they nevertheless formalized the powers of the special procedure mandate-holders to conduct assessments in relation to human rights violations of States that had ratified these treaties. This challenges the traditional international rule according to which the consent to be bound by a treaty is different to the consent to be monitored by an international body in relation to the conventional obligations arising from that treaty. For instance, until the adoption of the Code of Conduct it would have been necessary to elaborate a theory for the existence of a new customary rule norm to justify that any organ other than the Human Rights Committee had competence to examine a violation of the International Covenant on Civil and Political Rights. In the case of individual communications, fresh consent to Protocol I of the Covenant would be required. However, as it has been sanctioned by the Code of Conduct any special procedure can provide assessments on violations of relevant treaties with the only condition that the State concerned is party to that treaty, without having obtained its express consent to do so.

Besides the challenges and opportunities these developments raise in relation to co-existence and co-operation of treaty and Charter bodies, several other difficult questions arise in terms of the situation of States who, not being party to particular treaties, but being members of the Council, can engage actively in the creation and work of a procedure where they will stand as ‘non-controlled controllers’ of the violations of conventional norms. In other words, this results in a curious position whereby they can judge or ‘control’ States for failure to maintain standards they, themselves, have not agreed to through the treaty bodies.

142 GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).
143 GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc.A/6316 (1966); 999 UNTS 302.
5. CONCLUSION

The propensity of special procedures to implement monitoring/protective activities without clear legal bases has raised questions about the legality of such practices. This development appears to subvert the traditional requirement of State consent when monitoring activities result in a final assessment based on international law as to the existence of a violation, privileging an exception in public international law as the rule. This reflects a more general phenomenon in international law, that is, that normative progress is often slower than advances made by the institutional monitoring mechanisms.\textsuperscript{145}

A growing number of States that are influential within the UN human rights machinery are using the real or perceived deficiencies attached to confrontational approaches to human rights to undermine the work of human rights monitoring mechanisms. This paper has focused particularly on the impact of these views in relation to the working methods developed by special procedures. However, it has also highlighted how the limits imposed on the freedom enjoyed so far by mandate-holders in the performance of their functions may have provided the most powerful arguments to overcome their brittle legal foundations, generating a sound legal basis to the most intrusive activities of such procedures. Some States, having gained increased weight in the UN human rights machinery, pushed through reforms of the Charter bodies designed to limit their powers of investigation. Paradoxically, the result of this process of reform has been the creation of a stronger legal basis for these bodies and, consequently, their increased ability to enforce human rights protections and provide redress.