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***RICHARD LILlich MEMORIAL LECTURE – PROMOTING THE  
ACCOUNTABILITY OF MEMBERS OF THE NEW UN HUMAN  
RIGHTS COUNCIL\****

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### *Richard Lillich Memorial Lecture*

#### **Promoting the Accountability of Members of the new UN Human Rights Council<sup>♦</sup>**

Philip Alston<sup>\*</sup>

Richard Lillich was a pioneer among United States scholars writing in the field of international human rights law. He combined his prodigious scholarly output on this and other fields<sup>1</sup> with a strong and highly productive engagement with the practice of human rights law. It is a privilege to be invited to give this Second Annual Lillich Lecture, named in his honor.

#### **1. Introduction**

The concept of accountability provides the overarching rationale for the establishment of an international human rights regime. The essential objectives of that regime are twofold. The first is to persuade, cajole and pressure governments to acknowledge their accountability to their own citizens and to establish ways and means by which those citizens can hold them to account. The second is to ensure that governments can be held to account by the international community for violations of human rights for which they are deemed to be responsible and in relation to which domestic accountability mechanisms have failed. But while participants in human rights discourse invoke the principle of accountability with almost reckless abandon, there have been all too few attempts to unpack the concept in meaningful ways or to explore the ways in which it might apply to some of those involved in human rights endeavors at the international level. In particular, there have been very few efforts to acknowledge that the custodians who are in the front line of holding others accountable must themselves be held to account in certain ways.

This article begins by noting some of the broad legitimacy and democracy-based critiques of international law and of international organizations that have been made in recent years and which provide a broad backdrop against which the more narrowly focused debates in the human rights domain are taking place. It then recounts one current set of efforts to ensure some degree of accountability, at least on the part of those governments in whom the principal responsibility is vested for holding their peers to account for

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<sup>1</sup> For a systematic presentation of Professor Lillich's writings see Samuel Pyeatt Menefee, *A Bibliography of the Legal Publications of Professor Richard B. Lillich (1933-1996)* (1997) 38 VA. J. INT'L L. 85.

human rights violations. These efforts have been played out in the context of a debate over the possible establishment of criteria for membership by governments of the new Human Rights Council which is to be set up, probably as from 2006.<sup>2</sup>

Its principal focus, however, is on the creation of a particular index which would facilitate the task of promoting at least a basic form of procedural accountability on the part of those governments which are elected to the new Council. This would be achieved through the adoption of a human rights accountability index. This index is designed to enable a broad-based and systematically derived indicator of governmental accountability to be taken into account in the election process. In brief the index would seek to measure the extent to which governments participate in the key international procedures designed to measure their accountability in matters of human rights. It could act as an incentive for reluctant governments to participate more actively and would provide a reasonably objective standard on the basis of which some governments could legitimately be preferred for election over others.

It should be acknowledged at the outset that such a proposal is no more than a starting point in efforts to encourage a more sustained and deeper focus on the issue of the accountability and legitimacy of the techniques employed by UN's Commission on Human Rights, most of which seem likely to be transposed to the new Human Rights Council. An accountability index would be strictly procedural and in itself would be neither an indication that a country receiving a favorable rating has a good human rights record nor would it go very far towards answering the broader critiques as to the legitimacy of the working methods or composition of the Commission/Council. It would, nevertheless, be an important starting point in moving down the road to an ethic of accountability in the attitudes of the Council.

## **2. The Democratic Legitimacy Critique of International Organizations**

A vast literature has emerged, partly in response to the anti-globalization campaigns of the late 1990s, alleging that many of the key international organizations are unaccountable and that the legitimacy of the power they exercise is therefore suspect at best. Amongst the most frequently cited (or, rather, indicted) in this regard are the World Trade Organization, the World Bank, and the International Monetary Fund. While a review of these critiques, let alone a response to them, is well beyond the scope of the present analysis, it is pertinent to note that the argument that international organizations

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<sup>2</sup> At the World Summit meeting held at the beginning of the UN General Assembly meeting in September 2005 the assembled Heads of State and Government resolved to create a Human Rights Council (World Summit Outcome, UN doc. A/60/L.1, 15 September 2005, available at <http://www.ohchr.org/english/bodies/chr/docs/wsoutcome2005.pdf> (accessed Oct. 10, 2005), para. 157), with a mandate 'to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.' (*id.*, para. 159). Accordingly they requested the *President* of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session [which ends in September 2006], with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council' (*id.*, para. 160).

suffer from a critical democracy deficit has been applied, although not systematically or with particular emphasis, to the United Nations itself.<sup>3</sup>

It is important to explore some of these critiques in order to set the scene for considering the question of the accountability of the UN Commission on Human Rights and, more pertinently now, that of its successor, the Human Rights Council. Three different examples illustrate: (i) the types of critiques that have been made; (ii) their provenance; and (iii) the sort of prescriptions that have generally been put forward.

The first example comes from a defense by Professor Jed Rubenfeld of the unilateralist tendencies of the United States. His analysis is based to a significant extent on the perceived democracy deficit inherent in international law in general and in the United Nations in particular and provides a reasonably representative account of neo-conservative thinking within the United States. He argues that international law is not just undemocratic, but is actively 'antidemocratic'.<sup>4</sup> Exhibit A in his prosecutorial statement are the assumptions which he considers to underpin most forms of international human rights discourse. In such discourse 'the views of democratic majorities ... will be said to be "simply irrelevant" to the validity and authority of international law'.<sup>5</sup> For Rubenfeld the notion that internationally agreed human rights standards should be promoted reflects a fundamentally 'antidemocratic worldview'.

It is hardly surprising then that he also singles out for criticism institutions such as the United Nations which are charged with implementing many of the international community's governance functions. They are said to be:

famous for their undemocratic opacity, remoteness from popular or representative politics, elitism, and unaccountability. International governance institutions and their officers tend to be bureaucratic, diplomatic, technocratic - everything but democratic.<sup>6</sup>

Rubenfeld is quick to rebut one of the standard responses of those who seek to defend current versions of multilateralism by pointing to the increasingly important role accorded to non-governmental organizations (NGOs).<sup>7</sup> They naively do so, in his view, 'as if these equally unaccountable, self-appointed, unrepresentative NGOs somehow exemplified world public opinion, and as if the antidemocratic nature of international

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<sup>3</sup> The single most important exception concerns the role accorded in the UN Charter to, and the role played in recent years by, the Security Council. See generally David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Bardo Fassbender, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EUR. J. INT'L L. 219 (2000); Tetsuo Sato, *The Legitimacy of Security Council Activities under Chapter VII of the UN Charter after the End of the Cold War*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen, eds., 2001) 309; and Jarrett Taubman, *Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq*, 37 N. Y. U. J. INT'L L. & POL. 161 (2005).

<sup>4</sup> Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U.L. REV. 1971 at 2017 (2004)

<sup>5</sup> *Id.*, at 2019.

<sup>6</sup> *Id.*, at 2017-18.

<sup>7</sup> See Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93 (Philip Alston ed., 2005).

governance were a kind of small accountability hole that these NGOs could plug.’<sup>8</sup> Without endorsing his characterization of the legitimacy of the role played by NGOs, it is true that in relation to human rights institutions the participatory opportunities accorded to some NGOs are invoked much too readily as though this were a sufficient answer to critiques focusing on the unaccountable, non-transparent, and undemocratic elements of the roles played by some of these organizations.

The problem is that for Rubinfeld there is only one answer. That is the nation-state. Since elections are a *sine qua non*, no other polity can be democratic. As a result he concludes that international law frequently conflicts with democracy.<sup>9</sup> This version of the unaccountability critique seems to leave little if any space for non-electoral forms of accountability designed to enhance the democratic legitimacy of international governance. Since it is fundamentally flawed, any palliative measures will be inadequate.

The second example reflects a more mainstream approach which has been developed in a recent book by Michael Barnett and Martha Finnemore. They focus on a cross-section of international institutions, do not indict international law per se, and explore the means by which the perceived deficiencies might be overcome or at least mitigated. They too are concerned about issues of accountability in relation to international governance but adopt a very different tone and approach from that of Rubinfeld. Their principal concern is with the bureaucratization involved in the deepening of many global governance arrangements. They warn of the ‘[l]ack of transparency and the growing prominence and power of international organizations’ and emphasize that these developments ‘raise concerns regarding their accountability.’<sup>10</sup>

It is true that their main preoccupation is with the unaccountable power of the bureaucrats called upon to implement policies and programs shaped by inter-governmental groups such as the governing boards of the International Monetary Fund (IMF) and the Office of the United Nations High Commissioner for Refugees (UNHCR). But the critique applies with almost equal force to the activities of the governing bodies themselves. Barnett and Finnemore also highlight the irony that it is precisely in an effort to promote liberal values such as human rights that international organizations use undemocratic procedures, thus creating what they term ‘undemocratic liberalism’ in global governance. But, unlike Rubinfeld, they do not set a standard which international organizations are, by definition, unable to meet. Rather they emphasize the need for ‘procedures that, if not democratic, at least provide some accountability and representation’.<sup>11</sup>

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<sup>8</sup> Rubinfeld, note 4 above, at 2018. For similar criticisms see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society* 11 EUR. J. INT’L L. 91 (2000).

<sup>9</sup> ‘The brute fact is that there is no world democratic polity today; the largest entities in which democracy exists are nation-states. As a result, international law can and does frequently conflict with democracy.’ Rubinfeld, note 4 above, at 2018.

<sup>10</sup> MICHAEL BARNETT AND MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* (2004) 170.

<sup>11</sup> *Id.*, 172.

In order to refute any suggestion that such concerns about institutional accountability emanate only from academics, or from those who are hostile to the very notion of multilateralism, it is useful to turn to the third strand of democracy critiques. This is best represented by the *Human Development Report*, published annually by the United Nations Development Program. The Report has a very high circulation, is published in a range of languages, and has been very influential in debates about the challenges of development and the global responses to them. In 2002 the report was devoted entirely to the theme of ‘deepening democracy in a fragmented world’.<sup>12</sup> A significant part of the analysis focused explicitly on the key agents of global governance – the United Nations (especially the Security Council), the WTO, the IMF, and the World Bank – and on the ways in which their functioning could better be informed by democratic processes. But while much play is given to the buzzwords of ‘representation’, ‘transparency’ and ‘accountability’, the Report’s substantive critiques and prescriptions focus mainly on the need for more adequate representation of developing countries’ governments in the halls of power of the respective organizations, and on according a more significant role to civil society actors.<sup>13</sup> While these notions are put forward within the confines of a report devoted to deepening democracy at the international level, it is clear that the mechanisms proposed are essentially compensatory and do not even seek to address the deeper critique implicit in the arguments of critics like Rubinfeld who are calling for some form of representative democracy if an international organization is to be able to assert its democratic legitimacy.

On the basis of this survey of different contributions to the current debate it is clear that there is justifiable concern to ensure that the main organs of international governance act in accountable and transparent ways and that they respond to an appropriately tailored version of the democracy deficit critique, one which takes account of the functions they perform, the powers they exercise, and the degree of intrusiveness into the domestic sphere which is reflected in their work. Political scientists and international lawyers have both responded, in different but nonetheless compatible ways, although both have essentially rejected any quest for democracy,<sup>14</sup> properly so called, and have instead proceeded under the rubric of accountability. In a political science framework Grant and Keohane have attempted to synthesize these concerns in relation to international governance in general by identifying seven different mechanisms by which accountability might be exacted in world politics, all of which have applicability in relation to

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<sup>12</sup> UNDP, HUMAN DEVELOPMENT REPORT 2002.

<sup>13</sup> These recommendations are encapsulated in the following conclusion:

Achieving deeper democracy globally will require expanding political space for a range of civil society actors and including developing countries more deeply in the decision-making of international institutions.

*Id.*, 122.

