



# **Reforming the “Reformed” United Nations Human Rights Council**

**Brief prepared by David Matas**

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**Joe Bogoroch**  
National President

**Frank Dimant**  
Executive Vice President

**Ruth Klein**  
National Director, Advocacy Dept.

**Anita Bromberg**  
National Director of Legal Affairs

**Karen Lazar**  
National Director of Communications

**Michael Mostyn**  
National Director of Public Affairs

**This document was written by David Matas,  
Senior Legal Counsel, B'nai Brith Canada**

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B'nai Brith Canada National Office  
15 Hove Street, Toronto, Ontario, Canada M3H 4Y8  
Phone 416-633-6224 Fax 416-630-2159  
E-mail [bnb@bnaibrith.ca](mailto:bnb@bnaibrith.ca) Website <http://www.bnaibrith.ca>

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# **I. THE NEED FOR REFORM**

## **A. The Initial Reform**

The United Nations Human Rights commission, one of the original United Nations organs, was replaced on April 3, 2006 by a new Human Rights Council. The General Assembly, in the resolution creating the Council, recognized

"the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization..."<sup>1</sup>

This phrase sets out the reason why the Commission was abolished, its double standards and politicization. To what was it referring? The state which was the greatest victim of the lack of universality and objectivity, the most obvious target of selectivity and double standards, the victim of politicization, was plainly Israel.

The Commission had two agenda items dealing with country human rights violations, one for Israel and the other for the rest of the world. For years, one third of the time and the resolutions of the Human Rights Commission were devoted to Israel alone.

The Human Rights Commission became so obviously an Israel-bashing Commission that its continued existence was unsustainable. The resolution could not have been more clear if, instead, this paragraph referred to

"the importance of not ganging up on Israel to the exclusion of real violator states."

Lest there be any doubt, listen to the words of Kofi Annan. He said:

"It sometimes seems the United Nations serves the interests of all the world's

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<sup>1</sup> UN Document number A/RES/60/251, 3 April 2006.

peoples but one: the Jews."<sup>2</sup>

He gave a speech to the Security Council where he said:

"Some may feel satisfaction at repeatedly passing General Assembly resolutions or holding conferences that condemn Israel's behaviour. But one should also ask whether such steps bring any tangible relief or benefit to the Palestinians. There have been decades of resolutions. There has been a proliferation of special committees, sessions and Secretariat divisions and units. Has any of this had an effect on Israel's policies, other than to strengthen the belief in Israel, and among many of its supporters, that this great organization is too one-sided to be allowed a significant role in the Middle East peace process?"<sup>3</sup>

The Commission had so disgraced itself that there was no one left to defend it. So, the UN General Assembly officially ended its life, replacing it with a new Human Rights Council.

## **B. Why Israel?**

The obsession of the enemies of Israel with the existence of the State of Israel is plain to see. But how did this obsession lead to the destruction of the leading human rights organ of the United Nations? Israel is a tiny country and the Jewish people, for whom the existence of the State of Israel is the expression of their right to self-determination, is a tiny population. Out of a global population of now more than 6.6 billion, the Jewish population world-wide does not even reach thirteen million, a mere .02 percent. How was it possible for hatred of this small state to bring down the United Nations human rights edifice?

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<sup>2</sup> Dec. 13, 1999, remarks made at an AJC dinner honouring Morris Abram

<sup>3</sup> Dec. 12, 2006. See Epstein, Eve. "Annan made the nations a little less united against Israel." *Jewish Daily Forward*, December 22, 2006.

The reason anti-Zionism was able to cause the collapse of the UN principal human rights organ was the leverage anti-Zionism had through the Organization of Islamic Conference (OIC) states. There are 57 states in the Organization of Islamic Conference, almost one third of the total UN membership of 192.

Not every OIC state is anti-Zionist, but the OIC defers to anti-Zionists. Standing up for the right to self-determination of the Jewish people is not a priority for any OIC state. But anti-Zionism is a priority for some who will abuse every available UN forum to pursue their anti-Zionist agenda. The result is that the Conference presents an automatic anti-Zionist voting bloc.

Moreover, OIC states are not randomly distributed throughout the planet. There is a heavy concentration of OIC states within the Asian and African blocs, which together formed a majority of the UN Human Rights Commission. The combination of an anti-Zionist-driven OIC and regional bloc voting had meant an automatic anti-Zionist majority at the Commission.

Human-rights-violating states within the Asian and African blocs and beyond exploited this anti-Zionist majority for their own ends. Violators came to realize that they could avoid accountability by promising the OIC to vote against Israel in exchange for the OIC's support for diverting Commission attention away from their own violations. Anti-Zionism became the weapon of choice for real violators to shield themselves against criticism.

At the same time that there was so much noise at the Commission about Israel, there were no resolutions on major human rights violators -- not on China or Zimbabwe or Chechnya or Iran. United Nations Secretary-General Kofi Annan called the Commission a club in which countries gained membership "not to strengthen human rights but to protect themselves from criticism or to criticise others."

The problem was not just the debates and votes of the Commission proper, which was a forum of states and inevitably political. Anti-Zionism also tainted the UN human rights special mechanisms, supposedly there to provide expert analysis and advice.

Year after year the Commission and several of its experts went through the same routine. Whatever Israel did to defend itself was de-contextualized, and condemned as gratuitous, spontaneous acts of violence against innocents<sup>4</sup>.

Anti-Zionism did not cause grave human rights violations perpetrated by member states. But it facilitated entry of these states into the Commission and their joining the chorus of mischief makers once they get there. Anti-Zionism became the tactic of choice to prevent states being held to account for their violations. Victims of human rights violations likely do not realize that anti-Zionism was partly responsible for their victimization. Yet, the workings of the UN Human Rights Commission showed that it was.

In some states, Parliamentarians are immune from prosecution. This immunity leads gangsters, organized crime, known criminals to seek election to these Parliaments as a way of escaping justice. Something similar happened with the UN Human Rights Commission. The Commission attracted to their membership gross human-rights-violating states who wanted to join to get immunity for themselves. And their vehicle of immunity was anti-Zionism.

There is a link between accountability for human rights violations and ending human rights violations. Violations of human rights are indefensible. When states are held firmly and unequivocally to account for their violations, they back off and lessen the suffering.

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<sup>4</sup> See Matas, David. "Corruption of International Institutions" in *Aftershock: Anti-Zionism and Antisemitism*. Dundurn Press: 2005.

Every minute in the Human Rights Commission spent on Israel was a minute not spent on real human rights violators. In the later years of the Commission, anti-Zionism prolonged the suffering of victims of human rights violations everywhere.

It is natural for the Jewish community to focus on antisemitism. However, if the scope of anti-Zionism were commensurate with the size of Israel, the General Assembly would have likely felt little need to abolish the Commission. The use of anti-Zionism by human rights violators to shield themselves meant that all victim communities, all those concerned with the promotion of human rights had to combat the Commission's obsession with anti-Zionism. Because the Human Rights Commission had degenerated into an anti-Zionist Commission, the global human rights community, both states and non-governmental organizations (NGOs), concluded that the Commission had to be replaced.

### **C. A Botched Reform**

However, once it got to solutions, all too many people made pie-in-the-sky proposals, attempting to construct what they saw as an ideal body, on the assumption that the large majority of states would act in the best way possible to promote human rights.

It was easy to destroy the Human Rights Commission, because it managed to please almost no one. Violators thought it was doing too much. Human rights promoters thought it was doing too little.

When gross violators saw the Commission being criticized for double standards and politicization, they did not think of Israel; rather, they thought of themselves. Gross violators reflexively reject criticism and claim that they are being unfairly criticised. They portrayed the Commission as the Western World ganging up on the Third World. Gross violators embraced the stated objective of the new Council, the elimination of

double standards and politicization, as elimination of criticism of them.

With the reconstruction, violators and human rights promoters reached a common accord necessary to build the new structure. With the benefit of hindsight, we can see that human rights promoters, in an effort to achieve consensus, were naive and forgetful.

In retrospect, it is astonishing that human rights advocates would promote, and rights-respecting states would accept, an international human rights system without any checks and balances, a system where states which do not respect rights could trample without hindrance on states which do. Astonishing or not, that was the result.

Violators negotiated a structure which could be even more easily manipulated than the previous structure. They fashioned a structure malleable to their ends and then pounced.

Anti-Zionists, when negotiating reforms, kept quiet about their anti-Zionism. The reformers - human rights experts, non-governmental organizations and like minded states - were blinded by their ideals and the pursuit of a consensus. Despite all evidence to the contrary, they could not bring themselves to believe that the world of tomorrow would resemble the world of today.

Some did not care. The need to protect the UN human rights system from being overwhelmed by anti-Zionism got overtaken by other agendas. Whatever triggered the reform, the reform movement was captured by people who paid little mind to why the reform movement had started.

There is a direct correlation between the reforms – from changes to size, the number of votes needed for convening a special session, shifts in numbers of regional blocs, to the frequency of sessions - and the malfunctioning of the Council. In the end, these

reforms made matters worse because the states running the Council had little political interest in an effective human rights body.

The membership of the Commission was 53 states, and of the Council, 47 states. The geographic distribution for the Commission was 15 from Africa, 12 from Asia, 5 from Eastern Europe, 11 from Latin America and the Caribbean, and 10 from the Western Europe and Others Group. For the Council, the geographic distribution is: Africa 13; Asia 13; Eastern Europe 6; Latin American and the Caribbean 8; and Western Europe and Others Group 7.

So Africa went from 15 to 13, or a loss of two. Asia went from 12 to 13, or a gain of one. Latin America and the Caribbean went from 11 to 8, or a loss of three. Eastern Europe went from five to six or a gain of one. The Western Europe and Others Group went from 10 to 7, or a loss of three.

Even in the old Commission, Asia and Africa had a razor thin majority, 27 out of 53, or a majority of one. With the new Council, the majority became more pronounced, 26 out of 47, or a majority of two.

The non-Islamic regions, Latin America and the Caribbean or the Western Europe and Others Group, were the big losers in the shift of geographical memberships. The greater majority for Asia and Africa combined has now made it easier for the OIC states to control the Council than it was for them in the past to control the Commission.

The OIC, after the first election, had 16 members on the Council, with a majority in the Asian region and the African regions (Asia seven and Africa nine). Those two regions together, counting 26 states, had a majority in the Council. Therefore the OIC in effect controlled the Council once there was regional bloc voting.

The story was the same after the 2007 elections. Fourteen seats on the Council came up for election in 2007. After those elections, the Council had seven OIC states in the Africa region. Algeria, Morocco and Tunisia left; Egypt joined. Since, in total, the Africa bloc is 13, the OIC still had a majority in the Africa bloc.

In Asia, the terms of Indonesia and Bahrain expired. Indonesia was re-elected and Qatar joined. So the OIC membership and majority in the Asian bloc remained the same. Accordingly, the OIC controlled the 2007 Council as it did the original Council.

