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International Human Rights Monitoring Mechanisms

Essays in Honour of Jakob Th. Möller, 2nd Revised Edition

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The United Nations Charter reminds us of our fundamental duty: to serve the peoples of the world. It is 'we the peoples' who give us the direction representing the voices of the afflicted men, women and children.

Let us together prove that our new Human Rights Council will make a difference in their lives.

15 What Effect if Any Will the UN Human Rights Council Have on Special Procedures?

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Introduction

Since the moment that the United Nations Commission on Human Rights ("Commission") – the parent body of the UN human rights special procedures system – was replaced by the UN Human Rights Council ("Council"), the question became: What effect if any will this change have on special procedures? To consider this issue, it is valuable first to recall the origin and development of special procedures under the Commission and then to point out their main strengths and weaknesses. We can then discuss why UN Member States decided to replace the Commission with the Council and how this change could affect special procedures.

The life and times of special procedures under the UN Commission on Human Rights

Because they derive their legal authority not from any specific human rights treaty, but only from the general powers which the Charter of the United Nations confers upon the Economic and Social Council (ECOSOC) to deal with human rights questions, "special procedures" are also referred to as "extraconventional mechanisms" or "Charter-based bodies". Special procedures were established to deal with serious human rights situations according to the current concerns of the international community, but they arose in an *ad hoc*, unsystematic and rather incoherent manner over many years. Unlike the UN human rights treaty bodies (such as the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the Committee Against Torture) which monitor a State Party's observance of the specific human rights set forth in the particular convention it ratified, "special procedures" focus on human rights issues regardless of State consent.

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In February 1946, ECOSOC established the Commission as its subsidiary body, and requested it to prepare an "international bill of rights".[1] The Commission's first step in this regard was to identify and list human rights considered common to all – a task that began in January 1947 and which culminated in the UN General Assembly's adoption of the Universal Declaration of Human Rights as a legally non-binding instrument on 10 December 1948.[2] Bearing in mind the fact that prior to 1945, human rights had not been considered to constitute a legitimate matter of international legal concern (except for minority rights and international labour law) as well as the challenges of finding agreement among widely differing philosophical, ideological, religious and cultural viewpoints, it is remarkable that the first Commission's 18 Member State representatives reached consensus in such short time. By holding up "a common standard of achievement for all peoples and all nations", the Declaration laid down a solid normative foundation for the subsequent elaboration of international human rights law and implementation. In order to achieve agreement, however, the Declaration's provisions were cast in the most general of terms that even omit to define the rights listed. Moreover, the Declaration's adoption in the form of a non-binding resolution of the General Assembly made the instrument far from adequate for victims or potential victims of human rights violations, who needed concrete remedies more than hortatory pronouncements.

Because in 1945 human rights had yet to be defined in specific enough legal terms to be incorporated in domestic law and implemented accordingly, individuals living in jurisdictions with poor human rights observance could do little more than send unsolicited communications in the form of letters, telexes and other missives directly to the United Nations, hoping that some action or other might be taken. Since its establishment, the UN has always received communications from individuals alleging human rights violations, but Member States at first could not agree to vest any investigatory powers in the Commission. Politically, the last thing that metropolitan Powers felt they needed was to see an active Commission receiving thousands of individual complaints about serious human abuses being committed in the territories of their colonial possessions. This explains why ECOSOC resolution 5(I) establishing the Commission in line with Article 68 of the UN Charter specifically refrained from conferring upon the Commission any powers of investigation or any capacity to receive or examine communications from individuals alleging human rights violations. However, the Commission's explicit lack of capacity *even to receive or examine* communications seemed to caricature the stated concern of UN Member States to promote human rights. Already in 1947, ECOSOC resolution 75(V) changed the Commission's procedures slightly to recognise the Commission's authority at least to receive communications, but the resolution goes on to reiterate that the Commission had "no power to take any action in regard to any

1 ECOSOC resolution 5(I), adopted 16 February 1946, established the Commission on Human Rights and requests the Commission to work on: "(a) an 'international bill of rights'; (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters; (c) the protection of minorities; (d) the prevention of discrimination on grounds of race, sex, language or religion."

2 Universal Declaration of Human Rights, adopted by UN General Assembly resolution 217A (III) of 10 December 1948.

complaints concerning human rights". ECOSOC resolution 76(V) repeats this stricture specifically as regards allegations of violations concerning the status of women.

