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THE ESTABLISHMENT OF THE HUMAN RIGHTS COUNCIL

by Nana Yeboah

INTRODUCTION

“We have reached a point at which the Commission’s declining credibility has cast a shadow on the reputation of the United Nations system as a whole, and where piecemeal reforms will not be enough.”¹

– Kofi Annan, April 2005

At the 2005 World Summit, the Member States of the United Nations agreed to establish a Human Rights Council to replace the Commission on Human Rights. In fact, the Commission was actually abolished before the negotiations on its successor had been completed. According to some sources, this unfortunately rushed the decision-making process that left some of the structural and political problems of the Commission inadequately addressed when establishing the Council. Others argue, however, that the Council is nonetheless an improvement, reflecting the best possible compromise at the time, and that the review processes in place will provide opportunities to remedy its weaknesses. This chapter identifies key issues that were under discussion in the transition from the Commission to the Council and provides observations assessing its early work. It should be noted that several independent experts, delegates to the UN in New York, and other sources officially affiliated with the Council were interviewed for this Chapter.

FROM THE COMMISSION TO THE COUNCIL

The Commission, mandated by the United Nations Charter, was established in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC). Based in Geneva, Switzerland, it consisted of 53 Member States reflecting the five regional groups of the UN: Africa, Asia, Eastern Europe, Latin America & the Caribbean and Western Europe & Other States, and was tasked to weave the international legal fabric that protects the fundamental rights and freedoms of people. Its first notable achievement was the formulation of the Universal Declaration of Human Rights, which was adopted as General Assembly resolution 217 A (III) in 1948. At first, the Commission concentrated on the overall promotion of global human rights, adhering strictly to the principle of sovereignty. However, the adoption of ECOSOC resolution 1235 in 1967 provided the Commission with a new opportunity to assert itself as it charged the Commission with responding to country-specific or thematic human rights violations within the framework of special procedures.

Unfortunately, the implementation of the country-specific resolution increasingly politicized the work of the Commission, as some Member States applied it to either seek protection from criticisms or to attack others. The consequence of the

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evolving geo-political dynamics over the years resulted in reinforcing the regional and political blocs, which permeated the decision processes of the Commission. The different blocs criticized the Commission from different perspectives, most notably perhaps along the North/South divide. On the one hand, the Commission was seen by many countries of the South as very “effective” because it held Israel and the US accountable for actions it opposed, but was “ineffectual” because it singled out Sudan for criticism. On the other hand, the Commission was regarded by states of the North as “ineffective” because it investigated Israel, but “effective” because it looked into human rights problems of Sudan and others from the South.

Northern criticisms of the Commission grew to an all time high with Sudan gaining a seat in 2001 and Libya winning the chairmanship in 2003. The re-election of Sudan on 4 May 2004 was the last straw for many Member States of the North, prompting US Ambassador Sichan Siv to walk out of an ECOSOC meeting. Although the election and re-election of Sudan and Libya to the Commission sparked off the debate about membership, for many states the elections were more symptomatic of a general crisis. Sudan and Libya’s seats became a secondary phenomenon of the deeper question of how the composition of the Commission needed to be altered in order to improve its credibility among the entire membership.

Although the Commission was praised by some Member States for its independent experts (the Special Rapporteurs), the political nature of some of its decisions resulted in heavy criticism and increasingly provoked calls for its reform. These came to a head in 2004 as indicated by the report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, “*A more secure world: our shared responsibility*” (A/59/565), which stated that the credibility and professionalism of the Commission had been declining as a result of some Member States seeking membership not to advance human rights, but to avoid criticism and to criticize others. It recommended that the Commission should have universal membership. Subsequently, then Secretary-General Kofi Annan urged, in his follow-up report in 2005, “*In Larger Freedom: towards development, security and human rights for all*” (A/59/2005), that the membership consider replacing the Commission with a new Human Rights Council: “Member States,” he said, “would need to decide if they want the Human Rights Council to be a principal organ of the United Nations or a subsidiary body of the General Assembly, but in either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting. The creation of the Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member States should determine the composition of the Council and the term of office of its members. Those elected to the Council should undertake to abide by the highest human rights standards.”

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According to one European ambassador, the decision to include the notion of a new human rights body was made mainly as a concession to the US – the main advocate of the abolishment of the Commission – following the oil-for-food scandal.² This assertion was confirmed by John Bolton, the US ambassador to the UN at that time.³

THE HUMAN RIGHTS COUNCIL’S ESTABLISHMENT: THE DEBATE

In September of 2005, Member States agreed to replace the Commission with the Council by adopting the World Summit Outcome Document (A/RES/60/1). Even though it was agreed to replace the Commission, details of the nature and composition of the Council were deferred for further discussions in the General Assembly. Consequently, it took over six months of negotiations for Member States to work out the details. Some of the significant subjects that led to protracted negotiations are discussed below.

Membership Composition and Criteria

During deliberations on the formation of the Council, membership criteria and composition were identified as key ingredients that would determine the Council's effectiveness. Deep conflicts arose between members of the North and most states from the South when the topic was up for debate. Four general models were proposed:

- Exclusive membership based on formal negative criteria;
- Exclusive membership provisions based on formal positive criteria;
- Exclusive membership based on procedural rules;
- All-inclusive membership.

A number of states from the North opted for a combination of formal membership criteria and procedural membership restrictions. The fault line dividing the membership was revealed when the North, joined by some countries of the South, demanded more exclusive membership rules, while most countries of the South and Russia, called for more inclusive membership rules. Some countries such as India, Singapore, Mexico, traditionally neutral Switzerland, and Pakistan, however, occupied the middle ground by welcoming the membership provisions stipulated in the draft resolution, which corresponded to a moderate version of the third model, as appropriate and useful.

