



**CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
NUMBER 4, 2006**

**RECONCEIVING THE UN HUMAN RIGHTS REGIME:
CHALLENGES CONFRONTING THE NEW
UN HUMAN RIGHTS COUNCIL**

Philip Alston

NYU School of Law • New York, NY 10012
No part of this paper may be reproduced in any form
without permission of the author.

* Final version forthcoming in *Melbourne Journal of International Law*, vol. 7 (2006).

**RECONCEIVING THE UN HUMAN RIGHTS REGIME:
CHALLENGES CONFRONTING THE NEW
UN HUMAN RIGHTS COUNCIL**

© PHILIP ALSTON
Professor of Law
New York University School of Law
Author email: philip.alston@nyu.edu

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. Philip Alston is the Center's Faculty Chair; Smita Narula and Margaret Satterthwaite are Faculty Directors; and Jayne Huckerby is Research Director.

Abstract

In 2006, the UN Commission on Human Rights, established 60 years earlier, was replaced by a new Human Rights Council. This article examines the widely differing reasons given for the Commission's loss of credibility and seeks to draw lessons relevant to the new institutional regime which the Council must build. It argues that the preoccupation with the Council's composition, and the exclusion of violators, fails to address the more important factors in the Commission's downfall. Detailed consideration is given to the potential strengths and pitfalls involved in establishing a system of universal periodic review of the human rights performance of every state, and of the need to learn from the dismal failure of a very similar exercise undertaken by the Commission between 1956 and 1981. The article then considers some of the key reforms that need to be undertaken in order to transform the system of 'special procedures' — currently involving some 41 country and thematic mechanisms — into a more coherent, professional and effective system for defending human rights and one which should be at the core of the work of the new Council.

RECONCEIVING THE UN HUMAN RIGHTS REGIME: CHALLENGES CONFRONTING THE NEW UN HUMAN RIGHTS COUNCIL⁺

PHILIP ALSTON*

I INTRODUCTION

A confluence of factors has made this the ideal time to reflect both critically and creatively on the strengths and shortcomings of the human rights regime established by the United Nations some 60 years ago. In March 2006, the UN General Assembly abolished the Commission on Human Rights ('the Commission') and created a new Human Rights Council ('the Council'), to come into existence on 19 June 2006.¹ While the debates preceding these reforms were protracted and at times heated, there was a surprising degree of consensus on three propositions: that the 60 year-old Commission had brought discredit upon itself and had largely failed; that a new, higher-level body with a different composition had to be established; and that the institutional machinery of the UN in the human rights field needed to be strengthened. This consensus, however, masked deep disagreements about what exactly went wrong with the Commission and what key ingredients should be included in the formula for the new Council. As a result, the General Assembly resolution proclaiming the new order resolved only the most basic structural issues as to the Council's composition and election procedure,² and only laid down rather broad guidelines governing the procedures and institutional arrangements which the Council should adopt in order to carry out the wide ranging tasks assigned to it.

The aims of this article are to seek a clearer understanding of where the Commission went wrong and to address the three key issues that have emerged from the recent debates. The first issue is that of membership. While it has been

* John Norton Pomeroy Professor of Law, Faculty Director of New York University Law School's Center for Human Rights and Global Justice, and United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. This article is based upon the lecture given as the 24th Allen Hope Southey Memorial Lecture at the University of Melbourne in September 2005. I am deeply grateful to Dean Michael Crommelin, Professor Anne Orford, John Tobin and other faculty members for their very warm hospitality during my visit to the Law School. At the time of writing I am the Chairperson of the Coordination Committee established to facilitate and promote the work of the 41 Special Procedures which report to the UN Commission on Human Rights. The comments in this paper do not constitute those of the Committee and do not necessarily reflect the views of the other mandate-holders represented in that Committee.

¹ The Commission's abolition was technically carried out by the Economic and Social Council in ESC Res 2/2006, UN ESCOR, 62nd sess, Annex, Agenda Item 4, UN Doc E/RES/62/2 (22 March 2006), but the terms of the arrangement were definitively spelled out in *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [1] (which creates the Council), [13] (which calls for the Council to abolish the Commission).

² See *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [7]–[9].

formally resolved it is nonetheless essential to understand the nature of the controversy over which states should belong to the Council and what, if any, criteria or procedures could be used to ensure that its membership will be genuinely supportive of its human rights objectives. To address the second issue of performance review, the article will determine whose performance the Council should scrutinise and, in particular, how the proposed ‘universal periodic review’, agreed upon by the General Assembly, should be implemented. As part of this consideration particular attention is given to an almost entirely forgotten historical parallel, the study of which yields important lessons for today’s planners. Finally, the article will identify the techniques that might be used by the new Council to avoid repeating some of the more egregious shortcomings of its discredited predecessor.

II THE COMMISSION’S FALL FROM GRACE

The establishment of the Commission was mandated by the *Charter of the United Nations*.³ After its first session in 1946, its many achievements have included the drafting of the *Universal Declaration of Human Rights* (‘UDHR’) and a plethora of subsequent human rights treaties.⁴ Having grown in size, it eventually consisted of 53 governments, elected on a rotating basis for three-year terms by the Economic and Social Council (‘ECOSOC’).⁵ It became the lynchpin of the institutional arrangements designed to promote and protect human rights — a status which defied the fact that it was institutionally inferior in the overall UN institutional hierarchy to both ECOSOC and the General Assembly. A recent UN report described its functions:

[It] is entrusted with promoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in building their human rights capacity.⁶

Its tasks of fostering cooperation and building capacity were uncontroversial — at least in principle, although not always in practice. In contrast, its mandate to promote global respect for human rights and to respond to rights violations was intrinsically controversial because it required that it monitor and call to account many of the countries that sat as members of the Commission.

In its final few years, and especially since 1998, these controversies plagued the operations of the Commission and resulted in a rancorous debate among governments, often reflecting a North–South split. Accusations of politicisation,

³ *Charter of the United Nations* art 68.

⁴ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948). For a detailed history of the Commission, see Philip Alston, ‘The Commission on Human Rights’ in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 126; Jean-Bernard Marie, *La Commission des droits de l’homme de l’ONU* (1975); Howard Tolley, *The UN Commission on Human Rights* (1987).

⁵ The Commission began with a membership of 18 in 1946, and was subsequently expanded to 21 in 1962, 32 in 1967, 43 in 1980 and 53 in 1992. For details of its membership over time, see Office of the United Nations High Commissioner for Human Rights, *Membership* (2006) <<http://www.ohchr.org/english/bodies/chr/membership.htm>> at 22 May 2006.

⁶ High-Level Panel on Threats, Challenges and Change, *A More Secure World — Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004) [282] (‘*Report of the High Level Panel*’).

double standards and unprofessionalism led many commentators to conclude that the Commission had lost its credibility and prompted calls for far-reaching reforms of its operation.⁷ Unsurprisingly, however, the diagnosis that it had lost credibility was motivated by radically divergent perceptions of what it should have been doing and what it had done or failed to do. While many of the critics called for a conciliatory approach that would avoid confrontation with governments,⁸ others impugned its credibility precisely because it had failed to condemn governments that they considered to be responsible for egregious cases of human rights violations.⁹

Much of the debate over the past few years revolved around the question of the composition of the Commission. The *Wall Street Journal Europe*, for example, accused the UN of conferring legitimacy on regimes with abysmal human rights records by allowing them to sit on the Commission, asking '[h]ow can the UN claim any legitimacy if it still allows Sudan to sit on its Human Rights Commission?'¹⁰ At the Commission's 2004 session, the US delegation took up this theme and insisted that '[t]his important body should not be allowed to become a protected sanctuary for human rights violators who aim to pervert and distort its work'.¹¹ It argued that only 'real democracies' should enjoy the privilege of membership.¹² There are many other examples of this type of discourse, which implied that the characterisation of countries as 'democratic', 'law abiding', 'human rights respecting' and so on was a reasonably straightforward exercise, if only the political will were present. In fact, the questions of which countries should be members of the Council and what criteria might be both workable and acceptable are very complex ones. These are also questions to which there are far fewer easy answers than most of the debate to date has implied.

⁷ See, eg, Michael Jordan, 'New Calls for Reform of UN Rights Commission; Cuba's Re-Election Last Week to the Commission on Human Rights is Drawing Criticism from Rights Groups', *The Christian Science Monitor* (Boston, US), 7 May 2003, 7. Such accusations are clearly acknowledged in the wording of the resolution establishing the new Council, in which the General Assembly explicitly recognises the importance of 'the elimination of double standards and politicization': *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) 2.

⁸ This approach was championed by the member states of the Like Minded Group: see below nn 96–104 and accompanying text.

⁹ See, eg, Editorial, 'Changing the UN', *The Washington Post* (Washington DC, US), 3 May 2003, A22; Colum Lynch, 'US Protests Sudan's Election to Human Rights Panel', *The Washington Post* (Washington DC, US), 5 May 2004, A30; Michael Coultan, 'Zimbabwe's UN Rights Role Raises Ire', *The Age* (Melbourne, Australia), 29 April 2005, 11.

¹⁰ Editorial, 'The UN Dogma', *The Wall Street Journal Europe* (Brussels, Belgium), 15 September 2004, A8.

¹¹ Ambassador Richard Williamson, US Representative to the United Nations for Special Political Affairs, US Government Delegation to the 60th Commission on Human Rights, *Item 4: Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights* (2004) <<http://www.humanrights-usa.net/statements/0319Williamson.htm>> at 22 May 2006.

¹² *Ibid.*

III WHO BELONGS? THE COMPOSITION OF THE COMMISSION ON HUMAN RIGHTS AND THE HUMAN RIGHTS COUNCIL

As discontent with the performance of the Commission grew in the late 1990s and the early 2000s, the issue of its composition became both the lightning rod that attracted much of the criticism and a convenient explanation for its inability to function effectively. The debate over how many countries should be members, what criteria — if any — those countries should have to satisfy, and how they would be elected, came to dominate reform discussions. In the end, these issues also became the sticking point that led the US to vote against the resolution establishing the Council and to decide not to contest the first round of elections for membership of the new body.¹³

This Part considers the historical dimensions of the membership controversy. It then surveys the feasibility of the various criteria put forward in recent debates by the US and other actors, and then examines the compromise solution adopted in March 2006.

A *The Historical Dimension*

The *UN Charter* explicitly required that a Commission ‘for the promotion of human rights’ be set up to assist ECOSOC in its work.¹⁴ As a result, a so-called ‘nuclear’ Commission was convened in February 1946 and was asked to make recommendations for the long-term work in this area.¹⁵ In relation to what it termed the ‘definitive composition of the Commission’, the nuclear group recommended that ‘the Commission should consist of highly qualified persons’, and that all of its members ‘should serve as non-governmental representatives, appointed by [ECOSOC] out of a list of nominees submitted by the Member States of the United Nations’.¹⁶ The only dissenting voice on this issue was the member representing the Union of Soviet Socialist Republics, who insisted that all members should be appointed as government representatives.¹⁷ This initial group did not seek to explain the rationale for its preferred approach other than to say that since both the General Assembly and ECOSOC were composed of government representatives, the composition of the Commission should be different. They thus missed the opportunity to spell out some reasons that might subsequently have been considered persuasive when governments came to consider the matter. They could, for example, have focused on the nature of the

¹³ See Ambassador John Bolton, US Permanent Representative to the United Nations, *Explanation of Vote by Ambassador John R Bolton, US Permanent Representative to the United Nations, on the Human Rights Council Draft Resolution, in the General Assembly* (Press Release, 15 March 2006) <http://www.usunnewyork.usmission.gov/06_051.htm> at 22 May 2006.

¹⁴ *UN Charter* art 68 provides that ‘[t]he Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions’. See generally Eibe Riedel, ‘Article 68’ in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) 1011, 1027.

¹⁵ ESC Res 5(I), UN ESCOR, 1st sess, 19th plen mtg, Annex, UN Doc E/RES/5(I) (29 January 1946) [6].

¹⁶ *Report of the Commission on Human Rights to the Second Session of the Economic and Social Council*, UN ESCOR, 2nd sess, Annex 4, UN Doc E/38 (21 June 1946) 230–1.

¹⁷ *Ibid* (fn 1).

issues being dealt with and the fact that it would be unrealistic to expect government representatives to be critical of their own governments. Or they might have pointed to the complex nature of the questions that would arise and the resulting need for technical expertise in fields of, for example, law, sociology and economics, a need that would be very unlikely to be satisfied if the members were regular diplomats or bureaucrats from their respective national capitals. Or they could have argued that the best approach would be to combine independent and government views by locating the real decision-making authority in ECOSOC and by using the Commission as a body for generating ideas which would subsequently be filtered through intergovernmental processes before being finalised.

