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The New UN Human Rights Council

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Human Rights *Brief*

Center for Human Rights and Humanitarian Law



A Legal Resource for the International Human Rights Community

Perspectives on the United Nations Human Rights Council

- 1 | The New UN Human Rights Council** MORTON H. HALPERIN AND
DIANE F. ORENTLICHER
- 5 | Will the Human Rights Council Have Better Membership
than the Commission on Human Rights?** LAWRENCE C. MOSS
- 6 | The UN Human Rights Council and the
Inherent Dignity of the Human Person** REPRESENTATIVE CHRIS SMITH
- 8 | The Politics of Depoliticization: International Perspectives
on the Human Rights Council** HADAR HARRIS
- 9 | Scrutinizing Countries: The Challenge of Universal Review** FELICE D. GAER

Also in this Issue

- 12 | Privatization of Corrections: A Violation of U.S. Domestic Law,
International Human Rights, and Good Sense** IRA P. ROBBINS
- 17 | Analyzing Prison Sex: Reconciling Self-Expression with Safety** BRENDA V. SMITH
- 23 | Mistakes in the Making: The Failure of U.S. Immigration Reform
to Protect the Labor Rights of Undocumented Workers** LILAH S. ROSENBLUM
- 28 | Victims of Terror Stopped at the Gate to Safety: The Impact
of the “Material Support to Terrorism” Bar on Refugees** JENNIE PASQUARELLA
- 34 | The Convention on the Elimination of All Forms of
Discrimination against Women and the Status of
Implementation on the Right to Health Care in Nigeria** ANIEKWU NKOLIKA IJEOMA
- 40 | Cutting the Hangman’s Noose: African Initiatives
to Abolish the Death Penalty** TIM CURRY
- 46 | Many Guantánamos: A Reflection on the Work of
Human Rights Clinics** RICHARD J. WILSON
- 49 | Columns**

The New UN Human Rights Council

by Morton H. Halperin and Diane F. Orentlicher

ON MARCH 24, 2006, the United Nations Human Rights Commission (Commission or CHR) briefly met for its 62nd and final session. In a four-paragraph resolution, the Commission decided “to conclude its work in accordance with” action taken by the UN General Assembly nine days earlier and to refer its outstanding work to a newly established Human Rights Council (Council) for consideration at the Council’s inaugural meeting in June 2006.¹

The General Assembly’s decision to replace the 60-year-old CHR with the Council evolved from a proposal put forth in a December 2004 report by the High-Level Panel on Threats, Challenges and Change, a commission appointed by Secretary-General Kofi Annan to report on all aspects of United Nations reform.² As the panel noted, in recent years the Commission had been widely discredited as states with poor human rights records — those most often mentioned included Libya, Sudan, Zimbabwe, and Cuba — were elected to serve on the 53-member body. “We are concerned,” the panel wrote, “that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.”³

Skeptical of proposals to reform the Commission by introducing rigorous membership criteria, the Panel recommended instead that membership in the CHR be expanded to include all UN Member States.⁴ With a view toward enhancing the Commission’s professionalism and ensuring that states did not escape scrutiny as a result of politicized deliberations and voting, the panel also urged that the CHR “be supported in its work by an advisory council or panel” comprising “some 15 individuals, independent experts,”⁵ and that the High Commissioner for Human Rights prepare an annual report on human rights worldwide, which could “serve as a basis for a comprehensive discussion with the Commission.”⁶

In a report published in March 2005, “In Larger Freedom: Towards Development, Security and Human Rights for All,” Secretary-General Annan endorsed many of the High-Level Panel’s reform proposals.⁷ Rather than try to reform the Commission, however, the Secretary-General proposed replacing the discredited body “with a smaller standing Human Rights Council.”⁸ To enhance the body’s prestige within the United Nations, Annan proposed that it be either “a principal organ of the United Nations or a subsidiary body of the General Assembly.”⁹ The CHR, in contrast, was a subsidiary body of the Economic and Social Council (ECOSOC). In either case the new Council’s members should “be elected directly by the General Assembly by a two-thirds majority of members present and voting.”¹⁰ Although Annan did not elaborate on the reasoning behind this proposal, its premise was that states with dismal human rights records would not likely garner the support of two-thirds of the General Assembly.

Notably, Annan’s proposal made no mention of geographic representation, an informal but crucial consideration in the election of members to the CHR. Instead, the principal criterion for membership would be a candidate state’s commitment to human rights. “Those elected to the Council,” Annan proposed, “should undertake to abide by the highest human rights standards.”¹¹ Finally, as a standing body, the Council would be able to respond year-round to ongoing abuses; in contrast, the Commission met regularly just once a year for six weeks.

