

# The UN Human Rights Council: Reviewing Its First Year

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## Abstract

The aim of the article is to examine the first year of practice of the Human Rights Council in order to provide a critical assessment of the Council's early activity. After a discussion of the process of establishment, mandate and working methods of the Council, consideration is given to the decisions adopted by the HRC in its first year of operation. The review of the early practice of the Human Rights Council shows the achievements of the new organ and the challenges ahead. In particular, the membership and methods of work of the Council pose very contentious issues.

By way of conclusion it is noted that institution building is by far the more important achievement in the first year of practice of the Council, particularly concerning the Universal Periodic Review. It presents, however, disconcerting aspects concerning consideration of Country situations and shows a very frail and politicized approach to these issues that will inexorably be reflected in the practice of the Council and compromise its credibility. Nonetheless, there is a widespread view that, if the UPR turns out to be successful, there is still a chance for the Council to develop as an authoritative and leading human rights body.

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*Key words:* Human Rights, United Nations, Human Rights Council.

## Resumen

El objetivo del artículo es examinar el primer año de práctica del Consejo de Derechos Humanos con el fin de ofrecer una valoración crítica de la primera actividad del Consejo. Después de un debate sobre el proceso de establecimiento, mandato y métodos de trabajo del Consejo, se consideran las situaciones adoptadas por el CDH en su primer año de funcionamiento. La revisión de la primera práctica del Consejo de Derechos Humanos muestra los logros del nuevo órgano y los retos del futuro. En concreto, los socios y los métodos de trabajo del Consejo plantean temas muy polémicos.

A modo de conclusión se observa que la construcción de la institución es con mucho el logro más importante del primer año de práctica del Consejo, especialmente en lo que concierne a la Revisión Periódica Universal. Presenta, sin embargo, aspectos desconcertantes referentes a la consideración de las situaciones del País y muestra un enfoque muy delicado y politicizado sobre estos temas que se verá inexorablemente reflejado en la práctica del

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Consejo y compromete su credibilidad. No obstante, existe una opinión generalizada de que, si la RPU resulta satisfactoria, todavía hay una oportunidad de que el Consejo se desarrolle como un órgano fidedigno y destacado de los derechos humanos.

*Palabras clave:* Derechos Humanos, Naciones Unidas, Consejo de Derechos Humanos

## Introduction

One of the key elements of the United Nations (UN) process of reform has been the issue of human rights,<sup>2</sup> which, along with security and development, forms the three main objectives of the World Organization.<sup>3</sup> The interdependence of these basic pillars of the UN has been equally emphasized by the former Secretary-General<sup>4</sup> and by the High Level Plenary Meeting of the 60<sup>th</sup> Session of the General Assembly held in New York September 14 -16, 2005.<sup>5</sup>

With the aim of moving towards an 'era of human rights implementation of human rights'<sup>6</sup> and considering an effective implementation of human rights a precondition for ensuring sustainable peace and development,<sup>7</sup> the Human Rights Council (hereinafter HRC) has been created replacing the Commission on Human Rights (hereinafter CHR) that has been, until now and despite its shortcomings, the central pillar of the United Nations human rights system. On June 16, 2006 the CHR held its last ses-

sion. Three days later the HRC met for the first time following the election of its first forty-seven members on May 9, 2006.<sup>8</sup>

The Council had been established with the proviso to review its work and functions five years after its establishment and report to the General Assembly (hereinafter GA).<sup>9</sup> Such an assessment process may turn out to be crucial for a truly effective discharging of the HRC's tasks insofar as it might lead to a serious evaluation of the Council's activity, verification of whether lessons learned from the CHR's practice have been taken into account, and an incremental improvement of the new body performance. It is also indicative of the provisional design of the new UN body.<sup>10</sup>

This article will examine the first year of practice of the Human Rights Council with the aim of providing a critical assessment of the Council's early activity. After a discussion of the process of establishment, mandate and working methods of the Council, consideration will be given to the decisions adopted by the HRC in its first year of operation. The review of the early practice of the Human Rights Council will show the achievements of the new organ and the challenges ahead.

## 1. Background

Four major reform movements have been identified prior to the final effort that culminated in the abolition of the Commission and its replacement by the Council in March 2006.<sup>11</sup>

<sup>2</sup> For reference reports and materials and analysis and background information on the process of UN reform see [www.un.org/reform/](http://www.un.org/reform/), [www.globalpolicy.org](http://www.globalpolicy.org) and [www.reformtheun.org](http://www.reformtheun.org).

<sup>3</sup> According to the conceptualization proposed by Professor Virally, M. (1972): *L'Organisation mondiale*, Armand Collin, Paris.

<sup>4</sup> '...we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.' Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, March 25, 2005, paragraph 17.

<sup>5</sup> UN Doc. A/60/1.

<sup>6</sup> Kofi Annan emphasized in his 2005 Report that the challenge for the future of human rights is to move from an era of legislation to an era of implementation. Along this line, see also UN High Commissioner for Human Rights, *Plan of Action*, UN Doc. A/59/2005/Add. 3 of May 26, 2005.

<sup>7</sup> *Supra* note 3. In this line it has been also interpreted by NOWAK, M. (2006): 'From The Human Rights Commission to The New Council', available at <http://www.fride.org> (visited on July 14, 2006).

<sup>8</sup> GA Resolution 60/251 of March 15, 2006 paragraphs 13, 15 and 16. A list of the current members of the HRC is available at <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (visited on March 10, 2008).

<sup>9</sup> *Supra* note 7, paragraph 16.

<sup>10</sup> The clue is that the Council is born as a provisional body according to VILLÁN DURÁN, C. (2006): 'Luces y Sombras del Nuevo Consejo de Derechos Humanos' available at [www.fride.org](http://www.fride.org) (visited on July 14, 2006).

For further references see the roundtable expert meeting entitled *El Consejo de Derechos Humanos* organized by the Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) and the Institute of Human Rights Pedro Arrupe of the University of Deusto in [www.fride.org](http://www.fride.org) (visited on July 14, 2006) and ALMQVIST, J. and GÓMEZ ISA, F. (2006): *El Consejo de Derechos Humanos: Oportunidades y Desafíos*, Universidad de Deusto, Bilbao.

<sup>11</sup> ALMEIDA, A. J. (2005): "Backgrounder on the Reform of the United Nations Commission on Human Rights", *Rights and Democracy*, p. 17.

### 1.1. *Earlier Reform Proposals*

The reform movements began in the 1950s with the introduction of the Advisory Service Programme apparently intended as a move to steer the CHR's work away from the field of standard setting, which the United States wanted to stop or to downplay.<sup>12</sup> The next phase occurred between 1967-1968 and increased the size of the CHR's membership. It also resulted in the creation of the 1235 and 1503 procedures, which became extremely important parts of the Commission's work. The subsequent phase of reform took place between the late 1970s and mid-1980s, and entailed another increase in the Commission's membership (bringing it to 43) and the lengthening of its annual session to six weeks (previously four). It also saw an attempt by Third World countries to instigate a substantive shift in the focus of the Commission's work, with the idea of making the Commission better attuned to the structural and economic factors underlying human rights violations.<sup>13</sup>

The fourth phase occurred in 1989. Here, there were competing proposals from the Western bloc and the Non-Aligned Group, which were fundamentally incompatible. Each sought to 'enhance' the work of the Commission according to their own political ideologies and national interests – in many cases this involved limiting the Commission's powers as much as possible.<sup>14</sup>

The end result of these competing proposals was a very limited (but still significant) reform package which included the final enlargement of the Commission to 53 members and author-

isation for it to meet for emergency special sessions when the majority of members considered it necessary.

These four phases of reform highlight only the successful attempts to re-organise the workings and mandate of the Commission. In contrast, the majority of such initiatives failed to bear fruit, leading to a perpetuation of the *status quo*. Some of the strongest arguments against proposals for reform came, surprisingly, from those more progressive states and even NGOs who would have liked the Commission to be as effective as possible. This was due to a fear that providing opportunities to assess the Commission's working methods and make changes to it would in fact have led to its powers being weakened and its mandate restricted.<sup>15</sup>

While the main target of the last attempt to reform the UN was the Security Council and the Management/Secretariat reform, the main outcome appears restricted to the abolition and replacement of the CHR by the HRC and the creation of the Peace-building Commission.<sup>16</sup>

The origins of the last process of reform of the Commission are to be found in its 1998 session. The Bureau of the 54<sup>th</sup> (1998) session presented a report<sup>17</sup> the following year with recommendations for various changes to the work of the CHR. The different regional groups were unable to agree on the proposals.<sup>18</sup> As a result, only a few of the less substantive recommendations were adopted, but a Working Group was established to consider the report further. The Working Group presented its findings to the Commission in 2000 and its report<sup>19</sup> was adopted in its entirety, with significant conse-

<sup>12</sup> *Ibidem*. On this see also TAYLOR, R. (2006): "The Ghost of Things to Come. Prospects of Success of the UN Human Rights Council", (LLM theses on file at the EIUC, Venice), pp. ii-v.

<sup>13</sup> ALSTON, P. (1992): "The Commission on Human Rights", in ALSTON, P. (ed), *The United Nations and Human Rights: A Critical Appraisal*, p. 197, Oxford University Press, Oxford.

<sup>14</sup> *Ibidem*, p. 178. Some of the proposals of the Non-Aligned Group included that: 'the Commission's approach should be 'constructive and remedial' and that 'judgmental, selective or inquisitorial approaches' should be eschewed; any reforms should involve no additional financial or personnel costs; the time for debate allocated to each item should reflect the importance accorded to it by the international community; all thematic procedures should be undertaken by five-member Working Groups, consisting in part of Geneva-based diplomats, rather than by individual Special Rapporteurs; Country Rapporteurs be chosen 'from amongst individuals commanding a thorough knowledge and familiarity of [sic] the specificities and complexities

of the Country in question'; the Sub-Commission should no longer adopt any resolutions and should not concern itself with violations; all communications should be dealt with solely under the 1503 procedure and not by the thematic Rapporteurs; and the role of NGOs should be restricted'.

<sup>15</sup> As a result of these factors, Alston has noted that 'major innovations have usually been achieved as a result of equally major political confrontations', *supra* note 12, p. 199.

<sup>16</sup> GA Resolution 60/1, October 24, 2005.

<sup>17</sup> E/CN.4/1999/104, Report of the Bureau of the fifty-fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112, (December 23, 1999).

<sup>18</sup> The Western Group being predominantly in favour and the Asian and Like-Minded Groups opposed.

<sup>19</sup> E/CN.4/2000/112, Report of the Inter-Sessional Open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights (February 16, 2000).

quences for the system of Special Procedures (hereinafter SPs), the 1503 procedure and the Sub-Commission.

Among these alterations, the Sub-Commission was prohibited from adopting Country-specific resolutions or thematic resolutions making references to specific countries. In other cases, the 'reform did not go far enough in addressing the very serious challenges facing the UN human rights system'<sup>20</sup> and most of the recommendations of the original report of the 1998 Bureau were not implemented.

In 2003, the Commission began a thorough review of its working methods,<sup>21</sup> which continued throughout 2004 and 2005.<sup>22</sup> Two of the more significant proposals, put into practice for the first time at the 2003 session, were the High-Level Segment and Interactive Dialogues with the SPs. The outcome of these reviews did not include any major substantive changes to the Commission's structure or mandate. Moreover, on the 1998-2000 process of reform, one of the members of the Sub-Commission has noted that 'he almost had the impression that the UN was suffering from an acute attack of «reformitis», and that in view of the results of that reform, 'reform did not necessarily amount to progress'.<sup>23</sup>

## 1.2. Secretary General Annan's Initiatives

Secretary General Kofi Annan made clear his intentions to reform and improve the UN system since he took office in 1996.<sup>24</sup>

<sup>20</sup> See *supra* note 10, p. 21.