Whether because the nuclear group did not articulate the reasons for its recommendation, or because it was never likely that governments would relinquish control over issues as potentially significant as human rights, the proposal was decisively rejected by ECOSOC.¹⁸ As a ‘compromise’, it was agreed that the Secretary-General should consult with the governments elected to the Commission before the representatives were ‘finally nominated ... and confirmed’ by ECOSOC.¹⁹ This was designed to ensure that representatives were of a high calibre and reflected a ‘balanced representation in the various fields covered by the Commission’.²⁰ While this procedure was honoured in a technical sense for several decades thereafter, it immediately became a formality to which no practical significance was ever attached. It is not known if any consultations were ever held, but certainly no nomination was ever rejected and the membership of the Commission was very rapidly ‘governmentalised’, despite the early membership of well-known individuals such as Eleanor Roosevelt of the US and René Cassin from France.²¹

This episode is of major relevance because it highlights the one option that would have enabled the Commission (or the new Council) to avoid the problem of the representation of governments considered to be responsible for grave violations. In principle at least, an individual expert, even if nominated by a reprehensible government, does not necessarily come with all of the baggage, let alone the legal responsibility, of that government. Moreover, the process of election would potentially be more open-ended because it would be easier to reject an individual — even if strongly supported by his or her government — than to vote against that government itself in the context of an intergovernmental voting procedure. It would also be much easier to establish informal criteria for minimum expertise for nominees, in much the same way as has been done in recent years in relation to the election of judges to serve on the International Criminal Court. But, having rejected the option of nominating independent experts to be members of the Commission, the governments condemned themselves to engage in the debates that have risen to such prominence in the past few years over which of them ‘deserve’ to be members and which ‘deserve’

¹⁸ ESC Res 9 (II), UN ESCOR, 2nd sess, Annex 14, UN Doc E/RES/9 (II) (21 June 1946).

¹⁹ Ibid [2(b)].

²⁰ Ibid.

²¹ See generally Miko Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments: An Inseparable Part of Promoting and Encouraging Respect for Human Rights* (2005) 13–18.

to be disqualified from membership. This gives rise to the issue as to what the criteria should be for arriving at any such determination.

B *The Feasibility of Various Criteria for Membership*

1 *The Emergence of Membership as the Key Concern*

Before examining the different criteria that have been suggested, it is essential to consider the way in which the issue of membership came to gain such prominence. The relevant resolutions governing the membership of the Commission never addressed the standards that needed to be met by countries seeking election.²² Indeed, the only criterion that has ever been important in determining the composition of the Commission was representation of different cultures and legal systems through a geographical balance.²³ Criteria such as relative economic strength, the ability to contribute to the effective implementation of relevant resolutions, compliance with particular standards, or membership of specific treaty regimes have never been seriously contemplated, despite the fact that they are well known in other intergovernmental fora such as the Security Council, the World Bank, the International Monetary Fund and some environmental regimes.²⁴

For the purposes of this analysis, the controversy over the Commission's composition can be traced back to May 2001, when the US presented its candidacy for re-election to the Commission on which it had served continuously since 1946. Its defeat, accompanied by the success of candidates perceived to be patently less worthy or qualified, provoked a harsh reaction within the US. Members of Congress talked of 'withholding aid from countries that voted against' the US,²⁵ although the fact that the ballot was secret rendered that option infeasible. The then National Security Adviser, Condoleezza Rice, condemned the vote, saying that the 'sad thing is that the country that has been the beacon for those fleeing tyranny for 200 years is not on this commission, and Sudan is ... It's very bad for those people who are suffering under tyranny around the world. And it is an outrage'.²⁶ A rather different approach was taken by China's official *Xinhua News Agency*, which said the US lost because it had 'undermined

²² See, eg, ESC Res 9(II), UN ESCOR, 2nd sess, Annex 14, UN Doc E/RES/9 (II) (21 June 1946) [2].

²³ This balance is reflected in a fixed membership quota for each of the five regional groupings into which the UN is divided for most purposes when it comes to elections. Those groupings are: Africa; Asia; Eastern Europe; Latin America; and Western Europe and Others.

²⁴ See, eg, the specific policy commitment of 'conditionality' required of all members of the IMF, aimed at strengthening economic policies and ensuring that funds are used in accordance with the IMF's Articles of Agreement: IMF, *Guidelines on Conditionality* (2002) <<http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.htm>> at 22 May 2006.

²⁵ United Nations Foundation, *US Could Withhold Dues after Losing Seat* (2001) <http://www.unwire.org/unwire/20010507/14626_story.asp> at 22 May 2006; United Nations Foundation, *Lawmakers Consider Withholding Dues Payment* (2001) <http://www.unwire.org/unwire/20010509/14655_story.asp> at 22 May 2006.

²⁶ Margaret Warner, 'Backlash', *Online NewsHour* (US), 9 May 2001 <http://www.pbs.org/newshour/bb/international/jan-june01/un_5-9.html> at 22 May 2006.

the atmosphere for dialogue' and had used 'human rights ... as a tool to pursue its power politics and hegemony in the world'.²⁷

The following year, after various governments and the Secretary-General had stressed that a Commission that did not include the US as a member was not in the interests of the UN, the Commission or the international human rights system,²⁸ and after a little old-fashioned arm-twisting, the US was restored to membership and has remained a member since that time.²⁹

However, the focus then turned to the question of who else was being elected to the Commission. In 2003, the job of Chairperson of the Commission, which rotates among each of the five major UN regions, was given by the African Group to the Government of Libya.³⁰ This was before the political rehabilitation of Libya had been completed, and came at a time when it was still considered a pariah, albeit more because of its alleged support for terrorism and possession of weapons of mass destruction than for its poor human rights record. The prospect of the world's major human rights body being led by a Libyan caused apoplexy among Western governments,³¹ many of whom had made significant diplomatic investments of time and capital in an effort to achieve a different outcome. The result was to lift the lid off a long-simmering debate over criteria for membership of the Commission, and to hand a propaganda gift to those who wanted to discredit the Commission for other, often very different, reasons.

Nevertheless, these electoral vicissitudes took place against a clear backdrop of strong competition for a place on the 53-member Commission, particularly on the part of certain states that were frequently cited as having especially problematic human rights records. Thus, for example, human rights groups singled out the membership of states such as China, Cuba, Nepal, Russia, Sudan, Zimbabwe and Saudi Arabia, to highlight the need for qualitative membership criteria to be introduced.³²

The issue continued to simmer, but was reignited by the re-election of Sudan in May 2004, at a time when its human rights record was under severe scrutiny and it was being widely accused of committing or condoning crimes against humanity, especially in the Darfur region. Its election was secured by following a relatively common practice in the UN whereby a regional group presents for

²⁷ Opinion, 'Vote for Justice, Embarrassment for US', *People's Daily* (China), 4 May 2001 <http://english.people.com.cn/english/200105/04/eng20010504_69258.html> at 22 May 2006.

²⁸ United Nations Foundation, *Flouting Bush, House Votes to Withhold UN Dues* (2001) <http://www.unwire.org/unwire/20010511/14704_story.asp?> at 22 May 2006.

²⁹ Matthew Lee, 'US Says It Will Return to Human Rights Panel after One-Year Absence', *Agence France-Presse Newsfeed*, 15 March 2002; 'US Allowed Back on to Human Rights Panel', *ChannelNewsAsia* (Singapore), 30 April 2002.

³⁰ UN, *Commission on Human Rights Elects Chairperson and Bureau for Fifty-Ninth Session* (Press Release, 20 January 2003) <<http://www.un.org/News/Press/docs/2003/hrcn991.doc.htm>> at 22 May 2006.

³¹ See, eg, US Department of State, *US Opposed to Libya Chairing UN Human Rights Commission* (Press Release, 13 January 2003) 1.

³² Asian Centre for Human Rights, 'High Commissioner Louise Arbour: Reconsider Support for Universal Membership in the CHR', *ACHR Review* (India), 26 January 2005 <<http://www.achrweb.org/Review/2005/57-05.htm>> at 22 May 2006. See also Amnesty International, *2003 UN Commission on Human Rights: A Time for Deep Reflection — Background Briefing* (2003) <<http://web.amnesty.org/library/index/ENGIOR410042003>> at 22 May 2006.

election precisely the same number of candidates as there are places, thus ensuring that every nominee is successful. The US representative argued that Sudan's candidacy was 'entirely inappropriate', given reports of what he termed 'ethnic cleansing' in Darfur. In his view, having Sudan as a member of the Commission 'threatens to undermine not only its work, but its very credibility'. He urged other governments not to 'elect a country to the only global body charged with protecting human rights at the precise time when thousands of its citizens are being murdered or left to die of starvation'.³³ The US delegation then walked out of the meeting in protest.³⁴

In February 2005, the controversy erupted again (as it is doubtless foredoomed to do on a regular basis until major reforms are undertaken). This time, the news concerned the constitution of a five-member panel ('the Working Group on Situations'), charged with recommending countries to be examined under a confidential procedure looking at 'consistent pattern[s] of gross and reliably attested violations of human rights'.³⁵ The panel was to consist of Cuba, Zimbabwe, Hungary, the Netherlands and Saudi Arabia. Each of these countries had been selected by the relevant regional group to represent it. The US State Department denounced the choice of Cuba and Zimbabwe.³⁶ Various newspapers³⁷ and commentators in Western countries followed suit, bemoaning the fact that these countries would thus get a 'free pass' and that 'their atrocities will be invisible'.³⁸ In reporting the story, parts of the Canadian press observed that the US State Department 'offered no criticism of the selection of Saudi Arabia, an authoritarian monarchy',³⁹ to serve on the panel, thereby highlighting the complexity of determining which states are qualified for membership and which are not.

2 *The Quest to Identify Criteria for Membership*

In response to these concerns, the challenge for the US and its supporters was to come up with some abstract or objective criteria to justify its political determination to exclude countries such as Libya, Sudan and Cuba from

³³ United States Mission to the United Nations, *Statement by Ambassador Sichan Siv, US Representative to the Economic and Social Council, Regarding the Candidacy of Sudan for the Commission on Human Rights, in the Economic and Social Council* (Press Release, 4 May 2004).

³⁴ Evelyn Leopold, 'Sudan Elected to UN Rights Group, US Walks Out', *Reuters News*, 5 May 2004.

³⁵ The procedure in question was set up under ESC Res 1503 (XLVIII), UN ESCOR, 48th sess, 1693rd mtg, Annex, Agenda Item 2, Supp 1A, UN Doc E/RES/1503 (27 May 1970). It is, in my view, deeply flawed: see Alston, above n 4, 145–55.

³⁶ See Eric Green, US Department of State, *Press Freedom Groups Praise Nicaragua, Decry Cuba, Zimbabwe* (2005) <<http://usinfo.state.gov/wh/Archive/2005/Feb/11-217356.html>> at 22 May 2006.

³⁷ Editorial, 'Cuba: Human Rights Overseer?', *The Washington Times* (Washington, US), 2 February 2005, 18. According to the Editorial, 'Cuba's rise to the so-called action panel of the UN Human Rights Commission does not besmirch the UN body much. After all, the panel has long been discredited by the serial human-rights violators that stand among its 53 members'.

³⁸ Editorial, 'Human Rights and the UN', *The New York Times* (New York, US), 3 May 2005, A24.

³⁹ See, eg, 'US Voices Objection over UN Rights Panel', *The Globe and Mail* (Toronto, Canada), 9 February 2005, A13.

membership. In 2004, the US suggested that the Commission should avoid becoming 'a protected sanctuary for human rights violators who aim to pervert and distort its work' by insisting that only 'real democracies' should enjoy the privilege of membership.⁴⁰

However the precise contours of a 'democratic system of government' and any determination that a state meets these criteria are both heavily contested. While the general public in the US might have understood what was intended by this focus on 'real democracies', other governments and most human rights organisations were much less optimistic that such an approach could be applied convincingly or objectively. Instead, these other actors began to suggest alternative criteria that might be applied to achieve a comparable outcome. In 2003, one such formulation was put forward by Human Rights Watch ('HRW'), which succeeded in capturing the general wisdom at the time. HRW subsequently acknowledged that these criteria were not likely to be workable and put forward a significantly different approach.⁴¹ For present purposes, however, it is relevant to focus on the criteria originally put forward by HRW as conditions for election. They were that the relevant governments 'should have ratified core human rights treaties, complied with their reporting obligations, issued open invitations to UN human rights experts and not have been condemned recently by the Commission for human rights violations'.⁴² Because the criteria have not been implemented for the new Council, we shall look only briefly at the problems involved in applying each of these tests. The purpose is to show that most of the objective tests that have been proposed are, in fact, unworkable.

The first proposed test focused on the relevant government's ratification of the six or seven core human rights treaties adopted by the UN between 1965 and

⁴⁰ Williamson, above n 11.

⁴¹ Joint Letter from 53 Civil Society Leaders to His Excellency Mr Jan Eliasson, President of the UN General Assembly, 1 November 2005, available at <<http://hrw.org/english/docs/2005/11/01/global11955.htm>> at 22 May 2006.

⁴² HRW, 'UN Rights Body in Serious Decline', *Human Rights News* (US), 25 April 2003 <<http://hrw.org/english/docs/2003/04/25/global5796.htm>> at 22 May 2006.

1989, each of which has garnered a significant number of ratifications.⁴³ The criterion requiring a state to have ratified all six treaties would have rendered many states ineligible for election, including, most notably, China and the US.⁴⁴ The same result would follow even if a significantly less demanding approach were adopted which required only ratification of the two most significant human rights treaties, the *ICESCR* and the *ICCPR* ('the Covenants').