In a speech before the CHR on April 7, 2005, the Secretary-General expressed his support for an innovative function — peer review by the new Council. In his words:

[The new Council] should have an explicitly defined function as a chamber of peer review. Its main task would be to

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evaluate the fulfillment by all states of their human rights obligations. This would give concrete expression to the principle that human rights are universal and indivisible....

Under such a system, every Member State could come up for review on a periodic basis. Any such rotation should not, however, impede the Council from dealing with massive and gross violations that might occur. Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.¹²

In a "plan of action" prepared pursuant to a request set forth in "In Larger Freedom," the UN's High Commissioner for Human Rights, Louise Arbour, expressed her strong support for "the Secretary-General's call for the Commission to be replaced by an upgraded Human Rights Council"¹³ and offered several views concerning its effective operation. First, she "strongly support[ed] the proposal that country scrutiny be exercised through a system of peer review ... built on the principle of universal scrutiny, whereby all states submit to a review of law and practice concerning their human rights obligations."¹⁴ She also affirmed the Secretary-General's view that "a new Human Rights Council should ... continue the practice of the Commission regarding access for non-governmental organizations (NGOs) and preserve the independent role of the special procedures."¹⁵

The special procedures to which Madame Arbour referred comprise special rapporteurs, individual experts, and working groups that have been appointed by the CHR to address either thematic issues, such as torture and enforced disappearance, or countries whose human rights records raise special concerns. Although the proliferation of mandates and uneven quality of reports by special procedures have focused attention on the need for further rationalization of their work,¹⁶ it is widely agreed that the special procedures represented a key strength of the Commission.

By the time heads of state convened to consider various UN reform proposals at a summit session of the General Assembly in September 2005, the Secretary-General's own credibility had been eroded, diminishing his ability to marshal support for his bold vision of an effective Human Rights Council. The organization he led had been buffeted by a series of scandals, the most damaging of which involved rampant corruption in the United Nations oil-for-food program in Iraq. In any case, the Secretary-General had probably been overly optimistic about prospects for forging consensus in support of the proposed Council.

Meanwhile, John Bolton, an outspoken critic of the United Nations, became the Permanent United States Representative to the United Nations in August 2005. After Bolton failed to gain confirmation from the U.S. Senate, President George W. Bush gave him a recess appointment as U.S. ambassador to the United Nations. Soon after taking up his new post, Ambassador Bolton thwarted the effort, then well under way, to arrive at a consensus position on reform issues by insisting on direct negotiations between countries. The U.S. delegation's approach was a key factor behind a drastic scaling back of the ambition of UN reform on many issues, including the creation of a new Human Rights Council.

When heads of state adopted a consensus statement on September 20, 2005, all that remained of earlier, largely-agreed-upon text relating to the new Council was a charge to the President of the General Assembly, Swedish diplomat Jan Eliasson, to secure adoption by the General Assembly of a resolution creating a new

Human Rights Council in a transparent manner. All of the concessions that the "spoiler states" had made to get language they wanted on other issues were gone.

Picking up the proverbial pieces, Eliasson appointed the Permanent Representatives of South Africa and Panama to conduct negotiations on his behalf. The negotiations that ensued were contentious. Going into the summit session, there had been broad agreement that country-specific resolutions had become too politicized at the Commission. Yet there was no consensus on what this meant. Some critics of the CHR cited China's ability to delay consideration of resolutions criticizing its human rights record year after year. Others asserted that the Western bloc, led by the United States, pushed resolutions against what it considered to be rogue regimes while blocking resolutions on countries that supported the United States in the "war on terror." In the eyes of many observers,

In June 2006 the United Nations Human Rights Council assumed its duties as successor to the Human Rights Commission, a body that served for more than 50 years as the UN's principal mechanism and international forum for the promotion and protection of human rights. On March 15, 2006, the UN General Assembly voted overwhelmingly to replace the Commission, which had come under increasing criticism in recent years, with the 47-seat Council. In focusing on this milestone, the articles collected in this issue of the *Human Rights Brief* offer various perspectives on both the process of the Council's creation and the challenges this important body will face in the years ahead. We hope that these articles will spur debate on the Council's future and, in the words of UN Secretary General Kofi Annan, help "breathe new life into all our work for human rights."

Christian M. De Vos and Erin Louise Palmer
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the CHR's annual spring meeting in Geneva was the setting for ritual disputes that did not provide significant help to those suffering human rights abuses.

