



MONASH University
Law

Faculty of Law, Monash University
Research Paper No 2007/02
Date 1 December 2008

The Hitch Hiker's Guide to the New United Nations Human Rights Council

Paula Gerber

This Paper can be downloaded without charge from the
Social Science Research Network electronic library at:
<http://ssrn.com/abstract=no.1346722>

www.law.monash.edu

THE HITCH HIKER'S GUIDE TO THE NEW UNITED NATIONS HUMAN RIGHTS COUNCIL

PAULA GERBER†

I INTRODUCTION

All through my life I've had this strange unaccountable feeling that something was going on in the world, something big, even sinister.¹

Unfortunately, this feeling described by the character Arthur Dent in *The Hitch Hiker's Guide to the Galaxy* cannot be dismissed as mere paranoia. There are sinister things going on in the world — they are called gross violations of human rights and include atrocities such as genocide, ethnic cleansing and torture.

The United Nations ('UN') established the Commission on Human Rights ('Commission') in 1946, to protect and promote human rights but, the history of the last 60 years, demonstrates all too clearly that this body has failed in its aims. Words like 'Rwanda', 'Darfur', 'Srebrenica', 'Abu Ghraib', and 'Pinochet' immediately evoke images of grave human rights abuses that the Commission failed to respond to.² It was the Commission's failures which motivated the UN General Assembly to pass a historic resolution on 15 March 2006, dismantling the Commission and replacing it with a new body — the Human Rights Council ('Council').³ This abolition of the Commission and creation of the Council is, without doubt, one of the most significant reforms regarding the way in which human rights are promoted and protected, within the history of the UN.

This article considers why there was a need for such dramatic change and, the exact nature and extent of the change. It provides an overview of the reforms by examining five specific aspects of the Commission that were widely criticised,

† LLB (QUT), MSc (King's College, London), LLM (Monash) Deputy Director of the Castan Centre for Human Rights Law and Senior Lecturer, Faculty of Law, Monash University.

The author would like to thank the anonymous reviewers for their comprehensive and helpful comments on an earlier draft of this article.

1 Douglas Adams, *The Hitch Hiker's Guide to the Galaxy* (1st ed, 1979) 143.

2 The UN body that is empowered to act in response to situations such as these that threaten international peace and security is of course the Security Council, which has the mandate to impose sanctions, and even authorise military action under the UN Charter. However, the Commission could have passed resolutions condemning these situations and/or made recommendations for appropriate action, but failed to do so. Of course, there is no guarantee that more resolutions on, for example, Rwanda would have stopped the carnage.

3 General Assembly Resolution 60/251, 15 March 2006.

namely: its membership and size; the complaint processes; the abuse of the no-action procedure; the role of non-governmental organisations ('NGOs'); and the operation of special procedures.⁴ It is important to understand and critique these functions of the Commission, since the Council has already indicated that it will continue with these processes and procedures for the first year of its operations.⁵ Early signs from the Council are that these procedures will be maintained by the Council, albeit with some modifications.⁶ Thus any impression that the Council, as a completely new entity, is starting out with a clean slate, is inaccurate.

This analysis of the Commission's *modus operandi* is followed by a discussion of how, specifically, the Council differs from its predecessor and whether the new body is likely to be an improvement on the old. Early signs suggest that the Council is replicating many of the bad practises of the Commission and heading towards a similar loss of credibility. Finally, the article concludes with a consideration of what further reforms are needed if the Council is to fulfil the hopes and aspirations of the States that overwhelmingly voted in favour of its creation.⁷

II WHY THE NEED FOR CHANGE?

From the outset, the founders of the UN contemplated the need for a Commission on Human Rights, as evidenced by Article 68 of the Charter of the United Nations:

The 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.

The Commission was seen as an integral part of the UN and was established within 12 months of the formation of the UN itself.⁸ However, the establishment of such a body was not without significant obstacles. Notwithstanding the desire to ensure that the atrocities seen in World War II were never repeated, there was resistance to the idea of a Commission on Human Rights. The main problem was 'the bogey of national sovereignty'.⁹ Many States (particularly the ones who were to become the permanent five members of the Security Council) maintained that

4 For a detailed history of the Commission see Philip Alston, 'The Commission on Human Rights' in Philip Alston and Frédéric Mégret (eds), *The United Nations and Human Rights: A Critical Appraisal* (1st ed, 1992) and Howard Tolley, *The UN Commission on Human Rights* (1987).

5 Human Rights Council Resolution A/HRC/1/L.6, 29 June 2006.

6 See for example the Working Group's paper on Special Procedures A/HRC/5/17, 6 June 2007.

7 The vote in the General Assembly was 170 countries in favour of abolishing the Commission and establishing the Council, and four opposed. The four States that voted against the resolution were the United States, Israel, the Marshall Islands and Palau. Venezuela, Iran and Belarus abstained.

8 Economic and Social Council Resolution 9(ii), 21 June 1946.

9 Paul Lauren, *The Evolution of International Human Rights: Visions Seen* (1998) 159.

what took place within their own borders was sacrosanct and should not be subjected to international scrutiny or interference.¹⁰

It was these concerns, from some of the most powerful States, that informed and influenced the formation of the Commission. The recommendation from the preparatory body, chaired by Eleanor Roosevelt, was that the Commission be composed of individuals with expertise in human rights rather than government representatives.¹¹ This recommendation was swiftly rejected by States who insisted that members of the Commission be official representatives of their governments.¹² The resulting fundamental structural element of the Commission would inhibit the work of the Commission throughout its 60 year existence and, as is demonstrated in this article, the same structural flaw threatens to undermine the work of the new Council.

Also rejected by the powerful members States, was a recommendation that the Commission be empowered to 'actively aid the Security Council by pointing out cases where violations of human rights constituted threats to world peace.'¹³ In the end, the Commission's mandate was limited to making proposals, recommendations and reports. It seems that it was as difficult to create a human rights body with real 'teeth' in 1946, as it was in 2006: The States' obsession with ensuring that there can be no interference with their sovereignty was, and remains, an impenetrable barrier to real reform of the UN human rights system.

Despite the limitations imposed on the Commission at the time of its formation, it did manage to enjoy some memorable successes during the six decades of its existence.¹⁴ However, the purpose of this article is not to evaluate its achievements, but rather to analyse what went wrong and, in particular, why, in 2006, the members of the UN General Assembly felt the need to dismantle such a well-entrenched organ of the UN, and create an entirely new entity.

A *Membership and Size of the Commission*

As indicated above, the insistence that the Commission consist of members who were State-appointed representatives had dire consequences. To have the Commission comprised of government delegates, with little or no expertise in human rights, was a fundamental flaw in the configuration of the Commission. Forming the Commission from constituents who were essentially instructed

10 For example, the United States was concerned that it could be subjected to criticism for its Jim crow laws, racial segregation and the ongoing lynching of African-Americans. Hadar Harris, 'Perspectives on the United Nations Human Rights Council' (2006) 13 *Human Rights Brief* 8.

11 'Nuclear' Commission (26 April – 20 May 1946) report: U.N. Doc E/38 Rev.1 (21 May 1946).

12 *Yearbook on Human Rights for 1947* (1949) 421.

13 Lauren, above n 9, 218.

14 Including, for example, the drafting of such important human rights instruments as the Universal Declaration of Human Rights ('UDHR'), the International Covenant on Civil and Political Rights ('ICCPR'), and the International Covenant on Economic Social and Cultural Rights ('ICESCR').

political delegates, allowed it to develop into the highly politicised body that so embarrassed the UN in later years.¹⁵

Examples abound of States making decisions based on political considerations rather than a true assessment of the human rights situation under examination and a genuine consideration of the most effective response. One of the more glaring examples of a democratic State refusing, for political reasons, to denounce gross human rights violations in another State occurred in 1989 when the United States declined to support a resolution condemning human rights abuses in Iraq. The USA clearly thought that their security arrangement with Saddam Hussein, at a time when the Iraq-Iran war had recently ended, was more important than any alleged human rights abuses.¹⁶ This clearly illustrates the problem with a body comprised of government representatives; decisions will always be based on a consideration of ALL relevant factors, which will include what is in a State's best interests, taking into account trade, economic, political and security interests that a State may have with the country the subject of the resolution under consideration.¹⁷

The lack of human rights expertise within the Commission was in part off-set by the existence of the Sub-Commission on the Promotion and Protection of Human Rights, the main subsidiary body of the Commission. The Sub-Commission consisted of 26 experts who acted in their personal capacity and were elected by the Commission.¹⁸ The Sub-Commission's mandate was to undertake studies and make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and to perform any other functions requested by the Commission. The Sub-Commission became increasingly independent of its parent body and this troubled many members of the Commission.¹⁹ This ultimately led to the Commission sabotaging the Sub-Commission's functioning. In 2000, the Commission reduced the duration of the Sub-Commission's annual meeting from four weeks to three and, in 2003, it directed the Sub-Commission to desist from passing country specific resolutions or making reference to specific countries.²⁰ This brought an immediate end to the Sub-Commission's role of passing resolutions on important human rights issues such as the Tiananmen Square

15 Tom Farer, 'The United Nations and Human Rights: More than a Whimper less than a Roar' (1987) 9 *Human Rights Quarterly* 550, 563.

