

For the 16th ANZSIL Conference

**The New Human Rights Council of the
United Nations: Progress or Regress?**

by

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INTRODUCTION

On June 18, 2007 at 23:58, after exhausting debates, the United Nations Human Rights Council, an intergovernmental organ, adopted new human rights control procedures to replace those of its predecessor, the Human Rights Commission¹.

An analysis of this reform may, I hope, be of special interest to Australian Human Rights defenders. Indeed victims of human rights abuses in Asia and the Pacific have no regional or sub-regional avenues for redress. While Africa and the Americas have each their regional human rights organizations, and Western Europe has no less than three such bodies (the Council of Europe at Strasbourg, the European Union at Brussels, and the OSCE in Vienna), complainants of Asia and the Pacific must go straight to the United Nations after exhausting domestic remedies. In fact, the United Nations has been, and remains, influential to a sizeable extent in protecting human rights in several instances throughout this vast region: let us think of the indigenous issue in Australia and elsewhere, the restoration of the rule of law after the Khmers rouges in Cambodia, and the present problems in Myanmar.

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¹ The decision to replace the Human Rights Commission by the Human Rights Council had been made by General Assembly Resolution 60/251 of 15 March 2006. For the text of the new procedures adopted in 2007, see UN docs A/HRC/5/L.2 and L.3/Rev. 1 of 18 June 2007. For a fuller background, see for instance: Tardu M., «Le nouveau Conseil des droits de l'homme aux Nations Unies : décadence ou résurrection ? », *Revue trimestrielle des droits de l'homme*, n 72, October 1, 2007, Brussels.

The crisis of the UNHR Commission, latent for years, gained momentum from 2004. Criticism was made regarding its composition, which included – it was said – some notorious human rights offenders such as Libya and Sudan. Furthermore, strong reproaches were expressed regarding the alleged deterioration of a key procedure of the Commission: its annual public debate on human rights violations – with NGO participation – leading to investigation by independent “Special Rapporteurs” and to follow-up monitoring.

This procedure, it was claimed, had become increasingly fraught with “politicizing” and “unfair selectivity”, as witnessed, for instance, the cases of Chechnya, Darfur, Guantanamo, the Israeli-Palestinian issues, and Tibet.

Dynamics for change united diverse and often opposite motivations. Those who wanted a change for the best – many NGOs, experts, scholars, and some states such as Switzerland – found themselves allied with those who really sought a change for the worse, a paralysed “Potemkin-Village” UN system. The latter category included strange bedfellows : the Bush Administration, China, Russia, Cuba, several Arab and Islamic states, who had often been in fact the beneficiaries of the “selectivity” which they denounced.

Throughout the negotiations in 2004 and 2005, under the mediation of the General Assembly President and the UN Secretary General², the risk of a change for the worse” grew and become critical. Finally, the General Assembly replaced the Human Rights Commission by the Human Rights Council and instituted a compromise system which left many issues open, apparently avoiding the worst but showing few signs of clear progress.

The criticism had focussed only on the Human Rights Commission, bringing disrepute to the whole UNHR system. It disregarded the fact that the Commission was only one element of the whole and that other elements had shown rather positive results. Overview of these other elements : treaty bodies under the Convention, composed of independent experts exercising quasi-judicial functions; technical cooperation programmes; the United Nations High Commissioner for human rights; and the recent role of the Security Council and the International Penal Tribunals.

² UN doc. A/59/2005 and Add 1, and written suggestions of NGOs of 1 November 2005.

Let us analyze this new system. We shall focus sequentially on the structural and broad procedural aspects, the information and monitoring procedures, and the deterrence and sanctions mechanisms.

At the term of this review, we shall try to make a preliminary diagnosis of the UNHR crisis, identifying its real causes, and we shall attempt to suggest some approaches to a lasting recovery and progress.

I. STRUCTURAL AND BROAD PROCEDURAL ASPECTS OF THE HUMAN RIGHTS COUNCIL

The number of states members of the Council elected by the General Assembly (47) is of the same order as that of the former Commission (53). Various strategies had been proposed to weed out the candidate countries reputed worst offenders, requiring for instance a minimum number of treaty ratifications, or the absence of Security Council condemnations. They were all rejected. The demand for a 2/3 electoral majority, supported by the SG, the Western and Latin American States and most NGOs, was equally dismissed.