<sup>21</sup> On the basis of CHR Resolution 2002/91, with input from the Expanded Bureau of the 58th session.

<sup>22</sup> The topics addressed pertained predominantly to issues of time management, documentation issues, duration of the session and format of resolutions.

<sup>23</sup> Statement by Mr. Marc Bossuyt, member of the Sub-Commission for the Promotion and Protection of Human Rights during its last session held in 2005. UN Doc.E/CN.4/Sub.2/2005/SR.5, paragraph 47, Summary Records of the Fifth Meeting, July 28, 2005, Fifty-Seventh Session of the Sub-Commission of the Promotion and Protection of Minorities.

In this line, Elvira Domínguez Redondo has pointed out that subjecting the same procedures and mechanisms to reform every now and then has great potential to undermine their credibility. Also it has a big impact on their efficiency since at the very least a good part of their work and scarce resources will be focused on the reform process instead of substantive issues relating to the concerning mandates. Statement made during her presentation entitled 'The European Union and the HRC's Expert Body: Can the Sub-Commission and Special Procedures Be Replaced by a More Effective

However, the first report of real significance regarding reform of the Commission is the High-Level Panel on Threats, Challenges and Change's Report entitled *A More Secure World: Our Shared Responsibility*, which was not released until 2004.<sup>25</sup> The Panel did accurately identify some of the problems preventing the Commission from functioning. In particular it noted,

'In recent years, the Commission's capacity to perform [its] tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.'<sup>26</sup>

The report's primary recommendations regarding the CHR include making membership of the Commission universal, with 'experienced human rights figures' as heads of delegation and better links between the High Commissioner for Human Rights, the Security Council, and the proposed Peace-building Commission. The idea of replacing the Commission with a Council is addressed only in passing (paragraph 291), the suggestion being simply that 'in the longer term' States 'should consider' making the Commission / Council a Charter body alongside the Economic and Social Council rather than subsidiary to it.<sup>27</sup>

Mechanism?', in *EIUC Diplomatic Conference: the Role of the European Union in the Newly Established UN Human Rights Council*, Venice, Monastery of San Nicolò, 7-8 July 2006.

<sup>24</sup> His first report on the subject – *Renewing the UN: A Program For Reform A/51/950*. - was published in 1997, a year after his mandate began. A second report, *Strengthening the United Nations: an Agenda for Further Change (A/57/387)*, was published in 2002, followed by *We, the Peoples: Civil Society, the UN and Global Governance (A/58/817)* in 2004.

<sup>25</sup> UN Doc. A/59/565 (December 2, 2004). The Panel's mandate was confined 'to the field of peace and security, broadly interpreted' and its role was to "[...] (c) Recommend the changes necessary to ensure effective collection action, including but not limited to a review of the principal organs of the United Nations. See A/59/565, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, Annex II, 2004, p. 119.

<sup>26</sup> *Ibidem*, paragraph 283, p. 89.

<sup>27</sup> *Ibidem*, p. 90. It is worth noticing that the report of the High-Level Panel did not mention the Sub-Commission but did propose the creation of an advisory council or panel to support the work of the CHR.

Kofi Annan's 2005 report *In Larger Freedom: Towards Development, Security and Human Rights for All* echoes the Panel's diagnosis regarding the controversy surrounding membership of the Commission and notes that, as a result, 'a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.'<sup>28</sup> Annan broadly backs the opinions of the High Level Panel but his recommendations for the Commission are somewhat different. He proposes to 'replace the Commission on Human Rights with a smaller standing Human Rights Council, as a principal organ of the United Nations or subsidiary body of the GA, whose members would be elected directly by the GA by a two-thirds majority of members present and voting.'<sup>29</sup> The composition of the Council and term of office of the members is left to be decided by States and no membership criteria proposed other than that members of the Council 'should undertake to abide by the highest human rights standards.'<sup>30</sup> It was from here that negotiations began with States aimed at reaching the momentum at the World Summit in New York in September 2005.<sup>31</sup>

### 1.3. *The Establishment of the Human Rights Council*

The Outcome document of the World Summit, which enshrined the decision to create the HRC,<sup>32</sup> introduced a dramatic change to the UN institutional structure and to the human rights protection activity performed by the Organization.<sup>33</sup> The first

and foremost responsibility of the new organ echoes Article 55 of the UN Charter<sup>34</sup> and lies in the promotion of universal respect for and the protection of all human rights and fundamental freedoms without discrimination of any kind.<sup>35</sup> In addition, the Council shall address, consistently with UN bodies practice from the end of 60s onwards,<sup>36</sup> situations of violations of human rights, including gross and systematic violations and make recommendations thereon, and promote effective coordination and mainstreaming of human rights within the UN system.<sup>37</sup>

Constitutive elements of the new body that are crucial for its effective functioning and credibility, e.g. mandate, functions, size, composition, membership, working methods and procedures, have not been elaborated in the Outcome document. Their definition has been left to the President of the GA, who, to this aim, has been requested to conduct 'open, transparent and inclusive negotiations to be completed as soon as possible during the sixtieth session [of the UN General Assembly]'.<sup>38</sup>

On October 28, 2005, the GA President, Swedish Ambassador Jan Eliasson,<sup>39</sup> circulated a 'compilation text' on the new human rights body.<sup>40</sup> The 'compilation text' contained a preamble and operative paragraphs drawn from an Option Paper subsequently distributed in early November, and proposals of amendments and deletions by states and regional groups.<sup>41</sup> Negotiations officially set off on November 30,

<sup>28</sup> *Supra* note 3, paragraph 182. Annan's brief assessment also highlights some of the successes of the Commission, however, including its role in the creation of key human rights treaties, the attention it draws to human rights issues during its public debates, its role as a forum developing UN human rights policy, the SPs system, and the unique engagement it has with NGOs.

<sup>29</sup> *Ibidem*.

<sup>30</sup> *Ibidem*, paragraph 183.

<sup>31</sup> High Level Plenary Meeting of the 60th Session of the UN General Assembly held in New York September 14-16, 2005.

<sup>32</sup> *Supra* note 15, paragraphs 157-160.

<sup>33</sup> *Ibidem*, paragraph 157.

<sup>34</sup> The Article states: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:... c. universal respect for, and observance of, human rights and funda-

mental freedoms for all without distinction as to race, sex, language, or religion.

<sup>35</sup> *Supra* note 15, paragraph 158.

<sup>36</sup> BUERGENTHAL, T. (1997): 'The Normative and Institutional Evolution of International Human Rights', *Human Rights Quarterly*, Vol. 9, n.º 4, pp. 703-723. Also on the different stages in which contemporary human rights law has evolved see CARRILLO SALCEDO, J.A. (2001): *Soberanía de los Estados y derechos humanos en Derecho internacional*, Tecnos, Madrid.

<sup>37</sup> *Supra* note 15, paragraph 159.

<sup>38</sup> *Ibidem*, paragraph 160.

<sup>39</sup> Mr. Eliasson was elected President of the UN General Assembly on July 13, 2005. See Press Release GA/10355, June 13, 2005.

<sup>40</sup> News Bulletin-UN Reform: 'Overview on the Negotiations on Human Rights Council So Far', December 5, 2005.

<sup>41</sup> *Ibidem*.

2005, and lasted five months. They were intense, lengthy and sometimes difficult.<sup>42</sup> It was even feared that no agreement was to be reached and that the CHR would have remained in place.<sup>43</sup>

One of the main areas of contention preventing States from reaching a definitive consensus on the text creating the HRC was over the difference between countries that emphasize the importance of preserving 'the' existing system of SPs against those in favour of 'a' system of special procedures.

At last, on March 15, 2006 the GA adopted Resolution 60/251, establishing the HRC. The GA President himself presented the text in informal consultations on February 23, 2006,<sup>44</sup> and since then delegations studied it carefully together with their governments and regional groups. The outcome of the overall process was an integrated final text representing 'the

work of all'<sup>45</sup> and was regarded as the herald of a new era of human rights promotion and protection.<sup>46</sup>

Resolution 60/251 was adopted by an overwhelming majority of 170 states in favour out of 177. Belarus, Iran and Venezuela abstained, while the US, Israel, Marshall Islands and Palau voted against.<sup>47</sup> The US in particular considered the Resolution 'not sufficiently improved'.<sup>48</sup> For the US, its main shortcoming lies in establishing an absolute majority for the election of the Council's members instead of a two-thirds majority, a requirement that was not to impede that countries not committed to human rights could sit in the Council. Therefore, the American delegation saw no assurance of credible membership and that the HRC would be better than the CHR. Nevertheless, the US pledged support to the new body, both politically and financially, and endeavoured to 'work cooperatively with other member states to make the Council as strong and effective as it can be.'<sup>49</sup>

<sup>42</sup> Because of the malicious attempts by states such as Cuba, the US and Sudan to submit proposals for draft resolutions that would have resulted in the establishment of a weak HRC or delayed the adoption of a final text indefinitely. See the concerns expressed by Jimmy Carter, Óscar Arias, Kim Dae Jung, Shirin Ebadi, and Desmond Tutu in 'Principles Defeat Politics at the UN', *The New York Times*, March 5, 2006. On the role of the US during the HRC negotiations see Mary ROBINSON, 'A needed UN Reform', *International Herald Tribune*, March 2, 2006. See also Human Rights Watch's letter to Secretary of State Condoleezza Rice: U.S.: Accept Draft Resolution on Human Rights Council as It Is, available at <http://hrw.org/english/docs/2006/02/24/usint12718.htm>, (visited on August 29, 2005). See also Human Rights Watch, (2006): New Council Opposed by Unusual Duo: U.S. and Cuba, available at [http://hrw.org/doc/?t=united\\_nations\\_hrc&document\\_limit=20,20](http://hrw.org/doc/?t=united_nations_hrc&document_limit=20,20) (visited on September 12, 2006).

<sup>43</sup> This concern was expressed by Human Rights Watch, which in the mentioned letter to Secretary of State Condoleezza Rice stated that "[n]o resolution, and no new Council, would leave only the discredited existing Commission in place, and/or allow the human rights machinery of the U.N. to collapse entirely, a result that would reward only the worst abusers". *Supra* note 41.

<sup>44</sup> Statement by The President of the General Assembly H.E. MR. Jan Eliasson at Informal Consultations of the Plenary on the Human Rights Council, United Nations Headquarters, New York, February 23, 2006.

<sup>45</sup> These words were spoken by the GA President, Ambassador Jan Eliasson, when presenting the draft resolution on the HRC. See 'General Assembly Establishes New Human Rights Council By Vote of 170 in Favour To 4 Against, with 3 Abstentions', General Assembly, GA 10/449, March 15, 2006, [hereinafter 'General Assembly Establishes New Human Rights Council'].

<sup>46</sup> UN News Centre, 'In 'Historic' Vote, General Assembly Creates New Human Rights Council', March 16, 2006; Human Rights Watch, (2006): U.N.: New Human Rights Council Offers Hope for Victims, available at <http://hrw.org/english/docs/2006/03/15/global12991.htm>, (visited on September 12, 2005); Amnesty International, (2006): UN Human Rights Council: The Promise of a New Beginning, available at <http://web.amnesty.org/library/Index/ENGIOR400232006>, (visited on September 12, 2006). See also Hoge W., 'UN Creates New Human Rights Panel', *The New York Times*, March 16, 2006.