16 Lawrence Moss, 'Perspectives in the United Nations Human Rights Council' (2006) 13 *Human Rights Brief* 5.

17 Ibid.

18 However, like the Commission, the Sub-Commission was from time to time subject to politicisation, and the quality of the 'experts' appointed by some States was somewhat questionable. Henry Steiner and Philip Alston, *International Human Rights in Context: Law Politics and Morals* (2nd ed, 2000) 601.

19 Ton Gardener et al 'The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: Recent Developments' (1982) 4 *Human Rights Quarterly* 353, 356.

20 Commission on Human Rights Resolution 2003/59, 24 April 2003, para 8(a).

massacre in Beijing (1989) and grave human rights violations by the Chinese in Tibet (1991).²¹

The Council has requested that the Sub-Commission prepare 'a paper on the Sub-Commission's record that gives its own vision and recommendations for future expert advice to the Council.'²² It would be preferable for the Council to give the Sub-Commission the opportunity to once again provide expert advice, including on human rights situations in specific countries, thus serving the function for which it was originally established.²³

As the Commission's work expanded from standard setting, to matters of promotion and protection, so too did its size. It was enlarged from 18 to 21 members in 1962, increased to 32 members in 1967, then to 43 members in 1980, and finally to 53 members, which was its size at the time of its demise. The size of the Commission meant that over 25 per cent of UN member States were represented on this body. The large size, and a requirement for geographical representation, meant that smaller developing countries had an opportunity to be involved in an important body within the UN. However, the large number of members also made the Commission unwieldy, inefficient and subject to extensive diplomatic wrangling.

Given how unwieldy the Commission had become, it shocked many that the High-Level Panel ('HLP')²⁴ recommended that the Commission be expanded to universal membership.²⁵ The HLP saw universal membership as the best way of removing politics from discussions on human rights and forcing the Commission to focus on substantive issues. It is fortunate that this recommendation was not followed. Having nearly 200 members would effectively paralyse any human rights body and do nothing to improve the promotion and protection of human rights. The Commission needed to become smaller to become more efficient, not larger.

Unfortunately, the new Council is almost the same size as the Commission; membership has been reduced by only six to 47 members. A Human Rights Council closer in size to the Security Council (15), would have been preferable, but clearly was not achievable. The United States of America advocated for a Council of 20, or, if this was not acceptable, no more than 30, but this received virtually no support.²⁶ While a smaller Council would be less representative, this problem could have been ameliorated by shortening the terms for which members

21 Reporters San Frontiers, *UN Sub-commission Puts Human Rights on Back Burner* (2003) Reporters San Frontiers <www.rsfr.org> at 21 August 2006.

22 Resolution A/HRC/1/L.6, 29 June 2006, para 3(b).

23 For an in-depth discussion of reforms needed to make the Sub-commission function more efficiently and effectively see Françoise Hampson, 'An Overview of the Reform of the UN Human Rights Machinery' (2007) *Human Rights Law Review* 1.

24 The High-Level Panel on Threats, Challenges and Change to Strengthen Human Rights was a 16 person panel established by the UN Secretary-General in 2003 to explore how the United Nations system could strengthen its work in the area of security and human rights.

25 UN A/59/565, 2 December 2004, para 285.

26 Alston, above n 4, 199.

serve, from three-year to two-year terms, thereby ensuring that, over time, membership was accessible to more States. The prohibition on members serving more than two consecutive terms would also ensure membership was accessible to more States.²⁷

It was not just the number of Commission members that was a problem, but also who they were. In the last few years, States accused of gross human rights violations not only enjoyed membership of the Commission, but also could chair sessions. Thus Zimbabwe, Sudan, the Republic of the Congo, Cuba and Saudi Arabia were all recent members, and, in 2003, Libya chaired the 59th Session of the Commission. The former UN Secretary-General, Kofi Annan in his extensive report on UN Reform made explicit reference to this problem when advocating for the abolition of the Commission. He stated that:

the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.²⁸

Perhaps surprisingly, there was never a requirement that States seeking membership of the Commission have a 'good' human rights record. This is in contrast to the Security Council where States seeking a seat must demonstrate the contribution they have made to the 'maintenance of international peace and security and to the other purposes of the Organization.'²⁹ Thus States campaigning for membership of the Security Council actively promote the contribution they have made to upholding peace and security, through, for example, their participation in UN peace-keeping missions.³⁰

Given there was no requirement that members of the Commission could not commit gross human rights violations, States with questionable human rights practices actively sought a place on the Commission, so that they could use the procedures discussed below to shield themselves from scrutiny and, direct attention away from themselves, by actively targeting the human rights practices of other States.³¹ Having such States as members of the very body charged with protecting and promoting human rights, was one of the factors that led to the Commission's ultimate demise. The Commission ceased having any legitimacy when those States entrusted with advancing human rights, were, in many cases, the same ones perpetrating the worst human rights atrocities.

27 General Assembly Resolution 60/251, 15 March 2006, para 7.

28 Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (2005) United Nations <www.un.org/largerfreedom/chap5.htm> at 28 January 2007.

29 *Charter of the United Nations*, art 23.

30 Moss, above n 16, 5.

31 Nazila Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?' (2006) 55 *International and Comparative Law Quarterly* 695.

In stark contrast to the Commission, the UN General Assembly has spelt out similar requirements to the Security Council for membership to the Human Rights Council. Thus, the resolution establishing the Council, mandates that when voting States onto the Council, members of the General Assembly should 'take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'.³² However, for the reasons outlined below, this is unlikely to be sufficient to keep human rights perpetrators from gaining a seat on the Council. Angola, Egypt and Qatar are all current members of the Council and all rated, by the NGO Freedom House,³³ as countries that are not 'free' and do not respect basic human rights. The Council risks becoming a deeply political and dysfunctional body like the Commission, if detailed membership selection criteria are not introduced.

B *Complaint Processes – 1235 and 1503 Procedures*

For the first 20 years of its existence, the Commission was preoccupied with standard setting, and refused to hear complaints about human rights violations, declaring that this was beyond its mandate. This stance was attacked by many, including renowned international scholar, Hersch Lauterpacht, who referred to the UN as abdicating its responsibilities by denying States a right to petition for human rights abuses³⁴ (remembering that the Commission preceded the development of the human rights covenants and conventions establishing treaty bodies with powers to receive individual complaints). The Commission's impotence to hear complaints continued until the late 1960s. By then the Commission's membership had expanded to 32 members, including many African and Asian States who were determined to see the Commission play a greater role in the enforcement and protection of human rights. The Commission's first foray into actively responding to human rights abuses saw it appoint a Special Rapporteur to study apartheid in South Africa and make recommendations.³⁵

The Commission embraced this newfound jurisdiction to investigate questions of human rights violations and went on to seek authority from the Economic and Social Council to examine specific allegations of human rights abuses. This resulted in ECOSOC Resolution 1235 in 1967 authorising a member State to initiate a complaint against another State, and Resolution 1503 in 1970, allowing individuals and NGOs, to make confidential complaints about 'situations which

32 Resolution A/HRC/1/L.6, 29 June 2006, para 7.

33 Freedom House rates countries as 'Free', 'Partly Free', or 'Not Free' according to the extent to which political rights and civil liberties are respected. Amanda Abrams, *UN Human Rights Council Elections Small Victory for Global Human Rights* (2007) Freedom House www.freedomhouse.org/template.cfm?page=70&release=507 Accessed on 2 June 2007.

34 Hersch Lauterpacht, *International Law and Human Rights* (1950) 236.

35 United Nations Commission on Human Rights Resolution 7(XXIII), 42 U.N. ESCOR Supp. (No. 6) at 128, UN Doc E4322 (1967).

appear to reveal a consistent pattern of gross and reliably attested violations of human rights'.³⁶

These two developments became known by the resolution numbers through which they were created. This increase in the jurisdiction of the Commission was initially welcomed, but limitations imposed by the language of the resolutions soon became apparent. In particular, the Commission was only empowered to consider 'situations' of gross systemic violations; there was no power to investigate, let alone try to remedy, particular violations.³⁷ Thus individual injuries were not considered unless they suggested a pattern of gross violations; a situation that has been aptly likened to a class action lawsuit, but without the claim for monetary damages.³⁸

Between 1972 and the Commission's demise in 2006, only 84 States were subjected to scrutiny.³⁹ The confidential 1503 Procedure, while slow and bureaucratic, had, until recently, been a useful way of investigating and reporting on grave human rights abuses. It was particularly useful when it came to reviewing complaints against countries that had not ratified the Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR') and thus could not have their conduct examined by the Human Rights Committee pursuant to an individual petition.

