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**50 words max biography:** Rhona K.M. Smith is Professor of International Human Rights at Northumbria Law School, UK and RWI Visiting Professor in Human Rights at Peking University Law School, China. She has written on International Human Rights, including OUP's Textbook on International Human Rights and Routledge-Cavendish's Text and Materials on International Human Rights.

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## **The Possibilities of an Independent Special Rapporteur**

### **<sup>i</sup> Scheme**

*Abstract: The independence and impartiality of the special rapporteurs is undoubtedly one of considerable importance to their work. In the context of the special procedures operating under the auspices of the Human Rights Council, a number of questions arise: what is meant by independent; independent of what; why is independence deemed so important; and what are the major barriers to independence? This article focuses on those questions, with particular regard to the role of the Human Rights Council (whose operation is scheduled for review in 2011) then draws together the threads of argument to ponder the implications, particularly for the Human Rights Council, of removing rapporteurs from its jurisdiction. (108 words)*

Keywords: United Nations, special rapporteurs, independence, Human Rights Council

Special Rapporteurs are one of the ‘least studied aspects of the United Nations system of protecting human rights’.<sup>ii</sup> Within a relatively compact body of literature, there is little specific consideration given to the independence of the rapporteurs, although the topic has been accorded greater importance in the context of the imminent review of the Human Rights Council and its special procedures. This article will examine some aspects of that divisive topic by delineating the parameters for independence then considering the relationship between the Human Rights Council and its rapporteurs. Thereafter, alternative frameworks will be outlined with note of the implications for the Human Rights Council. It appears that the Human Rights Council may suffer a credibility deficit should it ‘lose’ the rapporteurs and thus it is to be hoped that efforts will be made to support and enhance their work during the imminent review. This should in turn strengthen the role of the Human Rights Council and perhaps even consolidate its position within the United Nations.

### **What is meant by ‘independent’?**

‘Independence’ is a much discussed attribute within international human rights.<sup>iii</sup> Inevitably any discussion on independence requires agreement on the definition deployed – for the purpose of this article, international human rights texts are used as a benchmark<sup>iv</sup> with the additional UN requirements of gender balance and geographical spread. Taking a simple doctrinal analysis, it is clear that the special rapporteurs generally satisfy objective tests of independence. Independence is the third stated criteria for appointment,<sup>v</sup> followed by impartiality<sup>vi</sup> and objectivity.<sup>vii</sup> Article 3 of the Code of Conduct for Special Procedures Mandate-holders enshrines the general principles of conduct and states that ‘mandate-holders are independent United Nations experts’ who shall

‘act in an independent capacity, and exercise their functions in accordance with their mandate, through a professional, impartial assessment of facts based on internationally recognized human rights standards, and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate’.<sup>viii</sup>

This provision is corroborated with subsequent statements on the need for mandate-holders to be mindful of ‘the fundamental obligations of truthfulness, loyalty and independence pertaining to their mandate’<sup>ix</sup> and exhortations to ‘uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith’.<sup>x</sup> Subsequent sub-paragraphs provide a clear definition of independence, prohibiting financial or other private gain, and acceptance of honours, gifts etc for activities in pursuance of their functions. The Manual of Operations of the Special Procedures of the Human Rights Council reiterates this, noting that this requirement does not preclude dialogue with a wide range of actors.<sup>xi</sup>

As Lempinen notes, ‘[i]t is an undisputed fact that the strength of the system of special procedures lies in its ability of carrying out investigations impartially and independently’.<sup>xii</sup> Independence garners respect, promotes confidence at the absence of bias and should facilitate access to all material and sources (eg a government agency may not be accorded full access to civil society material). It thus engenders respect from all sides. If the rapporteur is independent, s/he should have more freedom to access a variety of sources and understand their relative value in an attempt at achieving a balanced viewpoint of the actual situation, of the best means of developing the right and such like. If States view the rapporteur as independent, they are more likely to enter into constructive dialogue with greater potential for positive results. If the Human Rights Council accepts their independence, greater weight should be placed on the reports produced. If people (in States) consider the mechanism independent, assurance of confidentiality will be maintained and trusted and thus more comprehensive and accurate information will become available to the rapporteur.

Clearly, it is not necessarily enough to be independent, that independence must be irrefutable.<sup>xiii</sup> Objective and subjectively verified independence should maintain confidence in the system of special rapporteurs. Although appearing apolitical implies neutrality and the absence of bias, in extremis it could suggest a consequential lack of passion and interest. Perhaps independence, while important, should not be the definitive criteria.

## **Relationships between the special rapporteurs and key actors**

Independence is viewed as a sine qua non of special rapporteurs, yet remains difficult to define. On the practical level, a more relevant approach is to consider the relationship between special rapporteurs and key actors.

### ***Special rapporteurs and States***

Technically special rapporteurs are appointed by States (specifically those sitting in the Human Rights Council), may be nominated by States and are dependent on States issuing invitations for visits. Nevertheless, they are required to be independent of States and governments. On one hand, this can be straightforward, as the Code of Conduct and Manual emphasise that mandate holders must not be influenced by States or receive honours and such like from governments. On the other hand, mandate holders are not stateless and thus all have a relationship with a State, and indeed are required to conform to travel authorisation/visa requirements in their country of nationality despite benefitting from immunity of UN staff members.<sup>xiv</sup>

More problematically, given some rapporteurs have previous links to their governments, the Coordination Committee for Special Procedures suggested that ‘[t]he requisite of independence and impartiality is not compatible with the appointment of individuals currently holding decision-making positions within the executive or legislative branches of their Governments’.<sup>xv</sup> The eventual wording adopted by the Human Rights Council is broader: ‘individuals holding decision-making positions in Government or in any other organization or entity’,<sup>xvi</sup> phraseology which has potentially adverse implications for human rights activists and defenders with various organizations.<sup>xvii</sup> Emphasising current ‘decision-making’ employment within Government is sensible but in theory would thus permit appointments of diplomats, retired heads of government or State and current government employees (who meet the other criteria). While such people may well satisfy objective tests of independence, would they be ‘seen to be independent’ on a subjective test?

