

**Commentary and Proposed Changes to the Draft Code of
Conduct as Tabled by the African Group:
The Concerns of a Coalition of Human Rights NGOs**

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Summary

The suggestions and comments found in this document address many specific concerns of the Sexual Rights Initiative with the Draft Code of Conduct, tabled by the African Group, and its pre-ambular paragraphs. Our overarching concern is the impact that many provisions contained in this Draft Code will have on the preservation and enhancement of the independence and effectiveness of the Special Procedures. The analysis contained herein is based on the experience of these organizations most of whom have worked with Special Procedures in the contexts of raising particular substantive issues with them, submitting communications to them on behalf of victims, and working with them in preparation for and during country visits. The analysis also draws on our experience advocating for women's and human rights nationally, regionally and internationally and our participation in United Nations fora, conferences and negotiations for the promotion of women's human rights and implementation of international human rights standards.

While we give commentary and make suggestions on nearly every provision of the Draft Code, we wish to highlight, by way of summary the following Articles, which we are most concerned about:

- Article 15 seeks to make the Council responsible for holding mandate-holders accountable for violations of the Code. Given the political nature of the Council, we believe this Article to be a significant

threat to the independence of mandate-holders in this Draft Code of Conduct. We would prefer to see the Secretary-General or the President of the Council entrusted with the responsibility for accountability under both the Code of Conduct and the Regulations Governing the Status, Basic Rights and Duties of Officials and Experts on Mission.

- Article 3(b) attempts to take away the privileges and immunities of mandate-holders by holding them accountable under national laws notwithstanding the application of the Convention on Privileges and Immunities. This provision violates international law as set out in the Convention and in two separate decisions of the International Court of Justice.
- Articles 5(a) and 13 seek to impose evidentiary criteria for the use of communications procedures in individual cases of human rights violation. This would defeat the purpose of this non-judicial tool, which merely brings the attention of a State to a particular matter so that they can investigate and/or uphold human rights standards.
- Article 5(b) seeks to restrict the scope of review by Special Procedures to international conventions ratified by the State in question. This undermines the universal nature of the Special Procedure system.
- Articles 11(a) and (b) seek to regulate the interactions of mandate-holders with the media and the release of information following country visits. These topics are covered extensively in the Manual of the Special Procedures and the provisions of the Code must be consistent with it.

Introduction

Human Rights Council Resolution 2/1 requests the Working Group on the review of mandates to draft a code of conduct regulating the work of the Special Procedures. Although a code of conduct for mandate-holders is unnecessary, this HRC Resolution requires that one be drafted and the focus must shift to ensuring that its content is appropriate and is consistent with the Council's mandate for the effective promotion and protection of all human rights. Unfortunately, to date, no other draft codes have been tabled by any other State or Group of States. Given this and given that the African Group has recently tabled a draft resolution for the adoption of its Draft Code of Conduct, we have decided to use the African Group's text as a starting point for the development of an appropriate code of conduct which allows for the independence of the Special Procedures to remain intact to the greatest extent possible.

Recommended deletions from the text are in ~~strike through~~ typeface and suggested additions are underlined. If the suggested language has been taken from a specific document, the document is identified directly afterwards in (parentheses). For many provisions, commentary on them or on the proposed changes is also given. However, we note that there are other possible solutions to many of the problematic elements of the African Group's Draft, and so these comments must be considered as ideas to be taken together with those of other reputable stakeholders.

We have analyzed both the operative provisions of the African Group's Draft Code as well as the pre-ambular paragraphs preceding these. However, our analysis of the pre-ambular paragraphs can be found after the analysis of the main part of the Draft Code.

Analysis of the Operative Paragraphs of the African Group's Draft Code of Conduct

Article 1 – Purpose of the Code of Conduct

The purpose of this Code of Conduct is to ~~define the standards of professional behaviour that mandate holders under~~ regulate [PROPOSE: guide] the work of the Special Procedures (HRC Res. 2/1, OP3) of the Human Rights Council (hereinafter referred to as "mandate-holders") ~~are called upon to observe whilst discharging their mandates~~ in order to promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. (GA Res. 60/251, OP2).

Commentary: The purpose of the Code of Conduct is already set out in HRC Res. 2/1, OP3, and it is not clear why the language in the actual code should be more constrictive than this. This language of HRC Res. 2/1, at least in the English version, legitimately allows for the incorporation into the Code of elements to do with cooperation by States with the Special Procedures, as the "work of the Special Procedures" is undermined by a lack of such cooperation, and so should be regulated. It should be noted that the Spanish version of this resolution makes this interpretation slightly more difficult as the word "labor" is used as opposed to "trabajo".

We also propose the word "guide" be used as opposed to "regulate" as the latter has a legal connotation that the Code should be laying down enforceable provisions in some detail as opposed to laying out some general guidelines. Given that HRC Res. 2/1 was not a consensus resolution, we would hope there may be some flexibility for making this substitution.

The purpose of the Code must also serve the ultimate purpose of the Council itself and of the Special Procedure system. Thus, incorporating this language from GA Res. 60/251 will help to reaffirm this fundamental purpose and will help to ensure that subsequent provisions of the Code are interpreted in a manner consistent with this. Language from the Council's founding resolution has a clear legitimacy and should be relatively non-controversial.