Under the 1503 Procedure, approximately 200,000 communications from individuals and/or NGOs were received each year, although only a fraction of these actually reached the Commission for consideration. The vast majority failed to meet admissibility criteria, or were otherwise dealt with by subordinate bodies, such as the Working Group on Communications, the Working Group on Situations, or the Sub-Commission on the Promotion and Protection of Human Rights.⁴⁰

Alas in the modern era, the 1503 Procedure, like so many other procedures in the Commission, became subject to political influences and manipulations and, as a result, many offending regimes were able to escape scrutiny. One such example was Idi Amin's Uganda. It was the subject of several 1503 procedural communications in 1974, 1976 and 1977, none of which resulted in any action being taken. Only in 1978, when Idi Amin was on the verge of being defeated by the Tanzanian Army, did the Commission take any action. Even then it was only

36 Resolution 1503(XLVIII) of the Economic and Social Council, para 5.

37 Jack Donnelly, 'International Human Rights: A Regime Analysis' (1986) 40(3) *International Organization* 599, 612.

38 Howard Tolley Jr, 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) *Human Rights Quarterly* 420, 434.

39 *States examined under the 1503 procedure by the Commission on Human Rights* (2003) Office of the High Commissioner for Human Rights <www.unhchr.ch/html/menu2/8/stat1.htm> at 13 March 2006.

40 Maria Francisca Ize-Charrin, '1503: A Serious Procedure' in Alfredsson, Gudmunder, Grimheden, Jonas, Ramcharan, G Bertram and Alfred de Zayas, (eds), *International Human Rights Monitoring Mechanisms* (2001) 293.

to send a representative to 'plead for more genteel behavior, that is to say, they talk softly and carry a twig.'⁴¹

It was apparent that the Commission decided cases based on political rather than legal criteria and was frequently accused of selective prosecution.⁴² Thus, only States with a 'relative disentanglement from global geopolitics', that is, those unable to form alliances to protect themselves from review and censure, were subjected to scrutiny.⁴³ Indeed States seem to expend more energy endeavouring to escape scrutiny than in actually defending their human rights — a clear indication that the Commission was governed by political considerations rather than a genuine desire to promote and protect human rights.⁴⁴

In 2005, the history of the 1503 Procedure reached its lowest point when Cuba, Zimbabwe, and Saudi Arabia were selected to the Working Group on Situations; the five-member panel that made the final decision on which human rights petitions reached the Commission. To have these three States deciding which human rights complaints deserved the consideration of the UN's leading human rights body was obscene. As Kenneth Roth, the Executive Director of Human Rights Watch observed this type of situation was like having a jury 'that includes murders and rapists, or a police force run in large part by suspected murderers and rapists who are determined to stymie investigation of their crimes.'⁴⁵

The 1235 and 1503 Procedures have the potential to provide meaningful international scrutiny, but that potential can only be realised if the new Human Rights Council resists efforts by member States to manipulate the system for political advantage in the manner observed in the Commission. This author is sceptical that such a change will occur. There is little prospect of improvement while Council members are government representatives acting in the best interests of their State, rather than independent experts actively implementing the Council's mandate.

C *No-action Procedure*

A further problem that plagued the Commission in recent years was the over-use of the so-called 'no-action' procedure. This was the technique employed by member States wanting to prevent discussion on a particular matter. By evoking the no-action procedure set out in Rule 65, Article 2, a State could call for a vote,

41 Farer, above n 15, 579.

42 Tolley, above n 38, 453.

43 Patrick Flood, *The Effectiveness of UN Human Rights Institutions* (1998) 101.

44 Louise Arbour, *Statement by Ms Louise Arbour United Nations High Commissioner for Human Rights on the closure of the 61st session of the Commission on Human Rights* (2005) Office of the High Commissioner for Human Rights <www.unhcr.ch/hurricane/hurricane.nsf/view01/B0848560A2465272C1256FEB0052A975?opendocument> at 22 January 2007.

45 Kenneth Roth, *Despots Pretending to Spot and Shame Despots* (2001) International Herald Tribune <<http://hrw.org/english/docs/2001/04/17/global12852.htm>> at 28 January 2007.

which, if passed, blocked any further discussion on that subject.⁴⁶ The original intent behind the no-action procedure was to preclude the consideration of matters not within the competency of the Commission and to prevent the proliferation of resolutions on one country or on one issue. However, members of the Commission soon realised that they could use this procedural rule to effectively stifle debate on any issue which was too uncomfortable for member States. Thus, this loophole was increasingly used to obstruct the Commission from carrying out its core functions. Some examples of the misuse of the non-action procedure in both the Commission and the Sub-Commission include:

- 1998 — The Moroccan representative used the no-action procedure to stop a resolution censuring Saddam Hussein for gassing the Kurds of Halabja;
- 1997 (and most years thereafter) — China invoked the no-action process to stifle debate on all resolutions concerning grave human rights abuses in its jurisdiction;
- 2002 (and most years thereafter) — Zimbabwe escaped scrutiny of its human rights practices by invoking the no-action procedure;
- 2003 — The no-action motion was used by Islamic countries to thwart the inclusion of anti-Semitism in a motion on racism following the Durban Conference on Racism;
- 2003 — Pakistan attempted to use a no-action motion to defeat a Brazilian resolution on homosexual rights. Although the no-action-motion was narrowly defeated, Pakistan was able to successfully employ other procedural tactics to ensure the issue was not dealt with at all at the 59th Session; and
- 2004 — The USA's mere threat to use the no-action procedure was sufficient to end debate about its detention of 600 prisoners at Guantanamo Bay.

As discussed above, States are multi-dimensional entities; they have relationships with each other on many levels. If the Council is to be an improvement on the Commission it must discontinue this abuse of the no-action procedure. The Council must be the forum where genuine concerns about human rights issues can be freely and openly discussed. The Council, like the Commission before it, will be unable to fulfil its mission of protecting and promoting human rights if tactics, such as no-action motions, are allowed to continue to flourish.

D *Role of Non-Governmental Organisations ('NGOs')*

The important role that NGOs play in protecting human rights was recognised at the time that the UN was founded⁴⁷ and NGOs actively participated in the

⁴⁶ *Rules of Procedure of the Functional Commissions of the Economic and Social Council*, rule 65 art 2: 'A motion requiring that no decision be taken on a proposal shall have priority over that proposal.'

⁴⁷ *Charter of the United Nations*, art 71.

Commission for much of its 60 year history. In 1996, ECOSOC updated the arrangements for NGO consultation with the Commission and, specifically provided that NGOs may propose agenda items, attend meetings, submit written statements and make oral presentations during Commission meetings.⁴⁸

NGOs have a wealth of expertise as well as local knowledge about human rights situations 'on the ground' in numerous States. This made them an invaluable resource for the Commission; one which the Commission took full advantage of over many years.⁴⁹ In particular, NGOs played an influential role in identifying country-specific human rights abuses for the Commission.⁵⁰

However, as States with poor human rights records became members of the Commission, the reception that NGOs received deteriorated and, the extent to which they were allowed to participate in proceedings, became limited. In 1999, the Swiss NGO, Christian Solidarity International, was expelled at the request of Sudan, because it had invited the Southern Sudanese rebel chief, John Garang, to address the Commission. In 2000, the Transnational Radical Party faced suspension at the behest of Russia after allowing a Chechen representative to participate in its submissions to the Commission. Freedom House, a highly regarded American civil liberties organisation, was also targeted for suspension as a result of its criticisms of Cuba, China and Sudan. Finally, in 2003, Libya and Cuba requested that the consultative status of the well respected NGO, Reporters without Borders, be suspended.⁵¹ This was a direct response to Reporters without Borders' protest about Libya's appointment as chair of the Commission.⁵² The proposal was voted on, with the result that Reporters Without Borders was suspended for one year.⁵³ Clearly, such retaliatory action was designed to have a chilling effect on NGOs' conduct at the Commission and marked a sharp move away from the mutually beneficial cooperative relationship that the Commission and NGOs had previously enjoyed.

The participation of NGOs at the first few sessions of the Council appears to have been constructive. Freedom House in its evaluation of the Council's work to-date observed that 'NGOs were allowed for the first time to participate in the Interactive Dialogue that traditionally follows the reports of the Special

48 ECOSOC Resolution 1996/31, Part V.

49 NGOs also actively participated in the Commission's subsidiary body — the Sub-Commission on the Promotion and Protection of Human Rights. For detailed discussions on the role of NGOs within UN see Dianne Otto, 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society' (1996) 18(1) *Human Rights Quarterly* 107; George Lopez, 'Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s' (1998) 20(2) *Human Rights Quarterly* 379 and Chadwick Alger, 'Evolving roles of NGOs in member State Decision-Making in the UN System' (2003) 2(3) *Journal of Human Rights* 407.

