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ABBREVIATIONS

AI	Amnesty International
CHR	Commission on Human Rights
ECOSOC	Economic and Social Council
GONGOS	Governmental organized NGOs
HLS	High Level Segment
IAD	Inter-Active Dialogue
LMG	Like-Minded Group
NGOs	Non-Governmental Organizations
OIC	Organization of the Islamic Conference
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights

As I make these representations to you, I am conscious that you are a Commission of principle, of pragmatism and of politics. I am conscious that you will approach your work needing to strike balances. I am conscious that in a political arena, sometimes one has to contend with political factors. I make no comment about this. However, at the end of the day the task of this Commission is to uphold the international human rights norms – many of which the Commission helped to draft. I believe that this is a decisive yardstick for the Commission in each instance namely: is it acting to uphold the international human rights norms.

[…]

Among the great principles that guide us in the conduct of human affairs, the principle of justice is without a doubt a preeminent one. It is at the heart of the human rights idea. This Commission on Human Rights was established to be a temple of justice and human rights. On the occasion of your 60th session, allow me to express the hope that you will be inspired by the principles of justice and of human rights.

The peoples of the United Nations in whose name you act look to you to make our world a world of universal respect for human rights not only on paper or in protestations, but in actual practice.

Address of Bertrand G. Ramcharam, Acting High Commissioner for Human Rights at the opening of the 60th session of the Commission on Human Rights Geneva, 15 March 2004.

INTRODUCTION

Since its creation, the promotion and protection of human rights has always stood out as one of the principal mandates of the United Nations (UN). In his 1997 report on "Renewing the United Nations: a programme for reform", the UN Secretary-General identified human rights as a cross cutting issue which should be integrated throughout the main structures of the Secretariat's work programme.[1] The Millennium Declaration adopted by all 189 Member States of the UN, on 8 September 2000, affirmed the continuing centrality of that mission: "We will spare no effort to promote […] respect for all internationally recognized human rights and fundamental freedoms".[2] The importance and relevance of this core mission for the work of the United Nations was further highlighted in the Secretary-General's 2002 report on "Strengthening the United Nations: an agenda for further change": "The promotion and protection of human rights is a bedrock requirement for the realization of the Charter's vision of a just and peaceful world".[3]

The UN Charter is the first international treaty whose aims are expressly based on universal respect for human rights. Although the term "human rights" appears in scattered places in the UN Charter[4], there can be no argument that human rights are at the centre of the UN system. The UN exists "to reaffirm faith in fundamental human rights, in the dignity and

[1] UN Secretary-General, *Renewing the United Nations: a programme for reform*, UN Doc A/51/950 (1997), Part One: Overview, paragraph 78.

[2] UN Doc A/55/2 (2000), part V paragraph 24.

[3] UN Secretary-General, *Strengthening of the United Nations: an agenda for further change*, UN Doc A/57/387 (2002), paragraph 45.

[4] The term "human rights" appears in the following key important provisions of the UN Charter : paragraph 2 of the Preamble, Article 1(3), Article 13(1)(b), Articles 55 and 56, Article 62(2), Article 68, and Article 76(c). See: Cot, Jean-Pierre and Alain Pellet (eds.), *La Charte des Nations Unies*, Paris, Economica/Bruylant, 1985, pp. 12-16; Petrenko, A., "The Human Rights Provisions of the United Nations Charter", (1978) 9 *Man. L.J.* 53; Schwelb, Egon, "The International Court of Justice and the Human Rights Clauses of the Charter", (1972) 66 *A.J.I.L.* 336.

worth of the human person, in the equal rights of men and women and of nations large and small". Article 1 of the Charter identifies four explicit "purposes" for the UN, the third of these "purposes" is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[5] There is further elaboration of this central purpose in Article 55 which, written in imperative terms, obliges the UN to act in such ways as to promote "universal respect for, and observance of, human rights and fundamental freedoms".[6] To enable it to fulfil that mission, the Charter gives the UN three powers and methods: "study", "examination" and "recommendation".[7] Over the years, these powers and methods have enabled the UN, in particular, to recommend to States the ratification of international human rights treaties. To further underline its seriousness with human rights, the UN asked the Economic and Social Council (ECOSOC) to "set up commissions"[8], including those "for the promotion of human rights".[9] Furthermore, under Article 56 of the Charter, States are given the duty to "take joint and separate action in cooperation with the Organization for the achievement of the purposes [including respect for human rights] set forth in Article 55".

The centrality of the human rights mission of the UN system is further reaffirmed with the *Universal Declaration of Human Rights*[10], adopted by the General Assembly on 10 December 1948. Expressing "a common standard of achievement for all peoples and all nations", the Universal Declaration recognizes that "everyone is entitled to a social and international order in which the rights and freedoms set forth [in the Declaration] can be fully realized".[11]

Original mandate of the Commission on Human Rights and its main functions

The UN Commission on Human Rights (hereinafter: the Commission) is the UN's primary body for discussions and standard setting exercises on

[5] Article 1(3), UN Charter.

[6] Article 55(c), UN Charter.

[7] See Articles 13, 60, 62, 76 and 87, UN Charter.

[8] Article 68, UN Charter.

[9] *Id.*

[10] GA res. 217A (III) (10 December 1948).

[11] *Id.*, Article 28.

international human rights issues. It is a functional commission of the UN Economic and Social Council (ECOSOC). The Commission on Human Rights was established by ECOSOC resolution 5 (I) of 16 February 1946. By that resolution (as amended by Council resolution 9 (II) of 21 June 1946), the Commission was mandated to submit proposals, recommendations and reports to ECOSOC [12] 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; (e) any other matter concerning human rights not covered by the other items.

The Commission was also expected to undertake special tasks assigned to it by ECOSOC – including the investigation of allegations concerning violations of human rights – and to "make studies and recommendations and provide information and other services at the request of ECOSOC" (Council Res. 5 (I), sect. A, para. 3). In May 1979, ECOSOC added the following provisions to the terms of reference of the Commission: "The Commission shall assist the ECOSOC in the coordination of activities concerning human rights in the UN system".

Despite its original mandate to deal with "any matter concerning human rights", the Commission was initially reluctant to address this issue. In its first twenty years, the Commission maintained that "it had no power to take any action in regard to any complaints concerning human rights".[13] The development of international human rights norms was almost the sole function of the Commission during this period. This very restrictive position was finally abandoned when ECOSOC adopted what eventually turned out to be two separate procedures: the public procedure under Resolution 1235 (XLII) in 1967 and the confidential procedure under Resolution 1503 (XLVIII) in 1970.[14] Since then, the Commission's activities have

[12] See E/RES/5 (I) (16 February 1946) and E/RES/9 (II) (21 June 1946).

[13] See Commission on Human Rights, Report on the 1st session (27 January – 10 February 1947), Chap. V, para. 21-22.

[14] The Commission devotes much time to monitoring the implementation of the standards it has set. In order to do so, besides the special procedures, it may turn to two permanent procedures: the 1503 Procedure and 1235 Procedure.

The 1503 Procedure is a confidential procedure named after ECOSCO Resolution 1503 by which it was established. It is activated when the Commission receives a communication or complaint about a consistent pattern of gross human rights violations. Violations considered under this procedure include genocide, apartheid, racial or ethnic discrimination, torture, forced mass migrations and mass imprisonment without a trial. Any person, group or NGO may invoke the procedure if they have reliable knowledge of such human rights violations. Once they have submitted their communications, the originators do not become involved at any stage in the implementation of the process and each stage is progressed in confidential sessions.

A Working Group on Communications designated by the Sub-Commission on the Promotion and Protection of Human Rights meets annually immediately after the Sub-Commission session to examine communications. Where the Working Group on Communica-

expanded to cover, in various degrees, all five aspects of its original mandate. Today, one of the main tasks of the Commission is to respond to violations of human rights and provide a degree of protection for victims.

The mandate and functions of the Commission helps to underline the extent to which it was supposed to be a technical, rather than political body. However, the Commission has never purported to be other than a political body in which decisions are made on political lines. In this respect, the Commission is as much a political body as the ECOSOC, the Security Council and the General Assembly. Despite this reality, demands that the Commission should "de-politicize" its deliberations continue to come from all sides.

The Commission's single most important characteristic is that it is composed of government representatives. Proposals made in 1946 to the effect that it should consist of independent experts were decisively rejected by the ECOSOC. The Commission is an inter-governmental body composed of the representatives of 53 governments elected for three-year renewable terms by the UN Economic and Social Council (ECOSOC). Each year, one third of its membership is renewed. The composition of the Commission has changed radically since its creation in 1946. Membership expanded gradually from 18 in 1946, to 21 in 1962, 32 in 1967, 43 in 1980, and 53 in 1992. On each occasion the rationale has been to ensure a more equitable and geographical balance. The existing practice is the election of 53 members of the Commission by five regional groupings: Africa (15), Asia-Pacific (12), Latin American / Caribbean (11), Western Group (10), and Eastern Europe (5). Only India and the Russian Federation have had continuous membership since the Commission began its work in 1947, and only twice has a permanent member of the Security Council not also been a member of the Commission (UK in 1991 and the US in 2002). On the other hand, records show that only 123 of the UN's 191 State members

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tions identifies reasonable evidence of a consistent pattern of gross violations of human rights, the matter is referred to the Working Group on Situations. The Working Group on Situations meets before CHR, to examine the particular situations forwarded to it by the Working Group on Communications and decide whether or not to refer any of these situations to CHR. The report of consistent gross human rights violations to the Commission may not be an anonymous one, yet does not require the consent of the state concerned for an investigation to take place. This regulation gives the Commission great leeway in deciding how to best approach a situation. Following its investigation, the Commission then decides what action to take.