The US was the main country which pressed for the implementation of the first model proposing that "...states against which the UN Security Council had adopted measures under Chapter VII of the UN Charter should be excluded from Council membership" (A/60/PV.72).

The model of positive membership criteria, which included a positive record of cooperation with the Commission's special procedures, the ratification of relevant international human rights treaties and being a donor to voluntary UN funds, was less prominent in the negotiations.

According to the Swiss Ambassador, Peter Maurer, the demand for negative membership criteria was merely a cloak for the interest-driven policies of powerful states: "We do not share the hard-line approaches of some who try to make us believe that they are the only ones fighting for ambitious human rights machinery. All too often high ambitions are cover-ups [sic] for less noble aims and are oriented not at improving the UN but at weakening it. This cannot be our objective" (A/60/PV.72).

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Switzerland, 15 March 2006

In a less hidden agenda, US Ambassador John Bolton advocated for a Council with a disproportionate level of influence by a select group of countries that the US viewed as 'good guys' and no level of influence from the 'bad guys.' Most importantly, the US wanted a Council "that downplayed the US policy on human rights at the international human rights review," one UN official noted.

Advocates for the all-inclusive membership criteria – primarily developing states and Russia – also criticized the idea of not providing more inclusive membership rules presented in the draft resolution. In a General Assembly debate, Cuban Ambassador Rodrigo Malmierca Diaz for instance, quoted the High-level Panel Report, which had initially recommended universalizing membership in the new UN human rights organ as a way to decrease the politicization of membership composition. He directed his criticism, in particular, at the membership suspension clause included in the draft resolution, saying, "If human rights are universal and are everybody's responsibility, why should the decision-making mechanism on these issues be limited? In fact, did not the High-level Panel recommend that, on these grounds, the new body should be one of universal membership? We

peoples of the South, besides continuing to be the target of unjust condemnatory resolutions, will in the future be subjected to the latent danger of being deprived of our access – won by election – to that body” (A/60/PV.72).

Role of the Council

During the negotiation phase for the establishment of the Council, it became evident that the demand for each membership criteria type was accompanied by a certain vision of the role of the Council. For example, advocates for the inclusive membership envisioned the role of the Council to be one that focused on cooperation and dialogue instead of confrontation. Speaking on behalf of the Caribbean Community (CARICOM), Margaret Ferrari of St. Vincent and the Grenadines explained to the General Assembly: “CARICOM sought the establishment of a Council which would be inclusive and open to the participation of all States and which would function as a cooperative mechanism for the promotion of human rights, serving as a vehicle for the promotion of genuine cooperation for capacity-building and for mutual assistance” (A/60/PV.72).

On the other hand, states that demanded a more exclusive membership were open to the idea of retaining the mechanism of Special Procedures⁴ and country-specific resolutions. The latter was strongly rejected by other states who argued that this would politicize the Council; however, they did not opt for more inclusiveness. The Pakistani Ambassador, Munir Akram, argued that “...the actual problem of the Commission was not its flawed membership composition but rather the confrontational atmosphere that characterized its work.” He urged that, the greatest challenge for the Council thus was to overcome this confrontational situation (A/60/PV.72). Echoing similar sentiments, the Chinese Ambassador Zhang Yishan, demanded the abolition of country-specific resolutions: “...it [the draft resolution] does not provide effective guarantees against political confrontation caused by country-specific resolutions, which became a chronic disease of the Commission on Human Rights” (A/60/PV.72).

To a certain extent, the issue of the role and mission of the Council, as with the question of membership composition and criteria, reflected the North/South divide. The North opted for retaining confrontational measures, in contrast to the South’s demands for a greater emphasis on dialogue and cooperation in the work of the Council.

Status of the Council within the UN system

The status of the Council within the UN system, by close examination, had some implications for the debate about exclusive or inclusive membership. The Chilean delegation, supported by some countries from the North such as the members of the European Union, Japan and Iceland, argued that the Council should have been launched as a principal organ of the UN because it would have elevated the importance of human rights within the UN framework. Delegates from Norway and New Zealand supported the idea of a Council as a subsidiary body of the General Assembly, but did not demand elevating it further in the UN system. However, some states did not even support a further upgrade of the Council’s status within the UN system. Egyptian Ambassador Maged Abdelaziz argued that the Council should merely be charged with drafting resolutions and recommendations which the General Assembly could then consider: “...the Human Rights Council is a subsidiary body of the GA, and that institutional link must not be jeopardized. Hence, our interpretation is that the Human Rights Council should submit all its recommendations and resolutions to the General Assembly for consideration, in accordance with the rules of procedure applicable to that universal body” (A/60/PV.72). In this way the exclusivity of the Council would be controlled by the General Assembly, whose membership is universal.

THE HUMAN RIGHTS COUNCIL'S ESTABLISHMENT: THE OUTCOME OF THE DEBATE

At the end of the prolonged negotiations, the General Assembly, on 15 March 2006, adopted resolution A/RES/60/251 – with 170 votes in favor, 4 against (Israel, US, Palau and Marshall Islands) and 3 abstentions (Belarus, Iran and Venezuela) – which formally established the Human Rights Council. Although the Council had been established by an overwhelming majority, several countries from both the North and the South expressed serious reservations (A/60/PV.72).

In an explanation of vote, US Ambassador John Bolton told the GA that the failure to incorporate formal negative criteria in the draft resolution had been one of the main reasons the US voted against it and would not seek membership (A/60/PV.72).