The only residual trace of the “weeding out” idea is a weak exhortation for the GA to take into account the contributions brought by each candidate to the human rights cause and the unilateral undertakings eventually made by them. Few countries have made specific undertakings.

The Council – as was the Commission – is assisted by an Advisory Committee composed of independent experts. The new Committee, however, is more strictly subordinated to its parent body and appears to lack all power of initiative.

While these features seem to indicate stagnation or regress, others constitute improvements. Thus, the Council is outranked only by the General Assembly, while the Commission had to seek the approval at two successive levels, the Ecosoc and the General Assembly. This tends to shorten the length of decision-making.

The number of sessions is greatly increased, up to 10 weeks minimum, and extraordinary sessions, notably to deal with urgent crises, need only one third membership plus one member to be convened. In fact, several extraordinary sessions

have been held on Darfur, Gaza, Lebanon, Myanmar and Palestine. This is a marked progress compared to the Commission which, hampered by its procedural rules, had reacted very slowly to crises such as Bosnia.

At the Commission, accredited NGOs exercised certain important rights based partly on their consultative status and partly on the practice of the Commission. According to that practice, NGOs were in fact accorded the right to criticize states in public statements. The preservation of such rights under the new system was not self-evident, as the NGO consultative status had been set down by the Ecosoc, a body from which the new Council was now independent. The compromise solution was to maintain expressly NGO participation as evolved “in the Commission’s practice”, the Council reserving, however, its right to “review” the issue in order to ensure “the best possible contribution of NGOs”.

NGO participation in the universal periodic review of human rights, a key feature of the new system, had some special restrictions, as will be shown later.

Altogether, the structural aspects of the Human Rights Commission show certain limitations. But it is fair to say that it does constitute progress in other respects, notably in reactivity and flexibility. Regarding the crucial NGO problem, some regressions exist, but the essentials appear to be saved.

II. INFORMATION AND MONITORING; THE UNIVERSAL PERIODIC REVIEW

The “Universal Periodic Review of Human Rights” (UPR) is emphasized in the General Assembly resolution as the most sound basis for UN information and action, as well as the best way of eliminating “unfair selectivity”. All states, including the Council’s members, shall be subjected to scrutiny on an equal basis. Thus presented, the scheme attracted many partisans of the “Change for the best”, including NGOs, as well as those who wanted to use the UPR as a pretext to subvert the country-specific investigation procedures.

In itself, this review concept is not innovative. The periodic examination of states’ reports is in fact the most widely used international implementation procedure, whether under UN human rights treaties or in the ILO and Unesco systems. Most of

those mechanisms provide for the participation not only of governments but also, at certain phases, of independent experts, with some right of comment by NGOs.

Among the positive aspects, let us note the broad substantive basis of the review, which include not only ratified treaties but also the Universal Declaration and any unilateral human rights commitments of states.

The goal is, first, to “improve the human rights situation in the field”. The granting of technical assistance for capacity-building is mentioned as a possible means to that end, but not exclusively or principally, as had been proposed by states partisans of a non-condemnatory system. Recommendations to states to improve their laws and policies remain possible, but the methodology should rely on “dialogue” and “cooperation” with the state itself for framing such recommendations.

The emphasis is placed on “**the sharing of best practice**” with a view to raising ultimately the universal level of human rights protection.

In such a spirit, the UPR may help to identify the massive structural human rights problems characteristic of our global age, such as the negative impact of uncontrolled economic forces on the right to food, lodging, a sound environment, and human development in general. The review may, through “the sharing of best practices”, stimulate the spreading of world policies indispensable to counter such negative trends.

Another helpful aspect is the stress laid on “**complementarity**” and coordination with comparable mechanisms, such as the reporting systems of the UN treaty bodies and the ILO. The thorough and generally objective character of the parallel reviews conducted by the treaty bodies would hopefully contribute to deter the HRC from “white-washing” the states reviewed in the UPR.