Article 2 – Complementary nature of the provisions of the Code of Conduct

a) This Code complements the Regulations Governing the Status, Basic Rights and Duties of Officials other than ~~non-UN~~ Secretariat Officials, and

Experts on Mission (hereinafter referred to as "UN Regulations governing the status of Experts in Mission").

Commentary: This clearly is an important provision to include in the Code and to bear in mind as many provisions of the proposed Draft simply incorporate slightly altered provisions from the Regulations. Given that this Draft Code is meant to complement the Regulations, it should be consistent with the Regulations. It could be said that any provision of the Draft Code that is inconsistent with the Regulations is also, therefore, inconsistent with this provision of the Code. The Code would thus fail to be an internally consistent document as it would contain conflicting provisions. This same argument can be used for the reference in Art. 2(b). It is suggested that the reference to the Regulations be corrected to accurately reflect the document's name.

b) The provisions of the Manual of the United Nations Human Rights Special Procedures on Human Rights complement those of the present Code.

ALTERNATIVE:

b) The provisions of the Manual of the United Nations Human Rights Special Procedures on Human Rights complement and those of the present Code are complementary and are mutually reinforcing.

Commentary: Article 2(b), as it currently exists, is a weak recognition of the legitimacy of this document, as the sentence would seem to imply that the Code would lay out the framework and the Manual would simply fill out provisions of the Code. It should be recognized that the Manual is an initiative that comes out of the implementation of the Vienna Declaration and Programme of Action (OP95): "The procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings."

At a minimum, this sub-article must remain in the Code as it formally recognizes the legitimacy of the Manual. As well, it could be said that the reference, even as it exists, necessitates that provisions of this Code provide a framework that is consistent with those of the Manual. However, to prevent any hierarchy between the two documents, the alternative formulation is preferred.

c) Mandate-holders ~~are~~ must be provided by the High Commissioner for Human Rights along with the documentation pertaining to their mission, and with a copy of this Code and of the Manual of the United Nations Human Rights Special Procedures of which they must acknowledge receipt,

Commentary: A similar provision exists in the Regulations to ensure that a copy of them is given to all experts when assuming their duties; it is thus an acceptable provision. However, to avoid creating a hierarchy between the Manual and the Code, and particularly given the

detailed and helpful guidance given to mandate-holders in the Manual, the provision should also refer to the Manual.

Article 3 - Status of mandate-holders

a) Mandate-holders are independent ~~person~~ experts; they exercise their functions in accordance with their mandate, ~~through~~ in a professional and impartial manner, and with the primary objective of the Special Procedures system: to promote the full implementation by States of their human rights obligations and to prevent and respond to human rights violations (Note by Special Procedures' Coordination Committee on a Code of Conduct, p.4) ~~and law based assessment of the facts, without outside influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever~~; the notion of independence is linked to the status of mandate-holders, and to their freedom to assess the human rights ~~questions~~ issues and situations that they are called upon to examine under their mandate.

Commentary: The provision recommended for deletion: "~~without outside influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reasons whatsoever~~" is clearly far too overly broad and could encompass virtually any suggestion made to a mandate-holder by anyone. The analysis that NGOs provide can be very helpful to mandate-holders to understand particular issues or raise considerations that may not have occurred to the mandate-holder. In these cases, it is always the mandate-holder who is the decision-maker as far as how they view a particular issue or whether they choose to use this suggested analysis. However, this provision disallows such dialogue which would undermine a perfectly healthy process.

b) Mandate-holders exercise their functions on a personal basis, their responsibilities being not a national but exclusively of an international nature.

Commentary: This provision is in fact very similar to Regulation 1(a), and so is not particularly harmful if included.

c) When exercising their functions, the mandate-holders enjoy the privileges and immunities provided for under section 22 of Article VI of the United Nations Convention on Privileges and Immunities; the mandate-holders must respect the national legislations and regulations of the country wherein they are exercising their missions to the extent that these laws and

regulations are consistent with human rights and the effective performance of the mandate holders' official functions (Note by Special Procedures' Coordination Committee on a Code of Conduct, p.4). These privileges and immunities may only be waived by the Secretary-General of the United Nations in accordance with Section 23 of Article VI of the United Nations Convention on Privileges and Immunities.

Commentary: Without the first suggested addition, this provision is self-contradictory. What is the purpose of privileges and immunities, if a mandate-holder must still abide by national laws where these laws could potentially render ineffective the mandate-holder's mission? Given that the nature of their mandates are international in scope, their being subject to national laws while on official missions is inappropriate as it could be that abiding by certain laws might actually harm the effectiveness of their mission or country visit. Immunities and privileges are extended to the expert because "the independent exercise of their functions during the period of their missions" is viewed as sufficiently important to the interests of the United Nations so as to justify the non-application of national laws (See section 22 of the Convention).

The reference to this provision of the Convention is a reflection of international law and in particular the ICJ Advisory Opinion in the case of Mazilu, in which the Court recognizes the applicability of section 22 of Article VI to Special Procedure mandate-holders. It may also be useful to include the suggested reference to section 23 of Article VI of the Convention. Violation of national laws by a mandate-holder in independently discharging their functions is one clear area where the Council cannot purport to have any authority over mandate-holders. It is the Secretary-General, as per section 23 of the Convention, who has the sole authority to waive section 22 immunities and privileges. Furthermore, as per the ICJ Advisory Opinion in the case of Kumaraswamy, the determination of whether conduct, in respect of which immunity is claimed, falls within the scope of an expert's mission is also solely within the power of the Secretary-General.