50 Hurst Hannum (ed), *Guide to International Human Rights Practice* (4th ed, 2004) 78.

51 Paula Gerber, 'Human Rights Reform in the United Nations: The Good, the Bad and the Ugly' (2006) 31(2) *Alternative Law Journal* 88.

52 *UN Commission on Human Rights Loses all Credibility* (2003) Reporters Without Borders <www.rsf.org/IMG/pdf/Report_UNU.gb.pdf> at 13 May 2006.

53 The vote was 27 in favour, 23 against, and 4 abstentions, www.rsf.org/article.php?id_article=7619 accessed on 2 June 2007.

Rapporteurs and Representatives.⁵⁴ Thus it seems that NGOs will be allowed to participate to a greater degree than they were during the latter years of the Commission.

One area which could be improved is the accreditation of NGOs. Theoretically, the rules governing NGO participation at the Commission dictated that NGOs who had been accredited with consultative status by the UN Committee on NGOs could take part in proceedings. However, in practice, the 19 member Committee had been known to withhold accreditation from NGOs who, although they satisfied the criteria, were held in hostile regard by Committee members. Thus, on 23 January 2006, the Committee refused accreditation to the International Lesbian and Gay Association and the Danish National Association for Gays and Lesbians.⁵⁵ The Council must ensure such discriminatory practices do not continue. It could do this by forming its own accreditation unit comprised of independent experts who apply accreditation guidelines in a neutral and even-handed manner.⁵⁶

E *Special Procedures*

The Commission developed numerous Country Mechanisms and Thematic Mandates, collectively referred to as Special Procedures.⁵⁷ These Procedures were developed in the 1960s, incrementally and on an ad hoc basis by the Commission and ECOSOC.⁵⁸ They included the appointment of independent experts, special rapporteurs, and the establishment of working groups, to investigate and highlight human rights violations, and increase understanding and awareness of specific human rights issues.⁵⁹ These individuals (who undertook their responsibilities without remuneration), were charged with undertaking fact-finding missions and reporting back to the annual meetings of the Commission. These Special Procedures, although directed at overall human rights situations were, at times, effective in bringing direct relief to individual victims. For example, in 1992, the Special Rapporteur on Afghanistan, was able to obtain, during a country visit, a

54 Freedom House, *The UN Human Rights Council at the Halfway Mark: A Report Card* (2006), Freedom House <www.freedomhouse.org/uploads/special_report/47.pdf> at 28 January 2007.

55 *Central and Eastern Europe Bulletin on Sexual and Reproductive Rights* (2006) Astra Network <www.astra.org.pl/36_issue.htm> at 22 August 2006.

56 International Commission of Jurists, *Reforming the Human Rights System: a Chance for the United Nations to Fulfil its Promise* (2005) <www.icj.org/IMG/pdf/ICJUNreform_05.pdf> at 22 January 2007.

57 For detailed analysis of the Commission's Special Procedures and recommendations for reform see Jeroen Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) *Human Rights Law Review* and Hurst Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights' (2007) *Human Rights Law Review*.

58 Lyal Sunga, 'The Special Procedures of the UN Commission on Human Rights: Should they be Scrapped?' in Alfredsson Gudmundur et al (eds), *International Human Rights Monitoring Mechanisms* (2001) 234.

59 Andrew Byrnes, 'United Nations Reform and Human Rights', in Marius Smith (ed), *Human Rights 2005 – The Year in Review* (2006).

presidential decision to commute the death sentence of some 114 individuals to 20-year prison sentences.⁶⁰

Just as the Commission turned on NGOs, so too did it start to attack special rapporteurs, a group that had always been highly regarded for their expertise, and independent investigations. Examples of this appalling behaviour were seen in 2002, when the Special Rapporteur on racism was summarily dismissed for referring in his report to a document which the Organization of the Islamic Conference regarded as blasphemous against the Koran. In 2003, the Special Rapporteur on torture had his impartiality questioned by the Algerian Ambassador, who demanded his resignation. It should be noted that the Algerian Government had not even allowed the Special Rapporteur on torture to visit its country.⁶¹

The whole concept of Special Procedures is not without criticism. One condemnation of the practice stems from the fact that they are used almost exclusively to focus on alleged civil and political rights violations, largely ignoring violations of economic, social and cultural rights. This prioritises the concerns of Western States over developing countries.⁶² If the Council adopts the Special Procedures of the Commission it must endeavour to ensure that they are used in a more balanced fashion that addresses the rights articulated in both of the international covenants.

The experts who have served as special rapporteurs have by and large displayed more independence than many of the members of the Commission.⁶³ The scrutiny which they apply to a country's practices is a vital tool in the protection and promotion of respect for human rights and the Council would be well advised to retain the Special Procedures, but to utilise them in a more professional and even-handed manner than the Commission did.

The Commission's final years were largely devoted to members' political point scoring and strategic game playing. There were no substantive human rights advances made. On the contrary, in many areas human rights monitoring went backwards. One of the main tools of the Commission was naming and shaming of human rights violators. Yet, many States were able to protect themselves from such exposure by relying on their allies' political self-interest. There can be no doubt that the Commission was irretrievably weakened by these practices.⁶⁴ Given the state of the Commission in its final few years, it is not unreasonable to expect that the Council will be an improvement, after all, the benchmark is pretty low. Nevertheless, as the following section demonstrates, there are reasons to be cynical about whether the Council is going to amount to anything more than a 'triumph of style over substance'.⁶⁵

60 Abraham Meghna, *A New Chapter for Human Rights: A Handbook on Issues of transition from the Commission on Human Rights to the Human Rights Council* (2006) 34.

61 Jean-Claude Buhrer, *UN Commission on Human Rights Loses all Credibility* (2003) Reporters without Borders <www.rsf.org> at 21 August 2006.

62 Sunga, above n 58, 266.

63 Donald Anton et al, *International Law: Cases and Materials* (2005) 787.

64 Ghana, above n 31, 139.

65 Ted Lapkin, 'Missed Chance to Right Wrongs' *The Australian* (Sydney), 22 March 2006.

III IS THE COUNCIL AN IMPROVEMENT ON THE COMMISSION?

Many fear that the new Council is not genuine reform and the changes amount to little more than a tweaking of the name and a tinkering around the edges. Former Secretary General Kofi Annan⁶⁶ acknowledged these concerns when he commented '[h]ow different the Council is from the Commission will depend in large part how committed member States are to make it better'⁶⁷ There are, in fact, some worrying early signs that the Council may well be the Commission in sheep's clothing. This section examines how much the Council really does differ from the Commission.

A *Membership, Size and Structure of the Council*

It was hoped that the Council would be significantly smaller than the Commission. Alas, the reduction in size from 53 to 47 members is unlikely to achieve the desired improvement in efficiency, nor make the Council less cumbersome than the Commission.

The former UN Secretary General, Kofi Annan, called for Council members to be elected by a two third majority of the General Assembly, that is, the same majority that is needed for a member to be suspended from the Council.⁶⁸ However, the final text of the resolution establishing the Council provides that States are elected if they have a bare majority of votes in the General Assembly. That equates to 96 votes and, it is possible, that in the future this will not be enough to block notorious human rights abusers, like Zimbabwe and Sudan, from gaining membership to the Council.⁶⁹ The notion requiring members be elected by a two third majority should be revisited at the mandated five year review, as such a move would likely ensure that Council members, and therefore ultimately the Council, enjoy more widespread support.

A notable difference between the election of States to the Commission and the Council is that members are now elected on an individual basis rather than as part of regional groups. However, this is only relevant if there are more States seeking election, than seats allocated for that regional block. As discussed below, there appears to be a trend amongst certain regional groups to nominate the same number of States as seats available, thereby effectively defeating the notion of individual election of members.

66 Kofi Annan stepped down as Secretary General in December 2006. The new Secretary General is Ban Ki-moon.

67 Statement made on 23 February 2006, SG/SM/10357, HR/4885.

68 Anan, above n 28, para 183. The General Assembly is authorised to suspend the Council membership of a state that commits gross and systematic violations of human rights. This would be a drastic measure, which is unlikely to be invoked except in extreme cases.