<sup>14</sup> Grant and Keohane, for example, observe that ‘multilateral organizations are in fact accountable – indeed more accountable in many respects than powerful states – but in ways quite different from those envisaged by observers who equate accountability with participation’, or, they might have added, with democracy. Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005)

international organizations.: hierarchical, supervisory, fiscal, legal, market, peer, and public reputational mechanisms.<sup>15</sup>

In the international law context a group of distinguished experts working within the framework of a ‘Committee on Accountability of International Organizations’, set up in 1996 by the International Law Association (ILA), have taken up the same challenge in their final report presented in 2002.<sup>16</sup> Their basic premise is not rooted in any particular theory of democracy or participatory legitimacy. They content themselves instead by starting with the proposition that ‘[p]ower entails accountability, that is the duty to account for its exercise’.<sup>17</sup> Thus, to the extent that an international organization or treaty-based organ exercises power, it is obligated to make itself accountable. This is to be achieved through compliance with a body of rules and practices which apply to both the institutional and operational activities of the body. The most important of these are the principles of: good governance, good faith, constitutionality and institutional balance, supervision and control, stating the reasons for decisions or a particular course of action, procedural regularity, objectivity and impartiality, due diligence, and promoting justice.<sup>18</sup> While each of the stated principles is convincing in its own right, the list as a whole is a somewhat curious amalgam of broad over-arching principles of democratic legitimacy, narrower rules rooted in administrative law traditions, and specific concepts taken from international legal doctrine. It is nonetheless an important and timely reminder of the fact that international organizations are subject to more general demands of accountability.

For present purposes it is noteworthy that the Commission on Human Rights does not rate a mention in either the analysis by Grant and Keohane, nor in the report of the ILA Committee. Perhaps more surprisingly, it is also not addressed in any way in the UNDP report, despite its focus on UN agencies and organs. It is worth reflecting on the reasons which might explain its omission in the latter context, since that is one in relation to which its relevance would seem most obvious. One is that the focus of the report is on international economic institutions, but this does not deter the authors from addressing the Security Council because of its predominant role within the UN. A second might be that human rights institutions are considered to be marginal to discussions of development and even global democracy, although this is surely highly debateable. And a third is that the Commission’s impact on the real world it is so minimal that its functioning does not give rise to concern about democracy. As the report notes, the pressure to extend democratic principles applies especially to those organizations which have become ‘deeply involved in national economic, political and social policies’.<sup>19</sup> But, it is precisely by this standard that the Commission should feature in such analyses.

For the purposes of the present analysis, several conclusions emerge from this brief review of the literature on accountability. The first is that there is considerable pressure

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<sup>15</sup> *Id.*, 36.

<sup>16</sup> International Law Association, New Delhi Conference (2002), Committee on Accountability of International Organizations, *Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices (“RRP-S”)*, available at [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm)

<sup>17</sup> *Id.*, 2.

<sup>18</sup> *Id.* 2-7.

<sup>19</sup> HUMAN DEVELOPMENT REPORT 2002, *supra* note 12, at 8.

on international organizations to be made accountable in various ways. Second, there is no reason why the Commission/Council should not be subject to such demands. Third, the ways in which the Commission/Council are or should be held accountable are complex and a full review of both existing and potential measures is well beyond the scope of this article. Fourth, it is clear that the conditions for membership of an oversight group such as the Commission/Council are important factors in determining their credibility in the eyes of their various constituencies and perhaps even the extent to which they are perceived to possess the requisite legitimacy.<sup>20</sup>

It is against this background that the debate over the setting of criteria to be met by States which aspire to be elected as members of the Commission/Council must be considered. Somewhat surprisingly, very little attention has been given to the various other dimensions of accountability which arise in relation to the methods of work and functions performed by the Commission/Council. While the remainder of this article focuses solely on the question of membership standards, it must be emphasized that a major research agenda on the different forms of accountability which are or should be applicable in this context needs to be undertaken.

### 3. The origins of the membership criteria debate

The fact that governments with demonstrably poor human rights records served as members of the Commission on Human Rights<sup>21</sup> was taken for granted for many years. During the long decades of the Cold War one side's human rights violators were the other side's champions of resistance. The side on which they found themselves, and thus the issue of whether they were championed by the United States or the Soviet Union depended on whether they claimed to be resisting capitalist or communist efforts to undermine them. There was thus an unstated but widely shared tolerance for the presence of human rights violators in many of the decision-making fora of the United Nations.

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<sup>20</sup> See generally Thomas Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

<sup>21</sup> The establishment of the Commission on Human Rights was mandated by Article 68 of the United Nations Charter and it originally consisted of 18 members. It has grown in size over the years and now consists of 53 governments, elected on a rotating basis for three-year terms by the Economic and Social Council (hereinafter ECOSOC). A recent United Nations report describes its functions in the following terms:

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

A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE (New York, United Nations, 2004) (hereinafter 'Report of the High-level Panel'), para. 282. For a detailed history of the Commission see Philip Alston, *The Commission on Human Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS* (Philip Alston, ed., 1992), Jean-Bernard Marie, *LA COMMISSION DES DROITS DE L'HOMME DE L' O.N.U.* (1975); and HOWARD TOLLEY, *THE U.N. COMMISSION ON HUMAN RIGHTS* (1987)

The end of the Cold War made possible a reconsideration of this policy and, as the principles of economic liberalism and political democracy spread, it became feasible to contemplate the option of establishing some sort of criteria for membership. After all, the Council of Europe had long required applicant states to sign on to a statement of democratic principles and more specifically to adhere to the European Convention on Human Rights. With the collapse of communism in eastern Europe a considerable number of states began to seek membership of the European Union, a process which not only required membership of the Council of Europe but compliance with a more extensive array of human rights standards which formed an integral part of the legal *acquis* of the Union.

Various scholars have suggested that international human rights bodies might be composed exclusively of states whose records are such that they can be considered democratic or committed to the rule of law.<sup>22</sup> But for the most part it was considered impractical and in some respects undesirable to seek to exclude states categorized as human rights violators from the regime. This was certainly true of the regime as a whole and various commentators, including the present author,<sup>23</sup> argued that it was not only infeasible but potentially counter-productive to create an exclusionist system which would put many countries completely beyond the purview of the regime and would definitively undermine the formal universalist claims of human rights law.<sup>24</sup> But these arguments were made in the context of the international treaty regime rather than of a body which was by definition limited in size and elected on the basis of certain criteria (even if those criteria were rarely specified in any meaningful way).<sup>25</sup> It is arguably a different issue as to whether such substantive standards could or should be applied in the latter context.

Despite occasional grumbling about the participation of certain 'pariah' states in the deliberations of the Commission, the matter did not come to a head until the United States was presented with a powerful incentive to consider the matter of criteria for membership. That incentive was its own failure in May 2001 to win re-election, for the first time since the Commission had been established in 1946. The response of then National Security Adviser Condoleezza Rice was fairly typical. She condemned the vote and lamented the sad fact 'that the country that has been the beacon for those fleeing tyranny for 200 years is not on this commission, and Sudan is. ... It's very bad for those

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<sup>22</sup> See e.g. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR J. INT'L L. 503 (1995); but cf. Jose Alvarez, *Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory*, 12 EUR J. INT'L L. 183 (2001). See also *Remarks by Anne F. Bayefsky*, Panel discussion entitled: 'The UN Human Rights Regime: Is it Effective?', 91 PROC. ANN. MTG AM. SOC'Y INT'L L. 1997 (1998) 460.

<sup>23</sup> Philip Alston, *Beyond 'Them and Us': Putting Treaty Body Reform into Appropriate Perspective*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING (Philip Alston & James Crawford, eds., 2000) 499.

<sup>24</sup> It would not necessarily have undermined the broader philosophical aspirations of human rights law to represent or reflect universal values. The argument would have been that the excluded states were violating those universal norms, not that they had put their legitimacy into doubt by rejecting them in principle.

<sup>25</sup> In other words, considerations such as the ability of the state to contribute to the work of the Commission, and its acceptance in principle of human rights standards, would have figured in most analyses of why a particular state should be elected to the Commission (had such analyses or calculations been undertaken).

people who are suffering under tyranny around the world and it is an outrage.’<sup>26</sup> A rather different approach was taken by China’s official Xinhua News Agency which said the US lost because it had ‘undermined the atmosphere for dialogue’ and had used ‘human rights... as a tool to pursue its power politics and hegemony in the world’.<sup>27</sup>

But while the rhetoric of United States’ officials was one of outrage, cooler reflection pointed to the fact that the U.S. would be unlikely to succeed in insisting on membership on the basis of its size or power, or because of its unequalled human rights record. A more productive approach, which sought to capitalize on its perception of its own role as a beacon of freedom, was to focus on the criteria of respect for democracy and human rights as pre-requisites for membership of the Commission. It expressed this position at the Commission’s 2004 session by insisting that ‘[t]his important body should not be allowed to become a protected sanctuary for human rights violators who aim to pervert and distort its work.’ Its proposed solution was to ensure that only ‘real democracies’ should enjoy the privilege of membership.<sup>28</sup>

This approach was driven by the fact that a number of states which the United States Government considered to be major violators of human rights were regularly elected to membership of the Commission and thus played an active part in all its deliberations as well as voting on all resolutions. Thus, for example, one human rights group singled out the membership of states such as China, Cuba, Nepal, Russia, Sudan, Zimbabwe and Saudi Arabia to highlight the need for qualitative membership criteria. Tellingly, however, the same group suggested that any such list would be incomplete without the addition of the United States and the United Kingdom.<sup>29</sup> While that comment came primarily in response to the coalition invasion of Iraq in 2003, it served to highlight the complex nature of determining which nations should be considered to be democratic and rights-respecting for purposes of election.

This complexity encouraged human rights groups to refine their criteria in an effort to become more specific, to focus on long term elements, and to make the tests more objective. The only criteria which had ever previously been acknowledged in determining the composition of the Commission were representation of different cultures and a more precisely formulated geographical balance reflecting the five regional groupings into which the United Nations is divided for most purposes when it comes to elections.<sup>30</sup> Criteria such as relative economic strength, the ability to contribute to the effective implementation of relevant resolutions, compliance with particular standards, or membership of specific treaty regimes were never seriously contemplated. It should be

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<sup>26</sup> Online News-Hour, May 9, 2001, available at [http://www.pbs.org/newshour/bb/international/jan-june01/un\\_5-9.html](http://www.pbs.org/newshour/bb/international/jan-june01/un_5-9.html)

<sup>27</sup> Opinion: Vote for Justice, Embarrassment for U.S., People’s Daily, May 4, 2001, available at [http://english.people.com.cn/english/200105/04/eng20010504\\_69258.html](http://english.people.com.cn/english/200105/04/eng20010504_69258.html)

<sup>28</sup> Statement by Ambassador Richard S. Williamson, ‘Item 4: Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights’, March 19, 2004, available at <http://www.humanrights-usa.net/statements/0319Williamson.htm> (accessed on Aug. 18, 2004).

<sup>29</sup> Asian Centre for Human Rights, ACHR Review No.57, 26 Feb. 2005.

<sup>30</sup> See Eye on the UN, available at <http://www.eyeontheun.org/view.asp?p=55&l=11>

added, however, that there was a presumption during the years of the Cold War that each of the five permanent members of the Security Council should always be members.

In the context of the twenty-first century debates over membership Human Rights Watch reflected most of the criteria that had been identified by those involved in the debate when it proposed in 2003 that ‘as a prerequisite for membership of the Commission, governments should have ratified core human rights treaties, complied with their reporting obligations, issued open invitations to U.N. human rights experts and not have been condemned recently by the Commission for human rights violations.’<sup>31</sup> We shall examine what each of these criteria involve and the impact they would have if used in drawing up a list of countries eligible to be elected to the new Human Rights Council in 2006.<sup>32</sup>

### (i) Ratification of core human rights treaties

The term ‘core human rights treaties’ is generally considered to refer to ratification of the six ‘core’ human rights treaties adopted by the United Nations between 1965 and 1989, each of which has garnered a very significant number of ratifications.<sup>33</sup> Application of

<sup>31</sup> Human Rights Watch, U.N. Rights Body In Serious Decline, April 25, 2003, available at <http://hrw.org/english/docs/2003/04/25/global5796.htm> It should be noted that Human Rights Watch subsequently changed its position and moved away from endorsing formal criteria for membership. See text accompanying note 52 below.

<sup>32</sup> The classification of States is based upon the situation in terms of treaty ratification, reporting, etc. as of October 1, 2005.