In the 1950s and 1960s, many countries in Asia and Africa rid themselves of colonial rule and were granted membership in an expanded General Assembly as newly sovereign and independent States. Pent-up indignation over the systematic human rights abuses committed in apartheid South Africa and elsewhere moved governments to consider that the UN should perhaps be empowered to hear from individuals after all. Already in 1961, the General Assembly had established a Special Committee on the Policies of Apartheid that reviewed individual communications. These procedures provided a model for the eventual adoption of ECOSOC resolution 1235 (XLII) on 6 June 1967 which authorised the Commission and the Sub-commission on the Prevention of Discrimination and Protection of Minorities (since 1999 denominated the Sub-commission on the Promotion and Protection of Human Rights) "to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa". At the time that ECOSOC resolution 1235 was being drafted, the government of South Africa vehemently objected to being singled out by the international community. To avoid the charge of political selectivity without letting South Africa off the hook, ECOSOC added the word "exemplified" to indicate that the Commission would examine the human rights situation in any country where human rights violations reached the gravity of those committed in apartheid South Africa and South West Africa. The word "exemplified" thus authorised the Commission to refer publicly to human rights violations in any part of the world regardless of the State's treaty obligations. Paragraph 3 of resolution 1235 further provides that "the Commission on Human Rights may, in appropriate cases, and after careful consideration of the information thus made available to it ... make a thorough study of situations which reveal a consistent pattern of violations of human rights and fundamental freedoms" and make recommendations thereon to ECOSOC. Another major development came about in 1970 with the adoption of ECOSOC resolution 1503, paragraph 1 of which basically requests the Sub-commission to appoint a working group to consider all communications alleging human rights violations, including replies of governments thereon, that have been sent to the UN. This Working Group considered the communications in private meetings and then decided whether to refer the situation to the ECOSOC resolution 1235 public debate procedure.[3]

3 Paragraph 5 of ECOSOC resolution 1503 requests the Sub-Commission "to consider in private meetings, in accordance with paragraph 1 above, the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of Governments relating thereto and other relevant information, with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission". Under resolution 1503, the Commission is obliged to examine any situation referred to it by the Sub-commission and to determine whether "it requires a thorough study by the Commission and a report and recommendations", whether it should become the subject of the public procedures under paragraph 3 of resolution 1235 or whether "it may be a subject of an investigation by an ad hoc committee to

ECOSOC resolutions 1235 and 1503 allowed the Commission to move beyond exclusive human rights standards setting, towards public debate on particular human rights violations, as well as monitoring, investigation and reporting, turning the Commission into the world's leading forum on urgent human rights issues. In 1980, the first thematic special procedures mandate grew out of the Commission's concern over disappearances being committed in specific countries.[4] These particular countries strenuously objected to their being named, and as in the formulation of ECOSOC resolution 1235, the response was to establish a mechanism with a broader rather than narrower mandate. Thus, the UN Working Group on Enforced or Involuntary Disappearances was created as a *thematic* mechanism to preserve a patina of political neutrality while allowing the Commission to address these kinds of violations occurring in countries under international concern. The Working Group's establishment paved the way for the gradual addition of other thematic mechanisms that were to cover a broad range of human rights issues.

During the confrontational Cold War years, both sides of the East-West ideological divide milked the propaganda value of human rights to denounce countries on the other side of the Iron Curtain. This ideological competition helped propel the Commission's work to develop legally binding international human rights standards. By 1966, the Commission succeeded in preparing the "international bill of rights" that ECOSOC had requested the Commission to complete, by putting forward for adoption the International Covenant on Civil and Political Rights (favoured mainly by Western capitalist States), and the International Covenant on Economic, Social and Cultural Rights (championed mainly by socialist States together with Nordic countries and many developing countries). The two Covenants represent the main normative pillars of international human rights law, and their entry into force in 1976 signalled that the time was ripe for the international community on the one hand to elaborate further the substance of international human rights law, and on the other to develop effective procedures for their implementation.

be appointed by the Commission which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it" in cases where: a) all domestic remedies have been exhausted, and b) the situation is not already being handled by other UN procedures provided for by a convention.

