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CIRCULATION

Mila Dezan

PRINTING

Pro! Editora Gráfica Ltda.

SUBSCRIPTION AND CONTACT

Sur – Human Rights University Network

Rua Pamplona, 1197 - Casa 4 São Paulo/SP - Brasil -

CEP: 01405-030 Tel.: (5511) 3884-7440 - Fax (5511) 3884-1122

E-mail: <surjournal@surjournal.org>

Internet: <<http://www.surjournal.org>>

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PRESENTATION



The ninth issue of the *Sur Journal* is dedicated to the commemoration of the sixty years of the Universal Declaration of Human Rights. The articles on this subject were chosen in collaboration with the International Service for Human Rights (ISHR). Two main issues were addressed in the selected articles: the indivisibility and the universality of human rights. These two issues were initially raised sixty years ago by the Universal Declaration of Human Rights as the pillars of international human rights law. In this ninth issue of the *Journal*, they are revisited under an especially critical light.

The issue of indivisibility is analyzed by both Eitan Felner and Fernanda Doz Costa. Felner adopts a pragmatic perspective: how can economic and social rights not only be recognized as human rights, but also be effectively implemented? The author proposes a methodological framework to assess whether or not a State has violated human rights obligations related to this set of rights. He also reveals some of the challenges in identifying violations of economic and social rights. Doz Costa approaches the issue from a conceptual perspective, discussing the possible connections between human rights and poverty.

Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU), in an interview with Conectas Human Rights, sheds light on how important the human rights movement is for the protection of individuals in the currently most powerful country in the world, a country that has “seen a remarkable loss of human rights” in the last eight years. In Romero’s words: “[t]he existence of a global human rights movement is actually, for this very reason, vitally important. Even if one government of one country sets back human rights, there is a movement of leaders and human rights NGOs that can keep the pressure on and keep pushing for advances in human rights.”

Katherine Short’s paper analyzes to which extent the Human Rights Council has been successful in overcoming the over-politicized approach adopted by the former UN Commission on Human Rights. Short highlights, however, that the Council’s effectiveness has been partially “undermined by both its failure to implement mechanisms to prevent its own membership to include acknowledged human rights violators and its continuing inability to harness US support.”

This issue of the *Sur Journal* also includes an analysis of the UN human rights system from an internal perspective: the perspective of Paulo Sergio Pinheiro, former UN Special Rapporteur on the Situation of Human Rights in Myanmar (2001-2008), former UN Independent Expert for the Study on Violence against Children (2003-2006), and former UN Special

Rapporteur on the Situation of Human Rights in Burundi (1995-1999). Pinheiro is currently member of the Inter-American Commission on Human Rights.

This issue of the *Sur Journal* also includes three thought provoking articles by Barbora Bukovská, Jeremy Sarkin and Rebecca Saunders. Bukovská defends an idealistic view of human rights organizations, a view that is not content with mere normative achievements in the field. According to the author, as human rights should always result in concrete protection for victims of violations, Bukovská highlights the need to bridge the gap that frequently exists between international human rights organizations and the actual victims of violations.

Sarkin examines the historical development of African prisons from colonial to modern times, raising two issues: first, he understands that African prisons current conditions are in great part a legacy of colonialism; second, he argues that overcrowding and violence are a widespread problem in prisons all over the world.

Finally, Saunders criticizes the system of transitional justice established in South Africa after Apartheid. In her own words, her article addresses "what is gained and lost when expressions of human suffering are translated into a standardized language of human rights." The author also questions the priority given to national over individual forms of healing.

These three articles invite discussion. We therefore invite readers to respond either with another article or with a three-to-five-page essay. Articles and essays will be subjected to the *Journal's* selection process, and hopefully will encourage further discussion on these key issues.

We would like to thank the following professors and partners for their contribution to the selection of the articles for this issue: Andre Degenszajn, Andrea Pochak, Fabián Sanchez, Flavia Piovesan, Habib Nassar, Inês Lafer, Juan Amaya Castro, Kwame Karikari, Lucia Nader, Magdalena Sepúlveda, Mustapha Al-Sayyed, Olga Espinosa, and Richard Pierre Claude. We would also like to inform that Profesor Upendra Baxi (Warwick University) has accepted our invitation to join the *Sur Journal* Editorial Board.

Finally, we would like to announce that the next edition of the *Sur Journal* will be a special issue on "People on the Move: Migrants and Refugees", to be published in collaboration with the Office of the UN High Commissioner for Refugees (**UNHCR**). The journal will also carry articles on other human rights topics.

The editors.



KATHERINE SHORT

Katherine Short has recently graduated with a BSc in International Relations at the London School of Economics. During her time at the LSE she specialised in International Human Rights Law and the Ethics of War.

Email: kshort@alumni.lse.ac.uk

ABSTRACT

In 2006 the United Nations underwent its greatest reform since its foundation in 1945, showing a renewed commitment to human rights protection. The replacement of the Commission on Human Rights with the Human Rights Council signifies the growing strength of the international human rights regime. However, this change has not been without criticism. In particular it has been alleged that the Council suffers from various political biases to the detriment of its effectiveness: for example, disproportionately focusing on the Occupied Palestinian Territories while failing to swiftly respond to abuses in Darfur. Further, the Council is arguably undermined by both its failure to implement effective mechanisms to prevent its own membership consisting to include acknowledged human rights violator and its continuing inability to harness US support. This paper analyses such criticisms.

Original in English.

KEYWORDS

United Nations – Human Rights Council – Commission on Human Rights – Politicisation.



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FROM COMMISSION TO COUNCIL: HAS THE UNITED NATIONS SUCCEEDED IN CREATING A CREDIBLE HUMAN RIGHTS BODY?

Katherine Short

1. Introduction

Failing to fulfil?