The text was adopted by a recorded vote upon request of the US delegation. The GA President and other states wished, instead, that the Resolution had been adopted without a vote, or by consensus. In their view, the establishment the HRC was a very important decision and as such should have had the strongest or widespread support of the GA delegations typically expressed by the two above voting procedures. The delegation of Norway and Kenya and the Caribbean Community were also in favour of the adoption of Resolution 60/251 without a vote. Iran and the EU would have preferred that the text be adopted by consensus. See 'General Assembly Establishes New Human Rights' and the Declaration by the Presidency on Behalf of the European Union on the Establishment of the Human Rights Council, Council of the European Union, March 16, 2006.

<sup>47</sup> 'General Assembly Establishes New Human Rights Council,' *supra* note 44.

<sup>48</sup> *Ibidem*.

<sup>49</sup> 'United States will Not Seek Human Rights Council Seat,' available at <http://usinfo.state.gov/is/Archive/2006/Apr/07-534030.html>, (visited on August 29, 2006).

## 2. Nature and Constitutive Elements of the Council

The text of GA Resolution 60/251 of March 15, 2006, lays out the main framework of the new body and leaves important aspects of its mandate and working methods to be decided by the Council itself in its early sessions. Thus far, the basic form of the Council differs from the Commission in several aspects, some of them apparently superficial, others more subtle but more significant whose comparison is made throughout the analysis of GA Resolution 60/251.

### 2.1. Legal Status of the Human Rights Council

GA Resolution 60/251 accords the HRC the status of subsidiary organ of the GA. This basically entails that the Assembly determines the scope of the subsidiary organ's functions, and maintains at all times organizational power and the ability to control the structure and activity of the organ, and to put an end to it.<sup>50</sup>

The GA is authorized to establish subsidiary organs by Article 22 of the UN Charter, 'the most important legal basis for the complex organizational structure of the UN.'<sup>51</sup> Laconically, the provision states that the GA 'may establish such subsidiary organs as it deems necessary for the performance of its functions.' The Article does not define the term 'subsidiary organ'. Nor is there a UN definition or a scholarly classification of such an organ. The UN practice however, highlights four characteristics of subsidiary bodies:

- a. a subsidiary body is created by or under the authority of a principal organ of the UN. Typically, the initiative for the creation of a subsidiary organ comes from the principal body, although in some cases its establishment may spur from a specific recommendation of international conferences or summits;<sup>52</sup>
- b. the membership, structure and terms of reference of a subsidiary organ are determined and may be altered by, or under the authority of, a principal body;

- c. a subsidiary body may be terminated by, or under the authority of, a principal body;<sup>53</sup> and
- d. a subsidiary organ necessarily owns a certain degree of independence from its parent body.<sup>54</sup>

The HRC presents all the above characteristics. As a matter of fact, the new body is created by a resolution of the GA acting upon a recommendation by the 2005 World Summit; the GA resolution establishes the new body's membership, structure and mandate;<sup>55</sup> the fact that the GA will review the status of the new body after five years is indirectly indicative of its power to have the last say on the overall activity of the HRC. Nevertheless, the HRC enjoys a degree of autonomy vis-à-vis the GA. This last feature is exemplified by the Council's ability to develop its methods of work and review them together with its overall functioning; to define modalities and time allocation for the UPR; and to review, improve and rationalize the SPs' mandates as well as the functions and responsibilities of the old CHR.

The elevated status of the body from a functional commission of ECOSOC to a subsidiary body of the GA (with further potential to become a principal UN organ on a par with ECOSOC and the Security Council) was broadly welcomed by governments and NGOs alike. Although easily dismissed as symbolic, such a measure reflected an increased international and institutional recognition of the importance of human rights. This change in status 'brings human rights issues much closer to the international political – and security – fora than heretofore. It also acknowledges the international political recognition that violations of human rights are directly linked – both as cause and effect – to international peace and security.'<sup>56</sup> The higher institutional status of the Council should make it capable of more effective and speedier decision-making. It may also make it 'more successful in mainstreaming human rights into all UN activities.'<sup>57</sup>

<sup>50</sup> KHAN D.E., 'Article 22', in SIMMA, B. (ed.), *The UN Charter, a Commentary*, Oxford University Press, Oxford, 2002, p.431.

<sup>51</sup> *Ibidem*, p. 421.

<sup>52</sup> For instance, the funding of UNEP was the subject of a recommendation by the 1972 Conference on the Human Environment.

<sup>53</sup> Khan, *supra* note, 49, p. 423.

<sup>54</sup> SZASZ P.C., 'The Complexification of the United Nations System', *Max Planck Yearbook of the United Nations Law*, 1999, pp. 1-57.

<sup>55</sup> GA Resolution 60/251, March 15, 2006, operative paragraphs 7-10 and 14, 1-6, 11-12.

<sup>56</sup> PACE, (2006): 'The UN Human Rights Council: Opportunities and Challenges,' in *Jurist*, available at <http://jurist.law.pitt.edu/forumy/2006/04/un-human-rights-council-opportunities.php> (visited on May 26, 2006).

<sup>57</sup> Netherlands Advisory Council on International Affairs (AIV) (2005) : 'Reforming the United Nations: A Closer Look at the Annan Report,' *Netherlands International Law Review*, Vol. LII, Issue 2, pp. 317-344.

The decision to postpone the possible elevation of status to principal UN organ level for five years was politically expeditious.<sup>58</sup> This compromise capitalises on current progress without restricting future potential. However, it was widely recognised that the change of status would remain a purely superficial alteration without the ‘profound culture shift that must accompany this institutional reform’.<sup>59</sup>

The ‘role and responsibilities’ of the Council in relation to the Office of the High Commissioner for Human Rights (OHCHR)<sup>60</sup> are to remain the same as those of the Commission, in accordance with GA Resolution 48/141 (1993). Precisely what is encompassed by this term is not clear. What is already obvious, however, is that some States see this as an opportunity to exert greater control over the work of the Office rather than allowing it more freedom to determine its own priorities and budgeting.<sup>61</sup> Increasing supervision and control of the OHCHR by a political body such as the Council would undoubtedly be to the detriment of effective international human rights protection.

## 2.2. Mandate

The GA Resolution has entrusted the Council with the following powers and tasks<sup>62</sup>:

- (a) 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;
- (b) Serve as a forum for dialogue on thematic issues on all human rights;
- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations

<sup>58</sup> Nonetheless, to have decided otherwise would have delayed the creation of the Council indefinitely pending the required changes to the UN Charter and the valuable reform momentum might have been lost.

<sup>59</sup> Statement by High Commissioner for Human Rights to Last Meeting of Commission on Human Rights, March 27, 2006, p. 2, United Nations Press Release, available at [www.unhcr.ch](http://www.unhcr.ch) (visited on March 29, 2006).

<sup>60</sup> *Supra* note 54, operative Paragraph 5(g).

<sup>61</sup> This interpretation is illustrated in the statement of the Chinese Ambassador after the vote adopting draft Resolution A/60/L48, in which he affirmed, ‘According to the draft resolution, the Council will guide the work of the Office of the High Commissioner for Human Rights according

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;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment 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;[...];

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and response promptly to human rights emergencies;

(g) Assume the role of 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 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;’

GA Resolution 60/251 also refers explicitly to the Council’s powers to address specific situations of gross human rights violations – a function which was hard-won within the Commission only after a considerable period of time. In contrast, the wording of the Council’s mandate states unequivocally:

‘3. the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon...’<sup>63</sup>

Since gross and systematic human rights violations as such constitute a threat to international peace and security, the GA Resolution can be interpreted as authorising the HRC to explicitly refer particular serious Country situations to the Security Council.

to the General Assembly in its Resolution 48/141.’ Statement by Ambassador Zhang Yishan, Permanent Representative of China to the UN, after the adoption of the draft resolution on Human Rights Council, March 15, 2006, available at [www.reformtheun.org](http://www.reformtheun.org) (visited on March 16, 2006).

<sup>62</sup> *Supra* note 54, operative Paragraph 5.

<sup>63</sup> *Supra* note 54, operative Paragraph 3. In the same paragraph the Council is also entrusted to ‘promote the effective coordination and the mainstreaming of human rights within the United Nations system’. That task is closely related to that of responding promptly to human rights emergencies, *ibidem*, operative Paragraph 5 (f).

One of the most innovative features of the Council is the Universal Periodic Review procedure (hereinafter, UPR)<sup>64</sup> that was initially proposed by the Secretary General as 'peer review'.<sup>65</sup> The provisions of the GA Resolution referring to the UPR are somewhat ambiguous about the scope and outcome of that review.<sup>66</sup> On the first hand, the working methods of the UPR are expressed in GA Resolution 60/251 only in very general terms, to include universal coverage based on a cooperative interactive dialogue which should 'not duplicate' the work of the Treaty-Bodies. As we will see below, the details have been subject to determination by the Council in its first year of practice.<sup>67</sup> Hampton has referred to some crucial issues that need to be addressed for the UPR to efficiently work. Who will determine who gets reviewed when? How will the process succeed in being both objective and non-political, engendering a sense of responsibility on the part of members of the Council to act to protect human rights without fear or favour? How will the very real possibility of undermining the work of the treaty monitoring bodies be avoided?<sup>68</sup> One may add to this list the issue related to the information upon which the review will be based upon.

In this connection, a very clear distinction between the political bodies (the new Council) and the technical expert bodies from where the Council can get the information about the situation of human rights (Treaty-Bodies, SPs) when it conducts the UPR

should be made since the lesson learned from experience at the UN and regional organizations shows that '...an objective, reliable and professional assessment and monitoring of human rights can only be achieved by truly independent expert bodies'.<sup>69</sup> The HRC should, as a political body, establish a follow-up mechanism to monitor the implementation of the recommendations made up by the Treaty-Bodies and the SPs regarding specific situations since one of the failures of the Commission was the lack of monitoring the implementation of its own recommendations. The Council must work on the 'objective and reliable information' coming from these sources to carry out its review of the fulfilment by each State of its human rights obligations.<sup>70</sup> The main aim of this distinction between the political and the technical functions is to decrease the level of politicisation of the HRC.

On the second hand, the GA Resolution also poses the question about how to reconcile the mandate to 'Undertake a universal periodic review (...) of the fulfilment by each State' (OP.5 (e)) with the provision requiring that the Council 'Decides also that members elected to the Council (...) shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership' (OP.9). The logical interpretation seems to be that the UPR will entail the assessment by the Council of all States, starting with its own member States, in a non-selective manner.<sup>71</sup>

<sup>64</sup> In fact, the UPR is not an entirely innovative proposal. In 1956 ECOSOC initiated a voluntary reporting system of periodic reports on the implementation of human rights (ESC Resolution 624B (XXII) 1956). Between 1956 and 1965, these reports were not given any serious attention by any UN body. Finally, in 1965, the Sub-Commission began undertaking initial studies of the reports, which were then submitted to the CHR for consideration. These reports included comments from NGOs and government responses. Despite the whole process being voluntary it led to such great controversy that in 1967 the CHR passed a resolution asking ECOSOC to request the Sub-Commission to cease its consideration of the reports and the whole practice effectively died. See EIDE, A. 'The Sub-Commission on Prevention of Discrimination and Protection of Minorities', in ALSTON, P. (ed.), *The United Nations and Human Rights: A Critical Appraisal*, supra note 12, 1992, pp. 211-264, at p. 223.