During visits rapporteurs work with a cross-section of entities in a State, including the government (usually the primary contact as visits are by official invitation), the National Human Rights Institution (if there is one), non-governmental organisations and civil society representatives and such other people and bodies as the rapporteur deems important/ appropriate. Generally the rapporteurs require freedom to shape their visits and act independently in furtherance of their enquiries. Where the government unduly restricts such freedom, rapporteurs may decide not to continue with the visit, or if restrictions are announced in advance, a planned visit may be cancelled.<sup>xviii</sup>

A mutually respectful relationship between States and Special Rapporteurs is essential for visits to be undertaken. Nevertheless, for independence tests to be satisfied, the rapporteurs must be accorded considerable autonomy when onsite. Following normal diplomacy practice, some rapporteurs will raise issues of concern with the government while on a visit and may intimate the principal areas of their report. Part of the mutually respectful relationship is constructive dialogue, with rapporteurs seeking to evaluate facts and then assist States in fulfilling their obligations under international law. Thus to ensure a balanced representation of views, States have the opportunity to respond publicly to criticism (and praise) of rapporteurs.

### ***Special rapporteurs and the UN***

The relationship between the Human Rights Council and special rapporteurs is considered in more detail below, but what of the UN generally? Special rapporteurs are not UN employees but are entitled to UN immunities. This does not compromise their independence, but rather is necessary to ensure they can discharge their mandates unhindered by threat of legal action.<sup>xix</sup>

Similarly, when travelling to countries posing a security risk, the UN may provide protection, a move which should ensure greater independence than may be the case if that security was provided exclusively the State being visited. Complete independence from the UN is impossible but autonomy within the organisation is both possible and necessary. Rapporteurs benefit from the UN endorsement giving credibility and weight to their work, as well as affording a degree of personal protection. The United Nations' Office of the High Commissioner for Human Rights also provides administrative support, including travel arrangements and country briefings.<sup>xx</sup>

As for other UN mechanisms, practically the work of the rapporteurs is distinct from that of the treaty monitoring bodies: the latter, while independent individual experts, are obviously restricted in operation to the powers conferred on them by the pertinent treaty,<sup>xxi</sup> are limited to consideration of State reports and related information and are obviously limited to the rights contained in the treaty itself.<sup>xxii</sup> Generally there is a cordial relationship with treaty bodies sometimes referring to the work of rapporteurs and rapporteurs perusing relevant treaty body reports in preparation for visits. Some individuals have served in both capacities,<sup>xxiii</sup> fostering a greater understanding of the compatibility of functions in furtherance of protecting and promoting human rights. It is obviously not desirable (from an independence standpoint) for the two roles to be exercised simultaneously, as too the Advisory Committee to the Human Rights Council.<sup>xxiv</sup> The appointment of a UN staff member (full or even part-time) would be a very different proposition.

Overall, it appears that the current system facilitates respect for autonomy within the wider United Nations and thus meets requirements for independence.

### ***Special Rapporteurs and NGOs/IGOs***

Independence from other Inter-Governmental Organisations (IGOs) as former employees is another issue. There are circumstances in which former IGO staff are offered mandates and care must be taken to ensure no evidence of influence, ie subjective independence tests are met. Similarly with NGOs. While the code of conduct controversially suggests that there should be no relationship with NGOs or civil society, this is perhaps not strictly necessary. Nifosi considers that appointing individuals who were 'former or current NGO members, lawyers or professors of PIL' and who 'started to apply their own expertise in discharging the mandates entrusted to them' a breakthrough, with a 'correlation between the human rights background and legal expertise of the experts and a more incisive implementation of their mandates'.<sup>xxv</sup> Precluding the appointments of individuals with such expertise may thus be unhelpful. In any event, many employers have links with NGOs as do many academics, external engagement being encouraged not least under human rights education principles. Removing all such individuals from the pool of potential rapporteurs could be counterproductive: preserving objective independence at the expense of proven competency.

The 'knowledge' requirement of appointment achieves appropriate prominence in the documentation.<sup>xxvi</sup> However, it is a controversial requirement when considered alongside the Code of Conduct. There are undoubted benefits to familiarity with the UN system and certainly many rapporteurs have CVs including UN internships, spells as government employees, work with NGOs etc. Insufficient evidence is available online to comment on how many appointees

have no such experience. Certainly it is fair to say that life in a vacuum would probably not foster the ideal skills and experience for being a Special Rapporteur. After all, international human rights has an inherent political dimension and subject expertise is demonstrably a factor impacting on the increasingly professional discharge of mandates.<sup>xxvii</sup>

Within the international system, it is the Human Rights Council which has the most overt impact on the special rapporteurs, hence this journal edition in advance of the 2011 review. The relationship between the Council and its rapporteurs thus requires closer examination to establish whether independence is compromised.

