

COMMENTARY ON THE FIRST SIX MONTHS OF THE NEW HUMAN RIGHTS COUNCIL

On 27 March 2006, the United Nations Commission on Human Rights (the Commission) held its last session after 60 years of work. On 19 June 2006, the first session of its successor, the Human Rights Council, was held. These two historic meetings provided the framework for the year's activities in the international human rights system.

THE CAMPAIGN AGAINST THE COMMISSION ON HUMAN RIGHTS

The end of the Commission on Human Rights was a shameful affair. Its abolition was dictated more by political consensus than by rational analysis of its strengths and weaknesses, its successes and failures. It followed a campaign against the Commission by many leading States and some non-governmental organisations (NGOs) over a period of years. They argued that the Commission was ineffective, hypocritical and politicised, dominated by States with appalling human rights records. Tellingly, these critics were joined in their condemnation of the Commission by precisely those States they most criticised. In a highly polarised environment, States from both sides of the international political divide used the same language, the same rhetoric to condemn the Commission, though each blamed the other for the situation. They were joined in this criticism by the report,¹ in December 2004, of the High-level Panel appointed by the Secretary-General

to advise on reform of the United Nations and then by the Secretary-General's response² to that report in March 2005.

What was lacking in all this critique, including in the reports of the High-level Panel and the Secretary-General, was any evaluation of the work of the Commission, any analysis of its strengths and of obstacles to its effectiveness, and any discussion of options that would address the obstacles without destroying the strengths. By the beginning of 2006 the Commission had been so thoroughly undermined that it was as though its name had been changed to the Discredited Commission on Human Rights. The Commission was rarely referred to without the addition of the adjective 'discredited' to its name.

By early 2006, the campaign against the Commission had been so effective that there was no alternative but its replacement with a new institution, no matter what the fears about the likelihood that the new body would be better or even as good as the Commission. In the World

¹ *A More Secure World: Our Shared Responsibility*, A/59/565, (2 December 2004), p. 74.

² *In Larger Freedom: development, security and human rights for all*, A/59/2005, (21 March 2005), p. 45.

Summit of September 2005, heads of State and government committed the United Nations to replacing the Commission within a year with a Human Rights Council. The General Assembly responded with the passage of the necessary resolution on 15 March 2006.³

The last rites

The 62nd session of the Commission on Human Rights was to begin on 13 March 2006 but the continuing wrangling in New York about the proposed Resolution on its replacement made the commencement of an ordinary session impossible. The start was delayed for a week and the Resolution was passed. The start was then delayed for another week while the bureau consulted with States about the form the final session should take. Some argued that the annual reports of the special procedures could not be deferred and had to be discussed while they were still current. Some said that there were urgent human rights situations that needed to be addressed. Others opposed any substantive work at all by the terminating body.

All that could be agreed was that the Commission should hold a final session of no more than three hours to mark its demise. In the end it took barely 150 minutes. Statements were kept to the barest minimum. Only one statement on behalf of NGOs was permitted. That statement was the largest joint statement ever delivered to the Commission. 265 NGOs expressed their collective rejection of the decision to reduce the many different voices of victims and their civil society advocates to a single three-minute statement. They also expressed the regret that the Commission's historic contribution to human rights should have been mocked in this way. The end of the Commission was truly ignominious, reflecting the sorry state of international human rights cooperation between States.

Assessing the Commission

A proper, balanced assessment of the 60 years' work of the Commission on Human Rights is still to be done and is still needed. Only by taking proper account of its successes and failures

can the new Council develop further the former and avoid the latter.

Certainly the Commission's most significant success lies in the development of international human rights law. When it was established in 1946, there was little or no human rights law. It began its work with the drafting, negotiation, and adoption of the *Universal Declaration of Human Rights*, still one of the greatest achievements of the 20th century. It is the foundation upon which all human rights law has been built. The Commission itself did much of the subsequent building, most notably through the drafting of the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, both adopted in 1966, and of other human rights treaties, declarations, principles, rules, guidelines and other instruments. Its work of construction was not limited to standards, however. It was also responsible for the development of mechanisms for international monitoring, investigation and accountability: its system of special procedures, described in November 2006 by the then Secretary-General as 'the jewel in the crown' of the Commission;⁴ the first international procedure for the consideration of individual complaints of human rights violations;⁵ and mechanisms for the consideration of the human rights performance of States and for the provision of international assistance to States to improve their human rights performance.⁶ It also opened itself to the participation of victims of human rights violations, human rights advocates and human rights defenders as no other international inter-governmental body did.