When a 1503 Procedure has failed to stop a human rights violation it has investigated, the CHR may invoke the 1235 Procedure under which it can hold an annual public debate about the gross violations of human rights in question. Governments and NGOs can identify publicly those country-specific situations that they consider to merit CHR's attention. If this also fails to adequately affect the situation, the Commission may move to have ECOSOC pass a resolution condemning the violators. This public condemnation tarnishes the reputation of the leaders in the state in question and discredits their legitimacy as political elites. The procedure also mandates CHR to study and investigate particular situations or individual cases through the use of whatever techniques the Commission deems appropriate.

have ever been members of the Commission and several of them served only one term.

The Commission has made an important contribution to the promotion and protection of human rights through the elaboration of international human rights treaties and the development of special procedures to examine specific country situations and thematic concerns. While the Commission still plays a critical role, there is a widespread feeling among many that the Commission has not been able to keep pace with the sweeping changes that have occurred in recent years around the world. As a result, the Commission is widely criticized. The very body set up to police human rights violations has failed to condemn or to scrutinize countries committing gross human rights violations. The annual six-week sessions of the Commission have degenerated into an adversarial exercise in which progress in the protection and promotion of human rights appears to have become a secondary interest. The Commission is becoming a forum for defending government records, rather than examining them.

These dynamics raise the following questions:

Why, despite multitude of treaties, programmes and mechanisms, the UN human rights system is struggling to realize the human rights it enshrines? Why has the Commission not yet found a coherent way to respond to abuses and violations of human rights despite the best efforts of thousands of dedicated individuals for over half a century? Is the Commission still able to serve as an instrument which can effectively address human rights violations worldwide and call on its Member States to fulfill their human rights obligation with the necessary authority? How can the Commission be re-designed in order to maintain its credibility, coherence and consistency so that it serves better the purposes for which it was originally intended?

The time has come to re-think – even to re-invent and re-imagine – the structure and working methods of the Commission to effectively address new and complex situations that make it more and more difficult for the Commission to fulfil its principal duty to monitor, promote and protect human rights. The adoption, on the last day of the 58th Commission on Human Rights, of Resolution 2002/91 aimed at enhancing "the effectiveness of the working methods of the Commission" re-opened Pandora's box. The Commission's moral authority and credibility can be redeemed through a systematic and substantive strengthening of the institution and a return to its democratic ideals and human rights principles. The guiding principle for addressing these tasks should —at least in theory— be to

make the system more effective and to ensure its capacity to better fulfil its original mandate and functions. This is in conformity with the priority placed on reform by the World Conference on Human Rights in 1993, which underlined "the importance of preserving and strengthening the system of special procedures" and specified that "the procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings".[15]

[15] See *Vienna Declaration and Programme of Action*, A/CONF.157/24 (25 June 1993), at Section II.A paragraph 95.

ASSESSMENT ON PROGRESS OF THE REFORM PROCESS

Early Attempts

Since its creation over 56 years ago, the Commission on Human Rights has undergone a profound transformation in terms of its role and functions. There have been a fair amount of discussions and attempts to reform the Commission. Prior to the current process of reform which began in 1998, there have been at least four major efforts at expanding the Commission's functions.[16] The first was in the 1950's when the United States was anxious to stop or down play the Commission's evolving standard-setting function. This reform phase produced the Advisory Service Programme, the periodic reporting system and the seminar programme. The second was between 1967-1978 in the wake of the decolonisation process. This phase increased the membership of the Commission to 32, and lead to the adoption of the 1235 and 1503 procedures and a much more effective focus on racism and colonialism. The third phase was between 1977-1986 when a major effort was made by Third World States to make the Commission more attuned to structural and economic factors underlying human rights violations and to identify an unjust international economic order. A package of reforms was discussed at each session of the Commission from 1978 onwards. The principal outcome of this reform phase was the 1979 expansion of the Commission's membership to 43, the extension of the Commission's annual session to six weeks, and formal recognition

[16] See Philip Alston, "The Commission on Human Rights", in Philip Alston, *The United Nations and Human Rights – A Critical Appraisal*, Oxford,1992, pp. 197-200.

of the Commission's role in assisting ECOSOC to co-ordinate all human rights activities.[17]

The fourth phase was in 1989 with the Non-Aligned Group wanting additional representation on the Commission and on other bodies. This phase was characterized by political confrontations. The Western group tried to link the proposed enlargement with a number of specific reform proposals for "enhancement" of the Commission's effectiveness. The Non-Aligned group responded with its own definition of "enhancement" by presenting a radical package of reforms (drafted by India and Pakistan) which included proposals that: the Commission's approach should be "constructive and remedial" and that "judgement, selective or inquisitorial approaches" should be eschewed; reforms should involve no additional financial or personnel costs; time for debate allocated to each item should reflect the importance accorder to it by the international community; all thematic procedures should be undertaken by five-member Working Groups composed in part of Geneva-based diplomats rather than by individual Special Rapporteurs; country rapporteurs were to be chosen "from amongst individuals commanding a thorough knowledge and familiarity of the specificities and complexities of the country in question"; the Sub-Commission should no-longer adopt any resolutions and neither concern itself with violations of human rights; all communications should be dealt with solely under the 1503 procedure and not by thematic rapporteurs; and the role of NGOs should be restricted[18]. This package has been described by some as being "aimed at eviscerating serious Commission scrutiny of violations".[19]

Unable to resolve the competing proposals, the Commission referred the matter to ECOSOC which adopted a package approving enlargement of the Commission membership to 53, while at the same time accepting many Western proposals, including: authorization for emergency special sessions of the Commission, three-year mandates for all thematic rapporteurs, and a week-long meeting of the Commission's Bureau to explore organizational reforms.[20]

[17] ECOSOC Res.1979/36.

[18] See Alston, op. cit., note 16, pp. 198-199.

[19] R. Brody, P. Parker and W. Weissbrodt, "Major Developments in 1990 at the UN Commission on Human Rights", 1990, 12 *Human Rights Quarterly* 559-590, at 563.

[20] ECOSOC Res.1990/48.

The Latest Review Process

The current review of the work of the Commission, initiated at the close of the 58th session in 2002, follows a more recent reform phase undertaken in 1998 by the Bureau of the 54th session. This reform produced a number of detailed and forceful observations and recommendations aimed at "enhancing the capacity of the UN to promote and protect internationally recognized human rights and contribute to the prevention of their violation"[21], and recognized the need for substantive change. Before looking at some proposals for the current reform of the Commission, it is therefore important to briefly look at what happened to the 1998-2000 reform process.

The Report of the 1998 Bureau presented at the 55th session of the Commission, in 1999, produced a number of observations, proposals and recommendations on: the special procedures, the 1503 procedure, the Sub-Commission and standard-setting working groups of the Commission. This report – which was prepared after extensive consultations with both governments and NGOs – proposed the rationalization and the strengthening of the special procedures of the Commission by merging certain mandates, terminating and transforming others. The Bureau's report also made recommendations with regard to appointments and approvals to special procedures posts, duration of mandates, preparation and circulation of reports and the creation of an interactive dialogue for presentation and discussion of reports. The report also recommended reducing the number of Sub-Commission members to 15, with a four-year mandate, renewable once, reducing the annual session to two weeks and changing its name to "Sub-Commission on the Promotion and Protection of Human Rights".

The Bureau's report was, on the one hand, broadly supported by the Western Group committed to enhancing the capacity of the UN to promote and protect internationally recognized human rights, and on the other hand, largely rejected by the Asian Group and the Like-Minded Group (LMG) who put forward their own positions.[22] In the end, no consensus was reached on the recommendations proposed by the Bureau. The depth of the division in the Commission over the Bureau's report and

[21] *Report of the Bureau of the fifty-fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112*, E/CN.4/1999/104 (23 December 1999) [hereinafter: Report of the 1998 Bureau].

[22] A position paper represented the views of the Asian Group (E/CN.4/1999/124) and the comments, observations and alternatives recommendations of a group of 14 countries, the LMG: Algeria, Bhutan, Burma, China, Cuba, Egypt, India, Iran, Malaysia, Nepal, Pakistan, Sri Lanka, Sudan and Viet Nam (E/CN.4/1999/120).

the issue of reform led to the adoption of a weak statement by the Chair in which only a small number of recommendations were accepted (e.g., the name of the Sub-Commission, the tenure of mandate holders).[23] Further consideration of the observations and recommendations of the Bureau's report were passed on to an inter-sessional Working Group.