### **Relationship between the Human Rights Council and its Rapporteurs**

The Code of Conduct explicitly states that mandate holders are accountable to the Human Rights Council in fulfilment of their mandates.<sup>xxviii</sup> It is thus difficult to maintain a veneer of independence therefrom<sup>xxix</sup> with several sources of potential friction. Arguably these are more pronounced in respect of country mandates as the Council is effectively stating that a named country has significant failings in human rights. The record suggests that procedure is politicised<sup>xxx</sup> and States all too often respond by refuting the mandate imposed. This often manifests itself with denial of access – see, for example, the country mandates for Myanmar<sup>xxxi</sup> and the Democratic Peoples’ Republic of Korea.<sup>xxxii</sup> Although thematic rapporteurs may have requests to visit refused by some States, their work can continue unabated albeit through visits elsewhere.

On tests of independence, the Human Rights Council appoints, approves, considers and terminates the mandates/ mandate-holders. All stages of this process must be evaluated through the prism of independence, with many States acknowledging that transparency is crucial, especially for appointment and termination.<sup>xxxiii</sup>

### ***Appointment***

The President of the Council appoints the mandate-holder, drawing on the public list compiled in light of the criteria specified in the Human Rights Council resolution 5/1 which further provides that ‘due consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems.’<sup>xxxiv</sup> This requirement furthers the subjective test of rapporteurs being ‘seen’ to be independent and impartial. Certainly almost any entity can nominate candidates: governments, regional UN groups, international organizations (including OHCHR), NGOs, other human rights bodies and individuals<sup>xxxv</sup> with a list of eligible persons maintained by the OHCHR. Upcoming mandates are now also advertised. A consultative group (of the Human Rights Council)<sup>xxxvi</sup> effectively shortlists the candidates for upcoming mandates. Nominees from and outwith the list can be considered, and views of outgoing special rapporteurs sought.<sup>xxxvii</sup> The final recommendations can be the subject of further consultations at the behest of the Human Rights Council President before appointments are made following approval of the Council.<sup>xxxviii</sup> This multi-stage

appointment process is undoubtedly symptomatic of attempts to render the process more transparent (previously appointments under the Commission were much more ad hoc, at least when viewed objectively).

A cursory evaluation of the present (as of 1 August 2010) mandates reveals the following data:

**Country mandates.** There are currently eight country mandates, three in Africa,<sup>xxxix</sup> one in Latin America<sup>xi</sup> and four in Asia.<sup>xli</sup> The mandate holders are three Asian,<sup>xlii</sup> two African,<sup>xliii</sup> two Western and European<sup>xliv</sup> and one Latin American.<sup>xlv</sup> Although mandate holders represent a geographical spread and different legal systems, it is debatable whether the spread is equitable. As for gender, all the country rapporteurs are currently male!

**Thematic mandates.** There are currently 27 individual mandate holders and four working groups. Within each working group there is a geographical spread (one representative from each regional grouping) and an approximate gender balance.<sup>xlvi</sup> Within the individual mandates, five are Latin American,<sup>xlvii</sup> seven are African,<sup>xlviii</sup> five are Asian,<sup>xlix</sup> two are East European<sup>i</sup> and nine are Western and European.<sup>ii</sup> Again the equitable nature of the spread may be questioned with three individual mandate holders from the USA, two each from South Africa, India and Brazil. (Interesting although some sixty-eight countries have issued standing invitations for Special Procedures, the USA is not among them.) With the presence of South African rapporteurs, hybrid legal systems are now represented. As for gender, eleven are female and sixteen male.<sup>iii</sup>

There are clearly some unresolved issues over gender and geographical balance of mandate holders, though there are arguably questions over whether a geographical and gender balance is essential. However, with gender mainstreaming in the UN and the pre-eminence of equality of nations large and small, east and west, north and south, these two requirements must be retained and monitored.

A further 'covert' requirement is availability. Mandate holders must be able to undertake the work necessary, work which is carried out on, in effect, a pro bono basis. Around 45 days per annum are required, though the reality is often more. In itself this acts as a filtering process as not everyone with due experience and the requisite skills has the flexibility and time to undertake missions. Some systems of employment law would allow unpaid (or indeed paid) leave of absence for employees appointed to a mandate, but the time factor may explain in part the number of academics serving as rapporteurs. Obviously they have the relevant expertise but crucially they have work which is traditionally more flexible than other employment. However, many universities are technically public not private enterprises thus the independence requirement is predicated on full respect for academic freedom.

Special rapporteurs are appointed ultimately by the Human Rights Council which, by definition, is a political body comprising States. This arguably compromises independence. Suggestions that the UN OHCHR could instead propose appointees have not been taken up, neither have other suggestions on other models of appointment.<sup>iiii</sup> Nevertheless in many national systems, the appointment of judges are subject to governmental approval,<sup>liv</sup> thus arguably the appointment system as it stands is not irrevocably flawed. There are some issues concerning politicisation of the process, eg condemnation by Israel of the appointment of Richard Falk to his mandate on the Palestinian Territories, though obviously in that case, the appointment was still made, but overall the rhetoric of independence appears respected.