In any case, the majority of the GA settled on a 47-member Council, which would continue to be based in Geneva. Perhaps the most important stipulation of the resolution was that the election rules of the new Council would be totally different from that of the Commission. Specifically, the members of the Council would be elected by the GA to ensure that the election procedure was more representative. Prospective candidates would have to make pledges and commitments, which the members of the GA would have to take into account when voting. The use of so-called ‘closed slates’ drawn up by regional groups would still be admissible;⁵ however, each individual candidate listed on the slates would have to win an absolute majority of votes in order to be elected.⁶ Additionally, in the event that a Member State of the Council committed gross and systematic violations of human rights during its tenure, membership could be suspended by a two-thirds majority vote in the GA. Member States would not be eligible to immediate re-election after two consecutive terms.

The resolution also included the following mandates for the new Council:

- “Promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in fair and equal manner.
- Address situations of violations of human rights, including gross and systematic violations and make recommendations thereon.
- Promote human rights education and learning as well as advisory services, technical assistance and capacity building, to be provided in consultation with and with the consent of Member States concerned.
- Serve as a forum for dialogue on thematic issues on all human rights.
- Make recommendations to the General Assembly for the further development of international law in the field of human rights.
- Promote the full implementation of human rights obligations undertaken by states and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits.
- Undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.
- Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.

- Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution A/RES/48/141 of 20 December 1993.
- Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil Society.
- Make recommendations with regard to the promotion and protection of human rights.
- Submit an annual report to the General Assembly.
- Promote effective coordination and mainstreaming of human rights within the UN System.”

Another essential difference between the new Council and the Commission is that the Council is designed as a standing body – one that could meet anytime in the year. This institutional difference addresses one of the fundamental weaknesses of the Commission, a lack of meeting time. The Council rules also made it easier to hold special sessions.⁷ In addition, unlike the Commission, which was established as a subsidiary body of the ECOSOC, the Council is a subsidiary organ of the General Assembly – a move changed designed to strengthen the Council’s effectiveness. However, in order not to ‘throw the baby out with the bath water,’ it was recognized that in spite of all the negative criticisms about the Commission, it also had some strengths which were preserved in the new Council:

- The independence of the Special Procedures.
- NGO involvement.
- Standard sessions – status of human rights and the provision of technical assistance.
- The individual communications and complaints mechanisms.⁸
- The mechanism of civil society and the subcommittees.

Since its creation, other noteworthy characteristics that truly set the Council apart are the new institutions that it has created and continues to improve upon. One UN official highlighted the creation of the Universal Periodic Review (UPR), including its complete procedure, as well as “...the wide latitude that civil society is given to participate in its sessions,” as examples. Additionally, the new and strengthened communications and complaints procedures of the Council build on some of the positive procedures used by the Commission. These mechanisms now allow more frequent – twice a year – examinations of communications.

THE COUNCIL: FROM 2006 TO PRESENT

The Council has so far held six regular sessions and six special sessions, and is currently holding its seventh regular session from 3 to 28 March 2008. Some of the main issues discussed at these sessions are described below.

Institution-Building Package

When the Council was created in 2006, the General Assembly gave it an onerous work program – “institution-building”: to review, rationalize and improve the Commission’s systems of Special Procedures, expert advice, and complaint procedure; to construct a new universal periodic review mechanism; and to develop the Council’s own rules of procedure, agenda and program of work. These tasks were to be completed by the end of its first year when the membership of the Council would also change. The institution-building work of the Council proved to be extremely complex in the highly political environment of the Council.⁹ Positions in the Council have been divided along regional, and ever more, often political groupings. The politics of regional and other blocs of

Member States within the Council made the process difficult and at times impossible. Often the maintenance of political positions took priority over substantive results.

At midnight on 18 June 2007, after intense negotiations, the final institution-building package was adopted by the Council as resolution 5/1. It further received overwhelming endorsement as resolution 62/434 in the General Assembly on 22 December 2007, with only Australia, Canada, Israel, Marshall Islands, Micronesia, Palau and the United States opposing it.

The Council, however, decided, in resolution 5/1, that some matters – for example the review of individual mandates – would continue after the formal end of the institution-building process.

Review of Mandates and Mechanisms

Part of the institution-building work was a review of individual mandates and of the system of special procedures that it assumed from the Commission. At its first session, in decision 1/104, the Council set up an intergovernmental working group to “...formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaint procedure, in conformity with General Assembly resolution 60/251.”

Critical issues in the review were the method of appointment and a code of conduct for mandate holders, and the future of country mandates. But the process by which the review was conducted was itself problematic. The Council proved unable to undertake a thorough, comprehensive review of the system as a whole. Instead it proceeded by way of a piecemeal approach that resulted more in a collection of individual mandates based on individual decisions than a properly constructed and integrated system.¹⁰

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The Council started its mandate review in September 2007 with the mandates of several Special Procedures, including Special Rapporteurs, an Independent Expert, and a Representative of the Secretary-General. During this period, the individual Special Procedures mandate holders continued to work and perform their duties, but found it difficult to develop programmes for their work or to make plans for specific activities. Many states took advantage of this situation by refusing to answer inquiries, issue invitations or make arrangements for their visits.

Nevertheless, at the conclusion of the session the Council decided to extend or renew the mandates of: the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Representative of the Secretary-General on the human rights of internally displaced persons (IDPs);¹¹ the Special Rapporteur on protection of human rights while countering terrorism for three years; freedom of religion or belief;¹² and Independent Expert on technical cooperation and advisory services in Liberia.