The second suggested criterion was compliance with reporting obligations under the principal international human rights treaties. But this is also fraught with difficulty because of the problems of measuring what is really 'overdue' in a culture which has long accepted inordinate delays, and because of the fact that delinquency is currently pervasive. This is illustrated by the following snapshot of the existing situation:

[Many States] have fallen seriously behind in submission of their reports. At the beginning of 2005, a total of 1490 reports, including 273 initial reports, were overdue. Of these, 648 have been overdue for more than five years. As a consequence, the average State party to a treaty with reporting requirements has more than eleven reports overdue to the treaty bodies. On average, States submit their initial reports 33 months late and their periodic reports 28 months late.⁴⁵

⁴³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (170 parties); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*') (153 parties); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') (156 parties); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*') (182 parties); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (141 parties); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*') (192 parties). See *Status of Ratifications of the Principal International Human Rights Treaties* (2006) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>> at 22 May 2006. It should be noted, however, that the Office of the High Commissioner for Human Rights ('OHCHR') has opted to include in its list of core treaties the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 2 May 1991, 30 ILM 1517 (1991) (entered into force 1 July 2003), thus making a total of seven such treaties: see OHCHR, *The Core International Human Rights Instruments and their Monitoring Bodies* (2006) <<http://www.ohchr.org/english/law/index.htm>> at 29 April 2006. Despite having been adopted in 1990, that *Convention* had only 34 states parties as at 10 April 2006. This raises the question as to what constitutes a 'core' treaty. In my view, it is not the fact that the treaty has its own monitoring body (which would seem to be the criterion applied by the OHCHR), but whether participation in the relevant treaty regime is sufficiently broad to establish the treaty as an absolute priority for any state wishing to demonstrate its human rights bona fides to the international community.

⁴⁴ China has signed (on 5 October 1998), but not yet ratified, the *ICCPR*. The US has signed but not yet ratified three of the six core treaties: *CEDAW* (signed by US on 17 July 1980); *ICESCR* (signed by US on 5 October 1977); and *CRC* (signed by US on 16 February 1995): see OHCHR, *Status of Ratifications of the Principal International Human Rights Treaties* <<http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>> at 22 May 2006.

⁴⁵ OHCHR, *Monitoring Implementation of the International Human Rights Instruments: An Overview of the Current Treaty Body System* (Paper presented at the Fifth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, New York, US, 4 February 2005) 9 (citations omitted).

While most Western European governments are fairly timely in their reporting, there is a wide range of governments with significant problems in this regard. Again, for example, both the US and China had a significant number of reports overdue as of November 2005.⁴⁶

The third proposed criterion is the issuance by states of open invitations to UN human rights experts to visit their countries for an on-site inspection.⁴⁷ The result would be that a special rapporteur or other independent expert reporting to the Commission could assume the existence of an invitation to visit, rather than having to negotiate one on an ad hoc basis. That would leave only the timing of a proposed visit to be determined.⁴⁸ Again, however, the use of this approach would exclude from membership most African and Asian countries (including China), as well as the US and Australia.

The fourth criterion suggested by HRW is that the country in question should not have been condemned by the Commission for having violated human rights. Condemnation in this context involves two elements: first, a country-specific resolution adopted by the Commission, and second, the adoption of the resolution under the item dealing with violations rather than the item dealing with the provision of 'technical assistance' to countries experiencing problems and deemed to be in need of help. The problem is that the concerted push by the key developing countries over the past decade, led by China, has been to eliminate all country-specific resolutions. While this effort has not yet been entirely successful, there is a clear trend indicating that it will be very difficult in the years ahead to obtain targeted resolutions in relation to all but the most egregious cases. The Commission has also increasingly resorted to the pretence that technical assistance is needed in situations where the missing element is political will, rather than expertise of some sort. Further, all of the countries that have recently been singled out in this way are developing countries, and their exclusion from membership of the Council would only serve to underscore the 'North as judge and South as defendant' critique of the Commission's work.

A fifth criterion, not included in the HRW list but suggested subsequently by the US, is that no country that has been the subject of Security Council sanctions should be permitted to be a member of the Commission. Thus, the US representative who walked out of ECOSOC in response to the scheduled election of Sudan in 2004 told the General Assembly in October 2005 that the international community should not 'make room on the Council for countries that seek to undermine the effectiveness of the UN's human rights machinery — much less governments under Security Council sanctions or investigation for

⁴⁶ OHCHR, *Overdue by Country* (2006) <<http://www.unhcr.ch/tbs/doc.nsf/newhvoerduebycountry?OpenView>> at 5 November 2005. See also International Human Rights Treaty Bodies, *Recent Reporting History under the Principal International Human Rights Instruments*, UN Doc HRI/GEN/4/Rev.5 (3 June 2005).

⁴⁷ As at May 2006, 54 countries had extended a standing invitation to thematic procedures: see OHCHR, *Countries Having Extended a Standing Invitation to Special Procedures* (2005) <<http://www.ohchr.org/english/bodies/chr/special/invitations.htm>> at 22 May 2006.

⁴⁸ For an explanation of the concept of standing invitations, see the joint written statement to the Commission on Human Rights by several non-governmental organisations entitled *Standing Invitations to Thematic Human Rights Mechanisms*, UN Doc E/CN.4/2004/NGO/2 (4 February 2004) 2.

human rights reasons'.⁴⁹ But there are a number of objections to this criterion. First, many of the countries that have been identified as states unworthy of membership of the Commission are not in fact the subject of Security Council sanctions. Secondly, Security Council sanctions are, in practice, imposed for a variety of reasons, only some of which reflect a poor human rights record. This means that a state might be excluded from membership in the human rights body for reasons relating to, for example, a nuclear program rather than for any conduct directly relating to human rights. While Security Council sanctions might be appropriate, it does not follow that the country should also automatically be excluded from the Council. Thirdly, privileging the actions of the Security Council in this way effectively gives 'the Permanent Five' (the veto-wielding members of the Security Council) an enhanced role in determining which countries should or should not be able to sit on the Council.

3 *Universality in Place of Selective Criteria*

While each of the criteria identified and analysed above had some merit, the overall conclusion to be drawn is that none of them would have operated to provide an effective filter that would ensure that only countries with good, or at least relatively good, human rights records would be eligible for election. Indeed, this is the conclusion that seems to have been drawn by the great majority of commentators, even though the US continued to suggest that criteria focusing on a state's commitment to democracy or to human rights might be both appropriate and viable.

In this sense, in its December 2004 report, the High-Level Panel on Threats, Challenges and Change ('the High-Level Panel') accurately characterised the rather futile nature of the debate and predicted the conclusions that others were to draw a year or so later.⁵⁰ The High-Level Panel was highly critical of the Commission and of the fact that 'States that lack a demonstrated commitment to [human rights] promotion and protection' had sought Commission membership 'not to strengthen human rights but to protect themselves against criticism or to criticize others'.⁵¹ But the Panel specifically opted not to seek to resolve the problem by setting membership criteria. It noted that 'the issue of which States are elected to the Commission has become a source of heated international tension',⁵² but observed dismissively that the resulting debate had had 'no positive impact on human rights and a negative impact on the work of the Commission'.⁵³ It observed that efforts to identify membership criteria would have little chance of changing the negative dynamics to which the debate had given rise and risked 'further politicizing the issue'.⁵⁴ Rather than address the question of criteria at all, the High-Level Panel advocated universal membership

⁴⁹ Ambassador Sichan Siv, US Alternative Representative to the General Assembly, *Statement by Ambassador Sichan Siv, US Alternate Representative to the General Assembly, on Agenda Items 71 (b) (c) and (e), in the Third Committee* (Press Release, 31 October 2005) <http://www.un.int/usa/05_194.htm> at 22 May 2006.

⁵⁰ High-Level Panel, above n 6, [282]–[291].

⁵¹ *Ibid* [283].

⁵² *Ibid* [285].

⁵³ *Ibid*.

⁵⁴ *Ibid*.

of the revamped Commission or Council, thus opening the way for the full participation of all 193 UN Member States.⁵⁵

Some eight months later, Amnesty International adopted a similar approach by calling for ‘electoral rules that effectively provide for genuine election of Council membership’.⁵⁶ Such a proposal would require election by a two-thirds majority of the General Assembly but would not involve any criteria that would exclude states from standing for election. Amnesty added that if Council membership was to be limited, the relevant ‘election rules and working methods should encourage the nomination and election of governments with a demonstrated commitment to the promotion and protection of human rights’.⁵⁷ In explaining what this meant, the organisation subsequently suggested that those states presenting themselves as candidates for election to the Council should ‘make public human rights commitments well in advance of the election date’.⁵⁸ In November 2005, Amnesty joined with 40 other civil society groups, including HRW, in calling for such states to ‘commit to abide by the highest standards of human rights and to cooperate fully with the [Council] and its mechanisms, and [to] put forward a platform that describes what they seek to accomplish during their term of membership’.⁵⁹

C *The Compromise on Council Membership*

At the end of prolonged negotiations, the General Assembly decided in March 2006 that none of the criteria that had been put forward by the most vociferous critics of the Commission was workable, and that the focus would instead need to be on procedural steps designed to achieve some form of selective filtering of the states seeking membership of the new Council. Before turning to those procedures, it should be noted that the early insistence by the US that membership of the Council should be as few as 20 received almost no support. The recommendation by the High-Level Panel which was designed to avoid the issue by proposing universal membership was not taken up either. Instead the General Assembly adopted a compromise: the number of member states would be 47, as opposed to the Commission’s 53.⁶⁰ The compromise appeared to acknowledge those who claimed that the Commission’s size had been unwieldy. However, it was ultimately a recognition that a great many governments are very keen to be members of the Council and most of them realised that they would be

⁵⁵ Ibid.

⁵⁶ Amnesty International, *Amnesty International’s Views on the Proposals for Reform of the UN’s Human Rights Machinery* (Press Release, 12 April 2005).

⁵⁷ Ibid.

⁵⁸ Amnesty International, *Amnesty International’s Ten-Point Program for the Creation of an Authoritative and Effective Human Rights Council* (2005) <<http://web.amnesty.org/library/Index/ENGIOR410682005?open&of=ENG-393>> at 22 May 2006.

⁵⁹ Joint Letter from 53 Civil Society Leaders, above n 41. In addition to Amnesty International and HRW, the letter was also signed by most of the other leading human rights groups, including: The Carter Center, CARE International, the Fédération Internationale des Ligues des Droits de l’Homme, Freedom House, Global Rights, Human Rights First, International Commission of Jurists, International Crisis Group, International League for Human Rights, International Service for Human Rights, Open Society Institute, Physicians for Human Rights, and the Organisation Mondiale contre la Torture.

⁶⁰ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [7].

unlikely ever to participate if the membership was too restricted. There were also major concerns that a membership as low as 20 would give the Council the appearance of being closer in form and perhaps also operation to the Security Council than to the old Commission. This smaller membership would have made it easier for large states, and the US in particular, to exert its power over the new Council's deliberations.

The new system has a number of important innovations regarding election of members to the Council. These include: election of states on an individual basis; election by a majority of states represented in the General Assembly; the elimination of permanent membership by compelling rotation; the requirement that candidates pledge to take human rights initiatives if elected; the possibility of suspending Council members for human rights violations; and the imposition of particular obligations upon members, including a review of their human rights record.⁶¹ The significance of each of these elements warrants further consideration.

1 *Individual Election*

One of the most problematic aspects of the election system for the Commission was the extent to which states within a particular geographical (and thus electoral) region determined among themselves — in advance — the states that would be nominated. The limitation on the number of candidates precluded states from other regions from exercising a choice in an election for the relevant regional seats. It was this practice of presenting 'clean slates'⁶² that ensured the election of certain states that others considered to be gross violators.⁶³ Under the new system, members of the Council will be 'elected directly and individually by secret ballots'⁶⁴ — each candidate state now requires the majority support of the General Assembly to succeed. The assumption underpinning the new system is that the procedure of electing states separately will encourage more nominations than there are places, in part because it is possible that one of the nominees may not get the requisite minimum vote required by the next element in the overall scheme.⁶⁵

Consistent with general UN practice, the resolution calls for an 'equitable geographic distribution' of the 47 seats. But since there is no mathematical formula for determining equity in this context, the resolution specifies the distribution as being: African Group — 13; Asian Group — 13; Eastern

⁶¹ Ibid [7]–[9].

⁶² Amnesty International defines a 'clean slate' as a 'practice by which regional groups determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region': Amnesty International, *UN: Governments Must Act Promptly and Effectively on Important Human Rights Commitments in 2005 World Summit Document* (Press Release, 26 September 2005).

⁶³ The irony is that the 'Western Europe and Others' group, of which the US and Australia are a part, was not averse to using this technique in cases where it was possible to negotiate successfully in advance.

⁶⁴ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [7].

⁶⁵ Member states must be elected directly and individually by secret ballot. They can only be elected by a majority of the members of the General Assembly: *ibid*.

European Group — 6; Latin America and the Caribbean — 8; Western European and Others — 7.