In 2008, for the African bloc, the term of OIC member Mali expired. It was replaced by Burkina Faso, also a member of the OIC. For the Asian bloc, the term of Sri Lanka expired, not a member of the OIC. It was replaced by Bahrain. So, for 2008, the OIC control of the Council became more pronounced.

From Commission to Council, the rules for calling special sessions changed. For the Commission, the threshold was a majority of states<sup>5</sup> For the Council, the threshold is one third<sup>6</sup>.

The frequency of sittings also changed. The Commission used to sit once a year in general session. The Council must hold no fewer than three sessions per year<sup>7</sup>.

A smaller membership, a shift in the geographic balance away from the West and toward the OIC states, a lower threshold for calling special sessions and more frequent sessions all have made a difference. They have contributed to the Council's unrelenting, institutionalized and near single-minded focus on Israel<sup>8</sup>.

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<sup>5</sup> ECOSOC resolution 1993/286 March 11, 1993.

<sup>6</sup> UNGA Resolution 60/251 paragraph 10 April 3, 2006.

<sup>7</sup> UNGA Resolution 60/251 paragraph 10 April 3, 2006.

<sup>8</sup> See the websites <eyeontheun.org> and <unwatch.org>. See also Matas, David. *From Commission to Council*. June 29, 2006; *The Threat from Anti-Zionism* October 11, 2006; *Combating Antisemitism at*

One can see the logic of these reforms in a Council controlled by human rights promoters. For instance, a low threshold vote for special sessions in a Council controlled by rights-respecting states would allow for ready intervention in emerging human rights crises. A Human Rights Council which meets frequently throughout the year has, if one ignores reality, the same naive justification: that the Council could more easily and quickly respond to new human rights violations.

If one thinks of governments as representing the people of their country rather than as those who have seized control of the state apparatus through violence, the geographic shift in membership of the Council also makes sense. The notion that a new Human Rights Council would have the same negative political tendencies as the previous Human Rights Commission, except even more so, seemed completely absent from the minds of reformers, even though that was the predictable, likely result.

It should have been obvious that a Council determined to gang up on Israel in exchange for immunity to real violators would, with a lower voting threshold, call one special session after another to condemn Israel. It should have been obvious that more frequent sessions of an anti-Israel body would mean more anti-Israel resolutions. It should have been obvious that a body with fewer members and a greater number of states from the Asian and African bloc would be all too easily dominated by the anti-Israel agenda of the OIC states.

#### **D. Why Bother?**

There are two avenues of Council reform. One is the reform of the Council by itself. The other is a reform of the Council by the General Assembly. Neither is realistic.

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*the United Nations* 21 March 2007; *UN B'nai Brith Advocacy*, May 7, 2007; *Abusing the UN Human Rights Mechanisms to Target Israel* November 18, 2007.

The Council is unlikely to see itself as defective. What defects exist are the consequences of member states' decisions which were taken consciously. The Council is intentionally anti-Zionist.

To ask the Council to reform itself, like any request for reform, is always worth doing. Human rights activists ask the worst violators to respect human rights even though the hope that they will do so may be forlorn. The Council should be treated no differently. But none of us should be holding our breath waiting for the Council to comply.

A reform of the Council by the General Assembly may be more plausible, but only in the long run. The General Assembly is not likely to turn quickly to reforming the Council, fresh from having just created this body. The resolution of April 3, 2006 of the General Assembly which created the Council was passed 60 years after the creation of the Commission in 1946, even though the Commission had been clearly dysfunctional for so many years prior to that date.

The General Assembly resolution creating the Council states "the Assembly shall review the status of the Council within five years," that is to say by April 2011. We can hope that the General Assembly will get round to try to address the shortcomings of the Council through that review, or, at least, in less than the 60 years it took the General Assembly to address the shortcomings of the Commission. Here, too, we should be making the request. Here, too, none of us should be holding our breath.

The UN human rights system was a legacy of the Holocaust. We owe it to that legacy to do what we can to make the system work, to make every effort to end its hijacking by those inimical to the Jewish state and the Jewish people.

Asking why we should be advocating reform of the Human Rights Council when reform does not seem likely is akin to asking why we should ask a repressive regime to respect human rights when it is apparent that respect for human rights is the last of the

regime's concerns. That sort of question suffers from an overly narrow selection of the intended audience for the advocacy.

Protesters of human rights violations have three basic audiences - the perpetrators, the victims and the public at large. The primary audience has to be the victims. Surviving victims of human rights violations suffer both physically and mentally. A large part of their mental suffering is their sense of betrayal, their feeling of abandonment, the despair of being left alone to their fate.

Advocacy of their cause, the show of solidarity, helps the victims to deal with their victimization, tells them that they are not alone. Expressions of concern about human rights violations, though they may not move the perpetrators to change their behaviour, surely move the victims to help them cope with their suffering. Crimes against humanity are crimes against us all. By showing solidarity with the victims, we acknowledge that we too are victims of these crimes.

When the UN silences real victims and instead absorbs its time with Israel-bashing, we must say that this muzzling is wrong. By urging reform of the UN Human Rights Council, we join common cause with human rights victims everywhere.

Providing examples of gross violations about which the UN has remained silent accomplishes the dual purpose of giving voice to the victims and presenting a powerful argument on the need for reform. Even should the reform effort go nowhere, the value of giving voice to the victims remains.

One can say the same about the UN's obsession with Israel. We would expect human rights advocates to protest attacks of Jews on the streets simply because they are Jews. We should expect no less from the human rights community when the Jewish state is systematically beaten up within the walls of the UN. Hostility to the Jewish state by diplomats and political leaders within the UN is no more respectable than

antisemitism by gangs on the street.

Walking away from the UN, saying nothing about the malfunctioning of the UN, means turning a blind eye to its victimization of the Jewish state and its envenoming of the conflict in the Middle East. The call for UN reform focuses attention on its incitement to hatred against the Jewish state and the Jewish people. UN reform advocacy is a call for global solidarity in protest against the victimization of the Jewish state and the Jewish people.

At the end of the day, UN reform will be achieved through public awareness and mobilization. Unless a functioning UN human rights system is promoted by the human rights community and endorsed by humanity at large, the UN's ideals will wither. When we put aside UN reform because those in charge are little interested, we ignore our most crucial support, the public, in the struggle for respect for human rights. Mobilize global humanity behind UN human rights reform and eventually the UN itself will follow.

## **II. A NEW REFORM**

So, let us start from scratch. Without redoing reform from top to bottom, what can be done? The bad news is that the new Council is not objective; it is selective; it imposes a double standard on Israel; it is highly politicized. The good news is that the General Assembly was prepared at least in principle to recognize and condemn these faults in the old Commission. There is a sentiment within the General Assembly that the sort of behaviour in which both the Commission and Council have engaged is wrong, a sentiment echoed by both the present and previous UN Secretary Generals.

How can a United Nations human rights body, with so many states which are anti-Zionist by conviction and so many others which are anti-Zionist by convenience, be made to function in any other way than to gang up on Israel? Any meaningful reform must focus on this problem and attempt to resolve it.

Is it possible to construct a human rights system which is not corrupted by anti-Zionism? How do we construct such a system? What are the defences which need to be put in place in the UN to deal with the world as it is, rather than as we would like it to be?

### **A. Form Alliances**

The destruction of UN systems by those with an anti-Zionism agenda is not just a Jewish or Israeli problem. It is a global problem, suggesting the forging of a joint Jewish and non-Jewish, Israeli and non-Israeli effort to address it.

There are two perspectives from which to observe the UN obsession with anti-Zionism. One is the Jewish community perspective. The other is the general human rights perspective.

The Jewish community, naturally, sees itself under threat when the world's only Jewish state is the target at the UN of continuous unjustified attacks, and virtually the only butt of criticism. For the Jewish community, the negative singling out of Israel at the UN, is one, albeit important, component of a larger anti-Israel propaganda campaign that is being waged. Addressing this anti-Israel bias is also only one component of what must be a multi-pronged strategy directed at combating anti-Zionism.

Getting rid of anti-Zionism at the UN can be done either by changing in some manner the UN or getting rid of anti-Zionism. If anti-Zionism disappears, then the problem of anti-Zionism at the UN would just disintegrate.

However, anti-Zionism is hardly a problem exclusive to the UN. It would be a problem even if the UN did not amplify it. Any strategy aimed at combating efforts to delegitimize the Jewish state must include a component that addresses the anti-Zionism

at the UN. One prong has to be reforming the UN so that it does not make matters worse and, one would hope, even makes the world a better place.

If we adopt a generalized global human rights perspective, while anti-Zionism is or should be a problem, corruption of UN human rights mechanisms is an even greater problem. From this perspective, the harm of anti-Zionism is not just the harm it does to the Jewish community. It is also the harm it does to human rights victims everywhere because, when the Council is monopolized wrongly to attack the Jewish state, it can not be used to combat real human rights violations.

For the general human rights community, fighting anti-Zionism outside the boundaries of the UN does not squarely address the corruption of the UN. Anti-Zionism at the UN, after all, is not just a matter of ideology; for many states it is a matter of convenience. As long as ideologies of some states can be used by other states as a shield to prevent human rights criticism and divert human rights mechanisms, the problem that anti-Zionism at the UN makes manifest will remain.

Therefore, from the general perspective, referring to anti-Zionism as the problem is overly narrow. The problem is rather the inability of the UN Human Rights Council to do its job because of its vulnerability to manipulation by human rights violators which anti-Zionism made manifest. Without UN reform, the defects in the UN Human Rights Council will not disappear even if anti-Zionism does.

Though the general human rights community and the Jewish community have different perspectives, they face a common problem, the monopolization by anti-Zionists of the UN human rights system. Resolving that problem becomes more likely if these two groups can work together.

There are a number of different ways in which this could be done, from simply communicating with each other on their individual efforts to achieve a common goal to

setting up formal joint mechanisms. However it is done, a joint effort is bound to be more effective than a divided one.

***Recommendation: The NGO community – Jewish and non-Jewish – should work together to attempt to make the UN human rights system more effective.***

## **B. Approach the OIC**

The virus which felled the Commission and diseased the Council is anti-Zionism. Its carrier is the OIC states. Combating the virus of anti-Zionism is an ideological struggle. Ending the transmission of the virus means engaging with OIC member states, especially those with whom Israel and the Jewish community have established relationships.

If the OIC refused to bring anti-Zionism to the UN Human Rights Council, there would still be some individual states pursuing that agenda, certainly Iran. But the voting leverage that the OIC brings to the issue would disappear.

There are two different ways in which the OIC can be approached. The NGO community can ask the OIC, as a matter of principle, to abandon its anti-Zionist UN agenda. As well, states concerned with the proper functioning of the Council can engage in diplomatic negotiations with the friendly member states of the OIC to that effect.

In those negotiations, it is likely that concerned states would have to offer individual OIC states something else in return to persuade them to abandon the status quo and take a stand that their hard line OIC colleagues would reject. What would be offered in return is not for this paper to say. But it need not be a matter on the agenda of the Human Rights Council.