At the 59th Session of the Commission on Human Rights, (“the Commission”), the then incumbent Secretary General of the United Nations (“UN”), stated that:

[w]e should be proud of the work of the United Nations in developing international human rights norms and standards. However, we cannot move forward without restoring the credibility and effectiveness of our human rights mechanisms and refocusing ourselves on the protection of individual rights.¹

This recognition typified and gave motivation to the belief that the UN human rights protection machinery was failing to fulfil its mandate to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”,² and to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and “to promote social progress and better standards of life in larger freedom”.³ As it entered the last stages of its life, the Commission was criticised by a wide spectrum of the international society including states, NGOs and academics. This criticism targeted a range of perceived failures from unwarranted politicisation and ineffectual decision making to a lack of appropriate standing within the UN. The Commission was undoubtedly suffering from a severe credibility deficit

Notes to this text start on page 168.

which threatened to undermine the entire UN human rights system. Kenneth Roth, executive director of Human Rights Watch, captured popular feeling towards the Commission when he described it as, “a jury that includes murderers and rapists, or a police force run in large part by suspected murderers and rapists who are determined to stymie investigation of their crimes”.⁴ Primarily as a consequence of such persistent heavy criticism, in June 2006 the Commission was superseded by the Human Rights Council, (“the Council”) in an attempt to create a credible UN human rights body.

The primary aim of the Council is to debate human rights issues and to address and condemn human rights violations. This article will argue that, while the Council has attempted to address the many issues that led to its predecessor’s loss of credibility, nevertheless, it can still be accused of a political bias, which jeopardizes its credibility. There have been many causes attributed to this failing. Firstly, that the Council is undermined by its failure to implement effective mechanisms to prevent its own membership, to include globally acknowledged human rights violators. Secondly, that the Council is broadly seen as suffering from political selectivity, exemplified by a perceived obsession with the human rights violations in the Occupied Palestinian Territories. Thirdly, that it has been accused of being as ineffective as the Commission before it was in responding quickly to violations, due to a lack of political will. The aim of this article is to assess how the Council has attempted to rectify the Commission’s failures and to evaluate its success in doing so. It will conclude by analysing the future of the Council, analyzing how it could succeed and avoid the failures of its forerunner.

The mandate and genesis of the Commission

The Commission was established under article 68 of the Charter of the United Nations as a Commission to the Economic and Social Council (“ECOSOC”) and given the initial mandate of submitting proposals for:

- an international bill of rights;
- international declarations or conventions on civil liberties, the status of women, freedom of information, and similar matters;
- the protection of minorities; and
- the prevention of discrimination on grounds of race, sex, language or religion.⁵

From its inception after World War Two, the UN established human rights as one of the three most important pillars for international society alongside economic and social development and international peace and security.⁶ The establishment of the Commission signalled triumph for those petitioning for universal human rights standards to be recognised and enforced by world bodies. It was deployed in an era of high expectations and initially fulfilled its standard-setting mandate. Although eventually disintegrating into disrepute, the formation of the body was

an immense achievement, contributing to a growing norm that states are externally accountable for the internal treatment of their citizens.

The Commission outlived the Cold War where an ideological approach to human rights created a heightened conflict between prioritising the civil and political rights,⁷ favoured by the Western bloc or economic and social rights,⁸ favoured by the Eastern bloc. Debates over the definition of “a human right” stifled numerous attempts by the Commission to widen its mandate towards effective condemnation and human rights enforcement. Furthermore, the nature of the ideological divide of the world into Communist and Capitalist blocs meant that voting was predictable in line with ideology. The Commission was unable to fully overcome the ideologically opposed approaches to human rights even after the Cold War; Tomasevski noted that “the Cold War has not ended within the Commission. It colours much of what the Commission does in economic, social and cultural rights”.⁹ After 1990, countries continued to vote in support of their former alliances, for example, as Kirkpatrick asserted, “Russia voted almost exactly as it had during the Cold War”.¹⁰ This is evidence of a wider problem experienced by the Commission, namely that political interests take priority over human rights and preclude criticism of allies. Bloc voting by powers meant that results were predictable and often did not correspond to the severity of the human rights violations being discussed.

As the twentieth century drew to a close, the Commission was progressively undermined, failing to fulfil its mandate and by aiding the perpetrators of human rights abuses, by indirectly granting them immunity from international scrutiny. It became a ridiculed body rife with scandal, its members coming from the same countries it was supposed to condemn. In 2003, for example, Sudan was successfully able to gain a seat on the Commission, despite its record of human rights abuses. The then-incumbent Secretary General, Kofi Annan, asserted in 2004 that “standard-setting to reinforce human rights cannot be achieved by states that lack a demonstrated commitment to their promotion and protection”.¹¹

The desire to uphold the Westphalian system in which states are sovereign actors guided by the norm of non-intervention, has prevented intervention in the jurisdiction of sovereign states, even when that intervention could promote the good of the individual over the good of the state through the enforcement of universal human rights standards. Lauren asserts that the “doctrine of sovereignty enabled national leaders to declare that what they did to their own people was their own business, making them immune from any international effort that might try to hold them responsible for violations of human rights”.¹² The theoretical and practical constraints that this brought about hampered the Commission throughout its life; “For the first two and a half decades of its existence, the Commission (...) narrowly interpreted its own mandate and focused principally on promotional activities and standard setting through the preparation of drafts of human rights instruments”.¹³ However, as the international human rights ideology grew, so did demands upon the Commission to widen its mandate to condemn and scrutinize. This extension of its mandate brought with it added problems of increased criticism of its selectivity of scrutiny.

Successes of the Commission

The Commission contributed to the development of a wealth of human rights laws, of various international treaties and in customary international law. The drafting of the Universal Declaration on Human Rights, (“UDHR”), adopted by the General Assembly on the 10th December 1948, will remain as one of the Commission’s greatest achievements and also as one of the most notable successes in the entire history of the UN. The UDHR has had profound consequences, as Lauren notes, coming quickly “to take on a life of its own and to assume growing moral, political, and even legal force through customary law”,¹⁴ making it legal as well as declaratory.