2 *Electoral Majority*

The resolution specifies that each Council member must be elected ‘by the majority of the members of the General Assembly’.⁶⁶ This has been interpreted as meaning that a state must obtain at least 96 votes in order to be elected.⁶⁷ The US pushed long and hard — but ultimately to no avail — to secure a provision requiring a two-thirds majority, presumably on the assumption that states with poor human rights records would not be able to muster that many votes. It was never explained why the US — given its pre-eminent role in international relations and its capacity to alienate as well as to befriend states — would assume that it would be capable of mustering such a majority in its own favour, especially when it had failed to be elected in 2001 when the majority required was much less demanding.

3 *Term Limits*

The resolution provides that states shall ‘not be eligible for immediate re-election after two consecutive terms’.⁶⁸ This provision was opposed by the US, in part because it would mean that the major powers would have to forego membership of the Council on a reasonably regular basis. It is not clear, however, whether a state would need to stand aside for a full three year period under this rule. Instead, a one year absence following two terms (six years) would seem sufficient to qualify a state to renominate. Nonetheless, the principle of term limits was welcomed by many reform-minded states, in the interests of ensuring a reasonable rotation of members and of rejecting the assumption that some states should permanently enjoy membership because of their global power and influence.

4 *Pledges*

The early proposals, and especially those emanating from civil society groups, would have obligated candidates to accept certain minimum membership criteria before nominating. However, the final formula made a state’s human rights record less significant, and its pledge to take certain measures voluntary, by indicating that such matters might only be *taken into account* by states when electing members of the Council.⁶⁹ The formula refers specifically to ‘the candidates’ contribution to the promotion and protection of human rights and their voluntary pledges and commitments made thereto’.⁷⁰ In a subsequent provision, the resolution also states that ‘Members elected to the Council shall

⁶⁶ Ibid.

⁶⁷ *Human Rights Council Election: Note by the Secretariat*, UN GAOR, 60th sess, Annex, UN Doc A/INF/60/6 (30 March 2006) [7].

⁶⁸ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [7].

⁶⁹ Ibid.

⁷⁰ Ibid.

uphold the highest standards in the promotion and protection of human rights, [and] shall fully cooperate with the Council'.⁷¹

Amnesty International sought to translate these provisions into firm commitments by calling on candidate countries 'to make specific and credible public pledges to promote and protect human rights, in their own country as well as internationally as a member of the Council'.⁷² This would include firstly a commitment to 'work for an efficient and effective' Council, for example by:

- ensuring effective responses to human rights violations wherever they occur ... ;
- strengthening the system of Special Procedures and other expert mechanisms of the Council;
- improving the opportunities for contributions to the Council from non-governmental organizations.⁷³

It would also include a commitment to 'promote and protect human rights' by, inter alia:

- cooperating fully with the Special Procedures of the Council by responding quickly and in full to their communications. This involves acting in good faith on their recommendations, issuing a standing invitation and facilitating visits as requested, including by ensuring free and unfettered access for the experts;
- ratifying and implementing all human rights treaties and the *Rome Statute of the International Criminal Court*, removing any limiting reservations, and providing for individual communications, inquiry and inspection;
- cooperating fully with the treaty monitoring bodies, including by submitting periodic reports on time, and acting in good faith on their concluding observations and recommendations.⁷⁴

In an effort to facilitate an evaluation of the record of candidate governments, Amnesty International has prepared an assessment of each country's performance.⁷⁵ HRW also prepared a comparative assessment of the record of each of the candidates for the Council. The evaluation took into account: whether each state had registered a 'pledge' of actions to be taken if elected; whether it had made a statement to the UN General Assembly in relation to their candidacy; how many of 14 possible core human rights treaties and protocols, and of the two protocols to the Geneva Conventions, had been ratified; whether the state was a party to the *Rome Statute of the International Criminal Court*;⁷⁶ whether it had issued a 'standing invitation' to UN Special Procedures; and its voting record in relation to selected resolutions on key human rights issues

⁷¹ Ibid [9].

⁷² Amnesty International, *First Elections to the New UN Human Rights Council: 9 May 2006* (Press Release, 24 March 2006) <<http://web.amnesty.org/library/Index/engior400102006>> at 22 May 2006.

⁷³ Ibid

⁷⁴ Ibid.

⁷⁵ Amnesty International, *Amnesty International's Guide to UN Human Rights Council Candidates* (2006) <<http://web.amnesty.org/pages/un-index-eng>> at 31 May 2006.

⁷⁶ Opened for signature 17 July 1998, 2197 UNTS 3 (entered into force 1 July 2002).

considered by the General Assembly and the Commission on Human Rights.⁷⁷ Other groups have engaged in similar exercises.⁷⁸ Most significantly, however, the OHCHR published a list of the issues that might be addressed in such pledges, and that list was significantly more extensive and demanding than that of Amnesty International.⁷⁹

The pledges that have been made are for the most part rather limited in scope, and certainly fall well short of the ideal described by Amnesty International. Many states have in fact confined themselves to only the most general expressions of good intentions, while some have altogether ignored the request to submit.⁸⁰

5 *Membership Suspension*

The resolution provides that the General Assembly, rather than the Council, may, ‘by a two-thirds majority of the members present and voting’, choose to ‘suspend the rights of membership in the Council of a member of the Human Rights Council that commits gross and systematic violations of human rights’.⁸¹ This is an important symbolic component in the sense that it would allow for any country that is widely condemned for its human rights record to be suspended from membership. It is noteworthy that states cannot be expelled from the Council and suspended states can presumably seek to be readmitted after even a short period of suspension. In practice, the provision is unlikely to be applied very often, especially given that one of the main motivations on the part of many countries that voted to terminate the Commission was to move away from all country-specific measures. Nonetheless, the provision provides a clear potential punishment for any state which, by dint of an atrocious human rights record, is foolish or brazen enough to have put itself forward for election to the Council.

6 *Review of Members’ Records*

The resolution also provides that states elected to the Council shall have their records ‘reviewed under the universal periodic review mechanism during their term of membership’.⁸² This is designed to be a disincentive because it ensures that a Council member’s human rights performance shall be scrutinised during its term of office which, in the case of those selected by lot to enjoy only an initial term of one year, means an almost immediate review. By the same token, the advantage of being a member is that a country can aspire to influence the

⁷⁷ HRW, *Human Rights Council — Election* (2006) <<http://www.hrw.org/un/elections/index.htm>> at 22 May 2006.

⁷⁸ See, eg, Asian Centre for Human Rights, *Shame on Asian States: HRC Elections 2006* (2006) <<http://www.achrweb.org/Review/2006/120-06.htm>> at 31 May 2006.

⁷⁹ OHCHR, *Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council* (2006) <<http://www.ohchr.org/english/13042006.pdf>> at 31 May 2006.

⁸⁰ The list of pledges has been made available on the UN website: UN, *Elections and Appointments — Human Rights Council* (2006) <<http://www.un.org/ga/60/elect/hrc/>> at 22 May 2006.

⁸¹ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [8].

⁸² *Ibid* [9].

procedures used in the review, and perhaps even the outcome, in relation to its own situation.

7 *The Impact of the Innovations*

On 9–10 May 2006, the first elections for membership of the Council took place. The outcome of the process vindicated the inclusion of several of the innovative measures, but also served to demonstrate that issues of composition alone do not hold the key to a more effective and productive human rights body. The first advance was to deter at least some states with especially bad human rights records from nominating for election.⁸³ The second was to ensure that the human rights record of those countries which were elected should now be subject to careful scrutiny under the periodic review mechanism. The third was to accord much greater publicity to the election process.

On the other hand, many of the countries targeted by human rights groups as being unsuitable candidates were nevertheless elected.⁸⁴ The larger states such as China, India, Russia, Nigeria, South Africa, Brazil, Germany, France and the UK all succeeded. Four of the five permanent members of the Security Council were elected, with the fifth — the US — having opted not to run. The result is that the new Council will not be dramatically different in composition from its predecessor, even if a few high profile human rights violators will be absent. The principal challenge remains — identifying new procedures that will remedy some of the Commission's shortcomings. The new composition neither assures nor prevents that outcome.

D *The Ambivalent Response of the US*

The US was one of the key players that instigated the reform process. Over time, however, its position changed significantly and it ultimately decided to distance itself from the enterprise. It did so first by voting against the creation of the new Council on the terms proposed,⁸⁵ and second by opting not to present its own candidacy.⁸⁶ It appears to have played a marginal role in most discussions of the details of reform, and to have made largely inconsistent proposals on membership. Initially, the US suggested that the overriding priority was to ensure that the Council was democratically elected and free of human rights violators. It then moved its position to suggest that the five permanent members

⁸³ HRW argued that it was significant that Sudan, North Korea, Belarus, Zimbabwe, Uzbekistan and Nepal all opted not to stand for election: see HRW, *UN: Keep Violators Off Human Rights Council* (2006) <<http://hrw.org/english/docs/2006/04/24/global13258.htm>> at 22 May 2006.

⁸⁴ China, Cuba, Pakistan, Russia and Saudi Arabia were all singled out by HRW as being unsuitable candidates. Each was subsequently elected. See 'UN Elects New Human Rights Body', *BBC News* (United Kingdom), 9 May 2006 <<http://news.bbc.co.uk/2/hi/americas/4754169.stm>> at 22 May 2006.

⁸⁵ The US was one of only four states to oppose the resolution. The others were Israel, Marshall Islands and Palau. Belarus, Iran and Venezuela abstained. See UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/60/PV.72 (15 March 2006) 5–6.

⁸⁶ See US Department of State, *The United States Will Not Seek Election to the UN Human Rights Council* (Press Release, 6 April 2006) <<http://www.state.gov/r/pa/prs/ps/2006/64182.htm>> at 22 May 2006.

of the Security Council — China, France, Russia, the UK and the US — should hold permanent seats on the Human Rights Council.

Once it became clear that not all of the US positions were going to be accepted by the majority, the US began expressing various misgivings, although it was never entirely clear what made up the *sine qua non* for US participation. At various times the US indicated that its requests included: the size of the Council should be 20 and certainly no more than 30; there should be no compulsory rotation preventing a state from serving more than two consecutive terms; there should have been clear criteria excluding human rights violators; the required majority for election should be the endorsement of two-thirds of the General Assembly, rather than a majority of those eligible; suspension of members should be able to occur with less than a two-thirds vote; foreign ministers should take responsibility for the nominees that their country supports; and countries subjected to Security Council sanctions in relation to human rights or terrorism issues should be ‘categorically excluded’.⁸⁷ ‘Absent assurance of a credible membership’, US Ambassador John Bolton reportedly ‘had insufficient confidence in the text; he could not say that the new body would be better than its predecessor’.⁸⁸

At the end of the day, the US came close to making a fetish of the membership issue, despite the strong arguments indicating that it would be almost impossible to design criteria which would have met the US objectives and would have still ensured a fair and equitable process. Most notably, the US avoided making substantive proposals to improve the functioning of the Council, despite the fact that such reforms will be crucial in enabling the Council to avoid the failures of the Commission. Even if they had been accepted in their entirety, the various membership proposals championed by the US would not on their own have ensured significant progress in that regard. Instead, the US confined its substantive comments to some relatively minor objections such as its objection to including a reference in the Council’s mandate to the outcomes of various UN conferences. This objection was made on the grounds that such references sought to ‘raise the status of outcomes from non-binding UN meetings’ up to something of legal or even political significance. The US also objected to references to the right to development, partly on the grounds that it is not contained in the *UDHR*, preferring to focus primarily on civil and political rights, thus implicitly diminishing the importance of economic, social and cultural rights in the work of the Council.⁸⁹

⁸⁷ These various criteria were never brought together in a single list but they emerge clearly from two statements: Bolton, *Explanation of Vote*, above n 13; John Bolton, *Statement by Ambassador John R Bolton, US Permanent Representative to the United Nations, on Moving Forward on Establishing a Credible and Responsible Human Rights Council* (Press Release, 11 January 2006) <http://www.usunnewyork.usmission.gov/06_002.htm> at 22 May 2006.

⁸⁸ UN Department of Public Information, *General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, with 3 Abstentions* (Press Release, 15 March 2006) 1 <<http://www.un.org/News/Press/docs/2006/ga10449.doc.htm>> at 22 May 2006.

⁸⁹ For these objections, see Bolton, *Explanation of Vote*, above n 13.

E *Re-Focussing the Debate*

The foremost conclusion to emerge from the foregoing analysis is that the key to significant reforms in the work of the UN in the human rights area lies much less in arguments over the composition of the new Council than in creative and constructive suggestions regarding how the new mechanism can avoid at least some of the many pitfalls which undermined the work of the Commission. It is to those more substantive issues that we now turn.

IV WHOSE PERFORMANCE IS SCRUTINISED? THE ‘UNIVERSAL PERIODIC REVIEW’

A *The Critique Developed by the Like Minded Group*

One of the most contentious issues debated within the Commission was deciding which states were to be singled out for evaluation and criticism. Western governments and leading international human rights NGOs had long been critical of the Commission’s failure to condemn countries that were said to have patently poor human rights records. But there was also a parallel set of criticisms made by a group of developing countries, coming together under the umbrella of the ‘Like Minded Group’. Led by China in particular, the Group called for an end to all country-specific criticisms and urged a more general and cooperative set of procedures.⁹⁰ The history of the Group’s claims sheds much light on the procedural steps used within the Commission to provoke major reforms.