4 On 29 February 1980, the Working Group was established by the Commission on Human Rights in resolution 20 (XXXVI) as the first UN thematic human rights mechanism, consisting of five members to serve as experts in their individual capacity to examine questions relevant to enforced or involuntary disappearances anywhere in the world. *See* W. Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine* (1998) p. 253, where Korey recounts that the proposal to create a Working Group arose out of Amnesty International's documentation of thousands of disappearances around the globe. The naming of Argentina, Afghanistan, Cambodia, Ethiopia, Nicaragua and Uganda prompted the governments of a number of these countries to object to the right of an NGO to denounce any country by name. While they were to succeed in avoiding being named in the title of the Working Group, the effect was to empower the Working Group to examine the phenomenon of disappearances in any country.

By the late 1990s, special procedures had become more balanced in several ways. First, individual mandate-holders seemed to introduce greater nuance into their reports and to equipoise sharp criticism of a government's failings on human rights matters with praise for positive action it had taken to improve human rights observance. Commission mandate-holders also moderated their reports by offering governments under scrutiny practical recommendations for further improvement. Second, the World Conference on Human Rights, held in Vienna in 1993, emphasised the universality, indivisibility, interdependence and interrelatedness of human rights,[5] which favoured the establishment of increasingly broad special procedures mandates and a more balanced treatment of economic, social and cultural rights alongside civil and political rights. The post-Cold War political climate further reduced Western political resistance to the argument, long tendered by Socialist Bloc and Non-Aligned Movement countries that economic, social and cultural rights should find their rightful place in the Commission's monitoring agenda. Commission mandates were no longer focused so narrowly on the more obvious, and in some sense, more immediate threats to life and liberty, such as the phenomena of arbitrary detention, enforced or involuntary disappearances, extrajudicial, summary or arbitrary executions and torture. By the time the Commission was dissolved in 2006, there were mandates also on wide-ranging economic, social and cultural rights, such as on the right to adequate housing, the right to food, the right to education, the question of human rights and extreme poverty, the right to health, the effects of structural adjustment policies on human rights and on the adverse effects of the illicit movement and dumping of dangerous products and toxic wastes. Third, special procedures had become less lop-sided as regards the range of countries covered. Certain developing countries had long argued that it was hypocritical for developed countries to berate them continually for shortcomings in civil and political rights protection from privileged positions of economic and political power. In the years 1967 to 1980, Commission members could only agree to establish mandates with respect to territories in which particularly egregious human rights practices had attracted almost universal condemnation, namely, southern Africa in respect of apartheid, Palestinian territories under Israeli occupation and Chile under the Pinochet military regime. By 1996, all five of the UN Security Council's permanent members – China, France, Russia, the United Kingdom and the United States – had come under thematic mandate attention, proving that none of even the most powerful of States were above special procedure scrutiny.[6]

Thus, the Commission functioned as a unique institutional laboratory that experimented with human rights investigation, monitoring and reporting – first by establishing "country mandates" in the late 1960s to examine human rights situations in particular countries or territories, and then from 1980 to 2006 also by establishing "thematic mandates". In 1998, special procedures mandates reached a total number of 53. By 2006, several country mandates were terminated and some thematic mandates were com-

5 *See* the Vienna Declaration and Programme of Action, Note by the Secretariat, World Conference on Human Rights, Vienna, 14–25 June 1993; A/CONF.157/23 of 12 July 1993, at para. 5.

6 *See* J. R. Crook, 'The Fifty-First Session of the UN Commission on Human Rights', 90 *American Journal of International Law* (1996) pp. 126–138.

bined such that by the Commission's final year of existence the number of country mandates stood at 13[7] and there were 28 thematic mandates. The Commission had gained fame and notoriety as the world's most politically charged human rights forum that annually brought together around 3,000 representatives of governments, international organisations, UN agencies, bodies and programmes, the International Committee of the Red Cross, and non-governmental organisations (NGOs) to hear the reports of Commission-appointed "special rapporteurs", "independent experts", "working groups" and "special representatives".