### ***Termination of mandate***

Security of tenure is an objective indicator of independence. Emerging evidence suggests the Council is beginning to consider renewal of special rapporteur mandates in light of perceived compliance with Human Rights Council resolution 5/2 (Code of Conduct). This gives credence to claims that politicisation, perhaps inevitably, is characterising the tenure of rapporteurs, especially those with country mandates. At present, thematic mandates are approved for three year periods, country mandates for one.<sup>lv</sup> Both can be renewed. Individual rapporteurs are now restricted to six year maximum terms.<sup>lvi</sup> However, there is no provision to preclude mandate holders from ‘swapping’ mandates and indeed there are some special rapporteurs who have held successive mandates. This obviously means the individuals concerned have amassed considerable expertise of UN procedures but raises potential problems as mandates can become ‘closed shops’ with more experienced individuals likely to be reappointed. However, this does not alter the tenure requirements. Note that obviously there is also a provision for non-accumulation of human rights functions<sup>lvii</sup> thus one UN position at a time is generally adhered to with minimal, if any, overlaps.

As for use of the Code of Conduct as a disciplinary tool against rapporteurs, applying strict interpretations of the Code (rather than using it as a general framework<sup>lviii</sup>), it is stated that mandate-holders should ‘exercise their functions in accordance with their mandate and in compliance with the Regulations,<sup>lix</sup> as well as with the present code’.<sup>lx</sup> This is a worrying development as resolutions passed in the Council may not have the general support of all States or even all regional groupings. Of greater concern, earlier drafts of the Code included suggestions on establishing an ‘Ethics Committee’ to oversee compliance by rapporteurs with the Code.<sup>lxi</sup> This despite the pre-existence of an internal peer-regulation procedure by which the Coordination Committee of the special rapporteurs itself addresses any issues.<sup>lxii</sup>

It is imperative that rapporteurs do not appear beholden to the Human Rights Council for their mandate to satisfy subjective tests of independence.

### ***Approval and consideration of mandates***

Mandates have grown in an ad hoc fashion over the last thirty years. The attempts of the Human Rights Council to streamline them and create a framework for their operation is potentially positive but has been viewed as a partial restriction on the freedom of the rapporteurs and even perceived as a threat to their independence.

The Human Rights Council considers the renewal of mandates themselves. Hurst Hannum suggests a radical approach: that ‘as a general rule’ most mandates should be terminated after a period of six years.<sup>lxiii</sup> He adds a caveat that this approach should not extend to protection mandates, rather be restricted to promotion mandates. The idea of finite mandates could certainly negate the threat of non-renewal as a quasi-sanction. It could also enrich the duration of the mandate through adding perspective, but with mandates remaining part-time unpaid positions, this is not necessarily a positive development. Arguably, an automatic ‘sunset’ clause could obviate some politicization concerns, thereby strengthening perceptions of independence of the

rapporteurs vis-a-vis tenure. Hannum does accept that mandates should be retained or created if they ‘reflect the specific mandate and expertise of the Council; fill obvious gaps in human rights protection, seek to protect victims; and do not duplicate other work either within the framework of the Council or elsewhere in the UN system.’<sup>lxiv</sup> Although the mandate for the Palestinian Territories occupied since 1967 is arguably the longest running mandate,<sup>lxv</sup> it could satisfy Hannum’s proposed test for continuation.

There is some evidence that mandates are being used as political tools – thus Lempinen and Scheinin report that ‘the price of maintaining the system of country-specific special procedures’ was the termination of the mandates for Cuba and Belarus.<sup>lxvi</sup> They also note that the geographical distribution of seats in the Council will make the creation of new country mandates more difficult than before.<sup>lxvii</sup> Indeed, Sudan is the only country mandate created by the Council.<sup>lxviii</sup> Perceived potential overlap between country mandates and universal periodic review (UPR) compound the issue. However, strong arguments can still be made that the procedures are inherently different: UPR is essentially peer review by States of States and considers the full spectrum of international human rights and humanitarian law; in contrast the country mechanisms are generally tasked with monitoring the situation and promoting human rights through dialogue, advice, advocacy and encouragement.<sup>lxix</sup> The two are rarely, if ever, incompatible. Indeed the reports of the special rapporteurs feed in to the work of the Council in UPR– part 2 (or b) of the documentation reflects this.<sup>lxx</sup> Given that only 68 States currently extend standing invitations to the special rapporteurs, Gutter<sup>lxxi</sup> and indeed others argue that States should be ineligible to sit on the Human Rights Council if they demonstrate non-compliance with special rapporteurs by, for example, refusing to issue an invitation, or imposing unacceptable restrictions on a visit. While this has some merit for thematic mandates, it is a more problematic stance with country mandates albeit that such countries are probably unlikely to seek membership of the Human Rights Council.

While the establishment, continuation and termination of mandates may exhibit political influences, it is submitted that those need not taint the question of independent of individual rapporteurs.

### ***Exercise of mandates – scope and resources***

Mandates are to examine, monitor, advise and report on specific countries and /or human rights.<sup>lxxii</sup> Rapporteurs are thus a conduit for, as well as generators of, information on human rights as standards in themselves or as applied in specific countries. The information generated is usually public (with the exception of the confidential complaint systems) and widely available. The rapporteurs operate under a unique set of mandates and operational requirements. Working under the umbrella of the UN and perceived independence, they enjoy access to all levels of society (in theory). They are also obligated to consider all sources of information. This is a key element distinguishing rapporteurs from other systems of human rights monitoring.

One of the most significant problems with most special procedures is their open-ended mandate, in the sense that they are often asked to undertake additional work or indeed, they see the possibilities for additional work to develop their mandate and advance human rights. While there is obvious logic to maximising available resources, as discussed supra rapporteurs work pro-

bono and most have other employment. The ‘cost’ of independence is often a limitation of time for missions.