Country-specific Mandates

Several country mandates remained in contention until the very end of the negotiations of the institution-building package. Several Member States (China, Algeria, Cuba, Sri Lanka, Philippines, and North Korea) argued for strict criteria for the establishment of new country mandates, and in some cases even for their elimination. Nevertheless, in the day before the adoption of the package, the President of the Council included most of the country mandates in his text and proposed that they be renewed and reviewed just as the thematic mandates had been. However, two specific

mandates, those on Belarus and Cuba, were discontinued immediately, arousing protests from the civil society.

Universal Periodic Review

In resolution A/60/251, the General Assembly mandated the Council to “undertake a universal periodic review [UPR], based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.” The resolution also mandated the review to be a “...cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.”

Complying with this mandate, on 18 June 2007 - at its fifth session – the Council adopted resolution 5/1, which details modalities regarding the UPR mechanism. These modalities set the basis-review, the principles and objectives to be followed, the periodicity and order of review of countries, the process and modalities to be used, as well as the procedures to be undertaken in regard to outcomes and follow-up. Furthermore, the Council decided that each review would be conducted in one working group composed of the 47 Member States of the Council. Each state’s situation is to be examined during a three hour debate. During its sixth session that began on 21 September 2007, the Council adopted a calendar for the reviews of the 192 Member States of the United Nations to be undertaken during the first four-year cycle of the UPR mechanism, and established the precise order of the reviews. The reviews to take place in 2008 are as follows:

- First session (7–18 April 2008): Tunisia, Morocco, Algeria, South Africa, Bahrain, Indonesia, India, Philippines, Ecuador, Brazil, Argentina, Finland, United Kingdom, Netherlands, Poland, Czech Republic.
- Second session (5–16 May 2008): Gabon, Ghana, Peru, Guatemala, Benin, Republic of Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania, and Mali.
- Third session (1–12 December 2008): Botswana, Bahamas, Burundi, Luxembourg, Barbados, Montenegro, United Arab Emirates, Israel, Liechtenstein, Serbia, Turkmenistan, Burkina Faso, Cape Verde, Colombia, Uzbekistan, and Tuvalu.
- The remainder of the 192 reviews will be completed by 2011.

In accordance with resolution 5/1, the review is to be based on the following documentation:

- Information prepared by the state being reviewed, which may take the form of a national report and any other information considered relevant by the state concerned, to be presented either orally or in writing. States are encouraged to prepare the information at the national level through a broad consultation process with all relevant stakeholders.
- Compilations prepared by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of treaty bodies, Special Procedures, including observations and comments by the state concerned, and other relevant official United Nations documents.
- Additional, credible and reliable information provided by other relevant stakeholders, such as non-governmental organizations (NGOs) and academic institutions.

The national reports are to be prepared on the basis of general guidelines (A/HRC/DEC/6/102) adopted by the Council during its sixth session on 27 September 2007.

On 28 February 2008, the Council resumed an organizational meeting it had started earlier with the sole purpose of selecting groups of three rapporteurs (troikas) from among different regional groups, to facilitate the review for each state as provided by resolution 5/1.

Other Features

The Council also took steps to:

- Offer technical assistance to build domestic institutions in some countries “...that would help in the long-term monitoring efforts to make sure the human rights problems are solved.”
- Continue the work of the Social Forum (resolution 6/13). The Social Forum provides an opportunity to improve the interactive dialogue between the United Nations human rights machinery and various stakeholders.
- Give NGOs the opportunity to question issues of concern and engage directly with the special procedures and Member States during the interactive dialogue.¹³
- “Give voice” to victims through the complaints and the Special Procedures, contained in ECOSOC resolution 1503.
- Enable it to encourage passage of appropriate resolutions, needed to address various situations in different countries.
- Establish random pilot projects in some countries, as part of the Council’s institution-building to assess the severity of human rights crisis around the world.
- Establish new thematic special procedures and a new advisory body on indigenous people’s rights.
- Hold a special event during the 6th session on the mainstreaming of gender into its work.

CHALLENGES AND CRITICISMS OF THE COUNCIL

There are many differing views concerning the timing of the Council’s creation, the “protection gap” it created and its performance. The following is an attempt to describe some of the views.

According to one UN official, the Human Rights Council is facing the same challenges as those faced by the Commission. Politics of human rights, the official explained, has not changed. As a result, there are still regional groupings “...that function to defend some governments.” That said, the Council is still very much in an infantile stage – in its second year of existence – and is still building the institutional mechanisms that would allow the Council, “...to mature fully and function to be an effective body,” as another UN official remarked. Furthermore, the official pointed out that the Council continues to monitor the implementation of the institution-building agreements and mechanisms that it has established, and suggested that, any political criticism should be viewed against this backdrop. “This is a newborn baby... and what people don’t realize is that it is still in its uncertain moments. A prodigious child is still a child that still has to build its own credit through its own actions. I think so far anyone who checks...will see that it has done quite a bit. But, it has a long way to go,” he said.

The Council’s First Year Objective

The first year of the Council was dominated by the institution-building process. As a result some observers criticized this phase arguing that the necessary groundwork of institution-building should have been done prior to the Council’s establishment, so more time could instead have been spent on interventions in human rights crises worldwide. According to one NGO expert on human rights, a protection gap was created as a result of the transition from the Commission to the Council. This,

the expert claimed, certainly affected the work of the Special Procedures that were left with an uncertain future for a protracted period, and led some observers to question the initial rush for the creation of a new council.

According to one Western ambassador, "...you cannot throw away one institution without having anything to replace it with. We wanted a new council, and most people wanted it the next day." But, as he added, "...Secretary General Kofi Annan, in his own report 'In Larger Freedom,' filtered what he thought was feasible from the Panel's recommendations and suggested the creation of the Council. [This] was sort of jumping the gun at the time; but the Council was created."