***Recommendation: NGOs and states should approach individual OIC member states with whom they have established relationships to stop their anti-Israel activities at the UN.***

## **C. Change or Use the Agenda**

### **1. Abolish the Special Agenda Item on Israel**

The exclusive agenda item on Israel is a direct contradiction of the principle of non-selectivity to which OIC states subscribed when supporting the General Assembly resolution which created the Council. Like other problems with the Council, the exclusive agenda item on Israel is an exemplification of the malfunctioning of the Council. If the Council were properly constituted, this separate Israel agenda item would not exist. The special agenda item on Israel is the symptom of a sick Council, not the cause of the disease.

Removing this particular item would not remove the anti-Israel bias of the Council as long as the other manifestations of bias remain - the frequent special sessions on Israel, the parade of resolutions condemning Israel, the special mechanism asking someone to report specifically and only on what Israel has done wrong, excluding human rights violations by Palestinians against Israelis and against other Palestinians.

Yet, the point needs to be made. In any indictment of the Council, this special agenda item on Israel should take pride of place. The sheer unlikelihood of the Council in the immediate future undoing what it has just done should not inure us to the enormity of their behaviour. We may not be able to change the behaviour of the Council; but we cannot afford to ignore or forget what they are doing.

While the agenda item is there, it must be used, not to beat up on Israel but to remind the Council and the world how inappropriate it is to have this agenda item. Any agenda item is a forum, an opportunity. This opportunity, like any other, should be seized.

***Recommendation: The Council should abolish the special Israel agenda item. Until that is done, the time allotted for this agenda item at the Council should be used by states and NGOs alike to criticise its existence.***

## **2. Improve Council Work on Violator Countries**

Each Council session has two country agenda items. One is Israel. The other is all other countries. This duality shows the need for two reforms. One is abolishing the Israel-specific item. The second is getting the agenda item that allows for a focus on other countries to work more effectively.

The item where violations of other countries can be raised is titled "Human rights situations that require the Council's attention," agenda item 4. Discussion on that item need not be country specific. It can be thematic only, discussing such issues as the rights of women or children without reference to violations in any country. But it can be country specific.

What has been happening during this item is that a few governments and NGOs give speeches about human rights violations around the world. Although it is only one agenda item amongst ten, it is the only place in the Council agenda where real human rights violations everywhere in the globe can be addressed.

This agenda item needs to be beefed up. It should be the central element of the Council's work, not just shoved to one side as it is now. Agenda item 4 is an under-utilized opportunity to bring to global attention real human rights violations.

We must keep in mind, when thinking of measures to improve the international response to human rights violations, how intergovernmental bodies differ from national democratic legislatures. There are at least four significant differences.

First, decisions of international bodies are declaratory, not constitutive. Within a country, the decision of its legislature is not just declaratory, a public recording of the opinions of the individual legislators. It is constitutive, enacting laws which are then implemented.

That is not true of international bodies. The decisions of international bodies, unlike decisions of national legislatures, are typically declaratory and not constitutive. When intergovernmental organizations make decisions about their programmes to support them and their policies, they are not making laws which member states or their citizens have to follow at home. Often all these intergovernmental bodies are doing when they adopt resolutions is recording the views of their individual governments.

Secondly, resolutions of international bodies are not binding, even on those states which voted for the resolutions. National laws have general force unless and until they are repealed. The laws for which legislators vote apply to themselves and others alike, regardless of who voted for the law. That is part of what the rule of law means.

These two differences mean that a lost vote has for each voting state the same legal significance as a won vote, that is to say no legal significance at all. Because a vote is just an accumulation of the stances of each voting state, nothing legally happens when a vote is won or lost.

Third, in a democratic state, the number of legislators bears some resemblance to the number of voters. When a majority of legislators vote in favour of a law, that vote has behind it the majority or a significant minority of voters.

For international instances, there is no necessary correlation between people and votes. Each state has one vote, no matter how numerous or tiny its population. South Pacific atolls like Kiribatu and Vanatu have the same number of votes as states with massive

populations like India or Indonesia.

When a vote is won or lost in the legislature of a democratic country, it is a recording of national public opinion. When a vote is won or lost in an intergovernmental arena, the opinion expressed in the vote may diverge dramatically from international public opinion and even from the opinion of the public in the voting state.

Fourth, all too many governments are undemocratic. They are controlled by repression rather than governed by consent. The votes of these states recorded in international instances are therefore not expressions of opinion of their populations but rather the views of tyrants who have seized control of states. These tyrants deserve no special consideration even when they form or contribute to a majority vote.

All of this suggests that those states and NGOs which are concerned about real human rights violations should put time and effort into developing more country-specific resolutions under agenda item four. The fact that the Council membership is now structured to prevent these resolutions from passing should not stop these resolutions from being drafted and voted on.

States can, outside the Council, express their specific human rights concern. The Council nonetheless remains a forum for these concerns which should not be overlooked. Violators use it. Rights-respecting states should too. Otherwise, the Council is valueless.

Resolutions engage the attention of all voting states. States which may never have fixed on any particular situation may be required, by the fact that they have to cast a vote, to do so. A resolution and a vote draws attention to a situation both in the media and in home capitals. The opportunity to draw that attention should not be foregone.

Violators are embarrassed, of course, by a vote which passes. But even a vote which fails, where those voting against are predominantly non-democratic states or states with small populations, is an indictment of the targeted state. Rights-respecting states should not ignore the mobilizing and remedial effect of even lost votes, depending on which are the states voting in favour of the resolution.

***Recommendation: Rights-respecting states should draft, present and ask for votes on resolutions dealing with each and every grave human rights situation no matter where in the world the situation occurs.***

### **3. Speak Separately and Jointly**

Anti-Zionist states filibuster the Council, consuming its time with their propaganda. One way they do that is rush to fill the speaker's lists. Another way is speaking both jointly and separately. It is quite common to hear, whenever Israel comes up on the Council agenda, joint statements from the Organization of Islamic Conference states and the Arab group as well as individual statements from several members.

Rights-promoting states in contrast generally speak either jointly or separately. If, for instance, the European Union gives a statement in one of these debates, it is rare for individual European Union members also to make individual statements.

So for instance, in the Council consideration in March 2009 of the report on Israel from the Universal Periodic Review working group on Israel, Pakistan made a statement on behalf of the Organization of Islamic Conference states. But so did these individual OIC states: Syria, Egypt, Iran, Yemen, and Malaysia. In contrast, the only member of WEOG (Western Europe and Others Group) to make a statement was the United States. There were no joint statements.

One simple way of avoiding the inordinate consumption of time with senseless blather is having the sensible speak. It is a tactic to which there should be more ready recourse than there has been.

***Recommendation: Rights-promoting states should be making statements both jointly and separately.***

#### **4. Be Wary of Consensus**

The very suggestion that consensus can be harmful may seem strange, contrary to standard diplomatic attitudes. Normal diplomatic practice is to embrace agreement, not avoid it.

Yet, the search for consensus plays into the hands of the anti-Zionist states. Anti-Zionists present a whole sequence of wildly exaggerated Israel-bashing resolutions. They then offer to mitigate their criticism in exchange for support.

All too many rights-promoting states fall dupe to this game. That is a primary reason why we see the remarkable spectacle of so many anti-Israel resolutions passing almost unopposed.

To take an example, the Human Rights Council in January 2009, at one of its many special sessions directed against Israel, passed a typical Israel-bashing resolution, this time about Gaza. The vote was 33 in favour, 13 abstentions, and only one opposed (Canada). The vote was the result of negotiations and text changes which led some states to back off outright opposition. The focus of several states voting in favour and abstaining was the content of the resolution rather than the singling out of Israel.

Many states take the point of view that, as long as they can mitigate a worse resolution and live with the changed language of the resolution in front of them, they will support

it or, at the very least, abstain. They fail to have regard to the effect that an accumulation of such resolutions can have on the reputation and effectiveness of the UN.

Anti-Zionist resolutions can not be viewed in isolation. They need to be seen as a cumulative whole.

Even if, in isolation, one resolution with less harsh language passed by consensus is better than a resolution with draconian language passed by a slim majority, the cumulation of such resolutions silences advocates of the proper use of the UN human rights system, makes them complicit in its abuse. For the UN to re-establish its credibility there must be no room for compromise in opposing anti-Zionist resolutions.

***Recommendation: States should be wary of seeking and joining a consensus on anti-Zionist resolutions.***

#### **D. Change the Threshold for Special Sessions**

As noted earlier, the threshold vote for special sessions was lowered from two thirds to one third on the theory that this would allow for ready intervention in emerging human rights crises. As well, Western states, whose voting power was being weakened by a shift in geographic distribution of votes from Commission to Council, reasoned that, though they would not be able to muster a two-thirds vote, they could probably manage to assemble the votes of one third of the Council.

This reasoning failed to think through the consequences of calling a special session where there was no majority in favour of meaningful conclusions. It is likely even today that rights-promoting states could gather enough votes for a special session on the situation in many of the states which present grave human rights concerns.

However, once the session is called, then what happens? If there are not enough votes to pass meaningful conclusions, the effect of the special session is perverse, tolerating rather than condemning human rights violations. Unless those wanting a special session have a majority lined up in advance to endorse the conclusions they would like to see coming out of the special session or some variation of those conclusion, calling a special session is pointless.

Experience has proved the validity of this point. Those concerned about the mass killings in Darfur, Sudan and the Congo managed to persuade the Council to convene a special session on each situation. But the conclusions emanating from both sessions were anodyne, of no real value in improving the human rights situation in either country.

So the one-third threshold serves those with a majority in their pocket. That certainly encompasses the OIC states. Out of the ten special sessions called by the Council as of May 2009, five were directed against Israel, including the first three.

But it does not encompass those states which would like to see the UN Human Rights Council focus on real human rights violators instead of obsessing on Israel. Those states which realized that a one-third vote could make a real difference to the Council failed to negotiate a system where they could use a one-third vote in a meaningful way. A one-third vote to call a special session is useless where there is no majority in tow.

A one-third vote to bloc a special session though is meaningful, something which already existed in the old Commission. The minority of rights-respecting states, here as elsewhere, did not realize that, in attempt to make things better, they were actually making things worse, that they were far better off with what they had than with what they negotiated to get.

***Recommendation: The threshold for special sessions should be raised from one third to two thirds of the members voting.***

## **E. Oppose Funding for Anti-Zionism**

### **1. Oppose the budget**

The United Nations General Assembly approved in late December 2007 its general budget for two years. Funds for the Human Rights Council are part of this budget. The United States was the lone state opposed. Its opposition was based on the fact that the budget included financing for preparatory conferences for a follow up to the World Conference against Racism held on Durban South Africa in 2001. Because the original conference was, according to the US representative "noxious" and a "disgrace," the US opposed funding preparation for a follow up<sup>9</sup>.

Though the US was the lone state to vote against the budget as a whole, there were many states which voted specifically against the Durban review budget, forty in all. The thirty nine other states, though, once they lost on the Durban review vote, did not vote against the whole UN budget.