The Report of the inter-sessional Working Group[24] was considered at the 56th session of the Commission in 2000. It provided information on: the Commission's network of special procedures, urgent responses; consideration of reports; follow-up between sessions; the 1503 procedure; the Sub-Commission; standard-setting; working methods of the Commission; and the OHCHR. The Working Group Report recognized the need to rationalize and strengthen the special procedure by a multi-pronged approach. It recommended criteria to apply when creating, merging or terminating mandates. It also recommended steps to improve quality of dialogue on the reports of rapporteurs at the Commission sessions. Procedure 1503 was simplified. The report, however, had the most negative effects on the mandate of the Sub-Commission: while it recommended that the Sub-Commission should continue to debate country situations not being dealt by the Commission, and also be allowed to discuss urgent matters involving serious violations of human rights in any country, it should not adopt country-specific resolutions and should refrain from negotiating and adopting thematic resolutions that contain references to specific countries. In its Decision 2000/109, the Commission decided to "approve and implement comprehensively and in its entirety the report of the inter-sessional open-ended Working Group on enhancing the effectiveness of the mechanisms of the Commission".[25]

The original goal of the 1998-2000 review to strengthen the UN human rights system was overlooked in the course of these political negotiations. The Commission's agenda was changed to deal with the specific issues of women, indigenous peoples and other vulnerable groups. The rotation of special procedures every 6 years was implemented, and we saw the creation of an "Expanded Bureau" of the Commission. It is made up of the Chair, three Vice-Chairs, the Rapporteur and the five Coordinators of the regional groups. However, this reform process was fuelled more by confrontation than rational debate. While the discussions conducted in the in-

[23] Statement by the Chairperson, 28 April 1999, see OHCHR/STM/99/5.

[24] *Report of the inter-sessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, E/CN.4/2000/112 (16 February 2000).

[25] Decision 2000/109 on "Enhancing the effectiveness of the mechanism of the Commission on Human Rights".

ter-sessional process may have given the impression that consensus was achieved, in the end, it brought limited improvements. The reform did not go far enough in addressing the very serious challenges facing the UN human rights system. The few changes mandated slightly improved the efficiency or effectiveness of the Commission, but in most cases damage was simply contained. Some recommendations have been implement but, all in all, most of the observations, proposals and recommendations presented in the Report of the 1998 Bureau still remain to be addressed.

The current discussion on the reform of the Commission has been triggered by the Commission's resolution 2002/91 entitled "Enhancement of the effectiveness of the working methods of the Commission". Under this controversial resolution, introduced by Cuba (36 States in favour and 17 abstentions), the Commission decided to initiate its 59th session, in 2003, a thorough review of its working methods. In particular, the resolution called on the Commission to consider a "non-exhaustive" list of issues under item 20: duration of the annual session; periodicity of the consideration of items; the documentation considered by the Commission including those submitted by NGOs; the organization of the work during the annual session including time management of delegates' intervention; the oral presentation of the special procedures reports; and the organization of parallel events. The resolution further requested the Expanded Bureau of the 58th session to submit at the 59th session ideas and proposals on procedures to consider this topic.

The response of the Expanded Bureau of the 58th session to this request is contained in document E/CN.4/2003/118.[26] This document, endorsed by the 59th session of the Commission[27], provides a list of recommendations on such issues as the duration of the annual session, the periodicity of the consideration of agenda items and the adoption of resolutions, the documentation considered by the Commission, the role of the Expanded Bureau and the organization of the work during the session including speaking time limits. The document also suggests that further discussion be incurred on issues such as the biennial or triennial consideration of thematic resolutions and the usefulness of convening a special debate. Like the previous process, the report of the 58th Bureau sets the limits on the

[26] "Enhancement of the working methods of the Commission: Reform of the working methods of the Commission on Human Rights with a view to strengthening the promotion and protection roles of the Commission: report containing a set of recommendations addressed by the Expanded Bureau of the fifty-eighth session to the Expanded Bureau of the fifty-ninth session of the Commission on Human Rights, submitted pursuant to Commission decision 2002/115 – Note by the secretariat", E/CN.4/2003/118 and Corr.1 (14 February 2003).

[27] Decision 2003/101 of the Commission.

Commission's reform by specifying that "any decision on working methods should be adopted by consensus".

As part of the on-going process of reform that began in 1998, the Commission on Human Rights continued to re-examine and fine-tune its working methods during the 60th session held in 2004. Under both agenda item 3 (organization of the work of the Commission) and agenda item 20 (rationalization of the work of the Commission), the Commission considered steps which could be recommended to the Extended Bureau of the 60th session in order to improve further organization of the work of the Commission. A note by the Secretariat containing a compilation of views from Member States, regional groups and NGOs, on enhancing the effectiveness of the working methods of the Commission was presented.[28] The Secretariat also transmitted a report containing recommendations on the improvement of the organization of the work of the Commission. Like previous documents, the recommendations contained in this report pertained to time management: rights of reply; fine-tuning the High-Level Segment; fine-tuning the interactive dialogues; issues relating to format, length and consideration of resolutions; national institutions; other issues relating to rules and practices of the Commission; and miscellaneous. [29] However, the reform proposals put forth by the Expanded Bureau in 2004 in this document received numerous objections. The required consensus could not be reached resulting in the non-endorsement of the recommendations in the plenary session. This situation led to some NGOs asking "where is the reform agenda?"[30]

[28] "Organization of the work of the session – Rationalization of the Work of the Commission – Compilation of views received by the Expanded Bureau in response to Commission decision 2003/116" – Note by the Secretariat, UN Doc. E/CN.4/2004/109 (12 January 2004).

[29] "Organization of the work of the session – Rationalization of the Work of the Commission – Improvement of the organization of the Commission" – Note by the Secretariat, UN Doc. E/CN.4/2004/110/Rev.1 (11 March 2004).

[30] See Amnesty International, UN Commission on Human Rights: Where is the reform agenda?, Press release, April 22, 2004 (AI Index: IOR 41/026/2004).

AREAS OF CONCERN FOR DEBATE AND DISCUSSION ON REFORM

Towards a More Constructive Approach to Country Situations

An important criteria or benchmark which is often used for judging the performance and achievements of the Commission is the extent to which it has succeeded in responding to specific violations of human rights and providing a degree of protection to actual and potential victims. As the main human rights body of the UN, the Commission is charged with promoting and protecting human rights violations wherever these occur. Yet, only a handful of countries are on the Commission's agenda despite ample evidence of gross and systematic human rights violations in many countries. The number of countries under scrutiny in the Commission has decreased in recent years. Since 1998, it is almost impossible to add new countries to the Commission's list of country-specific resolutions. In doing so, UN Member States are neglecting one of their basic legal commitments: the UN Charter which they ratified when they joined the organization and which contains principles and objectives with regard to human rights.

The current agenda of the Commission contains various items that take up country situations: item 3 which includes the report of the OHCHR on Colombia; item 5 on situations engaging the right of peoples to self-determination; item 8 on the occupied Arab territories; item 9 on country situations; and item 19 on advisory services and technical cooperation. To this list, we must add the 1503 procedure which is part of item 9 and is

undertaken as a confidential procedure to which only members of the Commission and the concerned country have access. The consideration of country situations at the Commission results either in the presentation of draft resolutions or draft Chairperson's statements.

The most severe slow-down imposed by States on the Commission and its special procedures has been the examination of country situations. The annual public debate on human rights abuses in countries – usually item 9 of the Commission's agenda – and the adoption of country-specific resolutions is one of the most contentious aspects of the Commission's work and is a source of agitation and division among Commission members. Agenda items 8 and 9 "lie at the heart of much of the acrimony that infests the Commission and the attempts by some States to reduce the effectiveness of, if not actually dismantle, the [UN human rights system]".[31] It is fair to say that the Commission's protection function is increasingly challenged by a number of States who would prefer the less confrontational promotion role be expanded.

In recent years, a strong and clear tendency to move away from country resolutions has been growing. Regional blocks, like the Asian and African Groups have been more and more vocal in their attempt to prevent country resolutions directed towards one of their neighbouring States. Although there is not yet a formal request to abolish agenda item 9, the Organization of the Islamic Conference (OIC), leading the opposition to country-specific resolutions, drew short of proposing the outright removal of item 9 during the 60th session.[32] These States are using the opportunity of general debate during items 3 and 4 and during the High Level Segment to contest the practicality and validity of item 9. They object to what they see as condemnation, as practices of "political blackmail", "finger-pointing", "confrontation" or "naming and shaming" by other States and NGOs, which they claim contributes to the politicization of the Commission and erodes its credibility. Instead, they promote the view that what is needed is "dialogue" and "technical cooperation" under item 19. The result is that States try to minimize the Commission's

[31] Ariane Brunet, Consultations on UNCHR Paper – *Getting Human Rights back on the Agenda: A Process in Steps*, 13 May 2003, p. 2 [unpublished].

[32] See Statement by H.E. Mr. Shaukat Umer, Ambassador and Permanent Representative of the Islamic Republic of Pakistan, on behalf of the member States of OIC on agenda item 9, Geneva, March 2004. Under this statement, the OIC maintained that Western States persists in misusing item 9 to target "Islamic and developing countries", whilst failing to acknowledge the concerns voiced by these countries. For the OIC, this "injustice" may soon lead to the complete removal of item 9 ("do away") "if its sole objective is pointing fingers rather than improvement of human rights through mutual cooperation and understanding".

human rights protection work and have it do more promotion, and therefore avoiding any effective examination of their human rights record. Moreover, States don't like to be put in the "hot seat" and are likely to attack the targeting of countries and the adoption of country-specific resolutions. Silence is the best friend of States who violate human rights. On the one hand, these States argue that public condemnations are counterproductive, but on the other they oppose decisions under the confidential procedure (1503 procedure). They claim that they need technical assistance and advisory services under item 19, but campaign to avoid resolutions under item 9.