The beauty of special procedures has been their remarkable effectiveness in marshalling international public opinion against violator governments. Over the years, special procedures mechanisms have brought tremendous pressure to bear on governments whose practices have fallen seriously out of line with international human rights standards, thanks in no small part to the very active and vibrant role human rights NGOs have played in the Commission's public sessions.[8] With instant global mass media and communications, and galloping economic globalisation, the exposure of serious human rights abuse can bring a responsible government into grave disrepute much more quickly than it would have in the past. Bad publicity can hit the State treasury quickly as tourists choose alternative destinations and merchants shop elsewhere. Commercial trade, foreign investment, multilateral assistance, arms deals and the benefits of a whole range of other forms of international cooperation can easily become jeopardised with deterioration in a government's human rights reputation. Like it or not, governments can little afford to ignore how their human rights practices are perceived at home and abroad because human rights along with democratic governance and the rule of law have become key elements in maintaining political legitimacy and international influence.

Unlike treaty-based mechanisms, special procedures can be established very quickly and be applied to any country or according to any theme, regardless of State consent. As such, they can address urgent problems that arise in specific countries and can be tailored to look into the particular kinds of violations that may be occurring. Consisting of *ad hoc* mechanisms, special procedures have been particularly versatile in the way they contribute to or intermesh with other kinds of monitoring or implementation mechanisms. Particularly striking in this regard has been the way in which the reports of special rapporteurs have led or contributed to the establishment of commissions of enquiry to investigate facts and responsibilities concerning criminal violations of human rights

7 These mandates concerned the particularly serious human rights situations in Belarus, Burundi, Cambodia, Cuba, Democratic Republic of Korea (North Korea), Democratic Republic of Congo, Haiti, Liberia, Myanmar, Palestinian territories occupied since 1967, Somalia, Sudan and Uzbekistan.

8 *See further* L. S. Sunga, *NGO Involvement in International Human Rights Monitoring, International Human Rights Law and Non-Governmental Organizations* (2005) pp. 41–69.

and humanitarian law in the former Yugoslavia,[9] Rwanda,[10] East Timor[11] and Darfur,[12] to name just a few examples. Special procedures mechanisms have also coordinated visits and shared information with UN human rights field presences deployed in particular countries.

Understandably, in most situations, governments wish to avoid drawing increased Commission examination. In some instances, the mere prospect of coming under Commission scrutiny has been enough to coax a government into accepting a less confrontational, albeit no less effective, form of UN human rights monitoring. In the case of Nepal, for example, following the King's Royal Proclamation of a state of emergency on 1 February 2005 along with the suspension of a range of human rights, the Commission expressed its "deep concern about the serious setback to multiparty democracy and the weakening of the rule of law" and over "arbitrary arrests and secret detention, in particular of political leaders and activists, human rights defenders, journalists and others, and about continued enforced disappearances, as well as allegations of torture". Having drawn extremely negative press by sacking his government, asserting direct rule over his subjects and suspending human rights guarantees, King Gyanendra must have realised that the Commission, about to convene in regular session in only four weeks time, would likely have established a new country mandate to monitor the human rights situation in Nepal. To avert this politically undesirable outcome, the King instead accepted the offer of the UN Office of the High Commissioner to deploy a UN human rights field presence to Nepal to monitor the situation first hand and provide technical assistance and advisory services – a far less confrontational process.[13]

9 *See* Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission resolution 1992/S-1/1 of 14 August 1992 and E/CN.4/1992/S-1/9 of 28 August 1992.

10 *See* Report of the UN Security Council's Commission of Experts on Rwanda, S/1994/1405 of 9 December 1994, p. 16, which refers to consultations with the Commission's Special Rapporteur on Rwanda.

11 *See* the Report of the Special Rapporteur on Torture (E/CN.4/1997/7), the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (E/CN.4/1997/60), the Working Group on Arbitrary Detention (E/CN.4/1997/4 and Add.1) and the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1997/34).

12 *See e.g.* the Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions on Her mission to the Sudan (E/CN.4/2005/7/Add.2), the Special Rapporteur on Violence against Women, Its Causes and Consequences, on her mission to the Darfur region of the Sudan (E/CN.4/2005/72/Add.5), among numerous others.