Some form of secured funding is essential for independence. Work pro bono reinforces the fact that rapporteurs are independent, not UN employees. However, as human rights provisions on the judiciary etc make clear, threats to independence arise when mechanisms are dependent on executive bodies for funding. In accordance with the existing practices (and as per the Manual), visits are organized, funded and coordinated through the OHCHR. There have been examples of mandate holders undertaking more extensive visits with the support of external (to the UN) funding. This raises additional issues of independence as well as of parity of mandates (not all holders will have access to additional funding, or indeed feel it is appropriate to use such funds).

Should available money be distributed equally, does that reflect the ‘needs’ and relative importance of the mandates? By definition country mandates are now more urgent in the sense that they reflect the concern of the Human Rights Council for a particular country/ territory and appointments are subject to annual review before any renewal. Given the aspiration that the situation changes within twelve months and the mandate can be terminated, how many country visits should there be each term, does it depend on the cost, and how are countries ‘prioritised’ for visits? At present, thematic rapporteurs have considerable autonomy to prioritise their own programme of work within the terms of their mandates and in light of standing invitations and /or invitations sought and received from States. ‘Just because of the scarcity of resources and the limited working capacity of an individual, thematic rapporteurs cannot travel every year to any country that would deserve to be scrutinized’.<sup>lxxiii</sup> Many rapporteurs do focus on visits to States which have not yet issued standing invitations and States which have not yet ratified relevant (to thematic mandate) core treaties.<sup>lxxiv</sup> (Obviously the rapporteurs uphold general international human rights as enshrined in the Universal Declaration of Human Rights, ratification or accession to any given treaty is not a pre-requisite to a thematic visit or to consideration of any right or freedom by country mandate holders).

Finally, it is important to re-emphasise that rapporteurs have immunity from legal process whilst under mandate.<sup>lxxv</sup> In carrying out their functions, they are bound by both the Code of Conduct<sup>lxxvi</sup> and the Regulations Governing the Status, Basic Rights and Duties of Official other than Secretariat Officials, and Experts on Mission,<sup>lxxvii</sup> giving rise to potential confusion as the two documents are not entirely congruent.

### **Alternatives to the present system**

The Human Rights Council uses the work of rapporteurs, both as part of Universal Periodic Review and as a contribution to its Special Sessions. The work of rapporteurs is also increasingly cited within Council debates, by NGOs and civil society, States, and treaty monitoring bodies. As their work is clearly valued, any discussion on the possibilities of independence must also consider alternatives: if special rapporteurs continue outwith the Human Rights Council, where could they sit?

**The General Assembly** is an obvious possibility. This would presumably mean under the ‘jurisdiction’ of the ‘Third Committee’ on social, humanitarian and cultural affairs which already

interacts with special rapporteurs. At present, the Human Rights Council still reports to the General Assembly so such a move is superfluous. Moreover, there is no guarantee that independence would be achieved. Politicised statements and challenges inevitably characterise the work of the General Assembly, albeit with a more diluted effect than is perhaps apparent in the Human Rights Council. Indeed there is already some evidence of States objecting to aspects of mandates and raising issues direct in the General Assembly, obviating the Council entirely, the General Assembly having a global membership and different alliances than those characterising the Council. Furthermore, the General Assembly already can convene sessions to consider human rights related issues and can appoint its own experts to undertake any investigations. Moving wholly to the auspices of the General Assembly would be a retrograde step.

**The Security Council** can invoke the UN Charter's enforcement provisions as well as investigating many issues. (It can and has appointed various fact finding missions.) Accordingly, positioning the mandates under the Security Council would remove some aspects of independence – for example appointments and mandates would always be scrutinised the five permanent members. In light of the omnipresent possibility of veto, the Security Council can be more political than the Human Rights Council or General Assembly, its comparative inactivity during the Cold War aptly demonstrates the paralysis which can occur when there are deep political divisions among the five permanent members. Furthermore, were rapporteurs directly responsible to the Security Council, they may be viewed as essentially more politicised than at present with the (albeit perhaps not entirely likely) possibility of enforcement action ensuing from any negative report.

**The Secretary-General** him (or in the future possibly her) self is another option. As with the other bodies discussed above, the Secretary-General has appointed various independent experts over the years. Given the wealth of other tasks falling on the Secretary-General and the nature of the role, as per the UN Charter, it is possibly not the best destination for any system of mechanisms of human rights. Perhaps some fact-finding elements and doctrinal analysis could fall within the remit of the office, but it would certainly be a change in function, something not likely to attract widespread support. Moreover, the personal characteristics and goals of each Secretary-General can vary. Ban Ki-Moon, it is written, views human rights as an integral part of the 'UN triad of security, human rights and development' thus would support rapporteurs.<sup>lxxviii</sup> The priorities of future Secretary-Generals may vary. Ultimately the Secretary-General heads the secretariat and employers, with a primary function clearly administrative in character.

**The Office of the High Commissioner for Human Rights** is perhaps the most obvious alternative. Certainly the power and credibility of the office<sup>lxxix</sup> has grown dramatically since its merger in 1997 with the former Centre for Human Rights in Geneva, and it is now a well-recognised authority on the global system of human rights. Although the High Commissioner has considerable diplomatic power and provides varied forms of assistance to governments as well as providing secretarial support to the treaty monitoring bodies, it arguably remains chronically underfunded. Despite this the OHCHR provides invaluable support to rapporteurs before and during country visits as well as generally administrative support for those wishing it. This arguably does not compromise the neutrality of the rapporteurs, given the impartiality expected of the OHCHR. Transparency of selection, appointment and termination would perhaps appear

more independent were responsibility to transfer to the OHCHR but, as noted above,<sup>lxxx</sup> this was unsuccessfully mooted.

