

The Human Rights Council: A New Era in UN Human Rights Work?

*Yvonne Terlingen**

Kofi Annan did more than any UN Secretary-General before him to stress the close link between human rights and peace and security. In his inaugural address to the newly created Human Rights Council in Geneva on June 19, 2006, he said: “. . . lack of respect for human rights and dignity is the fundamental reason why the peace of the world today is so precarious, and why prosperity is so unequally shared.” With the creation of the Human Rights Council, “a new era in the human rights work of the United Nations has been proclaimed.”

The previous year, at the September 2005 World Summit in New York, Annan persuaded all of the world’s leaders to agree that human rights constitute one of the three pillars—along with peace and security and economic and social development—that form the base of all the UN’s work. The summit’s Outcome Document captured the results of the highly ambitious if not wholly successful UN reform agenda that Annan had initiated in his second term. Landmark outcomes from the vantage point of human rights include recognition by all states that the international community has a “responsibility to protect . . . should peaceful means be inadequate and national authorities manifestly fail to protect their populations” from genocide, war crimes, and crimes against humanity; that the regular budget resources of the Office of the High Commissioner for Human Rights must be doubled; and that a new Peacebuilding Commission will be created to “advise on and propose integrated strategies for post-conflict peacebuilding and recovery.”

Most important, world leaders decided that a new, more authoritative human rights body—a Human Rights Council—should be created to replace the fifty-nine-year-old Commission on Human Rights. After intense and at times highly

* The author heads Amnesty International’s United Nations office in New York. This article reflects the views of the author and not necessarily those of Amnesty International.

divisive negotiations, which were eventually resolved by General Assembly President Jan Eliasson of Sweden, the assembly adopted Resolution 60/251 by an overwhelming majority on March 15, 2006, resolving to create a Human Rights Council. In the 170–4 vote, only the United States, Israel, the Marshall Islands, and Palau voted against (with Iran, Venezuela, and Belarus abstaining). Nevertheless, U.S. Representative John Bolton graciously promised that “the United States will work cooperatively . . . to make the Council as strong and effective as it can be,” and added: “We remain committed to support the UN’s historic mission to promote and protect the basic human rights of all the world’s citizens.”

WHY A NEW HUMAN RIGHTS BODY?

The council’s predecessor, the Commission on Human Rights, created in 1946, achieved a more substantive body of human rights work than is often recognized. The commission drafted major international human rights standards, including the two international human rights covenants, which, together with the earlier adopted Universal Declaration of Human Rights (1948), form what is known as the International Bill of Human Rights. The commission advanced human rights protection globally through increasingly substantive thematic and country-specific work, inventing a unique system of Special Procedures—that is, a body of independent and objective human rights experts and working groups that includes, and is sometimes generally referred to as, Special Rapporteurs. As the commission’s—and now the council’s—“eyes and ears,” these Special Rapporteurs monitor and rapidly respond to reported human rights violations anywhere in the world, visiting countries, carrying out studies, intervening on behalf of individuals, and reporting back with recommendations for action. Now numbering forty-one, this body of country-specific and thematic experts began to grow in the 1980s, when they were first established to address enforced disappearances and other gross human rights violations in Chile and Argentina. Their current mandates include torture, violence against women, issues of health and housing, and specific country situations, such as Myanmar, Sudan, and North Korea. They perform the crucial function of providing objective information to underpin the UN’s human rights work. They have provided early warning of human rights crises and have pressured states to turn their human rights commitments into reality. Nongovernmental organizations (NGOs) concerned with human rights, whether big or small, national or international,

have gained access to the commission in a manner unequaled elsewhere in the UN system.

Nonetheless, the commission suffered increasing criticism from NGOs for failing to address important issues on their merits. States complained of double standards, especially in the selection of countries for public scrutiny. Some states from the South rightly wondered why the Commission on Human Rights—on which the “Permanent Five” members of the Security Council (China, France, the Russian Federation, the United Kingdom, and the United States) were virtually guaranteed a permanent seat—never adopted a resolution condemning well-known and gross abuses in, for instance, Tibet, Chechnya (the commission did so exceptionally in 2000 and 2001 but subsequent draft resolutions were rejected), or in Guantanamo Bay. Of particular annoyance to the United States was its unexpected failure to win a seat on the commission in 2002 and the election of the Libyan ambassador to chair the commission in 2003 (in which capacity she served rather well). Even the High Commissioner for Human Rights and the UN Secretary-General himself, in his landmark March 2005 report “In Larger Freedom,” spoke of the commission suffering a “credibility deficit.” In outlining his reform agenda, Annan severely criticized the commission:

Yet the Commission’s capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.