<sup>65</sup> On the concepts of "peer review" and "periodic review" see Gaer, F.D. "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System", *Human Rights Law Review*, vol. 7, n.º 1, 2007, pp. 109-139.

<sup>66</sup> *The Human Rights Council: An Expert Meeting on Challenges Ahead (Conclusions)*, supra note 9, p. 4.

<sup>67</sup> As one NGO has highlighted, 'Universal periodic review could be an excellent means to ensure the equality of States in international accountability. It

could also be a way to waste time and resources on essentially fruitless discussions'. See SIDOTI C. (2006): *Now the Real Work Begins*, International Service for Human Rights, available at [www.ishr.ch](http://www.ishr.ch) (visited on April 28, 2006).

<sup>68</sup> HAMPTON, F. "The Reform of the UN Human Rights Machinery", *Human Rights Law Review*, vol. 7, n.º 1, pp. 7-27, 2007, p. 16.

<sup>69</sup> This has been highlighted by NOWAK, M. 'The EU Input to the Universal Periodic Review Mechanism: how to Deal with Country Situations?', *EIUC Diplomatic Conference: The Role of the European Union in the Newly Established UN Human Rights Council*, Venice, Monastery of San Nicolò, July 7-8, 2006, pp. 4-5. (On file with the authors).

<sup>70</sup> *Supra* note 54, paragraph 5. Nowak proposes that the UPR serves only the purpose of '...supervising the domestic implementation of the respective decisions, conclusions and recommendations of independent expert bodies...', and that it would be the role of the OHCHR to collect all available objective and reliable information on the States to be reviewed and the role of the Council would be merely to supervise whether or not the respective Government has taken adequate measures to implement the decisions and recommendations outlined above. *Ibidem*, p. 6 (emphasis in the original).

<sup>71</sup> NOWAK, *supra* note 6, p. 3.

The GA Resolution does not make any reference to the outcome of the UPR. The rationale behind the mechanism is that the Council can make recommendations to States for the improvement of the human rights situations.

On the other hand, some wording of the operative paragraph 5 (e) of the GA Resolution brings one to question what is the main purpose of the UPR, such as the following: 'the review shall be a cooperative mechanism, based on interactive dialogue, with the full involvement of the Country concerned and with consideration given to its capacity-building needs...'. The UPR not only has to meet the capacity-building needs of countries in the area of human rights, but also to address the importance of the situations regarding human rights violations which prevail in specific countries.

A further pivotal component of the HRC's mandate concerns the review of functions and responsibilities of the CHR as well as its overall human rights machinery. The operative paragraph is clear in this regard and reads as follows:

'6. ...the Council will assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure...'

The above wording offers a great opportunity for reforming and boosting the effectiveness of the human rights apparatus of the old UN Commission. The analysis of the practice of the Council will show whether the shortcomings of the confidential procedure under ECOSOC Resolution 1503 have been truly reviewed, often condemned as useless or even harmful to the protection of human rights.<sup>72</sup>

Arguably, the most sensitive aspect of the overall review process has to do with the SPs, the most vital tools the CHR created to monitor and protect human rights. The future existence of the SPs has been put into question since the GA Resolution refers to 'a system of special procedures' due to the pressure of the so-called like-minded group of states. Their so-called 'rationalization' has also attracted very different views (note Hampton). One may recognize that reshaping the mandate of the

Procedures as to exclude for instance consideration of individual cases or the urgent messages procedures, or the termination of crucial mandates such as that on torture, arbitrary detention, disappearances, or those on economic social and cultural rights, would mean to completely distort the Procedures.

A serious review of the SPs shall, first of all, envisage the inclusion of all the members of the HRC, the SPs' mandate holders, and civil society representatives.<sup>73</sup> Secondly, the review should begin with a conceptualization of the role the Procedures should play as independent experts advising and supporting the Human Rights Council, above all, in the UPR. This should be then followed by an analysis of issues such as selection process; complementarity and gaps; enhancement of follow-up; emerging new human rights issues; improvements of guidelines to ensure a consistently high standard of work; harmonization of work between mandates where appropriate and within the OHCHR to ensure maximum effectiveness and efficient use of resources; and enhancing links with relevant partners such as the UN agencies, the Security Council, national human rights institutions, Treaty-Bodies, etc.<sup>74</sup> Thirdly, a very significant improvement to the work of the SPs would also include enhancing cooperation with the mandates by governments, yet this is perhaps the most difficult reform to implement in practice.<sup>75</sup> However, the requirement that Council members 'fully cooperate with the Council'<sup>76</sup> may be interpreted as including full cooperation with the Council's mechanisms. The pledges made as part of the election procedure may also create further psychological pressure on States to take such a measure. In any event, the Council should closely monitor those kinds of offers to ensure cooperation.

The review and rationalization process of the SPs that has taken place in the first year of the Council's mandate will be examined below.

### 2.3. Membership

The quality of membership is one of the main challenges underlying the establishment of the Council.<sup>77</sup> According to GA

<sup>72</sup> On the proposal of reviewing the 1503 procedure see Nowak, *supra* note 70, pp. 7-8.

<sup>73</sup> See the report of the 13th annual meeting of the SPs and specifically Annex II, A/HRC/4/43.

<sup>74</sup> *Ibidem*.

<sup>75</sup> *Ibidem*.

<sup>76</sup> *Supra* note 54, paragraph 9.

<sup>77</sup> *Supra* note 6, p. 3.

Resolution 60/251<sup>78</sup> the Council is composed of forty-seven members elected directly and individually by the majority of the GA members (or ninety-six countries). The HRC's membership is smaller than that of its predecessor, a feature that it was hoped to allow for a more efficient and improved decision-making process. The Council's election by the GA rather than regional groups, as in the case of the CHR, was thought to guarantee, at least in principle, that 'countries with a greater commitment to human rights' would sit in the Council.

GA Resolution 60/251 sets that membership is based on the principle of equitable geographic representation according to the following distribution of seats: thirteen seats to the Group of African states; thirteen seats to the Group of Asian states; six seats to the Group of Eastern European states; eight seats to the Group of Latin American and Caribbean states and seven seats to the group Western European and other states. Each member state will serve for a period of three years and 'shall not be eligible for immediate re-election after two consecutive terms.'<sup>79</sup>

The process for electing members to the Council differs in small but significant ways to that of the Commission since members are elected by the GA rather than ECOSOC (which previously was accused of 'rubber-stamping' candidates proposed by regional groups with little real competition). This change was intended to make 'members more accountable and the body more representative.'<sup>80</sup> The reform proposal originally required a two-thirds GA majority for election but this was later reduced to a simple majority (96 votes of a possible 191). Although this would have made it harder for States with poor human rights records to be elected, in reality it may have represented an unrealistically high standard for many States.<sup>81</sup>

Operative paragraph 8 of GA Resolution 60/251 then sets the criteria for membership. It requires States 'to take into account' when electing members of the HRC 'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.' As it has been pointed out, this 'neither formally binds a candidate State to submit voluntary pledges nor precludes any State from voting a candidate that has neither made nor met its pledges. In this respect, the provision falls short of conditionality attached to membership, an element which many States had advocated [...]'.<sup>82</sup> Besides this criteria, HRC's members are expected to uphold the highest human rights standards, fully cooperate with the Council and will be subjected to the UPR during their terms of membership.<sup>83</sup>

Regarding the criteria for membership, it would have been desirable that the GA identified what kind of state activity and behaviour falls within the category of 'contribution to human rights.' In addition, the degree of fulfilment of human rights obligations should have been included as a key requirement for membership.<sup>84</sup> Specifications of the criteria for membership have emerged from state delegations' statements after the vote on GA Resolution 60/251<sup>85</sup> and from candidate countries through the pledges presented.<sup>86</sup>

It should also be highlighted that operative paragraph 8 provides for the suspension of the HRC's membership by the GA if member states commit gross and systematic violations of human rights. Exactly what would be included in this definition - and who would decide - is not specified but one possibility would be for the UPR to have the power to recommend a state for suspension. Until now, suspension from a UN body could only take

<sup>78</sup> *Supra* note 54, operative paragraph 7.

<sup>79</sup> *Supra* note 54, operative paragraph 7.

<sup>80</sup> A/59/2005/Add.1, Explanatory Note by the Secretary-General, *In Larger Freedom*, paragraph 4, *supra* note 3.

<sup>81</sup> Noting the results of the elections on May 9, 2006 it was only the African Group in which all members were elected with a comfortable two-thirds majority. This would appear to indicate regional solidarity rather than universal approval as in contrast the highest-scoring member from the WEOG Group (Germany) won just 154 votes – 14 less than the lowest ranked African member (Algeria).

<sup>82</sup> UPTON, H. "The Human Rights Council: First Impressions and Future Challenges", *Human Rights Law Review*, vol. 7, n.º 1, 2007, pp. 29-39, at p. 32.

<sup>83</sup> *Supra* note 54, paragraph 9.

<sup>84</sup> Some Commentators have regarded the criteria for membership as a further guarantee that the HRC will be less politicized and more professional than the HRC.

<sup>85</sup> In particular, the EU, Liechtenstein, Japan, Canada and Australia have pointed out that when electing a member to the HRC they will consider whether the candidate Country is under enforcement measure decided by the Security Council under Chapter VII of the UN Charter. 'General Assembly Establishes New Human Rights Council', *supra* note 44.

<sup>86</sup> See TAYLOR, *supra* note 11, pp. 53ff. All candidates in the first election of the HRC made voluntary pledges and commitments during the election process.

place with Security Council authorisation. Although suspension would require a higher voting standard than initial election to the Council (two-thirds of GA members present and voting), abstentions are discounted so in practice a member could be suspended with fewer than 96 votes.

Considering the results of the May 9, 2006 and the May 17, 2007 elections, an overview of the current Council membership shows that over half of the Council's initial members were also members of the Commission in 2005, and two-thirds were Commission members in either 2003 or 2004. Most notably among these returning States are China, Cuba, the Russian Federation, and Saudi Arabia – all of which have been cited for grave and massive human rights violations.<sup>87</sup> The USA is conspicuous by its absence, made somewhat ironic by its public opposition to the establishment of the Council on the ground.

#### 2.4. Sessions

The Council will meet regularly scheduling no fewer than three sessions per year, including a main meeting, and hold spe-

cial sessions at the request of one of its members and the support of one third of the member states.<sup>88</sup>

Notably, participation in the HRC's session by NGOs is also envisaged: it will have to be based on agreements, ECOSOC resolution 1993/31 and practices observed by the Commission. Indeed, NGOs participation together with the preservation of the system of the SPs constitute the most significant legacies of the CHR's practice.<sup>89</sup>

As far as the methods of work are concerned the HRC shall apply the GA rules of procedures and fulfil its mandate in a transparent, fair and impartial way.<sup>90</sup> This means that its session should bring about genuine dialogue, be result-oriented and allow for follow-up to recommendations and substantive interaction with the SPs.<sup>91</sup> These very provisions could be a way to potentially tackle most of the CHR's shortcomings. The analysis of the practice of the Council will show if those provisions have been put in practice.