Article 4 - Solemn declaration

At the time a mandate-holder accepts his or her office, he or she should make, in writing or ~~Prior to assuming their functions, mandate holders make~~ in open sitting of the Human Rights Council (hereinafter referred to as the "Council"), the following solemn declaration,

"I solemnly declare that I shall exercise my functions ~~from a completely impartial, loyal and conscientious standpoint~~ in all loyalty, discretion, impartiality and conscience (Regulations 1(B), "impartiality" added), ~~scrupulously observing the truth~~ and that I shall discharge these

functions and regulate my conduct in a manner totally in keeping with the terms of my mandate and the interests of the Organisation of the United Nations, without seeking or accepting any instruction from any other party whatsoever and with the sole motivation of the promotion of human rights and the protection of victims from violations of their human rights.
(adapted from Coordination Committee, Possible Elements of a Code of Conduct, s. 2)

Commentary: The Regulations (Reg. 1(b)) set out an oath already applicable to mandate-holders. Though unusual, there is nothing inherently wrong with mandate-holders having to swear two oaths, so long as these oaths do not conflict with one another. The use of the term "impartiality" is not harmful if it is balanced with language concerning the primary mission of the Special Procedure system, promoting and protecting human rights, as suggested. As well, the requirement of impartiality is anyway contained in Regulation 2(b). Indeed, given that the oath in the Code is intended for Special Procedures, and the one in the Regulations is meant generally for experts on mission, it would represent some added value for the oath in the Code to include this language as it is perfectly appropriate for mandate-holders to swear to uphold the fundamental aim or the primary mission of the Special Procedure system.

Regardless of what is intended, the phrase "scrupulously observing the truth" will invariably have clear implications for the ability of mandate-holders to act on behalf of victims through individual communications as well as for reports from country missions. With respect to individual communications, the tool is a preventive and non-judicial one, and as such truth-seeking is unnecessary as it is always open to States to respond to allegations. With respect to country missions, it is very often the case that a concerned country will disagree with the findings, analysis and recommendations of the Special Procedures. If this phrase is included, mandate-holders could be subject to allegations of having broken this oath merely by virtue of these disagreements. It is clear that this phrase must be deleted, as suggested.

Having mandate-holders come to Geneva simply to swear an oath prior to assuming office is very wasteful of the resources of the UN and of the mandate-holder. It is not clear what an in-person oath can achieve that a written one cannot. Moreover, waiting until the mandate-holder is able to come to Geneva will result in either a delay before a mandate-holder is able to commence her duties or a period where the mandate-holder is performing her duties without having sworn these oaths. Thus swearing this oath must be permitted in writing, as is clearly permissible for the one in the Regulations (see Reg. 1(b), commentary).

Article 5 -Prerogatives

~~Without prejudice to prerogatives for which provision is made as part of their mandate, the mandate holders will:~~

~~a) establish the facts, based on objective, reliable information, that has been duly verified by them.~~

~~b) evaluate these facts in light of universally recognised human standards and of international conventions ratified by the State concerned;~~

Mandate-holders are subject to the obligations stipulated in the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9). They are entitled to the immunities and privileges listed in section 22 and 23 of Article VI of the United Nations Convention on Privileges and Immunities.

Commentary: This article as it stands does not appear to be actually about prerogatives, despite the title of the article, but about information-gathering and bases of review. The ideas are better incorporated (after substantial modifications) into other articles (see our suggestions under Article 8).

The phrase "establish the facts, based on ... reliable information, that has been duly verified by them" **is clearly unacceptable** as it seeks to impose evidentiary criteria on information before a Special Procedure is able to act upon it. When Special Procedures act on behalf of victims they do so when they are satisfied that the information is credible. They employ a few indicators to assess this credibility (see Draft Manual, para. 42). Any level of verification beyond this is impossible and is not the function of this tool which is meant to alert States to situations and request them to investigate and/or to uphold human rights standards.

Given the in-person nature of a country visit, the reliability of information provided to a mandate-holder is more easily assessed. This provision could also be modified to reflect its non-application to individual communications; however, any evidentiary criteria put forth for receiving info during a country visit must be consistent with the Manual (paras. 23, 74, & 75).

The phrase "ratified by the State concerned" **is clearly unacceptable** as it seeks to reduce the scope of the Special Procedures to something less than universal. Part of the added value (aside from individual communications) of the Special Procedure system over the treaty-bodies is its ability to scrutinize the situation of human rights in potentially any country. The inclusion of this clause clearly seeks to undermine the universal nature of human rights and thus runs contrary to the foundational resolution of the Council (GA Res. 60/251, OP2). Its implementation will more easily allow opponents of the system to later argue that the Special Procedures merely duplicate the work of the treaty bodies and thus should be further restricted or eliminated.

Article 6 - General principles of conduct

While discharging their mandate, mandate-holders must:

a) Keep in mind the mandate of the Council to contribute to the promotion and protection of human rights, including through dialogue and cooperation;

PROPOSE:

a) Keep in mind the mandate of the Council to promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner; (GA Res. 60/251, OP2)

Commentary: As it currently stands, this provision incorporates modified language from GA Res. 60/251, OP 5(f). Clearly, while dialogue and cooperation are ideal, their existence depends on the will of the State in question. This potentially leaves it open for States to attack Special Procedures when States do not to cooperate. The alternative formulation is preferred as it is nearly a verbatim incorporation of OP2 of the Council's founding resolution, which could be read as the primary mandate of the Council.