"... you cannot throw away one institution without having anything to replace it"

Another UN official, however, pointed out that the Commission was so undermined in the years before its abolition that it seemed that there was no real choice but to abolish it as soon as they could, even though it was not a well-chosen time to reform the system. Furthermore, the fear of creating a "protection gap" once the Commission was abolished, the official added, created a sense of urgency and huge pressure to put together the Council. These series of events created the legroom to skip a lot of the bureaucracy that usually undermines the creation of such bodies.

This view was shared by another NGO expert, who blamed Kofi Annan for the process used to create the Council. The former Secretary-General's statements played some role in discrediting the Commission and making the body unworkable, and as a result it had to be abolished. The expert added that she did not believe the rushed process had a direct impact on the Council. The composition of the Commission, she explained did not reflect the geographical balance of the UN membership and as a result, "...it was natural and necessary for that to be adjusted in the membership of the Council. As no agreement could be reached on universal membership – which would have been the best under the circumstances – the outcome was more or less inevitable."

The Council's Controversial Positions

Much criticism of the Council centered on its treatment of specific country situations. For example, its abuse of some states, particularly Israel, continues to make headlines. According to Peggy Hicks, Global Advocacy Director of Human Right Watch: "...the Human Rights Council...failed to take action regarding countries facing human rights crises such as Darfur, Burma, Colombia, Somalia, Turkmenistan, and Zimbabwe; ended the mandates of human rights experts on Belarus and Cuba, and rolled back its consideration of the deteriorating situations in Iran and Uzbekistan [in its first year]. At the same time, it focused disproportionately on Israel's human rights record and worse still, did so in a manner doomed to be ineffective because it failed to look comprehensively at the situation, including the responsibilities and roles of Palestinian authorities and armed groups."

On 20 June 2007, Secretary-General Ban Ki-moon echoed these sentiments in a statement, "The Secretary-General is disappointed at the Council's decision to single out only one specific regional item given the range and scope of allegations of human rights violations throughout the world." The US continued its harsh criticism of the Council. Alejandro Wolff, Deputy US Permanent Representative, accused the Council of "a pathological obsession with Israel" and also denounced its action on Cuba and Belarus. "I think the record is starting to speak for itself," he told journalists.¹⁴

Doru Costea, Romanian Ambassador and Council President, also cautioned in a statement to Swiss newspaper *Le Temps*, on 29 September 2007 that the Council must examine the behavior of all parties involved in complex disputes and not place just one state under the magnifying glass.

A Western ambassador acknowledged that the Council should have a broader agenda than it presently has; however, he argued that in a situation where Israel attacks Lebanon, for example, the Council should convene a special session and "...express itself on it." "The real problem," the ambassador added "...is that there are a lot of situations of comparable gravity where the Council does not act," noting that the Council had not convened special sessions on Kenya, Somalia and a number of other issues that are as justified as convening meetings on the closing of Gaza.

Two UN officials very close to the Council fervidly disputed the above criticisms. The Council, one official said, dealt with "dozens and dozens" of other country crises in depth and even adopted many resolutions to this effect. He also gave examples of areas, such as Darfur, Sri Lanka, Lebanon, Liberia, Cuba, the Democratic Republic of the Congo (DRC), Burundi, Myanmar and Haiti, which the Council had dealt with during this period.

In the case of Darfur, for instance, the UN official asserted that there were not only special sessions, but special missions as well. "We dealt more stringently with Darfur than Israel," he noted, and insisted that, the Council committed "weeks and weeks" of interviews and telephone conversations of "hundreds and hundreds" of people, and reviewed thousands of pages of attested documents. Also, the Council's work in Myanmar had been "exceptional," he said.

What the Council has been dealing with in connection to Israel, the official continued, are human rights violations in the Occupied Palestinian Territories (OPT) and not in the country Israel. This, he argued, did not mean that there were no issues in Israel nor did it mean that the issues in the OPT were the only ones the Council was dealing with. He pointed out that the OPT are occupied by Israel, and the settlements there are all "Israeli zones." There is no Palestinian occupation of Israeli land. However, the issue of armed groups firing rockets into Israel, he argued, "...has been dealt with by the Council."

A second UN official cautioned that one has to be careful in looking at the statistics that are normally given in terms of the number of resolutions against a specific country or another. A good Council innovation, she said, is that whenever the Council has adopted a resolution on a specific country, it has held a special session and had follow-ups to it. In each regular session following a special session, she continued that, the Council looks at the implementation of that resolution. "It looks to see where the governments have complied with the Council's pronouncements and in each case, has adopted a follow up resolution calling for further implementation if necessary." The Council, the official further argued, had done so in the case of Myanmar, Darfur/Sudan and in relation to all the special sessions that it has held. Most of the resolutions adopted on Israel are follow-up resolutions "...saying that Israel has not complied with the resolutions of the Council and simply calling on Israel to look at the commitments that it has undertaken and to comply."

On the issue of the Council assigning a Permanent Expert to monitor Israel and not any other countries, one UN official pointed out that Permanent Experts were also assigned to North Korea, Myanmar, Burundi, Cambodia, DRC, and Somalia. In addition, the official indicated that the Permanent Expert for Israel had been assigned for as long as "foreign occupation" exists. This, he insisted, did not mean the mandate was permanent.