The Commission survived the polarisation and politicisation of the Cold War decades to enjoy a few idyllic years in the early 1990s. In fact these years may have led to its ultimate demise. First, they heightened expectations of what an inter-governmental, essentially political body could accomplish and those expectations were simply too high to be capable of fulfillment. Second, they enabled the development of new practices of State accountability that many States became determined to do all in their power to resist. Third, they diminished the dominance of the most powerful States and those States could not or would not accept that. This conjunction of factors produced the odd coalition of interests demanding, successfully, the replacement of the Commission.

³ General Assembly *Resolution 60/251*.

⁴ 'Secretary-General's message to the Third Session of the Human Rights Council', delivered by Ms. Louise Arbour, 29 November 2006, available at: www.unpo.org/article.php?id=5942.

⁵ Known as the 1503 procedure as it was set up under *Resolution 1503* of the Economic and Social Council.

⁶ Discussed in the last years of the Commission under agenda Items 9 and 19.

The coming of the Council

And so the Human Rights Council was established by the General Assembly Resolution of 15 March 2006 and began its life and work two months later, on 19 June. The Resolution indicates that the Council should guarantee ‘universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization’. The problem is that, although these descriptive directions were adopted overwhelmingly by the General Assembly, there is no agreement among States about what they mean in fact.

The new Council is marginally smaller than its predecessor, 47 member States in place of the 53 previously. The proportional representation of geographical groupings of States was altered very significantly to reflect more closely the proportions of the groups within the total membership of the United Nations. The proportion of members from the Western European and Others Group and the Eastern European Group were reduced and those of members from the African Group and Asian Group were increased. Its mandate is largely the same, a broad mandate to promote and protect human rights. It must review all the mechanisms that it has inherited from the Commission and retain a system of special procedures, individual complaints and expert advice. In addition it will have a new mechanism, the Universal Periodic Review (UPR), whereby all States will have the fulfilment of their human rights obligations and commitments reviewed periodically. It must be at least as open as the old Commission was to participation by observers – States, inter-governmental organisations, national human rights institutions and NGOs. It will also meet more regularly – at least three times a year – for a longer total period – at least ten weeks a year. In addition, there are far easier provisions to convene special sessions.

The inauguration

The inauguration of the Council on 19 June 2006 was a disappointing, low-key event, perhaps reflecting a wish not to make too much of the start of what could prove to be an un-

successful enterprise. The Secretary-General, the President of the General Assembly (who had steered skillfully the passage of the Resolution to establish the Council), and the High Commissioner for Human Rights all attended and spoke. The first President and his Vice Presidents were elected. A children’s choir sang a little. During the days that followed, a succession of over 80 high-level government speakers expressed their hopes for the new institution.⁷ The flatness of the first week was broken only towards its end by inspiring statements by four civil society speakers after the conclusion of the high-level segment. They challenged the new Council and its members to respond to people’s actual experiences of human rights, especially the experiences of victims of human rights violations. They presented what the Council needed to do, in spite of fears about its capacity to do it.

The first six months

The Human Rights Council held three sessions during 2006, two weeks from 19 to 30 June, three weeks from 18 September to 6 October, and two weeks from 27 November to 8 December. It also held four special sessions, on Israeli attacks in the Gaza Strip, Israeli attacks on Lebanon, an Israeli attack on Beit Hanoun in the Gaza Strip, and the situation in the Darfur region of the Sudan. In addition there were seemingly countless days and weeks of informal consultations and working group meetings.

At its first session, the Council established two working groups, one to conduct the reviews and the other to develop the UPR mechanism. At its third session it established a third working group to deal with the agenda, programme of work, working methods and rules of procedure. Substantial time in each session of the Council was devoted to discussion of the reports of the working groups and the issues on their agendas.