~~b) focus exclusively on the interests of the Organisation of the United Nations, constantly keeping in mind their fundamental obligations to observe the truth, loyalty and independence pertaining to their mandate;~~

Commentary: This same language was incorporated into the oath and so it is repetitive to include here again. It once again seeks to impose an obligation "to observe the truth". How will this phrase be interpreted when a State disagrees with the contents of a mandate-holder's report? The mandate-holder would be open to attacks for failing to "observe the truth". In fact, an example has already been given by a proponent of the African Group's Draft Code as to the applicability of this provision in a situation where a mandate-holder has merely based his or her findings after a country visit on credible information provided by an NGO instead of on information provided by the State. Clearly, it is up to the State to make known this information that the mandate-holder has not found credible, but the mandate-holder should not be open to attacks based on this legitimate exercise of discretion.

~~b) e) Uphold the highest standards of efficiency, competence, and integrity, independence and by integrity is meant, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith; The concept of integrity includes, but is not limited to, probity, impartiality, fairness,~~

honesty and truthfulness in all matters affecting their work and status.
(Regulations, 2(a))

Commentary: This provision as drafted by the African Group is taken directly from Regulation 2(a) with the addition of the words "equity" and "good faith". In itself, this provision is not worrying, though we suggest wording that reflects that which is found in Regulation 2(a). The provision incorporates very general concepts related to professional conduct that one would expect to find in a code of conduct. However, once again, the concern is the means of accountability for upholding these standards that is provided for in the final Article of the Draft Code. Please see our comments under Article 15.

~~d) neither seek nor accept instructions from any Government, individual, governmental or non governmental organisation or pressure group whatsoever;~~

Commentary: While this provision would appear to be in keeping with Regulation 2(b), we have a concern over the interpretation of the word "instructions" in the context of this provision. Under no circumstances should this word be interpreted to include information provided or suggestions made to the mandate-holder. These are both legitimate activities which help ensure that mandate-holders have the information needed to perform their functions. However, without language to ensure clarity on this, we are concerned that many States will attempt to employ a wide interpretation of this word, when mandate-holders make statements that States disagree with. This fear is particularly understandable given the wide language that the African Group has employed in drafting Article 3(a).

We acknowledge that for a mandate-holder to receive instructions, that is to acquiesce to demands made by a State or group external to the UN which threatens their impartiality or objectivity, is improper. However, we feel that if this provision were to occur in the final Code of Conduct, it must be balanced with strong language that mandate-holders are encouraged to receive information from a wide variety of sources. As the spirit of this provision can already be found in the Regulations, we would recommend its deletion in the absence of language to balance the interpretation of "instructions" as excluding information/suggestions.

c) e) Adopt a conduct that is consistent with their status, at all times;

~~f) be aware of the importance of their duties and responsibilities, take the particular nature of their mandate into consideration and behave in such a way as to maintain and reinforce the trust they enjoy from all stakeholders.~~

Commentary: The spirit of this has been captured in the preceding Article 6(e) of the African Group's Draft. The proposed (f), however, contains language, such as "behave in such a way as to maintain and reinforce the trust", which once again has the potential to

open up mandate-holders to attack in situations where they disagree with States, doubt the information they provide during a country visit or bring attention to human rights problems.

PROPOSE:

d) g) Not use his/her office or knowledge gained from his/her functions for private gain, financial or otherwise, or for the gain ~~and/detriment~~ of any third party.

SECONDARY SUGGESTION: "... or for the gain and/or detriment of any individual third party."

Commentary: This is an incorporation of Regulation 2(e), with one significant change: the addition of "and/or detriment". This has the effect of opening mandate-holders to criticism for doing anything to the detriment of a State, person, or corporation (each of which could be an interpretation of "third party"). Thus, mandate-holders could be attacked for reporting human rights abuses in a country that the State, or persons or corporations involved might find embarrassing or to the "detriment" of their public image.

We would propose deleting "and/or detriment". However, if "detriment" is to be retained we would suggest attempting ensure that it is understood as meaning an "individual".

e) h) Not accept any honour, decoration, favour, gift or remuneration from any government or non-governmental source for activities carried out in pursuit of his/her mandate.

Commentary: This provision appears to be consistent with Regulation 2(g).

f) i) Mandate-holders shall be courteous in their relations with States, civil society and other actors with whom they are in contact during the exercise of their functions. (Coordination Committee, "Possible Elements of a Code of Conduct", s. 3)

g) j) Mandate-holders shall exercise appropriate caution in taking any action that may place victims and their interlocutors at risk. (Coordination Committee, "Possible Elements of a Code of Conduct", s. 3)

Commentary: Our proposed sub-articles (f) and (g) are found in the Coordination Committee's "Possible Elements of a Code of Conduct". We believe these are perfectly appropriate and necessary for any code of conduct that is to apply to mandate-holders. Currently, in the African Group's Draft Code of Conduct, there are no references to

mandate-holders' obligation not to do anything that would place victims or human rights defenders at risk.

Article 7 - Observance of the terms of the mandate

Mandate-holders must exercise their functions in strict observance of the terms of reference of their mandate; in case of doubt, they must seek guidance from the Council.