The frequency and length of Council sessions present both advantages and disadvantages in comparison to those of the Commission. The Commission's highly compressed 6-week annual

<sup>87</sup> The current composition of the Council, including the newly elected members and the previously elected members whose terms have not yet expired, is shown in the following table:

African Group	Asia Group	Eastern European Group	Latin and Caribbean Group	Western European and Other Groups
<b>13</b> Angola 2010 Cameroon 2009 Djibouti 2009 Egypt 2010 Gabon 2008 Ghana 2008 Madagascar 2010 Mali 2008 Mauritius 2009 Nigeria 2009 Senegal 2009 South Africa 2010 Zambia 2008	<b>13</b> Bangladesh 2009 China 2009 India 2010 Indonesia 2010 Japan 2008 Jordan 2009 Malaysia 2009 Pakistan 2008 Philippines 2010 Qatar 2010 Rep. of Korea 2008 S. Arabia 2009 Sri Lanka 2008	<b>6</b> Azerbaijan 2009 Bosnia and Herzegovina 2010 Romania 2008 Russian Federation 2009 Slovenia 2010 Ukraine 2008	<b>8</b> Bolivia 2010 Brazil 2008 Cuba 2009 Guatemala 2008 Mexico 2009 Nicaragua 2010 Peru 2008 Uruguay 2009	<b>7</b> Canada 2009 France 2008 Germany 2009 Italy 2010 Netherlands 2010 Switzerland 2009 United Kingdom 2008

<sup>88</sup> *Supra* note 54, operative paragraph 10.

<sup>89</sup> *Ibidem*, paragraph 11. As result of NGOs activism and lobby the draft resolution presented by Eliasson on February 23, 2006, clearly stated, in paragraph 11, that 'the participation of and consultation with observers, including (...) NGOs shall be based on arrangements, including ECOSOC Resolution 1996/31, and practices observed by the Commission, while ensuring the most effective contribution of these entities'. NGOs have lobbied hard and managed to have a solid legal basis for participation in the HRC.

<sup>90</sup> *Supra* note 54, paragraphs 11 and 12.

<sup>91</sup> *Ibidem*, paragraph 12.

sessions hampered its ability 'to tackle crisis situations or to take timely action to prevent them,' '[did] not allow for sustained attention to human rights,'<sup>92</sup> and added to its 'politicisation' as different items vied for time and attention. It also presented serious logistical difficulties for smaller missions and NGOs attempting to cover all meetings and resolution negotiations.

GA Resolution 60/251 states only the minimum requirements: that the Council should meet for at least three sessions per year, for a minimum of ten weeks in total, and should include a 'main session.' There is also provision for holding 'special sessions' as required. These extended sessions should help to reduce politicisation by allowing 'more time for a wider range of issues to be addressed more comprehensively'<sup>93</sup> and allow more concerted follow-up of, for example, States' implementation of SPs and Treaty-Bodies's recommendations. The need for such follow-up to maintain pressure on target situations and produce concrete results has been highlighted as a key requirement for effective reform. However, additional time alone will not automatically entail successful follow-up. Even with the additional sitting time, it will still be necessary to manage the Council's agenda responsibly to ensure that all pertinent issues are addressed within the time available.

The new format offers a workable model for addressing emergency situations promptly. In light of the GA's recent endorsement of the concept of the 'Responsibility to Protect,'<sup>94</sup> it will be interesting to note what use the Council makes of its enhanced powers to respond to human rights crises in a timely manner. However, it could be argued that the scarcity of special sessions of the Commission were the result of lack of political will rather than functional complexity and as such the Council

is perhaps no more likely to address emergency situations effectively than its predecessor. As the Council cannot permanently sit in special session, deciding which situations require emergency sessions will also require political choices to be made. It is also worth noting that there is no mandate for a special session to be called on the initiative of the High Commissioner for Human Rights, which would have been an advantage.

It is therefore extremely important that the Council's main session be of sufficient length and meaningful content to attract participation by the groups identified above so as to address these concerns.

### 3. The Early Practice of the HRC: a Year and Half in Review

#### 3.1. The Ordinary Sessions

(i) In its industrious first session, held June 19-30, 2006, the Council adopted five resolutions and seven decisions.<sup>95</sup>

The Council decided to extend the mandates of all SPs for one year and created an open-ended intergovernmental working group charged with the task of formulating recommendations on their review and rationalization.<sup>96</sup> Notably, an inter-sessional open-ended intergovernmental working group was additionally created to develop the modalities of the UPR.<sup>97</sup>

The body was quite selective in dealing with thematic issues and Country situations focusing only on incitement to racial and religious hatred and the promotion of tolerance<sup>98</sup>, the right to development,<sup>99</sup> and the situation in Palestine and other Occupied Arab Territories.<sup>100</sup>

<sup>92</sup> Amnesty International, (2005): Meeting the Challenge: Transforming the Commission on Human Rights into a Human Rights Council, IOR 40/008/2005, available at [www.amnesty.org](http://www.amnesty.org) (visited on June 28, 2006).

<sup>93</sup> PROVE P., "Re-Commissioning the Commission on Human Rights: UN Reform and the UN Human Rights Architecture", available at [www.lutheranworld.org/What\\_We\\_Do/OIAHR/Issues\\_Events/UN\\_Reform-Human\\_Rights.pdf](http://www.lutheranworld.org/What_We_Do/OIAHR/Issues_Events/UN_Reform-Human_Rights.pdf), p.12.

<sup>94</sup> *Supra* note 54, operative paragraphs 138-139.

<sup>95</sup> The Resolutions and decisions of the HRC are available at <http://www.ohchr.org/english/bodies/hrcouncil/1session/resolutions.htm>, (accessed on February 5, 2006). For an overview of the HRC's first two regular sessions see UPTON, *supra* note 81, and SCANNELLA P. and SPLINTER P., (2007): "The United Nations Human Rights Council: A Promise to be Fulfilled", *Human Rights Law Review*, Volume 7, n.º 1, 2007, pp.41-72.

<sup>96</sup> A/HRC/DEC/102, June 30, 2006.

<sup>97</sup> A/HRC/DEC/103, June 30, 2006.

<sup>98</sup> A/HRC/DEC/11/107, June 29, 2006. Also the Council endorsed the conclusions and recommendations of the Working Group on the effective implementation of the Durban Declaration and Programme of Action, A/HRC/RES/1/5 June 29, 2006.

<sup>99</sup> A/HRC/RES/1/4, June 30, 2006.

<sup>100</sup> Decision 1/106, June 30, 2006. As a result the Council requested the relevant Special Rapporteurs to report at its next session and decided to substantially examine human rights violations and implications of Israeli occupation of Palestine and other Arab Territories at its next and following sessions.

Although the first session might be deemed a good start, it is submitted that the HRC should have gone a little further in considering human rights concerns and Country situations by addressing, for instance, women's rights, access to medicines, poverty, and the situations in Sudan and Iraq. As such issues are topical and urgent, it would have been appropriate for the Council to address them first.

ii) The HRC's second session highlighted consideration and discussion of many key issues 'in unprecedented depth'<sup>101</sup>, but also showed very problematic aspects. During the meeting, convened September 6-October 18 2006, the Council heard and considered all Thematic and Country SPs' reports and remarked on the report on the joint mission to Lebanon and Israel of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to health, the Special Rapporteur on adequate housing, and the Special Representative of the Secretary General for internally-displaced persons.<sup>102</sup>

The main lack of such an intense activity characterizing the second session of the Council is the absence of decisions on measures to adopt vis-à-vis the issues discussed. The Council was not able to agree on them and eventually decided to postpone any decision until November 27, 2006 when it adopted five resolutions and sixteen decisions.

More worryingly, the examination of the situations of human rights in Sudan, Lebanon and the Occupied Palestinian Territories showed the 'old fashioned political maneuvering reminiscent of the [old] Commission'<sup>103</sup> and resulted in the impossibility to give the Country situations at stake meaningful consideration.<sup>104</sup> In this regard, the role played by the Organization of the Islamic Conference (OIC) is especially emblematic. As it has been noticed, member States of the Council that belong to the OIC, such as Pakistan, have fought resolutely to shield states from criticism and 'have acted in virtual unison to undermine the Council'.<sup>105</sup>

iii) On November 29, 2006, the HRC held its third session, which ended on December 8, 2006.<sup>106</sup> The highlight of the meeting was the adoption of Resolution 3/2 enshrining the Council's decision to act as the Preparatory Committee for the 2009 Durban Review Conference.<sup>107</sup>

iv) The fourth session of the HRC took place March 12-30, 2007. The Council heard the reports of Country<sup>108</sup> and thematic SPs<sup>109</sup> and followed-up on its fourth special session on Darfur.<sup>110</sup> The body adopted a resolution in which it regretted that the high-level mission established during the emergency session could not visit the Darfur region and established a group of experts, to be presided over by the Special Rapporteur on Sudan, charged with the task of ensuring compliance with all the rel-

<sup>101</sup> Amnesty International (2006): UN Human Rights Council: Member Governments Must Do More to Build an Effective Council, available at <http://web.amnesty.org/pages/un-index-eng>, (visited on 19 October 2006).

<sup>102</sup> A/HRC/2/7. The main objective of the joint visit was to assess the impact on the civilian populations of the armed conflict that affected southern Lebanon and northern Israel between July 12 and August 14, 2006.

<sup>103</sup> Amnesty international, *supra* note 100.

<sup>104</sup> Human Rights Watch, (2006): UN: Rights Council, Disappoints Again, available at <http://hrw.org/english/docs/2006/10/06/global14354.htm>, (accessed on October 19, 2006).

<sup>105</sup> Hicks P. (2007): 'How to Put U.N. Rights Council Back on Track', available at <http://www.forward.com/articles/how-to-put-un-rights-council-back-on-track/>, (visited on February 8, 2007). Hicks notices that when the Council considered the report and findings of the four independent experts' joint visit to Lebanon and Israel, 'state after state from the OIC took the floor to denounce the experts for daring to look beyond Israeli violations to discuss Hezbollah's as well. Strikingly, States that support human rights, meanwhile, were silent.... Yet, only Chile spoke in defense of the experts and their report', *Ibidem*.

<sup>106</sup> The resolutions and decisions adopted by the Council are reproduced in the Annual Report to the General Assembly A/HRC/3/7 of March 26, 2007.

<sup>107</sup> As recalled by the Council in the resolution, the Third Committee of the General Assembly recommended the convening the Durban Review Conference and requested the HRC to undertake preparation for the event and formulate a concrete plan by 2007.

<sup>108</sup> The Country reports dealt with the situation of human rights in Burundi, Liberia, Democratic Republic of Congo, Myanmar, the Democratic People's Republic of Korea and the Occupied Palestinian Territories. Respectively: A/HRC/4/5, A/HRC/4/6, A/HRC/4/7, A/HRC/4/14, A/HRC/4/15, A/HRC/4/17.

<sup>109</sup> Namely, the rights of minorities, racism and racial discrimination, freedom of religion or belief, physical and mental health, torture, indigenous people's rights, arbitrary detention, freedom of opinion and expression, human rights and transnational corporations, and economic, social and cultural rights. This overview of the thematic reports is only illustrative. The documentation of the fourth session of the HRC is available at <http://www2.ohchr.org/english/bodies/hrcouncil/4session/reports.htm> (last visited on December 17, 2007).

