

*The New United Nations Human Rights Council:  
What Has Changed? What Can Change?*

On 15 March, 2006, the United Nations General Assembly (UNGA) overwhelmingly approved the creation of new body to address human rights issues and improve international responses to human rights violations (UNGA Resolution 60/251, 2006). The new Human Rights Council (HRC) took over the much discredited United Nations Commission on Human Rights (CHR) in an attempt to de-politicize the United Nations' (UN) approach to this area. The old Commission ceased its work on 16 June 2006, and only three days later the new Council met for the first time. At the time of writing this article, the new body is holding its second regular session in Geneva – from 18 September to 6 October – while two special sessions were already held during the summer of 2006 to take up on human rights violations in the occupied territories and during the Lebanese conflict.

In light of the acute criticism over the scope and depth of the real reform that the HRC is bringing to the area of human rights, the purpose of this article is to offer a positive – albeit moderately optimistic – assessment of the new body and its impact on the field of human rights defense. Such interpretation is based on both the acknowledgement of the improvements that the HRC has

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introduced with respect to the CHR, and the recognition of the intrinsic limitation that our current international system imposes upon the feasibility of more ambitious plans to further strengthen our tools and mechanisms to protect human rights. While a better, more robust human rights system would have been desirable, the reality is that it was not attainable given the prevalence UN members states give to their political agendas over the wellbeing of the international system. That is why, for the time being, energies should be concentrated on supporting the HRC and maximizing the opportunities it offers to advance and enhance human rights, rather than on undermining the new body on the ground that it has contributed little to improve the previous CHR.

In order to illustrate the many hurdles in the way of the new HRC, I will begin by offering a brief overview of the intricate road that led to its establishment. Such account should help understand my pessimism about the prospects for a better human rights system; that is, until states change their attitude to this issue and opt for working proactively, rather than approaching human rights with a politicized agenda. Then, I will contrast both the HRC and the CHR, in an attempt to demonstrate that despite the scaled back reforms, the reality is there has been a significant advancement with respect to the previous Commission. Finally, I will comment the challenges ahead, stressing the fact that in the end it is up to member states to make the most of the opportunities the new HRC offers in enhancing the protection of human rights.

#### THE LONG AND WINDING ROAD

Creating the HRC was an arduous and complex process that culminated in the spring of 2006, but whose first stone was laid more than a year earlier, in December 2004, with the publication of the report by the High Level Panel on Threats, Challenges and Change set up by UN Secretary General (UNSG) Kofi Annan. Previously, the erosion in the credibility enjoyed by the Commission as a result of the poor human rights records of its members – many of whom sought membership to protect themselves against scrutiny – led to much talk about the need for reform, but no action. The report by the High Level Panel was the first serious attempt by the UN itself to shape such aspiration by substituting the Commission with a new Human Rights Council and solidly place the reform of the UN human rights system at the forefront of world body's agenda (UNGA, A/59/565, paras.285-291).

Although the High Level Panel report included specific proposals on the HRC – such as the establishment of universal membership for the new Council, the compulsory designation of experienced human rights figures as heads of the national delegations, the creation of an advisory council of experts, and the production of annual reports and periodic reviews on the situation of human rights worldwide – the report's definition of the new body was still vague, and it envisioned its establishment as a long term goal. It was UNSG Kofi Annan who set forth a more comprehensive, detailed plan to establish the HRC in his subsequent document *In Larger Freedom*, published in March 2005. Annan's proposal was an ambitious one: it stipulated a new body that would ideally be a principal organ of the UN, or at least a standing

subsidiary body of the UNGA, with a much smaller number of members elected by a 2/3 majority of the UNGA and abided by the highest human rights standards. His proposal also contemplated giving the Council a broader implementation mandate and means to respond to urgent breaches in human rights (UNGA, A/59/2005, para.183).