Commentary: With respect to this Article, our concern is not the actual provision, as we believe that mandate-holders have generally acted in accordance with their mandates and have had sound reasons for interpreting topics as coming within their mandate, even when certain States have accused specific mandate-holders of exceeding their mandates. Our concern is the means of accountability for this provision where a State feels that a mandate-holder has exceeded their mandate. This means of accountability is a concern that we have for many provisions within the Draft Code. Please see our comments under Article 15.

Article 8 - Gathering information from various sources ~~of information~~

In gathering information, the Mandate-holders must:

a) Be guided by the principles of discretion, transparency and impartiality, and exercise caution, particularly in taking any action that may place victims and their interlocutors at risk (Coordination Committee, Possible Elements of a Code of Conduct, s.3).

Commentary: While this might seem like an appropriate provision, we have one major concern with it. The requirement of "transparency" in gathering information has the possibility of requiring mandate-holders to disclose sources of information. This may put victims of human rights abuses and those who represent them at risk of reprisal from States or private actors. Although we acknowledge that "transparency" is one of the principles of information-gathering set out in the Manual (para. 24), we recommend the addition of language that makes it clear that the exercise of caution must be foremost with an eye to ensuring the safety of victims and their interlocutors. Various provisions of the Draft Manual provide adequate guidance for mandate-holders with respect to protection of sources.

b) ~~Verify the veracity of the facts along with the validity of the positions on which they base their reports and conclusions.~~ Take account of all available sources of information that they consider to be credible and relevant (Draft Manual, para. 23) and base their analyses, conclusions, and findings upon the

consideration of ~~Evaluate those facts~~ this information in light of universally internationally-recognised human rights standards and of international conventions ratified by the State concerned (modified from African Group's Draft Code of Conduct, Art. 5(b)).

Commentary: This Article, once again, seeks to impose a high evidentiary threshold for Special Procedures to be able to use information received from sources. This suggested formulation is taken from the Manual and the African Group's Draft Code and combined here to give a very appropriate formulation recognizing the discretion of mandate-holders in deciding what information to use.

~~e) Give Representatives of the concerned State the opportunity of commenting their assessment and of responding to the allegations made against the State.~~

Commentary: Under current practice, States are specifically asked to investigate and comment on allegations in individual cases, apart from urgent appeals, before these are made public. They are usually kept confidential until such time as the annual report is released, thus providing ample opportunity for comment by States. In the case of field visits or country missions, this opportunity operates a bit differently in order for mandate-holders to make use of the highest point of media interest in their visit. We recommend removal of this provision from this Article as opportunities to comment on "assessments" from country visits and "allegations" of individual human rights violations are best dealt with separately and perhaps more appropriately under Articles 11 & 12.

Article 9- Official field visits

Mandate-holders must ensure:

a) That their visit is conducted in compliance with the terms of reference of their mandate;

~~b) that their visit is conducted with the consent and cooperation, or at the invitation of the concerned State;~~

Commentary: This is redundant in light of provisions of the Draft Manual and established practice and, so, deletion is recommended. However, it could easily remain part of the Code if provisions concerning cooperation by States were incorporated into later Articles, as suggested. The inefficiency in the system with respect to field visits has not been due to activities of mandate-holders being done without State consent, but has been due to unwillingness on behalf of many States to cooperate and to extend invitations.

b) ~~ε)~~ That they prepare their visit in close collaboration with the Permanent Mission of the concerned State to the UN Office in Geneva, provided that the State is represented in Geneva by a Mission;

c) ~~δ)~~ Seek to establish a dialogue with the relevant government authorities, as well as with relevant intergovernmental organisations, non-governmental organizations, national human rights institutions, the victims of alleged human rights abuses, relatives of victims, and witnesses. (Manual of the UN Human Rights Procedures, para. 23)

Commentary: It is clear that a dialogue with government authorities is important for the success of a country visit. However, dialogue with a Government is in great part dependent on the willingness of the relevant Government to engage in that dialogue. The obligation on the mandate-holder can only be to take reasonable steps to establish a dialogue with the relevant government. The Government of a country is not the only stakeholder with whom mandate-holders should seek to dialogue. A general list of all relevant stakeholders should appear in addition.

~~Article 10 – The non political nature of the mandate~~

~~a) The mandate holders must bear in mind the non political nature of their mandate and ensure that their opinions, convictions and declarations are without prejudice to the execution of their mission, and have no influence on their conclusions and recommendations.~~

~~b) To this effect, they shall show restraint, moderation and discretion so as not to undermine the independent nature of their mandate or the environment necessary to properly discharge the said mandate.~~

Commentary: The provisions of this article are embodied in more general requirements of objectivity, impartiality and independence found in other parts of this Code. As they exist, they incorporate parts of Regulation 2(d), but altering quite significantly the language of the regulation. As observed by the Coordination Committee, the language used in these provisions is unclear and once again runs the risk of being overly broad. Given that the likely intention behind these provisions is covered in other Articles and in the Regulations, we would recommend deletion of this Article entirely.