The initial task of the Commission was to outline desirable universal standards of human rights, especially important given the post-war context. Upton asserts that “an examination of the covenants, conventions and declarations initiated by the Commission during its lifetime clearly indicates that this body has fulfilled its standard-setting mandate”.¹⁵ Introducing civil and political as well as economic and social norms into civil society, the Commission showed an important recognition of the previously deprioritised economic and social rights in its creation of Special Rapporteurs (“SRs”) in areas such as health and education. In particular, the creation of the SRs on the right to education in 1998 has been highly successful and, as Smith notes, has been important in the recognition of “the use of education as a tool for fighting war and conflict,”¹⁶ showing an important recognition by the Commission of the role that human rights play in development.

“The Commission advanced human rights protection globally through increasingly substantive thematic and country specific work, inventing a unique system of Special Procedures.”¹⁷ The Commission’s first SR reported on human rights abuses in Chile under Pinochet, and by 2002 some 41 SRs worked globally examining human rights abuses. This system of SRs has been highly praised for investigative abilities and detailed reports. The rapporteurs have reported early signs of impending human rights abuses, identifying problems that could lead to catastrophes, for example, the early recognition of a humanitarian emergency in Rwanda.¹⁸ However, as Pinheiro, a former SR notes, the Commission was “unlikely to assign SRs who [did] not have at least the acquiescence of their own governments”¹⁹ restricting their capability to condemn. SRs need to prioritize the safety of individuals and it is vitally necessary that they be able to maintain their independence and impartiality. Their success was further limited by states neglecting to reply to requests or restricting access if granted. For example, SRs acting in areas including torture and health were refused access to Guantanamo Bay by the US government.²⁰ Furthermore, there was, and still is, a great discrepancy between the vast number of communications or urgent appeals sent in by SRs and Working Groups and the number of replies. For example, the Working Group on Enforced and Involuntary Disappearance has issued thousands of requests to governments around the world; yet received very few responses.²¹

The involvement of non-state actors led the Commission to be, apparently, an inclusive body aimed at hearing the opinions of all in order to reach a universal consensus. At its annual meeting there were “more than 3000 participants, between

national human rights institutions, UN agencies, and NGOs²² who met to discuss human rights issues in a formal setting. By inviting NGOs, and observer states to attend, it was able to engage a wide spectrum of international society. However, while independent organisations were able to offer constructive suggestions, helping to depoliticise issues, there remained the problem that NGOs come from a wide variety of political backgrounds and defend specific causes.

It can be argued that the Commission's greatest achievement was that it ever came into existence. The first global body with state membership that was solely focused on human rights, it became an organisation for states and individuals to refer to for advice and for complaints. Its investigative powers brought to life some of the most horrific human rights abuses worldwide and provided impetus for change. It encouraged governments to act to improve their human rights records, evident in their willingness to avoid criticism by the Commission. However, its achievements in championing and safeguarding human rights came to be overshadowed by a credibility crisis.

Difficulties in the history of the Commission

By 2006, the Commission had become the primary "forum in which governments publicly named and shamed others for abusing their citizens".²³ While it was supposed to open up necessary discussions and make it hard for states to escape condemnation, its credibility was put into question when some members were themselves human rights violators. A study by Freedom House in 2005 revealed that "six of the eighteen most repressive governments, those of China, Cuba, Eritrea, Saudi Arabia, Sudan, and Zimbabwe, are members of the Commission on Human Rights (CHR), representing nearly 11 percent of the 53-member body".²⁴ It became worryingly obvious that states were seeking membership in order to shield themselves from criticism or to criticise others for politically motivated reasons. The chair of the Commission rotated among the regional groups, and when it fell to the African Group in 2003, Libya, a state notorious for its abysmal treatment of its citizens, was appointed, a problem unfortunately unavoidable in a truly democratic organisation. The "realist contention that international organisations, like the UNCHR, have selectively enforced rules to support friends and punish adversaries"²⁵ was very much alive in the last few years of the Commission.

In May 2001 the Commission came under international scrutiny when the US failed to be re-elected for the first time since the body was established. There were suggestions that the US, under the new Bush administration, had not effectively campaigned since it was already disheartened by the inefficacy of the institution. Others claimed that the lack of US participation in new human rights instruments such as the International Criminal Court strongly influenced other western states into voting against its inclusion in the Commission. Sanger suggests that "China had quietly lobbied to get the United States removed, striking back for the annual (...) resolution that Washington sponsors condemning Beijing's treatment of dissidents and, this year, the Falun Gong movement".²⁶

The institutional standing of the Commission as a subsidiary of ECOSOC failed to give the Commission the focus it needed to increase its credibility. The importance of human rights within the UN had been mentioned in the preamble of the UN Charter declaring their protection, as one of the purposes of the UN, and yet they had not been given a position equivalent to the Security Council or ECOSOC. This sent a message that human rights, rather than being fundamental, could be subsumed to the political, economic or security interests of states. With cooperation and good faith this could have been overcome, but with human rights used as a pawn, institutional change and restructuring was essential to restore credibility in the UN human rights mechanisms.

2. From Commission to Council

Final straw events

By 2006, it had become clear that change was vitally necessary if the discrediting of the entire UN human rights system was to be avoided. Kofi Annan stated that:

*if the United Nations is to meet the expectations of men and women everywhere - and indeed, if the Organisation is to take the cause of human rights as seriously as those of security and development - then member states should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council.*²⁷

The Council has a greater position within the UN; it is now it reports directly to the General Assembly instead of ECOSOC, giving it improved international importance.