69 Gerber, above n 51, 91.

The first elections were held on 9 May 2006 and resulted in the following countries being voted in as inaugural members of the New Council:

African States	Asian States	Eastern European States	Latin American and Caribbean States	Western Europe and Other States
Algeria	Bahrain	Azerbaijan	Argentina*	Canada*
Cameroon	Bangladesh	Czech Republic	Brazil*	Finland *
Djibouti	China*	Poland	Cuba*	France*
Gabo	India*	Romania*	Ecuador *	Germany*
Ghana	Indonesia*	Russian Federation*	Guatemala*	Netherlands *
Mali	Japan*	Ukraine*	Mexico*	Switzerland
Mauritius	Jordon		Peru*	UK*
Morocco	Malaysia*		Uruguay	
Nigeria*	Pakistan*			
Senegal	Philippines			
South Africa*	Republic of Korea*			
Tunisia	Saudi Arabia*			
Zambia	Sri Lanka*			

* Indicates States that were members of the Commission at the time of its demise.

It is interesting to note that over half the members of the new Council (27) were members of the Commission at the time of its downfall, including the United States of America's nemesis, Cuba. However, Libya, Sudan and Zimbabwe, three States with particularly poor human rights records, which were members of the Commission and, prompted criticisms that the Commission had lost credibility, are not members of the Council.⁷⁰

⁷⁰ Indeed, Sudan was a country of concern under Item 9 of the Commission's Agenda at the time it was elected to the Commission in 2002.

Of the 20 States that were not members of the Commission at its conclusion, the majority are African States (11), with the next largest group coming from the Asian region. Thus the Council is not only smaller than the Commission, but also has a different geographical spread. Paragraph 7 of the resolution establishing the Council referred to an equitable geographic distribution of seats. As Alston notes 'there is no mathematical formula for determining equity in this context'⁷¹ and so the resolution spells out what the distribution will be. With the reduction in size from 53 to 47, one could reasonably expect that each of the five geographic regions would be reduced in size. However, the Asian block was allocated one more seat than it had on the Commission. The decrease in the proportional representation of Western countries and the proportional increase in the representation of African and Asian countries has resulted in an increase in the influence of the Organization of the Islamic Conference ('OIC'). The impact of this change can be seen in the issues that the Council has chosen to focus on in its first year (discussed in section B below).

A notable omission from the Council is the United States of America, which did not put itself forward for election, making it the only Permanent Five member of the Security Council not on the Human Rights Council. The USA indicated that it did not seek a place on the Council because '[t]here are strong candidates in our regional group, with long records of support for human rights, that voted in favor of the resolution creating the Council. They should have the opportunity to run.'⁷² However, many perceive America's decision not to run as continued opposition to the Council.⁷³

Second elections for one third of the seats on the Council were held in May 2007 and resulted in five States re-elected and nine new States elected. Only two of the geographic groups — Western European and other States and Eastern European States — had a greater number of States contesting than were seats available. This most recent election revealed some interesting developments; in particular the failure of Belarus to get elected suggests that efforts to keep gross human rights abusers off the Council can work. Belarus' unexpected defeat was due to a determined campaign by a few States, including the United States and a group of NGOs, who campaigned hard for the election of Bosnia and Herzegovina over Belarus.⁷⁴ Such efforts, however, are obviously only possible where there are more candidates than seats — which was the not case in the Asian, African and Latin American blocks.

Another notable feature of the second elections was America's continued refusal to seek a seat on the Council. The United States explained that its position

71 Alston, above n 4, 199.

72 Sean McCormack, *The United States Will Not Seek Election to the UN Human Rights Council* (2006) US Department of State <www.state.gov/r/pa/prs/ps/2006/64182.htm> at April 6, 2006.

73 The USA has however indicated that it will likely run for the Council next year. Further elections will be held next year because the 47 member States listed in the table have been appointed for terms of one, two or three years.

74 Peggy Hicks, 'HR Council: Don't Write it off Yet' (2007) Human Rights Tribune <www.humanrights-geneva.info/article.php3?id_article=1883> at 23 June 2007.

was based on its belief that '[t]he Human Rights Council has thus far not proved itself to be a credible body in the mission it's been charged with'⁷⁵ referring, in particular, to the Council's singular focus on Israel while ignoring gross human rights violators such as Cuba, North Korea and Burma. It is an unfortunate reality that the Council is likely to continue to suffer from legitimacy concerns while the world's only superpower refuses to become a member.

Making the Council a subsidiary organ of the General Assembly is an improvement on the Commission, which was a subsidiary body of ECOSOC. The United States of America pushed for the Council to be a principle organ of the UN, that is, that it have the same standing as the General Assembly and not be subordinate to it. While this would be desirable in an ideal world and would give greater credence to the Council, the more important focus should be on how the body actually functions, rather than where it is positioned within the UN hierarchy.

The final point worth noting regarding membership is the HLP's recommendations in this regard. The HLP recognised that States would not agree to individual experts being members and would insist that members remain government representatives. However, they recommended that at least all members 'designate prominent and experienced human rights figures as the heads of their delegation'.⁷⁶ This recommendation did not form part of the resolution establishing the Council and, thus, the Council, like the Commission, suffers from a dearth of human rights expertise.

B *The Council's Work to Date*

The Council's first session began on 19 June 2006 and concluded on 30 June 2006 with the adoption of eight resolutions, three decisions and two statements by the President, Mr Jan Eliasson of Sweden.⁷⁷ One of the more notable resolutions was that which placed Israel's alleged violations of human rights in Palestine, as a permanent item on the Council's agenda.⁷⁸ This resolution was sponsored by Islamic nations and passed by a vote of 29–12, with five abstentions. It was the only resolution to focus on a specific country. This is particularly telling, given that at the time of the Council's first session, there was a major humanitarian crisis taking place in the Darfur region of Sudan and grave human rights concerns in Iraq and North Korea, to name but a few. In this context, the singling out of Israel for permanent monitoring is difficult to justify; it smacks of political considerations taking precedence over objective evaluation.

75 US State Department Spokesman Sean McCormack quoted in David Gollust, *US Again Spurns UN Human Rights Council Election* (2007) Voice of America <<http://voanews.com/english/archive/2007-03/2007-03-06-voa65.cfm?CFID=95598117&CFTOKEN=10487820>> at 2 June 2007.

76 UN A/59/565, 2 December 2004, para 286.

77 *The Human Rights Council* (2007) Office of the High Commissioner for Human Rights <www.ohchr.org/english/bodies/hrcouncil/> at 14 August 2006.

78 A/HRC/1/L.15, 25 June 2006.

To include the examination of Israel as a permanent fixture on the Council's agenda evokes memories of the defunct Commission, renowned for its antagonism towards the Jewish state. The Commission's hostility towards Israel is apparent even from a cursory look at its schedule — item 8 on the Commission's fixed agenda concerned Israel's violations of human rights, while item 9 was dedicated to human rights violations in the rest of the world.⁷⁹ Over the Commission's 60 year history, 30 per cent of the resolutions condemning human rights violations by specific States were directed at Israel.⁸⁰ Nobody could cogently argue that this was a true or fair representation of the spread of human rights violations in the world. It would be disappointing if the Council follows the practices of the Commission in this regard, yet there are early signs that this is, in fact, happening. An analysis of the Council's Third Session⁸¹ revealed that nine hours (17 per cent) of the Council's time was spent on Israel compared to six and a half hours (11.5 per cent) on all other countries.⁸²

A review of the Special Sessions held by the Council reveals a similar trend at these meetings. At the time of writing, the Council had held four Special Sessions, the first three of which were devoted to Israel. The first one in July 2006 resulted in a resolution to dispatch a Special Rapporteur to undertake an urgent fact-finding mission on the situation in the Palestinian territories. The second in August 2006 resulted in a resolution that 'strongly condemns the grave Israeli violations of human rights and breaches of international humanitarian law in Lebanon'.⁸³ There is no doubt that it was appropriate for the Council to respond to the war in Lebanon, but the complete failure to address allegations of human rights violations by Hezbollah highlights the one-sidedness of the Council's approach. One scholar has observed that '[t]he Commission took forty years to discredit itself but the Human Rights Council has achieved it in a fortnight'.⁸⁴ Whilst this is clearly an exaggeration, the Council must be conscious that the eyes of the world are upon it and be vigilant about not repeating the mistakes of the Commission. The third Special Session resulted in a resolution denouncing Israel's actions and dispatching a high-level fact-finding mission.⁸⁵ Only the fourth Special Session did not concern Israel; it focused on Sudan and resulted in a resolution dispatching a

79 International Commission of Jurists, above n 56.

80 Anne Bayefsky, 'That Same Old Bash-Israel Agenda' *Jerusalem Post* 5 July, 2006. This percentage increased in recent times — in 2005, the Commission adopted four resolutions against Israel and four resolutions against all other countries. Brett Schaefer, *The United Nations Human Rights Council: A Disastrous First Year* (2007) www.heritage.org/Research/WorldwideFreedom/bg2038.cfm#_ftn22, at 2 July 2007.