~~Article 10 11– Relations with the media~~

~~Mandate holders must:~~

~~a) avoid making any declaration that is incompatible with the integrity, independence and impartiality which their status requires, and which is likely to undermine a constructive dialogue among stakeholders or hamper the efficient and consensual promotion and protection of human rights;~~ a) All information, evaluations, testimonies, comments of the activities held in the field and statements would be given with the objective of enhancement of human rights protection beyond any kind of political, religious, cultural or social issues and in accordance with the general principles of conduct stipulated in this Code of Conduct (Note by Special Procedures' Coordination Committee on a Code of Conduct, p.5, italicized portions are our suggested additions).

Commentary: This provision, as it has been proposed by the African Group, is **very problematic**. First, it treats any statement of a mandate-holder that is "likely to undermine a constructive dialogue among stakeholders" as inappropriate for a mandate-holder. General language such as this would allow a State to interpret it as including any comment with which they did not agree or found embarrassing. Clearly, the integrity of a mandate-holder cannot be questioned based on these concerns, i.e. disagreement with the statement or a State's dislike for a mandate-holder's scrutiny.

The second problematic element in this provision is the reference to the "consensual promotion and protection of human rights". Human rights are universal and their application within a country does not depend on the consent of the State concerned. The consent of a State is also irrelevant to a mandate-holder's and the Council's responsibility to promote and protect human rights.

b) In the case of country visits, mandate-holders must make reasonable attempts to ensure that the concerned State and the Council are the first recipients of their conclusions and recommendations the departure briefing, during which they share with the government concerned their preliminary findings and recommendations, takes place before the press conference that mandate-holders generally organize at the end of their visit; (see Manual of the UN Special Procedures, para. 72 and 73)

Commentary: As formulated by the African Group, this paragraph is **very problematic**. Requiring that the Council be the first recipients of their conclusions and recommendations would entail a delay of up to a full year before the reports from their country missions could be released. It is essential that mandate-holders are able to make use of the highest point of media interest in the country visit, which occurs at the end of their visit. According to the Draft Manual, mandate-holders are meant to hold a departure briefing with government officials as well as a press conference prior to concluding their country visit. It would be quite a fair requirement to have mandate-holders make reasonable

attempts to hold their departure briefing before the press conference, and would not significantly impair a mandate-holder's ability to make use of the highest point of media interest in their visit. This proposed language represents a solid compromise that is in keeping with the Draft Manual (paras. 72 & 73).

Article 11 12 - ~~Channel of communication with Governments~~

a) Mandate-holders must ensure that in all their communications to the Government of a State concerned, including under an urgency procedure, at a minimum, a copy is provided (see Note by Special Procedures' Coordination Committee on a Code of Conduct, p.5) ~~are addressed exclusively~~ to the Permanent Mission of the relevant State duly accredited to the Office of the United Nations in Geneva, or designated Embassy (see Note by Special Procedures' Coordination Committee on a Code of Conduct, p.5) in compliance with the current regulations and practices within the Organisation of the United Nations.

Commentary: Our suggestion for this sub-article is based on the comments of the Coordination Committee relating to this provision. We would note that the sub-article as drafted by the African Group is more or less consistent with paragraph 34 of the Draft Manual. That being said, the African Group has not made provision for urgent appeals which must be sent using the channel the mandate-holder judges most efficient (see para 48 of Draft Manual).

It is clear that a provision of this type is more appropriate for an operational document like the Manual than it is for a code of conduct. We also believe that the overarching concern is ensuring that the Government takes action on the communication and so the channel of communication must have this as its central consideration. The inclusion of the African Group's provision could be allowed with explicit exception for urgent appeals in exchange for provisions clearly outlining States' obligation to investigate and respond promptly to these communications.

b) Except in the case of urgent appeals, Representatives of the concerned State must be given an opportunity of commenting on the ~~allegations made against this State~~ (Draft Code of Conduct, African Group, Art.8(c)) content of such communications before they are communicated to the media and other stakeholders.

Commentary: This would be an appropriate place within the framework of this Code to include a provision on allowing States the opportunity of comment before communications, apart from urgent appeals, are released to media or other stakeholders. It is clear from

the Draft Manual (at paras. 37 & 50) that this is the current practice, that non-urgent communications remain confidential until they are released or until the mandate-holder feels that there is a particular reason for publicizing the information. In these cases, there is clearly ample time for the State to comment on the communication. It is not the actual press release or press statement upon which a State must be given an opportunity of commenting, but the non-urgent communications that are the subject of the press release or statement.

Article 12 ~~13~~ - Urgent appeals

Mandate-holders must only resort to urgent appeals ~~after an objective and impartial assessment of the~~ following receipt of credible information pointing to the existence or imminent occurrence of gross violations of human rights violations of an urgent nature.

Commentary: An urgent appeal is not made after the mandate-holder has determined with certainty that gross violations have already occurred, as this proposed provision would entail. This provision as proposed by the African Group would render ineffective the urgent appeals tool. First, an urgent appeal is predominantly of a preventive nature and thus the language must reflect that a particular violation need not have occurred. Secondly, mandate-holders are not in a position to make a determination as to the existence of any individual violation. The purpose of the communications tool is to raise the alleged incident or situation with the government and request them to investigate and act where necessary.

Article 13 ~~14~~ - Recommendations

While formulating their recommendations, mandate-holders must:

a) Bear in mind the need to promote dialogue and cooperation with the State concerned as well as the primary objective of the Special Procedures system to promote the full implementation by States of their human rights obligations and to prevent and respond to human rights violations (Note by Special Procedures' Coordination Committee on a Code of Conduct, p.4);

b) Ensure that their recommendations do not exceed either their mandate or the mandate of the Human Rights Council and that these recommendations comply with the provisions of the United Nations Charter.