The 1993 Conference on Human Rights in Vienna signified that change was almost inevitable, as it recognised the new human rights priorities that existed in the world, crucially reaffirming the indivisibility between civil and political and economic and social rights. In his 2005 report 'In Larger Freedom' Kofi Annan proposed radical reform to the Commission declaring that, "a credibility deficit has developed, which casts a shadow on the reputation of the [UN] as a whole".²⁸ Moreover, the report asserted that the "promotion of [human rights] has been one of the purposes of the Organization from its beginnings but now clearly requires more effective operational structures",²⁹ suggesting that this could be done by disbanding the discredited Commission and replacing it with a much improved Council.

The preamble to GA Resolution 60/251 stated that the Council would recognise "the work undertaken by the Commission and the need to preserve and build on its achievements, as well as redressing its shortcomings".³⁰ The formation of the new Council involved almost a year of contentious debate over its new structure and mandate. Mary Robinson, former UN High Commissioner for Human Rights, has suggested that it was built upon compromise which led to human rights standards being sacrificed.³¹ The Council "shall be guided by the principles of universality, impartiality, objectivity, and non selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human

rights”³² and will aim to set universal standards of human rights to be adhered to globally. As a result, the new organisation has significant institutional changes to implement.

The inaugural session of the Council consisted of representatives from 153 states including all 47 member states, 154 International NGOs and 25 representatives from international organisations, including the UN. The Council was voted in with a near unanimous vote from the members of the General Assembly under Resolution 60/251³³ with only the US, Israel, the Marshall Island and Palau voting against it. While perhaps it is too soon to make a comprehensive analysis of the new Council, its failings and its successes are already starting to show.

New structure and mechanisms

After much negotiation,³⁴ the Council has introduced significant changes and improvements on the workings of the Commission. These include a universal review system; stricter membership criteria, including measures to counter selectivity and fairer geographical representation; and procedural aspects such as a quicker response to human rights emergencies.

Universal Periodic Review

In an attempt to overcome accusations of selectivity and double standards, the Council has installed an examination system called the Universal Period Review (the “UPR”). Resolution 60/251 stated that the UPR would be “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”.³⁵ This review system will first examine 28 Council members, 2 voluntary states and 18 randomly-selected states. The normative framework of the review is taken from “[t]he Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which a State is party, voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council”.³⁶

The establishment of the UPR, while praised by many, has not escaped criticism. In the first place, the length of time that it took to get the review under way was criticised for being highly unacceptable. However, this was overcome with the review planned for April 2008. Secondly, the Council was faced with the challenge of deciding which state should be reviewed first. Critics claimed that the Council should have started by scrutinising all of its members before venturing further afield, in order to ensure that the body enforcing human rights would also be actively promoting these values by setting an example. The Council has taken steps to ensure that this problem will be overcome by declaring that every member of the Council will be examined during its three year membership.

The review system is very ambitious for a nascent body. With 191 recognised states in the UN, the task of examining the human rights records of all of them is

immense and will involve a great deal of staff, time and funding, all three of which are not plentiful within the Council or the UN as a whole. Initially “the Council [had] no budget to undertake”³⁷ the UPR, which threatened to delay its implementation. However, the OHCHR has now contributed a great deal of resources and personnel to work on this ambitious project, and Switzerland has also set up a fund to support smaller states who are preparing their UPR reports. The UPR will examine 48 countries per year, perhaps too many to allow the vigorous examination needed of every state, but will ensure that all states are regularly reviewed. Three hours will be allotted to each state review, regardless of whether the state has a good human rights record or of its size and population. Whilst this maintains equality between member states, it nevertheless fails to take into account the fact that states with poor human rights records need to be examined more closely.

While the resolution establishing the UPR system dictated that the review procedure would “complement and not duplicate the work of the treaty bodies”,³⁸ the Council has to ensure that the UN human rights system does not use this review system as an excuse for not utilising other UN Charter and Treaty mechanisms which already document human rights abuses. Treaty-based bodies such as the Human Rights Committee consider it as within their jurisdiction to investigate violations, so that the Council must endeavour to make sure to complement rather than undermines or overshadows these Committees’ important work. The UPR will not undermine country specific processes that were already in force within the Commission, as states are able to convene for special sessions and can examine specific human rights regardless of whether they are being reviewed.

“A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (troika) will be formed to facilitate each review.”³⁹ This will help the credibility of the body by ensuring that no bloc of regional states can seek to get involved in the review process to shield themselves from criticism. The UPR has the capacity to be one of the greatest successes and innovations of the Council as condemnation can have a detrimental impact on states’ political and economic foreign relations, an impact that states are eager to avoid. Pressure upon states to conform under popular pressure to human rights norms should make them reassess their public policies. A problem arises when states seek to influence the outcome of the review process to escape scrutiny; indeed Egypt has already attempted to do so.⁴⁰ During the 7th session, this became clear in the repeated statements of government representatives using the UPR to avoid discussion of their human rights records.

The UPR is a system of not only periodic review but also peer evaluation; states will be examining other states, which could result in undesirable politicisation weakening the credibility of the Council. A problem with the former Commission was that states took upon themselves the role of “judges and defendants at the same time (...) [indulging] in their little diplomatic games for big political stakes”.⁴¹ The Council, with its mandate of human rights promotion, does not take precedence in the international relations of states; the furthering of national interest will inevitably be a state priority. The dependence upon state cooperation and a willingness to

condemn in a fair and impartial manner leads to the conclusion that the UPR will only function if states commit themselves to its success.

The UPR is now fully underway, and is exceeding the expectations of its critics. States being reviewed have brought huge delegations to Geneva, and have been helpful in preparing and introducing the documents, the inter-active dialogue was fairly open and recommendations were made. A positive result of the UPR that we can already observe is in the ratification of treaties: Honduras and Ecuador have ratified a number of treaties as a consequence of the UPR. However, it remains to be seen whether or not this will set a precedent.