In that report the Secretary-General proposed to replace the commission with a smaller Human Rights Council, a decision that appears to have been taken rather hastily. The idea was no more than an afterthought in the December 2004 report of the High-Level Panel on Threats, Challenges, and Change, which Annan had specifically commissioned to lay the groundwork for the recommendations in his own report. In fact, the High-Level Panel’s chief recommendation had gone in the opposite direction: it advocated that the fifty-three-member Commission on Human Rights be turned into a body with universal membership, adding at the very end that “in the longer term, Member States should consider upgrading the Commission to become a ‘Human Rights Council’ that is no longer subsidiary to the Economic and Social Council [ECOSOC] but a Charter body standing alongside it and the Security Council. . . .”

Making this far-reaching human rights proposal immediately his own was certainly a bold initiative, and bold is what NGOs had asked Annan to be. The Secretary-General's decision was, however, made at a time of profound suspicion and distrust between North and South, sharpened by the U.S.-led invasion of Iraq and its aftermath. Certainly, this was not an easy time, as experience shows, to build an entirely new human rights body that must be better than its predecessor.

KEY FEATURES OF THE NEW HUMAN RIGHTS COUNCIL

Annan conceived the council as having “a more authoritative position corresponding to the primacy of human rights in the Charter.” He expressed the hope that the Human Rights Council, like the Security Council, the General Assembly, and ECOSOC, could be elevated to the status of a “principal organ” of the United Nations. Human rights would thus logically, in institutional terms, get their proper place next to peace and security and development as one of the three pillars of the UN. Although many countries wished the Human Rights Council to have that principal organ status, putting it on an equal footing with the Security Council was not a particularly welcome idea to some key developing countries. They did not look favorably upon linking the UN's main human rights body to the all-powerful Security Council, which can take binding decisions. Rather, the Human Rights Council was eventually created as a subsidiary organ of the General Assembly, but the assembly agreed to review the council's status within five years of its formation. Meanwhile, the council was given a firm mandate “to address situations of violations of human rights, including gross and systematic violations,” and to “respond promptly to human rights emergencies.” Arrangements and practices observed by the commission for NGO participation, based on ECOSOC Resolution 1996/31, were retained. General Assembly Resolution 60/251 places much emphasis on the principles of cooperation and genuine dialogue in the council's work; recognizes the need for “objectivity and non-selectivity” in considering human rights issues; and proclaims that “double standards and politicization” must be eliminated.

Although there had been growing support for the High-Level Panel's proposal to make the Commission on Human Rights a universal membership body—which would help enhance its authority by the sheer force of its members—the Secretary-General, probably with an eye on the United States, proposed to create

a “smaller standing Human Rights Council.” The United States had consistently advocated a smaller, leaner human rights body, arguing that a membership of twenty states would be ideal. Eventually, a compromise was reached and a body of forty-seven members (just under the commission’s fifty-three) was decided upon.

What many diplomats did not realize until late in the negotiations was that any new UN body would have to be created along customary UN lines of equitable geographical distribution. In the case of the council, this comes down to thirteen for the African Group (which had fifteen in the commission), thirteen for the Asian Group (which had twelve), six for Eastern Europe (which had five), eight for the Latin American and Caribbean Group (which had eleven), and seven for the Western European and Others Group (known as WEOG, which previously had ten seats).

In the commission, African and Asian states had about the same number of votes as the Latin American and WEOG groups combined, but the lineup is very different in the council. The African and Asian members now have a comfortable majority (at least twenty-six out of forty-seven votes) in the UN’s main political human rights body; and they are definitely using it to set the agenda, as is clear on a range of issues, including the selection of countries for immediate attention by “special session” (see below) and the reluctance of many African and Asian members to act on country situations apart from Israel. WEOG and the Latin American Group have lost their power to win a vote on these and other issues unless their proposals attract the support of at least three African and Asian states. The changed political dynamics point to the need for European and Latin American countries to adopt a cross-regional approach to address human rights issues of common concern.

Membership is for three years and shall end after a country has served two consecutive terms. Thus, the principle of rotation has been established, so that even the permanent members of the Security Council have lost their *de facto* claim to perpetual membership. All council members are obliged to “uphold the highest standards in the promotion and protection of human rights” and “shall fully cooperate with the Council”—obligations unfortunately not taken seriously by some of its current elected members. Elections are held in secret and the votes of an absolute majority of the General Assembly’s members—that is, at least 97 out of 192—are needed for election regardless of how many UN member states are present and voting. Candidates’ contributions to human rights as well as their pledges and commitments shall be taken into account in the vote. Interestingly,

all regions except Africa put up more candidates than there were seats for the region, and countries with highly problematic human rights records—such as Sudan and Zimbabwe—did not stand for the first elections, held in May 2006. Iran and Venezuela—two of the three countries that abstained in the vote to establish the council—were not elected. The election outcome shows that the results would hardly have been different had the United States won its campaign for a two-thirds majority voting requirement for council membership. (Disregarding the vote in the highly competitive Eastern European Group, only Saudi Arabia and Sri Lanka would not have been elected under a two-thirds majority requirement.) Although not obliged to do so, all candidates made written pledges outlining their human rights agendas, a major advance even though the quality of the pledges varies greatly from country to country.