For the next few months, three issues dominated the negotiations: how members of the new Council would be elected, how often the Council would meet, and how it would deal with country-specific matters. It was comparatively easy to reach consensus on the latter two issues. With respect to meetings by the Council, General Assembly Resolution 60/251, which set forth the terms on which the Council would operate, provided that the General Assembly

Decides ... that the Council shall meet regularly throughout the year and schedule no fewer than three

sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council.¹⁷

As for country-specific matters, although the General Assembly directed the new Council to undertake “a universal periodic review ... of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment of all States,”¹⁸ it made clear that the Council could also single out gross violators for special scrutiny.¹⁹

Widely-accepted language was also developed to ensure that non-governmental organizations had essentially the same access to the Council that they had enjoyed vis-à-vis the Commission²⁰ and to preserve the role of special procedures while reviewing and, “where necessary,” improving and rationalizing “all mandates, mechanisms, functions and responsibilities” of the CHR.²¹

In addition, by providing that the Council should “[m]ake recommendations to the General Assembly for the further development of international law in the field of human rights,”²² the resolution sought to ensure that the Council would continue to perform one of the CHR’s singular successes — the development of effective human rights norms. Indeed, long before the Commission developed implementation machinery, it earned global respect for its role in developing norms. As the High Commissioner for Human Rights observed at the CHR’s final session, the instruments comprising the International Bill of Human Rights, developed by the CHR relatively early in its history, “were and are ground breaking human rights instruments, maybe the most famous contribution ever made by the United Nations to the wellbeing of the whole of mankind.”²³ And, Madame Arbour continued, the Commission “steadily continued to set standards on a wide range of human rights issues,” a contribution that continued through the CHR’s last full session.²⁴

Although it proved relatively easy to forge consensus on the new Council’s norm-setting role, the issue of selection criteria and processes remained contentious to the end of the negotiating process in New York. During the summit session it quickly became apparent that there was little support for abandoning the criterion of geographic representation.²⁵ It also became clear that the reform package would need to address an imbalance in representation on the CHR, in which more seats were held by states belonging to the Western European and Others Group (WEOG) and the Latin American and Caribbean Group.²⁶

Despite general agreement that members of the new Council should be elected by the General Assembly (rather than by ECOSOC), there was little support for a Charter amendment creating a new primary body. The new Council will be a subsidiary organ of the General Assembly.²⁷

The most intensive debate centered on election procedures. The United States, the European Union (EU), and like-minded states pressed for a process that would prevent the election of egregious rights offenders but could not agree on what the election procedures should be. To the very end of negotiations, the United States pressed for a provision banning states that had been sanctioned by the UN Security Council for human rights violations or for supporting terrorism. Opponents of this proposal noted that this criterion would not prevent the election of most countries to which the U.S. government objected and argued that it had no

chance of approval because the General Assembly would not imaginably approve a provision that, in the view of many states, ceded the Assembly’s authority to the Security Council.

The EU advanced a proposal pursuant to which each regional bloc would be required to put forward more countries than the number of seats allocated to the region to ensure that the General Assembly could make a meaningful choice and exclude the worst offenders. Its own experience with this approach led the United States to reject this proposal. In 2001 the United States was excluded from the Commission — the only time this had happened in the Commission’s history — when WEOG presented more candidates than the number of positions on the Commission committed to WEOG states.

The United States supported the proposal put forth by the Secretary-General in “In Larger Freedom” pursuant to which the General Assembly would elect members to the Council by a two-thirds vote. This proposal was appealing in part because it originat-

“In marked contrast to membership in the [Human Rights Commission], membership in the Council is subject to explicit human rights criteria. In electing members, Member States are to ‘take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.’”

ed with the Secretary-General rather than the Western bloc. But it also had many opponents. Some states with poor human rights records, including Cuba, Egypt, and Algeria, feared that the two-thirds threshold would keep them off the Council. Some argued that the proposal violated General Assembly rules, which provide for election to key UN organs, with the exception of primary organs like the Security Council, by majority vote. Some relatively small states that are strong supporters of human rights feared that countries that favored a weak human rights body would keep them off the Council. After all, the two-thirds requirement would allow one-third plus one states to bloc a candidate country’s nomination.

Some officials in the U.S. government reportedly feared that, in the face of international criticism of its detention policies at Guantánamo and other facilities, its practice of “extraordinary rendition” of terrorism suspects, and the abuses committed by U.S. forces at the Abu Ghraib detention facility in Iraq and elsewhere, the United States would not be able to get the support of two-thirds of the members of the UN.