<sup>33</sup> The treaties, in chronological order, are: the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter ICERD) (170 States Parties as of June 3, 2005); the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (hereinafter ICESCR) (152 parties), the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (hereinafter ICCPR) (154 parties), the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 (hereinafter CEDAW) (180 parties), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 (hereinafter CAT) (139 parties), and the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990 (hereinafter CRC) (192 parties). See ‘Status of Ratifications of the Principal International Human Rights Treaties, as of 03 June 2005’, available at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>, accessed on Nov. 5, 2005.

It should be noted, however, that the Office of the High Commissioner for Human Rights (OHCHR) has opted to include the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in the list of core treaties, thus making a total of seven such treaties. See ‘The Core International Human Rights Instruments and their Monitoring Bodies’, available at <http://www.ohchr.org/english/law/index.htm>, accessed Nov. 5, 2005. Despite having been adopted in 1990 that Convention had only 19 States Parties as of June 3, 2005. This raises the question as to what constitutes a ‘core’ treaty. In my view it is not the fact that the treaty has its own monitoring body, which would seem to be the criterion applied by the OHCHR, but whether participation in the relevant treaty regime is sufficiently broad as to establish the treaty as a ‘core’ element in any list of treaties which should

the criterion by requiring a state to have ratified all six treaties would have rendered a significant number of countries ineligible for election, including China, Iran, Iraq, Jamaica, Malaysia, Pakistan, Saudi Arabia, Singapore, Tanzania, Thailand, Vietnam and the United States. While this outcome is not inconceivable it certainly raises questions as to whether treaty ratification per se is an appropriate standard to apply in relation to Council membership.

A less demanding approach, which takes the main United Nations human rights treaties as its starting point, is to require only acceptance of the two cornerstone treaties which, together with the Universal Declaration of Human Rights, make up the International Bill of Rights, a commitment to the preparation of which emerged from the process of drafting the UN Charter<sup>34</sup> and was the principal item listed in the terms of reference given to the first Commission on Human Rights in 1946.<sup>35</sup> This would mean requiring that a State eligible for election to the Council should be a party to both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>36</sup> If this minimalist criterion is applied neither China nor the United States, among others, would be ineligible for election to the new Council.

### **(ii) Compliance with reporting obligations**

This criterion is more complex than it might seem at first. Under most of the core treaties States Parties are required to make an initial report within 2 years and then to provide additional or 'periodic' reports every four or five years thereafter.<sup>37</sup> Compliance with the obligation to report is central to the accountability mechanisms established under these treaties. In general, the monitoring process in relation to a given country is only triggered by the submission of a report, so that failure to report or very late reporting significantly undermines the system. Measurement of non-compliance is, however, made difficult by virtue of the fact that a widespread practise has emerged whereby States habitually, and without apology or regret, submit their reports long after they are due. The situation is best summed up by the following analysis:

[Many States] have fallen seriously behind in submission of their reports. At the beginning of 2005, a total of 1.490 reports, including 273 initial reports, were

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be considered as absolute priorities for any state wishing to establish its clear human rights *bona fides* in terms of the international regime.

<sup>34</sup> See LOUIS B. SOHN AND THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973) 514.

<sup>35</sup> See Egon Schwelb and Philip Alston, *The Principal Institutions and Other Bodies Founded under the Charter*, in *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* (Karel Vasak and Philip Alston, eds., 1982) 231 at 244.

<sup>36</sup> See note 33 above.

<sup>37</sup> For a more precise overview of information relating to the reporting schedules under the different treaties see 'Monitoring implementation of the international human rights instruments: an overview of the current treaty body system', Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights for the Fifth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, (24 January - 4 February 2005), UN doc. A/AC.265/2005/CRP/2.

overdue. Of these, 648 have been overdue for more than five years. As a consequence, the average State party to a treaty with reporting requirements has more than eleven reports overdue to the treaty bodies. On average, States submit their initial reports 33 months late and their periodic reports 28 months late.<sup>38</sup>

While it might be assumed that the poorer developing countries are the most likely to be well behind in meeting their reporting obligations, delinquency is in fact a widely shared phenomenon. As of November 2005 the United States, for example, was officially listed as having 5 reports overdue, some by a very considerable period of time. China also had four overdue reports, while only 18 states were listed as having no more than a single report outstanding (including Canada, Finland, Germany, Italy and the United Kingdom, but also North Korea and Myanmar.<sup>39</sup> But the fact that reporting delinquency is all too common should not serve to distract attention from the fact that it poses a major threat to the integrity and effectiveness of the reporting procedures or that timely submission is a potentially appropriate criterion by which to measure the extent to which States live up to their international obligations in the human rights field. Indeed, it may be argued that it is precisely because there are no penalties or other disincentives attaching to tardy reporting that the practise has flourished.

Three conclusions may be drawn for present purposes from this brief survey. The first is that a stark requirement of timely submission of reports is an unworkable criterion for Council membership since it would lead to the disqualification of a huge number of States. The second is that incurring some form of penalty or disadvantage for systematic delinquency is both necessary and appropriate, but that it needs to be applied in a fashion which reflects existing realities. The third, which follows from the first two, is that the application of a modified or composite requirement in relation to reporting would be feasible and reasonable, and would constitute an important reinforcement of one of the key components of the existing arrangements for international accountability. While it is beyond the scope of the present analysis to suggest any precise model in this regard, the solution will presumably lie in some form of aggregate test according to which a State would be ineligible for election if, on aggregate, the sum of its reports was a total of more than two years overdue. It should be added that this would not necessarily represent an undue burden on developing countries since they are eligible for technical assistance provided by the Office of the High Commissioner for Human Rights in the preparation of reports if they request it.

### **(iii) Issuance of open invitations to UN human rights experts**

This criterion refers to a technique developed in order to facilitate the functioning of the thematic special procedures which constitute another of the major human rights accountability mechanisms developed by the Commission on Human Rights. It involves

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<sup>38</sup> *Id.*, para. 24.

<sup>39</sup> OHCHR, Treaty Body Database, List of reports 'overdue by country', available at <http://www.unhchr.ch/tbs/doc.nsf/newhvoverduebycountry?OpenView>, accessed Nov. 5, 2005. See also International Human Rights Treaty Bodies: Recent Reporting History under the Principal International Human Rights Instruments, UN doc. HRI/GEN/4/Rev.5, 3 June 2005.

a State issuing a ‘standing invitation’ to all of the UN Special Rapporteurs, Special Representatives, and Independent Experts who deal with a particular theme.<sup>40</sup> The significance is that the relevant mandate-holder does not need to seek an invitation from a government on an ad hoc basis but has only to negotiate the timing of a proposed on-site visit to a country.<sup>41</sup>

The application of this criterion for Council membership would exclude the great majority of African and Asian countries (including China) as well as the United States and Russia.

#### **(iv) Non-condemnation by the Commission on Human Rights**

It is this requirement that would be the least demanding and lead to the exclusion from potential membership of the smallest number of countries. In good measure the current reform criticism has been driven by those States such as China and Cuba which feel that the Commission should not have singled out particular countries for criticism in the form of a country-specific resolution. At present there are 13 countries which are the subject of specific procedures. Some of these, however, are being dealt with under Item 19 on the Commission’s agenda which concerns the provision of technical cooperation and advisory services, rather than under Item dealing with violations of human rights. Although it would be presumed that only those dealt with under Item 9 would be excluded from potential membership of the Council, the use of Item 19 as a way of dealing with violators while avoiding a formal condemnation makes it difficult to attach undue consideration to this distinction.

The list of countries currently under consideration consists of: Belarus, Burundi, Cambodia, Cuba, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Haiti, Liberia, Myanmar, Palestinian territories occupied since 1967, Somalia, Sudan, and Uzbekistan.<sup>42</sup>

The use of such a list would be problematic for two major reasons. The first is that in no way factors in the situation of other States in relation to which major efforts had been made to secure a country-specific procedure. They include, for example, China, Zimbabwe, Turkmenistan, Russia (in relation to Chechnya), and the United States (in

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<sup>40</sup> As of October 14, 2005, the following 53 countries have extended a standing invitation to thematic procedures: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Georgia, Greece, Guatemala, Hungary, Iceland, Ireland, Islamic Republic of Iran, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Republic of Macedonia, Romania, San Marino, Serbia Montenegro, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, and Uruguay. See <http://www.ohchr.org/english/bodies/chr/special/invitations.htm> (accessed Oct. 16, 2005).

<sup>41</sup> For an explanation of the concept of standing invitations see the joint written statement to the Commission on Human Rights by several non-governmental organizations entitled ‘Standing Invitations to Thematic Human Rights Mechanisms’, UN doc. E/CN.4/2004/NGO/2, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.NGO.2.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.NGO.2.En?Opendocument)

<sup>42</sup> See Office of the High Commissioner for Human Rights, ‘Country Mandates’, available at <http://www.ohchr.org/english/bodies/chr/special/countries.htm> (accessed Oct 5, 2005).

relation to Guantanamo). Most observers would suggest that the failure to condemn in those cases owed more to the political clout of the countries concerned than to the insignificant nature of the alleged violations. The second reason is that all of the countries on the list are from developing countries and their exclusion from potential membership in the Council would only serve to underscore the ‘North as judge and South as defendant’ critique of the Commission’s work. While such an approach might seem reasonable to an observer steeped in U.S. state constitutional law assumptions about the appropriateness of disenfranchising felons,<sup>43</sup> the United Nations system is built on the radically different notion of the sovereign equality of states. While much of the evolving international human rights regime has been designed to transcend certain aspects of that notion, depriving delinquent States of their rights to vote and to participate in international governance without a procedure such as that mandated by the UN Charter in relation to the Security Council.

#### **(v) Countries subject to Security Council sanctions**

One final additional criterion which has been suggested by the United States is that countries which are the subject of sanctions imposed by the Security Council should not be eligible for election. This argument was put forward by a senior U.S. diplomat in the context of discussions about the new Council. He urged UN Member States not to:

make room on the Council for countries that seek to undermine the effectiveness of the UN’s human rights machinery – much less governments under Security Council sanctions or investigation for human rights reasons.<sup>44</sup>

On its face this limitation would appear reasonable. By the same token consideration needs to be given to several factors which make the solution less satisfactory than might first appear. One is that only a rather limited range of countries would be precluded from election as a result. At present such an exclusion would affect only: Afghanistan, Burundi, Côte d’Ivoire, Democratic Republic of the Congo, Iraq, Libya, Rwanda, Sierra Leone, Somalia, Sudan, Tanzania, and Uganda.<sup>45</sup> The list does not include countries such as Myanmar or Uzbekistan which are subject to sanctions by groups such as the European Union, nor of course the much larger list of countries subject to some form of United States-imposed unilateral sanctions. Moreover, some of the States whose membership of the Commission the United States considers to be most problematic, such as Cuba, would not be covered. Another problem is the nature of Security Council sanctions. They are, in practice, imposed for a variety of reasons, only some of which reflect a poor human rights record. Thus, for example, a country may be subject to sanctions because it is

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<sup>43</sup> The 14th Amendment to the U.S. Constitution permits states to deny the vote "for participation in rebellion, or other crime." In 2004 it was estimated that some 4.7 million U.S. citizens were barred from voting because of their felony records. See Kevin Krajick, ‘Why Can’t Ex-Felons Vote?’, Washington Post, Aug. 18, 2004, p A19, available at <http://www.washingtonpost.com/wp-dyn/articles/A9785-2004Aug17.html> (accessed Oct. 14, 2005).

<sup>44</sup> Statement by Ambassador Sichan Siv, U.S. Alternate Representative to the General Assembly, on Agenda Items 71 (b) (c) and (e), in the Third Committee, October 31, 2005, United States Mission to the United Nations, Press Release #194 (05), Oct. 31, 2005, available at [http://www.un.int/usa/05\\_194.htm](http://www.un.int/usa/05_194.htm)

<sup>45</sup> “List of countries subject to United Nations sanctions”, available at [http://www.tid.gov.hk/english/import\\_export/uns/uns\\_countrylist.html](http://www.tid.gov.hk/english/import_export/uns/uns_countrylist.html)

facilitating arms imports by another state which is prohibited from obtaining them. While sanction might be fully warranted, it is questionable whether exclusion from the Human Rights Council should follow. If the answer to that question is in the affirmative, then the question is why exclusion from other international forums is not equally warranted if the objective is to impose a general purpose punishment.