13 In an agreement between the UN High Commissioner on Human Rights and the government of Nepal, signed 10 April 2005, the government accepts the establishment of a human rights office in Nepal "to assist the Nepalese authorities in developing policies and programmes for the promotion and protection of human rights, to monitor the situation of human rights and observance of international humanitarian law, including investigation and verification nationwide through international human rights officers and the establishment of field-based offices staffed with international personnel, to report in accordance with the Agreement and

If the Commission was so effective, then why did UN Member States decide to replace it with the Council? Part of the reason is that the Commission was a victim of its own success. The Commission's broader focus inevitably diluted its examination of more urgent issues and arguably weakened its power to take effective action. The growth in the number of Commission mandates on an *ad hoc* basis also brought about a certain measure of overlap which did not help matters. Perhaps even worse, the Commission workload had increased substantially during the 1990s while the Secretariat responsible for servicing the Commission and its mandate-holders were given inadequate additional resources to match it. By the end of the 1990s, Commission mandate-holders were heard regularly complaining about the poor quality of Secretariat administrative, technical and research support. In short, individual Commission mandates succeeded in spotlighting particular human rights problems, but the special procedures *system* had begun to crack and crumble under its own weight.

An even more serious set of problems had sprouted from what had always been a major strength of the Commission – its clearly political character. Having States as members, the Commission's resolutions were always backed with a certain level of diplomatic and political force, depending on the depth and breadth of intergovernmental solidarity at hand, to address the more obvious and urgent violations. During the 1980s and 1990s, Commission members managed to scrape together enough consensuses to establish many important country and thematic mandates to address particularly pressing human rights situations. While raw political self-interests and alliances have always played an important role in Commission member voting, politicisation of the Commission seemed to degenerate more rapidly with the marked shift in the United States towards a heavily unilateralist foreign policy agenda. On 3 May 2001, for the first time in history, the United States lost its seat on the Commission as other States lined up against the Bush Administration's cavalier attitude to global warming, missile defence agreements and the issue of making anti-AIDS medications available to those who need them. Matters went from bad to worse in the aftermath of the 11 September 2001 terrorist attacks on the World Trade Center and Pentagon, reaching a low point with the 59th session of the Commission, held from 17 March to 27 April 2003. To begin with, on 19 March 2003, the Bush Administration launched Operation Iraqi Freedom without Security Council authorisation, ignoring the pleas of the UN Secretary-General, European Union as well as Canada and many other countries, showing blatant disregard for international law and world public opinion. In so doing, the Bush Administration marginalised the UN and worsened the prospects for international dialogue inside and outside the Commission. Indeed, a proposal to have a special debate on the situation in Iraq pitted the US, Europe, Australia, Canada and certain Latin American countries against many Islamic countries, Cuba and China, but was narrowly defeated. Despite its very poor human rights record, Libya was elected to chair the Commission, starkly revealing the Commission's thoroughly politicised character. The human rights NGO Reporters without Borders scattered leaflets during the opening of the Commission, proclaiming:

> What credibility will remain for a body headed by the representative of a country that abuses human rights every day. By putting Libya at the helm, the Commission shows that it is ready to cover up the brutalities of some of its members through dirty deals.[14]

For its unruly protests, Reporters without Borders was barred from the Commission for one year as from 24 July 2003. A few days before the 2003 Commission session closed, the Secretary-General lamented that

> [t]his is a time when your mission to promote and protect human rights in the widest sense is more important than ever, your responsibility to act more urgent. And yet, divisions and disputes in recent months have made your voice not stronger, but weaker; your voice in the great debates about human rights more muffled, not clearer.[15]

Two years later, in addressing the opening of the Commission session in March 2005, the Secretary-General complained 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.[16]

He went on to propose that

> Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council ... The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member States should determine the composition of the Council and the term of office of its members. Those elected to the Council should undertake to abide by the highest human rights standards.[17]

If we step back and look at the entire lifespan of special procedures under the Commission, we can see that at some point during the 1990s they had become recognisable in their organic totality as a system that seemed to take on a life of its own, despite the fact that these monitoring mechanisms were never created as an integrated body from the outset. As discussed above, each new special procedure was created *ad hoc* and sort of stitched on to the rest. Perhaps it was always inevitable that the Commission's

to work in cooperation with other United Nations and other international organizations based in Nepal in this regard".

14 *See* J.-C. Buhrer, *UN Commission on Human Rights Loses All Credibility: Wheeling and Dealing, Incompetence and "Non-Action" – Reporters Without Borders Calls for Drastic Overhaul of How the Commission Works*, report of Reporters without Borders of July 2003.

15 K. Annan, *UN Secretary-General to Commission on Human Rights: We Must Hope a New Era of Human Rights in Iraq Will Begin Now*, Statement of 24 April 2003, Geneva.