Membership

The Commission was established as a small group of only 18 members; by the end of the 20th century it had grown to 53 members. The Council has maintained a size similar to that of the Commission with a membership of 47 states. Two conflicting ideas influenced discussions regarding the membership of the Council: smaller membership than before with strict entry requirements or a body with universal membership. Kofi Annan originally proposed a smaller council which would have taken on the role of being a guide with moral authority made up of a small number of members; with admirable human rights records,⁴² which would allow more focused discussion and debate. However, the problems of establishing the membership criteria for such a body were so difficult that the proposal was considered unfeasible. A body with universal membership, as originally proposed in the High Level Panel,⁴³ would be much more suited to the UN, and would enable it to assume the role of a negotiating table. Arguably it is better to have human rights violators engaged in active debate and discussion than to ostracise them from the international community. In the end, General Assembly President Jan Eliasson proposed a compromise whereby the Council would remain fairly large, at 47 members, but each state running for election would have its human rights records assessed.

A pre-occupation of the Council has been to introduce membership criteria stricter than those used by the Commission. Resolution 60/251 states that:

When electing members of the Human Rights Council, Member States shall take into account (1) the contribution of candidates to the promotion and protection of human rights and (2) their voluntary pledges and commitments made thereto. Additionally, members elected to the Council shall (1) uphold the highest standards in the promotion and protection of human rights; (2) fully cooperate with the Council and (3) be reviewed under the universal period review mechanism during their term.⁴⁴

The UPR will be able to support a state's membership bid by giving evidence of its contribution to the protection of human rights, and states will be obliged to undergo the UPR during their membership term.

The element of subjectivity in the above criteria has been criticised and there were demands for more prescriptive membership criteria such as a close examination

of human rights treaties ratified by an applicant state. Such measures would have severely restricted the number of member states and would have undermined the universality and geographical representation the Council was striving for. Discussions over membership criteria remain controversial; Schaefer has argued that “the presumption that a country is a violator of human rights is very subjective. If you want to create criteria (...) that exclude certain countries, why not those that don’t support trade liberalization or that don’t implement foreign aid targets? The knife cuts both ways”.⁴⁵ States are theoretically still able to obtain membership even if they are under some form of sanction by the Security Council for human rights abuses. However, a prerequisite for membership is that states abide by human rights law and international standards, which will restrict ease of gaining membership. Despite this, Pace notes that “the effective implementation of this mechanism will require an unprecedented level of efficiency and good faith by member States to judge by the poor reporting record to the treaty bodies – not to mention the preparedness of the Secretariat”.⁴⁶

The new geographical distribution of the Council allows developing states greater opportunity to voice their opinions on human rights issues. While it does go towards universality, this is not necessarily the best way of safeguarding human rights. Fairness in terms of geographical representation has to be weighed against fairness in terms of a good human rights record. A state can only serve a maximum of two terms, preventing the domination by certain states on the body, an attempt to correct another fault of the Commission. Forty-seven Member States are “elected directly and individually by secret ballot by absolute majority of the members of the General Assembly”,⁴⁷ receiving an obligatory 96 votes. This is a lower number of votes than the two-thirds that the US and the then incumbent Secretary General requested the Council have as a voting requirement. Members will lose their membership if two thirds of the General Assembly vote against them cancelling their membership for reasons of severe violations of human rights, which is a positive change no doubt, but still it continues to be considerably harder to evict members from the Council than to elect it.

The first election for membership of the Council showed significant improvements in comparison to the Commission, with severe human rights violators not even standing for election. However, the body has been criticised for allowing Egypt to take up membership until 2010. It is alleged that the Egyptian government has tortured its political opponents, evoking memories of the Commission when Sudan was able to take a seat, a state subject to criticism for its policies involving its own citizens. On the one hand, the ballots allow states to vote honestly without fear of repercussions in other areas of their foreign affairs. However, on the other hand, the secret ballots have led to a lack of accountability which has not adequately prevented states such as Egypt, Algeria, Pakistan, China, and Cuba from gaining a seat on the Council.

Procedure

A serious criticism of the Commission concerned its failure to establish efficient mechanisms to allow it to deal with urgent human rights crises. It was often unable

to respond until its annual meeting, permitting states to act with relative impunity in the meantime. This issue has been addressed in the Council by the “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”.⁴⁸ These increased ad-hoc meetings will also help to alleviate the large backlog that the Council developed throughout the transition process. The special sessions can be called with only a third of the Council’s members. This ease of calling session may make the mechanisms more susceptible to politicisation, as no safeguards exist against self interested groups of states usurping this mechanism for their own political ends.

Kofi Annan expressed grave concern at apparent attempts to undermine and discredit the Special Procedures, calling them “the crown jewel of the system”.⁴⁹ While the system of Special Procedures has been highly successful, it has not been without criticism. The Council chose controversially not to renew the mandates of Cuba, Belarus and DRC, with the mandate on the DRC being replaced by “an ambiguous call on a group of thematic Special Procedures to carry out a joint mission to the country and report to the Council in March 2009”.⁵⁰ The Special Procedures have been further weakened by the fact that there have been “concerted efforts by a small number of states, including Algeria, Egypt and Pakistan, to rewrite the rules governing the selection of mandate-holders in order to impose measures that would seriously undermine the independence and effectiveness of the Special Procedures”.⁵¹

The system of sending SR’s to investigate human rights abuses, while not without problems, has been one of the most successful elements of the UN human rights regime. However, the future of the “crown jewel” of the Council is uncertain. If states continue to undermine this process then the repercussions will impact on the entire credibility of the Council.

Is the deficit addressed in the Council?

In order to be a credible international organisation, the Council should fulfil certain criteria. It must be impartial, consistent, universal and able to effectively and appropriately respond to human rights crises as they occur. This article will now assess the Council’s successes and failures against these criteria.

Effectiveness

The Council must not only be able to periodically review the status of a state’s approach to human rights, but also be able to respond to humanitarian emergencies as and when they arise. The issue of how to deal with the situation in Darfur has been one of the Council’s first urgent highly problematic issues that it had to address swiftly and effectively to demonstrate that it has been able to overcome the credibility deficit of the Commission and that it possesses the ability to swiftly respond to emergencies.