The demands of the first six months were great, leaving many State delegations and all NGOs struggling to cope with the workload and time demands. During its first half-year, several critical issues emerged that affected the Council’s work and raised anxieties about its future.

⁷ A high-level speaker had to be of or above the rank of deputy minister in a government.

Selectivity

The General Assembly Resolution included non-selectivity among the obligations of the new Council and members of the Council and observer States reiterated this continually, like a mantra. Their performance during its first six months, however, was marked by even greater selectivity than had been seen in the former Commission. The situation in relation to Israel, Palestine and Lebanon was indeed very serious with the most significant military combat in many years in July and August 2006. It certainly warranted Council attention but it was the only situation on which there were debates at every ordinary session of the Council, several resolutions, and three special sessions. In contrast, the situation in Darfur was not subject of a resolution until November 2006 or a special session until December 2006, and there has not been a single debate, resolution or special session on the situation of human rights in Iraq.

Objectivity

The General Assembly Resolution also requires the Council to be objective but its debates and procedures are increasingly failing to constructively engage with the Council's independent experts. This is evident both in the treatment of the Council's current independent experts and in attempts to curtail the role of independent expertise in future procedures and mechanisms and to subject the experts to political control. Some proposals for the modalities of the Universal Periodic Review would deny any role for independent expert advice to the Council in reviewing States and some proposals in the review of the system of special procedures would eliminate many of the most important roles and responsibilities of the mandate holders and subject them to far greater State political control. The dialogues with the special procedures, both at the second and third sessions of the Council, were noted by increasingly sharp and intemperate attacks on individual mandate holders by some States. Of particular concern were very personal criticisms of the Special Representative of the Secretary-General on Human Rights Defenders by Algeria on behalf of the African Group; on the Special Rapporteur on Extrajudicial Executions by Nigeria; and on the Special Rapporteur on Extrajudicial Executions,

the Representative of the Secretary-General on Internally Displaced Persons, the Special Rapporteur on the Right to Housing and the Special Rapporteur on the Right to Health by Pakistan on behalf of the Organization of the Islamic Conference. Neither the High Commissioner for Human Rights nor the President of the Council thought it necessary or appropriate to defend the mandate holders when their integrity and independence were impugned. On other occasions the integrity and objectivity of the High Commissioner herself came under attack, most notably by Algeria on behalf of the African Group.

Substance

The Council faced tension during this period between its institution-building responsibilities and the substantial work of human rights protection and promotion. The General Assembly gave the Council the task of completing the review of past mechanisms and establishing the new Universal Periodic Review within one year. The agenda for each session was a simple one, containing only a few Items and principally directed towards the institution-building work. There were no agenda Items addressing specific human rights issues or the situations of specific groups, although a general Item, 'Other issues', was included each time to permit issues of substance and significance to be raised and discussed.

The most substantial discussions of human rights issues and situations took place at the September session in the context of the reports of the special procedures mandate holders, all of which had been carried over from the last session of the former Commission on Human Rights in March. Although the reports were quite dated in many instances, the discussions were robust and engaged far more States in far more substance than was the case in the dialogues with special procedures in the former Commission. For the first time, too, NGOs were permitted to participate in the dialogues. Although the discussions were substantive, the results were not. There was no clarity and no agreement on what should follow the reports and dialogues. Most, if not all, the reports made recommendations but these were not taken up by the Council. NGOs were disappointed by the inaction and

the special procedures themselves must have left with a sense that their work had not been properly appreciated by the Council and their recommendations not taken sufficiently seriously.

Polarisation

In the corridors and coffee shops around the Council, the atmosphere within the Council is often described as poisonous. Certainly the discussions in formal sessions and working groups and in informal meetings and receptions are often characterised by bitterness and hostility even more than was often evident during the days of the old Commission. In one sense the level of conflict is understandable. The former Commission lasted 60 years. The institution-building work of the first year of the Council is likely to govern or at least influence its operations for the foreseeable future, perhaps the next two or three decades. The stakes are high and the issues worth contesting, even if the atmosphere at present is far from that demanded by the General Assembly Resolution: a Council working on the basis of cooperation and dialogue.

In another sense, however, the nature of the conflict is being portrayed in terms that are quite inaccurate and could cause substantial long-term damage to the Council and its work. Some States, most notably Algeria, who is also convenor of the African Group, persistently portray the division in North-South terms.