81 This review was undertaken by the Hudson Institute and the Touro Law Centre Institute for Human Rights.

82 The remainder of the time was spent on non-country specific issues: www.eyeontheun.org/geneva-updates.asp?p=288 accessed on 27 January 2007.

83 Human Rights Council, *UN Press Release: Second Special Session of Human Rights Council Decides to Establish High-Level Inquiry Commission for Lebanon* (2006) United Nations <www.unhcr.ch/hurricane/hurricane.nsf/view01/5B9DECECFE9A68A6C12571CA0026386B?op=endocument> at 20 August, 2006.

84 Hampson, above n 23, 9.

85 Resolution A/HRC/S-3/L.1, 14 November 2006.

mission to assess the human rights situation in Darfur.⁸⁶ This delegation was headed by the President of the Council and reported back to the fourth regular session of the Council in March/April 2007.⁸⁷ However, the Sudanese Government denied the mission entry to Darfur, with the result that the investigation was conducted from Ethiopia and Chad. The report strongly condemned the Sudanese Government for orchestrating and participating in 'large-scale international crime' in Darfur.⁸⁸ However, allies of Sudan on the Council questioned the validity of the report because the investigatory team had not gone to Darfur and the Council finally adopted a weak resolution that 'took note' of the report but did not adopt its recommendations nor did it condemn the Sudanese Government for its actions in Darfur.⁸⁹

While it is promising that the Council can organise special sessions to promptly respond to urgent human rights concerns, something the Commission managed to do only intermittently,⁹⁰ it is hoped that these sessions will not be dominated by alleged human rights violations by Israel, to the exclusion of allegations of grave human rights abuses in other countries. This new body must show even-handedness and ensure that it considers all urgent human rights situations, rather than repeatedly pointing the finger at Israel.⁹¹ The propensity of the Council to concentrate on alleged human rights violations by Israel has become so noticeable that it was recently commented on by UN Secretary-General Ban Ki-moon who stated that he 'is disappointed at the Council's decision to single out only one specific regional item, given the range and scope of allegations of human rights violations throughout the world'⁹² and urged the Council to treat all situations of human rights violations equally.

Although the Council's first session was dominated by procedural matters, there were two notable, substantive achievements. The Council adopted, by consensus, a new human rights treaty. The Draft International Convention for the Protection of All Persons from Enforced Disappearance was transmitted to the General Assembly with a recommendation that it be adopted.⁹³ This treaty was prepared by a working group established by the Commission and is a significant step forward in the efforts to end forced disappearances. The Council also

86 Resolution A/HRC/S-4/L.2, 6 December 2006.

87 Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101, A/HRC/4/80, 9 March 2007.

88 Ibid 25.

89 Schaefer, above n 80.

90 It was not until 1990 that the Commission was empowered to hold special sessions (Resolution 1990/48 of 25 May 1990). In all the Commission held five special sessions. Two were in 1992 and related to the human rights situation in the former Yugoslavia; one in 1994 related to Rwanda, one in 1999 related to East Timor, and the final special session was in 2000 and focused on alleged human rights abuses of Palestinians by Israel.

91 *UN: Mixed Start for New Human Rights Council* (2006) Human Rights Watch <www.hrw.org> at 21 August 2006.

92 UN Press Release Secretary-General urges Human Rights Council to take Responsibilities Seriously, Stresses Importance of Considering all Violations Equally SG/SM/11053 HRC/8, 20 June 2007.

93 Resolution A/HRC/1/L.2, 23 June 2006.

accepted the Draft Declaration on the Rights of Indigenous Peoples and recommended that the General Assembly adopt it.⁹⁴ This document had been drafted by the Working Group on Indigenous Populations for well over a decade and was long overdue for adoption. It is a positive sign that the Council dealt with these important matters in a timely manner.

C *Periodic Review*

The requirement that the Council review the human rights records of all countries, beginning with its own members is a definite improvement on the Commission. States with appalling human rights records may be less enthusiastic about becoming members of the Council once they realise that membership will not shield them from an examination of their own performance regarding human rights.

Commission members were not subjected to regular review of their own human rights record and, indeed, many sought a seat on the Commission, because they perceived that they could use their membership to block scrutiny of their own human rights practices. The Council will differ significantly from the Commission in this regard. All UN member States, beginning with Council members, will from now on be subjected to periodic review. Details of how this universal system of review will work are yet to be finalised, however, the General Assembly Resolution establishing the Council gives us some clue as to how it will work. It states that the:

Review shall be a cooperative mechanism, based on 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.⁹⁵

The International Commission of Jurists ('ICJ') has been quick to point out that what is required is not **peer** review, but rather **periodic** review.⁹⁶ According to the ICJ, the language used by the General Assembly in its Resolution makes it clear that the process is not limited to intergovernmental review, that is, every stage of the review process does not have to be conducted by government representatives, which would carry a distinct risk that the entire process becomes highly politicised. The ICJ suggests that the Council's consideration of a State's human rights record should be based on 'a preliminary, objective and technical expert assessment, which should be free from political pressures and influences.'⁹⁷ Thus the ICJ recommends that the periodic review be a three stage process, whereby independent experts undertake an initial objective review of a State's human rights record. This report is then submitted to the Council and State under review and a

94 Resolution A/HRC/1/L.3, 23 June 2006.

95 Resolution 60/251, para 5.

96 International Commission of Jurists, *The Universal Periodic Review of the Human Rights Council* (2006) International Commission of Jurists <www.icj.org/news.php3?id_article=4000&lang=en> at 27 January 2007.

97 Ibid.

public hearing before the Council scheduled. Such a hearing would ensure transparency of the process and engender confidence that the process was not overly subjective or political. The third and final stage of the periodic review would be the recommendations, or any other action the Council adopted following the public hearing. Such a three stage process would ensure that there is a clear distinction between the assessment of a State's human rights record, and the decisions which flow from that assessment, with only the latter being at risk from political influences. A further advantage of this model is that by externally delegating significant components of the review process, the Council would not be overly encumbered by its new responsibilities.

There are several other proposals for how the periodic review process might evolve. For example, Canada has suggested that the majority of the review process be undertaken by a Peer Review Committee comprising 12 members of the Council who would submit a final report to the Council which would then decide what follow-up action, if any, was required.⁹⁸

The United States of America, although not a member of the Council, has also expressed views on how the periodic review process should work. America takes the firm position that it should be a *peer* review process, and therefore not involve independent experts. It proposed establishing a peer review working group made up of two members of the Council from each regional group, which group would develop a short factual questionnaire for the State under review to complete. There would then be a two-hour-long interactive dialogue, which would be open to the public and to NGOs and which would be based on the questionnaire and information received from other sources.⁹⁹ The USA's proposal is, in effect, that the periodic review process should be minimal and engage in nothing of substance. The idea that a two-hour meeting based largely on a questionnaire completed by the State under review would amount to any sort of meaningful review of human rights is laughable.

The Council is progressing with its efforts to develop an appropriate process for the periodic review. At its First Session it passed a resolution establishing an 'inter-sessional open-ended working group to develop the modalities of the universal periodic review system.'¹⁰⁰ This resolution specifically directed the Office of the United Nations High Commissioner for Human Rights ('OHCHR') to gather information for the working group on how periodic review mechanisms work in other organisations such as the International Labor Organization ('ILO'), World Trade Organization ('WTO'), International Monetary Fund ('IMF') and the Organisation for Economic Cooperation and Development ('OECD'). At first glance, these organisations' systems of review seem unlikely to provide useful guidance, since they deal predominantly with trade agreements or monetary

98 *Human Rights peer Review Mechanism* (2006) Eye on the UN <www.eyeontheun.org/assets/attachments/documents/hr_peer_review_mechanism_canada.pdf> at 27 January 2007.

99 'U.S Position on the Universal Periodic Review' presented at the Third Session of the Human Rights Council on 4 December 2006. Accessed on 27 January 2007 at www.usmission.ch/Press/2006/1204PeriodicReview.html.

100 Resolution A/HRC/1/L.12, 29 June 2006.

policies which are narrow and more concrete than organisations evaluating levels of compliance with international human rights laws.¹⁰¹ However, the ILO has one of the most elaborate review mechanisms and it does cover human rights issues including such matters as child labour, forced labour, discrimination and freedom of association.