Using finances to control the policy of the UN Human Rights Council is a blunt instrument. The budgetary arm of the UN system does not decide policy. The UN budget is decided by the Fifth Committee of the General Assembly. UN human rights policy is decided by the Third Committee of the General Assembly. A state which has lost a policy vote at the UN Human Rights Council and the UN General Assembly Third Committee could, and for consistency purposes should, vote against the budget to fund the policy to which it objects. But once that vote is also lost, as it likely will be, in light of the previous loss or losses, there is not much to be done.

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<sup>9</sup> Warren Hoge "Despite U.S. Opposition, United Nations Budget Is Approved" New York Times, December 23, 2007

Budgetary opposition is a way of carrying forward and publicising policy positions. For instance, the mandate of the Special Rapporteur on the human rights in the Palestinian territories occupied since 1967 should not exist. Opposition to that mandate could and should take budgetary as well as substantive form.

***Recommendation: The budget for anti-Zionist activities and mechanisms at the UN Human Rights Council should be opposed.***

## **2. Oppose contributions to the budget**

Each country is assessed a financial contribution to pay for the UN budget. The expenses of the budget are borne by member states in the proportion decided by the General Assembly<sup>10</sup>. In theory, a member state could refuse to pay its financial contribution in part or in whole. However, if the amount in arrears is sufficiently large, the state member loses its vote in the General Assembly<sup>11</sup>. Once the amount withheld equals or exceeds the contribution due for the previous two years, the right to vote is lost.

Voting against the budget for the whole UN Human Rights Council or the whole UN system is, as noted, unlikely to get very far. Withholding contributions is different.

The money withheld does not necessarily mean reduced finances for the activity for which disapproval is registered. There is loose talk when contributions are withheld on the basis of not funding this or that activity; literally that is not what happens. The budget for the activity remains the same. So does the funding. All that happens is that the country withholding funds pays less than its assessed contribution to the total budget. In the year of withholding, the cash flow of the UN is reduced.

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<sup>10</sup> UN Charter Article 17(2).

<sup>11</sup> UN Charter Article 19.

Even this cash-flow reduction is not necessarily problematic. The UN cannot borrow externally without specific authorization from the General Assembly. The UN can and does cross borrow money amongst its component parts to cover deficits in any one component. In the past, the UN has financed shortfalls in its regular budget through borrowing from its budgets for peacekeeping or international tribunals.

Moreover, money withheld is never actually lost to the UN. The withheld portion of an assessment just constitutes an arrears, a debt the country owes to the UN. At some point, the debt will have to be paid to the UN if the country is to remain in good standing.

Nonetheless, money talks. Withheld funds become a form of leverage. The system has an incentive to change its ways to get the withheld money paid as soon as possible.

The United States Congress in 2007 passed a foreign operations appropriation bill with an amendment stating:

"(a) In General - No funds appropriated or otherwise made available by any Act for fiscal years 2008 or 2009 for contributions to international organizations may be made available to support the United Nations Human Rights Council.

(b) Exceptions- The prohibition under subsection (a) shall not apply for a fiscal year if, during that fiscal year--

(1) the President determines and certifies to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives that the provision of funds to support the United Nations Human Rights Council is in the national interest of the United States; or

(2) the United States is a member of the Human Rights Council."<sup>12</sup>

The Senate passed similar legislation in 2008<sup>13</sup>.

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<sup>12</sup> See S. 1698.

It is not clear how this legislation can be made to work, since the US gives an overall assessed amount to the UN and the UN decides how the money is spent. The US does not give an assessed contribution directly to the Council. The amendment would have been clearer if the US overall contribution to the UN were reduced by an amount calculated by applying the US percentage of the UN overall budget which is allotted to the Human Rights Council budget.

Moreover, this amendment sits uneasily with United States legislation. The United States Code provides:

"Nothing herein shall be regarded as authorizing the United States to participate in any future United Nations borrowing. It is the sense of the Congress that the United States shall use its best efforts to promote a pattern of United Nations financing (including a vigorous program for collection of delinquencies on annual assessments of nations and maintenance of such annual assessments on a current basis) that will avoid any future large-scale deficits."<sup>14</sup>

So Congress at one and the same time has voted to not pay a component of the US assessment for the UN and "a vigorous program for collection of delinquencies on annual assessments." Whatever the US President can make of this when deciding whether it is in the national interest for the US to withhold from the UN an amount equivalent to its calculated contribution to the UN Human Rights Council, the point the US makes to the international community, should funds be withheld, is surely muddled.

The incentive of withholding funds worked a few years back with UNESCO, the United Nations Education Science and Cultural Organization, a specialized UN agency with its own budget and membership contributions. In 1984, the United States withdrew from

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<sup>13</sup> Bill S.3288 section 767.

<sup>14</sup> US Code Title 22 section 287j.

UNESCO, complaining about "poor management and values opposed to our own"<sup>15</sup> and withheld its membership contribution. This financial withdrawal imposed a pressure on the UN to reform UNESCO and changes were made. The US rejoined UNESCO in 2002.<sup>16</sup>

States could take the position that, unless and until the UN Human Rights Council amends its anti-Zionist ways, the assessed contribution of the state to the UN system as a whole would decrease by the amount of that state's notional percentage contribution to the UN Human Rights Council. That contribution could be calculated by applying to the Human Rights Council budget the state's percentage assessed contribution to the overall budget. Figuring out the budgetary cost of the Council, separate from the Office of the United Nations High Commissioner for Human Rights and the treaty based mechanisms, is not that simple. But, in the overall budget of the United Nations, it is relatively tiny. It would take many years before any state would lose its vote in the General Assembly simply by reducing its notional calculated contribution to the Human Rights Council. The flip side of that consideration is that the temporary loss of these funds to the UN, because the amount is relatively small, will impose little hardship on the UN and generate little pressure on it.

Withholding, like budgetary opposition, needs to be specific. Rather than withholding funding of the budget for the whole Human Rights Council, there should be withholding funding for those components of the Council which show it at its worst. These are the special sessions attacking Israel, the special reports commissioned to attack Israel and the Special Rapporteur whose mandate is to criticise Israel. Withholding funding for these activities would serve to highlight the bias of the Council, its ganging up on the Jewish state, its perverse intention to stand against the right to self determination of the Jewish people.

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<sup>15</sup> "Fact Sheet: United States Rejoins UNESCO." The White House: September 12, 2002

<sup>16</sup> Ibid.

***Recommendation: States should withhold funding for anti-Zionist activities and mechanisms of the Council.***

## **F. Develop Alternative Fora**

There is already in place another intergovernmental organization which is committed to democratic principles and restricted to democratic or democratizing members, the Community of Democracies. As it stands, the Community of Democracies is a fledgling organization. It was started only in the year 2000 by Poland and the US. It began with a Ministerial level meeting in Warsaw at which 110 governments adopted a set of democratic principles and an agreement to work cooperatively to strengthen democracy. The organization is led by ten convening governments - Czech Republic, Chile, India, South Korea, Mali, Poland, the US, Portugal, South Africa and Mexico. There is no permanent secretariat and no staff. There have subsequent Ministerial level meetings in Seoul, South Korea, November 2002, in Santiago, Chile in April 2005 and Bamako, Mali, November 2007. The organization has formed a caucus at the UN, the UN Democracy Caucus.

The organization has its own problems. At its first meeting, it did not exclude any state on the basis that it is not democratic. Some states which are not democratic attended the meetings of the organization. At the initial meeting, in the year 2000, Tunisia, Yemen, Egypt, Burkina Faso, Azerbaijan, Qatar, Kenya and Kuwait all attended. Human Rights Watch protested, stating that

"the concept of democracy is cheapened when it includes one party states and governments which get 99% of the vote...To justify their inclusion by referring to their supposed democratic aspirations is to mock the values that should underlie a conference of democracies."<sup>17</sup>

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<sup>17</sup> "Democracies Urged to Protect Rights." Warsaw, Poland. Human Rights Watch. June 24, 2000

The organization took this criticism to heart. The Convening Group now issues invitations to countries based on a determination whether or not they meet a set of democratic criteria. The Group is aided in its work by a panel of independent experts, the International Advisory Committee.

The Advisory Committee in April 2007 recommended in favour of inviting 100 governments as full participants to the Mali meeting in November 2007, and 18 governments as observers because of progress made towards democracy. It explicitly rejected 54 governments, including Russia and Iraq<sup>18</sup>.

The Advisory Committee does not just list countries. For borderline countries, where there is a real question as to whether an invitation should be issued or not, the Committee produces country reports. These country reports have the sanction of the Committee only and not the whole organization. They nonetheless remain useful documents<sup>19</sup>.

The Convening Group rejected the suggestion of its Advisory Committee and nonetheless invited Iraq as a participant<sup>20</sup>. Russia was downgraded from a participant in Chile in 2005 to an observer in Mali in 2007 but was not completely rejected<sup>21</sup>.

Israel was recommended to be invited and was invited to the meeting as a full participant without hesitation. Virtually all of the hard-line anti-Zionist states were absent. Recognition of Israel was not a criterion for invitation. Indeed, the host and

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<sup>18</sup> Taylor, Paul. "Russia, Iraq deemed unfit for democracies' meeting." *Reuters*. April 12, 2007

<sup>19</sup> "Community of Democracies Meetings in Bamako." Democracy Coalition Project. Accessed online at <[http://www.demcoalition.org/site09-2008/2005\\_html/commu\\_cdm07.html](http://www.demcoalition.org/site09-2008/2005_html/commu_cdm07.html)>: May 08, 2008.

<sup>20</sup> Statement of the Convening Group of the Community of Democracies on the Invitation Process for the Fourth Ministerial Conference to be held in Bamako, Mali, November 14-17, 2007

<sup>21</sup> "Invitations for Global Club of Democrats Deemed Largely Credible." Democracy Coalition Project. September 6, 2007

co-convenor, Mali, does not recognize Israel. The near complete absence of anti-Zionist states from a democratic conclave indicates how deeply embedded anti-Zionism is in the non-democratic world.

Should this organization be developed to the point where it takes over the work on country situations now allocated to the UN Human Rights Council? Even if we put to one side the bare bones nature of the organization and controversies over its membership, the question remains whether shifting human rights country work away from the UN to a more limited membership organization makes sense. Human Rights Watch has argued to the contrary with this statement:

"Achieving a consensus for democracy and human rights in bodies with universal representation may be hard, but such a consensus is also much harder for dictatorships to dismiss."<sup>22</sup>

This analysis assumes that the worst that can happen at the UN about democracy and human rights is that nothing is done. However, that is not the reality. The result of UN involvement in country specific human rights situations is that the UN becomes a propaganda broadcaster for human rights violators and human rights violations. That is certainly true for anti-Zionism which human rights violators have the opportunity to foment at the UN because the UN is in the human rights business. When that is what happens, it would be better for human rights if the UN did not get involved in country specific human rights situations at all.

***Recommendation: Develop the human rights work of the Council of Democracies.***

## **G. Stop Consideration of Israel**

i) The Commission, when it first began its work, had nothing to do with country-specific human rights violations. It focused exclusively on the development of standards and

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<sup>22</sup> "Standards Urged for Community of Democracies." Human Rights Watch. August 9, 2001

did so for twenty one years.