Complaints of "selectivity" and "politicization" in the Commission are hardly new. The Commission is what States want it to be. Since it has always been a multilateral political body made up of States representatives defending their country's interest, the political nature of the Commission is not in question. What is at stake here is the use of the term "politicization" which does not represent an accurate description of the processes at play. As noted by the International Service for Human Rights, this practice would be better termed as "political capture or political highjacking of the Commission's agenda to defend their own interests".[33] The late High Commissioner for Human Rights, Sergio Vieira de Mello, was absolutely right when in his closing remarks to the 59th session he suggested that "the word 'politicization' and its variants be retired from active service". He also pointed out that:

> *Most of the people in this room work for governments or seek to affect the actions of governments. That is politics. For some to accuse others of being political is a bit like fish criticizing one another for being wet. The accusation hardly means anything anymore. It has become a way to express disapproval without saying what is really on our mind. The Commission could use with plainer speaking. This, rather than charges of politicization, will truly help us get beyond politics to the strengthening of human rights in all countries*.[34]

Fortunately, many NGOs and States refrain from indulging in such games, and believe that the value of critical country-specific resolutions

[33] International Service for Human Rights (ISHR), Commission on Human Rights, 60th session: Analytical Report of the 60th session – Geneva, 15 March to 23 April 2004, see the Overview of the 60th session, p. 1. Available at: www.ishr.ch/About%20UN/Reports%20and%20Analysis/CHR60/CHR60-Reports.htm

[34] Statement of the High Commissioner for Human Rights Sergio Vieira De Mello to the closing meeting of the fifty-ninth Session of the Commission on Human Rights on 25 April 2003.

tabled under item 9 are essential for the protection mandate of the Commission, its dignity and credibility. This is particularly true since the Commission has, as we have seen, silenced and disarmed its Sub-Commission which no longer has the right to decide on cases of severe human rights violations.[35]

Country situations should be dealt with through the adoption of resolutions. The purpose of a country-specific resolution is to draw attention to human rights violations, call for change in order to prevent future violations, and follow-up government implementation of the Commission's request. The credibility of the entire UN system is at stake here. If the Commission on Human Rights can no longer resolve a situation, then who can? Promotion is only one line of attack to weaken the Commission and the system generally. Whatever is done to increase the promotion function of the Commission, must not weaken its protection responsibilities. These two functions of the Commission will always be "uncomfortable bedfellows", some years one may predominate over the other. The tension is inherent. Former High Commissioner Mary Robinson, in her closing statement to the 58th session in 2002, had the courage to remind the Commission's member States of their responsibility in matters of protection and promotion of human rights.[36] The importance of country-specific resolutions was also echoed along a similar line during the Sub-Commission's 53rd session in 2001, when the Chairperson, Louis Joinet, highlighted how critical draft resolutions have been useful in initiating constructive dialogue with States. Mr. Joinet concluded by asking his colleagues to consider whether such country resolutions "have not contributed to the development of our common cause, that of the Commission and of the Sub-Commission, which is the promotion and protection of human rights".[37]

Clearly, the Commission has both the right and the obligation to discuss and respond when it is faced with systematic and gross violations of human rights in a given country. To eliminate item 9 from the Commission's

[35] See Decision 2000/19.

[36] In her Address at the closing of the 58th UNCHR on 26 April 2002, Mary Robinson noted:

> "I feel it my duty as High Commissioner to pose this question: is it not right that when there are situations of gross violations of human rights, this Commission seeks to protect the victims? And if it is felt that the existing methods are not adequate, is there not a responsibility on the membership of this Commission to consult and to find adequate ways of helping to protect the victims of such violations?"

[37] Cited in International Service for Human Rights (ISHR), *Analytical report of the 59th session - Geneva, 17 March to 25 April 2002*, part XVI Overview of the 59th session, p. 6.

agenda would severely undermine the Commission's role in protecting, monitoring and promoting human rights. Furthermore, such decision would represent a victory for human rights abusers. However, we must acknowledge that there is inconsistency and hypocrisy in the way some country-specific situations are raised and others not; in the way decisions are taken with regard to some countries and not on others. The primary problem is the country or situations omitted rather than those included. There is clearly a need for a better method for determining which country situations should be the subject of item 9 debate. This is where the current discussion should focus, not on whether or not country-specific resolutions should be eliminated or suspended from the Commission's agenda.

Therefore, the question remains: how can the approach dealing with country situations be revised in order for the Commission to function more effectively? Alternatively, is there another way in which we could envisage how to deal with country situations, so as to remove the main irritants while preserving the Commission's rights and obligation to protect?

The controversy surrounding item 9 will no doubt continue through to the 61st session of the Commission in 2005. For many, the fear is that the opposition of members of the LMG to country resolutions under item 9 will culminate at some point in a formal request to move for the item's removal from the Commission's annual agenda. There are different approaches to country situations that could be developed or taken. The important thing is to consider and discuss better options to the current process in order to avoid the application of "double-standards" in the choice of countries subject to consideration by the Commission.

Strengthening the Effectiveness of the UN Human Rights Mechanisms

Perhaps the most remarkable development in the work of the Commission since the 1980s has been the development of a large and sophisticated system of special rapporteurs, independent experts, special representatives and working groups, all appointed to consider a particular geographic or thematic human rights issue. Though they have grown and developed in an *ad hoc*, rather than systematic way, the so-called "special procedures" of the Commission have played an extremely important role in fact-finding, monitoring and reporting on human rights violations in countries around the world, thus increasingly providing the qualitative

and substantive content to the work of the Commission on Human Rights.

These mechanisms are unique and, as noted in the 1998-2000 review of the Commission's work, the special procedures have been "one of the Commission's major achievements and constitute an essential cornerstone of United Nations efforts to promote and protect internationally recognized human rights and contribute to the prevention of their violation".[38] The current review should increase its efforts to place the special procedures at the heart of the Commission's process.

Special Procedures

The Secretary-General of the United Nations, Kofi Annan, in his report "Strengthening of the United Nations: an agenda for further change"[39], submitted to the 57th session of the General Assembly in September 2002, highlighted the importance of the United Nations work on human rights and the need to build upon its achievements and to strengthen the United Nations human rights machinery. An essential part of that machinery is the special procedure mechanisms. However, due to the *ad hoc* expansion in the number of special procedures in recent years, the Secretary-General felt that steps could be taken to enhance their effectiveness. The Secretary-General identified two related sets of measures that are required: (1) improve the quality of reports and analysis produced by the special procedures. This can be achieved by setting clear criteria for the use of special procedures and the selection of appointees, and by establishing better guidelines for their operations and reporting functions; (2) strengthen the organization's capacity to support the special procedures. Measures to address this problem could include the appointment of more senior professionals and better administrative support. [40] The Secretary-General requested the United Nations High Commissioner for Human Rights to undertake a review of the special procedures and to report back by September 2003 with recommendations on how to enhance their effectiveness and improve the support provided.[41]

[38] E/CN.4/1999/104, Observation 5.

[39] UN Doc. A/57/387, *op. cit.*, note 3, see paragraphs 45-58.

[40] *Id.*, paragraphs 55 and 56.

[41] *Id.*, Action 4.

Under the pretext of "streamlining" and "increased efficiency", the independence and integrity of the Commission's special procedures have been under attack by some States who want to see them weakened and marginalized. Due to the nature, the rigor and the quality of their work, these procedures are capable of considerable amount of discomfort and embarrassment for abusive governments. It is not surprising to see them coming under fire by many of those States during the Commission's annual session. Of particular concern was the adoption of regressive decisions, such as Decision 2003/113, introduced by Pakistan, which curbs current working methods of the special procedures with regard to the issuing of urgent appeals and communications, thereby reducing its effectiveness considerably. There have also been attempts by some States to insert into resolutions language requiring mandate holders to only respond to, or act upon, "well founded and reliable" information, without making clear what would qualify as such information.

The independence of mandate holders was specifically targeted at the 59th session when Algeria, unfoundedly, accused the Special Rapporteur on the question of torture for being too closely related to NGOs. Such accusation implicates and targets other special rapporteurs who establish necessary working relationships amongst a variety of sectors including NGOs, States, intergovernmental organizations and national human rights institutions. The door opened by Algeria on the affiliations which mandate holders may have, provides the Commission with the opportunity to re-visit the question of the status of the independent experts appointed to thematic or country-specific mandates and to the Sub-Commission as well. Also deeply disturbing was the sharp and occasionally personalized criticisms which some governments addressed during the 60th session to the Commission's own human rights experts. Both Spain and Thailand, angry about criticisms of violations in their countries following country visits, questioned the basic credibility of the Special Rapporteur on Torture and the Special Representative of the Secretary-General on Human Rights Defenders.