16 Secretary General's Report on UN Reform, *In Larger Freedom*, 21 March 2005.

17 *Ibid.*

bold, beautiful and well-intentioned experiment to monitor serious human rights violations eventually ended up like Dr. Frankenstein's monster: 1) enormous; 2) out of control; 3) both fascinating and hideous to look at; and, above all, 4) more feared than loved by its creator. All the same, the special procedures system had established itself as the world's most visible human rights forum and it could not be killed off just like that. So on 15 March 2006, the General Assembly established the Human Rights Council to replace the Commission. By doing so, the Assembly hoped that the Council would provide stricter control as foster parent over the special procedures monstrosity in the best interests of the international community at large. The Commission held its final session on 27 March 2006, and in accordance with the Assembly's request, ECOSOC formally dissolved the Commission on 16 June 2006.[18] The new Council held its first meeting on 19 June 2006.

How does the UN Human Rights Council differ from the UN Commission on Human Rights?

At first glance, nothing has changed in the transition from Commission to Council. The Council meets in Geneva, it is attended more or less by the same coterie of State delegates and representatives of international organisations and NGOs, and it talks about the same kinds of issues. Perhaps the most fundamental aspect that remains unchanged between Commission and Council is the overtly political character governing the process to establish special procedure mandates. Like the Commission, the Council's membership is open to all UN Member States, Council membership has to reflect the UN principle of equitable geographic distribution and the members decide by majority voting which country should be subject of country mandate review.[19] As with the Commission, the Council embraces civil, political, economic, social and cultural rights, including the right to development.

There are some important differences, however, between the Commission and Council in terms of the formal criteria for membership. Unlike the Commission, which was a functional commission of ECOSOC, the Council has been constituted as a subsidiary body under the General Assembly and as such it operates directly under the Assembly's auspices, commanding higher institutional profile within the UN system than did the Commission. Whereas the Commission's membership was determined by majority voting in ECOSOC (which has only 54 Member States), Council membership is determined by majority vote of the entire General Assembly present and voting (which stood at 192 at the time of writing). Thus, Council membership requires a broader base of political support than that which had been required in respect of the Commission. The Council is also marginally smaller than the Commission, with 47 Member States instead of 53. To ensure greater equity in representation, Council members are not eligible for re-election after holding Council membership for two consecutive terms.

18 UN General Assembly resolution A/Res/60/251, adopted 15 March 2006.

19 Council membership has been allocated according to the following regional groupings: African Group (13); Asian Group (13); Eastern European Group (6); Latin American and Caribbean Group (8) and Western European and Others Group (7).

As per paragraphs 8 and 9 of resolution 60/251, the General Assembly decided that

> when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights ...

and that

> members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership.

Thus, important new conditions have been introduced as regards Council membership. In voting for States seeking membership in the Council, consideration has to be accorded to the degree to which the candidate State has contributed to human rights promotion and protection, and once elected Council members have to cooperate with the Council such as through the submission of voluntary pledges to uphold the highest human rights standards.

How will the quality of commitment to human rights and cooperation with the Council be assessed? The new Council arrangements envisage a universal periodic review system to ensure that Council Members fulfil their membership responsibilities. On 18 June 2007, in line with resolution 60/251, the Council adopted resolution 5/1, with an annex entitled "Institution-Building of the Human Rights Council" that sets forth the universal periodic review procedures. Part C of the annex establishes that the order of review "should reflect the principles of universality and equal treatment" and that "[a]ll member States of the Council shall be reviewed during their term of membership". The initial members of the Council have to be reviewed first, to be followed with a mixture of Council Member States and Observer States, while ensuring an equitable geographic distribution of countries under review. Paragraph 12 indicates that the first States to be reviewed will be done with the drawing of lots from each regional grouping, and then alphabetic order will be applied, "unless other countries volunteer to be reviewed". The reviews are to be done in cycles of four years, which implies, as stated in paragraph 14, that "48 States have to be reviewed per year during three sessions of the working group of two weeks each" (because there are currently 192 Member States of the UN). The resolution's annex also specifies the documentation upon which the review shall be based, and the workings of the process itself, which basically involves three main phases. First, the review is carried out in a working group composed of the President of the Council and the 47 Council Member States by a *troika*. The *troika* consists of individuals, who could come from member State delegations or be experts nominated by the State under review, and a different *troika* is formed for each State review. For example, the *troika* in respect of Bahrain – the first country to have been considered under the review system – was formed from one rapporteur each from Slovenia, United Kingdom and Sri Lanka. The rapporteurs in respect of Ecuador, the next country on the list, were drawn from