Further discussion at the UNGA during the Spring and Summer of 2005 paved the way to a progressive definition of the characteristics of the new body, following arduous negotiations brokered by the then UNGA President, Gabonese Jean Ping. Ping's effort concentrated in producing a final document that would translate Annan's blueprint on security, development and human rights into practical reform proposals that could be agreed upon by all UN member states. He hoped the final document would be solemnly adopted at the so called World Summit of September 2005, which celebrated the 60<sup>th</sup> Anniversary of the United Nations. Ping produced up to three drafts of the Outcome Documents for the summit- 3 June, 22 July, 10 August - none of which received full endorsement by UN members.

The last round of consultations following the August 10<sup>th</sup> draft document were particularly difficult, especially with the arrival to New York of John Bolton, President Bush's recess appointment as US Permanent Representative to the UN. Just three weeks before the opening of the World Summit, Ambassador Bolton opened Pandora's box. Bolton's more than 750 edits to the 38-page document circulated by President Ping proved a real last-minute blow to the delicate consensus brooked during the previous months, reopening the negotiations and creating an opportunity for spoilers like Algeria, Cuba,

Egypt, India, Iran, Pakistan and Venezuela to undermine deeper reforms that would have run against the interest of their governments.

Bolton's maneuver casts a shadow on his real commitment to work in favor of improving the UN (Schorr 10-12). His polemic deletion of all references to the Millennium Development Goals (MDGs), for instance, is hard to explain. It causes suspicion about the agenda of a man who once said that there is no such thing as the United Nations and the collapse of the ten top stories of the UN secretary building in New York would not make a bit difference (CNN, 2005).

The final 2005 World Summit Declaration was agreed to just hours before the Summit's start. Following a frantic final week of negotiations, it was a less ambitious document that weakened some of the reforms initially envisioned by the UNSG. With respect to human rights reform, it endorsed the creation of the HRC. But unlike initially intended, the declaration postponed the creation of the new body, tasking the UNGA with defining the specific issues of status, size, election mechanism, membership criteria, mandate, working methods and special procedures (UNGA, A/60/L.1, paras.157-160). As a consolation prize, the Summit agreed to double the budget of the Office of the United Nations High Commissioner for Human Rights (OHCHR), which has been coordinating human rights activities throughout the UN system since its creation in 1993. Other proposed reforms included the establishment of a Peacebuilding Commission, reinforcement of the development agenda and the Millennium Development Goals, enhanced counterterrorism efforts, reform of the UN management system, and implementation of the responsibility to

protect doctrine and stronger mechanisms to prevent genocide.

The Fall of 2005, therefore, witnessed again a frenetic diplomatic activity to define the final parameters of the new HRC. Negotiations began in New York in October 2005, under the leadership of Ping's successor as President of the GA, the Swedish Jan Eliasson. The process was even more intricate and divisive than the one leading to the World Summit, with backstage deals, compromises and maneuvers making very difficult the agreement over a final text. Six different drafts were considered during the negotiations, which extended over five months and encompassed more than thirty rounds of consultations. Many of the statements released by various UN Permanent Missions on the negotiations and their positions throughout the process reflect the complexity of the discussions and the difficulty to reach a compromise on the final text (Almqvist, 2006, p.1).

US Ambassador John Bolton was once more an obstacle to the talks, in sharp contrast with the leadership former US-UN representatives have usually exerted in this kind of situations, particularly as human rights champions since the creation of the UN. To begin with, out of the aforementioned thirty plus negotiating sessions over the HRC, Bolton only attended one, with Deputy Assistant Secretary of State Mark Lagon and other lower-ranking U.S. foreign service officials taking his place in a few others and the U.S. chair remaining empty at many meetings (Bolton Watch, 2006). The US Ambassador's threat to withhold US approval of the UN budget unless the UN institutions implemented substantial management reforms - couple with proposed US Congressional legislation to condition the payment of US dues to the UN on

the implementation of reforms, like the Hyde (H.R. 2745, 2005) and Coleman-Lugar bills (S. 1383, 2005) –precipitated the ongoing budgetary crisis and did not contribute to facilitate a favorable negotiation environment at the time. Finally, during the final stage of the negotiations in early 2006, Bolton pressed for the granting of permanent HRC membership to the five Security Council permanent members, a terrible measure that not only would have further alienated the G-77 against excessive power enjoyed by the so-called P-5, but would also have granted unchallenged representation at the Council to blatant human rights violators like China and Russia (The Economist, 2006:1).