The Commission's first country focus, on South Africa, did not begin until 1967. Israel was not far behind, two years later in 1969. For six years, it was just those two countries, a harbinger of the current slurs against Israel as an apartheid state. Chile joined the list in 1975. And from there the pattern became more general.

The United Nations, so it is said in its defense, is blamed for reflecting global reality, almost as if it holds up a mirror to the face of the world. If the United Nations is anti-Zionist, the reason is that the planet is anti-Zionist. Blaming the United Nations is blaming the messenger.

However, that is not the problem. The United Nations human rights system is not just neutral. In many situations, it makes matters worse.

The human-rights-violations debates at the UN provoke friction and confrontation and hinder co-operation amongst states. Giving a human-rights-violations mandate to a political body inevitably means inserting political discourse into human rights work. Allegations of human rights violations are often used by governments for political purposes to attempt to discredit and delegitimize their political opponents.

The disputes, the politics, exist outside the UN. But the debates within the UN exacerbate conflicts. Sheldon Gordon has written that the:

"very act of airing tensions at the United Nations becomes an attempt to sharpen rather than conciliate conflict". "The United Nations increases the number of states which are party to a conflict, making it harder to resolve. States which are peripheral to a dispute offer their votes to those directly implicated in return for future considerations".<sup>23</sup>

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<sup>23</sup> Globe and Mail, October 1, 1982.

The United Nations Charter states as one of its purposes

"to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples."

Instead of promotion of respect for human rights being used as a tool or a precondition for developing friendly relations between states, at the UN, unfounded or exaggerated accusations of human rights violations have become weapons in hostile exchanges between states.

States on decidedly unfriendly terms exchange accusations of human rights violations back and forth. These exchanges lead to an envenoming of relations rather than to an improvement in relations. Because the United Nations has assembled nations of the world and votes regularly on resolutions, states which might otherwise not have been involved have been drawn into these verbal hostilities and end up taking sides.

The United Nations Commission and Council have too often been fora for unfriendly relations. They more than just mirror these unfriendly relations. They magnify them, and human rights violations accusations assist in the magnification.

The human rights vocabulary at the United Nations Commission and Council have become distorted and degraded. Because the United Nations is so politicized, it often ignores violations of the politically popular, those who can line up voting blocs behind them. Those who are politically unpopular, who cannot call on large voting blocs to silence their critics, find it easy to dismiss criticism of human rights violations because of its political nature.

Has all or indeed any of the focus on Israel by the United Nations Commission and Council brought peace closer or improved respect for human rights in the Middle East? The Commission, as noted, began to direct its attention to Israel in 1969, thirty nine years ago. That is surely a long enough run to assess the value of this technique.

Since the focus of the country work of the Council has been almost exclusively Israel, one can legitimately ask: has this focus improved the chances of peace or respect for human rights since the work of the Council began?

The answer to these questions is surely no. The answer has to be: quite the contrary. The UN Commission and Council have made matters worse.

Carl von Clausewitz wrote about diplomacy and war that "War is nothing but the continuation of politics by other means."<sup>24</sup> For Arab hostility to Israel, the converse has been also true. Diplomacy has been a continuation of the wars against Israel by other means.

Anti-Zionism has been the main obstacle to peace between Israel and its neighbours. The consequence of anti-Zionism has been unending war.

Anti-Zionists cannot win on the battlefield. But rather than sue for peace, they come to the UN to continue the war. By portraying Israel as the primary or sole human rights violator, UN institutions embitter the dispute. Anti-Zionists become more intransigent, more determined to destroy the State of Israel through military means.

UN condemnations more than just reflect that anti-Zionism that is a facet of state policy of so many countries in the world. United Nations sanction for this bigotry gives it a credibility it would not otherwise have. It provides propaganda fodder for anti-Zionists who portray the trumped up condemnations of Israel they ram through the Council as the voice of international law. It hardens the advocates of war with Israel in their negationist positions; it makes peace with Israel harder to achieve.

For Israel, it is all too easy to ignore whatever few kernels of truth there may be in the

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<sup>24</sup> *On War*, first published 1832.

mountains of propaganda directed against it. For the Palestinian Authority and Israel's anti-Zionist neighbours, the silence of the United Nations Commission and Council about the victimization they cause has meant to them a license to keep on doing it.

Getting the Council out of the business of dealing with Israeli human rights violations would work better for the world not just in a practical sense. It would also be more consistent with the ideals of the UN to promote respect for human rights and friendly relations between states.

The proposal here is not just to have the Council drop its special agenda item on Israel. It is to stop consideration of Israel under any agenda item, even the general agenda item on human rights situations that require the Council's attention.

Particular problems require particular solutions. The problem with the Human Rights Council is specific – it's distortion and corruption by anti-Zionism. Banish anti-Zionism from the halls of the Council and there is at least a hope that the Council will function effectively. More general solutions may either fall short or overshoot the mark, not do enough or do too much.

Dropping consideration of Israel from the Council and its specialized mechanisms does not mean giving Israel a human rights free ride. There would, one can be sure, continue to be charges of human rights violations made against Israel whether those charges are levied within the Council walls or not. Avoiding the topic within the Council would be only a recognition that this silence is necessary for the Council itself to survive as a meaningful human rights body.

***Recommendation: The Human Rights Council should not address the human rights situation in Israel, the West Bank or Gaza as long as Israel remains at war with its anti-Zionist neighbours.***

ii) The Security Council has the power to request the International Criminal Court to defer an investigation or prosecution<sup>25</sup>. The article empowering the request for deferral does not indicate what is to be deferred - investigation or prosecution of an individual, or all investigations or prosecutions arising out of a situation.

However, elsewhere in the statute, the Court is given jurisdiction with respect to a crime if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council<sup>26</sup>. The Security Council referral power exists for situations only and not individuals. Presumably, it is the same for the deferral power.

The United Nations Charter gives the Security Council authority over threats to the peace, breaches of the peace and acts of aggression<sup>27</sup>. Both the referral and the deferral powers the Court statute gives to the Security Council have to be exercised under this branch of its Charter powers.

The power of deferral which the Security Council has in relation to the Court it also has in relation to the UN Human Rights Council. For the Court, a specific statement was needed, because the Court exists by virtue of a treaty and is not itself an organ of the United Nations. For the UN Human Rights Council no specific instrument or provision is necessary. The general authority the UN Charter gives to the Security Council over war and peace is sufficient.

I have grave doubts whether the Security Council should ever exercise its deferral power over the Court. In my view, prosecution of war criminals, criminals against humanity and genocidal killers always helps peace. The Court statute does not allow

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<sup>25</sup> Statute of the International Criminal Court, Article 16

<sup>26</sup> Article 13(b)

<sup>27</sup> Chapter VII, Article 39

for prosecution of states or criminalization of organizations or groups<sup>28</sup>. Only individuals can be prosecuted.

The matter is different with the UN Human Rights Council. The Council deals with states, not individuals. In this context, the exercise of deferral powers could contribute to peace. Indeed, if suspension of action against individuals for the sake of peace makes sense, suspension of action against states for the sake of peace would make even more sense.

As I have indicated, the anti-Zionist invectives of the Human Rights Council make peace harder to achieve. The Security Council could easily and justifiably pass a resolution under its Charter authority over war and peace asking the Human Rights Council to defer all consideration of Israeli violation of human rights until there was a peace agreement between Israel and its neighbours. We should be asking the Security Council to do that. That sort of resolution would not only benefit efforts to achieve peace; it would confer an enormous benefit on the Human Rights Council, taking the anti-Zionist monkey off its back.

Security Council deferral, like all Security Council decisions, would require the acquiescence of the five permanent members - China, France, United Kingdom, the United States and Russia. These five would not have to vote in favour. But each would have to refrain from exercising the veto the state has. Given the general commitment to achieving peace in the Middle East, obtaining that acquiescence is arguably realistic.

***Recommendation: The Security Council should ask the Human Rights Council to defer consideration of all human rights violations in Israel, the West Bank and Gaza until Israel has reached a peace agreement with the other states in the region and the Palestinians.***

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<sup>28</sup> Article 25.

## **H. Change the voting rules**

Within the OIC, there are degrees of anti-Zionism. Some states just go along. Others are active leaders. Especially problematic are the states which do not recognize Israel. The original Council had eleven members who do not recognize Israel - Bangladesh, Cuba, Djibouti, Indonesia, Mali, Pakistan, Saudi Arabia, Algeria, Morocco, Tunisia and Bahrain. The terms of five of those expired in 2007 - Algeria, Morocco, Tunisia, Bahrain and Indonesia. Indonesia was re-elected in 2007 and Qatar was elected for the first time. After the 2007 elections, there were eight members of the Council who did not recognize Israel - Bangladesh, Cuba, Djibouti, Indonesia, Mali, Pakistan, Qatar, and Saudi Arabia. Israel has a trade office in Qatar.

It should seem obvious that a state which does not recognize Israel is going to vote against Israel politically, regardless of Israel's human rights record. Such states, as a matter of principle, should not be allowed to speak or vote on matters relating to Israel.

The principle should be that no state which refuses to recognize another state should be speaking or voting on the human rights record of that state. That would require a change from the Council itself, not the General Assembly. Given the current make up of the Council, such a change is unlikely, but nonetheless worthwhile.

***Recommendation: The rule of the Council should provide that no state which refuses to recognize another state should be permitted to speak or vote on the human rights record of that state.***

## **I. Change the Membership of the Council**

### **1. Exclude Gross Violators from Membership**

One does not have to reform the Council to make the Council work. All one has to have is a better membership.

The US voted against the Council because the reform did not do enough to exclude human rights violators from the Council. If, in fact, gross human rights violators were excluded from the Council, then the concerns of the US and others would be answered.

Secretary General Kofi Annan, in a report to the General Assembly, wrote:

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

If the United Nations is to meet the expectations of men and women everywhere - and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development - then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council. Member States would need to decide if they want the Human Rights Council to be a principal organ of the United Nations or a subsidiary body of the General Assembly, but in either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting. The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member States should determine the composition of the Council and the term of office of its members. Those elected to the Council should undertake to abide by the highest human rights standards<sup>29</sup>".

So, Annan envisaged two safeguards to ensure that the Council membership was respectable, a two thirds vote and an undertaking. Regrettably, neither happened.

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<sup>29</sup> United Nations Document A/59/2005, 21 March 2005, paragraph 182 and 183.

The General Assembly resolution creating the Council provided for election by majority vote of the members of the General Assembly<sup>30</sup>. The two thirds vote was to be used to evict violators from the Council once they got there. As well, instead of an undertaking being required, the resolution merely stated that any pledges and commitments made were to be taken into account.

Specifically, the UN General Assembly resolution creating the Council provided:

"the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights."<sup>31</sup>

So, the principle of keeping out gross violators is to be found in the mandating resolution. But the resolution stripped away the suggested mechanism for making the principle work.