Furthermore, it was confirmed that the investigation reports of Special Rapporteurs on human rights in specific countries shall be one of the basis for the UPR³. This would make it difficult for the states aiming at “a change for the worse” to use the UPR as a pretext to abandon the investigation procedures as superfluous.

On the other hand, there are preoccupying features.

³ UN Doc. A/HRC/5/L.2, Section D(1).

The main problem arises from the essentially *inter-governmental* character of the procedure. The examination of the state's report and other documents is conducted by three members of the Council drawn by lot (the "troika") and belonging to different regional groups, and the conclusions are formulated by the Council as a whole. No independent expert intervenes at any stage.

The experience of the former Commission⁴ as well as that of the UN Covenant on Economic, Social and Cultural Rights⁵ show the inefficient and often meaningless character of periodic reports systems which exclude independent expertise. The temptation of politically motivated compromise, at a loss for human rights protection, proved in each case too strong in this club of states.

Equally negative is the **restrictions imposed upon NGOs**. Their participation seems to be limited to : a) the provision of written statements, if "credible and reliable", to be summarized in a Secretariat's short document as one of the sources for the review; and b) the making of "general comments" – meaning statements not country-targeted – in the debate on the conclusions.

Finally, the review process suffers from **insufficient publicity**. Even in the final phase of conclusion-making, the Council will act as a "working group of the whole" open to NGOs (with – presumably – no right to criticize specific countries), but deprived of official records. This goes against the very end of the periodic review system, as many nuances expressed in the debate, possibly helpful for assessing the state's performance, but not reflected in the conclusions, will be lost.

The first phase of the UPR is just being completed this month. The overall preliminary impression tends on the whole to confirm our misgivings. The problems outlined above were stressed by several participants, who called for corrective measures.

III. COMPLAINTS, DETERRENCE AND SANCTIONS

After intense debate, the mechanisms built by the former Commission for denouncing and condemning human rights violations in specific countries were

⁴ Ecosoc, res. 624 B (XXII) of 1956 ; GA res. 35/209 of 17 December 1980.

preserved. But we made it by the “skin of our teeth”. The strange coalition I already mentioned – ranging from the Bush presidency to Pakistan, Cuba, China, Russia, and others – almost succeeded in transforming these procedures into empty shells, in the name of “dialogue” and “de-politicizing”. Yet, on the last hour, their essential demands – especially the proposed requirements of qualified majorities to discuss specific countries and to launch investigation – could not get enough support.

This was due essentially to the relentless lobbying work of the NGO community, supported by various government delegates – Western states, some Latin-American and some African countries –and facilitated by a remarkable chairman.

The institution of the “**Special Rapporteurs**” – on a thematic and country basis – is maintained. The Council keeps, however, the right to discontinue any mandate in order to “rationalize” the system, and a time-limit of one year, renewable up to six years maximum, was placed on country rapporteurs.

One positive aspect : the procedure of appointment of Special Rapporteurs was more elaborated and made more transparent. The lists of candidates selected shall be made public and the reasons for selection spelled out at various stages.

Stress is laid on incompatibilities between Special Rapporteurship and any decision-making functions in states or other entities, including NGOs.

Much debate took place on the new “**Code of Conduct**” for **Special Rapporteurs**. Some articles of the Code may lend themselves to undue restrictions. Thus the Rapporteurs are enjoined to “fully respect national legislation” even under emergency regimes, and they must plan their field visits “in close collaboration with the government concerned”. However, the UN Convention on Privileges and Immunities, protecting the Rapporteurs in mission, would limit the scope of restrictions.

Field visits may also be hampered by the exclusion of written testimonies “politically motivated” or “abusively formulated”. States must be the first recipients of rapporteurs’ draft conclusions and, pending governments’ replies, the media might not apparently be informed.

⁵ Ecosoc, res. 1985/17 of 28 May 1985.

Other provisions of the Code appear to be somewhat more positive. States are “obliged” to ensure the effectiveness of the investigation, a clause which seems to proclaim, more clearly than in the past at the UN, a legal duty to cooperate with rapporteurs under Article 56 of the Charter.

In spite of the state’s surveillance of their dealings, the Code affirms rapporteurs’ right to establish a “dialogue with all concerned” – including witnesses – and to keep their sources confidential for the protection of witnesses.