The process began in 1997 with a draft resolution proposing a series of reforms.⁹¹ The draft drew little support, however, and was subsequently withdrawn. The substance of this draft re-emerged the following year when the Group promoted a procedural initiative designed to ensure discussion of measures aiming to ‘enhance the effectiveness of the mechanisms of the Commission on Human Rights’.⁹² The result of the initiative was a comprehensive report prepared by the office-holders of the 1999 Session of the Commission,⁹³ which was presided over by South Africa. That report, along with a highly critical assessment of it submitted by the Like Minded Group,⁹⁴ was in turn considered by a Working Group, which met between the 1999 and 2000 sessions of the Commission and presented a proposal which the Commission

⁹⁰ UN Information Service, *Commission on Human Rights Opens Sixty-First Session*, UN Doc HR/CN/1107 (14 March 2005).

⁹¹ Commission on Human Rights, *Rationalization of the Work of the Special Procedures System*, UN Doc E/CN.4/1997/L.86 (10 April 1997).

⁹² Commission on Human Rights, *Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights — Commission on Human Rights Decision 1998/112*, UN Doc E/CN.4/DEC/1998/112 (24 April 1998).

⁹³ Commission on Human Rights, *Report of the Bureau of the Fifty-Fourth Session of the Commission on Human Rights Submitted pursuant to Commission Decision 1998/112: Rationalisation of the Work of the Commission*, UN Doc E/CN.4/1999/104 (23 December 1998).

⁹⁴ *Letter Dated 26 February 1999 from the Delegations of Algeria, Bhutan, China, Cuba, Egypt, India, Iran (Islamic Republic of), Malaysia, Myanmar, Nepal, Pakistan, Sri Lanka, Sudan and Viet Nam Addressed to the Secretariat of the Commission on Human Rights*, UN ESCOR, 55th sess, Annex, Agenda Item 20, UN Doc E/CN.4/1999/120 (26 February 1999).

subsequently decided to ‘approve and implement comprehensively and in its entirety’.⁹⁵ In fact, however, the various reforms during this period did not achieve the Group’s cherished objective of eliminating all critical country-specific resolutions and procedures.

Thus, despite their apparent success in facilitating reforms, the Like Minded Group continues to express dissatisfaction with the procedures and substantive outcomes of much of the Commission’s work. This can best be illustrated by reference to a range of comments made at the opening session of the Commission in 2005. The Chairperson of the Commission, from Indonesia, called upon governments to ‘refrain from defamatory statements and references’ in relation to human rights violations by states — a formula followed closely by comments made by Egypt.⁹⁶ Suggestions that the Commission acted in a politicised manner were made by South Korea, Pakistan, China and Cuba. Pakistan lamented the ‘increasing politicization’ of the Commission,⁹⁷ which manifested itself especially through country-specific resolutions. South Korea called for ‘dialogue, consultation and consensus-building’ in order to avoid ‘counter-productive politicization’ of the Commission’s work.⁹⁸ China also expressed regret at the ‘intense politicization and confrontation’ and criticised the Commission’s loss of ‘objectivity, credibility and impartiality’, calling for ‘dialogue instead of confrontation, and ... more soul-searching instead of finger-pointing’.⁹⁹ The strongest criticism came from Cuba, which called the Commission ‘a sinking boat, wrecked because of its growing lack of credibility and prestige; sinking as a result of political manipulation and ... double standards’.¹⁰⁰ The Commission was accused by Cuba of having always placed the countries of the South as ‘the defendants in the forum’, and of providing an ‘inquisition tribunal for the rich’.¹⁰¹ Among the needed reforms were, according to Cuba, the elimination of ‘the pernicious practice of imposing unjust resolutions against countries’ and ‘putting an end to double standards and to the impunity of the most powerful’.¹⁰²

One of the more interesting grounds on which some states have criticised the Commission is a form of ‘original intent’ critique. In 2004, China called for the Commission to be ‘a forum of dialogue and cooperation’ and justified this model by saying that it was what ‘the founders of the [Commission] wished it to be’.¹⁰³ India also observed that the Commission had been conceived as a very different body in 1946 when it was ‘envisioned, essentially, as a body for setting

⁹⁵ Commission on Human Rights, *Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights — Commission on Human Rights Decision 2000/109*, UN Doc E/CN.4/DEC/2000/109 (26 April 2000).

⁹⁶ The Commission’s work should be kept ‘free from defamatory and negative references’: UN Information Service, *Commission on Human Rights Opens Sixty-First Session*, UN Doc HR/CN/1107 (14 March 2005).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

standards'.¹⁰⁴ India argued that its 'ever expanding role' in the intervening years has 'led many countries to wonder if its present structure might be doing more harm than good'.¹⁰⁵

The suggestion that current practice in relation to violations should respect the 'original intent' of those who founded the Commission seems strange, but it is also a position that has been put forward by US officials in arguing against the adoption of a complaints procedure in relation to economic, social and cultural rights.¹⁰⁶ But evolution in line with changing circumstances is the essence of institutional development. The Commission would never have addressed specific issues such as apartheid, racism or even summary executions if the original intent had been respected, because the founders were very anxious to ensure that no government would ever be directly criticised for human rights violations.

Ultimately, the reform process has, at least in principle, succeeded in responding to the concerns of both Western countries and the Like Minded Group by opting to establish a universal periodic review process. In practice, however, the expectations of the two groups are likely to be quite different with the Western Group wanting a probing review process which generates critical country-specific conclusions, and the Like Minded Group wanting a more general and open-ended process. The outcome of these debates will thus be heavily influenced by those states, especially Latin American and African, which have not aligned themselves closely with either of the main protagonist groups.

B *The Procedure Adopted for Universal Periodic Review*

The idea that the Commission should undertake a regular and systematic review of the performance of all states was articulated by UN Secretary-General Kofi Annan in a speech to the Commission on 7 April 2005.¹⁰⁷ He used the phrase 'peer review'¹⁰⁸ — a term which, although often employed at the international level, has no fixed meaning beyond indicating the involvement of other states. The proposal had several attractions, particularly for those states which felt that the Commission had become unduly adversarial in its debates on violations. The first attraction was its universality, ensuring that all countries — not just those accused of the most serious violations — would be reviewed. Secondly, the Secretary-General suggested that the process would help to avoid 'the politicization of its sessions and the selectivity of its work', which currently 'undermined' the efforts of the Commission.¹⁰⁹ However, he did not identify any

¹⁰⁴ Ibid.

¹⁰⁵ His Excellency Ambassador Hardeep Puri (Speech delivered at the 59th Session of the Commission on Human Rights, Geneva, Switzerland, 17 March – 25 April 2003).

¹⁰⁶ See Michael Dennis and David Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 *American Journal of International Law* 462.

¹⁰⁷ Kofi Annan, UN Secretary-General, 'Major Proposals to Reform UN Human Rights Machinery' (Speech delivered at the Human Rights Commission, Geneva, Switzerland, 7 April 2005), available at <<http://www.un.org/News/Press/docs/2005/sgsm9808.doc.htm>> at 22 May 2006.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

mechanism that could realistically achieve such a result. Thirdly, the peer review would facilitate the provision of ‘technical assistance’ and ‘policy advice’.¹¹⁰

This vision of a review process was faithfully reflected in the resolution creating the Council, although the phrase ‘peer review’ was replaced by ‘universal periodic review’. The relevant passage of the resolution calls upon the Council to:

undertake a universal periodic review based on objective and reliable information of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all Member States. The review shall be a cooperative mechanism based on an interactive dialogue with the full involvement of the country concerned and with consideration given to its capacity-building needs. Such a mechanism shall complement and not duplicate the work of treaty-bodies. The Council shall develop the modalities and necessary time allocation of the universal periodic review mechanism within one year after the holding of its first session.¹¹¹

C *An Historical Parallel*

The potential strengths and weaknesses of this mechanism can best be appreciated in light of a comparable initiative undertaken more than half a century earlier in the very early days of the Commission. As early as 1950, the French Government had proposed the establishment of a periodic reporting system tied to the *UDHR*.¹¹² Although other governments were, for the most part, not enthusiastic about the idea, the Secretary-General took it up and included it in a memorandum proposing the adoption of a 20 year program ‘for achieving peace through the United Nations’.¹¹³ Although the USSR was not in favour of the idea, the principal opposition came from the US and other Western and Latin American nations. In addition to arguing that the UN’s *Yearbook on Human Rights* already provided states with an adequate opportunity for reporting on legislative and related developments, they feared that only the ‘democratic states’ would submit reports, thereby giving their ‘totalitarian’ counterparts an easy opportunity to criticise.¹¹⁴

Were it not for a sudden change of heart — or rather of tactics — by the US, nothing would have come of the proposed reporting system. In April 1953, the new Eisenhower Administration responded to conservative pressure led by Senator Bricker, who was implacably opposed to US participation in the proposed human rights covenants, by proclaiming a new policy towards the UN’s human rights program. Secretary of State Dulles announced that ‘while we shall not withhold our counsel from those who seek to draft a treaty or covenant

¹¹⁰ Ibid.

¹¹¹ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [5(e)].

¹¹² For an account of this proposal, see *Official Records of the Economic and Social Council*, UN ESCOR, 11th sess, Annex, Supp 5, UN Doc E/1681 (27 March – 19 May 1950) [47].

¹¹³ *Memorandum by the Secretary-General*, UN ESCOR, 12th sess, Annex, Agenda Item 23, UN Doc E/1900 (12 February 1951) [25]–[61].

¹¹⁴ Commission on Human Rights, *Report of the Sixth Session of the Commission on Human Rights*, UN Doc E/1681 (19 May 1950) 8.

on human rights', the US would never ratify any such treaty.¹¹⁵ Two days after the Dulles policy statement was made, the US representative to the Commission sought to deflect criticism by putting forward a new action program 'based on American experience'.¹¹⁶

Under the US proposal,¹¹⁷ reports would have been voluntarily submitted by member states on an annual basis and would have dealt with the 'results achieved and difficulties encountered ... in the promotion and development of human rights'.¹¹⁸ Each report would focus on a particular group of rights in accordance with a schedule to be determined by the Commission. In its consideration of the reports, the Commission would be assisted by a summary and analysis of the reports, to be prepared by the Secretary-General, as well as by reports submitted by specialised agencies 'summarizing the information contained in the reports which they receive from their members, together with any comments they may deem appropriate'.¹¹⁹ In the latter regard, every effort was to be made to cooperate with the agencies and 'to avoid duplication of effort'.¹²⁰

In retrospect, the proposal is remarkable for several reasons. First, it symbolised how far the UN had moved since 1948, when the *UDHR* was adopted on the basis that it was not legally binding and that each state's conduct would not be subjected to any formal review procedures. It represented a belief on the part of its sponsors that a reporting procedure could be designed so as not to constitute interference in the domestic affairs of states. While this view was strongly contested by some states,¹²¹ an important precedent was being established.

That such a proposal would be championed by the US was as ironic as it was revealing. The irony lay in the fact that the US was advocating the establishment, albeit on a voluntary basis, of a procedure that was remarkably similar to that which had already been proposed for the Covenants. Yet it was the unequivocal rejection of the Covenants by the Eisenhower Administration which led to the proposal of the new procedure. The proposal was revealing because it implied the US' considerable confidence that it could control and shape the evolution of a UN reporting system to avoid undue criticism from its ideological opponents. The US' principal allies were far less confident and their worst fears were immediately confirmed by a joint Egyptian–Indian amendment designed to

¹¹⁵ US Department of State, 'US Policy on Human Rights' 28 *Department of State Bulletin* (Washington DC, US), 20 April 1953, 592.

¹¹⁶ See generally US Representative to the UN Commission on Human Rights, 'A New Human Rights Action Program' 28 *Department of State Bulletin* (Washington DC, US), 15 June 1953, 842.

¹¹⁷ 'United States of America: Revised Draft Resolution on Annual Reports', UN Doc E/CN.4/L.266/Rev.2 in *Report of the Ninth Session of the Commission on Human Rights*, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [263].

¹¹⁸ *Ibid* [1(a)].

¹¹⁹ *Ibid* [1(b)].

¹²⁰ *Ibid* [5].