The Security Council criterion is also complicated by the fact that respect for human rights has itself been proposed as an important element required if a country is to qualify for election to one of the proposed new permanent seats on the Security Council.<sup>46</sup>

The final problem with this criterion is that it would endow the Permanent Five, veto-wielding members of the Security Council with much of the power to determine which countries should or should not be able to sit on the Human Rights Council. This may be more of a political than an equity-based objection but it would nevertheless be a factor which would affect the overall political legitimacy of the new Council while at the same time resulting in the exclusion of relatively few countries, without catching all of the major human rights violators.

#### **4. An Alternative to Formal Membership Criteria?**

The clear conclusion that emerges from the foregoing analysis is that while the idea of membership criteria has a great deal to recommend it, it seems unlikely to be workable, and certainly unlikely to be effective, in practice. This has now been acknowledged by most observers, although some have still sought to encourage consideration of soft or voluntarily-assumed obligations which should be considered by states which are elected to the Council.

The best illustration of this process of reluctant abandonment of formal criteria is to be found in the December 2004 report of a high-level panel on UN reform.<sup>47</sup> In a section entitled 'A more effective United Nations for the twenty-first century' the panel focused squarely on the issue of the inclusion in the Commission of countries with poor human rights records. Instead of using terms like egregious violators or the like the panel preferred a diplomatic euphemism by referring to 'States that lack a demonstrated commitment to [human rights] promotion and protection'. Such States, the report said, had sought Commission membership 'not to strengthen human rights but to protect themselves against criticism or to criticize others'. The result was an erosion of credibility and professionalism: 'The Commission cannot be credible if it is seen to be

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<sup>46</sup> The United States has urged that 'We must also ensure that new permanent members are supremely qualified to undertake the tremendous duties and responsibilities they will assume. In our view, qualified nations should meet criteria in the following areas: size of economy and population; military capacity; contributions to peacekeeping operations; commitment to democracy and human rights; financial contributions to the United Nations; non-proliferation and counterterrorism records; and equitable geographic balance.' Statement by Ambassador John R. Bolton, U.S. Representative to the United Nations, on Security Council Reform, in the General Assembly, November 10, 2005, United States Mission to the United Nations, Press Release # 214 (05), November 10, 2005, available at [http://www.un.int/usa/05\\_214.htm](http://www.un.int/usa/05_214.htm)

<sup>47</sup> Report of the High-level Panel, n. 21 above.

maintaining double standards in addressing human rights concerns.’ But while emphasizing the need for reform the panel began by dismissing the possibility of setting criteria for membership, an approach which it said would only risk further politicization. Instead it opted for universal membership by which all 193 UN Member States would be able to participate and vote in the Commission’s proceedings.<sup>48</sup>

Amnesty International has also eschewed any formal criteria and has instead contented itself with calling for ‘electoral rules that effectively provide for genuine election of Council membership (precluding ‘clean slates’)<sup>49</sup>, that provide for election by a two-thirds majority of the General Assembly and that ensure that Council membership is effectively open to all members.’<sup>50</sup> This highlights the fact that the question of the size of the new Human Rights Council is a particularly contentious one with proposals varying from as few as 20, a number favored by the United States, to as many as 193 (or however many members there are at the time of the United Nations). These figures raise critical questions of legitimacy, credibility, acceptability, and diversity, all of which warrant much more systematic consideration than they have so far received in the discussions in international forums. Regrettably, in view of their considerable importance, those issues go well beyond the scope of the present article.

While Amnesty International concluded that it ‘does not consider that imposing specific criteria for membership is an effective approach’ it nonetheless went on to say that if Council membership is to be limited, the relevant ‘election rules and working methods should encourage the nomination and election of governments with a demonstrated commitment to the promotion and protection of human rights.’<sup>51</sup> This was elaborated in a subsequent statement in which Amnesty called upon states presenting themselves as candidates for election to the Council to ‘make public human rights commitments well in advance of the election date’.<sup>52</sup> However, the statement carefully avoided spelling out the precise nature of such commitments. In November 2005, Amnesty in collaboration with 40 other civil society groups, including Human Rights Watch, called upon states seeking election to the Council to ‘commit to abide by the highest standards of human rights and to cooperate fully with the [Council] and its mechanisms, and [to] put forward

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<sup>48</sup> *Id.*

<sup>49</sup> Amnesty International has defined a ‘clean slate’ as a ‘practice by which regional groups determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region’. The result is to avoid an electoral competition and instead to ensure that the countries agreed within the regional group will unavoidably be selected. Amnesty International, UN: Governments must act promptly and effectively on important human rights commitments in 2005 World Summit Document, AI Index: IOR 41/062/2005, Sept. 26, 2005, available at <http://web.amnesty.org/library/Index/ENGIOR410622005?open&of=ENG-393> (accessed Oct 12, 2005).

<sup>50</sup> *Id.*

<sup>51</sup> Amnesty International’s Views on the Proposals for Reform of the UN’s human rights machinery, AI Index: IOR 41/032/2005, News Service No: 089, 11 April 2005, available at <http://web.amnesty.org/library/Index/ENGIOR410322005?open&of=ENG-393>

<sup>52</sup> Amnesty International’s Ten-point Program for the Creation of an Authoritative and Effective Human Rights Council, AI Index: IOR 41/068/2005, 1 Nov. 2005, available at <http://web.amnesty.org/library/Index/ENGIOR410682005?open&of=ENG-393>

a platform that describes what they seek to accomplish during their term of membership.’<sup>53</sup>

The major challenge that then emerges in trying to ensure some degree of accountability on the part of the members of the new Human Rights Council is how best to encourage candidate states to put forward the sort of pledges or electoral platforms that have been called for and how to encourage other states to take account of the human rights record of the candidates in deciding how to cast their ballots. This process is best seen not as a matter of legal or other mandatory requirements but as a process of education.

In the remaining part of this article the argument is made that a consolidated performance index is a vital part of any such endeavours. Expecting most governments to scrutinize in detail the record of every individual candidate for election, and to use appropriate and comparable criteria in doing so, is asking a lot and the record to date offers little prospect that such a process will apply. The availability of a consolidated index, applying the same criteria to every state, offers an accessible basis for evaluation and one which is built upon criteria which have in effect been endorsed by all states rather than on a more selective list which is inevitably going to be presented by some states as having been designed to promote particular outcomes.

## 5. Some Models for a Human Rights Index

There are many advantages to the drawing up of a composite index which reflects in a single numerical rating a range of factors which have been weighted according to their relevance and significance. Such an index seeks to capture a complex reality and to reduce it to a form which provides a readily understandable measure of performance across a range of activities.

While there are now many such composite indexes prepared on an annual basis for a wide range of purposes<sup>54</sup> it is useful to take note of two particularly pertinent models

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<sup>53</sup> Joint Letter on the U.N. Human Rights Council, Letter from Forty-one Civil Society Leaders to the President of the U.N. General Assembly, Nov. 1, 2005, available at

<http://hrw.org/english/docs/2005/11/01/global11955.htm> In addition to Amnesty International and Human Rights Watch the letter was also signed by most of the other leading human rights groups including: The Carter Center, CARE International, the Fédération Internationale des Ligues des Droits de l’Homme, Freedom House, Global Rights, Human Rights First, International Commission of Jurists, International Crisis Group, International League for Human Rights, International Service for Human Rights, Open Society Institute, Physicians for Human Rights, and the World Organisation Against Torture.

<sup>54</sup> Two such examples are a Commitment to Development Index and a Gender Equality Index. The latter has been developed by the World Economic Forum and measures the state of gender equality in 58 countries in relation to five criteria: economic participation, economic opportunity, political empowerment, educational attainment, and health and well-being. Augusto Lopez-Claros & Saadia Zahidi, Women’s Empowerment: Measuring the Global Gender Gap (2005), available at [http://www.weforum.org/pdf/Global\\_Competitiveness\\_Reports/Reports/gender\\_gap.pdf](http://www.weforum.org/pdf/Global_Competitiveness_Reports/Reports/gender_gap.pdf)

The Commitment to Development Index measures the development-friendliness of the policies adopted by 21 of the world’s richest countries. It takes account of the following factors: quality and quantity of foreign aid; openness to developing-country exports; policies that influence investment; migration policies;

which could be considered in the construction of any such index in the human rights field. They are the Human Development Index and the Environmental Sustainability Index.

The first of these – the Human Development Index (HDI) – is perhaps the best-known and certainly the most frequently imitated recent initiative of this kind. Its origins lie in part in efforts to create an antidote to the standard measures of economic performance – Gross National Product per capita (GNP) – which for many years had been used to rate and rank countries' performance as though little else counted. Those who found it to be, in Amartya Sen's words, 'an overused and oversold index',<sup>55</sup> often argued that it should be replaced by reference to a complex set of tables which would give a better indication of the reality. But at the end of the day it was an alternative composite indicator, one which was equally 'crude but convenient',<sup>56</sup> which succeeded in providing an alternative form of evaluation. This was the HDI. It was developed by Mahbub ul Haq and Amartya Sen within the framework of the *Human Development Report* (HDR) which was first published, under the auspices of the United Nations Development Program, in 1990. The HDI aggregates three different sets of indicators relating to (i) life expectancy at birth, (ii) literacy and school enrolment, and (iii) Gross Domestic Product per capita.<sup>57</sup> Since 1990 the same report has gone on to develop a range of other indexes which are also designed to capture complex realities by a numerical indicator. They include the Gender-related Development Index and the Gender Empowerment Measure (GDI/GEM), the Human Poverty Index (HPI-1 and HPI-2), the Human Freedom Index (HFI), and the Political Freedom Index (PFI).<sup>58</sup>

While the HDI has generated a considerable literature critiquing its shortcomings, omissions and pretensions<sup>59</sup> there is no doubt that it has also generated intense interest and 'a great deal of media coverage'.<sup>60</sup> Indeed, it would be fair to say that it has had a major impact on the way in which development success is measured. This is borne out not only by the extent to which the HDI is regularly cited in the mainstream development literature but also by the extent to which governments either invoke or denounce the ratings they receive depending upon whether or not they are happy with the outcome.<sup>61</sup>

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environmental policies; security policies; and support for creation and dissemination of new technologies.

See [http://www.cgdev.org/section/initiatives/\\_active/cdi/about\\_cdi](http://www.cgdev.org/section/initiatives/_active/cdi/about_cdi)

<sup>55</sup> Amartya Sen, 'Assessing Human Development', in HUMAN DEVELOPMENT REPORT 1999, p. 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, 333. The Index covers 175 Member states of the United Nations as well as the Special Administrative Region of Hong Kong and the Occupied Palestinian Territories. Only 16 Member states are excluded, in each case because the necessary data is lacking. *Id.*, 211.

<sup>58</sup> For an explanation of these composite indices and how they are calculated see

[http://hdr.undp.org/docs/statistics/indices/technote\\_1.pdf](http://hdr.undp.org/docs/statistics/indices/technote_1.pdf)

<sup>59</sup> For a sustained recent critique see Thomas W. Pogge, Can the Capability Approach Be Justified?, available at <http://mora.rente.nhh.no/projects/EqualityExchange/Portals/0/articles/pogge1.pdf>, especially pp. 64-70.

<sup>60</sup> HUMAN SECURITY REPORT 2005, 90.