<sup>110</sup> S-4/101, December 13, 2006.

evant resolutions and recommendations formulated by UN human rights bodies and mechanisms.<sup>111</sup>

Finally, the Council met behind closed doors to consider gross violations of human rights under the 1503 procedure. The most striking result of this monitoring exercise was the decision to discontinue consideration of the human rights situations in Iran and Uzbekistan despite their deterioration.<sup>112</sup>

The fourth session dramatically highlights the lack of any concrete human rights work by the Council. The body has failed to consider very urgent situations such as those in Myanmar and Sri Lanka,<sup>113</sup> and has not been able to follow-up on the recommendations of thematic Special Rapporteurs, which draw attention to violations of human rights occurring in many Countries and address 'the endemic failure of many states to cooperate fully with the experts'.<sup>114</sup>

In addition, the attitude of the Council towards Country situations reviewed during the session is highly unsatisfactory. The decision to end the examination of the human rights situations in Iran and Uzbekistan is particularly illustrative in this regard. It suggests that the manner in which the Council is going about Country situations is biased, obliging and ineffective. It seems like the Council wants to 'play it safe' by avoiding condemnation and serious investigation of certain states that violate human rights. All this runs contrary to the mandate of the Council explicitly referring to the examination of Country situations, constitutes a backward step in the UN human rights practice which since end of the sixties has focused on Country situations, and is very likely to impair the future credibility of the Council.

<sup>111</sup> Resolution 4/8 paragraphs 6-7, March 30, 2007. The designated experts were: Radhika Coomaraswamy, Special Representative of the Secretary General for children in armed conflict; Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions; Hina Jilani, Special Representative of the Secretary General concerning the situation of human rights defenders; Walter Kälin, Representative of the Secretary General for internally displaced persons; Manfred Nowak, Special Rapporteur on torture and Yakin Erturk, Special Rapporteur on violence against women.

<sup>112</sup> Human Rights Watch, (2007): UN: Rights Council Remains Timid in Face of Abuses, available at <http://hrw.org/english/docs/2007/03/30/global15608.htm> (last visited December 7, 2007).

<sup>113</sup> *Ibidem*.

<sup>114</sup> *Ibidem*.

<sup>115</sup> Decision 6/102, September 27, 2007. The Council also defined the requirements for the candidatures of its Advisory Committee.

v) The fifth session, held June 11-18, 2007, was largely focused on the drafting of the resolution on the institution building of the Council, laying down the fundamental rules and procedures that will inform the body's future practice. The result of this negotiation is Resolution 5/1, enshrining the modalities of the UPR and the review of the SPs, establishing the Council's Advisory Committee and a new complaint procedure, and setting the Council's agenda and program of work. The content of the resolution is discussed in the next pages of this article.

vi) The Human Rights Council held the first part of its sixth session from September 10-28, 2007, and the second part from December 10-14, 2007. The first part was devoted to the institution building, particularly the adoption of the general guidelines for the preparation of the information under the UPR and the technical and objective requirements for electing the experts who will serve as SPs.<sup>115</sup>

The Council then chose the countries to be scrutinized under the UPR from 2008 to 2011. The states to undergo the review process at the first session of the UPR Working Group in 2008 are Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, the Czech Republic, and Argentina.<sup>116</sup>

The highlights of the second part of the sixth session were the presentations of the final report of the group of experts on Darfur and the report of the Special Envoy to Myanmar of the United Nations Secretary General.<sup>117</sup> The Council decided to end the mandate of the group and to renew that of the Special Rapporteur on Sudan.<sup>118</sup> The Council also requested

<sup>116</sup> "HRC Suspends Sixth Session until 10 December", UNOG, 28 September 2007, available at [http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/5A0FB8EEF6761DB8C12573640044FDA3?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/5A0FB8EEF6761DB8C12573640044FDA3?OpenDocument) (last visited on December 12, 2007).

<sup>117</sup> A/HRC/6/19 and A/HRC/6/14.

<sup>118</sup> The decision was the result of an agreement between the EU and the group of African states 'to the effect that the [group of experts] mandate should be taken up by the Special Rapporteur for Sudan, Sima Samar of Afghanistan'. BÜHRER M., GASPARIINI J./TDH, 'Sudan Expert Group Disbanded', Human Rights Tribune Geneva, available at <http://www.humanrights-geneva.info/spip.php?breve817> (last visited on December 18, 2007). In truth, the agreement was a true trade off with which the EU 'sacrificed' the group of experts in order to avert the abolition of the mandate on Sudan. *Ibidem*.

the expert on Myanmar to undertake a follow-up visit to that Country.<sup>119</sup>

The sixth session brought the Council into the New Year 2008. The body has refined its institution-building with the very important clarification of the information that will be used during the UPR and the selection of the Countries to be scrutinized between 2008 and 2011. The Council is then ready to carry out the assessment of the human rights performance of all UN member states, the most innovative task envisaged in its mandate.

In spite of this new prospect, dark shades hang over the future of the HRC. Overall, its responsiveness to human rights violations occurring worldwide in its first year and half of life has been very poor, tainted with selectivity, lack of objectivity and politicization. These shortcomings appear to be endemic and may negatively affect the UPR.

### 3.2. *The Special Sessions*

The outcomes of the first three emergency sessions of the HRC highlight the recurring problem of politicization and double standards, and are more discouraging than those of the regular sessions.<sup>120</sup>

<sup>119</sup> "Human Rights Council Concludes Resumed Sixth Session", Information Service, United Nations Office at Geneva <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/074722EB06AE3958C12573B10075B40F>, (last visited December 17, 2007).

<sup>120</sup> Human Rights Watch has highlighted the same concerns. See HRW, (2006): Lebanon/Israel: U.N. Rights Body Squanders Chance to Help Civilians, available at [http://hrw.org/doc/?t=united\\_nations\\_hrc&document\\_limit=0,20](http://hrw.org/doc/?t=united_nations_hrc&document_limit=0,20), (visited on September 12, 2006).

<sup>121</sup> S-1/1, 6 July 2006.

<sup>122</sup> The Permanent Representative of Tunisia to the United Nations office in Geneva, on behalf of the Group of Arab states and the Organization of the Islamic Conference, requested, on 7 August, 2006, the President of the Council to convene the second special session. See the report on the Second Special session, A/HRC/S-2/2, p. 6, paragraph 2.

<sup>123</sup> S-2/1, August 11, 2006.

<sup>124</sup> *Ibidem*.

<sup>125</sup> The commission of inquiry has been mandated to investigate the systematic targeting and killings of civilians by Israel in Lebanon; to examine the types of weapons used by Israel and their conformity with international law, to assess the extent and deadly impact of Israeli attacks

The first special session, convened on July 5-6, 2006, to address the deterioration of the situation in the Occupied Palestinian Territories following the kidnapping of an Israeli soldier by Palestinian militants in Gaza, concluded with the adoption of an unbalanced resolution establishing a fact-finding mission in the Occupied Territories, condemning Israel for violations of human rights law and humanitarian law but neglecting to mention the kidnapping of the Israeli soldier and Hamas government's responsibilities.<sup>121</sup>

The same holds true for the second emergency meeting of the HRC, held in the wake of the war in Lebanon on August 11, 2006.<sup>122</sup> The Council strongly condemned Israel's military operations in Lebanon, including the indiscriminate air strike in Qana on July 30, 2006, and called for respect of human rights law and humanitarian law.<sup>123</sup> Strikingly, no mention is made in the final resolution of Hezbollah's responsibility in starting the conflict, kidnapping two Israeli soldiers and killing Israeli civilians.<sup>124</sup> Such an unbalanced approach is again evident in the fact-finding measures endorsed by the Council, namely the establishment of a high-level commission of inquiry to investigate Israel violations of international law only.<sup>125</sup>

The situation of human rights in the Occupied Palestinian Territories was addressed again during the third special session of the HRC convened on November 15, 2006.<sup>126</sup> The emergency

on human life, property, critical infrastructure and the environment. See S-2/1, August 11, 2006, paragraph 7.

The Council had designated the experts to take part to the inquiry on September 1, 2006. They are Clemente Baena Soares of Brazil, a former Secretary-General of the Organization of American States (OAS), Mohamed Chande Othman, a judge on the Supreme Court of Tanzania, and Stelios Perrakis of Greece, the Director of the European Centre for Research and Training on Human Rights and Humanitarian Action. See "UN Human Rights Council names Experts to probe Israeli civilian Killing in Lebanon", available at [http://www.rawstory.com/news/2006/UN\\_Human\\_Rights\\_Council\\_names\\_experts\\_0901.html](http://www.rawstory.com/news/2006/UN_Human_Rights_Council_names_experts_0901.html), (visited on September 1, 2006). The report of the Commission of Inquiry is now available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm>, (visited on February 5, 2007).

<sup>126</sup> The permanent representatives of Bahrain and Pakistan, on behalf of the Group of Arab states and the Group of the Organization of the Islamic Conference, requested the convening of the emergency meeting. See in this regard the Note Verbale from the Secretariat of November 10, 2006, and the Note Verbale from the Secretariat of November 13, 2006, available at <http://www2.ohchr.org/english/bodies/hrcouncil/3session/index.htm> (visited on February 5, 2007).

meeting dealt with Israel military incursion in Beit Hanoun, which killed nineteen Palestinians, including eight children and seven women, and wounded more than forty.<sup>127</sup> The Council condemned Israel's targeting of Palestinian civilians, and established a high-level fact-finding mission to investigate the human rights violations in Beit Hanoun.<sup>128</sup>

Once again, the third special session suggests a partial approach to the Israeli-Palestinian conflict. There are no doubts that Israel's incursion in Beit Hanoun constitutes a flagrant violation of human rights and humanitarian law and the Council was right in tackling the issue. However, the activity of Palestinian militants firing rockets in Israel residential areas, in Israel's view the trigger of the incursion, should also have been considered.

The outcomes of the first three special sessions of the Council are very troubling. They give the impression that the Council is using the emergency sessions as a political tool and turning them in a forum of confrontation among its regional groups.<sup>129</sup> This sensation is, only in part, eased by the fourth and fifth special sessions. The former met December 12-13, 2006, to discuss the situation of human rights in Sudan and during which the Council resolved to dispatch a High-level Mission to assess the human rights situation in Darfur.<sup>130</sup> The latter, held on October 2, 2007, focused on the grave situation in Myanmar.<sup>131</sup> The Council urged the Government to release without delay all political detainees, including Daw Aung San Suu Ky, and welcomed the government's decision to receive a visit by the Special Envoy to Myanmar of the United Nations Secretary-General,<sup>132</sup> who was requested to assess the situation in the Country and report to Council at the sixth resumed session.<sup>133</sup>

<sup>127</sup> "Thousands Mourn Beit Hanoun Dead", available at [http://news.bbc.co.uk/2/hi/middle\\_east/6131860.stm](http://news.bbc.co.uk/2/hi/middle_east/6131860.stm) (visited on February 5, 2007).

<sup>128</sup> Resolution S-3/1, November 14, 2006.

<sup>129</sup> It is significant that France, in its explanation of vote after the vote of Resolution S-3/1, said that it was concerned about the way special sessions were taking place and the impossibility for the Council to adopt resolutions by consensus.

<sup>130</sup> Decision S-4/101, 13 December 2006. The Session was convened upon request of the Permanent Representative of Finland to the United Nations Office at Geneva, on 30 November 2006. See the report on the special session, A/HRC/S-4/5 at 3.

<sup>131</sup> The session was convened at the request of Slovenia, see the report on the session submitted to the General Assembly, A/HRC/S-5-2, p. 5.