¹²¹ The Soviet Union was the main opponent but was supported by other Eastern European countries: see *ibid* [274].

ensure that states' reports would also deal with the situation in their colonial territories.¹²²

The debate that took place over the proposals in 1953 reveals how long ago the die was cast for the formal design of UN human rights reporting procedures. In the first place, it is clear from the debates in the Commission that different states had rather different goals in mind. The US rhetoric emphasised the value of providing the UN organs with information on the basis of which they could more effectively shape the UN's overall human rights program, as well as 'the value of each country drawing on the experience of other countries for inspiration and practical guidance in solving its own problems'.¹²³

Other states, notably France, clearly had in mind the development of a system analogous to that of the International Labour Organization, to scrutinise the extent to which states were living up to their formal commitments. Yugoslavia, on the other hand, immediately raised an issue that continues to bedevil the debate over the proper role of reporting systems. It proposed that efforts should be made 'to give full international assistance to States prevented by lack of national resources from overcoming the difficulties in the way of full achievement of respect for human rights without such international assistance'.¹²⁴

Ultimately, the procedures adopted by the Commission in 1956 did not decisively endorse any of these different conceptions.¹²⁵ The Commission's failure to adopt a French proposal, in which the Commission would have been assisted by 'a committee of experts, which would carry out the preliminary examination of the reports',¹²⁶ further compounded the vagueness of the whole endeavour and laid the foundations for its ultimate inefficacy.

Perhaps the most interesting and innovative aspect of the original US proposal was a provision calling 'the attention of Members to the advisability of setting

¹²² See *ibid* [267].

¹²³ *Yugoslavia: Amendments to the Draft Resolution on Annual Reports (E/CN.4/L.266) Submitted by the United States of America*, UN ESCOR, UN Doc E/CN.4/L.305/Rev.1 (1953) in *Report of the Ninth Session of the Commission on Human Rights*, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [266].

¹²⁴ *Ibid*.

¹²⁵ The fifth preambular paragraph of the Resolution finally adopted by the Commission indicated that the purpose was 'to obtain from each State Member ... information on development and progress achieved in the field of human rights ... with a view to learning the results obtained and difficulties encountered'. *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (5–29 March 1956), [23] Resolution I. Under the terms of a Soviet proposal, the Commission would have recognised 'that it is desirable for the States Members of the United Nations to keep each other informed of their successes and achievements in the sphere of human rights', thereby emphasising only the information-sharing aspect of the procedure: *Union of Soviet Socialist Republics: Amendments to the Draft Resolution on Annual Reports on Human Rights Submitted by the United States of America*, UN Doc E/CN.4/L422 (1956). Although this proposal was not adopted, the Commission sought to allay the fears of those states which did not want any form of supervisory procedure to emerge, by noting in its report 'that the role of the Commission was not to criticize individual Governments on the basis of reports': *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (5–29 March 1956) [28].

¹²⁶ See the amendment of France (E/CN.4/L.304/Rev.1) in *Report of the Ninth Session of the Commission on Human Rights*, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [265].

up an advisory body, composed of experienced and competent persons, to assist their Governments in the preparation of its annual report'.¹²⁷ The provision was similar to a suggestion by ECOSOC as early as 1946 inviting states 'to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission'.¹²⁸ The 1946 resolution had failed to produce any concrete results, but the US attempt to revive it in 1953 fared marginally better. Subsequent debates reveal that the US proposal contemplated the involvement of NGO representatives in the preparation of a state's report.¹²⁹ By the same token, its sponsors emphasised that governments would remain entirely free to prepare their reports in any way they wished.¹³⁰ In practice, however, the experience of subsequent years indicated that the suggestion had been acted upon by few, if any, governments. The issue was raised yet again in 1960 on the initiative of a former Chairman of the Commission. Mr Gunewardene had proposed the establishment of national advisory committees on human rights, but the resolution which resulted was such a dilution of the original proposal that it too was of little consequence.¹³¹

These proposals are of particular relevance today given the growing recognition that one of the principal potential achievements of a reporting procedure is the stimulation of an authentic national dialogue over domestic human rights policies. As a result of the fears of the Western European colonial powers, the objections of the Eastern Europeans on the grounds of domestic jurisdiction, a conviction that the US proposals were designed primarily to kill the Covenants, and a general reluctance to open domestic records to international scrutiny, it was not until 1956 that the Commission finally established the reporting system. In the meantime, ECOSOC sought comments on the proposal from states and the specialised agencies.¹³² Draft resolutions were debated by the Commission at both its 1954 and 1955 sessions, but no agreement was reached on any of the aspects that had been disputed when the proposal was first made.¹³³ By 1956, there was still no great enthusiasm for the proposal, although US determination to get it through had not waned. The Soviets, on the other hand, were prepared to support the initiative, particularly as the importance of the draft Covenants might be strengthened (contrary to US policy) if

¹²⁷ See the Draft Resolution (E/CN.4/L.266/Rev.2) in *ibid* [263].

¹²⁸ ESC Res 9(II), UN ESCOR, 2nd sess, Annex 14, UN Doc E/RES/9(II) (21 June 1946) [5].

¹²⁹ *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (29 March 1956) [41].

¹³⁰ *Ibid*.

¹³¹ See Commission on Human Rights, *Report of the Commission on Human Rights on its 16th Session*, UN Doc E/3335 (1960) [34]–[50]. Particularly note how draft resolution E/CN.4/L.548 was amended in the report before its final adoption by resolution by the Commission: Commission on Human Rights, *Resolution on National Advisory Committees on Human Rights*, Res 2 (XVI) (1960).

¹³² ESC Res 501 (XVI) C, UN ESCOR, 16th sess, 746th plen mtg, Annex, Supp 1, 10, UN Doc RES/501(XVI) C (3 August 1953).

¹³³ See *Commission on Human Rights Report of the Tenth Session*, UN ESCOR, 18th sess, Annex, Supp 7, UN Doc E/2573 (16 April 1954), [336]–[347].

‘progressive measures such as those combating discrimination and implementing self-determination’ were ‘specially emphasized in the annual reports’.¹³⁴

At least three of the controversial decisions taken by the Commission in 1956 have continued to haunt UN reporting procedures ever since. First, in determining the scope of states’ reports, the Commission decided to seek information only on ‘general developments and progress achieved’, rather than on ‘results achieved and difficulties encountered’ — as had originally been proposed.¹³⁵ Although the formulations subsequently adopted in the Covenants reflect the latter, more expansive approach, the reports prepared by most states continue to follow the restrictive spirit of the 1956 resolution by downplaying or ignoring difficulties.

The second significant aspect of the 1956 compromise formula was its request that the Secretary-General prepare a ‘brief summary’ of the reports, rather than ‘a brief summary and analysis’, as originally proposed.¹³⁶ Thus, in one fell swoop, an indispensable element of an effective reporting system was removed without dissent by even a single member of the Commission. Few decisions by the Commission have been as conscientiously adhered to as this one has been. Even 50 years later, not a single UN human rights reporting system provides for the Secretariat to undertake a detailed technical *analysis* of states’ reports prior to their consideration by the relevant political or expert body concerned — a practice long followed by the ILO and the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’).

Thirdly, the original US proposal was somewhat open-ended and would have authorised the Commission to make ‘whatever comments and conclusions ... it deems appropriate’.¹³⁷ In the final version, the power to make ‘recommendations’ as well as comments and conclusions was added. But a major limitation was also imposed, to the effect that all three must be ‘of an objective and general’ nature.¹³⁸ Used in such a context, the word ‘objective’ was apparently intended as a euphemism for ‘non-country-specific’,¹³⁹ and the term ‘general’ was designed to reinforce the notion that no comments should deal with particular situations. These somewhat draconian restrictions were subsequently inherited by all UN reporting procedures, although over time, the

¹³⁴ See the draft resolution proposed by the USSR (E/CN.4/L.424/Rev.2) and rejected by the Commission: *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (29 March 1956) [32].

¹³⁵ Compare CHR Res 1(XII), UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/Res/1(XII) (29 March 1956) [1], with the Draft Resolution (E/CN.4/L.266/Rev.2) in *Report of the Ninth Session of the Commission on Human Rights*, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [263].

¹³⁶ *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (5–29 March 1956), [23] Resolution I, para. 4.

¹³⁷ *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (29 March 1956) [41].

¹³⁸ Compare CHR Res 1(XII), UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/Res/1(XII) (29 March 1956) [1] with the Draft Resolution (E/CN.4/L.266/Rev.2) in *Report of the Ninth Session of the Commission on Human Rights*, UN ESCOR, 16th sess, Annex, Supp 8, UN Doc E/2447 (30 May 1953) [263].

¹³⁹ In the view of the language adopted (by the USSR), the comments, conclusions and recommendations ‘should not be related to any particular country or territory’: *Commission on Human Rights Report of the Twelfth Session*, UN ESCOR, 22nd sess, Annex, Supp 3, UN Doc E/2844 (29 March 1956) [37].

treaty bodies managed to transcend this particular limitation by developing the notion of ‘concluding observations’ as the culmination of the process of examining states’ reports.¹⁴⁰

In 1975, the last occasion on which periodic reports dealing with economic, social and cultural rights were considered, the Commission’s Ad Hoc Committee on Periodic Reports was considering reports from 47 governments and four specialised agencies (the Food and Agricultural Organization, ILO, UNESCO and the World Meteorological Organization), and comments by 13 NGOs in consultative status.¹⁴¹ On the basis of its deliberations, the Ad Hoc Committee proposed a draft resolution, which the Commission adopted in full without either a debate or a vote.¹⁴² In the resolution, the Commission noted ‘with satisfaction the encouraging number of reports received’, while at the same time expressing the hope that governmental participation in the reporting system would ‘continue to increase’.¹⁴³ The Commission was apparently able to feel encouraged, despite the fact that the number of reports received had dropped to 47 from a high of 67 10 years earlier.¹⁴⁴

The Commission’s reporting procedure was quietly abolished in 1981, 25 years after it had been established.¹⁴⁵ Its achievements could readily be measured in terms of trees destroyed, but it is doubtful whether it made any significant contribution to the promotion of respect for human rights. It did, however, succeed in giving the appearance that all governments were making themselves accountable to the Commission, and it gave NGOs and UN specialized agencies an excuse to submit written comments.

D *Learning from the Past*

The importance of the lessons to be learned from the futile and ultimately abandoned periodic review procedure which the Commission maintained for a quarter of a century cannot be overstated. Those lessons point to a number of ingredients which must be part of the Council’s attempt to develop a new procedure that will not discredit the Council, frustrate civil society and contribute nothing to human rights.

These lessons can be summed up and expressed as four basic requirements. The first is the need for a fair and transparent system based on clearly stated criteria. Every state must be assessed against a set of objectives which are identified in advance, and there should be regular review of those objectives. States should also be given the opportunity to respond to the information gathered in relation to their own human rights situation. Such responses should,

¹⁴⁰ This notion was pioneered by the Committee on Economic, Social and Cultural Rights in 1990: see generally Michael O’Flaherty, ‘The Concluding Observations of United Nations Human Rights Treaty Bodies’ (2006) 6 *Human Rights Law Review* 27, 30.

¹⁴¹ Commission on Human Rights, *Report of the Fifty-Eighth Session*, UN Doc E/5635 (27 February 1975).

¹⁴² *Ibid* 42.

¹⁴³ CHR Res 12 (XXXI), UN ESCOR, 31st sess, 1332nd plen mtg, Annex, Supp 4, UN Doc E/CN.4/RES/12 (XXXI) (1975) 70.

¹⁴⁴ Commission on Human Rights, *Report of the Twenty-First Session*, UN Doc E/4024 (1950) 87.

¹⁴⁵ CHR Decision 10 (XXXVII), UN ESCOR, Resumed 2nd regular sess, Annex, Supp 1B, UN Doc E/Res/10 (XXXVII) (21 October – 25 November 1981).

at least to some extent, be in writing so that the process is clear and is not dependent on recording a dialogue between a state's representative and the relevant group or committee undertaking the first part of the review.

The second component is the need to ensure that the procedure is based upon a strong and reliable flow of information. In the past this has been interpreted in terms of who is permitted to submit information, leading to heated debates over whether specialised agencies and NGOs could make such submissions, and under what circumstances and in what form they could do so. These issues are now almost entirely anachronistic, although this is no guarantee that the debate in the Council will not treat them as though they are as relevant today as they were in the 1950s. The *sine qua non* for the success of the procedure is to take full account of all country-specific information generated by the process of reporting to the various treaty bodies and, most importantly, of all of the reports generated by the system of special procedures which has been carried over to the Council from the Commission. All other relevant sources of information should be taken into account, but this is not a matter which can be determined by specifying authorised sources and modes of submission.

The third element comprises the question of process. The starting point is to acknowledge the cumbersome, technologically outmoded, expensive and generally unproductive nature of monitoring processes which are dependent upon an initial report by the state itself. While the treaty bodies are required by the terms of the relevant treaties to base themselves upon state reports — a process conceived of during, and based upon the assumptions of, the 1950s — it is revealing that this approach has not been followed in most other areas of international monitoring. Whether it is a question of environmental treaties, compliance with the standards of the IMF, or even many privately organised social responsibility mechanisms, the starting point is not with information compiled in the first instance by the actor being monitored.¹⁴⁶ This raises the issue of how best to compile the reports upon which the Council will base its review. One option is for the process to be somewhat mechanical and to consist of a compilation of information generated by the treaty bodies and the special procedures. This would be unfortunate, because political bodies like the Council are simply not equipped to make effective use of large quantities of undigested primary material. It is beyond the scope of this article to speculate on the best approach to be used, but there must be a major role for the OHCHR and for designated experts. The basis for the Council's examination of a country must be a concise, focussed set of recommendations, based on a thorough and expert study of the situation. It is the responsibility accorded to expert inputs that will primarily distinguish the Council's more objective and systematic approach from the haphazard and unscientific country-focused discussions held by the Commission. This is not to suggest that the outcome will be determined by the

¹⁴⁶ In relation to approaches to monitoring in these various areas, see generally the papers reproduced in Benedict Kingsbury et al, 'Global Governance as Administration — National and Transnational Approaches to Global Administrative Law' (2005) 68(3) *Law and Contemporary Problems* 1. In relation to the environment in particular, see Ulrich Beyerlin, Peter-Tobias Stoll and Ruediger Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia* (2006).

experts. The ultimate decision-making process will remain a quintessentially political one which will rest firmly in the hands of the members of the Council.