Commentary: As a substantive obligation on mandate-holders, this provision is not problematic, as these are both currently done by mandate-holders in formulating

recommendations. We would, of course, prefer to see the inclusion of the suggested language for sub-article (a), as, once again, dialogue and cooperation are predominantly in the control of the State in question. Special Procedures cannot be undermined for making recommendations in situations where a State was not cooperative or could not be drawn into dialogue. What is problematic, as with a number of provisions of this Code, is the means of accountability for alleged contraventions of these provisions. Please see our comments under Article 15.

Article 14 15 - ~~Relations with the Council~~ Accountability

~~Mandate-holders are accountable to the Council, which appoints them and defines their mission, for the way in which they fulfill their mission~~ proper discharge of their functions (Regulation 3, ST/SGB/2002/9)

Commentary: This is perhaps **the most problematic article** of the Draft Code of Conduct, as it deals with the accountability for abiding by the terms of this Code. It is clear that the drafter of this provision had intended for it to be in keeping with the Commentary to Regulation 3: "For experts on mission, it would be the Secretary-General or the appointing authority who could terminate an assignment or otherwise admonish the expert."

As a small point, the draft Article prejudices the outcome of the institution-building as it has not been formally decided that the Council will be the appointing authority for Special Procedures. But this draft Article raises the larger concern of who is actually responsible for accountability under both this Code and the Regulations. While the Regulations do reference the "appointing authority" as responsible for overseeing accountability, they were meant to apply to a wide variety of experts and they were drafted at a time when it was clear that the Chairperson of the Commission on Human Rights was the appointing authority for the Special Procedures. For the Council to assume the role of ensuring the accountability of mandate-holders under the Regulations makes it easy for the Council to assume the same role under the Code of Conduct, as well. More significantly, it would make the enforcement of the Regulations for mandate-holders a political affair. States unhappy with a particular mandate-holder would simply have to rally support from friendly States to have the expert admonished. This would represent a significant threat to the independence of mandate-holders. Had the drafters of the Regulations been aware of the potential that the Council would one day become the appointing authority for Special Procedures, they may have drafted the commentary for this provision differently to avoid the inevitable politicization of accountability that would ensue.

The Regulations do acknowledge that the method of accountability may vary (see Regulation 3 commentary). We would suggest that accountability for the Regulations and the Code of Conduct rest with the Secretary-General. It is already he who wields the power to waive immunities and privileges, and vesting this power in the highest single authority within the UN would have a depoliticizing effect on the enforcement of these two documents. Alternatively, the President of the Council could be responsible for accountability under both documents, as under the CHR, it was this authority (the Chairperson) who appointed

mandate-holders. If the Council is to remain the accountability authority for the Regulations and the Code of Conduct, we would recommend a two-thirds majority be required for the termination or admonishment of a mandate-holder, in order to ensure at least a measure of protection of their independence.

One further small comment about this Article is that its title "Relations with the Council" is clearly inappropriate as it suggests that the primary nature of the relationship between the Council and its Special Procedures is in the former overseeing the discharge of the functions of the latter. Special Procedures are the eyes and ears of the Council who function to provide the Council with detailed information and analysis as to the human rights issues within their mandates. The Council's main relationship with the Special Procedures is in receiving and acting upon the information and recommendations they provide.

Article 15 - Principles concerning State relationship with Special Procedures

a) States shall respect the independence and integrity of mandate-holders and shall facilitate their work.

b) States shall be courteous to mandate-holders in their interactions with them and refrain from making personal attacks or threats.

c) States shall not interfere in the relations between mandate-holders and organizations or individuals of civil society.

d) States shall guarantee that individuals and groups providing information to the mandate-holders will not be subjected to intimidation or attacks as a result of such cooperation.

e) States shall respect the confidentiality of the sources of information which the mandate-holders use in their communications with States and in other aspects of their work.

Article 16 - Cooperation: Mandate-holders and States

a) Mandate-holders and States shall cooperate in the promotion and protection of human rights, with paramount importance placed on those whose human rights have been violated or are at risk of such violations.

b) Mandate-holders shall prepare reports under their mandates efficaciously and seek information from all relevant sources, including States, civil society and inter-governmental organizations and those victims of human rights violations who are affected by the situations in question. States shall cooperate in providing such information and facilitating access to the relevant sources transparently and expeditiously.

c) Mandate-holders shall communicate with States to seek assistance and justice on behalf of those affected negatively by human rights situations. States shall cooperate by responding effectively and in a timely manner.

d) Mandate-holders shall seek to visit countries in the exercise of their mandates so as to be apprised of the situation on the ground and to re-visit them where appropriate. States shall cooperate by responding expeditiously and positively to requests from mandate-holders by inviting them to visit and shall ensure that they have full access to all those with whom they wish to meet.

e) Mandate-holders shall make recommendations to States to improve the human rights situation in relation to issues arising under their mandate. States shall respond to such recommendations constructively and with a view to ensuring the effective implementation of the required measures.

f) The cooperation between the mandate-holders and States shall be facilitated and supported efficaciously by the Human Rights Council, the United Nations, including the Office of the United Nations High Commissioner for Human Rights, and the Coordination Committee of the Special Procedures.