<sup>61</sup> Kate Raworth & David Stewart, Critiques of the Human Development Index: A Review, in READINGS IN HUMAN DEVELOPMENT: CONCEPTS, MEASURES AND POLICIES FOR A DEVELOPMENT PARADIGM (Sakiko Fukuda-Parr and A. K. Shiva Kumar eds., 2003) 140; and Anuradha K. Rajivan, Taking Stock of the HDR Experience: Potential, Limitations and Future Directions, available at <http://hdr.undp.org.in/APRI/wkgppr/TakingStockHDRs.pdf>

An even more telling tribute to the success of the HDI is the extent to which it has been emulated in a variety of different contexts over the past decade. It has also stimulated others to seek to design more comprehensive and complex indices designed to achieve similar goals. For present purposes it will suffice to note one of the most detailed and scientifically sophisticated of these which is the Environmental Sustainability Index (ESI).<sup>62</sup>

The ESI seeks to encapsulate in a numerical index a set of 21 environmental sustainability indicators that measure factors such as natural resource endowments, past and present pollution levels, environmental management efforts, and the capacity of a society to improve its environmental performance. The stated objectives of the index are to provide '(1) a powerful tool for putting environmental decisionmaking on firmer analytical footing (2) an alternative to GDP and the Human Development Index for gauging country progress, and (3) a useful mechanism for benchmarking environmental performance.'<sup>63</sup> While the ESI shares some of the goals of the HDI its methods are quite different. It makes use of a very extensive and carefully constructed set of indicators and it specifically emphasizes the importance of peer group comparisons in relation to specific indicators. As a result of the extent of its ambition, its authors inevitably have faced major challenges in filling '[s]erious and persistent data gaps' in relation to items that are covered and have lamented the fact that various issues of major environmental significance are not covered at all because of the absence of data.<sup>64</sup>

The ESI's sponsors have also sought to measure the impact of the index by looking at the extent to which it has been cited in mainstream publications. The resulting survey shows extensive use across a wide range of sources.<sup>65</sup> They have also recorded and endeavored to respond to a range of critiques that have been made. These include criticisms that the index underemphasizes some dimensions of environmental sustainability, that it is meaningless because of its efforts to combine too many disparate elements, that other indexes are more informative in certain respects, that it gives undue weight to governments' stated intentions rather than to their actual performance, and that it has an inherently "northern" bias which favors developed over developing countries.<sup>66</sup> Many of these critiques would have clearly predictable counterparts in relation to any substantive human rights index that might be drawn up.

In general terms the advantages that might be obtained through the development of composite indices include the following:

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<sup>62</sup> 2005 ENVIRONMENTAL SUSTAINABILITY INDEX: BENCHMARKING NATIONAL ENVIRONMENTAL STEWARDSHIP. The Index is prepared by the Yale Center for Environmental Law and Policy and the Center for International Earth Science Information Network, Columbia University, in collaboration with the World Economic Forum, Geneva, Switzerland and the Joint Research Centre, European Commission Ispra, Italy. Available at <http://sedac.ciesin.columbia.edu/es/esi/downloads.html>

<sup>63</sup> *Id.*, 1.

<sup>64</sup> *Id.*, 2.

<sup>65</sup> *Id.*, Appendix I: Published Citations to the ESI, at p. 403.

<sup>66</sup> *Id.*, Appendix H: Critiques and Responses, at p. 397.

- To convey through a single measure a sense of the implications of a range of complex data which would not otherwise be readily understood by non-professionals;
- To compensate for the shortcomings of individual indicators, so that the whole is actually more useful than the sum of the parts;<sup>67</sup>
- To facilitate comparisons among countries;
- To facilitate comparisons over time;<sup>68</sup>
- To draw attention to the significance of the issues reflected in the indicator;
- To facilitate the ‘reportability’ of the issues in the media and thus help to develop a better public appreciation of the importance of the relevant issues;
- To generate a degree of public pressure through enhanced discussion and attention to the issues reflected in the component parts of the index; and
- To provide an incentive to governments and other decision-makers to take greater account of the factors reflected in the index in their policies and programs.

On the other hand, in addition to the inevitably difficult questions which will arise as to the design of any given index, there remains one over-arching question that needs to be answered in deciding whether to proceed with such an index. That is whether the disadvantages of giving prominence to a crude and technically unsatisfying index outweigh the advantages suggested above. It is highly instructive that this dilemma was squarely confronted by the architects of the HDI. One of them, Nobel Prize-winning economist Amartya Sen, subsequently stated that he had initially seen little merit in the HDI because of its crudeness and its inability to capture the richness and complexity of the information which underpinned it. But Sen went on to acknowledge that the principal proponent of the HDI, Mahbub ul Haq, had been right in insisting that only an indicator ‘of the same level of vulgarity as GNP’ could succeed in challenging GNP in the popular

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<sup>67</sup> The value of this function is strongly defended in a recent World Bank research study on governance which acknowledges that many of the available indicators are only ‘imperfect proxies’ for some of the fundamental concepts of governance. The authors identify three advantages flowing from distilling the proxies into a small number of aggregate indicators: (1) the aggregate indicators span a much larger set of countries than any individual source, thereby permitting comparisons of governance across a broad set of countries; (2) aggregate indicators can provide more precise measures of governance than individual indicators; and (3) it is possible to construct quantitative measures of the precision of both the aggregate governance indicators and their components, allowing formal testing of hypotheses regarding cross-country differences in governance. Kaufmann, Kray, and Zoido-Lobaton, ‘Aggregating Governance Indicators’, (1999) 1.

<sup>68</sup> It should be noted, however, that the HDI explicitly eschews its usage for this purpose. Thus the HUMAN DEVELOPMENT REPORT 2005, p. 212, notes that ‘Because of periodic revisions of data or changes in methodology by international agencies, statistics presented in different editions of the Report may not be comparable. For this reason the Human Development Report Office strongly advises against constructing trend analyses based on data from different editions.’

imagination. The real goal, in his view, was to use the HDI as a hook which would get the readers of the report 'to take an involved interest in the large class of systematic tables and detailed critical analyses presented'. In Sen's words, the 'crude index spoke loud and clear and received intelligent attention and through that vehicle the complex reality contained in the rest of the Report also found an interested audience.'<sup>69</sup> And it is precisely such a rationale which is invoked by the proponents of most of the composite indices which are now being prepared. The question for present purposes is whether such a justification is sufficiently compelling in the human rights context.

## **6. The Feasibility of a Human Rights Index**

In fields closely related to human rights a growing number of composite indices have emerged in recent years in relation to governance issues and to economic policy. Thus, for example, the Index of Economic Freedoms is compiled by the Heritage Foundation and rates countries according to levels of: corruption, non-tariff barriers to trade, the fiscal burden of government (tax rates etc.), the rule of law (defined as efficiency within the judiciary and the ability to enforce contracts), regulatory burdens on business, restrictions on banks, labor market regulations, and informal market activities.<sup>70</sup> Other notable governance-related indices include the Global Competitiveness Survey,<sup>71</sup> and the Corruptions Perception Index.<sup>72</sup> Such initiatives, and the publicity and attention that they have received, raise the question as to whether it is now time to seek to develop an authoritative composite index which would enable every country in the world to be ranked in a single index which measures their human rights records.

This section of the analysis consists of three parts. The first notes the historical reluctance of human rights proponents to engage in the development of composite indices. The second explores several recent developments which indicate a growing openness in this regard, and the third reviews arguments that a comprehensive general purpose human rights index is neither feasible nor desirable.

### **(a) The Historical Reluctance of Human Rights Proponents**

Despite the clear advantages to be gained from the development and use of composite indices, and the extent to which they have been promoted in other areas, the international human rights community has long been skeptical of the utility of such indices in relation

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<sup>69</sup> Sen, note 55 above.

<sup>70</sup> William W. Beach and Marc A. Miles, Explaining the Factors of the Index of Economic Freedom in 2005 INDEX OF ECONOMIC FREEDOM: THE LINK BETWEEN ECONOMIC OPPORTUNITY AND PROSPERITY (Marc A. Miles, Mary Anastasia O'Grady, & Edwin Feulner, Jr., eds.), Chap. 5, available at [http://www.heritage.org/research/features/index/chapters/Chapter\\_5.pdf](http://www.heritage.org/research/features/index/chapters/Chapter_5.pdf)

<sup>71</sup> GLOBAL COMPETITIVENESS REPORT 2005-2006: POLICIES UNDERPINNING RISING PROSPERITY (Augusto Lopez-Claros, Michael E. Porter & Klaus Schwab, eds., 2005) The report uses a Growth Competitiveness Index (GCI) which gives a score for the competitiveness of the macroeconomic environment, the quality of public institutions and the use of technology.

<sup>72</sup> This index is prepared annually by Transparency International and ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians. It is a composite index based largely on the perceptions of business people and the general public. See [http://www1.transparency.org/cpi/2005/cpi2005\\_faq.en.html](http://www1.transparency.org/cpi/2005/cpi2005_faq.en.html)

to its own areas of concern. This remains true even as new indices are launched in relation to gender representation or empowerment, the rule of law, good governance and so on. As a result none of the major international human rights groups, including Amnesty International, the *Fédération internationale des droits de l'homme*, or Human Rights Watch, make any sustained use of indices in their work.

Several factors help to explain this reluctance. The first is historical. Freedom House was the first major advocacy group to develop a set of criteria against which countries human rights conduct was systematically ranked. It began this work in a rather elementary form in the mid-1950s and from 1978 onwards it began to produce detailed annual reports using an increasingly sophisticated methodology. Commentators generally considered its criteria to be ideologically skewed both in terms of the range of rights used as the basis for the evaluation and in terms of the subjectivity of the rankings that were given to different countries. In methodological terms, scholars were especially critical of the fact that Freedom House did not clearly indicate the factors taken into account in drawing up the various scales used and of the fact that the scales were not able to be disaggregated.<sup>73</sup> The rankings were especially criticized during the 1980's in relation to countries generally perceived to have been in comparable situations but whose rankings varied dramatically from one another's. They included Nicaragua/El Salvador, Egypt/Israel, and Zaire/Chad. Those countries which were allied with the United States in the Cold War context appeared to be given the benefit of the doubt while those on the other side were evaluated harshly. Even after the Cold War ended commentators suggested that the surveys often reflected 'erratic value judgments'.<sup>74</sup>

Misgivings about the value of such indices were further exacerbated by the *World Human Rights Guide*, which was published over three editions between 1983 and 1992,<sup>75</sup> and used as the basis for an ill-fated *HDR* effort in the early 1990s to construct a Human Freedom Index. There were several problems with the index developed by Charles Humana. In the eyes of some commentators the virtual omission of the rights contained in the International Covenant on Economic, Social and Cultural Rights, apart from the right to form trade unions, the prohibition on child labor, and the right to take part in cultural life, ensured the one-sidedness of the index and its failure to live up to its claim to assess human rights in general. Onuma, for example, concluded that the assessment was 'based on the subjective view of the author' which, in turn, was said to reflect 'the bias of Western NGOs and media'.<sup>76</sup> But much more problematically politically, and the reason why the use of the *Guide* by the *HDR* was so controversial, was the fact that the

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<sup>73</sup> Thus it has been noted that 'the implicit range of each dimension and the weighting system (if any) employed in comparing countries and the decisional (mathematical) rule used to bring together units as a single ranking are never discussed'. G. Lopez and M. Stohl, 'Problems of Concept and Measurement in the Study of Human Rights', in, *HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT* (Thomas Jabine and Richard Claude, eds., 1991) 216 at 223.

<sup>74</sup> Cecelia Lynch, Book review of *World Human Rights Guide* (3rd ed., 1992) by Charles Humana, 3 *LAW AND POLITICS BOOK REVIEW* (August, 1993) 87, available at <http://www.bsos.umd.edu/gvpt/lpbr/>

<sup>75</sup> Charles Humana, *WORLD HUMAN RIGHTS GUIDE* (1983).

<sup>76</sup> Yasuaki Onuma, *The Need for an Intercivilizational Approach to Evaluating Human Rights*, 1/10 *HUMAN RIGHTS DIALOGUE* (1997), available at <https://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/574>

Humana Index took account of the 'rights': 'to purchase and drink alcohol', to practise homosexuality between consenting adults', 'to use contraceptive pills and devices', the freedom 'of early abortion' and the freedom 'of divorce'.<sup>77</sup>

Even after considerable criticism had been directed at the first two editions of the index, one reviewer of Humana's third edition expressed the hope that "the next edition will be less partial, although it would surely remain contentious".<sup>78</sup> At the end of the day neither of these two much publicized attempts to construct a composite index of human rights performance succeeded in persuading NGOs and other observers that rankings in this field could be done in an 'objective' manner.