The fourth and final component is to ensure that there is a tangible outcome to the process. Unless the Council makes specific, well-formulated and feasible recommendations based on its review of each country's performance, the process will lack credibility and will soon fall first into disrepute and then into desuetude.

V OTHER TECHNIQUES THAT THE NEW COUNCIL MIGHT USE

Implicit in much of the preceding analysis is the assumption that the system of special procedures lies at the heart of the Council's work. Thus, in addition to devising an effective and meaningful system of universal periodic review, the Council will need to reform the system of special procedures. This will allow it to maximise its potential effectiveness and to remove some of the obstacles that currently prevent these procedures from evolving into a truly systematic and professional system for responding to, and seeking to pre-empt or prevent, major human rights violations around the world. The need for reform was recognised by the General Assembly in its resolution creating the Council:

the Council will assume, review, and where necessary improve and rationalize, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a system of special procedures, expert advice and complaint procedure.¹⁴⁷

The resolution went on to specify that this review must be completed by the end of the Council's first year of existence, thus ensuring both that there would be no opportunity for filibustering and that there would be too little time for careful reflection and systematic construction of any new architecture. The key elements of the required review are the special procedures,¹⁴⁸ the so-called 1503 procedure,¹⁴⁹ and the future role, if any, of the Sub-Commission on the Promotion and Protection of Human Rights.¹⁵⁰ The latter two issues are controversial but cannot be analysed in any detail in the present context. It is sufficient to note that there are strong reasons to conclude that both once performed important and valuable roles but that, in their present form, each has outlived its usefulness. Whether they will simply be abolished or replaced by significantly restructured provisions which go well beyond existing arrangements remains to be seen.

¹⁴⁷ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [6].

¹⁴⁸ To understand the roles played by the special procedures, see OHCHR, *Special Procedures Bulletin* (2006) <<http://www.ohchr.org/english/bodies/chr/special/BulletinJan-Apr2006.pdf>> at 22 May 2006. To give a sense of the dynamism of the system, the review indicates that in the first four months of 2006, special procedures sent 347 communications (letters alleging violations or seeking explanations) to a total of 96 countries.

¹⁴⁹ See above n 35.

¹⁵⁰ On the role of the Sub-Commission, see generally International Service for Human Rights, *Charter-Based Bodies: Sub-Commission on the Promotion and Protection of Human Rights* (2004) <http://www.ishr.ch/About%20UN/Charter-based%20bodies/Sub.2/sub_2.htm> at 22 May 2006.

It is the special procedures, however, which will present the biggest challenge and will, to a very significant extent, determine the fate of the grand reform which the creation of the Council is supposed to help bring about. The mandate-holders themselves have stated succinctly what they consider to be the principal role of the system of special procedures:

The hallmarks of the special procedures system are its independence, impartiality and objectivity. Its ability to monitor the situation in any country of the world in relation to the specific mandates established by States within the framework of the Commission on Human Rights ensure [sic] that it plays a crucial role within the overall United Nations human rights system. It is uniquely placed to act as an early warning system in relation to situations involving serious human rights violations. It is thus essential that the special procedures be accorded full and free access to all countries. Mandate holders must also be assured appropriate access, on an effective and consistent basis, to all bodies within the United Nations system dealing with issues of human rights. Their ability to act in a timely fashion is also of the essence.¹⁵¹

Many proposals have been put forward purporting to enhance the effectiveness of the system, but the extent to which some of these contradict one another in their fundamental assumptions is striking. The main engine for radical reform comprised the Asian Group of states within the old Commission, most of whom were subsequently elected to the Council. If implemented, the Asian proposals would result in a very different, and significantly constrained, set of procedures.¹⁵² The African Group has expressed sympathy with some, but by no means all, of the Asian proposals.¹⁵³ On the other hand, the countries of Western and Eastern Europe and the Latin American and Caribbean Group are broadly supportive of the main aspects of the system as it currently exists and have put forward suggestions for improvement of those basic arrangements.¹⁵⁴

The future reform of the system of special procedures will take place at two stages. The first will involve structural changes adopted by the Council, and the second will entail procedural changes in the working methods introduced by the mandate-holders. The most important of the proposed structural changes relate to the number of mandates, the qualifications of mandate-holders, the methods by which they are appointed, and the rules governing their conduct.

¹⁵¹ Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, UN Doc E/CN.4/2006/4 (3 August 2005) [66].

¹⁵² Asian Group, *Initial Discussion Paper on 'Enhancing the Effectiveness of the Special Mechanisms of the Commission on Human Rights'* (2005) <http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/ASIA%20GROUP.DOC> at 22 May 2006.

¹⁵³ African Group, *Observations of the African Group on the Initial Discussion Paper Entitled 'Enhancing the Effectiveness of the Special Mechanisms of the Commission on Human Rights' Prepared by the Experts of the Asian Group on Human Rights* (2005) <http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/AFRICAN%20GROUP.DOC> at 22 May 2006.

¹⁵⁴ For an example of the attitude of Western countries, see *New Zealand and Canadian Input into the Discussion on Strengthening and Enhancement of the Special Procedures* (2005) <http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/NZCANADA%20SUBMISSION%200ON%20SPECIAL%20PROCEDURES%2C%20OCT%202005_V1.DOC> at 22 May 2006.

The first of these issues is probably the most intractable. There are now 41 different mandates and most observers would probably agree, in principle, that this is too many and that the system could be more efficient if it were streamlined. The problem is that there is no agreement as to which mandates are superfluous nor are there any readily apparent criteria which might guide such a process. In a nutshell, an individual mandate may be vehemently opposed by one country but considered an indispensable component by another. The most feasible reform is to introduce a system which will slow the introduction of new mandates.

The second issue — the qualifications of mandate-holders — has been contested mainly in relation to the question of whether government officials and office-holders in human rights NGOs can be considered to satisfy the requirement of independence, which is considered to be essential. While there would seem to be a conflict of interest in a situation in which a mandate-holder is closely affiliated with an NGO concerned with issues arising directly within his or her mandate, this problem may be one which is better resolved through some general guidelines rather than with a formal prohibition. Nevertheless, it is not an issue which should be ignored. On the other hand, holding a ministerial, diplomatic or other executive position within a government presents a clear and irrefutable conflict of interest. In a situation in which the interests of the mandate-holder's government, which is also his or her employer and whose interests he or she is paid to defend, conflict with those of the mandate, there can be no question that the individual must violate the trust of one side. Since the government post would undoubtedly provide full-time continuing employment and the UN mandate provides no income and is temporary, it is not difficult to predict which side will lose out. At their annual meeting in 2005, the mandate-holders expressed the strong position that '[t]he requisite independence and impartiality are not compatible with the appointment of individuals currently holding decision-making positions within the executive or legislative branches of their Governments'.¹⁵⁵ If the Council decides not to follow this approach, the system of special procedures will be severely compromised and the prospects for moving to a genuinely expert and independent system will be undermined.

The third issue concerns the methods by which mandate-holders are appointed. It is on this point that the biggest threat to independence has been mooted. Under the proposals put forward by the Asian Group, the regional groups would take it in turn to appoint a mandate-holder.¹⁵⁶ This means that the post of Special Rapporteur on Extrajudicial Executions, for example, would be filled by whichever nominee is chosen by the single geopolitical group whose turn it is at the time. The fact that a more qualified candidate is available from some other country would be irrelevant, and the prospect of turning down a clearly unqualified candidate who has secured sufficient support within the relevant group would be very low.¹⁵⁷ Linked to this proposal is the suggestion

¹⁵⁵ Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, UN Doc E/CN.4/2006/4 (3 August 2005) [67].

¹⁵⁶ Asian Group, above n 152.

¹⁵⁷ At their 2005 annual meeting, the mandate-holders recognised 'the importance of ensuring overall regional diversity', but concluded that 'there should be no link between a given

that mandate-holders might be elected rather than nominated by the Chairperson of the Council, as is presently the case.¹⁵⁸ If adopted, either of these proposals would add a highly political dimension into the process and would significantly limit the system's ability to achieve the elements of expertise, professionalism and independence that are essential to an effective set of procedures.

The fourth issue concerns the rules governing the conduct of mandate-holders in performing their functions. It is widely agreed that there is a need for a more detailed and up-to-date Manual of Procedures in order to enhance the consistency, predictability and transparency of the approaches adopted by the different mandate-holders.¹⁵⁹ That agreement is, however, predicated upon the assumption that any general rules will need to be adapted to respond to the requirements of individual mandates and the exigencies of any given situation. In contrast, proposals put forward by the Asian Group talk not of a procedural manual but of a 'code of conduct'. Some of the suggested contents of that code would dramatically transform existing arrangements.

The proposal is for a 'standardized procedure' which would, inter alia, impose strict confidentiality provisions, limit interaction with the media, and require 'close coordination' between the mandate-holder and the government concerned.¹⁶⁰ The Asian Group further proposed that the special procedures should only respond to allegations in relation to which domestic remedies had been exhausted.¹⁶¹ Combined, these proposals would relegate the role of the special procedures to providing confidential advice to the government concerned and to undertaking historical reviews of issues the saliency of which may have long since expired. Such an approach would represent a major regression and would almost certainly fuel complaints that the new Council is unable to respond in a timely, effective and objective way to major violations of human rights. In other words, these proposals would seem to be incompatible with the clearly stated goals of the General Assembly in establishing the new Council. Among other goals, the Council is called upon to 'contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies'.¹⁶² It is true that some states consider the reference to 'cooperation' to mean that the Council should not adopt an

region and any particular mandate. Such linkage would undermine the emphasis on finding the individual who is most highly qualified for a specific mandate'. They added, however, that '[i]t is essential that a gender balance be achieved in relation to the overall list of mandate holders': see Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, UN Doc E/CN.4/2006/4 (3 August 2005) [67].

¹⁵⁸ Asian Group, above n 152.

¹⁵⁹ 'There was common support for updating and improving the Manual. It was underlined that expanding the Manual should in no way curb the independence of each special procedure': Commission on Human Rights, *Rationalization of the Work of the Commission: Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights*, UN Doc E/CN.4/2006/116 (12 December 2005) [32].

¹⁶⁰ Asian Group, above n 152.

¹⁶¹ *Ibid* 4.

¹⁶² *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Annex, Agenda Items 46 and 120, UN Doc A/RES/60/251 (15 March 2006) [5(f)].

adversarial approach. It does not follow, however, that the Council can adopt an approach which is largely determined by a decision by the government concerned to be more or less cooperative. In the entire history of efforts by the Commission and the General Assembly, the instances in which governments accused of significant human rights violations have been cooperative are rare. Thus, the insistence on cooperation only makes sense — or at least can only be interpreted as a requirement put forward in good faith — if it applies principally to the government concerned and that government's cooperation with duly constituted procedures that the Council has adopted in an open, transparent and accountable fashion. In the context of special procedures, the required cooperation means taking whatever steps are necessary in order to comply with the primary obligation of seeking to prevent, and of responding to, violations.

Beyond the challenges raised by these four major issues, the Council has a great deal to do to ensure the effectiveness of the special procedures system. Without seeking to be in any way comprehensive, those steps include: ensuring that special procedures mandate-holders are accorded access to the countries they wish to visit; providing sufficient time to consider the reports of mandate-holders and being prepared to take measures to follow-up on the relevant recommendations; ensuring that adequate funding is available; and incorporating the information generated by the special procedures into all other relevant aspects of its work, especially the universal periodic review.

Finally, as noted above, a very significant proportion of the major reforms needed to ensure the enhanced effectiveness of the special procedures system must come from changes in the working methods of the mandate-holders. The mandate-holders themselves must introduce these changes. Indeed, there is greater potential for such self-generated reforms to lead to the evolution of a more professional, better coordinated and more effective system than there is for the Council to be able to impose the necessary reforms. The starting point is for the mandate-holders to recognise the weaknesses and blind spots inherent in the current arrangements and to introduce the necessary changes in a coordinated fashion. Innovation is the key: efforts to harmonise must be kept in perspective and individual experts should be prepared to challenge the assumption that the only way to deal with issues is to slavishly follow precedents regardless of whether or not they are producing optimal results.

The ability to be reflective is not in overabundance in any institutional setting, but the special procedures are especially self-critical. This insecurity derives from a perception that any attempts at internally-generated reform will be seized upon by those wishing to constrain or to undermine the system as evidence of the need for major changes or as an opportunity to tack disabling reforms onto well-intentioned ones. This mentality must change. The special procedures must be confident that they enjoy significant support across the international community and of their ability to innovate and significantly enhance their own effectiveness, despite the limited material resources generally allocated to them.