The case of Belarus provides an example worth noting. Belarus is an undemocratic state against whom there is evidence of serious human rights violations. It was also the subject of a special UN procedure. The Government of Belarus, in May 2007, sought membership in the Council. Its motivation was obvious. The mandate of the UN Special Rapporteur on Belarus was up for renewal at the next scheduled general session of the Council one month later in June 2007. Belarus wanted to join in order to end that procedure.

Human rights activists were sufficiently alarmed and motivated to do something about it. Belarus was one of two candidates for two regional slots for Eastern Europe, the other being Slovenia; it appeared to be coasting towards acclamation. Activists leaned on Bosnia to contest and then lobbied against Belarus successfully. Bosnia and

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<sup>30</sup> United Nations A/RES/60/251 paragraph 7.

<sup>31</sup> Paragraph 8.

Slovenia ended up getting the two Eastern European slots.

Belarus, as it turned, need not have worried. When the Council met in June 2007, the mandate of the Special Rapporteur on Belarus, along with that of Cuba, ended up being discontinued.

Did Belarus agree not to hold states to their commitment to support its candidacy for the Council in exchange for a vote in the Council on the discontinuance of the Belarus special procedure? Even if that were so, the damage Belarus did with this putative negotiation was limited. Its presence on the Council would have meant much more harm than that.

Though the case of Belarus is a positive example, it is not that easy an example to follow. Human rights activists also opposed the election in May 2007 of Egypt to the Council. But Egypt got elected anyways. The activist community could not even find another state within the African block to contest Egypt. So the Egyptian election was by acclamation.

The General Assembly is far from an ideal forum to combat anti-Zionism. The General Assembly each year passes up to twenty unbalanced anti-Israel resolutions. Attempting to use the General Assembly to whittle down the anti-Zionist majority of the Council is quixotic.

However, just because the forum is unlikely to generate easy victories or many victories, that is no reason not to try. On the contrary, trying to effect reform of the Council through General Assembly votes on the membership of the Council is an effective way of showing how important membership is and how ineffective the present system is in placing worthy members on the Council.

Even if there were a will, what is the way? What would be an effective mechanism for

excluding gross human rights violators from the Council? The workings of the Council of Democracies provide a suggestion.

As noted, the organization has a Convening Group of states which issues invitations to that Council. The Convening Group is assisted by a panel of independent experts, the International Advisory Committee. The Committee recommendations are accompanied, in cases where there is a real question as to whether an invitation should be issued or not, by detailed justifying reports. This Council provides a model which the General Assembly, in choosing the membership of the Human Rights Council, can follow.

***Recommendation: The General Assembly should exclude from membership of the Council states which are gross human rights violators. In deciding which states to exclude, the General Assembly should be assisted by reports from an independent expert advisory committee.***

## **2. Elect human rights leaders**

The UN General Assembly resolution creating the Council also provided:

"when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto."

This is an encouragement not just to exclude the worst, but also to elect the best. In principle, the better the human rights record of a state, the stronger its candidacy to membership in the Council should be.

Standing for a Human Rights Council seat should mean the casting of a spotlight on the human rights record of the candidate state. Human rights promoting NGOs should be assessing and ranking the human rights records of all candidates' states, and then campaigning for and against candidates based on those rankings. The very existence

of these campaigns, if they become thorough and high profile enough, would discourage states with poor human rights records from standing for election.

***Recommendation: Human rights promoting states and NGOS should campaign for and against membership in the Council based on the human rights record of the candidate state.***

### **3. Limit OIC membership**

The present geographical distribution of Council seats has led to an effective majority for state members of the OIC states. But it does not have to be that way.

The present geographic distribution makes it easier for member states of the OIC states to have a majority of the Council. But this majority is not automatic. It is the consequence of the elections to the Council of a large number of OIC states which then become the majority of both part the Asian and African blocs.

In light of the anti-Zionist bent of the OIC states and the corruption of the Council by anti-Zionism, the General Assembly should make a conscious effort to avoid a majority of OIC states in both the Asian and African blocs. This avoidance should continue until such time as the OIC as an organization gives full recognition to Israel.

***Recommendation: The General Assembly should avoid a majority of OIC states in both the Asian and the African blocs until such time as the OIC as an organization gives full recognition to Israel***

### **J. Expand Membership of the Council**

The logic of a small Council disappears once the membership of the Council includes violator states, once the Council is controlled by the OIC states. The General Assembly, politicized and manipulated as it is, makes the Council look bad by comparison.

If every state member of the UN were a member of the Council, then it would follow that Israel would be a member of the Council. Given the UN treatment of Israel as the Jew amongst nations, this is likely to be the only way that Israel would get membership in the Council.

The High-level Panel on Threats, Challenges and Change on its report to the United Nations in 2004 recommended universal membership for the then Human Rights Commission. It wrote:

"In recent years, the issue of which States are elected to the Commission has become a source of heated international tension, with no positive impact on human rights and a negative impact on the work of the Commission. Proposals for membership criteria have little chance of changing these dynamics and indeed risk further politicizing the issue. Rather, we recommend that the membership of the Commission on Human Rights be expanded to universal membership. This would underscore that all members are committed by the Charter to the promotion of human rights, and might help to focus attention back on to substantive issues rather than who is debating and voting on them."<sup>32</sup>

If the Council were to include every member state, the question becomes, how is it different from the Third Committee of the General Assembly, which has a human rights focus? One answer would be its frequency of meetings. The second would be its location - in Geneva rather than New York, involving a different set of state representatives. A third would be its responsibilities, its supervision over and interaction with the specialized mechanisms. While there is something to be said for the abolition of the Council altogether, as long as it continues, it would work better with universal membership than with reduced membership.

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<sup>32</sup> Paragraph 285

If the membership of the Council were expanded to include all states, then replacing the Council with the Third Committee of the General Assembly would be an alternative to this expansion. While keeping the Council in expanded form is preferable to its replacement by the Third Committee for the reasons just given, the difference between these two alternatives is not that great.

If the Council were abolished, all the specialized mechanisms would remain. They would just report directly to the Third Committee. There would be the advantage of some financial saving if the Council were abolished.

Continuing the Council with a universal membership runs a risk of duplicating the Third Committee. There would have to be a meaningful division of work between the two bodies so that we do not end up having one body just echoing the other.

***Recommendation: Expand the membership of the Council to include all states.***

## **K. End or Change Blocs**

### **1. End Bloc Voting**

Ending bloc voting at the Council would end the OIC states' hegemony over the Council. However, ending bloc voting is easier said than done.

The impetus for bloc voting does not just come from the OIC. It also comes from the European Union. EU states like to vote together as a way of expressing and strengthening their union. Because of that, EU states are little inclined to oppose bloc voting.

It is possible to argue that the EU is a special case, because it is a union with common institutions. Other blocs do not fit that description. There is an Organization of African

Unity, an Organization of American States, and, of course, the Organisation of the Islamic Conference. The institutional connection between member states of blocs like the OAS and OIC is nothing like the institutional connection amongst member states of the EU.

While, in principle, one can make that distinction between the EU on the one hand, and the OAU, OAS and OIC on the other hand, in practice this distinction has little persuasive force. Other blocs will wonder what is wrong with their voting together when the EU is voting together.

There is an irony in the EU bloc voting. The EU contains many of the states which are proud of their human rights record and committed to improving the human rights performance of the United Nations. Yet, through the example these states set of bloc voting, they undermine the UN ideals.

For NGOs, there are two choices. One is to advocate the EU as a special case. The other is to oppose bloc voting for any bloc. I suggest that the second choice is simpler, clearer and more persuasive.

***Recommendation: Bloc voting at the Human Rights Council should end.***

## **2. Allow Israel to Join a Regional Bloc**

Though Israel has been part of the United Nations since 1949, it was denied admission to any of the regional groupings. It is the regional groupings that nominate and then vote for state members of United Nations committees. The rejection of Israel from all regional groupings meant that Israel could be elected to none of these committees. Israel could never become a member of, say, the Human Rights Commission or the Security Council because there was no regional bloc to nominate and vote for it. Many of the United Nations institutions that were condemning Israel with abandon Israel

could not even join.

The obvious regional grouping for Israel to join would be the grouping for the region in which it is found, the Asian grouping. However, Arab states have opposed membership in that grouping. Since the groupings operate by consensus, Israeli membership in the Asian grouping became impossible. Arab states in the Asian grouping continue to this day to let their political animus rule over the dictates of geography.

Finally, in the year 2000 Israel was given a form of membership in the Western European and Others Group (WEOG). The "Others" in WEOG include the United States, Canada, Australia and New Zealand. The present solution is partial only. Israel is eligible on rotation to sit on United Nations committees elected in New York but not on United Nations committees that are elected elsewhere around the world<sup>33</sup>.

The regional groupings function for policy as well as election purposes. In regional groupings, resolutions are discussed, wording as well as votes. Regional blocs often vote together. What a bloc vote will be is determined in bloc meetings. By excluding Israel from regional groupings in Geneva, Israel is effectively sidelined from the workings of the Council, even though the subject matter of Israel is a main business of the Council.

This exclusion of Israel both highlights and makes easier the manifest prejudice of the Council against Israel. To allow Israel to speak at the Council without allowing its participation at prior policy and planning regional meetings means that Israel is faced with a *fait accompli* by the time its voice is heard.

***Recommendation: Israel at Geneva at the Human Rights Council should be a full member of at least one regional grouping.***

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<sup>33</sup> Ron Csillag, *Israel's UN isolation comes to an end*, Canadian Jewish News, June 8, 2000

## **L. Reform expert mechanisms**

### **1. Maintain Country-Specific Mechanisms**

Country-specific mechanisms - special rapporteurs, independent experts, working groups - have been useful in promoting human rights. They serve to highlight situations of grave concern and dilute the focus of the system on Israel. Regrettably, as the Council advances, these mechanisms are disappearing one by one, isolating the obsession of the Council with Israel.

So far, country specific procedures relating to countries other than Israel have been disappearing almost as fast as the Council has been considering them. In June 2007, the Council heard from and decided to continue the special procedures for Cambodia, Congo (DRC), Somalia and Haiti. The Council heard from and decided to discontinue the special procedures on Belarus and Cuba.

There was no noticeable improvement in the human rights records of Belarus and Cuba before the 2007 discontinuation. Belarus is not a member of the Council, but Cuba is. What was noticeable for Cuba was how vociferously anti-Zionist it had become within the confines of the Council. The Cuba discontinuation was immunity bought with anti-Zionism.

In December 2007, the Council ended the mandate of its Group of Experts on the human rights situation in Darfur. This was done while the genocide in Darfur continued.

In March 2008, the Council decided to end the mandate of the independent expert on the Democratic Republic of Congo despite the awful human rights situation there. The African bloc has taken the position that there should be no special mechanism for a country in the bloc unless the country requests the mechanism. The Congo did not want the independent expert. So the African bloc manoeuvred to end its mandate.

In September 2008, the mandate of the independent expert on Liberia ended. In the case of Liberia, there was an improvement in the human rights situation since the expert was first appointed. However, what seemed determinative was not the human rights situation on the ground, but simply the wishes of Liberia.