Another reason for the human rights community's reluctance is the problem of the incommensurability of different states in terms of their human rights record. Members of the press and public often want to know whether country X's record should be considered to be better than that of country Y. But the human rights groups have assiduously responded by insisting that the performance of one country cannot reasonably be compared with that of another without sending either false or undesirable messages. For example, should a country in which official torture is widespread and systematic be rated more highly than another country in which a significant number of disappearances, but little torture, have been reported? What conclusions could an observer be expected to draw from the fact that one country gets a 4 out of 10 ranking where another gets 5, or from the fact that both are classified as having, say, "significant but not appalling" human rights problems? And how can silent but systemic violations such as longstanding but reasonably subtle discrimination against ethnic, religious, or linguistic groups be adequately captured in such overall rankings?

A related objection is that every human right counts and the fact that a country scores well on a composite index of some sort should not be permitted to obscure the fact that it might nevertheless have a poor record in relation to one or more specific issues. Similarly, a government can abuse such rankings to trumpet the fact that its performance is better than that of other countries, despite the existence of ongoing violations. This could make the normative content of human rights relative and allow a state that is doing the 'best' compared to other states, but is still not meeting its human rights obligations, to flaunt its high comparative rank. Ranking can also be problematic in relation to countries with very strong overall human rights records but which are nevertheless open to criticism in relation to certain shortcomings.

Another obstacle which has been identified is that 'the documentation of individual cases is and must be the primary concern of the many organizations that work on behalf of individual victims'.<sup>79</sup> While that statement is tautologous on its face, it suggests that most human rights organizations could be classified in that way. But today in fact more and more groups perceive that a vital part of their work is to provide an overall sense of

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<sup>77</sup> Humana, note 75 above, 33.

<sup>78</sup> Lynch, note 74 above, 88.

<sup>79</sup> Jabine and Claude (eds.), 'Introduction', in *Human Rights and Statistics: Getting the Record Straight*, note 10 above, p. 3.

the performance of governments and other actors in relation to specific rights issues and that a dominant focus on individual cases is not only time-consuming and backward-looking but does not enable them to provide the overall picture that is needed.

The difficulty of taking appropriate account of country resource and other contextual factors within the confines of a composite index also constitutes another element that explains the attitudes that human rights advocates have towards indices. This reinforces the sense that it is difficult to use a monolithic index as a means by which to compare two countries which are quite differently situated.

Finally, the preparation of a wide-ranging composite index in the human rights field is rendered more difficult by deep disparities in the quality and quantity of available information from one country to another. This problem has several dimensions. In the first place, there are countries in relation to which official information is almost entirely unreliable and in which the access granted to international NGOs, as well as the capacity of domestic NGOs to function independently, are so restricted that quantifiable data is relatively scarce and evaluations must be based on a variety of other types of information. In such cases, it is not possible to compile technically 'objective' measures of performance. By the same token, leaving such countries out of any comparative ranking that purports to be reasonably comprehensive is particularly problematic. Secondly, where reliable and detailed statistical information about human rights issues is available, reliance upon it is likely to distort even further the comparative picture that emerges since countries with a genuine commitment to protecting human rights are likely to generate far more critical information about themselves than are countries in which there is little if any respect for human rights.

### **(b) The Growing Importance of Indices and Indicators in Human Rights**

But while the human rights community's historical record is clearly one of considerable and deep-rooted reluctance about indices and indicators it must also be acknowledged that times and attitudes are changing. This is due in part to the successful examples from other fields, to the greater availability of data and enhanced capacities to organize and manipulate it, and to the growing sophistication of the human rights community. The following section of the analysis considers some recent examples of openness to the use of indicators or indices by UN human rights treaty bodies, by the UN Commission on Human Rights and its Sub-Commission, and by Amnesty International.

#### **(i) Human Rights Treaty Bodies**

The UN Committee on Economic, Social and Cultural Rights has consistently emphasized the value of national level indicators and benchmarks.<sup>80</sup> This dimension was taken up by the 1993 Vienna World Conference on Human Rights which affirmed the importance of using indicators as a means of measuring or assessing progress in relation

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<sup>80</sup> Note that the definition of what constitutes an 'indicator' in this context remains controversial. See Maria Green, What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement, 23 HUMAN RIGHTS QUARTERLY (2001), 1062.

to those rights.<sup>81</sup> The Committee has taken up this challenge in a series of General Comments adopted since 1999, each of which has focused in part on the importance of indicators. Thus, for example, in its General Comment No. 13 (1999) on the right to education the Committee urged states to ‘include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored’.<sup>82</sup> Similarly in its General Comment No. 15 (2002) on the rights to water the Committee called upon states to identify ‘right to water indicators . . . in the national water strategies or plans of action’.<sup>83</sup> It suggested that these ‘should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party’s territorial jurisdiction or under their control.’<sup>84</sup>

It has to be acknowledged, however, that the Committee has had only limited success in encouraging governments to pay more serious attention to such indicators. Moreover, for present purposes, it is noteworthy that the role envisaged to be played by indicators is primarily at the national, rather than at the international, level.

### (ii) The Commission on Human Rights

Despite the central importance attributed by many states to the issue of the composition of the Commission, there have been no formal proposals put to the Commission to develop an index or ranking which would evaluate the human rights standing of its actual or potential members. In 2002, however, an important group of Latin American governments, working within the framework of the Rio Group<sup>85</sup> proposed replacing the Commission’s country resolutions with a Global Human Rights Report which would ‘include a list of countries ranked by a human rights index based on quantifiable and relative variables related to political, civil, economic, social and cultural rights.’<sup>86</sup> This proposal, which was estimated would take five or six years to implement, drew support both from the then Chairperson of the Commission and from the UN Secretary-General. The latter commented that ‘the idea of trying to approach human rights in a systematic manner, trying to determine how it is being applied and where it stands in the various countries in a constructive manner that can help the countries develop it further, taking

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<sup>81</sup> The Conference called for the pursuit of approaches ‘such as a system of indicators to measure progress in the realization of the rights set forth in the International Covenant on Economic, Social and Cultural Rights.’ See Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, Part II, para. 98, in UN doc. A/CONF.157/23, 12 July 1993, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

<sup>82</sup> E/C.12/1999/10, para. 52.

<sup>83</sup> Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.6, 12 May 2003, p. 105. Para. 37(f).

<sup>84</sup> *Id.*, para. 53.

<sup>85</sup> The Rio Group was established in 1986 and now consists of 19 Latin American states (including Argentina, Brazil, Chile, Colombia, Mexico, and Venezuela) seeking to coordinate their positions on key foreign policy issues. See <http://cns.miis.edu/pubs/inven/pdfs/rio.pdf>

<sup>86</sup> [http://www.cyberdyaryo.com/features/f2002\\_0322\\_05.htm](http://www.cyberdyaryo.com/features/f2002_0322_05.htm)

the politics out of it and doing it very systematically, it is going to be very helpful.<sup>87</sup> The proposal has not, however, subsequently been taken up within the Commission.

### (iii) A Racial Equality Index

Proposals made over the past couple of years for the elaboration of a Racial Equality Index represent the first sustained indication of interest on the part of inter-governmental bodies in the preparation of a composite human rights index. The initiative derives from one of the recommendations which emerged from the highly controversial 2001 World Conference against Racism. It was that the UN Secretary-General should appoint a panel of 'five independent eminent experts' whose task would be to give impetus to the implementation of the recommendations emerging from the Conference.<sup>88</sup> At its first meeting, in September 2003, the expert group made a series of recommendations, one of which was 'that the international community find ways of measuring existing racial inequalities, possibly through the development of a "Racial Equality Index", similar to the Human Development Index ...'.<sup>89</sup> This recommendation was subsequently endorsed by the UN General Assembly which gave its authority to a request to the UN High Commissioner for Human Rights to examine the possibility of developing such an index.<sup>90</sup> The High Commissioner's response has been positive but cautious. In her first report on the issue she noted that national classification systems exist in some countries but not others, that there is no accepted international classification system for 'races', 'tribes', 'ethnic minorities', or 'indigenous peoples' and that those terms 'have distinct and different meanings in different countries'.<sup>91</sup> International comparisons must thus rely on national-level data which are not readily comparable. She concluded that:

The issue is very complex and we must proceed step by step with prior, thorough consultations with competent partners within and outside the United Nations before engaging in the process of elaborating an actual project proposal.<sup>92</sup>

While the original proposal explicitly drew a comparison between the HDI and the proposed new index, the analyses that have so far been undertaken seem to point more in the direction of a series of indicators rather than a composite index.

### (iv) International Criminal Law: An Amnesty International Proposal

<sup>87</sup> <http://www.un.org/apps/sg/offthecuff.asp?nid=93>

<sup>88</sup> See Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, UN doc. A/CONF.189/12, para. 191(b), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/215/43/PDF/N0221543.pdf?OpenElement>

<sup>89</sup> Views of the independent eminent experts on the implementation of the Durban Declaration and Programme of Action: Note by the secretariat, UN doc. E/CN.4/2004/112, para. 6(f).

<sup>90</sup> General Assembly Res. 58/160 of 22 Dec. 2003, para. 34. The Commission on Human Rights subsequently endorsed the same request in its resolution 2004/88, of 22 April 2004, para. 13.

<sup>91</sup> 'Possibility of the development of a racial equality index: Report of the High Commissioner for Human Rights', UN doc. E/CN.4/2005/17, para. 5.

<sup>92</sup> *Id.*

In discussions on approaches which might assist in evaluating the extent to which the standards contained in the Rome Statute of the International Criminal Court are being respected by States Amnesty International has proposed the development of an annual ‘anti-impunity index’. The focus of such an index would be on ‘some things that can easily be defended, measured and accepted as relevant in the fight against impunity’.<sup>93</sup> The index would reflect both positive and negative steps taken by states. The former would include: ratification of the Rome Statute and of the Agreement on Privileges and Immunities of the International Criminal Court; the enactment of effective implementing legislation; the adoption of cooperation agreements with the Court; reports of crimes under international law; national criminal investigations opened and completed; prosecutions begun, final judgments awarded and sentences fully served; and orders of reparations made and implemented. The negative elements might include:

amnesties, pardons and similar measures of impunity for genocide, crimes against humanity and war crimes – measures that are prohibited under international law when they prevent judicial determinations of guilt or innocence, the emergence of the truth or satisfactory reparations.

The proposed index is wide-ranging and combines, somewhat uneasily both objective and subjective elements. It does not appear to have been taken up by any group, nor to have been pursued by Amnesty International itself. Nonetheless, it demonstrates an interest in seeking to evaluate governmental performance in the area of international criminal law and to do so in a way which would convey to the broader public a sense of comparative achievement.

### (c) The Current Outlook

In 1992, an entire volume entitled *Human Rights and Statistics* contained no significant discussion of the possibility of a composite human rights index which could be used as a basis for comparative country rankings.<sup>94</sup> The situation today is very different. As the examples given in the preceding section illustrate, a significant number of specific proposals for the use of indices have been made. In general, however, despite some noteworthy efforts to move down the road to detailed comparative human rights indices, most observers remain determinedly sceptical about the desirability or feasibility of such an undertaking. Before reviewing the reasons for that scepticism it is appropriate to note two of the more elaborate efforts that have been undertaken in recent years.

The first, moderately ambitious, initiative concerns the preparation of a ‘Human Rights Commitment’ Index. This project was undertaken by the Danish Centre for Human Rights and led to the publication in 2000 of both a methodology for measuring comparative respect for human rights and a set of rankings.<sup>95</sup> The methodology is of the

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<sup>93</sup> Amnesty International, ‘Measuring the preventive impact of the Office of the Prosecutor – intervention by Christopher Keith Hall, 17 June 2003’, on file with the author.

<sup>94</sup> Jabine & Claude, note 73 above.