Following a decisive campaign by human rights groups in the United States, it was the direct decision by US Secretary of State Condoleezza Rice to get directly involved in the negotiations that prevented Bolton from annihilating again the consensus reached over the characteristics of the new HRC at the last moment (Boston Globe, 2006). Although the US Ambassador still compared the proposed HRC to a “caterpillar” while arguing that the US could only accept a “butterfly” (The Economist, 2006:2), and despite the fact that the United States was one of the only four states to vote against the text of the resolution submitted by Eliasson to the GA on 24 February – the other three were Israel, the Marshall Islands and Palau, with Belarus, Iran and Venezuela abstaining to vote – the new Council was finally approved by the GA on March 15, 2006, with 170 favorable votes.

### WHAT HAS CHANGED?

While many question and boycott the HRC on the grounds that a better result could have been achieved, the many hurdles obstructing the creation of the body evidence that any other outcome was highly unrealistic. There is always a reason to believe that more could have been done; nonetheless, as the depiction of the complexity of the negotiations shows, the attainment of a better result was very difficult due to the politicized agenda of most - if not all - of the negotiating member states. Acknowledging that deeper and greater reforms would have always been desirable, the finest approach is to adequately assess the degree and quality of the change the HRC has introduced in the UN's human rights system.

To begin with, the Human Rights Council enjoys a higher profile and status than its predecessor, the Commission on Human Rights. Not only has the new body's stand been enhanced by becoming a subsidiary organ of the GA—the CHR reported to the less authoritative UN's Economic and Social Council (ECOSOC)—but its position could be further strengthened in five years, when the HRC's status is to be revised by the GA. Maybe then the Council could actually become a principal organ of the United Nations (UNGA 60/251, para.1).

More interesting and polemic is the issue of membership to the HRC. The main criticism of the CHR was that its credibility was totally challenged by the prolonged membership of notorious human rights abusers, including the surreal episode of Lybia holding the presidency of the body in 2003. As highlighted by SG Annan in *In Larger Freedom*, "States have sought

membership on the Commission not to strengthen human rights, but to protect themselves against criticism or criticize others.” (UNGA, A/59/2005, para.182). During the 2004 CHR’s session, it was evident that Sudan’s membership to the Commission would render ineffective any initiative to condemn and take action against Khartoum-sponsored repeated violation of human rights in Darfur. This state of affairs motivated the Security Council (UNSC) to assume the leadership and initiative on this issue, hence proving the CHR’s incompetence and excessive politicization.

The new mechanisms to prevent potential spoilers from seeking or attaining membership at the HRC are not as solid and efficient as initially intended, but still provide an important improvement with respect to the CHR. Council members are now elected by absolute majority (96 votes) by the General Assembly (all UN 192 member states), instead of simple majority by the 54-member ECOSOC. Moreover, HRC candidates are chosen by individual, direct vote, while in the past they were elected by acclamation within their regional groups. This new election mechanism brings greater transparency and legitimacy to the body. Candidates are also obligated to make public commitments to respect and promote human rights when running for a seat, a foreseen special scrutiny on the member’s human rights records is set, and members can now be suspended by a 2/3 majority vote if they engage in major and systematic human rights violations. In addition, tenure at the HRC is limited to two consecutive terms of three years each, guaranteeing a periodic renewal in membership that the term limitless CHR lacked.