An attempt to impose to rapporteurs the protection of armed forces at the will of the state was defeated. In the final text, such protection shall be granted only at the request of rapporteurs.

The right of rapporteurs to address “urgent appeals” via the media in case of imminent threat to life or other most serious danger was in essence safeguarded.

Last but not least, the right of accredited NGOs to participate in the public debates on violations and on the rapporteur’s reports is fully maintained and has been exercised.

Surprisingly, the whole debate on deterrence at the Council ignored some key aspects of the problems. There was no mention whatsoever of the future relationship between the Human Rights Council and **the Security Council**, in spite of the latter’s increasing consciousness of the link between human rights and peace. There was no mention of the International Penal Tribunals on the ex-Yugoslavia and Rwanda, nor of the **Permanent International Criminal Court**. Yet, these appear to be the most innovative and pregnant advances of international law for the protection of human rights.

There was no mention of the basic problem of recourse to UN economic and cultural sanctions against states violators of human rights. Such measures had indeed been resorted to against the South African Apartheid regime and the Smith racist regime of Rhodesia with some success.

Recently, on the other hand, proposals for economic sanctions on human rights issues have been rejected at the UN. They were sometimes branded as disguised neo-colonialism. They were said to cause widespread suffering among the peoples while sparing the true culprits. Yet, it is a fact that the human rights defenders and liberation

movements concerned are generally all in favour of effective economic sanctions even at some costs for the population. The Human Rights Council could not indefinitely evade the issue. It must organize a regime of true economic deterrence which would minimize the costs for the innocents.

Finally, there was hardly any mention in the new system of the relationship of the Human Rights Council with regional inter-state organizations for the protection of human rights, such as the Council for Europe, the OAS and the OUA. All these entities tend to operate as though in a vacuum, independently from each other. To a certain extent, diversity can be viewed as a positive feature. Having alternative options benefits the victims, already so disarmed against the might of the states. However, inter-institutional relations must be regulated so as to clarify and facilitate claimants' access to the procedures.

Altogether, the deterrence system of the Human Rights Council, as it emerges from the 2006 crisis, is definitely imperfect. The risk of "unfair selectivity" remains and may never be eradicated. The danger of deterioration into a parody of justice is always present and calls for constant vigilance. The UNHRC further appears to be rather autistic, insufficiently harmonized with other components of the broader international human rights system. However, the worst has been avoided and some capacity for deterrence, relying greatly on positive NGO action, has been preserved.

CONCLUSIONS

Attempts at diagnosis; some thoughts for an in-depth HNHR reform

The human rights crisis at the UN is real, but the reform is based on a largely erroneous diagnosis. Essentially, the problem does not flow from the "political" tensions inherent in an intergovernmental body such as the Human Rights Commission.

The power-holders – state, economic, religious, etc. – exist. Rather than giving them free rein under cover of "pure" illusory mechanisms, let us rather balance these powers within a new multipolar UN system.

This new multipolar UNHR system should continue to include as a key component intergovernmental organ such as the Human Rights Council. One of its positive aspects is the development of a sense of collective human interest, nearing fraternity, among state delegates. Session after session, they come to know and understand each other more than their government masters at home. This might degenerate into a elitist “club” feeling, but the long-term benefits are greater.

Inter-state political rivalry itself may have some positive effects, generally ignored. Today fortunately, among states, a show of respect for human rights is seen as a strong political plus and being denounced as a human rights violator is perceived as a politically damageable factor. Hence an ongoing competition to show one’s good sides and criticize the other’s shortcomings. This does not mean ignoring the inherent serious defects of politically-driven international debates nor promoting political tensions. It simply means recognizing the sociological fact of political rivalry, which one should utilize as a judo wrestler for the benefit of human rights, keeping things within rational proportions.

An intergovernmental organ composed of experienced delegates, behaving in a constructive – albeit to some extent political – spirit, may play a very important role. Through exchange of information and dialogue, notably through a UPR well conceived, it may identify new human rights problems and recommend new international norms and practical solutions. It may stimulate the adoption everywhere of positive national institutions, as was the case for the Ombudsman. It may call for preventive measures to avoid genocide or other mass violations.