Article 22 of the ILO Constitution provides that States must submit reports to the ILO on the measures they have taken to give effect to the provisions of the conventions they have ratified. Reports detailing the steps a member State has taken to apply the eight fundamental and four priority conventions must be submitted every two years; for all other conventions, reports must be submitted every five years. The report must also be submitted to employer organisations and workers unions. After preliminary review by the secretariat, an independent Committee of Experts examines the reports. The Committee of Experts was set up in 1926 to examine State reports on ratified conventions. It is made up of 20 eminent jurists appointed for three-year terms and provides impartial and technical evaluation of a State's application of the conventions.¹⁰²

The experts may direct questions and observations to the States concerned. They then prepare a report which contains two separate kinds of comments: observations which are publicly reported, and direct requests which are transmitted only to the government of the State being reviewed. These direct requests remain confidential for a time so that the State can take steps to address the problem before it is published. This system appears to be having a positive impact on global labour practices. Since 1964, the Committee of Experts has kept track of the number of cases in which it has noted changes in law and practice which improved the application of a ratified convention. Over 2,300 cases of progress have been noted.¹⁰³ If the new Human Rights Council could achieve anything like this number of improvements in human rights practices over the space of a few decades, it would be doing exceptionally well.

A core part of the ILO is its tripartite structure which ensures that employer organisations and trade unions have an equal voice with member States. The ILO sees facilitating dialogue between these three sectors as a core function. An equivalent tripartite system in the Human Rights Council would see NGOs and National Human Rights Institutions ('NHRIs') actively engaged in the periodic review process. Elevating the role of NGOs and NHRIs in this way would be a marked improvement, and likely provoke more meaningful dialogue. However, it is unlikely to be a move that UN member States would endorse as many countries would find such an arrangement threatening and an unwarranted incursion on their sovereignty.

101 International Commission of Jurists, above n 56.

102 International Labour Standards, *Committee of Experts on the Application of Conventions and Recommendations* (2007) International Labour Standards <www.ilo.org/public/english/standards/norm/applying/committee.htm> at 27 January 2007.

103 International Labour Standards, *The impact of the regular supervisory system* (2007) International Labour Standards <www.ilo.org/public/english/standards/norm/applying/impact.htm> at 27 January 2007.

The ILO system of supervising States' compliance with conventions through review by a Committee of Experts has much to offer the Council. However, the establishment of a comparable system by the Human Rights Council will be controversial as there are several powerful States who will lobby hard to avoid such a system. The United States of America's position on this has already been noted above.

Whichever format the periodic review system takes, there are certain key factors which will be crucial to a successful program of review. First, the review process must be open and transparent. Any attempt to conduct reviews confidentially, in the way that reviews of 1503 complaints were conducted, would not engender confidence in the process. Second, the review process must be undertaken in a spirit of cooperation with active dialogue and participation by all relevant stakeholders, including NGOs. Third, the review should be undertaken by independent experts in the field of human rights, in order to minimise the risk of politicisation of the process that is likely to occur if government delegates are the reviewers. Finally, the review must be comprehensive. Any suggestion of superficial 'window dressing' will immediately strip the review process of all credibility. However, at the same time a thorough review must ensure that the Council does not duplicate existing review systems such as those undertaken by treaty bodies. Many States already feel over-burdened by the reporting requirements of various treaty committees and have inadequate resources to comply with these obligations. The Council's process of review must therefore endeavour to complement, rather than duplicate, existing monitoring mechanisms. The ICJ suggest that the Council's review process would be most effective if it focused on the *implementation* of reports and recommendations from special rapporteurs, treaty bodies, the OHCHR and previous Commission/Council resolutions.¹⁰⁴ In this way the review process would address one of the major deficiencies in the UN human rights system, namely the lack of follow-up mechanisms.

Guidelines will have to be developed as to how the Council is to respond to a negative review of a State's human rights practices. Criticism on its own is unlikely to provoke a State to reform its practices. Once again the ILO could be used as a model. The Expert Committee not only reviews States' compliance with ILO conventions, but also offers technical assistance. This includes sending advisory missions, whereby ILO officials discuss with government representatives problems in the application of standards with the aim of finding solutions; assisting with capacity building; and providing technical assistance in drafting national legislation in line with the ILO standards.¹⁰⁵ These are all services which many UN members would welcome in the area of human rights.

¹⁰⁴ International Commission of Jurists, above n 56.

¹⁰⁵ International Labour Standards, *Technical assistance and training* (2007) International Labour Standards <www.ilo.org/public/english/standards/norm/applying/technical.htm> at 27 January 2007.

Other follow-up measures that have been suggested for the Human Rights Council periodic review include: identifying specific questions or issues that the State needs to resolve by the next round of review; requesting an additional report from the State which is to be examined at the next session of the Council; and, if the situation is serious enough, referring the State to the General Assembly for a vote on whether it should have its membership on the Council suspended.¹⁰⁶ This final suggestion should only be considered as a last resort, as it is preferable to engage with a State and assist it to improve its human rights practice than to expel it from the 'club' thus removing all possibilities of influencing its behaviour.

Finally, on a practical note, how is such a review system to be funded? The United Nations High Commissioner for Human Rights, Louise Arbour, calculates that 60 States will be reviewed every year, meaning that each State will have their human rights record analysed every three years.¹⁰⁷ To achieve this volume of reviews, without compromising the depth and quality of analysis will require a significant allocation of resources (both human and monetary). With the tight budget that the UN currently operates under, it is difficult to see where these funds will come from.

Hopefully, the working group established by the Council to develop procedures for the system of periodic review will be able to provide answers to these very difficult questions. However, reservations remain as to whether an essentially political organ is ever going to be capable of carrying out truly objective independent reviews.¹⁰⁸ As one leading scholar noted, the Council must be careful develop a review system which does not 'discredit the Council, frustrate civil society and contribute nothing to human rights.'¹⁰⁹ The ultimate measure of the success of any periodic review system will be whether there are tangible outcomes from the process. This will only happen if the Council uses the review procedure to make specific, well formulated and feasible recommendations.¹¹⁰ States' implementation of such recommendations must be monitored and, if necessary, the UN must assist States to give effect to the recommendations.

IV WHAT FURTHER REFORMS ARE NEEDED?

After little more than a year of operation, it is premature to judge just how effective the Council will be. However, as indicated above there are already some signs of problems and indications of areas in which the Council could improve.

106 International Commission of Jurists, above n 96.

107 Lisa Schlein, *UN Human Rights Council Kicks Off* (2006) Voice of America <www.voanews.com> at 18 June 2006.

108 Peter Hilpold, 'Reforming the United Nations: New Proposals in a Long-Lasting Endeavour' (2005) *Netherlands International Law Review* 389, 427.

109 Alston, above n 4, 213.

110 Ibid 214.

The resolution establishing the Council called for it to be reviewed by the General Assembly in five years. This section looks at what reforms should be considered at that time.

A *Tightening of Voting and Selection Criteria for Membership*

The Commission's loss of credibility that ultimately led to its demise was largely due to the election of States with appalling human rights records as members of the Commission. The Council risks the same fate as the Commission if safeguards are not put in place to ensure that States guilty of egregious human rights violations cannot become members of this important human rights body.

The current criteria for election onto the Council are minimal; the General Assembly merely has to 'take into account the candidates' contribution to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.'¹¹¹ It is suggested that the language in the resolution establishing the Council is too vague to ensure that States guilty of committing serious human rights violations are ineligible for membership.

More specific selection criteria is required. However, identifying appropriate selection criteria is not easy and, no doubt, one of the reasons why it did not form part of the resolution establishing the Council. If the criteria included a requirement that States had ratified the majority of key human rights treaties, the world's only superpower would not qualify for membership; the United States having ratified only three of the seven major conventions.¹¹² Even if the criteria was less onerous, for example that a State had ratified the two covenants (ICCPR and ICESCR), powerful States such as China and the United States of America, would still be excluded.

If the criteria included a requirement that a State be punctual with its reports to treaty committees, many States who are not gross human rights abusers, but who have inadequate resources to comply with the onerous reporting requirements, would be excluded. Furthermore, being current with treaty reporting requirements is not evidence of good human rights practices; it simply demonstrates a government's ability to comply with often bureaucratic formalities. Finally, it may be difficult to determine when a State is overdue given the widespread practice of UN committees to tolerate inordinate delays in reporting.¹¹³

¹¹¹ Resolution establishing the Council A/Res/60/251, 15 March 2006, para 8.

¹¹² The USA has ratified the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Elimination of All Forms of Racial Discrimination. The United States has refused to ratify the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

¹¹³ Alston, above n 4, 199.

The United States of America suggested that membership should not be open to States that are currently the subject of Security Council sanctions.¹¹⁴ This seems a reasonable standard, but should not be the sole measure, since this would currently exclude only seven countries.¹¹⁵ To this list could be added countries that are currently or, have in the recent past, been the subject of a country specific resolution by the Council condemning their human rights practices.¹¹⁶ However, if the Council becomes overly politicised, this may not be an appropriate measure.