Something similar has happened with the confidential complaints procedures. The old Commission considered in confidence consistent patterns of gross violations of human rights occurring in any part of the world. The consideration was named the 1503 procedure after the number of the Economic and Social Council resolution of 27 May 1970 which had created it. The new Council carries forward this procedure with intent to replace it<sup>34</sup>.

The president of the Human Rights Council announced on March 26, 2007 that the Council decided to discontinue consideration under that procedure of both Uzbekistan and Iran. Again, here, there was no noticeable improvement in the human rights situation of either Uzbekistan or Iran before the decisions to discontinue. What is noticeable is that both states are members of the OIC.

There is a value to country specific mechanisms even once there is a functioning universal periodic review, because there is a meaningful distinction to be made between gross violations of human rights and less severe violations of human rights. Country specific mechanisms are justified when the level of violations is so high that a specific international remedy is needed.

Yet many states, including the whole Africa bloc, have taken the position that the advent of the universal periodic review, even in its present malfunctioning form,

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<sup>34</sup> Resolution 5/1, Annex Section IV.

justifies the abandonment of country specific mechanisms<sup>35</sup>. This logic, of course, has little sway with anti-Zionists determined to target Israel. But it has had a role in the ending of the mandate of other country specific mechanisms. The advent of the universal periodic review has then had this perverse result, making the Council more selective rather than less, increasing rather than decreasing double standards, by making the Israel country specific mechanism in the Council stand out even more as an anomaly than it did in the old Commission.

As this process continues, Israel will be left alone or with little company as the object of a specific country mechanism. The Council should either abolish all country procedure mechanisms, including the one focused on Israel, or preferably, it should drop the Israel-specific mechanism, and maintain and develop the remedy of country mechanisms for countries where there are gross human rights violations.

The Council has abandoned country mechanisms for countries other than Israel not at the behest of human rights promoters, but rather at the urging of human rights violators, the objects of the mechanisms. The very efficacy of these mechanisms has led to their undoing. But this efficacy speaks to the value of their maintenance and re-establishment.

***Recommendation: The Council should maintain and develop country specific mechanisms as a remedy for gross human rights violations.***

## **2. Improve Selection of the Specialized Mechanisms**

The specialized mechanisms of the Council function more or less effectively, except when it comes to Israel. The problems with mechanisms in other areas are underfunding and its correlative understaffing. Sometimes the individuals appointed

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<sup>35</sup> Gasparini, Juan. "Liberia wants no more UN country rapporteurs." *Human Rights Tribune*, September 11, 2008

are not as well informed or dedicated as they should be. There are occasions where they lack diplomatic flair.

Only Israel represents a problem of malice, where individuals are appointed for their bias against Israel and use that bias with gusto to please the states which saw to their appointment. The most notable examples have been John Dugard, the former Special Rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967," and Jean Ziegler, the former special rapporteur on the right to food.

The anti-Zionism of the Dugard reports as well as those of the former rapporteur on the right to food Jean Ziegler (now a member of the Council's Advisory Committee) and the virulently anti-Israel statements of Richard Falk prior to his appointment to succeed Dugard raise the question of how to prevent the politicisation of the specialized mechanisms. Their politicisation can not, like the Council or Commission before it, be excused on the basis that it is just the opinions of governments, which are inherently political.

One solution would be a more transparent selection process. Right now the expert mechanisms are selected by the Bureau of the Council, its executive. The Bureau is in turn chosen by the Council. So the OIC control of the Council translates into control in selection of the expert mechanisms. It was this serial control which made inevitable the succession of one vehemently anti-Zionist rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, with another, Richard Falk.

States could propose opposing candidates to the worst of the rapporteurs, insisting on recorded votes for their selection. Another possibility is démarches to capitals by governments and NGOs alike to ask nominating states to avoid or withdraw nominations of politicised candidates.

***Recommendation: The selection process for Human Rights Council special mechanisms should become transparent with, if necessary, recorded votes for selection of candidates and public advocacy by states and NGOs for and against particular candidates.***

### **3. Use the Code of Conduct**

The Human Rights Council in June 2007 adopted a code of conduct for special procedure mandate holders. The code is filled with worthy principles which, when it comes to Israel, are all too often honoured in the breach.

As with many other standards and mechanisms, it is the violators who invoke this code to seek immunity rather than rights promoting states to advance the cause of human rights. Rights violating states have been abusively invoking the code of conduct in an attempt to silence criticism of their abuse.

For instance, at the March 2009 Council session, Equatorial Guinea and Pakistan on behalf of the Organization of Islamic Conference states accused UN Special Rapporteur against Torture Manfred Nowak of violating the code of conduct. Yet, the report and behaviour of Manfred Nowak have been admirable and exemplary, everything a UN Special Rapporteur should be.

Richard Falk, UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, has violated the code of conduct, if anyone has. Yet, though his report was much criticised when discussed at the Council in March 2009, no state, not the United States, not even Israel, suggested that he had violated the code of conduct.

The problem does not lie with the code of conduct itself but rather with the enthusiasm, energy and ingenuity of violators. Violators have become a lot more adept at abusing

the mechanisms and standards of the Council for anti-Zionism and immunity than have rights respecting states to promote compliance with human rights standards.

The code of conduct for special procedure mandate holders should cease to be the sole preserve of gross human rights violators. It needs to be wielded in the combat for respect for human rights.

***Recommendation: The code of conduct for special procedure mandate holders should be invoked to combat anti-Zionism amongst those procedures.***

#### **4. Change the Mandate of the Israel-Specific Mechanism**

While abolition of the mandate of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 is preferable to its continuation, there is need for it be modified if it is to be continued. Neither Palestinian violations against Israel nor Palestinian violations against other Palestinians fall within the scope of the mandate. Both should.

Requiring the mandate holder to look only at Israel is inevitably one sided. Dugard, because of his bias, had made a bad situation worse. But the problem was not just him. It was his mandate.

For instance, this Rapporteur was asked, by resolution of the Council dated June 29, 2006, to "report to the next session of the Council on the Israeli human rights violations in occupied Palestine"<sup>36</sup>. The reference was to Israeli human rights violations alone. There was no reference to human rights violations by any other possible actor.

Dugard has noted the limitations of his mandate and added that despite those

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<sup>36</sup> UN Document A/HRC/1/L.15, Council decision 1/106.

limitations, violations of human rights in the West Bank and Gaza by other actors were matters of "deep concern" to him<sup>37</sup>. Given the venomous glee with which Dugard lit into Israeli behaviour, his regret for the limitations of his mandate was crocodile tears, a handy excuse for his bias. But even a neutral observer would have been hard placed to maintain neutrality with a mandate like that.

***Recommendation: As long as the mandate of Rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967" continues, it should encompass human rights violations committed by all actors and not just human rights violations allegedly committed by Israel.***

## **5. Abolish the Israel-specific Mechanism**

The Council has continued indefinitely the mandate of the special rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967". The mandate is arbitrary and discriminatory.

The arbitrariness is highlighted by the phrase "occupied since 1967". Presumably the predecessor Commission, when it created the mandate, was not trying to discourage its holder from considering human rights violations before 1967, but rather trying to say that the territories deserved the label "occupied" only since 1967, as if a change of state in control of the territories from Egypt and Jordan to Israel could change their legal status at international law.

A discriminatory feature of the mandate is that it was indefinite, never needing to be renewed. The resolution on renewal of mandates proposed that all mandates be renewed for one year pending a review of the mandates of all the mechanisms.

There was a footnote to this resolution treating specially the mandate of the rapporteur

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<sup>37</sup> See for instance UN Document A/HRC/4/17, 29 January 2007, paragraph 5.

for the situation of human rights in the Palestinian territories occupied since 1967. The footnote stated "The duration of this mandate has been established until the end of the occupation (cf. CHR resolution 1993/2)", which will presumably be never, since the UN includes in Palestinian territories occupied since 1967 large swathes of Jerusalem, the Israeli capital.

There had been four other mechanisms with indefinite mandates, including the now terminated mandate for the Rapporteur for Cuba. The indefinite mandates of none of these other four mandates was footnoted.

The mandate of this Special Rapporteur is so plainly an anti-Zionist political device, it has no place in the Human Rights council. Specialized mechanisms exist, in principle, to deal with the matters of most serious concern, with gross human rights violations. Any attempt to pin that label on Israeli behaviour in the West Bank and Gaza is wildly inappropriate.

While no country is violation free, none of the violations of human rights for which there is evidence of Israeli involvement rises to the level of international concern. Adequate recourses and remedies exist within Israel for all such claimed violations. On the contrary, when one considers the prolonged vicious terrorist threat against which the Jewish state has had to defend, Israeli measures against that threat have been exemplary, far more respectful of human rights than the behaviour of other democratic states reacting to terrorist attacks against them.

Could the continuation of the mechanism be justified by a balanced mandate, a mandate which would allow consideration of Palestinian violations both against Israel and other Palestinians? To date, neither the Council nor the Commission before it has supported the creation or maintenance of a country specific mechanism by reference to the gravity of a terrorist threat directed against the state institutions of that country. As well, it is pie in the sky to think that, in the current context, an Israel specific

mechanism even with a nominally balanced mandate would produce a balanced report.

***Recommendation: The mandate of the rapporteur for the situation of human rights in the Palestinian territories occupied since 1967 should end.***

## **M. Reform Universal Periodic Review**

Though the failure of the Council is calamitous and plain to see, there are some who claim that the present reform can be made to work. Apologists for the present reform argue that the Council will evolve over time, that it will become a better place than it now is.

The mechanism which takes pride of place in this hope for a better world is the universal periodic review. Because the review is universal, the theory is that, with this review, the singling out of Israel will diminish.

The universal periodic review, as its name suggests, is global. It covers every country in the United Nations, not just countries members of the Council. It does not, it should be noted, encompass observers. So the Palestinian Authority is not included, creating at least one element of bias against Israel.

The pace is sixteen countries up for consideration a session, starting with the first session of 2008. The Council has three sessions a year. The cycle will be complete over a period of four years, covering 192 countries. Scrutiny once every four years is not a close or exacting scrutiny<sup>38</sup>.

The documents on which the reviews are based include information contained in the reports of treaty bodies<sup>39</sup>. The worst violators, which sign no or few treaties, have little

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<sup>38</sup> UN Human Rights Council Resolution 5/1, June 18, 2007 paragraph 14.

<sup>39</sup> Paragraph 51(a).

or nothing in reports from treaty bodies. The states which show the greatest respect for international human rights by signing all human rights treaties have the greatest volume of reports from treaty bodies. Looking at reports of treaty bodies creates an inherent bias in favour of violators and against those who attempt to respect international human rights.

The documents on which the reviews are based also include reports from special procedures. As noted, these country specific special procedures for countries other than Israel have been fast disappearing, while the Israel specific mandate has been continued indefinitely.

Even more problematic is who conducts the review. The review is conducted by the Council itself, in a working group composed of all member states of the Council<sup>40</sup>. Observer states, that is to say everybody else, can participate in the review<sup>41</sup>. The duration of the review for each country in the working group is three hours<sup>42</sup>.