Italy, Mexico and India, and in respect of Tunisia, from Bosnia-Herzegovina, Mauritius and China. Observer States are entitled to participate in the review itself and during the interactive dialogue, while "other relevant stakeholders may attend the review" (paragraph 18(c)). This part of the process culminates in the development of an "outcome document" that summarises recommendations made by States in respect of the State under review, including the reviewed State's own observations. Second, the outcome document is placed before the Working Group for adoption within two weeks, but not before 48 hours has elapsed since the carrying out of the review phase, so as to afford the State under review sufficient time to prepare an adequate response. In the final phase, the outcome document is placed before a plenary session of the Council which accords the State under review 20 minutes to reply to issues raised during the review process, 20 minutes to member and observer States to comment on the outcome document, and a further 20 minutes for NGOs and other "stakeholders" such as national human rights institutions to add their comments before the Council considers whether to adopt the document by resolution. It is then up to the State to implement the recommendations over the next four years until such time as it is placed under the next review.

The Commission used to meet annually in regular session from mid-March to the end of April, and in special sessions that were convened from time to time to address urgent situations. In contrast, the Council has to hold no fewer than three sessions per year in Geneva, for a total duration of not less than ten weeks annually. Where a Council member so requests and at least one-third of the Council membership agrees, a special session can be convened. Thus, the duration of regular session times has been stretched from six weeks to ten per year, and the timing of sessions has been made more flexible to enable closer review of urgent human rights situations as they may arise.

What effect, if any, will the UN Human Rights Council have on special procedures?

Will special procedures work better or worse under the Council than they did under the Commission?

At this early stage in the life of the Council, any answer to the above question must remain tentative and speculative. At the time of writing, the Council was due to consider what should be done with the country and thematic mandates that the Commission bequeathed to it. To avoid unnecessary disruption in the operation of the special procedures system, all existing Commission mandates were provisionally continued to operate under the aegis of the Council. Despite the current uncertainty, it is nonetheless worthwhile considering the kinds of factors that could affect the quality of special procedures monitoring and reporting.

Under the Council, special procedures could become more effective if the new qualifications required of State membership in the Council were to be properly implemented. After all, membership has been made conditional upon a State's respect for human rights, which shall be assessed by the universal periodic review discussed above. Evidently, the future quality of special procedures is likely to be determined by how pertinent, precise and perspicacious the universal periodic review will be, and by the degree to which Council members find themselves politically able to use it as a consideration in the election of members to the Council, and as regards suspension of an existing member. Were the universal periodic review to end up being little more than a polite nod of approval to almost any State rather than as a thoroughgoing exercise to appraise the balance of a State's human rights and wrongs, then the important condition that Council members shall uphold the highest standards of human rights promotion and protection could be rendered virtually irrelevant. If, on the other hand, the universal periodic review of Council members were to be carried out in a critical yet balanced, fair and relatively objective way, then quite possibly the review could play its intended role. More important in the assessment of a State's commitment to human rights promotion and protection should be the government's willingness to improve its human rights practices and its demonstrated efforts to do so, rather than its actual ability to repair human rights violations. There are obvious differences among countries as regards objective conditions such as wealth, size of population, political stability, relations with neighbouring countries and other factors that affect the efficacy of the State's executive, legislative and judicial functions and ultimately the degree to which the government can realistically address human rights issues over a given period of time. The point of the Council, however, is not to produce a club of countries that already enjoys the highest human rights standards. Rather, the Council has to be a means by which to encourage and enable every State to make its own best efforts, using all available means at its disposal and working in close cooperation with the international community at large, to make genuine improvements in the promotion and protection of human rights in the sense of Article 56 of the Charter of the United Nations.[20]

Ultimately, the Council remains a political body made up of States. A brief look at the first few sessions of the Council indicates how difficult it will be for States to rise above base political motives and self-interest. Whereas the final session of the Commission at the time of its dissolution counted among its members a number of States whose governments showed weak political will to improve human rights promotion and protection in their jurisdictions, arguably the Council's membership has improved marginally. Interestingly, the United States withdrew its candidature for membership in the new Council, probably fearing the prospect of a politically humiliating defeat over its illegal invasion of Iraq or its seemingly systematic maltreatment of terrorist suspects and their irregular rendition to third States for interrogation that amounted to torture.