Furthermore, in regard to criticisms that the Council ended the mandates for experts on both Cuba and Belarus, another UN official underscored that in the case of Cuba it was a miracle the mandate was even adopted in the first place. The mandate "...was hanging by the string," he said, and pointed out that it was the United States who built up the case against Cuba. A majority of Member States, he added, did not agree with the case made against Cuba and as a result voted to end the mandate of the Permanent Expert. In addition, most Member States from the Non-aligned Movement (NAM) were never in favor of having country-specific experts, he claimed (See Appendix III).

A Western ambassador indicated that ending the mandates of the experts on Cuba and Belarus was a trade off to retain the feature of the Special Procedures. The Special Procedures, he explained, "...was the best thing [gains of the last 25 years] of the Commission." "The moment that a new body needs to be created, there is the risk of loosing everything. We could have lost the whole system of Special Procedures.... [Though] most Member States are aware that Cuba for example commits human rights violations, it is not one of the worst situations in the world."

Overall, the sources interviewed cautioned that too much focus on which country-specific human rights situation the Council addresses or does not address diminishes the other work that it does. The Council also addresses a number of thematic human rights issues and has held a number of panels and exchanges on the rights of disabled persons, children's rights and women's rights.

Membership

Criteria for membership in the Council is another area that has been criticized. The Council has no set criteria for membership other than quotas for each of the regional groups in the UN and a requirement that Council members be elected by a simple majority of the General Assembly (currently 97 of 192 votes). General Assembly Resolution 60/251 simply instructs Member States that "when electing members of the Council, [they] shall take into account the contribution of candidates to the promotion and protection of human rights." According to an American NGO, "no state, no matter how poor its human rights record, is barred from membership. Even states under Security Council sanction for human rights abuses may become members."¹⁵

A concern raised by some critics of the Council has also been the competitiveness for seats to the Council. Unlike the strong competition for seats in the 2006 election, only two regions – Western Europe and Other States, and Eastern European States – presented more candidates than the number of available seats in the 2007 elections. The African, Asian, and Latin American and Caribbean regions only offered an adequate number of candidates to fill their open seats. One critic pointed out that this marked a disturbing return to the practices of the Commission and defeated the purpose of competitive elections in the General Assembly, which were supposed to offer a larger choice of possible candidates in order to select the best possible members for the Council.¹⁶

One Western ambassador noted that the majority of the Council is presently in the hands of countries – particularly Member States of NAM – which used to be in the "defensive position." Indeed, the Commission had greater representation of "Western-style democracies," according to one UN official, who added that the notion that somehow the wisdom of human rights resides in Washington and in the West is undemocratic and somewhat absurd: "What is important is member engagement and not quality of members," he said. The idea of good guys and bad guys, he continued, is politically incorrect and not factual. He stressed that the whole idea of the Council was not to pick the good guys as its members, because there are none, but to bring Member States together to negotiate the best outcome for human rights as peers.

Another ambassador argued that the Council is not a human rights court. It is a political body that can have members such as Cuba. The ambassador wondered why critics do not turn their sights on the Security Council which has members that, in his view, are threats to international peace and security. A UN official claimed that in comparison to other organs, for example the Security Council, the criteria for membership of the Council is by far the most effective. "If for example a country had to post voluntary pledges on websites, and show that they have never bombed another country before, then the US would never be a member of the Security Council." The requirements for a prospective member of the Human Rights Council are big improvements compared to previous qualifications, the official noted.

The minimum threshold of votes that prospective candidates need to obtain is another mechanism ensuring that not everyone can get elected, another official added. Candidates need to get the support from other states and cannot rely on only their own region to get elected, he pointed out. For instance, a pre-screen “weeded out” Zimbabwe and Sudan, indicating that the rules created were working. Moreover, he added that prospective candidates have to post their voluntary pledges of commitment on their websites as part of the campaign. Nevertheless, he stated that regions have been made aware of the lack of competitiveness and said that he was hopeful that the next elections would be better.

Universal Periodic Review

The assessment of the Council’s success or failure is often considered linked to the Universal Periodic Review’s (UPR) successful implementation. While this new mechanism has understandably attracted a lot of interest, including from human rights activists, its limitations may prevent the process from delivering on their expectations.

According to the International Service for Human Rights, the UPR does not include a formal role for experts in the process, and the involvement of NGOs is very restricted. Furthermore, its outcomes are also very constrained and the level of influence of the state under review on the outcome may determine the credibility of the process.¹⁷ Another NGO also complained about the time allotted for each country’s review. “The review for every country, whether it is Sweden or Sudan, is limited to three hours. The review is required to be a country-led process in which the “country under review shall be fully involved in the outcome” and it must “take into account the level of development and specificities of countries.”¹⁸

Moreover, reviews will occur every four years, regardless of circumstances in the country, and only after exhausting all efforts to encourage a state to cooperate with the UPR mechanism would the Council address, as appropriate, cases of persistent non-cooperation. In other words, a genocide or massive political crackdown could occur in some country and the Council could wait four years or more before examining the issue.

Some UN officials however, disagreed with this criticism and argued that the three hours allotted for every country is purely a mathematical issue. The officials further argued that 192 countries have to be reviewed and this has to be done at a reasonably balanced time period to avoid a longer review session, which could otherwise go up to “...20 years if you want to give each country so many hours.” According to an expert from the NGO community, the UPR is not about time, but about the type of speakers and whether the needed information is being presented.

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It is important, the expert noted, for the UPR to be viewed as a continuous process and not just a three hour interactive dialogue. Firstly, there is the national consultation resulting in the state information provided and the information submitted by the Special Procedures, NGOs and national human rights institutions. Secondly, there is the three hour discussion which is followed by additional time allocated to the production of the outcome report and recommendations. Finally, there is another meeting set up specifically for the exchange of views with members of civil society and the states. The review process, another NGO expert pointed out, allows members of civil society to be deeply involved in the entire process.