The UN has stated that over two million people have fled their homes in Darfur and that hundreds of thousands of lives have been lost during the ongoing

conflict. Colin Powell argued as early as 2004 that “genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility and genocide may still be occurring”.⁵² There is a growing recognition that the international community may have a duty to respond, at least through condemnation if not military intervention. The genocide in Darfur has great international repercussions. It has caused the Sudan’s relationship with Chad to become even more strained as more and more refugees flee across the borders and, as it grows, the situation constitutes an ever larger threat to international peace and security.

It took a substantial amount of time for the Council to act upon this dreadful issue, for which it received widespread criticism, and when it did, it initially chose to only “express concern”⁵³ rather than issue a condemnation, as it has done with great ease in the case of Israel. There have been constant calls for the Council to do more. Minority Rights Group has suggested that there has been “little effort by UN or external actors to drive forward a negotiated solution”.⁵⁴ The Council attempted to send a mission to Darfur but Sudan did not grant visas to the investigative team attempting to enter the country, a move which the Council’s subsequent resolution did not condemn. While it admirably attempted to carry out this mandate without being granted entry, through speaking to refugees and aid workers from Darfur, its actions were slow. “While the group of experts was ready to deliver their damning report on Sudan in September, Doru Costea agreed to delay it for two months without getting anything in return.”⁵⁵

The decision not to renew the mandate⁵⁶ of the Group of Experts team was met with criticism by human rights NGOs such as Amnesty International.⁵⁷ The aim of this group had been to oversee the implementation of UN recommendations concerning Darfur and its lack of presence in the region will damage the reputation of the Council. The SR on Sudan will now take over this mandate while simultaneously being mandated with the investigation of abuses elsewhere in Sudan.

The report issued by the Council on the 7th March 2007⁵⁸ was damning not only upon Sudan but also upon the international community for its inability to act. Given the previous inaction coupled with Sudan’s seat on the Commission, tackling the situation in Darfur will be one of the most difficult tests of the Council and is its chance to prove that it has greater credibility than the Commission. The team investigating Darfur has called the response of the international community “pathetic”, calling upon “the solemn obligation of the international community to exercise its responsibility to protect [adopted at the 2005 world summit] has become evident and urgent”. If a state were to find it in its interests to act however, the Council’s resolution will hopefully prove to be a moral guide in gaining Security Council authority. The Council’s actions concerning Darfur are one of its greatest achievements. While slow to begin to act, once authorised, the Council has made good use of its limited resources in researching the situation and condemning the abuses. This has proven that the Council possesses the ability to act in the face of unprecedented crises; however, this does not mean that it always will.

Impartiality and Universality

The Council's ability to act effectively and quickly is clearly still overly dependent on the political will of its members. The Council's credibility is also being undermined by those states which have chosen not to join the body, as they are succeeding in undermining the Council's legitimacy. One of the greatest criticisms of the Commission was that throughout its years it became a highly politicised body, dependent upon the political will of its members to act. The Council has been faced with the difficult challenge of attempting to gain the cooperation and membership of the world's greatest powers whilst remaining impartial and free from political influence.

The United States was one of the four states, alongside Israel, the Marshall Islands, and Palau, that voted against the creation of the Council and it has not yet chosen to seek a seat on the Council, despite almost continually holding a seat on the Commission. It publicly shunned the body in favour of a unilateral approach to human rights, arguing that it could further human rights better from the outside while pledging financial support to the institution to enable it to efficiently carry out its mandate. They argued that there is a lack of sufficient safeguards to prevent it from suffering from the same deficiencies as the Commission. Critics of the American decision suggest that this stems from fear of criticism under the review system, as a result of the high profile negative publicity surrounding the treatment of suspected terrorists at Guantanamo Bay and the Abu Ghraib prison⁵⁹ made in part by the SR's earlier scathing report. It was also reluctant to get involved without being able to guarantee its ability to exert a dominating influence, thus avoiding having its power and decisions undermined, not having the veto power it commands on the Security Council. The US preoccupied with the maintenance of its leading world power status and is reluctant to submit to universal principles that might put it in jeopardy.

US attitudes towards the Council have been a mixed blessing for the success of the body. Objections have been most loudly vocalised by John Bolton, the US Ambassador to the UN. He articulated the American reluctance to compromise with his declaration that "we want a butterfly. We're not going to put lipstick on a caterpillar and declare it a success".⁶⁰ While the US opposition to the Council has been a setback for its credibility and reputation, during the early stages, the Council may have actually gained from the US position. The US argued persistently for stricter membership criteria which influenced the current structure of the body. Furthermore, once the US had made clear its opposition to the Council, and its intention not to join, the formation of the Council was able to proceed with fewer compromises.

Lack of US engagement in the Council has had repercussions on the Council's credibility and its ability to act with global legitimacy. As the largest financial donor to the UN, the US is arguably its most powerful member. Primarily as a result of the Council's condemnation of Israel, the US has argued that the Council has developed a credibility deficit akin to the Commission and has threatened to withdraw funding.⁶¹

There have already been discussions as to whether the Council can afford to fully undertake its periodic review system, as decreased funding would serve to harm its most prized innovation.

American acquiescence and cooperation is vital to the success of the Council as the Council needs the US for funding, support, and its power in influencing other states to comply with human rights norms. If the US does not abide by extremely high human rights standards, other states will feel no compulsion to do so either, using US actions as a justification. The US has gradually been increasing its involvement in the Council, having chosen to be an observer at meetings. A future of cooperation between the US and the Council looks optimistic as the US appears to begin to accept its work. Such a move would help to restore faith in the US' commitment to international human rights and as it would improve the international standing and reputation of the Council.