### 3.3. *The Pillars of the HRC's Institution Building: The UPR and the SPs*

The most impressive feature of the Council's institution building is the breadth of the UPR encompassing international scrutiny of virtually all states in the world. Resolution 5/1 is unequivocally clear in this regard as it stipulates that each UN member state will be reviewed in cycles of four years.<sup>134</sup> The resolution further specifies that member states of the Council shall be reviewed during their term of membership<sup>135</sup> and that the review will also affect observer states of the Council.<sup>136</sup> Overall the procedure will allow consideration of 48 states per year.<sup>137</sup>

The review will be carried out by a working group chaired by the President of the Council and composed of member states of the Council, the main task of which is to undertake an interactive dialogue with the state under scrutiny.<sup>138</sup> Observer states and other relevant stake holders, such as NGOs, will participate in the review.<sup>139</sup>

Resolution 5/1 also details the kind of information that will be used to assess states' fulfillment of their human rights obligations and commitments.<sup>140</sup> Accordingly, three kinds of information will be considered: information by the state concerned, which could be submitted in the form of a national report compiled on the basis of general guidelines to be adopted by the Council at its sixth session; a compilation of relevant information enclosed in the reports of Treaty-Bodies and SPs, and other relevant UN documents prepared by the OHCHR; and any other reliable information provided by the relevant stakeholders of the UPR. A page limit for each different type of documentation is set: state reports shall not exceed twenty pages; the High Commissioner's compilation

<sup>132</sup> S-5/1, paragraph 3.

<sup>133</sup> *Ibidem* paragraph 9.

<sup>134</sup> Resolution 5/1, June 18, 2007, paragraph 14.

<sup>135</sup> *Ibidem* paragraph 8.

<sup>136</sup> *Ibidem*, paragraph 10.

<sup>137</sup> *Ibidem*, paragraph 14.

<sup>138</sup> *Ibidem*, paragraphs 18 (a) and 21. Three rapporteurs will be appointed with the task of preparing the report of the working group and smoothing all the proceedings within the review Resolution 5/1 paragraph 18 (d).

<sup>139</sup> *Ibidem*, paragraph 18 (b) and (c).

<sup>140</sup> *Ibidem*, paragraph 15 (a), (b), (c).

and the stake-holders's contribution shall not be longer than ten pages.<sup>141</sup> The aim is 'to guarantee equal treatment to all States and not to overburden the mechanism'.<sup>142</sup>

The outcome of the UPR will consist of a report presenting a summary of the proceedings, and detailing conclusions, recommendations and voluntary commitments of the state concerned.<sup>143</sup> By virtue of the cooperative nature of the review, the report may also include an objective and transparent assessment of the Country situation at stake, best practices, and efforts aimed to enhance cooperation and technical assistance.<sup>144</sup> The report will also include recommendations adopted with and without the consent of the state scrutinized.<sup>145</sup> The outcome will be adopted by the Council convened in plenary session during which the state concerned, member states of the Council and observer states will have the opportunity to take the floor and express their views and comments.<sup>146</sup> The implementation of the outcome will be assessed during the subsequent review of the state.<sup>147</sup> The state concerned, relevant stake holders and the international community shall be involved in the implementation of the outcome and cases of stubborn non-cooperation will be duly addressed by the Council.<sup>148</sup> 'In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary'.<sup>149</sup>

The definition of the procedure for the UPR is the first fundamental step in the process of consolidation of the prospective practice of the Council. One of its more relevant aspects is the information that will be used to study Country situations. According to the wording of Resolution 5/1, such documentation will be varied and comprehensive. The information provided by states will not only have to comply with the Council's guidelines, but will also be examined in light of compilations of reports of

UN human rights bodies and civil society actors. This should ensure a transparent, unbiased and serious examination of Country situations. Arguably, an addition could have been made to the information for the UPR. The Council should have requested Country SPs dealing with the same human rights situations examined under the UPR to submit their reports separately instead of having them enclosed in a ten page compilation of other UN documents. As many of these reports are written after visits to the countries concerned, they offer a unique perspective on the human rights violations occurring on the spot and ways tackle them and should, therefore, be used extensively.

The participation of NGOs and other stake holders is another very important aspect of the UPR. It ensures more objectivity, impartiality and effectiveness in the implementation of the overall review procedure. It has to be noted that the recognition of the role of civil society within the framework of the review is the result of negotiations by the EU which had to overcome the opposition of the OIC, China and India.<sup>150</sup> Thus, civil society actors will be able to submit information against which the state human rights performance will be analyzed and contribute to the interactive dialogue between the state concerned and the Council.

As seen, the review will conclude with a report on the outcome achieved through the interactive dialogue with the state concerned.<sup>151</sup> In this last regard, the modality of the Council's follow-up to the implementation of the outcome, the tools it will identify to react to states' inertia, and the periodicity of the evaluation of what states do after the review will be crucial. Resolution 5/1 is vague on these issues but it is compelling for the Council to clarify them as there is no doubt that they will be determinative of the success and effectiveness of the review.

<sup>141</sup> *Ibidem*, paragraph 15 (a), (b), (c).

<sup>142</sup> *Ibidem*, paragraph 15 (a).

<sup>143</sup> *Ibidem*, paragraph 26.

<sup>144</sup> *Ibidem*, paragraph 27.

<sup>145</sup> *Ibidem*, paragraph 32.

<sup>146</sup> *Ibidem*, paragraph 30.

<sup>147</sup> *Ibidem*, paragraph 34.

<sup>148</sup> *Ibidem*, paragraphs 33, 36 and 38.

<sup>149</sup> *Ibidem*, paragraph 37.

<sup>150</sup> These states were pushing for a state-centric and non-confrontational review, the main aim of which should have been the development

of state capacity building and the provision of technical assistance. The EU efforts were not in vain and in the end they were successful in securing a role for NGOs and other stake-holders.

<sup>151</sup> Importantly, as Amnesty International has pointed out, 'the ultimate effectiveness of the UPR will lie in its ability to focus on key human rights issues in the Country under review and the quality and timeliness of its recommendations.' Amnesty International, (2007): Conclusion of the United Nations Human Rights Council's institution Building: Has the Spirit of General Assembly Resolution 60/251 Been Honoured?, AI Index: IOR 41/015/2007.

The UPR should not exclude further consideration of Country situations and that states may be examined outside its framework. As mentioned, the GA has made clear that examining Country situations is one of the key components of the Council's terms of reference by mandating it to 'address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon'.<sup>152</sup> The Agenda item No. 4 opens the door for such a scrutiny. From a substantive point of view, the examination of Country situations can be done in different ways, for instance by using traditional tools such as Country SPs, adopting resolutions on specific countries, or the convening of special sessions. Moreover, it is submitted that the Council should be more creative about ways to tackle Country situations because the potential for innovation in this field is considerable and should not be wasted.<sup>153</sup>

The UPR will fundamentally be a *collaborative* 'device' to inspect human rights situations occurring within the boundaries of UN member states. Such a result of the Council's institution building is not surprising given the political nature of the body and the desire to overcome the too confrontational atmosphere pervading the CHR meetings. Cooperation is not a bad thing in itself and may actually be a good avenue to create a constructive working environment and induce the states to comply with the human rights related requests the international community will put forward in the outcome of the UPR. Nevertheless, it is of paramount importance that focus on cooperation will not be an excuse for not being firm and clear about the human rights issues that warrant state action, how these issues shall be addressed and within which time frame. It is for the Council to

avoid that the UPR will develop as a mere technical assistance exercise.

Part II of Resolution 5/1 enshrines the review of the SPs, arguably the most sensitive issue at stake in the Council's institution building. Resolution 5/1 first sets out six general criteria for the nomination, selection and appointment of the UN experts: expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity.<sup>154</sup> Several actors will be involved in the nomination of candidates as SPs.<sup>155</sup> Individuals serving as state officials or working for international organizations will be excluded in the nomination as SPs in order not to contravene to the requirement that '[m]andate-holders will act in their personal capacity'.<sup>156</sup>

Besides, Resolution 5/1 develops a procedure for the appointment of SPs: the OHCHR will prepare and regularly update a public list of eligible candidates in a standardized format which shall include personal data and information on expertise and professional experience.<sup>157</sup>

Importantly, Resolution 5/1 makes clear that the review, rationalization and improvements of SPs will take place in the context of negotiations of the relevant resolutions.<sup>158</sup> The process shall be guided by the principles of universality, objectivity, non-selectivity, constructive dialogue, and cooperation, and aimed to enhance promotion of all human rights.<sup>159</sup> It will focus on the relevance, scope and contents of the mandates within the framework of internationally recognized human rights standards, the system of the SPs and GA Resolution 60/251.<sup>160</sup> Overall the review and rationalization of the SPs will pursue im-

<sup>152</sup> GA Resolution 60/251.

<sup>153</sup> See Human Rights Watch, (2006): Human Rights Council. New Approaches to Addressing Human Rights Situations, available at <http://hrw.org/english/docs/2006/09/15/global14209.htm> (last visited on January 2, 2008).

<sup>154</sup> Resolution 5/, paragraph 39. The Resolution does not detail the technical and objective requirements for candidates for mandate-holders deferring their definition to the sixth session of the Council (first session of the second cycle). *Ibidem*, paragraph 41.

<sup>155</sup> *Ibidem*, paragraph 42. Namely, governments, regional groups operating within the UN human rights system, international organizations and their offices, NGOs, other human rights bodies and individuals

<sup>156</sup> *Ibidem*, paragraph 46.

<sup>157</sup> *Ibidem*, paragraph 43. A Consultative Group will be set up with the task to recommend to the President of the Council a list of candidates

best suited to be appointed as SPs on the basis of the above public list and taking into account, as appropriate, the view of stake-holders, including current or former SPs. The recommendations of the Consultative Group will have to be "public and substantiated". The Group will consist of five members appointed by the Regional Groups and acting in their personal capacity. The President of the Council, on the basis of the Group's recommendations and broad consultations with the regional coordinators, will identify the candidates for each vacancy and prepare a list of nominees to be submitted to the Council for approval. Resolution 5/1, paragraphs 47, 49, 50, 52-53.

<sup>158</sup> *Ibidem*, paragraph 55.

<sup>159</sup> *Ibidem*, paragraph 54.

<sup>160</sup> *Ibidem*, paragraph 56.

improvements in the system of the procedures, for instance by avoiding duplication or paying equal attention to all human rights.<sup>161</sup> Finally, decisions to streamline, merge and terminate mandates should always be inspired by the need to improve the enjoyment and protection of human rights and the principles of cooperation and genuine dialogue, the main purpose of which is to enable states to comply with their human rights obligations.<sup>162</sup>

The most sensitive aspect of the review of the SPs concerned the fate of the Country procedures, an issue that became explosive as a consequence of the mentioned presentation of the experts on Cuba and Belarus's reports. As seen, states such as Pakistan (on behalf of the OIC), the Russian Federation and India, among others, fought hard for the termination of Country specific resolutions. China even argued that the adoption of a Country specific resolution should require a two-thirds majority. Western states and NGOs, who were in favor of the preservation of the Country mandates, engaged in lengthy negotiations and diplomatic efforts to retain the Country Procedures. At the end they succeeded, although their victory was not without cost: the mandates on Cuba and Belarus were discontinued.

Thus, the traditional structure of the system of the SPs will be preserved. Thematic Rapporteurs will be appointed for a period of three years while Country mandates will be established for one year.<sup>163</sup> A UN expert's tenure in his/her function as SPs will not be longer than six years.<sup>164</sup>

The review and rationalization of the SPs has not been as catastrophic as many predicted. The SPs will be retained and will continue carrying out their mandate under the auspices of the Council. There are at least two features of the review and rationalization of the SPs that are encouraging.

First, the introduction of a more structured and transparent selection of candidates as SPs. While in the past, the UN experts were designated by the Chairman of the CHR after the conduc-

tion of consultations with the Regional Groups, from now on obtaining the appointment as a special procedure will be similar to applying for a job. The selection of the mandate-holders will be based on the list the Office of the High Commissioner has been requested to prepare which will not only contain the names of the potential nominees but also their resumes.