The first elections to the HRC, held on May 9, 2006 are a good testimony of the moderately positive trend that the UN's human rights system is experiencing. The elections were reasonably competitive, with 64 candidacies competing to occupy the Council's 47 seats and two-run-offs being needed to fill seats in the Eastern European region. Although some countries with a poor human rights record still got elected – Russia, China, Cuba, Pakistan, Tunisia, Saudi Arabia – they are now bound by their pledges to uphold the highest standards of human rights and to cooperate with the Council. Notable human rights violators seeking election, including Iran and Venezuela, were rejected. Overall, the new membership showed a slightly better human rights record than the preceding Commission: while in 2005 countries with very poor records on human rights accounted for 17 percent of the Commission's membership, the percentage was reduced to 10 percent in the new Council (Campaign for a UN Democracy Caucus, 2006).

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MEMBERSHIP TO THE HRC BY REGIONAL GROUPS (Elected on May 9, 2006)	
AFRICA (13)	Algeria, Cameroon, Djibouti, Gabon, Ghana, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia.
ASIA (13)	Bahrain, Bangladesh, People's Republic of China, India, Indonesia, Japan, Jordan, Malaysia, Pakistan, Philippines, Saudi Arabia, South Korea and Sri Lanka.
E. EUROPE (6)	Azerbaijan, Czech Republic, Poland, Romania, Russian Federation and Ukraine.
L. AMERICA (8)	Argentina, Brazil, Cuba, Ecuador, Guatemala, Mexico(*), Peru and Uruguay.
W. EUROPE (7)	Canada, Finland, France, Germany, Netherlands, Switzerland and the United Kingdom.
(*) President	

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A more substantive improvement introduced by the HRC is the creation of a Universal Periodic Review mechanism (UPR) that will analyze the status of human rights in all UN member states, under the principles of objectivity, universality, reliability, and cooperation. Although the final parameters of the UPR are still being defined, the fact that now all UN members are subject to scrutiny will prevent the double-standards in the selection of the countries examined by the Council, and hopefully end the old practice by countries to seek membership in order to escape censorship (UNGA 60/251, para.5). The Council's member's obligation to cooperate with the body should also operate as a membership deterrent for serious human rights violators, whose failure to cooperate could propitiate an embarrassing expulsion from the body.

The HRC also has the virtue of retaining and reaffirming some of the best tools of the CHR, including the so-called special procedures, the right to issue country-specific resolutions, and the granting of access to its works and sessions to human rights NGOs. In particular, the special procedures will be subject to review during the first year of the HRC, a period that hopefully not only will confirm, but enhance these tools. The procedures were one of the great strengths of the former CHR, and encompass the invaluable array of independent expert – rapporteurs, representatives, working groups – that first the CHR and now the HRC use to investigate complaints on specific human rights violations (country mandates) and analyze global human rights issues (thematic mandates). Currently, a working group is assessing the special procedures' effectiveness, and is expected to produce recommendations on how to improve them.

It must be pointed that the HRC is also in better position than its predecessor to promptly respond to situations of gross and systematic violations of human rights. This aptitude is the consequence of the Council's ability to meet throughout the year and the lowered requirements to call special sessions. As opposed to the CHR, which met only once a year for a mere six weeks, the HRC is mandated to hold no fewer than three regular sessions a year, with the total number of annual sessions lasting no less than 10 weeks total. For its part, calling special emergency sessions only requires the approval by 1/3 of its members, while the defunct CHR needed a majority of votes to do so. These two innovations will prove very valuable at making the Council a more successful body to deal with emergency situations and confront emerging threats to human rights in a rapidly changing international environment.