The Council has been criticised for failing to promote universal human rights and, as such, letting down the people of the world living under repressive regimes. "A partisan approach by the Human Rights Council won't help the victims of [Arab-Israeli] conflict. It will only undermine the new Council's credibility."⁶² The Council has begun to recognise this failing, evident in the admission by Doru Costea, the current President of the Council, that with regards to the Israel-Palestine conflict the "the Council has failed".⁶³ George Bush has stated that the "body has been silent on repression by regimes from Havana to Caracas to Pyongyang and Tehran, while focusing its criticism excessively on Israel."⁶⁴ The Council made the calling of special sessions easier to enable a quicker response to violations as they happen. So far, this has arguably been abused, however, it is well within the capabilities of member states to reform and hold sessions covering other issues, both thematic and country specific.

Encouraged by Kofi Annan to take "urgent action" on the matter, there was a special session held on the situation in Darfur in December 2006, marking a positive change of the Council after its previous weak approach. Indeed, "the Council fulfilled its mandate by 'rising to its responsibilities', 'putting people before politics' and thus cementing its credibility".⁶⁵ The session marked a move away from the highly politicised special sessions previously focused on Israel.⁶⁶ However, though lauded as a great success, the session did not have a strong enough repercussion to help with the situation in Darfur.

Consistency

In order to prevent accusations of selectivity and politicisation the Council must respond to human rights issues consistently and not be dependent on the ideological, political or economic alliances of its members. It should develop a human rights standard that is universally applicable to all states.

The most controversial path the Council has taken is towards the Occupied Palestinian Territories. It has maintained a disproportionate condemnation of Israeli military actions, neglecting the condemnation of other participating states. The Council has not yet, at least numerically, demonstrated impartiality, proving to critics

that it is a politicised body incapable of acting fairly. In its first meeting, the Council made Israel a permanent agenda item, while simultaneously ignoring great human rights violations in other countries. This lack of impartiality has not gone unnoticed and has led to severe criticism of the body by the press, academics and the UN.⁶⁷ Ban Ki-Moon, incumbent Secretary General, expressed his disappointment “at the Council’s decision to single out only one specific regional item, given the range and scope of allegations of human rights violations throughout the world”.⁶⁸

The actions of the Council during its second session regarding the 2006 conflict in Lebanon were one-sided, condemning Israel while ignoring violations of international law by the opposing side, Hezbollah. Out of the six special sessions called since its inception, the Council has devoted four to Israel. Louise Arbour, former High Commissioner for Human Rights, argued that “the independence, impartiality and objectivity of such an inquiry must be guaranteed not only by the credibility of the panel members, but also by the scope and the methodology of their mandate”⁶⁹ and the Council is failing to fulfil this mandate.

The resolution condemning Israeli action on the Gaza strip was voted against by many European States, including France and Germany, who argued that the Council should treat these sensitive and controversial issues in a more balanced manner.⁷⁰ Furthermore, the resolutions regarding the occupied territories lack explicit references to the rockets fired by militant Palestinian groups against Israel while constantly condemning the latter. If the Council cannot escape states forming blocs according to ideological or religious beliefs and voting accordingly, rather than voting impartially in the face of human rights abuses, then it will be unable to maintain any shred of credibility.

The controversial amendment to the mandate of the SR on the freedom of expression, which was supported by the Organisation of the Islamic Conference and by states such as China and Russia and passed in March 2008, was declared by the International Humanist and Ethical Union to be “the end of Universal Human Rights”.⁷¹ The amendment maintains that the SR will have to report on instances of “abuse of the right of freedom of expression which constitutes an act of religious or racial discrimination”.⁷² The resolution was opposed by many states as they saw it as an infringement of free speech and they “were of the view that it gave the SR ‘policing functions’ contrary to the established practice of Special Procedures and ran the risk of setting a precedent”.⁷³ Freedom of expressions is one of the most fundamental human rights and must be protected in order to ensure a free society. Furthermore, in order to prove itself to be consistent and credible, the Council must not only impartially comment on the human rights of all states, but also covers all aspects of human rights, ensuring their indivisibility.

Recommendations and conclusions

There were three key factors which impeded the credibility of the Commission: a lack of effective mechanisms, politicisation and the inability to respond to human rights issues in a speedy manner. By 2006 it was not respected as a credible body,

creating a need for reform which was made possible by the end of the Cold War and the rise in strength and influence of the international human rights ideology. There was a demand for an organisation that would be respected by the international community. Human Rights Watch declared that, “the credibility deficit of the Commission on Human Rights, especially in its later years, created a demand for a body that is principled, credible, objective, firm in its dealings with governments, and timely in its response”.⁷⁴ The aim of this article was to assess whether the UN has succeeded in creating such a body that succeeds in overcoming the Commission's key failings.

The establishment of the Council received a mixed reception and has experienced vastly differing levels of engagement by states. The US, as the UN's most influential member and largest financial supporter, was initially one of its most vocal critics, which threatened to cause great problems for the body. It is clear that the UN has finally begun to embrace its third pillar, the protection of human rights, showing a “pursuit of the emerging norm of a collective international responsibility to protect”.⁷⁵ However, the persistent accusations of politicisation threaten its future. The new Council introduced significant changes in the Commission, including new membership, improved meeting processes and an improved standing within the UN, which has succeeded in giving it a new life with which to investigate human rights abuses. “Its inaugural two-week session, in June 2006, attracted several thousand participants, including representatives of the 47 Member States, 108 other states, 25 UN and other international organisations and 154 international NGOs”.⁷⁶

The Commission lacked effective mechanisms to prevent human rights violators of gaining a seat on the body. To overcome this it will be necessary for its members to undergo a periodic review, a move which will increase the transparency of the body. The UPR is the most impressive institutional change within the Council; it will reduce politicisation and help counter selectivity. No state will be able to avoid scrutiny, regardless of its power or UN contributions. Cuba criticised the Commission for being “an inquisition tribunal for the rich”,⁷⁷ China argued that in the Commission “human rights progress in certain parts of the world could be bloated beyond proportion in order to fulfil hidden political agendas. For the same reason, serious human rights violations could also be ignored on purpose”.⁷⁸ With the new ability to suspend membership, the Council should succeed in being a reputable body to further human rights.