First, this is simply inaccurate. There are many different views within each of the geographical groups and those views place northern and southern States alongside each other, on one side or the other of the policy debate. For instance, the great majority of States in the Latin American and Caribbean Group (GRULAC) frequently agree with the policy positions of the majority of States of the Western European and Others Group. The issue is therefore not simply one of a North-South divide.

Second, this portrayal is quite pernicious. It is used as a political ploy to create the perception of a strict polarisation that does not exist in fact. It is a strategy to push States into camps, in particular to force the 26 African and Asian States,

out of the 47 Council members, into a solid bloc of hardline opposition to an effective Human Rights Council, through a sense of solidarity with the group rather than out of policy conviction. Whether these tactics prove effective is still to be seen but the dangers to the Council are already clear.

NGO participation

Far more positively, the first sessions of the Council have seen NGO participation not only maintained but enhanced. Their past entitlement to make written statements has been continued. They have been able to make oral statements as in the past but there has been no limit to the number of statements any individual NGO can make and they have been able to participate in areas not previously open to them, most notably during the interactive dialogues with the High Commissioner for Human Rights and with the special procedures. Indeed, the only part of the agenda from which they are excluded is the debate on proposed resolutions and decisions during voting sessions. However, to-date there have been fewer NGOs present at sessions of the Council than there were at the Commission.

Although NGOs have been able to participate in more areas than previously, their participation has been tightly restricted in terms of total time allocated and the numbers permitted to speak. In the old Commission, there was no limit on the number of NGOs able to speak on an agenda Item and debate on every Item continued until all speakers, both governmental and non-governmental, had been heard. In the Council, observer States encounter no restriction on their ability to speak but NGO participation is capped, disadvantaging them in comparison with other observers. As fewer NGOs attended sessions in 2006 than past years this has so far not been a major problem. The limited time that is being allocated to NGOs will become far more problematic if and when NGOs come to the Council in their past numbers, perhaps beginning at the session in March 2007.

Authors

Meghna Abraham, Eléonore Dziurzynski, Michael Ineichen, Claire Mahon, Gergey Pasztor, Chris Sidoti and Gareth Sweeney (Geneva); Alison Graham and Cléa Thouin (New York).

Editors

Eléonore Dziurzynski (copy editor), Meghna Abraham, Alison Graham, and Gareth Sweeney (section editors).

Contributors

Jay Bahadur, Corey Barr, Nicola Brandt, Nicholas Calacouras, Maxence Delchambre, Pauline Egret, George Florea, Valeria Fruzzetti, Jessica Griffiths, Michael Ineichen, Eleni Kartsonaki, Asger Kjaerum, Brigit Morris, Gergey Pasztor, Harini Sivalingham, Arzoo Syeddah, Cléa Thouin, Una Walsh, and Brennan Webert (Geneva); Onyema Afulukwe, Jason Burns, Ean Fullerton, Brie Gettleson, Yasmin Grewal-Kok, Kiley Kane, Kristi Kenyon, Asger Kjaerum, Eva Nudd, Cléa Thouin, Christina Piaia' and Bethany Sousa (New York).

Closing of this edition

16 February 2007.

Copyright and distribution

Copyright © 2007 International Service for Human Rights

Material from this publication may be reproduced for training, teaching or other non-commercial purposes as long as ISHR is fully acknowledged. You can also distribute this publication and link to it from your website as long as ISHR is fully acknowledged as the source. No part of this publication may be reproduced for any commercial purpose without the prior express permission of the copyright holders.

Disclaimer

While every effort has been made to ensure the accuracy and reliability of the information contained in this publication, ISHR does not guarantee, and accepts no legal liability whatsoever arising from any possible mistakes in the information reported on or any use of this publication. We are however happy to correct any errors you may come across so please notify information@ishr-sidh.ch

Subscriptions

To subscribe to the *Human Rights Monitor*, please write to information@ishr-sidh.ch with Human Rights Monitor in the subject line.

Human Rights Monitor online

For regular reports on the UN human rights bodies published under the Human Rights Monitor Series, please visit www.ishr.ch/hrm