On 30 June 2006, Tunisia, on behalf of the Group of Arab States requested that a special Council session be convened to address Israeli military action in the Occupied Palestinian Territory. The special session of the Council was called for by 21 Council Member States and comprised two meetings. Council S-1/1 entitled "Human rights situation in the Occupied Palestinian Territory" expresses deep concern over Israel's breaches of "international humanitarian law and human rights law in the Occupied Palestinian Territory, including the arbitrary arrest of Palestinian ministers, members

20 Article 56 of the Charter of the United Nations declares that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". Article 55(c) obliges the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

of the Palestinian Legislative Council and other officials, as well as the arbitrary arrest of other civilians, the military attacks against Palestinian ministries, including the office of the Premier, and the destruction of Palestinian infrastructure, including water networks, power plants and bridges". The Council also decided to send an urgent fact-finding mission headed by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, and called for a negotiated solution to the crisis. Despite the resolution's focus on the dire humanitarian situation of the Palestinian people under Israeli occupation, there emerged a disturbingly clear and familiar political cleavage with Arab and Latin American Council Member States together with Bangladesh, China, India, Pakistan, the Philippines, Russia, Sri Lanka and African Member States all voting in favour of the resolution, while Canada, Czech Republic, Finland, France, Germany, Japan, The Netherlands, Poland, Romania, Ukraine and the UK (all European Council Member States plus Canada and Japan) voted against. Cameroon, Mexico, Nigeria, South Korea and Switzerland abstained. Council Member States stuck more or less to the same voting pattern as the Council convened for its second special session, this time over Israeli action that violated the territorial sovereignty of Lebanon, causing thousands of deaths and injuries. The resolution condemned Israeli military operations in Lebanon, qualifying them as "gross and systematic human rights violations of the Lebanese people" and denounced the indiscriminate and massive air strikes on the village of Qana where Israeli forces tried to eliminate Hezbollah operatives. Had there been genuine concern for the terrible human rights situation of the Palestinians in Israeli occupied territory and of the Lebanese people whose suffering was produced in an obvious and direct way by what seemed to be an ill-considered and gross overreaction on the part of the Israeli government and military to the abduction of two of its soldiers, one might reasonably have expected nothing short of unanimous support for the resolution. Instead, the countries voting against and abstaining found other reasons not to support the resolution, seemingly placing humanitarian and human rights needs second to other considerations.

In case the casual observer was tempted to laud the high-minded concern of Arab, Latin American and African States over Israeli's belligerent actions in Palestine and Lebanon, while Western States dithered, the situation was precisely reversed over the question of gross and systematic violations being perpetrated in the Darfur region of Sudan where thousands had been raped and murdered by Janjaweed militia, with the seeming acquiescence or complicity of the government of Sudan. Shamefully, not a single Arab, Latin American or African country could bring itself to co-sponsor a draft resolution that expressed its grave concern over the seriousness of the human rights and humanitarian situation in Darfur, called for an immediate end to the ongoing violations and urged all parties to ensure an end to impunity.[21]

Early meetings of the Council seemed to prove the pessimists right and the optimists wrong: no government seemed capable of putting concern for human rights completely above its own political interests, alliances and biases. If this situation does not change, it is difficult to imagine the Council radically improving the special procedures system of international human rights monitoring, reporting and follow up, whose legitimacy

21 *See* A/HRC/S-4/L.1, 4 December 2006, on the human rights situation in Darfur.

and efficacy depend upon the independence, impartiality and objectivity not only of mandate-holders but also of the manner in which mandates are established and countries selected for examination. On the other hand, it has become increasingly clear that human security, and ultimately the legitimacy, stability and security of governments that remain responsible to ensure it, depend upon the quality of democratic governance, human rights and the rule of law at home and abroad. If governments were again to realise, as they did in the immediate aftermath of World War Two, that their own political interests to ensure human security in fact coincide with their obligations under international law to promote and protect all human rights for all, then they might take more serious steps to strengthen UN human rights special procedures.