**Treaty bodies** operating to monitor compliance of States with their treaty obligations. This is also a non-starter as the whole point of rapporteurs is that they are not restricted to measuring compliance with a single treaty. Nigel Rodley, who has held appointments as both a rapporteur and a member of a treaty monitoring body, makes clear his view that coexistence is mutually beneficial.<sup>lxxxii</sup> Thus while treaty bodies use rapporteurs and may work closely with them, there is no potential for them to administer the system.

**The Economic and Social Council** retains responsibility for human rights, although should the Human Rights Council achieve full status as a Council, responsibility will shift. Ramcharan notes that '[i]t must be admitted that the Economic and Social Council has not really played a substantive role on human rights issues for quite some time'.<sup>lxxxiii</sup> Nevertheless, it maintains a role<sup>lxxxiii</sup> and previously, of course, rapporteurs operated under the auspices of ECOSOC's Commission on Human Rights.

**Others options** would remove the rapporteurs from the UN system: States and National Human Rights Institutions should have that power already to investigate as do NGOs and civil society organisations. While undoubtedly particularly the latter entities play a role in fact-finding and reporting, a role recognised in the stakeholders report for UPR, they lack the credibility and impartiality which attachment to the UN system provides.

Naturally the system of special rapporteurs cannot exist in a vacuum, thus consideration must be given to their formal role and situation within the United Nations. It is perhaps helpful to consider the implications of moving the rapporteurs from the jurisdiction of the Human Rights Council.

### ***What are the implications for the Human Rights Council if special rapporteurs are removed from their jurisdiction?***

Should the special procedures move from the jurisdiction of the Human Rights Council, it is submitted that the Human Rights Council would immediately lose some of its credibility. If there is no semblance of independence therewith, that authority is inevitably undermined. Confidence in the Human Rights Council as a body would be eroded, lessening its chances of recognition as a full council of the UN. Moreover, without the rapporteurs to exercise a check and balance effect on information, substance would be added to claims of politicisation, similar claims arguably sealing the fate of the Commission on Human Rights. The Human Rights Council would also lose a very valuable pool of expertise to draw on, although it obviously retains its Advisory Committee.

A final point to consider, removing the Special Rapporteurs from the Human Rights Council would arguably undermine the Council's role of according human rights 'a more authoritative position'<sup>lxxxiv</sup> and place the Council in breach of GA Res 60/251.

## **Conclusions**

Independence is a multi-faceted concept, entailing subjective and objective tests. Key instruments provide a system of guarantees for de facto independence of rapporteurs in their functions. Nevertheless concerns remain as to whether all rapporteurs are independent, concerns which perhaps are better phrased as whether rapporteurs can ever be totally independent, given it is so complicated to establish from whom they should be independent and how that independence can be proven. Undoubtedly special rapporteurs are securely woven into the fabric of human rights protection and promotion activities undertaken under the auspices of the United Nations. That importance is, in no small way, attributable to their perceived independence which enables them to work across all sectors of society in their efforts to advance the promotion and protection of human rights. Strengthening of the position of special procedures has occurred in part as rapporteurs become increasingly 'expert'.<sup>lxxxv</sup> That expertise, however, arguably comes at a cost for independence. Accruing appropriate qualifications and experience frequently involves interaction with key actors thereby raising potential challenges on subjective independence. Rapporteurs' work is further strengthened through growing evidence of joint visits, communiqués and press releases.<sup>lxxxvi</sup> Cooperation between rapporteurs minimises overlapping in their activities (important when there are limited resources) and increases the pressure which can be applied on States which are failing to meet their obligations under international human rights. It also ameliorates the independence issue by 'defraying' the impact of any single rapporteur.

Thus, does it still matter whether special rapporteurs are independent by any or all tests? Independence is not necessarily determinative of competency. Credibility is, however, decisive, independence being a major component thereof. Arguably it is for country rather than thematic mandates that independence is more indicative of credibility but, even then, the alleged politicisation of Human Rights Council decisions to create or maintain country mandates seems to attain a higher profile than the individual appointment of a rapporteur.

Rapporteurs continue to do a remarkable job under difficult circumstances, their success attributable to the individual personalities of the mandate-holders. The aura of credibility and respect they enjoy takes hard work and dedication. While standardising and streamlining the process of selection and termination of mandates is perhaps inevitable, it potentially comes at a price: eroding the independence of the rapporteurs through increasing their accountability to the Human Rights Council removes a part of the very essence which sets them apart from other mechanisms in the first place. The autonomy of the rapporteurs, albeit dependent on the professionalism and passion for human rights of the mandate holders, is key to their neutrality, objectivity, respect and integrity. Special rapporteurs occupy a unique place in the mesh of mechanisms which promote and protect the web of international human rights, the 'crown jewel' of the system as Kofi Annan famously described them.<sup>lxxxvii</sup> Multifaceted though that jewel undoubtedly is, clouding rapporteurs' independence and autonomy will inevitably tarnish and reduce value. Careful consideration of the consequences of any proposed changes is vital during the forthcoming review.

<sup>i</sup> Note the term rapporteur is used herewith for consistency within this edition. Many of the UN documents use ‘special procedures’ as a more generic nomenclature which includes special rapporteurs, independent experts, working groups etc.