The problem stems in part from the fact that the Human Rights Commission had been overloaded with many different functions, some of them it is inherently ill-fit to carry out. The very fact of political rivalry makes it very difficult for it to act, and be recognized, as a judge. Yet this role was assigned to it when it was called upon to hold debates on violations, institute investigations by Special Rapporteurs, and rule on their findings. In spite of many positive results in changing public opinion and even state regimes – such as Argentina, Chile, the Philippines –, this system could not achieve the independent and impartial character of a Court.

At present, the judicial function in human rights matters is exercised in the UN only in cases of extreme violation called war crimes, or crimes against humanity, by the international Criminal Court and the Penal Tribunals on ex-Yugoslavia and Rwanda. The International Court of Justice, since it is open only to states, has rarely and will most probably almost never deal with human rights issues. Opening the World Court to individual plaintiffs would require an amendment to the UN Charter, a formidable obstacle.

What is lacking is a UN Court, open to individuals, which would assess and condemn in an independent and impartial manner the HR conduct of states or individual power-holders not amounting to war crimes or crimes against humanity. Proposals to create such a court outright have never been successful. It would give rise to endless debates and procedural complications.

Alternatively, one might envisage “judicializing” the experts’ bodies dealing with individual complaints under the First Protocol to the UN Covenant on Civil and Political Rights (CCPR), the Convention against racial discrimination (CERD) and the Convention against torture (CAT) : strengthening the guarantees of their independence; extending their means of investigation (oral testimonies, technical expert opinions, field visits); ensuring full equality of arms between plaintiffs and defendant states. One should contemplate according to such bodies the rights to declare state laws void and to order compensation to the victims, as exist in the European Court system.

Such reforms of the treaty bodies could be achieved partly through practice and partly through adoption of a new protocol to the basic conventions. No easy task, indeed, but still easier than a UN Charter amendment. At present, the individual complaint procedures applied by the human rights treaty bodies are ratified by only about 2/3 of the UN membership. The goal of universal ratification may not be easy to reach. Yet the increased judicial character of the treaty bodies we suggested above would inspire greater trust and hopefully act as a catalyst for a new wave of ratifications. Acceptance of the new procedures may be perceived as a political plus, displaying self-confidence in the fair and democratic character of one’s internal institutions. A further enticement to ratification might be a UN offer of technical

assistance to strengthen domestic administrative and judicial control systems, so as to prevent violations of human rights and to better ensure the carrying out of the judgements of the treaty bodies.

Another, complementary, approach would be to extend progressively the material jurisdiction of the International Criminal Court through fully developing the concept of “**crimes against humanity**”. Although the emphasis has so far been on mass murders, torture and deportation, this notion has been left open since Nuremberg in international case law. It could encompass a large number of the gross and systematic violation of human rights denounced by the HRC. This would require closer coordination between the HRC and its Special Rapporteurs, the treaty bodies and the Prosecutor’s Office of the International Criminal Court.

Extending in this manner the jurisdiction of the International Criminal Court would mean focussing increasingly on the individual responsibility of heads of states and other power-holders. This is a positive trend which would not exclude the liability of states and other collective entities. It may well be applied in the future by the reformed treaty bodies.

Let us emphasize : promoting in such manners the concept of a UN judicial function in the human rights field should in no way serve as pretext for weakening the debating and investigative activities of the HRC, with full NGO participation. There is, and will continue to be, need for both types of processes. Relying solely on judicial procedure initiated by individual plaintiffs entails the risk of aborted trials through plaintiff’s intimidation. The debate on violations at the HRC and the Special Rapporteur’s reports remain essential for information, fact-finding, public consciousness raising and countering the risk of plaintiff’s intimidation in the treaty bodies. The Special Rapporteurs’ reports could well be submitted as evidence before the enhanced treaty bodies.

To sum up, one should aim at a UN reformed institutional network composed of a Parliament (the HR Council), prosecutors (the NGO community), and a judicial arm (the International Criminal Court plus reformed treaty bodies).