<sup>95</sup> Hans-Otto Sano & Lone Lindholt, *HUMAN RIGHTS INDICATORS: COUNTRY DATA AND METHODOLOGY 2000*, available at <http://www.humanrights.dk/upload/application/c05c487f/indicator-full.pdf>

greatest interest in the present context. It consisted of the development of four dimensions of 'commitment'. They are (i) formal commitment in terms of ratifications etc; (ii) commitment to civil and political rights; (iii) commitment to economic, social and cultural rights; and (iv) gender discrimination. The first of these will be considered below in relation to the proposed accountability index. The second is reasonably comprehensive in taking account of violations of eight major types of rights.<sup>96</sup> But the third and fourth are much less developed and serve to highlight the difficulty of developing a genuinely balanced and comprehensive set of human rights indicators. The Commitment Index does not appear to have been developed or up-dated since 2000 and it is unclear whether it has had a practical impact in terms of its stated objective of contributing to 'strategy development and country assessment in the project work' of the Danish Centre.<sup>97</sup>

Significantly, the creators of the Commitment Index note that they decided to refrain from developing a single index rating 'because of the complexity of weighing rights and because of the inadequacy of available data' in relation to items (iii) and (iv). And even where rankings have been assigned they note that '[t]ext and qualitative assessment must be combined with any use of indicators.'<sup>98</sup>

The second initiative concerns research being undertaken under the auspices of the World Bank's program on Governance into the feasibility of developing a comprehensive quantitative assessment of the relationships among human rights, governance and development indicators on a global basis.<sup>99</sup> Daniel Kaufmann, the principal architect of the Bank's work in this area, compares the challenge today to that which faced those working on issues of governance and corruption a decade earlier. The relevant concerns were considered to be too difficult to measure and where data did exist its reliability was questioned. Kaufmann points to the success achieved in those areas on the basis of 'more rigorous statistical tools, improved survey techniques, and in-depth empirical analysis', and concludes that comparable progress could occur in relation to human rights if an investment is made in the necessary empirical work, if an effort is made to collect and analyze the necessary data, and if margins of error are codified.<sup>100</sup> That work remains, however, at a relatively early stage and there is no reason to believe that a broadly accepted human rights performance index is imminent.

A variety of other commentators have all expressed considerable scepticism about the viability or utility of constructing meaningful composite indices of human rights performance. Sakiko Fukuda-Parr, who directed the preparation of the HDR from 1996 to 2004, has cautioned strongly against equating development and human rights goals and

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<sup>96</sup> They are: 1. extra-judicial killings /disappearances, 2. torture and ill-treatment, 3. detention without trial, 4. unfair trial, 5. participation in the political process, 6. freedom of association, 7. freedom of expression, and 8. discrimination.

<sup>97</sup> Sano & Lindholt, note 95 above, 1.

<sup>98</sup> *Id.*, 66.

<sup>99</sup> See Daniel Kaufmann, Human Rights and Governance: The Empirical Challenge, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson, eds., 2005) 352. See more generally <http://www.worldbank.org/wbi/governance/pubs/humanrights.html>

<sup>100</sup> Kaufmann, note 99 above, 383.

indicators. She highlights the fact that the human rights paradigm is important precisely because it introduces elements of participation, non-discrimination, accountability etc. which are not prominent reflected in the development indices.<sup>101</sup> In addition, she warns that ‘monitoring human rights with data is particularly difficult because key issues such as participation, conduct and remedy are not quantifiable, and because data are not readily available that show distribution of achievements and deprivations.’<sup>102</sup>

An even more cautious approach to the measurement of human rights through indicators has been put forward by Kate Raworth who has argued that it would be a mistake to seek to apply universally applicable indicators.<sup>103</sup> She provides several reasons for such pessimism: a different policy mix is required in each country in order to fulfil human rights; a set of generally applicable indicators will not reflect different national circumstances; even those that do have broader appeal will not necessarily work across large income gaps or over long periods of time; and the feasibility of data collection varies dramatically from one country to the next.<sup>104</sup> In essence she argues for context specificity in the design of inevitably complex solutions, which in turn makes the use of standardized universal indicators all the more inappropriate.

Nancy Thede adopts a very different starting point to Raworth’s, but in practical terms her conclusion is not significantly different. She begins with a presumption that human rights indicators are ‘extremely desirable’ in order to track progress over time and to enhance governmental accountability.<sup>105</sup> But she too is troubled by the complexity of human rights concepts, the need for interpretation and contextualization if they are to be meaningfully reduced to indicators, and the absence of sophisticated theoretical models which would underpin the validity of most indicators. Her concern is that:

... if a statistic is produced, it will be used, in many cases without contextual analysis and without any awareness of the methodological constraints under which it was generated. This tendency to ‘autonomisation of statistics’ is enhanced by the numerous proposals for rating systems and comparative indices based on calculations that are riddled with unadmitted subjective judgements and uncontrolled variables.<sup>106</sup>

Nonetheless, Thede tries hard to conclude on a positive note by calling for the fostering of what she terms a ‘culture of statistics’ on the part of human rights groups, and the pursuit of ‘transparency and dialogue in building an international indicators framework.’<sup>107</sup>

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<sup>101</sup> Sakiko Fukuda-Parr, *Indicators of Human Development and Human Rights – Overlaps, Differences . . . and what about the Human Development Index?*, 18 STAT. J U. N. ECON. COMM. FOR EUR. 239, 244 (2001).

<sup>102</sup> *Id.*, 245.

<sup>103</sup> Kate Raworth, *Measuring Human Rights*, 15 ETHICS & INT’L AFF. 111, 130 (2001).

<sup>104</sup> *Id.*, 124-25.

<sup>105</sup> Nancy Thede, *Human Rights and Statistics: Some Reflections on the no-man’s-land between Concept and Indicator*, 18 STAT. J U. N. ECON. COMM. FOR EUR. 259 (2001).

<sup>106</sup> *Id.*, 270.

<sup>107</sup> *Id.*, 271.

A much more negative conclusion was reached, however, in the *Human Security Report 2005*.<sup>108</sup> The report reflects a major new initiative designed precisely to track developments in terms of human security defined as including measures of political violence, human rights abuses, criminal violence and human trafficking. The report provides significant support for a little-known index called the Political Terror Scale (PTS), which measures core violations of civil and political rights based on data taken from annual reports by the U.S. State Department and Amnesty International.<sup>109</sup> Interestingly, the biggest hole in the data relates to developed countries. While there are plenty of data available to document large-scale violations such as torture and killings there is relatively little comparable data to measure the type of human rights problems that are much more common in wealthier countries.<sup>110</sup> In addition to the PTS the report notes two other ‘parallel measures of the world’s least secure countries’ based on sets of statistics compiled by widely differing sources. They are a human security dataset recording deaths from political violence, a political terror scale measuring ‘core’ human rights abuses, and the World Bank’s composite ‘Political Instability and Absence of Violence Index’.<sup>111</sup>

For present purposes, however, the principal significance of the *Human Security Report* is that it specifically raises the question of whether a composite human security index would be feasible. It concedes that, in principle, it might be possible to combine various measures such as ‘battle-related death rates, “indirect” death rates, and homicide and rape rates’ in order to compile such an index. But, after noting that much of that data is not readily available or is not reliable, the authors go on to dismiss the desirability of such a composite index. Such indices can, according to the report, ‘conceal more information than they convey’.<sup>112</sup>

The overall picture that emerges from this survey of recent efforts is a mixed one. On the one hand there have been regular calls made for the development of more innovative indices which measure and serve to draw attention to the comparative human rights performances of different states. On the other hand, the great majority of analyses reflect a consistent recognition not only of the complexity of such a task but of the extent to which it is potentially fraught with difficulty. The conclusion to be drawn is that very few experts – be they economists, statisticians, or human rights specialists – consider that a composite index of human rights performance is likely to be feasible, credible or useful in the foreseeable future.

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<sup>108</sup> THE HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21<sup>ST</sup> CENTURY, available at <http://www.humansecurityreport.info/index.php?option=content&task=view&id=28&Itemid=63> (accessed Oct. 17, 2005).

<sup>109</sup> Linda Cornett & Mark Gibney, Tracking Terror: The Political Terror Scale 1980-2001, (2003) available at [http://www.humansecurityreport.info/background/Cornett-Gibney\\_Political\\_Terror\\_Scale\\_1980-2001.pdf](http://www.humansecurityreport.info/background/Cornett-Gibney_Political_Terror_Scale_1980-2001.pdf)

<sup>110</sup> HUMAN SECURITY REPORT 2005, note 108 above, 78 and 91

<sup>111</sup> *Id.*, 91.

<sup>112</sup> *Id.*

## 7. An Intermediate Solution: Responding to the Accountability Challenge

The conclusion that emerges from the preceding analysis is not that the systematic collection of human rights-related statistical data and their incorporation into a composite indicator is per se undesirable. It is clear, however, that the time is not yet ripe for such a development. This is partly because an international consensus on what factors should be measured has not yet crystallized, and partly because the necessary data are not available and are unlikely to be reliably so for quite some time to come. There also remain considerable misgivings about the appropriateness of seeking to capture such a broad spectrum of data within a single index.

But the rejection of a composite index showing the overall human rights performance of each state is by no means the end of the original inquiry. There still remains a pressing and broadly acknowledged need for some basis upon which to evaluate the suitability for election of prospective members of the new Human Rights Council. While it may be feasible to block the election of any state which has been the subject of specific critical measures by the Security Council, such a measure does not go very far in satisfying the need for a generally applicable test of accountability.

The focus of the remaining part of this article is on an alternative measure which is designed to evaluate the performance of states in terms of their good faith cooperation with the procedures for promoting accountability upon which the international human rights regime has been constructed. The proposed Human Rights Accountability Index (HRAI) is far from being a panacea but it does respond directly to many of the calls that have been made in the wake of the demise of the Commission on Human Rights for states to be evaluated in the future on the basis of their records vis-à-vis the various accountability procedures which have been adopted. Before examining the possible elements to be included in such an Index it is appropriate to consider some of the criteria on the basis of which any such index might usefully be constructed.

### Considerations in Designing a HRAI<sup>113</sup>

It is probably true that no composite index of any type could ever fully satisfy all of its potential critics. There will always be some states who will look ahead and foresee that they would not do well on the basis of any such ranking. Nonetheless, based on the experiences surveyed above, it is possible to identify certain criteria which should help to ensure that objective observers favor the construction of an index which satisfies most or all of the considerations reflected in the various criteria.

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<sup>113</sup> On the basis of a broad-ranging review of the potential use of human rights indicators in such contexts one commentator identified four minimal requirements that any such index would need to meet if it were to be both credible and politically acceptable: (i) it should be grounded in the major United Nations human rights instruments; (ii) it must emanate from an inclusive process; (iii) it must be statistically sound; and (iv) it must explicitly state the data sources and procedures used. He suggested that on this basis any such index would meet the necessary standards of transparency and accountability. Onuma, note 76 above

*Accuracy* requires that the sources from which the data are derived provide a reasonably accurate picture. If the raw data are vague or in some way dubious, then any composite use of those data is likely to magnify the various distortions and raise serious questions as to the resulting index. The raw material should thus be accessible and its accuracy potentially verifiable.

*Objectivity* requires that in-built biases be eliminated from the design of the index. It should, in particular, be objective in the sense of constituting a faithful reflection of widely accepted international human rights standards, and should, as far as possible, avoid cultural, political and other biases.

*Utility.* A composite index is only worth preparing if its potential utility is clear. It should thus be designed and constructed in such a way that governments and others seeking to evaluate performance will be able and willing to make use of it.

*Methodological soundness.* The construction of a composite index is a difficult task and it will be essential for appropriate expertise to be employed to make sure that the proposed methodology is convincing. In particular, consideration will need to be given to the relative weighting of different factors and to measures which might compensate for the limited relevance of a given factor in relation to certain states.

*Comprehensiveness,* in the sense of potential applicability to all states, is essential. The difficulty of gathering accurate and meaningful data on many states is one of the key reasons for rejecting various forms of possible composite indices. The HRAI should be able to measure the performance of almost all states equally well.