The resolution that the Council adopted in June 2006 – which established the UPR – stipulated that the input from NGOs and other stakeholders would constitute part of the three avenues for submitting information for the UPR. While the NGOs do not have the right to speak or to intervene

– since the review process is considered an inter-state review in which only states’ representatives can question each other - they would be allowed to participate by informally feeding questions to Member States for their delegates to ask. The resolution – A/HRC/RES/5/1 – allows Member States to have civil society members in their delegation during the review.

Further, resolution 5/1 allows NGOs to provide general comments and recommendations before the adoption of a state’s reviewed outcome by the plenary. Consequently, there are several channels that guarantee NGO input in the UPR process, which is important for the credibility of the UPR, according to one source.

On the issue of the UPR being country-led, one UN official argued that it was not important who was in the “driver’s seat.” The important factors, he said, are that there are avenues for independent information – from Special Rapporteurs, NGOs, treaty bodies – to be part of the process, and that the process is done publicly.

The first review cycle for all 192 countries is scheduled to end in 2011, when the work of the Council is to be reviewed. Consequently, lessons learnt from the first cycle can be used to define whether a shorter or a longer review mechanism is needed. As indicated by another official, “...it is not guaranteed in stone that the review process will happen every four years. All 192 countries will be reviewed first, and then we will redefine as we go along.”

Moreover, since the UPR is not the only mechanism of the Council, in a situation where there is a genocide or massive political crackdown, the Council would not wait for four years before addressing these issues, according to one UN official. These issues can still be addressed under the mechanisms of Special Procedures, regular sessions or special sessions. In addition, another official contends that there is a little leeway in the wording of the UPR resolution on follow-ups and outcomes that was included precisely to allow any emergency situation to be addressed if necessary.

New Code of Conduct

The system of independent experts charged with investigating thematic human rights issues, such as freedom of opinion and expression, torture, and the right to food, were preserved by the Council. However, Yvonne Terlingen of Amnesty International argues that the hastily drafted Code of Conduct (A/HRC/5) has the potential to undermine the experts’ ability to do their work.¹⁹

According to another NGO expert, the Council does not utilize the human rights expertise made available to it enough. Its decisions, she stated, are primarily based on political considerations which continues to be its main weakness. In addition, she stated that a committee appointed by the Council selects experts “...from a roster of qualified candidates.” This process, she claimed, increases opportunities for the Council to directly pressure and influence the experts.

One UN official, however, contended that the final version of the Code of Conduct did not include such restrictions or provisions as feared by civil society, but rather provides specific guidelines for the special procedures, and does not fundamentally change the way the experts work. The Code of Conduct stipulates among others that:

- Mandate-holders are independent United Nations experts. While discharging their mandate, they shall:
 - Neither seek nor accept *instructions* from any Government, individual, governmental or non-governmental organization or pressure group whatsoever;

- Always seek to establish the facts, based on objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible;
- In their information-gathering activities the mandate-holders shall:
 - Be guided by the principles of discretion, transparency, impartiality, and even-handedness;
 - Rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up;
- With a view to achieving effectiveness and harmonization in the handling of letters of allegation by special procedures, mandate-holders shall assess their conformity with reference to the following criteria:
 - The communication should not be manifestly unfounded or politically motivated;
 - The language in the communication should not be abusive;
 - The communication should be submitted by a person or a group of persons claiming to be the victim of violations *or* by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights, and free from politically motivated stands or contrary to the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of those violations substantiated by clear information;
 - The communication should not be exclusively based on reports disseminated by mass media;
- Mandate-holders shall: In implementing their mandate, therefore, show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate.

FUTURE OF THE HUMAN RIGHTS COUNCIL

Even with a rocky beginning, many experts believe that the Human Rights Council has the potential to become stronger and better performing than the Commission, and that it will continue to be the primary UN body responsible for human rights promotion and protection. Indeed the Council is proving to be significantly better than many activists had thought it would be.²⁰ In spite of the international political landscape, and the limitations inherent in any intergovernmental body to which the Council is not exempt, effective engagement by human rights activists in the Council could still make a difference.

In April 2008, the Council will for the first time begin to scrutinize the human rights situations of Member States through the new Universal Periodic Review. Most observers consider this process to be the greatest innovation of the Council, as it will counter the criticism that the Council only singles out certain countries, while boosting the credibility of the system as a whole. As might be expected, some Member States have already disclosed that they would prefer to see a “trouncing” rather than an overall review. But this review, if done properly, could not only provide an unprecedented opportunity for public scrutiny of the human rights records of individual Member States, it could also lead to improvements in the human rights afforded to their citizens.

Additionally, the human rights experts appointed by the Council to address both thematic and country-specific situations could also push the Council forward in the coming years. According to Peggy Hicks, “...the Council has for the first time afforded these experts a real opportunity to present their findings and recommendations, a step that increases the pressure upon governments to respond.”²¹ These experts have also come together to address urgent issues - including Darfur. The

Council's experts, however, are constantly confronted with criticisms from states "...with poor human rights records," indicating that the experts are indeed seen as a threat.²² Although those states succeeded in ending the mandates for Permanent Experts on Cuba and Belarus, they failed in their efforts to eliminate the system of country experts altogether. But without ongoing commitment by human rights activists, it is these experts who could face threats to their independence. With backing from civil society as well as states that support them, the system of human rights experts can be preserved and strengthened.