Commentary: We suggest the addition of two articles (which we have labelled articles 15 and 16). The suggested text we have taken from sections 4, 5 and 6 of the "Possible Elements of a Code of Conduct" drafted by the Coordination Committee with input from other Special Procedure mandate-holders. These provisions predominantly deal with the cooperation of States with mandate-holders. We believe this is an appropriate subject for this Code of Conduct as it would represent an elaboration of the existing requirement for States to cooperate with mandate-holders as embodied in the Vienna Declaration and Programme of Action: "All States are asked to cooperate fully with these procedures and mechanisms" (OP95).

Pre-ambular Paragraphs

While it seems clear from the construction of this draft resolution that these pre-ambular paragraphs do not comprise a part of the Code, we are concerned that they might be read as a preamble or chapeau to the Code of Conduct, thus potentially affecting the interpretation of various provisions. With this in mind we would like to make the following commentary and suggestions with respect to the pre-ambular paragraphs:

PP3

With respect to PP3, which quotes a number of provisions of the Council's foundational resolution (GA Res. 60/251), we would comment that language from only certain provisions has been selected for inclusion in this paragraph. All relevant paragraphs as to the fundamental mandate of the Council to promote and protect human rights should be cited in this paragraph. Thus we recommend the addition to PP3 of the following references:

- further decided "that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner"; (GA Res. 60/251, OP2)
- also stated that the Council shall "promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits"; (GA Res. 60/251, OP5(d))
- further stated that the Council shall "contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies"; (GA Res. 60/251, OP5(f))

PP4

One of the central qualities of the Special Procedure system that is left out of this paragraph is the "expertise" of the mandate-holders which extends well beyond their "technical skills". This should be added to this paragraph in the following place:

"Underlining the centrality of the notions of impartiality, objectivity, and independence as well as the technical skills and relevant expertise of mandate holders, within the context of the special procedures, along with the need to give the required degree of attention to all human rights violations, wherever they may be taking place;"

PP5

The term in this paragraph "the adoption... of regulations" refers to the adoption of this Code of Conduct describing the benefits of this. This code of conduct should not be seen as "regulations" as Regulations describing the basic rights and duties of mandate-holders already exist and were adopted by the General Assembly in 2002. The word "guidelines" should be substituted for the word "regulations" in this paragraph.

PP7

The references to these provisions of the UN Charter are not appropriate as they describe the obligations and privileges of paid UN officials, which Special Procedures mandate-holders are not. This paragraph should be deleted.

PP8

While it is clear from two ICJ Advisory Opinions that section 22 of Article VI of this Convention, and the immunities listed therein, applies to mandate-holders, reference should also be made to section 23 of this document, which provides that only the UN Secretary-General can waive these immunities. It is important for the Council to bear in mind that cannot seek to usurp this role through any provision of the Code of Conduct or any attempt to enforce it. Thus the paragraph would read as follows:

Noting sections 22 and 23 of Article VI of the Convention on the Privileges and Immunities of the United Nations, ~~dated~~ adopted by the General Assembly on 13 February 1946;

PP9

As the Coordination Committee remarks in its "Response to Discussions on a Code of Conduct", the reference to OP6 of GA Res. 60/251, with its language of "improve and rationalize all mandates" is incomplete without a reference to the Council's fundamental mandate to promote and protect

human rights. Thus it should be considered in the context of the other provisions of GA Res. 60/251 that include language with respect to this fundamental mandate. It is suggested to move this reference to PP3, where it will be balanced with references to other parts of the Council's foundational resolution.

PP11

Delete the final words "mentioned above" in light of suggested elimination of PP9.

PP13

We would recommend deletion of this paragraph as it is, to begin with, redundant with PP4 in its weak reiteration of the importance of independence, and as it also contains the unclear phrase "the proper discharge of their prerogatives". It is not absolutely clear what this phrase means, and at the same time, it could be taken as implying that prerogatives enjoyed by mandate-holders need to be more circumscribed than international law currently permits.

PP14

We would recommend deletion of this paragraph as its general meaning seems already captured by PP5 which suggests that the Code would reinforce the efficiency of the Special Procedure system. The additional problematic element of PP14 is that it speaks of the "moral authority" of mandate-holders, and the intended meaning of this term is, at best, unclear.

PP15

The use of the term "prerogatives" in this paragraph is inappropriate. The linking of these "prerogatives" with the discharge of their mandates would seem to imply that if mandate-holders were to go beyond the terms of their mandates, immunities would not apply. It has often been the case that one or two States have disagreed with a mandate-holder's analysis or the inclusion of certain topics within the mandate and have consequently accused the mandate-holder of going beyond the scope of his/her mandate. This paragraph would seem to suggest that, in this situation, immunities do not apply and that it would be open for legal recourse to be taken against the mandate-holder. At the very least, the paragraph leaves it open for States

to attempt to do this in these types of situations. We would consequently suggest deletion of this paragraph.

PP17 and PP18

The references to these two texts, the GA-adopted "Regulations" and the Manual of UN Special Procedures, should be moved to be in chronological order with the other documents cited in the pre-ambular paragraphs. Citing them at this stage of the preamble would seem to suggest that despite their relatively long history, they are not as significant in the discussion or articulation of the Code of Conduct. Thus they should both be moved to occur directly after PP8.