The review is an interactive dialogue<sup>43</sup>. That is to say that during those three hours, the subject of the review responds to interventions. Given the time allowed for this response, if the chairs limit state interventions to two minutes, which has become a common practice, 60 state interventions at maximum can fit within the three hours.

It did not take long before gross violator states figured out how to game the system. They lined up their friends or those they could bully to register to speak during the two hours, chewing up the time with praise or even justifications for the violations. Since the pool of potential speaker states is the full UN membership and not just the Council membership, the three hours can become quickly consumed with organized

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<sup>40</sup> Resolution 5/1 paragraph 18(a).

<sup>41</sup> Paragraph 18(b).

<sup>42</sup> Paragraph 22

<sup>43</sup> Paragraph 21.

filibustering.

The very label "review" is misleading. Unlike an expert mechanism report, the review produces no evaluation or assessment of the human rights record of the state under scrutiny, no overall recommendations, observations or statements of concern. All that happens during the course of the review is that other states may make recommendations to the state subject of the review. The state under review decides on its own which recommendations to adopt. The remaining recommendations are just noted<sup>44</sup>.

The fact that there is no real review cuts down on the opportunity for a tilt of the review against Israel. Nonetheless states participating in the review have inundated Israel with tendentious recommendations. Anti-Zionist states even use the UPR to criticise other states who are the subject of review for their support of Israel or failure to condemn it.

OIC states during the UPR have lit into Israel with abandon. In contrast, they have applauded each other for human rights accomplishments when the turn of one of theirs arrives, no matter how bad the human rights record of the OIC state under scrutiny really is. The OIC states are amongst those who have organized filibusters to attempt to protect their own human rights records from scrutiny. Israel, as a rights respecting state, is not inclined to attempt to organize such a filibuster, and, given its few friends at the UN, could not do so even if it wanted to.

The objectives of the universal periodic review set out in the General Assembly resolution creating the Council are a mix of the real and fantastical. One of the listed objectives is the enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned. Another is the sharing

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<sup>44</sup> Paragraph 32.

of best practices among States and other stakeholders.

These objectives seem to suggest that human rights violations are unfortunate mistakes borne out of ignorance about how to go about respecting human rights. The notion that violating human rights is a conscious choice made by tyrants to keep in power is absent.

There may indeed be some stumblebum governments who violate human rights through inadvertence. But that is far from the norm. Pretending that it is the norm is a recipe for failure in the effort to improve respect for human rights.

Improving the human rights records of states who know what they are doing when they violate human rights is not going to happen through capacity building, technical assistance and the sharing of best practices. It is going to happen through naming and shaming.

It may be diplomatic to pretend that human rights violations were just an unfortunate mistake rather than intentional. This pretence allows violators to save face. However, we must not confuse pretence with reality. A diplomatic pretence will not, in itself, lead to abandonment or moderation of gross human rights violations.

Only when a government suffers a loss of credibility from human rights violations will its intentional use of violations abate. That loss of credibility is more likely to be generated by an expert mechanism than by statements from governments which, if they say anything at all, can be dismissed as politically motivated.

A real, expert universal review would serve to dilute and give perspective to the one sided attacks on Israel found elsewhere on the Council agenda. But now that the universal period review has become a review in name only, this potential for dilution and perspective is lost. The obsession elsewhere in the Council with Israel is

unmitigated.

The Council which attempts to reform itself is like a dog attempting to catch its tail. A Council which could reform itself would not need to do so. Seeing the problem is itself the solution. If the Council could muster the votes to shift the universal periodic review from peer to expert review, it need not bother.

However, that is different from advocating such a change. The choice we as outsiders face is not what to do with the Council, which is beyond our powers, but what to say about the Council. What needs to be said, now, is that peer review, when the peers are violators, does not work. Expert review would be better.

The United States was an advocate of peer review for the universal periodic review. But that position was based on the supposition that gross human rights violators could be kept off the Council and that the potential participants would be the Council members alone and not all UN members. Universal periodic review with the current system is much more literally a peer review than the creators of the Council had imagined. Violators are reviewing the record of other violators. That sort of review is pointless.

Expert review has its limitations. As we have seen with John Dugard, Richard Falk and Jean Ziegler when it comes to expert review, the experts chosen by the Council can be and are as anti-Zionist as the Council itself.

There is not much to choose between the views of John Dugard, Richard Falk and Jean Ziegler on the one hand and the views of the OIC states on the other. Indeed, the technical detail accompanying the anti-Zionist venom of Dugard and Ziegler made countering their efforts more laborious than contradicting the blatant puffery of the political spokespersons for the OIC states.

Particular problems need particular solutions. Ziegler should have been fired. The problem was not his mandate. It was him.

The problem with Dugard was more general. He, personally, was problematic. But so was and is his mandate. Replacing him with someone else was no solution. The mandate should be abolished.

However, even if the likes of Ziegler and Dugard never resurface at the Council and the mandate Dugard had disappears, even if the membership of the Council changed to keep out gross violators, that would not end the problems with the Council. In such a situation, the Council would look a lot more like international human rights non-governmental organizations, from whose expertise the Commission and Council mechanisms have often drawn.

The NGO human rights world, if we put to one side GONGOs (government organised NGOs), is a good deal better than the UN Human Rights Commission and Council. Yet, even this NGO world is far from ideal. It too beats up on Israel unnecessarily and disproportionately. It is much too kind to China by focusing on criticism to which China is receptive and either avoiding or downplaying criticism which sends the Government of China ballistic, for example the condemnation of China's vicious, widespread persecution of the Falun Gong. It too tilts against open societies where information is easy to get and says little about closed societies where repression is a good deal worse but where finding out about violations takes a lot more work.

The UN experts who do not deal with Israel, with a few notable exceptions, do a lot better job on the human rights issues and countries within their mandates than the Council members themselves do. Replacing peer review with expert review will not remove the double standards from which Israel suffers. But it should shift the Council away from its almost exclusive focus on Israel.

A shift from peer review to expert review will not banish anti-Zionism from the UN halls. But the UN will start to look more like the rest of the world, rather than presenting a distorted, almost exclusively anti-Zionist reflection.

***Recommendation: The universal periodic review should shift from peer to expert review.***

### **III. CONCLUSION**

Should democratic states disgusted with the perversion of the Council just abandon the Council to its self-imposed fate? The French have a phrase for this sort of strategy - "la politique du pire". According to this strategy, the best way to reform the Council is to make it look as bad as possible. The worse the Council gets, the more likely it is that it will be changed.

But the French also have a commentary on this strategy: "La politique du pire est la pire de la politique". Making matters worse in order to make them better is a mistake. Of all the strategies available, it is the worst of the lot.

If the Council were a world unto itself, ignoring the Council might make sense. But the invective inside the Council chambers reverberates around the world. Anti-Zionists, like hate promoters everywhere, try to manipulate established institutions, to give credibility to their incitement.

We see this pattern with universities and libraries. It is no different with the United Nations. When outsiders hear that an arm of the United Nations condemns Israel, many are not sophisticated enough to know that this condemnation is a manoeuvre orchestrated by the enemies of Israel. They take the condemnation as an indication that Israel has done something wrong. The UN manipulation puts wind in the sails of anti-Zionism; it increases the sympathy for the anti-Zionist cause around the world.

For NGOs to absent themselves from the Council does not make much of a point. The absence, for example, of B'nai Brith International from the Council, is likely to draw a lot less attention than its presence where that presence is used to combat anti-Zionism and stand up for human rights.

Another French saying is "les absents ont toujours tort," the absent are always wrong. Better that the anti-Zionist invective within the Council be answered than that it go unanswered. After all, what matters for the Council is not so much what happens within the Council itself as how what happens there is used outside. What B'nai Brith says inside the Council can be used outside; if B'nai Brith is absent and says nothing, it has nothing to use.

It is distasteful to descend into an arena wallowing in anti-Zionism and antisemitism, where the cards are stacked against rationality, where violators win almost every vote. Yet the alternative, leaving a global forum to violators and anti-Zionists alone, is worse.

There may be a tendency, when faced with the malfunction of the United Nations Human Rights Council, to note that malfunction with regret and move on. Yet the inability of the UN to deal effectively with human rights is too important an inability just to decry. What is wrong has to be made right. None of the options listed here may work, singly or together. But the importance of the goal means that we have to try.

## IV. SUMMARY OF RECOMMENDATIONS

1. *The NGOs based in the Jewish community and general human rights NGOs should work together to attempt to make the UN human rights system more effective.*
2. *NGOs and states should approach individual OIC member states with whom they have established relationships to stop their anti-Israel activities at the UN.*
3. *The Council should abolish the special Israel agenda item. Until that is done, the time allotted for this agenda item at the Council should be used by states and NGOs alike to criticise its existence.*
4. *Rights respecting states should draft, present and ask for votes on resolutions dealing with each and every grave human rights situation no matter where in the world the situation occurs.*
5. *Rights promoting states should be making statements at the Council both jointly and separately.*
6. *States should be wary of seeking and joining in consensus on anti-Zionist resolutions.*
7. *The threshold for special sessions should be raised from one thirds to two thirds of the members voting.*
8. *The budget for anti-Zionist activities and mechanisms at the UN Human Rights Council should be opposed.*
9. *States should withhold funding for anti-Zionist activities and mechanisms of the Council.*

10. *Develop the human rights work of the Council of Democracies.*
11. *The Human Rights Council should not address the human rights situation in Israel, the West Bank or Gaza as long as Israel remains at war with its anti-Zionist neighbours.*
12. *The Security Council should ask the Human Rights Council to defer consideration of all human rights violations in Israel, the West Bank and Gaza until Israel has reached a peace agreement with the other states in the region and the Palestinians.*
13. *The rule of the Council should provide that no state which refuses to recognize another state should be permitted to speak or vote on the human rights record of that state.*
14. *The General Assembly should exclude from membership of the Council states which are gross human rights violators. In deciding which states to exclude, the General Assembly should be assisted by reports from an independent expert advisory committee.*
15. *Human rights promoting states and NGOS should campaign for and against membership in the Council based on the human rights record of the candidate state.*
16. *The General Assembly should avoid a majority of OIC states in both the Asian and the African blocs until such time as the OIC as an organization gives full recognition to Israel.*
17. *Expand the membership of the Council to include all states.*
18. *Bloc voting at the Human Rights council should end.*

*19. Israel at Geneva at the Human Rights Council should be a full member of at least one regional grouping.*

*20. The Council should maintain and develop country specific mechanisms as a remedy for gross human rights violations.*

*21. The selection process for Human Rights Council special mechanisms should become transparent with, if necessary, recorded votes for selection of candidates and public advocacy by states and NGOs for and against particular candidates.*

*22. The code of conduct for special procedure mandate holders should be invoked to combat anti-Zionism amongst those procedures.*

*23. As long as the mandate of rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967" continues, it should encompass human rights violations by all actors and not just human rights violations allegedly committed by Israel.*

*24. The mandate of the rapporteur for the situation of human rights in the Palestinian territories occupied since 1967 should end.*

*25. The universal periodic review should shift from peer to expert review.*