Another possible criterion is the issuance by States of open invitations to UN special rapporteurs to visit their country for inspections. However, as Alston points out this would not only exclude most Asian and African nations but also the United States of America and Australia.¹¹⁷

It is clear that developing selection criteria for Council membership is fraught with difficulties, and risks polarising UN member States even further, which is why the HLP did not recommend the introduction of selection criteria.¹¹⁸ However, the credibility of Council members is critical to ensuring the long term success of the Council and thus membership selection criteria must be explored further. Perhaps one of the Council's tasks in the five years leading up to its first review, should be the establishment of a working group devoted to drafting selection criteria for the General Assembly's consideration.

B *Permanent Standing Body*

One of the criticisms of the Commission was that it met only once a year for a six week session. The problem that this created was illustrated all too clearly in 1993. In August of that year, the special investigator working on Rwanda warned the Commission that genocide was likely in Rwanda. This was eight months before the massacres began. Alas this communication was not read until the Commission session in March 1994 and even then received little attention, being lost in a large agenda of other human rights abuses. While much of the criticism of the UN over the Rwandan genocide has focused on the Security Council,¹¹⁹ the Commission cannot escape responsibility for its role in this dark history.

The Council meets for ten weeks a year spread over three sessions, therefore there is unlikely to be a similar delay in receiving and responding to urgent reports such as the one from the Rwandan expert. It also has the power to call special

114 Sichan Siv, *Statement by Ambassador Sichan Siv, US Alternate Representative to the General Assembly, on Agenda Items 71 (b) (c) and (e), in the Third Committee* (2005) United States Mission to the United Nations <www.usunnewyork.usmission.gov/05_194.htm> at 2 July 2007.

115 The seven countries are: Côte d'Ivoire, Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, Somalia and Sudan. None of these States are currently members of the Council.

116 Alston, above n 4, 65.

117 Ibid 195.

118 UN A/59/565, 2 December 2004, para 285.

119 See for example Michael Barnett, *Eyewitness to a Genocide: the United Nations and Rwanda* (2003) and United Nations Department of Public Information, *The United Nations and Rwanda, 1993-96* (1996).

sessions and, as noted above, has not been reluctant about using this power, with four special sessions already held. However, given the number of human rights atrocities occurring around the world, 10 weeks a year and a smattering of special sessions is not going to be enough to allow for comprehensive analysis and debate of all the issues before the Council.

A year round standing body would allow for proactive in-depth analysis and debate on human rights situations, rather than reactive responses to human rights crises.¹²⁰ However, measures would have to be put in place to ensure that poorer States, and smaller NGOs, who lack the resources to fund a year round delegation in Geneva, are not unduly disadvantaged.¹²¹

C *Changing Practices and Procedures*

The creation of a new body brings with it opportunities to examine ways in which the Council can improve its systems, not only compared to the way that the Commission conducted itself, but also compared to other UN entities. Everyone is all too familiar with the ongoing complaints that the UN is just an unwieldy bureaucracy. The Council represents a chance to look at creative ways of improving operations and, with that, the credibility of the organisation.

One suggestion for improving the Council's practices is to make greater use of technology, including for example, webcasting Council sessions, televising them to regional UN centres and generally making the Council's work more transparent and accessible.¹²² Technology could be used to bring the human rights work of the UN to a greater audience, thereby making it more relevant to people in places far removed from Geneva. Students could learn about the UN by watching it in action, rather than having to read dry reports and resolutions. Making the new Human Rights Council pertinent to young persons, in particular, is an important step in ensuring that it is, and continues to be, a credible and well respected body.

The need to always hold the meetings in Geneva has been questioned.¹²³ Arranging for some Council sessions to be held in other parts of the world, would assist in making the UN and the Council in particular, seem less distant, and more relevant to human rights at the grass roots level. Perhaps a roster could be developed scheduling at least one session a year in a different regional area. This would be an innovative step that would bring the Council closer to the individuals and communities that are the intended beneficiaries of the greater protection and promotion of human rights that the Council promises.

120 Cees Flinterman and Peter Baehr, 'Three Cheers for the New Human Rights Council?' (2005) 23(4) *Netherlands Quarterly of Human Rights* 547.

121 Peter Prove, 'Reform at the UN: Waiting for Godot?' (2005) 24 *University of Queensland Law Journal* 293, 311.

122 International Catholic Movement for Intellectual and Cultural Affairs, *Roundtable Discussion on NGO Participation in the Human Rights Council* (2006) Pax Romania <www.paxromania.org> at 21 August 2006.

123 Ibid.

If the Council is to have a genuine impact on human rights situations, it must ensure it engages in meaningful dialogue during its sessions. This means favouring substance over form and allowing adequate time for contributions from all interested parties (ie not relegating NGOs to a few minutes at the end of States' submissions). All too often the Commission was hijacked by members' posturing and lengthy monologues. Genuine interactive dialogue amongst all interested persons is the key to bringing about real improvements in human rights practices.¹²⁴ However, this takes time and that is something that the Commission and Council have both struggled to find. The answer is to either limit the agenda or increase the time available (refer back to section B above regarding having the Council as a permanent body, rather than sitting for only 10 weeks a year). There will need to be a fundamental shift in the way agenda and programs are prepared and administered, if this kind of change is to occur.

D *Complete Restructure?*

The Council has an extremely broad mandate — to protect and promote human rights. Some scholars question whether a policy making organ, responsible for drafting international norms, can also effectively perform enforcement activities.¹²⁵ In other words, the skills needed to perform these disparate functions are unlikely to be found within the one body. Furthermore, a Council burdened with so many responsibilities is unlikely to be able to adequately perform all the required tasks. For this reason, it is suggested that the Council be split into two separate, but complementary, bodies. The existing Council could retain the functions relating to investigating and enforcing human rights abuses, be they thematic or State based, and a new body, perhaps called the Human Rights Congress, could be responsible for developing norms and promoting human rights generally.¹²⁶ It is suggested that this is a logical division of responsibilities, and that separating out the functions in this way is likely to result in each area receiving more attention.

A further benefit of having two human rights bodies carry out the functions for which the Council is currently responsible, is that more States could be actively involved in important UN human rights bodies. Rules could be developed to the effect that a State cannot serve on both bodies at the same time. If the Council and Congress each had a membership of, say 35, this would result in 70 States having the opportunity to actively participate in important human rights organs of the UN, compared with the 47 that currently serve on the Council. A detailed analysis of this idea of two separate human rights bodies within the UN is beyond the scope of this article, but is certainly worthy of future in-depth exploration, particularly in light of the rocky start that the Council has had.

¹²⁴ The ILO tripartite system discussed above could be a useful model for elevating the role of non-State actors and engaging in in-depth dialogue.

¹²⁵ Howard Tolley, *The UN Commission on Human Rights* (1987).

¹²⁶ The Sub-Commission, being made up of independent experts, could easily be reconfigured to become this new body.

V CONCLUSION

Early signs are that the Council is adhering closely to the practices of the Commission, particularly regarding its focus on Israel. While the Commission did have some useful processes that the Council would do well to continue, including the active involvement of civil society and the use of special rapporteurs and independent experts, the initial indications are that it is the Commission's negative practices that the Council is adopting. With over half the current Council members being immediate past members of the Commission, one can readily appreciate how this might happen. But if the Council is to realise its full potential, there must be a concerted effort to avoid the conduct that led to the Commission losing credibility and eventually being shut down.

It appears that many of the flaws that plagued the Commission are also present in the Council. States are as unwilling today, as they were in the 1940s, to create a genuinely independent and powerful body that is truly capable of promoting and protecting human rights. The 'bogey of national sovereignty' continues to thwart efforts to improve human rights and appears to be limiting the Council's chances of having any meaningful impact on the global human rights situation.

This article began with a quote from *The Hitch Hiker's Guide to the Galaxy*, and it is appropriate that it end with one. As you read the following excerpt, try substituting the UN Commission on Human Rights for the Vogons.

Vogons ... They are one of the most unpleasant races in the Galaxy — not actually evil, but bad-tempered, bureaucratic, officious, and callous. They wouldn't even lift a finger to save their own grandmothers from the ravenous Bug-Blatter Beast of Traal without orders signed in triplicate, sent in, sent back, queried, lost, found, subjected to public inquiry, lost again and finally buried in soft peat for three months and recycled as firelighters.¹²⁷

The Commission, like the Vogons, was not itself evil, but its conduct in recent years enabled evil to flourish in the form of gross human rights violations around the world. The ultimate responsibility for human rights violations lies with those that perpetrate them, but the Council, like the Commission before it, has a responsibility to take action so that it is not complicit in creating an air of impunity where human rights abuses are concerned. Given the fundamental flaws in the structure of the Council and, its track record in the first year of its existence, there is a distinct chance that the Council will also become 'Vogon-like' and perpetrators of human rights violations can continue, confident, that they will not be held to account by the Council.

¹²⁷ Adams, above n 1, 45.