An associated question that could also be considered by the Commission is: how many mandates can one person hold? Consideration should be given to the opinion during the previous review which led to an agreement on term limitation for thematic mandates: limiting the number of mandates one individual may hold could "contribute to maintaining an appropriate degree of detachment and objectivity on the part of office-

holders and ensur[e] a regular infusion of new expertise and perspectives into […] the system".[42] This would certainly enhance the Commission's effectiveness and efficiency.

Role of the Office of the High Commissioner for Human Rights (OHCHR)

The system of special procedures constitutes the frontline of the Commission's effort to protect and promote human rights. The effectiveness of such a system depends to a large extent on the effectiveness of the Office of the High Commissioner for Human Rights (OHCHR), on its capacity to provide more efficient support to the special rapporteurs/representatives, experts and working groups in order to ensure that mandate holders can respond to requests for action in a timely and effective manner. With the increased awareness of human rights issues, and with the increase of mandates created by the Commission, the demands on the OHCHR have become almost overwhelming. Demands on the OHCHR also further increased with the important direction given by the UN Secretary-General, Kofi Annan, as part of his package reform, to mainstream human rights into the work of all UN activities and agencies.[43]

The OHCHR has undertaken a series of reforms to address theses problems. A study prepared in July 1999 by Mona Rishmawi and Thomas Hammarberg identified a series of five measures/recommendations that could be taken by the OHCHR to effectively enhance its response to victims of human rights violations through strengthening the special procedures: improvement of the urgent action procedures; development of a more effective response to emergencies; improvement of the methods of follow-up; increase to the support for the experts through additional staff and development of a data base. Some steps to follow-up on the study's recommendations have been taken and efforts are underway to make the use of such steps more systematic. Of the study's five principal recommendations, two have been implemented: a "quick response desk" was set up in early 2000 and a thematic database has been developed. The rapporteurs themselves have also taken things into their own hands, for instance: they undertake more and more joint initiatives, send urgent appeals and communications; coordinate field visits; and have developed

[42] Report of the 1998 Bureau, *op. cit.*, note 21, paragraph 33.

[43] See UN Doc. A/51/950 (1997), *op. cit.*, note 1.

follow-up questionnaires they address to governments of countries they visited.

The above measures are positive steps in the right direction towards the implementation of the study's recommendations. However, further steps need to be taken by the OHCHR to enhance the effectiveness of the special procedures system.

Time Management

Time constraints for presentation and debate of the special procedures' report are another issue of concern. In recent years, the lack of speaking and meeting time has imposed serious restrictions on the ability of the Commission to function effectively. However, we welcome the encouraging signs at the 59th session where modest, but important, procedural changes on time management were consolidated. Such changes included the delivery of rights to reply at the end of each meeting, the cutting of speaking times across the board (not just for observers, mandate holders, national human rights institutions and NGOs), and the institution of the High Level Segment and the Inter-Active Dialogues. The delivery of joint statements by groups of States and NGOs was also further encouraged.

Particular attention should be paid to the proposals on time management that have been put forward in the Report of the Expanded Bureau of the 58th session to the Expanded Bureau of the 59th session.[44] In the interest of efficiency, these proposals have already been endorsed by the Commission.[45] Their objective is to encourage both members and observers to make better use of the limited time available during the six week meeting of the Commission.

High Level Segment (HLS)

Another positive step is the "partially successful" High Level Segment introduced at the 59th session in which dignitaries from both States and intergovernmental organizations address the Commission in the first week of the session. 89 statements were delivered during the first week of the 60th session[46] which had been set aside for the High Level Segment. The

[44] E/CN.4/2003/118 and Corr.1, *op. cit.*, note 26. See paragraph 4.1 on "Organization of the work during the annual session".

[45] Commission on Human Rights decision 2003/101 endorsed Commission decision 2002/115 and resolution 2002/91.

[46] 84 statements were delivered in the 59th session during the HLS.

clustering of statements during the HLS has the advantages of better respect of the time limit assigned to each speaker and a more attentive audience. The disadvantage is that having almost the entire first week taken by the HLS means that the Commission is a week late in getting down to business.

Inter-Active Dialogue (IAD) with the Special Procedures

We also welcome the encouraging signs at the 59th and 60th sessions that allowed the special procedures sufficient time to present their findings and recommendations to the Commission and to engage in an Inter-active Dialogue (IAD) with governments. Following a procedure suggested in the report of the 1998 Bureau[47], and refined in the report of the Expanded Bureau of the 58th session, each agenda item was commenced with the introduction by special procedures of their reports, followed by an opportunity for States to ask questions and for mandates holders to reply.[48] There was, however, during the 59th session insufficient time for such dialogue and – due to an arcane UN rule that apparently prohibits the Commission's special procedures from being listed on the order of the day – the schedules were not sufficiently announced before hand to enable delegations to adequately prepare their questions. At the 60th session, the IAD was further refined in a note by the Secretariat on improvement of the organization of the work of the Commission.[49]

The Inter-active Dialogue is seen by many as an interesting and important development. What is now needed is finding practical ways to enhance it, to make it more free flowing. Developing such mechanism could help to improve the understanding of what special procedures do and why they do it.

Greater State Cooperation of Special Procedure Observations and Recommendations

It should be stated at the outset, that an effective reform of the Commission and its special procedures depends not only on the OHCHR; much

[47] See Report of the 1998 Bureau, *op. cit.*, note 20, Recommendations 7 and 9. This was also reiterated in the 2000 report of the Working Group on enhancing the effectiveness of the mechanisms of the Commission and in the report of the Expand Bureau of the 58th session E/CN.4/2003/118, *op. cit.*, note 26, at 4.1(d)(ii).

[48] E/CN.4/2003/118, *Id.*, suggestion B 4 (d) (ii), p. 5.

[49] See E/CN.4/2004/110/Rev.1, op. cit., note 21, at 7.

depends on the cooperation, will and assistance of all those involved in the process, the Member States of the UN, and in particular, the members of the Commission. Unfortunately, many governments pay lip service to human rights or act as though their obligation ends with the ratification of relevant treaties. Many neglect the continuing obligations that these treaties impose on them and their pledge, contained in Articles 55 and 56 of the Charter of the UN, to cooperate with the UN in promoting respect for human rights. States should be reminded of the observation made by the Bureau in its report of the 55th session of the Commission that "the essential foundation on which the effectiveness of the Commission and its mechanisms rests the responsibility of all governments to cooperate fully with these mechanisms".[50]

The special procedures could also be reinforced by the decision of governments to extend standing invitations to all thematic mechanisms of the Commission to visit their country on a permanent basis. As of October 14, 2004, a total of 51 States had issued standing invitations. However, this means that the remaining 140 member States of the UN have yet to issue an invitation. We hope that the number of standing invitations will increase significantly by the 61st session of the Commission in 2005. Such invitations do not only facilitate the work of the special procedures, they also demonstrate good faith of States in accepting their obligation to cooperate effectively with the mechanisms they themselves have created through the Commission. At the same time, it would be useful if the OHCHR would make available a comprehensive list of all visits undertaken by special procedures, all outstanding requests for visits and the response – if any – from governments.

Enhancing the Effectiveness of the Human Rights Treaty Bodies

As indicated earlier, the promotion and protection of human rights is one of the fundamental aims of the United Nations. The setting of legal standards in the field of human rights and the establishment of mechanisms to monitor those standards has been one the primary means of achieving this aim. Starting with the adoption in 1965 of the International Convention on the Elimination of All Forms of Racial Discrimination, the UN has adopted a total of seven human rights treaties (of which six are currently

[50] Report of the 1998 Bureau, *op. cit.*, note 21, Observation 3.

in force)[51], under which committees of independent experts have been established to monitor the implementation by States parties of their obligations under the treaties through a number of different procedures, including: reporting procedures, individual complaint procedures, inter-State complaint procedure, and inquiry procedures. In addition, the treaty bodies contribute to the development and understanding of international human rights standards through the process of writing "General Comments" or Recommendations. These are commentaries on the nature of obligations associated with particular treaty rights and freedoms.

The human rights treaties are at the core of the international system for the promotion and protection of human rights. Every UN member state is a party to one or more of the seven major human rights treaties. 81% of States have ratified four or more.[52] It is a universal human rights legal system which applies to virtually every child, woman or man in the world - over six billion people. Although no treaty has achieved universal ratification, the "concerted effort" to ratify treaties and their protocols, called for ten years ago at the World Conference on Human Rights, has yielded some positive results, with a 32% increase in ratifications.[53]

As the system has grown – similarly to the Commission's special procedures – it has been confronted with various problems and challenges. The treaty bodies are struggling to cope with vast backlogs of reports and individual complaints, an ever-growing number of overdue reports, lack of adequate visibility of their work as well as the lack of mechanisms for follow-up to concluding observations. Another important weakness of the system is its chronic under-funding.

These problems are well known and have been the topic of discussion by the treaty bodies themselves, the meeting of Chairpersons of human

[51] The treaty bodies are: the Committee on the Elimination of Racial Discrimination (CERD) established by the Convention on the Elimination of all forms of Racial Discrimination (in force January 4, 1969); the Human Rights Committee (HRC) established by the International Covenant on Civil and Political Rights (CCPR) (in force March 23, 1976); the Committee on Economic, Social and Cultural Rights (CESCR) established by the International Covenant on Economic, Social and Cultural Rights (in force March 23, 1976); the Committee on the Elimination of Discrimination Against Women (CEDAW) established by the Convention on the Elimination of Discrimination Against Women (in force September 3, 1981); the Committee Against Torture (CAT) established by the Convention Against Torture (in force June 26, 1987); the Committee on the Rights of the Child (CRC) established by the Convention on the Rights of the Child (in force 2 September 1990); and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) established by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (in force July 1, 2003).