<sup>ii</sup> N. Rodley, Preface to Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Antwerpen: Intersentia, 2005) pvii

<sup>iii</sup> There is eg extensive literature on independence of judges, including Basic Principles on the Independence of the Judiciary (GA Res 40/32, 29 November 1985) and material on National Human Rights Institutions (Paris Principles relating to the Status of National Institutions, GA Res 48/134, 20 December 1993)

<sup>iv</sup> Ibid, drawing on objective and subjective tests for independence

<sup>v</sup> United Nations Human Rights Council Resolution 5/1, II A at para 39(c)

<sup>vi</sup> Ibid at para 39(d)

<sup>vii</sup> Ibid at para 39(f)

<sup>viii</sup> United Nations Human Rights Council Resolution 5/2 (Code of Conduct) Article 3(a)

<sup>ix</sup> Ibid as Article 3(e)

<sup>x</sup> Ibid at 3(f)

<sup>xi</sup> Current version August 2008, at para 11

<sup>xii</sup> Miko Lempinen, *Challenges Facing the System of Special procedures of the United Nations Commission on Human Rights* (Abo: Abo Akademi, 2001) at p40

<sup>xiii</sup> For example, in the UK, see Lord Browne-Wilkinson in *In Re Pinochet* Session 1998-99 House of Lords <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> (accessed 5 October, 2010)

<sup>xiv</sup> Discussed infra

<sup>xv</sup> in their letter of 4 September 2007, Annexe, ‘Possible elements of a Code of Conduct’, Coordination Committee of Special Procedures, *A note by the Special Procedures’ Coordination Committee in Response to Discussions on a Code of Conduct*, Geneva, 13 April 2007, at para 3

<sup>xvi</sup> UN Human Rights Council Resolution 5/1, at para 46

<sup>xvii</sup> Discussed infra

<sup>xviii</sup> See press release statement by Leandro Despouy, Paul Hunt, Manfred Nowak (all rapporteurs) and Leila Zerrougui (Working group chair) on their decision not to visit the US detention facilities in Guantanamo Bay, Cuba, due to restrictions on their visit.

<sup>xix</sup> *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, advisory opinion of the International Court of Justice 29 April 1999

<sup>xx</sup> Resources for rapporteurs are a vexed issue and considered infra

<sup>xxi</sup> With the core treaty exception of the Committee on Economic, Social and Cultural Rights which was created by ECOSOC Res 1985/17, 28 May 1985

<sup>xxii</sup> For more on this, see, Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law :in search of a sense of community* (Antwerp: Intersentia, 2006), Nigel Rodley, ‘United Nations Human

Rights Treaty Bodies and Special Procedures of the Commission on Human Rights – Complementarity or Competition?', *Human Rights Quarterly* 25 (2003) 882-908, updated in Nigel Rodley 'The United Nations Human Rights Council, its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition' in *New Institutions for Human Rights Protection*, ed Kevin Boyle (Oxford: OUP, 2009), 49-73; Miko Lempinen *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights* (Abo: Abo Akademi, 2001) pp181-211

<sup>xxiii</sup> For example, Professor Sir Nigel Rodley or Professor Philip Alston

<sup>xxiv</sup> Jean Ziegler, for example, is currently serving on the Advisory Committee though was previously a special rapporteur on the right to food. Previously Professor Paulo Sergio Pinheiro has served as special rapporteur, independent expert and member of the sub-commission on promotion and protection of human rights.

<sup>xxv</sup> Nifosi, *UN Special Procedures*, 149

<sup>xxvi</sup> UN Human Rights Council resolution 5/1, at paras 39(a) and (b)

<sup>xxvii</sup> Nifosi, *UN Special Procedures*, 149-150

<sup>xxviii</sup> UN Human Rights Council resolution 5/2, annexe Article 15

<sup>xxix</sup> So too with the former Commission – eg see Lempinen, *Challenges*, 42 et seq

<sup>xxx</sup> Early press statements on the initial sessions of the Human Rights Council impute bias with an allegedly disproportionate focus on Israel and the Palestinian Occupied territories notwithstanding significant human rights abuses elsewhere in the world.

<sup>xxxi</sup> Established 1992, Commission Resolution 1992/58; latest extension HR Council Resolution 13/25 (2010)

<sup>xxxii</sup> Established 2004, Commission Resolution 2004/13; latest extension HR Council Resolution 13/14 (2010)

<sup>xxxiii</sup> 'Summary of the discussions on the review of procedures, prepared by the Secretariat', UN Doc A/HRC/3/CRP.2 (2006) at paras 32 et seq. This also reflects the tenor of literature on independence of judges and members of national human rights institutions

<sup>xxxiv</sup> UN Human Rights Council resolution 5/1 at para 40; the UN's pursuance of gender balance being re-emphasised through the establishment of UN Women in July 2010

<sup>xxxv</sup> Ibid at para 42

<sup>xxxvi</sup> Comprising representatives of each regional group within the HRC aided by the OHCHR – Ibid at para 49

<sup>xxxvii</sup> Ibid at 52

<sup>xxxviii</sup> Ibid at 53

<sup>xxxix</sup> Sudan, Somalia, Burundi

<sup>xl</sup> Haiti

<sup>xli</sup> Cambodia, DPR Korea, Myanmar and Palestinian territories occupied since 1967.