Yet something important would still be lacking : an independent overseer – cum – ombudsman. This was the inspiration at the root of the concept of the “**UN High**

Commissioner for Human Rights”, promoted mostly by NGOs from the 1970’s. They viewed the High Commissioner as an entity independent from, though coordinated with, the UN machinery.

The High Commissioner, as established by the General Assembly in 1993⁶, is endowed with substantial powers. He could draw attention in his reports to certain specific situations or to the defects of the UN system and propose reforms. He could initiate “dialogues” with governments in order to prevent the occurrence of violations and to ensure the carrying out of UN decisions. However, his action is in fact hampered as he is absorbed into the UN Secretariat and made totally dependent on the UN budget voted by states. The pressures of many member states on the High Commission have grown heavier year after year, notably as regards the geographic composition of his staff. The trend to reduce the Secretariat to purely ministerial tasks, negating his role as adviser, has been relentless. The morale of the staff has been severely damaged through endless restructuring, political interference and erosion of career guarantees.

One important aim of the UNHR reform should be to ensure the **independence of the High Commissioner** and the effectiveness of his staff while keeping his legitimacy as the voice of the world community.

As a first step, one single High Commissioner should be replaced by a “troika”, appointed by the Secretary General with the General Assembly’s consent, which would represent different cultural/political streaks. This may inspire greater trust among member countries.

An adequate financing formula should be negotiated with states and with the United Nations to protect effectively the High Commissioner from pressures. One could envisage, for instance, part of his funds coming from the UN budget, the other part being drawn from voluntary sources carefully chosen from varying areas of the world – foundations, associations – excluding commercial, political or religious entities. The High Commissioner’s budget would need approval from the United Nations, but rejection of any voluntary sources would require a qualified majority and a statement of reasons by the General Assembly.

The High Commissioners should be accorded stronger powers. At present, he is allowed to engage a dialogue with states and to report publicly in case of persistent violations. They should further be empowered to seize juridically the various competent UN organs – the HRC, the treaty bodies, the General Assembly, the Prosecutor of the International Criminal Court, the Security Council, as the need would arise – such bodies being bound to examine the matter and rule upon it urgently.

All these reforms would be built upon existing institutions, rather than resort to creating new bodies, with the attendant procedural complications and political risks. They could achieve the most with minimal changes. Let us beware of sweeping reform plans aiming at legal perfection : this search might involuntarily lead itself to provide a cover for negative intents to delay progress *ad calendar grecas* or to nullify existing control systems. Thus, I have reservations about the wishes of some jurists to tidy up and unify the complaint-receiving treaty bodies (the Human Rights Committee, CERD, CAT, etc.). Let us fear that the reduction to one of the UN investigative mechanisms might reduce the victims' chances to get redress, and it may even leave them with only one meaningless procedure.

The High Commissioners should oversee not only the international control mechanisms described above but, further, the growing network of UN technical cooperation and “capacity-building” programmes carried out at the request of states. This type of UNHR activities has developed rapidly indeed since 1980, too fast in many ways for a fully rational organization.

Yet these preventive activities, especially the many forms of education and training for human rights, should be given the highest priority. The UN as educator should help the UN as fireman to slowly wither away. Especially, the human rights awareness-raising and training of key professional groups – such as teachers, judges, the police, the armed forces – is of crucial importance. Some progress could be observed in such fields, through UN and Unesco programmes, but much remains to be done.

Among the professional categories to be targeted by training programmes, news media should receive much more attention. The need for their training is

⁶ General Assembly Resolution 48/141 of 20 December 1993, adopted on the proposal of the Second World

overwhelming, as UNHR news remain among the lowest priorities of media editors. Earlier attempts at media training in the 1950's were killed by Cold War mutual distrust, and renewed programmes must overcome now some North-South conflictual fears of cultural "neo-colonialism". Yet fuller media understanding and communication of UNHR news is indispensable to make the UN exist for the world at large, beyond the small "club" of its meeting participants.

Many questions remain open and some will probably remain open for as long as mankind exist on the vessel earth. Let us not seek "perfection or death", lest we get death without perfection. But let us secure steadily one real progress after another, in the firm belief to paraphrase the famous dictum, that "the multilateral human rights system is no doubt the worse one, with the exception of all the others".

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