*Comparability of data.* Various indices have been proposed which would take account of developments at the national level such as the existence of a national human rights commission, or the constitutional recognition of human rights, or the role of the judiciary in upholding rights. Although such measures are potentially very important, they almost inevitably rely on subjective evaluations which mean that the data not readily comparable from one country to another. Thus for example a national human rights commission might be genuinely superfluous in a particular national context in which other mechanisms perform the same functions equally well or perhaps better.<sup>114</sup>

*General acceptability.* An index which is highly contested by key players is unlikely to serve the purposes for which it is established. It should thus seek to measure compliance with requirements whose legitimacy has been clearly endorsed by the great majority of states. While it may be difficult to demonstrate in formal terms the universal acceptability of every relevant standard, it is generally not difficult to point to a long succession of resolutions, usually adopted by consensus, which calls upon all states to

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<sup>114</sup> This criterion renders problematic one attempt at a composite index which resembles the proposed HRAI. The 'formal commitment' dimension of the Human Rights Commitment Indicators used by the Danish Centre for Human Rights (see note 95 above) measures not only the degree of national ratification of international human rights treaties, but also the extent to which relevant norms are included in national Bills of Rights. While this would be a reasonable criterion in some countries, it would be less so in relation to those which have opted for a constitutional structure that does not contain a detailed bill of rights.

take certain steps such as ratifying core treaties and cooperating with the various procedures.

### **An Outline of a Human Rights Accountability Index**

The proposed HRAI seeks to measure governmental performance in relation to three components: (i) the normative foundations of accountability; (ii) respect for procedural obligations; and (iii) responsiveness to the outcomes of the procedures.

#### **(i) Normative Foundations of Accountability**

This part of the index would reflect the extent to which each state has ratified or acceded to the six core human rights treaties.<sup>115</sup> In addition, the acceptance of the various optional complaints procedures under the ICCPR,<sup>116</sup> ICERD,<sup>117</sup> CAT,<sup>118</sup> and CEDAW<sup>119</sup> should be reflected. While some states remain determinedly averse to the acceptance of such complaints procedures, they have clearly become an integral part of any strong definition of good global human rights citizenship.

Additional international instruments which could be included, if not immediately, in the HRAI are: (i) the first and second optional protocols to the Convention on the Rights of the Child, which relate to children in armed conflict<sup>120</sup> and to the sale of children, child prostitution and child pornography<sup>121</sup> respectively; and (ii) the optional protocol to the CAT which provides for on-site country visits.<sup>122</sup> A more controversial inclusion would be the optional protocol to the ICCPR which provides for abolition of the death penalty.<sup>123</sup> In view of the depth of opposition to this provision on the part of various states it might be wiser not to include it in the index at this stage, despite the central importance attached by human rights proponents to eliminating capital punishment.

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<sup>115</sup> For a list of the core treaties see note 33 above. See also the discussion in that footnote as to whether the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families New York should be treated as a seventh core treaty for this purpose.

<sup>116</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

<sup>117</sup> CERD, note 33 above, Art. 14.

<sup>118</sup> CAT, note 33 above, Art. 22.

<sup>119</sup> Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), entered into force Dec. 22, 2000.

<sup>120</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002.

<sup>121</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force January 18, 2002

<sup>122</sup> Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)].

<sup>123</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991.

In addition, there are strong arguments in favor of adding two other reference points. The first would be the principal building blocks of international humanitarian law – the four Geneva Conventions of 1949<sup>124</sup> and the two Additional Protocols of 1977.<sup>125</sup> The second would be the Statute of the International Criminal Court (ICC).<sup>126</sup> The rationale for each of these additions is similar. The Security Council, the International Court of Justice, and other key international bodies have in recent years placed increasing reliance upon respect for the Geneva Conventions and Protocols. This is because it is now recognized, in a way that was not the case as recently as a decade ago, that the two bodies of law – human rights, and humanitarian law – are intimately intertwined and cannot reasonably be viewed in isolation from one another in any given context. Similarly the international community has consistently called upon all governments to ratify the ICC Statute. As a result, it achieved its 100<sup>th</sup> ratification in October 2005, only a little over seven years after its adoption.<sup>127</sup>

Consideration might also be given as to whether the Index should reflect participation in one of the major regional human rights treaties.<sup>128</sup> In Africa, Europe, and the Americas participation in the appropriate regional regime clearly strengthens accountability. While there is thus a strong case for reflecting this variable in the index, the principal objection is that there is no such option available to countries in Asia and the Middle East and that they should not be penalized for that fact. This element could, however, be taken into account in the design of the index so that states which are ineligible to join a regional regime would not be penalized under the index.

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<sup>124</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

<sup>125</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

<sup>126</sup> Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002.

<sup>127</sup> See '100<sup>th</sup> Ratification of the Rome Statute', available at <http://www.iccnw.org/100th/>

<sup>128</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); and African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

## (ii) Respect for Procedural Obligations

A very large part of the thrust of efforts to strengthen the international human rights regime over the past two decades has been to develop the procedural obligations assumed by states by virtue of their obligations as Member States of the United Nations (Charter-based obligations) or as a result of the ratification of specific treaties (treaty-based obligations). The most important procedural obligations in terms of Charter-based arrangements are to cooperate with the Special Procedures established by the Commission on Human Rights.<sup>129</sup> This involves two principal elements. The first is to respond substantively to the requests for information issued by the relevant Procedures. The second involves the issuance of 'standing invitations' by which states signify in advance that, if requested by any of the Procedures, they will agree to a visit from the relevant office-holder to inspect the situation in the country concerned, subject only to agreement as to the timing.<sup>130</sup>

If international humanitarian law instruments were to be included in the HRAI then it would also be appropriate to factor in the preparedness of each state to facilitate visits by the International Committee of the Red Cross in order to inspect compliance with those standards.<sup>131</sup> Because the ICRC does not make its reports publicly available (with rare exceptions) this indicator would be limited to reflecting the relatively few situations in which visits have not been permitted.

Respect for treaty-based obligations would be measured by reference to the compliance by each state with its reporting obligations under the applicable treaties. While the timetable varies from one treaty to the next, the general principle is that a state should submit an initial report within two years of becoming a party to the treaty, and this is generally followed by the requirement that a periodic report be submitted every five years thereafter. Failure to submit a report is a clear violation of the terms of the treaty. The only issue to be decided in the design of the index would be how much leeway should be given to states before they are declared to be delinquent. This question arises because a general climate of tardiness has come to prevail and evaluation solely by reference to the formal deadline would lead to a huge delinquency rate.<sup>132</sup> This is, however, a factor which could easily be accommodated in a well-designed index.

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<sup>129</sup> 'Special procedures' is the general name given to the mechanisms established by the Commission on Human Rights to address either specific country or more general 'thematic' issues. For details see <http://www.ohchr.org/english/bodies/chr/special/index.htm> For a current analysis and critique of the system see Amnesty International, *United Nations Special Procedures: Building on a cornerstone of human rights protection*, Oct. 2005, AI Index: IOR 40/017/2005, p. 18, available at <http://web.amnesty.org/library/Index/ENGIOR400172005> (accessed Oct. 14, 2005).

<sup>130</sup> See note 40 above.

<sup>131</sup> See generally David Forsythe, *THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (2005).

<sup>132</sup> See text accompanying notes 37-38 above.

### (iii) Responsiveness to Procedural Outcomes

The various procedures followed by the treaty bodies and by the different Special Procedures all lead to specific recommendations addressed to the state which finds itself under scrutiny. In relation to some of these procedures there are now follow-up arrangements which evaluate the extent to which a satisfactory response has emanated from the relevant state. In those instances there would be no difficulty factoring the outcomes into the HRAI. However, where such follow-up is not undertaken or is not specific, any attempt to reflect the response to recommendations in the index would require the making of a subjective judgment on the part of those preparing the index. While it should be noted that the making of such judgments is often required on the part of those responsible for the preparation of indices, it is likely that the very existence of the indices would provide important incentives to those involved. Both the treaty bodies and the special procedure mandate-holders would be encouraged to be more precise and specific in terms of the outcomes they want to see, and the governments to which the recommendations are addressed would have a significant incentive to act forcefully in response to the recommendations.

In summary, the HRAI might reflect the following elements:

#### 1. *Normative Foundations*

- ratification of, or accession to, the six (or seven) core UN human rights treaties;
- acceptance of the optional complaints procedures established under four of the core treaties (ICCPR, CERD, CAT, and CEDAW);
- ratification of the two optional protocols to the CRC and the one protocol to the CAT;
- ratification of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977; and
- ratification of the Rome Statute of the International Criminal Court.

#### 2. *Procedural obligations*

- provision of requested information to special procedures;
- standing invitations to special procedures;
- admission of the delegates of the ICRC to visit detainees; and
- timely submission of reports due to treaty bodies;

#### 3. *Responsiveness*

- responses to recommendations by treaty bodies;
- responses to ‘final views’ adopted in connection with communications procedures; and
- responses to recommendations by special procedures mandate-holders.

### **Conclusion**

The essential thrust of this article can be easily summarized. It is that the credibility and legitimacy of the new Human Rights Council – being created by the United Nations to

replace the Commission on Human Rights that existed from 1946 until 2005 – will depend significantly on the extent to which it makes itself and the governments that are elected as its members accountable. One way of doing this is to facilitate an assessment of the empirical human rights track record of each government which should then be taken into consideration in the election process and in the Council's subsequent activities. This will not happen, however, because of the complexity and difficulty of undertaking a substantive evaluation and reducing it to a single ranking.

A more feasible option, and one which could be pursued immediately, is to evaluate the extent to which each government has cooperated with precisely the forms of accountability which the Commission itself has consistently called upon states to accept. These revolve essentially around the ratification of a range of basic treaty standards, compliance with the procedural obligations that attach to those and other universally applicable standards, and responsiveness to the assessments that emanate from the various bodies set up by governments to ensure a basic form of accountability. These components of accountability could readily be captured in a single Human Rights Accountability Index which would be relatively straightforward to design and calculate, would faithfully reflect existing and accepted obligations, and would provide as good a foundation as any for a universal index to ensure a minimum level of accountability for states aspiring to be elected to the Human Rights Council.

This article has suggested the form which such a HRAI could take but several aspects of this proposal warrant emphasis. The first is that the objective of such a composite index would be to measure accountability and not performance. In other words, a state which does not have a particularly good human rights record but is consistently prepared to cooperate with the international community in relation to these issues will rank well. In contrast, a state which is generally considered to have a strong human rights record but considers it unnecessary to cooperate with international procedures and to contribute to the strengthening of international accountability will not score highly. What counts is the state's degree of commitment to the international normative regime and its preparedness to cooperate with the various mechanisms established to promote accountability. This is an undeniable shortcoming, but one which afflicts almost any composite index and it should not be sufficient to deter such an effort.

The second is that the process by which the index is developed should be consultative and provide for an opportunity for experts to give their input on its design and content before the initial survey is undertaken. This is consistent with the approach adopted in relation to those indices which have been used to assess comparative international performances in relation to issues such as human development and environmental sustainability and it is important not to under-estimate the need for technical expertise even in the design of the relatively straightforward index proposed here.<sup>133</sup>

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<sup>133</sup> Thus, for example, the HDR is produced with the assistance of a Statistical Advisory Panel made up of statisticians and development economist working at both the national and international levels. It generally meets twice a year. See HUMAN DEVELOPMENT REPORT 2005, 332.

Thirdly, while it may ideally be desirable for such an index to be compiled by a United Nations agency, there is no reason why a consortium of non-governmental organizations could not achieve the same objective. Given the difficulty of persuading inter-governmental groups to move ahead with such initiatives it may be both desirable and necessary for others to show the way. The HRAI can become a force to be reckoned with regardless of its provenance, provided only that it is done systematically and sensitively.

Finally, it may be objected that some of the proposed components are not yet sufficiently precise or susceptible to numerical evaluation as to be used for such purposes. The reality is that nothing will be more effective in persuading Special Procedures and treaty bodies to formulate their recommendations more precisely and to evaluate compliance more systematically than the prospect that their efforts will actually count in a practical and recognizable way.

Fifteen years ago an index of this type would have been neither feasible nor reliable because of the uneven level of governmental participation in key aspects of the international human rights regime. Today, the picture is much more comprehensive and systematic and the gaps are much less significant. The principal objective of the proposed HRAI is to encourage governments to engage with the system, as opposed to remaining outside it by refusing to participate or by participating in a manner which is no more than formalistic or perfunctory and thus does not satisfy the requirement of accountability.