<sup>xlii</sup> Nepalese, Indonesian, Bangladeshi

<sup>xliii</sup> Algerian and Tanzanian

<sup>xliv</sup> French and American (USA counts in this bloc for voting)



<sup>xlv</sup> Argentinian

<sup>xlvi</sup> Variations within each group, some predominantly male, others predominantly female' Overall, 11 male and 9 females serve on the working groups.

<sup>xlvii</sup> Adequate housing (Brazil); Extreme poverty (Chile); opinion and expression (Guatemala); Independence of judges and lawyers (Brazil); and migrants (Mexico).

<sup>xlviii</sup> Sale of children (Morocco); foreign debt (Zambia); arbitrary executions (South Africa); human rights defenders (Uganda); racism (Kenya); trafficking (Nigeria) and violence against women (South Africa).

<sup>xlix</sup> Cultural rights (Pakistan); Education (India); Health (India); and international solidarity (Indonesia)

<sup>l</sup> Slavery (Armenia); and toxic and dangerous waste (Romania).

<sup>li</sup> Food (Belgium); freedom of religion (Germany); Indigenous peoples (USA); internally displaced persons (Switzerland); minority issues (USA); terrorism (Finland); torture (Austria); and water (Portugal); and transnational corporations (USA).

<sup>lii</sup> One female appointee was lost in June 2010

<sup>liii</sup> Suggestions that the OHCHR appoints mandate holders were unsuccessful – see Miko Lempinen and Martin Scheinin, 'The New Human Rights Council: The First Two Years' workshop report (European University Institute, Instituto Affari Internazionali and Institute for Human Rights at Abo Akademi University) November 2007 at p19

<sup>liv</sup> US Supreme Court; England and Wales until Judicial Appointments Commission (Constitutional Reform Act 2005)

<sup>lv</sup> UN Human Rights Council resolution 5/1 IIB at para 60

<sup>lvi</sup> Ibid at para 45

<sup>lvii</sup> Ibid at para 44

<sup>lviii</sup> See, eg, draft resolution tabled by China, Cuba (on behalf of the Non-Aligned Movement) and the Russian Federation, UN Doc A/HRC/11/L.8 stipulating that rapporteurs cannot inter alia challenge or question their mandates.

<sup>lix</sup> *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* UN Doc ST/SGB/2002/9

<sup>lx</sup> UN Human Rights Council resolution 5/2, Annex, at Article 3 (c)

<sup>lxi</sup> Abraham, M., *Building the New Human Rights Council: Outcome and analysis of the institution-building year* (Geneva: Friedrich Ebert Stiftung, 2007) (Dialogue on Globalization Occasional paper no 33) pp31-32

<sup>lxii</sup> 25 June 2008 internal advisory NGOs *Ten Principles to guide a successful outcome of the Review of the UN Human Rights Council as it relates to the Special Procedures*, available online from Human Rights Council homepage: [http://www2.ohchr.org/english/bodies/hrcouncil/HRC\\_review.htm](http://www2.ohchr.org/english/bodies/hrcouncil/HRC_review.htm) (accessed 5 October 2010)

<sup>lxiii</sup> Hurst Hannum, 'Reforming the Special procedures and Mechanisms of the Commission on Human Rights' *Human Rights Law Review* 7.1 (2007) 73-92 at 81

<sup>lxiv</sup> *ibid* at p 82

<sup>lxv</sup> Arguably monitored from shortly after Economic and Security Council resolution 1235 (XLII), see also GA Res 3092A, B (XXVII) 1973

<sup>lxvi</sup> Lempinen and Scheinin, *The New Human Rights Council*, 19

lxvii *ibid*

lxviii Human Rights Council resolution 11/10 (2009), renewed 2010 (decision 14/117) until the 15<sup>th</sup> session of the Council.

lxix Terms taken from *Manual of Operations of the Special Procedures of the Human Rights Council* 2008 para 4.

lxx OHCHR compilation of UN documents, UN Human Rights Council resolution 5/1 at para 15(b)

lxxi Jeroen Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' *Human Rights Law Review* 7.1 (2007) 93-107

lxxii See *Manual of Operations of the Special Procedures of the Human Rights Council* at para 5

lxxiii Christian Tomuschat, *Human Rights – between Idealism and Realism* (Oxford: OUP 2003): 124

lxxiv For an early tabular representation of this, see Lempinen, *Challenges*

lxxv *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of the International Court of Justice. 29 April 1999, Opinion sought in respect of Dato' Param Cumaraswamy, a Malaysian national serving as Special Rapporteur on the Independence of Judges and lawyers

lxxvi UN Human Rights Council resolution 5/2

lxxvii UN Doc ST/SGB/2002/9

lxxviii Bertrand Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Leiden: Martinus Nijhoff, 2009) at p29

lxxix Post of High Commissioner created by General Assembly Resolution 48/141, 20 December 1993

lxxx Lempinen and Scheinin, *The New Human Rights Council*

lxxxi Rodley, 'Complementarity or Competition?' and 'the United Nations Human Rights Council'

lxxxii Ramcharan, *The Protection Roles*, 28

lxxxiii See GA Res 61/16 (2006)

lxxxiv *In Larger Freedom*, <http://www.un.org/largerfreedom> (accessed 5 October 2010) para 183

lxxxv Nifosi, *The UN Special Procedures*

lxxxvi The purported visit to the Guantanamo Bay detention facilities is an example

lxxxvii Secretary-General's message to the Third Session of the Human Rights Council [delivered by Mrs. Louise Arbour, High Commissioner for Human Rights] 2006