Finally, it is worth underlining that the HRC has the potential to make an advancement in human rights that is still to be defined, and will only translate into real actions as the Council carries out its activity. In this regard, the first HRC session, held in Geneva on 19-30 June 2006, offers a good indication of the path to follow, with the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (E/CN.4/2005/WG.22/WP.1/REV.4, 2006) and the agreement on a UN Declaration on the Rights of Indigenous Peoples (E/CN.4/2006/79, 2006). The decision to create two working groups to review and improve the special procedures and to define the characteristics of the new UPR mechanism are also positive steps that remind us that, far from being an accomplished task, the reform of the UN

human rights system just started with the establishment of the Council.

### **WHAT CAN CHANGE?**

Although many things have changed in the UN human rights system across the last few months, many more changes are possible depending on the Council's performance during its first year. These initial stages will determine the HRC's future agenda and working practices, shaping the scope and strength of the new UPR mechanism and the mandate enjoyed by the experts that support the Council in its research and activities. The ongoing 2<sup>nd</sup> session (18 September - 6 October) and subsequent 3<sup>rd</sup> and 4<sup>th</sup> regular sessions (27 November - 8 December and 12 March - 6 April) will determine if the Council will be equipped with the tools, endorsement and resources necessary to really exert an exhaustive monitoring of human rights.

With regard to the issue of membership, the 9 May elections show that the slight improvements introduced do not fully prevent the accession of human rights violators to the HRC. Until governments with a positive human rights record decide to put aside their individual, immediate, shortsighted political interest and work together to facilitate the selection of the best possible candidates, membership will remain the Council's weak flank, consequently limiting the effectiveness of the whole UN human rights system. Coordinated efforts to keep away bad candidates and encouragement to make future elections more competitive could help prevent an erosion similar to the one experienced by the CHR during its final decade.

The recommendations of the two working groups tasked with the reform

of special procedures and definition of the new UPR will play a vital role at determining whether both mechanisms are truly functional and have the ability to hold states accountable to their commitments and obligations. In the particular case of the UPR, governments and NGOs have put forth various proposals during the informal consultations held since July. Most civil society groups emphasize that the periodic review should not substitute the Council's work at addressing emerging human rights situations, and should be carried out in close coordination with the Office of the High Commissioner for Human Rights (OHCHR) without duplicating the work of other UN bodies (NGOs Letter to Community of Democracies members, 2006). There is less agreement over other issues, including the periodicity of the reviews, and the *modus operandi*. In any case, it is clear that for the UPR to be effective it should be led and carried out by independent expert panels in specific sessions, its periodicity should not be exceeded four or five years, it should be based on the widest possible range of reliable sources, and it should include follow up mechanisms to ensure that its specific recommendations are implemented. If anything, implementation and better accountability are the keys to really improve the UN human rights system.

The Council's best tool to call attention and respond promptly and firmly to particular cases of gross human rights violation is the holding of special sessions on urgent situations. The ongoing genocide in Darfur certainly demands such treatment, as do the critical situations in North Korea, Uzbekistan, Burma, Sri Lanka, Zimbabwe, and Democratic Republic of Congo. On a more thematic level, the HRC should devote a special session to examine

current efforts by many governments to introduce legislation restricting freedom of association and undermining the activity of both local and foreign human rights activists in their territory.

The issuing of a specific country resolution inevitably leads us to one of the HRC's most notorious failures during its brief existence: the adoption of two resolutions condemning Israel's violation of human rights in the occupied territories and Lebanon. While the reprobation of Tel Aviv's record is plausible, the selectiveness of Israel as the sole subject of criticism renews many observers' fears of politicization of the HRC, much like the CHR. The Council's criticism over Israel should not cease, but it should be accompanied by the aforementioned condemnation of other human rights emergencies. At the same time, it is unprincipled and deceitful to blame Israel's role in Lebanon without also censuring Hezbollah, a one-sided approach that does a little service to the Council's opportunity to win supporters and silence those who question its credibility.