Many examples could be given, but for present purposes, one will suffice. The biggest question that arises in relation to reports by mandate-holders on any given aspect of a country's human rights situation is: are they effective? In other words, have they had a positive human rights impact? If so, how, and in relation to which actors? More generally, is there a compelling answer to the potential

criticism that the special procedures represent a giant façade of accountability that actually does little to improve the plight of those whose human rights are being violated?

The issue of impact is dealt with by UN organs under the rather oblique heading of ‘follow-up’. It is a concept about which much has been said but all too little done, at least in the context of the special procedures. It can mean either a pro forma review of steps taken by governments in response to the reports of special procedures, or a more wide-ranging and nuanced review of ways in which a situation has changed in response to the overall reporting process. The importance of the concept was most recently underlined in a report on a 2005 UN seminar which examined the effectiveness of the special procedures:

It was commonly agreed [by the participating Governments] that it was crucial that the findings of special procedures following a country visit were not merely consigned to a report, but formed the basis of negotiation and constructive open dialogue with States, with a view to working together on overcoming obstacles. It was stressed by many participants that States should cooperate fully with special procedures and that this encompassed incorporating their findings into national policies. Where States did not implement recommendations, they should provide information on why.¹⁶³

The first of the special procedures to undertake a systematic self-evaluation in relation to country visits under the rubric of ‘follow-up’ was the Special Rapporteur on Torture, in a report presented in 2005.¹⁶⁴ In the following year, in my capacity as Special Rapporteur on Extrajudicial Executions, I sought to undertake a similar exercise, but in a more evaluative fashion. In my 2006 report to the Commission, I reviewed the action that had been taken in response to the various recommendations made by my predecessor based on visits to Honduras, Jamaica, Brazil and Sudan between 2001 and 2004.¹⁶⁵ Significantly, none of the four governments responded to my requests for information regarding the steps they had taken. Therefore, the follow-up assessment had to be based largely on information available from other international organisations, the media, NGOs and civil society groups within the relevant countries.

The results of the survey provide strong grounds for concern, and there is no reason to believe that these concerns are confined to this particular mandate. It appeared that while some minimal follow-up to the recommendations had occurred, they generally had made little impact.¹⁶⁶ The question then was: what inferences could reasonably be drawn from this unsatisfying conclusion?

¹⁶³ Commission on Human Rights, *Rationalization of the Work of the Commission: Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights*, UN Doc E/CN.4/2006/116 (12 December 2005) [49].

¹⁶⁴ Commission on Human Rights, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur, Theo van Boven — Follow-Up Recommendations Made by the Special Rapporteur*, UN Doc E/CN.4/2005/62/Add.2 (21 February 2005).

¹⁶⁵ Commission on Human Rights, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Report of the Special Rapporteur, Philip Alston — Follow-Up to Country Recommendations*, UN Doc E/CN.4/2006/53/Add.2 (27 March 2006).

¹⁶⁶ *Ibid* [7].

Before answering that question, I should first acknowledge that my predecessor, Asma Jahangir, took her responsibilities very seriously and produced reports of the highest quality, so the problem was not in any way one of unsatisfactory reports. In addition, two caveats are necessary. First, the determination of cause and effect between the recommendations made by a special procedure and any legal and policy reforms subsequently adopted by the relevant government is inevitably complicated. It is unusual for a government to acknowledge that it is changing course in response to any outside pressure, and there might thus be good reason to take ameliorative steps, though perhaps not precisely those recommended by a special rapporteur. Secondly, it is essential to see a country visit by a special rapporteur in its overall perspective and not to assess it exclusively in terms of measures overtly taken in response to his or her recommendations. A country visit seeks to achieve a range of objectives, including: to encourage all actors at the national level to see the issues from a human rights perspective 'rather than only through alternative lenses such as the restoration of peace, the fight against crime, or the vindication of majoritarian political preferences';¹⁶⁷ to encourage the government to undertake its own domestic review of policy options, whether before or after the visit; to reassure civil society groups and victims that their struggles are legitimate and to convey the message that the international community is supportive; and to provide authoritative reports to other actors, including both international agencies and other governments, who are well placed to engage the government concerned in a human rights dialogue.

However important these diverse objectives might be, it remains the case that a consistent pattern of neglect of the relevant recommendations should ring alarm bells among those who are concerned with ensuring that the international human rights regime is capable of making a positive difference. Several steps might usefully be taken to improve the impact of the process, and thereby contribute to enhancing the effectiveness of the Council and ensuring its credibility. One step is for the special procedure mandate-holders to rank their various recommendations in order of importance and urgency. In the past, far too many reports have contained large lists of undifferentiated recommendations, as though the longer this part of the report, the better it is assumed to be. In practice, such lack of differentiation makes it all too easy either to ignore all of the recommendations or to take a strategic approach and address, ideally with some fanfare, the least significant and crucial of the recommendations. One way of moving beyond this practice is to urge each mandate-holder to identify a limited number of key recommendations — perhaps as few as five — that result from each country visit. The Council would then undertake to address at least those priority issues in its debates and ideally in its resolutions.

Another step is to move beyond treating country visits by special procedures as the governmental equivalent of an unpleasant dental appointment which, once endured, can comfortably be forgotten. Governments should be required to respond to the Council within one year of the presentation of the report with a statement as to which of the recommendations have been acted upon and why the remainder were rejected. Related to this step is the proposal made earlier

¹⁶⁷ Ibid [8].

according to which the reports of the special procedures would be an integral part of the universal periodic review carried out by the Council, thus providing an ideal opportunity for the Council to follow up on the relevant reports of the special procedures.

Steps such as these would turn the process into a genuine dialogue and would also put pressure on the special procedures to make their reporting more professional and focused. In particular, it would highlight the need for the recommendations to be both specific and implementable, taking account of the time and resources available. Because the reports (in general) and the recommendations (in particular) have not been subjected to adequate examination by the Commission, mandate-holders have been able to largely ignore the practical implications of their suggestions. Greater scrutiny of this sort would also compel those governments who consider that some or all of the recommendations are misconceived, inappropriate or unrealistic to state their concerns, rather than issuing a blanket rejection or effectively ignoring the reports. This would ensure the type of feedback which is necessary if the system is to mature and to be made more accountable.

VI DRAWING CONCLUSIONS

Much of the analysis contained in this article reviews the history of recent efforts to reform the UN human rights regime. Careful consideration is also given to the types of argument used to justify proposals to abolish the old Commission and replace it with the new Council. This emphasis on the old order and the period of transition is indispensable if we are to avoid repeating the problems of the past. There is no better recipe for disaster than failing to undertake a systematic and accurate diagnosis of the pathologies of the old system. Failing to do so facilitates an arbitrary, selective and inevitably flawed set of recommendations and undermines our ability to conceptualise the type of regime that is needed in the future. The types of reform needed can only be appreciated in light of an understanding of how we reached the extremely important crossroads at which the system now stands.

The analysis of the fall of the Commission and the debates that surrounded it lead to several concluding observations. The first concerns the complex, even bizarre nature of the process of reform. It is a story of competing perspectives, often based on fundamentally incompatible assumptions, nevertheless coalescing to provide the impetus for major structural changes. The almost completely contradictory diagnoses put forward by different groups of states, and the radically different expectations that they hold for the outcome of the reform process, are a striking part of the mix. These inconsistencies serve to highlight several characteristics of the current situation, including: the problematic nature of actually achieving deep-rooted change despite agreement on major institutional restructuring; the uncertain nature of the process and the difficulty of predicting whether the eventual outcomes will be more favourable to human rights; and the inability of any one group of states to dominate the debate or to impose any particular formula for reform.

The second observation is that the reform episode represents a fascinating case study of the role of various non-state actors, particularly in a setting in which state preferences were both inconsistent and often not clearly formulated.

These include the UN Secretary-General, the High Commissioner for Human Rights, the High-Level Panel and leading NGOs. The Secretary-General played a key role by focusing on reform of the human rights machinery in some of his earlier analyses and by commissioning an independent expert group — the High-Level Panel — which endorsed the need for reform and honed some of the proposals that the Secretary-General himself might not have been able to put forward. Furthermore, at a critical moment the Secretary-General added his weight to the criticism of the Commission's performance and its general lack of credibility.¹⁶⁸ The High Commissioner for Human Rights made an important contribution by pushing forward a program of action for her Office in the midst of a crucial phase of the reform process, and by ensuring that the plan, ostensibly dealing with administrative reorganisation and financing, contained something of a blueprint for major reform of the system itself.¹⁶⁹ The High-Level Panel had no particular 'standing' within the UN system beyond the influence of its members and the persuasiveness of its analysis and prescriptions.¹⁷⁰ Despite this, the Panel may have proven that it is easier to create institutions than to bring about thorough reform.¹⁷¹ Nevertheless, its emphasis on the 'legitimacy deficit' of the Commission and on the desirability of creating a new Council proved to be extremely influential.¹⁷² Finally, the major international NGOs in the human rights field — notably Amnesty International and HRW, as well as some of the influential regional groups such as the Asian Human Rights Commission — helped by putting forward specific formulae for reform and by keeping the media attention at a sufficiently high level to ensure momentum.

¹⁶⁸ The Secretary-General insulated himself from some criticism by relying heavily on the *Report of the High-Level Panel* and by even using its terminology, repeating the allegation that some states had sought membership of the Commission primarily in order to protect themselves (an allegation curiously not aimed at the US, China and others, although their motivation is not dissimilar in this respect). He nonetheless criticised the Commission for its 'declining credibility and professionalism' and asserted that the resulting 'credibility deficit ... casts a shadow on the reputation of the United Nations system as a whole': General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc A/59/2005 (21 March 2005) 45. In a postscript to the report, once it had become clear that there was no significant political support remaining for the Commission, the Secretary-General went further and suggested that its ability to carry out its functions had been 'overtaken by new needs and undermined by the politicization of its sessions and the selectivity of its work': General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General — Addendum*, UN Doc A/59/2005/Add.1 (23 May 2005) 1–2.

¹⁶⁹ The impetus to rectify the Office's longstanding funding inadequacies came in part from the recommendations of the High-Level Panel, which highlighted the 'clear contradiction between a regular budget allocation of 2 per cent for this Office and the obligation under the Charter of the United Nations to make the promotion and protection of human rights one of the principal objectives of the Organization': High-Level Panel, above n 6, [290]. The issue was then taken up by the Secretary-General.

¹⁷⁰ The Panel was chaired by a former Prime Minister of Thailand, Anand Panyarachun, and included former Australian Foreign Minister Gareth Evans among its 16 members: *ibid* annex II.

¹⁷¹ The Panel's recommendations bore fruit in the creation of a new Peacebuilding Commission and of the Human Rights Council, but their main emphasis was on the need for a new and broader consensus on the meaning of security, and on meaningful reforms of the Security Council's composition and the rules for its authorisation of the use of military force. In the latter domains, their impact was less significant than would have been hoped.

¹⁷² High-Level Panel, above n 6, [291].

The third observation is that the largely illusory nature of one of the most influential arguments used in pushing for reform — the need to ensure that human rights violators have no place as members of the Commission — did not significantly undermine the argument in public discourse or prevent it from providing impetus to the broader reform movement. Reform would not have occurred if the US, stung by its own rejection in 2001 and by its inability to secure consistent condemnation of certain states, had not launched a major campaign aimed at ensuring that non-democratic states and states that did not respect human rights would be excluded from membership in a reformed body. Yet neither the US Government nor other observers were able to come up with a convincing definition of the states that should be excluded or a workable formula for ensuring their exclusion. While the resulting reforms have gone a little way towards improving the composition of the Council elected in May 2006, they have certainly not achieved the paradigmatic change that was central to the rhetoric of reform promoted by the US and its allies. Instead, the approach adopted by the High-Level Panel was to some extent vindicated. It advocated universal membership, primarily, it seems, in order to eliminate the membership debate once and for all and thereby ‘to focus attention back on to substantive issues rather than who is debating and voting on them’.¹⁷³

The fourth observation concerns the challenges that lie ahead. The international human rights regime has evolved in a singularly unplanned way — one that better reflects the determination of different states to prevent certain developments from transpiring than one that has been built upon any coherent underlying vision of the system. We should be under no illusion that all of the pathologies of the old Commission system will be transcended now that the new Council has replaced it. The grand vision of renewal and reform generally associated with the project of creating the Council will not be achieved without a concerted effort to ensure that the previous flaws are rejected and that the principal tools available to the Council are used effectively.

This article has focussed on the need to take the universal periodic review process seriously and, in particular, to avoid the pitfalls which ensured that the previous international endeavour of this type ended in complete failure. In addition, the system of special procedures should be conceived of as the backbone of the new Council. This will require that all of the relevant actors, and not least the special procedure mandate-holders, grasp the opportunities presented by the Council’s creation to make that system more coherent, professional and effective.

¹⁷³ High-Level Panel on Threats, Challenges and Change, above n 6, 89.