[52] See Amnesty International, *United Nations: Proposals to strengthen the human rights treaty bodies*, September 2003, AI Index: IOR 40/018/2003, p. 3.

[53] *Id.*

rights treaty bodies, the Commission on Human Rights, the General Assembly, States parties and other commentators. Various proposals for treaty body reform have been made since the late 1980s.

In 1989, the Secretary-General appointed an independent expert to study the possible long-term approaches to enhancing the effectiveness operation of the treaty bodies. The independent expert, Philip Alston, prepared three reports on the issue including a series of recommendations aimed at improving the effectiveness of the human rights treaty system.[54] More recently, an independent academic study of the treaty bodies carried out by professor Anne Bayefsky produced a number of recommendations directed at the treaty bodies, the OHCHR, NGOs, UN agencies, bodies and programmes, and States parties. A number of these recommendations have been implemented, or are currently being envisaged by the OHCHR, to help assist in improving the functioning of the treaty bodies. In particular, a document identifying steps taken by the OHCHR to follow-up on the recommendations of the Bayefsky study has been prepared.[55] Another important source of proposal reforms has been the meetings of the Chairpersons of treaty bodies, sixteen have been held since 1984. These meetings provide a forum for discussion and examination of the various recommendations proposed by the treaty bodies, the independent expert, the Bayefsky study and other commentators.

In his 2002 report "Strengthening the United Nations: an agenda for further change", the UN Secretary-General identifies further modernization of the treaty system as a key element in the United Nations goal of promoting and protecting human rights. He has called on the human rights treaty bodies to consider two measures: first, to craft a more coordinated approach to their activities and standardize their varied reporting requirements; and second, to allow each State to produce a single report summarizing its adherence to the full range of human rights treaties to which it is a party. [56] The Secretary-General also requested the OHCHR to consult with the committees on new streamlined reporting procedures. These suggestions have focused debate on report models and treaty body

[54] Reports of the independent expert: A/44/668 (1989); A/CONF.157/PC/62/Add.11/rev.1 (22 April 1993); E/CN.4/1997/74 (27 March 1997).

[55] Document entitled "List of recommendations directed at OHCHR" [unpublished document distributed by the OHCHR at the Think Tank on "Strengthening the United Nations Mechanisms for the Protection and Promotion of Human Rights", organized by Rights & Democracy in Ottawa, on 15 June 2001].

[56] UN Doc. A/57/387, *op. cit.*, note 3, paragraph 54.

working methods, and have been the subject of further attention at the 58th and 59th regular session of the General Assembly (in 2003 and 2004).

As part of the continuing process to review and enhance the work of the treaty body system, extensive consultations on ways to foster cooperation among treaty bodies and to enhance implementation of human rights instruments at the national level have been undertaken by the OHCHR. The treaty bodies themselves have agreed to continue efforts to develop common working methods, in particular follow-up procedures and harmonized procedures to the submission of overdue reports.[57] Furthermore, in June 2004, the Secretariat prepared draft guidelines for a common core document and treaty-specific targeted reports for consideration at the third inter-committee meeting and the sixteenth meeting of the chairpersons in June 2004.[58] These draft guidelines provide guidance to States parties on the form and content of their reports to treaty bodies. These draft guidelines were welcomed and the OHCHR was requested to continue to work on the guidelines with a view to produce revised guidelines for submission to the fourth inter-committee meeting in June 2005.

The Role of Non-Governmental Organizations (NGOs)

Equally important is the role of non-governmental organizations (NGOs). We can describe the current state of NGO participation in the Commission as privileged, but also dysfunctional. NGOs have a greater level of access to and participation in the proceeding of the Commission than in any other part of the UN system. Since the widening of ECOSOC's consultative status provisions in 1996, the Commission is the UN body that has attracted the greatest number of new NGOs.

NGOs have played a vital role in the work of the Commission. Deputy Secretary-General, Louise Fréchette, views NGOs as "the leading edge of civil society" who serve the crucial role of "global conscience".[59] An international survey of several developed nations found that NGOs are trusted nearly two to one to "do what is right" compared to government,

[57] See Note by the Secretary-General, "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights", UN Doc. A/59/254 (11 August 2004).

[58] See Report of the Secretariat, "Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties", UN Doc. HRI/MC/2004/3 (9 June 2004)

[59] Deputy Secretary-General, Press Release DSG/SM/38, "On the 50th Anniversary of Conference of Non-Governmental Organizations, Deputy Secretary-General Says NGOs Serve as Global Conscience" (3 December 1998).

media or corporations, suggesting that NGO aid for UN initiatives is also likely to represent and attract wide public support.[60]

The relevance of NGOs' contributions must not be seen as being limited to the written and oral interventions in the Commission's plenary meetings. Over the years, NGOs have taken a proactive approach to strengthening the work of human rights mechanisms. They have been involved in fact-finding and monitoring missions, capacity building and training activities, and have, on many occasions, proposed initiatives to relieve some of the pressure placed upon those UN agencies and programmes struggling to promote human rights. Furthermore, as a crucial bridge between the UN and the general public, NGOs have often proven immensely successful at mobilizing public support, lobbying governments, undertaking policy analysis, documenting human rights violations for submission to the UN, and disseminating information. Along with other members of civil society, NGOs have a vital role to play in ensuring that the UN can become a relevant instrument in a world of increasing complexity and live up to its guiding principles as stated in its founding document, the UN Charter, and the Universal Declaration of Human Rights.

Despite recognition of the indispensable role of NGOs in the effective functioning of the Commission, the relationship has been sometimes stormy and never easy. The dysfunctionality in the relationship flows directly, in large part, from the privileged access arrangements. Few States actually defend NGOs' right to be present and to participate fully and freely in the Commission's work. In recent years, the situation has become worse and their contribution is being challenged. NGOs are under constant review and attack by an array of repressive regimes who, amidst all discussions of reform, want to organize them and restrict their right to participation. NGOs are increasingly being marginalized, their rights are shrinking and their speaking time is being cut. There have been cases where the now common 3 minute NGO speaking time has been reduced to 1 minute. To make matters worse, States who complain about the role NGOs play at the Commission are pushing for the participation of so-called "GONGOs" (governmental-organized NGOs) – pro-governmental NGOs masquerading as independent NGOs – who come to Geneva to defend violating governments.

[60] "NGO Update" *Go Between* 84 (January – February 2001) p. 20.

The current review of the work of the Commission should not be used as a tool to limit NGO access and participation, but rather be seen as an opportunity for NGOs to re-think their role and participation in the process. We need to consider how the rights of NGOs to address the Commission can be preserved while, simultaneously, acknowledging the need for a more effective use of the current time constraints imposed on the Commission. NGOs have to put aside their own narrow interests and work with the Commission's mechanisms and friendly States to bring back relevancy to human rights. The UN human rights system requires allies and coalitions for progress to be made. As painful or unpopular as this collaboration may be, it is an essential "evil" if we want the Commission to function with any semblance of order and rationality. If NGOs fail to engage with various States to discuss NGO participation at the Commission, changes will be instituted by States, and States alone, which might be detrimental to meaningful NGO involvement in UN human rights processes.

Changes in the Commission's structures, working methods and financing arrangements will face delay and impediments. Changes to State attitudes and practices will only be realized incrementally and through insistent pressure. Thus the immediate possibilities for change reside largely within civil society, of which NGOs are the best-equipped and best-positioned to act on these issues. Whilst continuing to advocate for reform of current UN and State practices, NGOs must endeavour to do whatever is within their capabilities to strengthen UN human rights mechanisms, employing all the creativity, flexibility, expertise and resources which are at their command.

Another issue with regard to NGOs is the need for professionalization of NGO work at the Commission. NGOs need a more organized presence at the Commission. It would be more influential if they would concentrate on well investigated cases and bring to the Commission the right people to testify and present their cases.

Furthermore, in the current phase of strengthening the Commission, we must ensure that the proposals protect the participation of civil society and NGOs in the Commission and do not expose human rights defenders to the risks of retaliation. With this in mind, particular attention should also be given to the work done by the High Level Panel created on February 13, 2003, by the UN Secretary-General to review relations between the United Nations and civil society (the Cardoso Panel). The Panel's final

report released on June 21, 2004, contains 30 specific proposals for reform on how to enhance UN-civil society relations.[61] In response to these proposals, the Secretary-General delivered a follow-up report with comments on the Panel's work.[62]

In their general comments to the Panel's final report, many NGOs welcomed the spirit of the report and believed that many of the proposed measures have great potential for enhancing the interaction between the UN and civil society, and for making an important contribution to improved global governance.[63] Some of the recommendations welcomed by NGOs included: the report's emphasis on measures to de-politicize the NGO accreditation process; proposals that could have the effect of increasing United Nations engagement with civil society at the country level, and in particular in countries of the South, as well increasing Southern civil society participation in the UN; and the report's support for innovations in UN processes of consultation and engagement. However, major concerns have been raised by NGOs with regard to the manner in which the report's proposals amalgamate fundamentally different groups – NGOs, parliamentarians and the private sector – under the term "civil society". NGOs are concerned that rights of access and participation long won through the various reforms of the ECOSOC consultative status process could be lost in favour of the principle of wide *inclusion*, rendering NGO participation meaningless in a sea of multiple, uncoordinated and diffused voices. Many of the reports proposals also lack a sufficient degree of precision to enable their practical implementation.