Country specific sessions run a great risk of excluding countries which deserve to be shamed and are at most risk from the politicisation that the Commission was infamous for, therefore they are one of the greatest challenges for the Council. The Council has put in place measures which will make it easier for special sessions to be held and it should make use of this opportunity to discuss thematic issues which would reduce politicisation opportunities. From its very first session in June 2006 the Council made Israel a permanent agenda item, subsequently dedicating the majority of its special sessions to the issue. The Council's obsession with Israel threatens to undermine its own credibility, hindering its prospects for

success and, furthermore, undermining all of the other good work which it is endeavouring to undertake. The ease with which special sessions can be held has made it possible that states with an ulterior political agenda have called them to further their own interests. The special sessions should be used to investigate not just country specific problems but also thematic human rights violations which would reduce opportunities for politicisation.

The Council replaced the Commission's annual meeting with three per year and incorporated allowance to convene for emergency sessions, yet it still does not respond to specific human rights violations quickly and effectively enough. As shown in Darfur, when a real and serious human rights emergency occurs, the Council is slow and ineffective when there is not the political will to encourage action. The situation in Darfur is deteriorating and a failure to act has serious implications on the lives of individuals.

Using the United States as a key example, this article has looked at the importance of gaining the involvement and cooperation of the largest world powers. The Council shows sufficient organisational improvements from the Commission and its mandate allows it to function credibly. The problem lies in its reliance on states to make full use of these opportunities. States are unwilling to damage the political and economic ties that they have with other states to enforce human rights standards that do not directly affect their own interests. Furthermore, it is the member states which prevent the Council from acting swiftly and effectively to sudden human rights violations, rather than institutional deficiencies.

While the Council may still be suffering from teething problems, there are provisions in place to allow for further reform, an advantage not available within the Commission. However, the Council cannot form a credible and effective human rights body if its members do not follow the standards it aims to preach. For this reason, the NGO involvement with the Council is a positive move, as it offers the opportunity to hear independent opinions on human rights abuses. It will even consider recommendations and reports from NGOs in the UPR. However, "until the United Nations holds its members accountable for their failure to observe well-established human rights norms, the United Nations is not the best forum for the pro-posed Human Rights Council".⁷⁹ The UN is an inadequate body to condemn human rights abuses, as, even if they are well documented, states will not openly admit to committing human rights violations. Furthermore, there still are insufficient safeguards to stop human rights violators from gaining membership. The Council is becoming a body tarnished with acquiescence and compromise rather than a body that is working to safeguard the human rights of the individual. A more effective body could be formed independently of the UN, made up of truly democratic liberal states, as the Council has trouble simultaneously taking on the role of violator and punisher while maintaining credibility.

The Council is still a young project of the UN and has the capability to "help bridge the gap between the lofty rhetoric of human rights in the halls of the United Nations and the sobering realities on the ground".⁸⁰ It is only just beginning to realise its potential to make great advancements and achievements

in the field of human rights. The Council will be reviewed in 2011; an important test which could elevate the status of the Council and prove to the international community that it is capable of upholding international human rights standards. If it fails, then the workings of the Council must be radically reassessed, and possibly reformed again to solve the problems highlighted. However, the real test is in the daily battle of victims of human rights for justice and redress. The Council must act on behalf of victims. "The moral authority of the U.N. depends on its ability to respond effectively and quickly to the plight of human rights victims around the world" declared Roth, adding that the Council "can be made to work if the governments of the world show the necessary commitment. The ball is in their court".⁸¹

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RESUMO

Em 2006 a Organização das Nações Unidas passou pela maior reforma desde sua fundação em 1945, demonstrando um compromisso renovado com a proteção dos direitos humanos. A substituição da Comissão de Direitos Humanos pelo Conselho de Direitos Humanos reflete o fortalecimento do regime internacional de proteção dos direitos humanos. Entretanto, essa mudança não transcorreu sem críticas. Particularmente, alega-se que o Conselho é influenciado por diferentes inclinações políticas, em detrimento de sua efetividade: mantendo, por exemplo, foco desproporcional nos Territórios Ocupados da Palestina, e falhando em reagir com prontidão aos abusos cometidos em Darfur. Além disso, o Conselho é claramente desacreditado por seu fracasso: de um lado, tem falhado na implementação de mecanismos eficazes de direitos humanos que impeçam ações de seus próprios membros, violadores de direitos humanos; de outro, não tem conseguido angariar apoio dos Estados Unidos. Esse artigo analisa tais críticas.

PALAVRAS-CHAVE

Nações Unidas - Conselho de Direitos Humanos - Comissão de Direitos Humanos - Politização

RESUMEN

En 2006 la Organización de Naciones Unidas sufrió su mayor reforma desde su creación en 1945, mostrando un renovado compromiso de protección de los derechos humanos. La sustitución de la Comisión de Derechos Humanos por el Consejo de Derechos Humanos pone de manifiesto la gran fortaleza del derecho internacional de los derechos humanos. Sin embargo, este cambio no ha estado exento de críticas. En particular se ha sostenido que el Consejo adolece de diversos prejuicios políticos en detrimento de su eficacia: por ejemplo, concentrándose desproporcionadamente en los territorios palestinos ocupados mientras que no responde rápidamente a los abusos en Darfur. Además, el Consejo está, sin duda, debilitado tanto por su fracaso para aplicar mecanismos eficaces para evitar que sus propios miembros sean violadores de los derechos humanos como por su incapacidad para conseguir el apoyo de los Estados Unidos. Este artículo analiza las referidas críticas.

PALABRAS CLAVES

Naciones Unidas - Consejo de Derechos Humanos - Comisión de Derechos Humanos - politización

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