The continued American non-involvement is also troubling. On 5 March 2007, the US State Department stated that for the second time in a row, the US had decided not to bid for a seat on the Council asserting that the body had lost its credibility with repeated attacks on Israel and had failed to confront other rights abusers.²³ President George W. Bush did pledge to support the Council financially. State Department spokesman Sean McCormack said, "...we will work closely with partners in the international community to encourage the Council to address serious cases of human rights abuses in countries such as Iran, Cuba, Zimbabwe, Burma, Sudan and North Korea."

However, some human rights experts believe that the performance of the Council would be improved if the US became a member. According to the Human Rights Watch, the divide between the "Northern" developed states and the "Southern" developing world has never been greater. This, the group claimed, infects all policy debates within the Council. States that might have been expected to push a strong human rights agenda at the Council, like South Africa, have found it convenient to play to those tensions, and have refused to criticize any other developing country. "While the US has played a relatively active role as an observer at the Council, the absence of the US from the Council's membership has created a leadership imbalance that the EU has been unable to remedy."²⁴

Some experts expect the Council to become the seventh principal organ of the UN after its five year incubation period ends in 2011. One ambassador, however, was not so optimistic. He indicated that, the five-year period stipulated by the GA was just a compromise the EU and the other Western group, and NAM, needed to reach a consensus to establish the Council. He added that another practical reason why the Council was not made a principal organ in 2006 was because of the time it would take. "You can create the council but then you have to have the Charter amended and this needs two-thirds vote of the membership [which will] take you years, at least two to five." Moreover, this ambassador believes that in view of the already damaged reputation of the Council, "...the last thing on people's mind is [to] make it a principal organ of the UN...the five year review might be used for other discussions."

Overall, the future of the Council based on the viewpoints of most sources is one that is challenging. As one UN official put it, the Council is the world, a mere reflection of the Member States and even though presently it is dealing with some difficult times, it will continue for the next few years to experiment. The Human Rights Council has the potential to be far more effective than the Commission it replaced. However, it is a long way from being the strong, credible institution which was envisioned when it was created. Nonetheless, its failings can be blamed not only on the minority of members with troubling records, as some experts believe, but also on the poor performance of a broader group of states with a professed commitment to human rights. Consequently, a full assessment of whether the Council is an improvement on the Commission will have to await the implementation of the institution-building package and the full functioning of its mechanisms and procedures.

¹ Kofi Annan, "Secretary-General's Address to the Commission on Human Rights," Office of the Spokesman for the Secretary-General, 7 April, 2005, at www.un.org/apps/sg/sgstats.asp?nid=1388

² The “Oil-for-Food” program was intended to use Iraq’s oil revenues for humanitarian assistance to the Iraqi people. Instead, Iraqi President Saddam Hussein used the oil revenues to manipulate the programs for his own ends.

³ John Bolton, *“Surrender is not an Option – Defending America at the United Nations and Abroad,”* Threshold Editions, New York, 2007.

⁴ “Special Procedures” is the general name given to the mechanisms established by the Human Rights Council to address either specific country situations or thematic issues. The Special Procedures are a way for the Council to be constantly engaged on an issue of concern throughout the year.

⁵ In comparison with the Commission, the distribution of seats among the regional groups in the Council has slightly changed in favor of Latin American and Caribbean states. The general purpose of the regional groups is to ensure a geographically equitable representation.

⁶ “Close Slate” was the election procedure of the Commission, which was normally drawn up by the regional groups. Here, Member States only nominated enough candidates to cover available seats. This voting procedure was criticized as representing a “rubber stamping” exercise rather than a democratic election.

⁷ During the time of the Commission there were only five special sessions in the course of 15 years. In what is basically the second year of the Council there has already been six.

⁸ These are formal procedures that allow individuals, groups or their representatives to submit complaints of human rights violations.

⁹ See http://www.ishr.ch/hrm/hrm2007/human_rights_monitor_2007.pdf

¹⁰ Ibid

¹¹ In discussing this mandate, some states raised the issue of the titles of mandate-holders. In the June 2007 institution-building package it was decided that there would be a uniform title, selection and appointment process for all mandate holders. Several states suggested changing the title of this mandate-holder to Special Rapporteur. This change was not included in the final decision, which extended the Representative’s mandate.

¹² A resolution to extend this mandate was opposed by a number of Islamic countries, but passed after a vote of 29-0 in favor, with 18 abstentions.

¹³ In the Commission, NGOs were given certain points at which to make all interventions – the general debate. They were not allowed to formally intervene when Member States were engaging in Special Procedures on their country reports or on their reports on specific issues of concern.

¹⁴ See <http://www.ohchr.org/english/bodies/hrcouncil/year.htm>

¹⁵ See <http://www.freedomhouse.org/template.cfm?page=70&release=412>

¹⁶ See <http://www.freedomhouse.org/template.cfm?page=70&release=507>

¹⁷ See http://www.ishr.ch/hrm/hrm2007/human_rights_monitor_2007.pdf p:30

¹⁸ Human Rights Council, *“Report to the General Assembly on the Fifth Session of the Human Rights Council,”* (A/HRC/5/L.11), 18 June, 2007, p. 5 at www.ohchr.org/english/bodies/hrCouncil/docs/5session/a_hrc_5_l11.doc

¹⁹ See <http://www.tcf.org/list.asp?type=EV&pubid=188>

²⁰ See http://www.ishr.ch/hrm/hrm2007/human_rights_monitor_2007.pdf

²¹ See <http://hrw.org/english/docs/2007/07/26/usint16521.htm>

²² Ibid

²³ New York Times, *“The Shame of the United Nations,”* 26 February 2006.

²⁴ See <http://hrw.org/english/docs/2007/06/21/global16228.htm>

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