In this same line, one of the main critics of the HRC, the United States, must be positively engaged in the work of the new body in order to give it the strength, authority and muscle that only the most powerful and influential UN member can provide. While the US was one of the only four countries that voted against the establishment of the Council, and despite Washington's decision not to seek a seat in the new organ, it is very important that the HRC propitiates a fruitful relation with Washington. This is a particularly challenging task given the erosion in human rights within the United States under the Bush Administration. Here, the HRC members will have to do a real

balancing act and while responsibly condemning practices such as Guantanamo, the trial of civilians by military tribunals or the rendition and CIA secret prisons program, they should prevent such condemnations from becoming politicized, as shown by the case of Israel. A constructive, non-confrontational approach to such issues could actually stimulate a more fluid dialogue that could eventually lead to a rehabilitated commitment by Washington to the HRC under a Democrat-control Congress. Otherwise, a dysfunctional HRC would only help reinvigorate the already strong camp of UN enemies within US politics, many of who argue that a credible body to protect human rights can only be created outside the UN framework (Schaefer, 2006).

Last but not least, much can change if the Council proves effective at engaging not only powerful countries like the United States, but also key actors like civil society groups and even other UN bodies and agencies. Specifically, the HRC should establish a functional system of regular consultations. The Council should be more active at encouraging and assisting the participation of NGOs from the developing world in its sessions and mechanisms, a noteworthy deficit in a CHR that otherwise promoted a good level of NGO input. With reference to other UN players, it is imperative that the Council builds solid collaboration channels and a close working partnership not only with the OHCHR and other various human rights-related agencies, commissions and treaty monitoring agents, but also with principal organs like the Security Council and the ECOSOC, together with the also recently created International Criminal Court (ICJ). Such cooperation could

help mainstreaming and advancing the profile of human rights in the UN agenda. It would also provide a better approach and enhanced tools to protect human rights in an era in which they are intimately linked to global security and economic development.

### CONCLUSION

Much has been accomplished in the last two years with regard to the reform of the UN human rights system. Although the changes were not as radical as initially intended, in the last months of 2004 very few would have thought that two years later a new HRC would be functioning, with ongoing working groups that have the potential to make the Council's mechanisms and procedures more effective. This article has tried to interpret and assess the potential impact the new HRC could have on the field of human rights putting the creation of the body in the adequate perspective. The description of the frequently underestimated complexity of the negotiations process that led to the establishment of the Council has helped illustrate that the final product is the result of multiple compromises. Diverging interests had to be accommodated for the HRC to see the light of day, many of which run against the establishment of a stronger human rights sentinel. In such an environment it was hardly possible to create much better institutions and mechanisms.

By contrasting the HRC and its predecessor, the CHR, I have emphasized that there has been a significant institutional improvement. The body that gave the world the Universal Declaration of Human Rights under the leadership of Eleanor Roosevelt became the victim of its own success: as it gained relevance

throughout the years, human rights abusers exploited the loopholes in the system, seeking membership to avoid condemnation (Roth, 2005). The new HRC enjoys enhanced elements to fill those gaps, such as the toughening of the membership election criteria, the new universal periodic review, the increase in the number of sessions or the possibility to suspend members, just to mention a few.

However, the creation of the HRC is only part of a story that is still to be written. During this first year of its existence, members will make critical decisions that will determine the Council's future effectiveness. On the one hand, further improvements are attainable if the open opportunities to create a credible, practical UPR mechanism and to strengthen the special procedures are maximized. On the other hand, the Council itself has to prove its renewed spirit by avoiding politicization, engaging key players like the US, NGOs and other UN organs and agencies, and responding firmly to ongoing threats to human rights. In both fronts, member states have the final word to confront the challenges and help turn the HRC into a success, "bridging the gap between the excess over human rights in the halls of the United Nations, and its sobering realities on the ground" (OHCHR, A/59/2005.Add.3).

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United Nations Democracy Caucus website: [www.democracycaucus.net](http://www.democracycaucus.net)

Bolton Watch Blog: <http://boltonwatch.tpmcafe.com>