Because of the prevailing political animus against NGOs, and because of the particularly high level of access that NGOs enjoy in the Commission, there is a high risk that this review of UN-civil society relations could result in a more rigid regulation of the privileges of NGOs in the Commission. During the UN General Assembly plenary meeting discussion on agenda item 52 (on revitalizing its work) and item 54 (on strengthening the United Nations system) held on October 4-5, 2004, several Member States expressed their interest in enhancing civil society participation in

[61] Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance*, UN. Doc. A/58/817 and Corr. 1 (2004).

[62] UN Secretary-General, *Response of the Secretary-General in response to the Panel of Eminent Persons on United Nations-Civil Society Relations*, UN Doc. A/59/354 (2004).

[63] See the NGLS Web site for a link to NGO comments on the Cardoso Report and other relevant documents on the issue: www.un-ngls.org/UNreform.htm.

the UN's work. However, some other States recommended that a cautious approach be taken in reforming current UN practices so that the Organization retains its intergovernmental nature.[64] It is therefore incumbent upon all NGOs to contribute constructive proposals to this review and follow-up to the report.

Membership in the Commission on Human Rights

The United Nations devotes enormous attention to influencing the behaviour of its Members States outside the institution. However, when it comes to governmental behaviour within the UN itself, the organization seems to pay little or no attention to it. The UN Commission on Human Rights provides a good illustration of this situation. Victims around the world look at the UN's principal human rights body to investigate serious human rights violations and generate pressure to stop them. However, as we have seen, many governments go to great lengths to avoid criticism by the foremost human rights body of their peers. When critics build their case against the Commission, exhibit A is often the fact that Libya in 2003, with its long record of human rights violations, was allowed to preside over the Commission. As so often happens when governments behave irresponsibly within the corridors of the UN, public opinion assigns the UN, and in this case the Commission, not the governments, the lion's share of blame. Therefore, until we recognize that the UNCHR's reputation rises or falls with the conduct of its members, we will never fully succeed in defending the Commission's legitimacy, credibility and coherence.

The globalization of human rights has its drawbacks. The Commission has become a casualty of its own success. In recent years, the membership of the Commission has changed significantly. States with weak human rights records have figured out that the best way to avoid embarrassing condemnation is to become a member of the Commission and try to steer it in less troublesome directions. This situation has led different analysts and observers to comment that the Commission has become a "market for political bargaining", an effective "Abusers' Defense Society" and a fo-

[64] For a detailed account of the discussions held at the General Assembly, see the article entitled "General Assembly Takes Up UN-Civil Society Relations" at: www.un-ngls.org/GAarticle.doc.

rum for defending States' records against scrutiny and criticism.[65] This dynamic undermines the Commission. The result is a Commission increasingly paralyzed in its efforts to promote and protect human rights. Country resolutions seeking to condemn highly abusive governments fail, others are blocked after "no-action" motions prevent them from being discussed on the merits. New human rights standards are watered down or derailed. Furthermore, as we have seen, "reforms" are proposed for the purpose of weakening the Commission's human rights machinery.

We should start by asking if States with notorious human rights deficiencies such as Libya, Syria and Cuba should in fact be sitting in a body whose mission is to develop and implement human rights? This also raises the question or previously taboo subject of whether there should be "criteria" or "standards" for membership to the Commission. At present, the only formal criterion for membership to the 53 Member Commission is to be a UN Member State.

This issue has become a recurring theme when discussing reforms. It is a critical one for the credibility and efficacy of the UN human rights body. If the Commission is to fulfill its mandate to monitor and set standards for all human rights, its members themselves should not be violating those very same standards. The UN Secretary-General himself addressed the problem in his report to the 58th session of the UN General Assembly in 2003. Kofi Annan said:

> *There has been public disquiet over the fact that governments accused of gross violations of human rights are admitted to membership in the Commission. There has been concern about the tone of discussion in the Commission and the fact that it does not address certain situations of grave violations of human rights. These are all important questions that I hope will be seriously addressed….*[66]

The good news is that several States and many NGOs have proposed the introduction of specific criteria for eligibility to the Commission. The proposed criteria include: extension of standing invitations to and cooperation with the Commission's special procedures; ratification of the main international human rights instruments; acceptance of individual com-

[65] See for example: Human Rights Watch, 2United Nations: Rights Commission Shields Abusers", Press release 26 April 2002; HRW, "UN Rights Body in Serious Decline", Press Release 25 April 2003; HRW, "UN: Credibility at Stake for Rights Commission", Press Release 10 March 2004.

[66] UN Secretary-General, *Report of the Secretary-General on the work of the Organization*, UN Doc. A/58/1 (2003), p. 35, para. 176.

munications procedures under these instruments; timely submission of periodic reports to treaty monitoring bodies; setting up a national human rights institution abiding by the Paris Principles; being a donor to the UN voluntary funds; not being the object of a country resolution under agenda item 9; not being on the list of States whose human rights situation is considered under the 1503 procedure and; not having refused to cooperate with the Commission's special procedures.

While it is true that these criteria are actions which UN Member States should be encouraged to consider seriously, it is unlikely they will be adopted. The principle of sovereign equality of States embodied in Article 2(1) of the UN Charter limits the possibility of excluding certain Member States from running for a seat at the Commission. Critics say these criteria set the benchmark too high. If such criteria were established, only a few countries would meet the test and be able to serve on the Commission. If the criteria were taken cumulatively, it would likely result in a situation in which no country, perhaps, would be eligible for election. Furthermore, these criteria do not, in themselves, guarantee a degree of real cooperation and compliance with the Commission's mechanisms nor provide an actual assessment of the situation of human rights in a specific country.

Another alternative to the "criteria" approach that has come up in recent debates is the transformation of the Commission into a body of the whole UN membership, such as the General Assembly. This solution would certainly have the advantage that the membership criteria would no longer be an issue by preventing competition for seats among States and indeed enable all States to participate and contribute to the Commission's work. However, universal membership would not address the problem of "politicization" of the Commission. It would most certainly make the situation even more difficult to manage with more competing alliances and groups. This approach would also represent the abandonment of the original concept of the Commission as a "functional / technical" body.

Some observers and analysts have also mentioned the desirability of transforming the Commission into a Human Rights Council – a central body for human rights of the same rank as the ECOSOC.[67] Such a body could remedy the deficiencies of the present organizational structure. It

[67] See Kalin, Walter and Cecilia Jimenez, *Reform of the UN Commission on Human Rights*, Study Commissioned by the Swiss Ministry of Foreign Affairs (Political Division IV), Bern/Geneva, 30 August 2003, p. 7; Marie, Jean-Bernard, *La Commission des droits de l'Homme de l'ONU*, Paris, Éditions A. Pedone, 1975, pp. 320-321.

could secure the necessary coordination in the field of human rights within the UN, thus contributing to a more effective protection and implementation of human rights. However, such a transformation would require a major revision of the UN Charter, an issue that lies outside the purpose of this paper.

It is clear that no country can claim to be totally without blemish in its human rights record. However, the simple fact that the Commission has started to question its membership is a good sign *per se*. Coming up with an alternate formulation in order to keep the most serious human rights violators from sitting on the Commission is a delicate task – yet it must be pursued as the Commission's future credibility depends on it. The Commission should be a forum where, despite differences in culture, political systems, and national experience, States can work together to secure human rights for all. Promoting, protecting and fulfilling international human rights obligations is worthy of our best efforts.

Given the current composition of the Commission, it is virtually inconceivable -- for now at least – that it would impose some kind of membership criteria on itself. In any event, as difficult as it might be to resolve, the discussion on criteria for membership of the Commission is an essential one for the future credibility of the Commission.

Membership in the Bureau

The expectation that members of the Commission will undertake the above commitment is particularly pertinent with regard to the five States elected to serve on the Bureau of the Commission. In recent years, some States and NGOs have also raised concerns over the national origins of the Chairperson and the composition of the Bureau. As a number of special duties are conferred upon the Chair of the Commission, including the appointment of individuals to special procedures posts, some believe it would be appropriate to require, as a prerequisite for membership in the Bureau, a minimum respect for human rights.

Intergovernmental and Multilateral Bodies

An associated issue is the emergence of a number of intergovernmental and multilateral bodies that have for the past years eroded the ability of

the Commission to act effectively in matters of protection and promotion of human rights.[68] For example, by means of systematic obstruction, procedural manoeuvring and tireless wheeling and dealing, the Like Minded Group has been able to impose decisions that often have nothing to do with human rights. The result of this is a carefully planned confrontation, reinforced by exchange of favours, where parties essentially seek to avoid reciprocal condemnation. These political games observed at the Commission are not new. An historical analysis of the Commission demonstrates that blocks have, at different stages, wielded a consistently determining influence on the ability of the Commission to act. What is new, however, is that this situation has never before reached such magnitude. The behaviour, activities and actions of the Like Minded Group and the other groupings of States raises the question of the legal personality of these groups and their standing within the UN framework.