In February 2006 the President of the General Assembly presented a compromise draft that was approved by the Assembly on March 15, 2006. The new Council will have 47 members, “which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly.”²⁸ In marked contrast to membership in the CHR, membership in the Council is subject to explicit human rights criteria. In electing members, Member States are to “take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.”²⁹ Members elected to the Council must “uphold the highest standards in the promotion and protection of human rights ... fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership.”³⁰ Further, the General Assembly can, “by a two-thirds majority of the members present and voting[,] ... suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.”³¹

Most states agreed with President Eliasson that this was the best language that could be obtained in the existing climate and that it was urgent to complete agreement before the Commission

held its next meeting. The United States, however, did not. Ambassador Bolton expressed his concern about many provisions of the text while refusing to state what changes would lead to U.S. support for the resolution and again called for direct country-to-country negotiations. There was little if any support for this position, and in the end the Assembly adopted the resolution creating the new Council by a vote of 170-to-4, with only the U.S., Israel, Palau, and the Marshall Islands voting against the resolution and three states, Iran, Belarus, and Venezuela, abstaining.

In the period leading up to the vote many states sought to persuade the United States to vote in favor of the resolution by pledging to work within regional blocs to avoid the selection of states with poor human rights records and to vote against them if they stood for election, whether nominated by a regional caucus or not. The U.S. government held back from seeking to organize this effort for fear that doing so would imply a commitment to vote for the resolution if there were enough public pledges.

After the vote many NGOs and like-minded states began an effort to persuade states with strong human rights records to stand for the Council and commit themselves not to vote for states with poor human rights records. On April 6, 2006, the United States announced that it would not stand for election to the first session of the Council but would support countries it deemed worthy of membership and would “likely” stand for election next year.³² Some observers have speculated that the United States’ decision was influenced by concerns that American abuses in Abu Ghraib and Guantánamo Bay could prevent its election under the new standards for membership.

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ENDNOTES: The New UN Human Rights Council

¹ *Procedural resolution on the closure of the work of the Commission*, U.N. Doc. E/CN.4/2006/L.2, ¶¶ 2, 4 (Mar. 27, 2006), available at <http://www1.umn.edu/humanrts/closure.html> (accessed Apr. 11, 2006). Elections for the new Council will take place on May 9, 2006. See U.N. Doc. A/RES/60/251, ¶ 15 (Mar. 15, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement> (accessed Apr. 11, 2006).

² Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Changes, *A More Secure World: Our Shared Responsibility* (Dec. 2, 2004), available at <http://www.un.org/secureworld/> (accessed Apr. 11, 2006).

³ *Id.* at ¶ 283.

⁴ See *id.* at ¶ 285.

⁵ *Id.* at ¶ 287.

⁶ *Id.* at ¶ 288.

⁷ Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* (Mar. 21, 2005), available at <http://www.un.org/largerfreedom/contents.htm> (accessed Apr. 11, 2006).

⁸ *Id.* at 45, ¶ 183.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Secretary-General’s Address to the Commission on Human Rights* (Apr. 7, 2005), available at <http://www.un.org/apps/sg/sgstats.asp?nid=1388#> (accessed Apr. 11, 2006).

¹³ See *Plan of action submitted by the United Nations High Commissioner for Human Rights*, U.N. Doc. A/59/2005/Add.3, Annex, 3 (May 26, 2005).

¹⁴ *Id.* at 22, ¶ 92.

¹⁵ *Id.*

¹⁶ This need has been addressed at several meetings convened during the past year.

¹⁷ U.N. Doc. A/RES/60/251 at ¶ 10.

¹⁸ *Id.* at ¶ 5(e).

¹⁹ See *id.* at ¶ 3. The General Assembly “*Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon.”

²⁰ *Id.* at ¶ 11. In language that concerned many NGOs, however, the resolution added that the Council should ensure “the most effective contribution of these [and several other] entities.” *Id.*

²¹ *Id.* at ¶ 6.

²² *Id.* at ¶ 5(c).

²³ Louise Arbour, UN High Commissioner for Human Rights, *On the Occasion of the 62nd session of the Commission on Human Rights*, 4 (Mar. 27, 2006), available at <http://www.treatycouncil.org/PDFs/HC.OPENING.FINAL.pdf> (accessed Apr. 11, 2006).

²⁴ *Id.* at 4-5.

²⁵ G.A. resolution 60/251 provided that Council “membership shall be based on equitable geographical distribution.” UN Doc. A/RES/60/251 at ¶ 7.

²⁶ See *id.*

²⁷ *Id.* at ¶ 1.

²⁸ *Id.* at ¶ 7.

²⁹ *Id.* at ¶ 8.

³⁰ *Id.* at ¶ 9.

³¹ *Id.*

³² See Warren Hoge, *N.Y. Times*, “U.S. Says It Won’t Be Candidate for U.N. Rights Council” (Apr. 6, 2006).