Thus, Resolution 5/1 has heeded the pressing need for transparency in the appointment of SPs.<sup>165</sup> While still being inherently and unavoidably political the selection process of the SPs is now more open and public than before.

Second, the reform of the SPs guarantees the independence and impartiality of the nominees by requiring that individuals serving as governmental officials for their countries cannot be appointed as UN experts. The 'independence requirement' already informed the selection of SPs by the CHR and, consequently, the reform merely formalizes an important legacy of the relatively recent practice of the Council's predecessor. The same holds true for other selection requirements set out in the review such as expertise and competence in the field of human rights: the CHR already ensured them by appointing individuals who were known for their human rights work.<sup>166</sup>

More troublingly, reforming the SPs has shown the hostile attitude of some member states of the Council towards Country experts and rendered the system of SPs more vulnerable to governments' whims. As mentioned, some states fought hard to abolish the Country Rapporteurs, and even though they did not succeed, the price of the retention of the Country experts, (i.e. the termination of the mandates on Cuba and Belarus), was very high.

The blatancy with which the Council challenged the experts and got rid of them creates two very dangerous precedents that states may follow again in the future to put an end to Country Procedures inconvenient for them. The lesson states learn from the case of Iran and Belarus is that if they can muster the 'right'

individuals working for their government, and began to appoint true human rights experts. They were professors of international law or international human rights law and members of human rights NGOs. See Nifosi, I. (2005): *The UN Special Procedures in the Field of Human Rights*, Intersentia, Antwerp, pp. 46-48.

<sup>161</sup> *Ibidem*, paragraph 58 (b) and (c).

<sup>162</sup> *Ibidem*, paragraphs 57 and 63.

<sup>163</sup> Resolution 5/1, paragraphs 60-61.

<sup>164</sup> *Ibidem*, paragraph 62.

<sup>165</sup> See Amnesty international, *supra* note 150.

<sup>166</sup> As a matter of fact, since the 1990s the CHR changed its approach to the selection of SPs, which in the past privileged the appointment of

alliances within the Council they can overtly refuse to collaborate with Country experts and show respect for their work, and even obtain the abolition of the Country procedure. This also highlights high potential for double standards and politicization in the practice of the Council, and the purely theoretical validity of the main principles informing the review, requiring, *inter alia*, the termination of a mandate to be guided by the need for improvement in the realization of human rights.

Moreover, those states that dislike the procedures will not cease to undermine them and will try to find other avenues to achieve their aims. One avenue has been already pursued with the adoption of the Code of Conduct of the SPs, which, by requiring the UN experts to carry out their tasks with impartiality and political objectivity, may seriously limit their activity.<sup>167</sup> The future of the SPs is far from bright.

Other aspects of the Council's institution-building should also be highlighted. Part III of Resolution 5/1 establishes the successor of the former Sub-Commission on the Promotion and Protection of Human Rights, the HRC Advisory Committee.<sup>168</sup> The new body will be composed of eighteen independent experts and function as a think tank for the Council. Its task is 'to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice'.<sup>169</sup>

A positive aspect of the establishment of the Committee is the involvement of civil society actors in the selection of its members. By stipulating that states should consult with these actors before proposing and endorsing candidates, Resolution 5/1 in fact guarantees that objectiveness and human rights expertise will inform the activity of the new Committee.<sup>170</sup> On the other hand, one cannot fail to notice an important shortcoming in the mandate of the new body, namely the fact that being required to only take up issues upon the Council's request it will not be able to undertake independent investigations and initia-

tives. This being so, the role the Committee will play within the UN human rights machinery is doomed to be limited and constrained.

Resolution 5/1 also establishes a new complaint procedure for dealing with gross violations of human rights. A textual analysis of the resolution suggests, disappointingly, that no break through has been achieved with the way the CHR handled communications on serious human rights violations under the 1503 Procedure.<sup>171</sup>

The establishment of the Advisory Committee and the new complaint procedure may be regarded as positive developments but their importance should not be overstated. It is unlikely that the Committee will play the same propulsive role as the Sub-Commissions, whereas the new complaint procedure is just a photocopy of the old and highly unsatisfactory 1503 procedure it was meant to replace.

Finally, the Council approved its agenda, program and methods of work.<sup>172</sup> The agenda items indicate that the most substantial work of the Council will be concerned with is the promotion and protection of all rights, the activity of human rights bodies and mechanisms, the UPR, the follow-up to the Vienna Declaration and Program of Action, racism and the follow-up and implementation of the Durban Declaration and Program of Action, and technical assistance.<sup>173</sup>

The most controversial aspect of the Council's new agenda is item No.7, dealing specifically with the human rights situation in Palestine and other Occupied Arab Territories. This reference to a specific Country situation contradicts the principles of impartiality, non-selectiveness and universality which should inform examination of Country situations. Other Country situations will be dealt with under item No. 4 on 'human rights situations that require the Council's attention'.

<sup>167</sup> The code of Conduct of the SPs is available at <http://www2.ohchr.org/english/bodies/chr/special/index.htm#code> (visited on December 15, 2007). As stressed by Amnesty International, this requirement being too imprecise might negatively affect the effectiveness and independence of the procedures depending on how it is interpreted. Amnesty has also stressed that the Code has not strengthened the Procedures but only *regulated* their working methods, see *supra* note 150.

<sup>168</sup> Resolution 5/1 paragraph 65.

<sup>169</sup> *Ibidem*, paragraph 75.

<sup>170</sup> *Ibidem*, paragraph 66.

<sup>171</sup> Resolution 5/1, paragraphs 85-109.

<sup>172</sup> Amnesty International has noted that "the agenda and program of work [...] provide] a good base from which to make the Council's work sufficiently predictable to enable effective participation by states and relevant stakeholders and sufficiently flexible to allow the Council to address human rights situations in an effective and timely manner".

<sup>173</sup> Resolution 5/1, Section V.

The methods of work of the Council present a further contentious issue pertaining to the analysis of Country situations. That is, the introduction of a sort of 'conditional clause' for the adoption of a Country resolutions whereby states proposing the texts shall have to 'secure the broadest possible support for their initiatives (preferably 15 members) before action is taken'.<sup>174</sup> This is the result of a compromise the UE was able to reach to contrast the above mentioned China's attempts to make the adoption of Country resolutions virtually unattainable. While it is not possible to predict how this new stipulation will affect the consideration of Country situations and the appointment of Country experts, it is not difficult to imagine that the OIC and states like China and Cuba will be very active in using the 'broadest possible support/15 members' requirement to sabotage negotiations for the adoption of Country resolutions. The very unknown in this regards is how successfully pro-human rights states will be in framing diplomatic strategies capable of triggering the necessary political support for Country resolutions.

## Conclusions

The establishment of the HRC marks a topical development in the law and practice of international organizations. From a legal point of view, the creation of the new GA subsidiary organ epitomizes one of the most current trends in International Law, that of a 'constitutional approach'<sup>175</sup> to global governance. That is, an approach fundamentally aimed at regulating international organizations' behaviour, setting legal limits to the exercise of their powers, and predicated on the premise that 'politics is inevitable in international life', or better, the very 'existential condition'<sup>176</sup> of international relations.

From the point of view of human rights promotion and protection, there are no doubts that the establishment of the HRC was needed. The old CHR, although profoundly contributing to human rights through standard setting and the creation of the system of the SPs, has in many respects weakened and discredited the human rights activity of the UN. The establishment

of the HRC and the overall UN reform process was meant to be a long awaited starting point of a new phase for the activity of the UN in the field of human rights.

GA Resolution 60/251 establishing the HRC enshrines the above expectation and quest for change. It introduces some innovative aspects in the structure and mandate of the HRC that may mark a true difference vis-à-vis the CHR: the higher institutional standing of the Council within the UN system; the convening of several sessions during one year, as opposed to the holding of only one three-week session per year; the UPR, arguably, the most remarkable addition to the HRC's terms of reference. Besides, the suspension by a two-thirds majority of the GA of a HRC's member state that commits gross and systematic violations of human rights is another noteworthy aspect. Although it may be argued that the suspension mechanism will seldom be put in practice because of the difficulty in mustering the 'super majority' envisaged in GA Resolution 60/251, the mere possibility of being suspended from the Council, given the damaging political and diplomatic repercussions it may produce for the Country concerned, may actually turn into an incentive for states to abstain from committing grave violations of human rights.

The above points are merely illustrative of the HRC's potential: the very test of what the new body will accomplish and whether it will be better than the old CHR rests on the critical issues of membership and fulfilment of mandate.

As far as membership is concerned, it is clear that it is the GA that has the primary responsibility in electing qualifying members. However, with states that have poor human records leading the charge, the Council has avoided criticizing even the most abusive governments, and has failed to take concrete action regarding human rights violations in places like Iran, Uzbekistan, Zimbabwe, or Colombia. Criteria for membership should have been far more specific. It is hoped that the GA will take this into account when reviewing the work of the Council in 2011.

Conversely, tangible indications of modalities of implementation of the Council's mandate have emerged from its early

<sup>174</sup> Resolution 5/1, paragraph 117 (d).

<sup>175</sup> KLABBERS, J. (2004): "Constitutionalism Lite", *International Organizations Law Review*, Vol. 1, n.º 1, p. 55.

<sup>176</sup> *Ibidem*, p. 57.

practice. So far, the discussion in the HRC has focused on how to deal with human rights rather than to scrutinize state human rights performances, which is not very understandable under the present circumstances; altogether five special sessions have been convened during the first eighteen months since the establishment of the HRC to address grave human rights situations and concerns has been voiced that time effectively allocated to the human rights debate, to the dialogue with the SPs, and to the participation of NGOs has been actually shortened.<sup>177</sup>

Overall, the early practice of the Council provokes a sensation of *déjà vu*. The regular and emergency sessions of the body have dramatically re-proposed the issue of politicization and the same impairing dynamics of the CHR's practice that the very establishment of the Council was supposed to overcome.

Besides, OIC attitude towards Country Procedures illustrates another serious problem. That is, the absence of leadership on the part of EU member states and Latin American countries, i.e. those states that supported the creation of a stronger, more effective Council, and 'the willingness of moderate [Asian and African] states to side with regimes that have notoriously bad human rights records and nefarious agendas'.<sup>178</sup>

As said, institution building is by far the more important achievement in the first year of practice of the Council, particularly concerning the UPR. It presents, however, disconcerting aspects concerning consideration of Country situations. Some member states have made very clear their aversion toward this working practice that has characterized the practice of the CHR since the end of the sixties. The Council's methods of work and the review of the SPs do not set forth rules and principles preventing states from jeopardizing serious scrutiny Country situations. On the contrary, they seem to confirm a very frail and politicized approach to these issues that will inexorably be reflected in the practice of the Council and compromise its credibility.

To conclude, it is imperative that the Council lives up to the expectations and hopes for a renewed and credible human

rights activity under the auspices of the UN. There is a widespread view that, if the UPR turns out to be successful, there is still a chance for the HRC to develop as an authoritative and leading human rights body.

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<sup>177</sup> Between January 23 and 24, 2008 the HRC held a sixth emergency session in order to deal with Israeli military incursions in the Occupied Palestinian Territories, including the recent ones in occupied Gaza and West Bank town of Nablus. For further information visit the following website

<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/6/index.htm> (last visited on February 26, 2008).

<sup>178</sup> Hicks, *supra* note 104.

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