The Commission may have only 53 members, but in a sense, as noted by an observer, "it has become a 'Commission of the whole', in which each State participates through one or more of these groupings and through which individual States are relieved of their obligation to make their positions clear and to act accordingly".[69] This "regional solidarity" can only have a negative effect on the Commission. What is at stake here "is the extent to which these entities may supplant or overwhelm the very structure upon which it has been agreed the UN is built […] and the capacity of States to develop and pursue their own foreign and domestic policy objectives either alone or with others."[70]

Financing the UN Human Rights System

One cannot talk about reform and rationalization of the work of the Commission on Human Rights without mentioning the question of under-funding and lack of human resources that continue to take a toll on the effectiveness of the UN human rights system, which has a long history of under-funding. The treaty bodies and special procedures systems

[68] These bodies include: the European Union (EU); the Organization of the Islamic Conference (OIC), the so-called Like-Minded Group (LMG – Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Lybia, Nepal, Pakistan, Philippines, Saudi Arabia, Sri Lanka, Sudan, Syria, Viet Nam); the Non-Aligned Movement (NAM); the African Group (as defined by the UN); and the Association of South-East Asian Nations (ASEAN).

[69] Jan Bauer, *Summary Report – UN Commission on Human Rights 2002 session (fifty-eighth)*, p. 8 [report available at: www.hri.ca/uninfo/unchr2002/report.htm]

[70] *Id.*

are facing some serious difficulties. Limited financial and human resources have imposed serious constraints on the activities of the Commission's mechanisms, whose mandates cannot always be serviced as effectively and thoroughly as their importance would warrant. The underfunding is so serious that country and thematic mandate holders frequently have to limit the number of visits they are able to carry out, cancel or scale back plans, and resort to fundraising themselves in order to support their work. Mandate holders are unpaid and often do not even have the support of a full-time civil servant at the UN. Moreover, the staff assigned to the mandates is frequently rotated.

Amongst those working in the field of human rights, a clear sense has emerged that funding for the UN human rights system is inadequate. At present, human rights work within the UN only receives approximately 1.5% of the UN regular budget.[71] Such a low figure is inconsistent with the professed importance of human rights to the UN and the resources actually devoted to their realization. For 2004, the OHCHR seeks, in its *Annual Appeal*, US$ 27,115,700 from the UN regular budget and an additional US$ 54,879,084 from voluntary contributions.[72] It is puzzling, to say the least, that such a significant UN body is forced to beseech donors for more than two thirds of the funds necessary for its operations.

Special procedures and treaty bodies can only be as effective as the support provided by the OHCHR permits them to be. As noted by the Acting High Commissioner and the former High Commissioners in the *Annual Appeals* for 2001, 2002, 2003, and 2004 despite the sharp increase in the number of new mandates created by the Commission and expectations placed upon the UN human rights system, their staffing and other resources have not increased. There is also a huge backlog on cases submitted for examination. A danger lies in simply increasing the number of human rights instruments available without first securing funding and attracting political will to support them. Voluntary contributions provide temporary relief, but this is not an alternative to stable support from the UN regular budget. This enables the recruitment of professionals but the OHCHR has yet to achieve even the minimum target of one full-time professional staff person for each special procedure. The UN Secretariat has

[71] See *Management review of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/57/488 (October 21, 2003), paragraph 3 which shows that between 1996-1997 to 2000-2001 the OHCHR's overall share of the UN regular budget has been reduced from 1.84% to 1.54%.

[72] OHCHR, *Annual Appeal 2004: Overview of Activities and Financial Requirements*, pp.19-20.

undertaken a series of reforms to address these problems, for instance by creating a "quick response desk". However, what is required is a responsible system for setting up procedures with clear mandates, time frames and resources.

Securing proper financing is not, in itself, enough. It is insufficient to simply demand more funds for human rights from the UN regular budget. The failure of some Member States to pay their dues in full, and on time, causes serious financial turmoil that reduces the capacity of the UN to act in a timely and effective manner. Therefore, for the UN to be in the forefront of the global effort to effectively promote and protect human rights, both resources and political will of its Members States are a necessity. A simple solution to this problem would be to ensure that States fulfil their legal obligation under Article 17 of the UN Charter, and that membership dues are paid in full and on time, or that States with tardy or incomplete payments pay their outstanding dues immediately.

The UN should also seek to diversify its funding sources as much as possible. There are other ways to amplify the resources and capacities of the UN human rights system that go beyond the options of increasing funding and enforcing Member States obligations.[73]

[73] See Rights & Democracy, Report of the Think Tank on "Strengthening the United Nations Mechanisms for the Protection and Promotion of Human Rights", 2 August 2001, available at www.dd-rd.ca.

CONCLUSION

As we have seen, it is not at all difficult to criticize the Commission on Human Rights on the grounds of inefficiency, hypocrisy, double standards and lack of imagination. However, focussing on the negative is rather a myopic view. It overlooks what has been achieved in the last five decades. In this process, the Commission has firmly established itself as the single most important UN organ in the human rights field. The level of participation, time, energy and resources spent by the international community in the Commission is greater than in virtually any other UN arena. In spite of past and present failures, the Commission remains a potentially significant prime mover and coordinator in situations where human rights are seriously at stake. People all over the world look to it for the protection of their rights and for "better standards of life in larger freedoms" as referred to in the Preamble of the UN Charter. This must clearly signify that some importance is attached to the Commission's position on at least some important issues.

The Commission needs comprehensive reform, but the current international political mood in relation to human rights tends towards weakening, rather than strengthening, the Commission and other international human rights bodies and mechanisms. The need for reform must not become the means or battleground by which some governments obstruct the work of the Commission, undermine its authority, capacity and credibility, redefine the nature and scope of rights, and roll back the gains made over the last five decades. For this reason, we have to avoid suggesting further major reforms at this time until the wheel of political and public opinion turns once again in favour of human rights. The risks are too great that some States may use the reform agenda as a pretext to diminish, undermine and to control the UN Commission on Human Rights.

The focus, at this time, must be not on reform but on existing human rights structures and mechanisms that could be optimized and strengthened.

The Commission on Human Rights has made progress in its normative role and has become quite operative. The current review of the Commission's working methods has not solved its major structural problems, but has certainly generated sufficient consensus to improve its functioning. The need for an effective, respected multilateral forum promoting human rights has never been clearer. How Member States choose to respond will, to a large extent, determine the future effectiveness of the Commission on Human Rights. We must not allow ourselves to lose sight of the reasons for which this institution was created. The Commission exists to clarify the human rights obligations of States toward their citizens and each other, and to strengthen UN mechanisms for the promotion and protection of human rights. There are many challenges facing the UN Commission on Human Rights. These challenges are by no means insurmountable, but they do require concerted and coordinated efforts from the UN, its Member States and the various groups comprising civil society. The question, however, is whether those who make decisions regarding changes – the Governments – actually want a more effective Commission or not!

There is a strong case to be made in favour of the proposition that major reforms are possible and that they could, if undertaken, yield significant saving of time and energy, as well as enhancing the Commission's credibility and usefulness. However, the need for reform must not become the means or battleground by which some governments obstruct the work of the Commission, undermine its authority, capacity and credibility, redefine the nature and scope of rights, and roll back the gains made over the last five decades.

As the recent sessions of the Commission on Human Rights have shown, the reform debate is at its root, a struggle over the Rule of Law. With States often locked into the political battles of the moment, it is up to civil society to put forward a more holistic, far-reaching, and profound vision of an effective international human rights system. Civil society must endeavour to do whatever is within its capabilities to strengthen the UN human rights system. The question remains, who else will stand up for the victims and speak for the oppressed? To quote the words of the late High Commissioner for Human Rights, Sergio Vieira de Mello:

> *[M]ilitating for the rule of law, for the strengthening of the international system, for multi-lateralism is, I think, more important than ever, particularly at a time when some - and I hope they will remain only some - speak of the irrelevance of the UN. I certainly don't agree with them, as you can imagine. I believe the UN has never been as relevant and as necessary as today, which does not mean it doesn't deserve reforms. And certain mechanisms, such as the Security Council or even our Commission can improve their function and their ability to respond to crises in particular. But the UN as a whole, imperfect as it may be, has never been as necessary as it is today.*[74]

As we consider future options for the reform of the Commission and its processes, guidance should be drawn less from how things have been done before, and more from the original mandate of the Commission, the present world politics and the needs of the peoples. We should not belittle the institution we have, however imperfect and disputable it may be. Much needs to be achieved.

Rights & Democracy hopes that this backgrounder paper will stimulate debate and discussions on the much needed reform of the UN Commission on Human Rights. Furthermore, we hope that the paper will also help in formulating recommendations to revamp and strengthen the credibility, coherence, consistency and effectiveness of the Commission —to reform and improve a vital institution that plays a central role in advancing human rights globally.

[74]*Human Rights Features*, 22-25 April 2003, p. 3.