Louise Arbour, the High Commissioner for Human Rights, argued that a system of Universal Periodic Review (UPR)—put forward by Annan as Universal Peer Review—was the only logical answer to the criticism (largely considered justified) that the commission's old practice of selecting specific countries for scrutiny was marked by "selectivity and double standards." Under this novel system of UPR, unique in the UN's human rights regime, the human rights record of all UN member states, including such powerful countries as China, the Russian Federation, and the United States, shall henceforth be examined by the council. Just how effective the UPR will be in holding all states to account, however, is yet to be seen.

A major drawback of the former commission was that it only sat once a year, for six weeks in spring, and was ill placed to react in a timely manner to human rights crisis situations. The new council sits for ten weeks per year, and shall meet at least three times a year, including for a main session. Moreover, it can easily convene in special session: it is sufficient that only a third of its members make the request, and the council has shown a great appetite for it.

HOW IS THE HUMAN RIGHTS COUNCIL DOING?

The council has had a difficult start. The simultaneous outbreak of renewed hostilities in the Middle East—traditionally the most sensitive issue on the former commission's agenda—complicated its early steps. As expected from a political body, strong political divisions among countries and groups are reflected in the council's debate, and its proceedings to date cannot be characterized as exemplifying

the spirit of “constructive international dialogue and cooperation” that Resolution 60/251 so proudly proclaims. Nonetheless, there are also some definite signs of hope.

The council’s first session, June 19–30, 2006, marked a substantive beginning, with two major new human rights instruments adopted. The International Convention for the Protection of All Persons from Enforced Disappearances was adopted by acclamation. (Fifty-seven states have already signed the convention after the General Assembly adopted the text by consensus at its sixty-first session.) The draft Declaration on the Rights of Indigenous Peoples, negotiated for more than eleven years, was adopted by vote with thirty for, two against, and twelve abstentions. (Unfortunately, the text is now running into difficulties in the current, sixty-first, General Assembly). In addition, a working group was established to draft a protocol to the Covenant on Economic, Social, and Cultural Rights to create an individual complaints procedure.

The council also took the first steps in the massive operation to build its entirely new human rights architecture. It decided to let all of its twenty-eight thematic and thirteen country-specific Special Rapporteurs continue their crucial work for one year, pending review. It created two working groups: one to review the system of these Special Rapporteurs, the other to establish the new UPR system to monitor all states’ human rights performance, as required by Resolution 60/251. Both groups have started their daunting task and must deliver results within one year, by June 2007. While the council is engaged in tense negotiations to establish the UPR and review the system of Special Procedures before the June 2007 deadline, its thematic and country work is taking a back seat.

The first regular session discussed five “substantive issues” and adopted a resolution on Palestine. Given the rapidly deteriorating situation in the Occupied Palestinian Territories, the council voted for the first time in its young history to hold a special session on that situation. For whatever reason, the European Union thought it necessary to call for a vote and then proceeded to vote against the proposal, which was easily passed with twenty-nine for, twelve against, and five abstentions.

The Special Session on the Occupied Palestinian Territories was held on July 6, 2006, and was the first in a series of three special sessions all called for by the Group of Arab States, who were twice joined by the Organization of the Islamic Conference (OIC), to deal with actions by Israel. As a result, the council decided, by vote, to send the Special Rapporteur on the Palestinian Territories

on a fact-finding mission. The second special session, held on August 11, 2006, responded to the worsening human rights crisis in Lebanon and established, also by vote, a high-level commission of inquiry. The third, on November 15, 2006, adopted a resolution (by a vote of thirty-two for, eight against, and six abstentions) expressing the council's shock at Israeli killings of Palestinian civilians at Beit Hanoun and calling for a high-level fact-finding mission.

On their merits, all three situations were urgent and grave and deserved the special attention of the council. But their outcome was in some respects unworthy of a council expected to act in a "fair and equal manner," as Resolution 60/251 requires. Particularly regrettable was the one-sided resolution that the council adopted—by a vote of twenty-seven for, eleven against, and four abstentions—on Lebanon (A/HRC/S-2/1). The highly politicized resolution strongly condemned "grave Israeli violations of Human Rights and breaches of International Humanitarian Law in Lebanon," but entirely ignored the massive human rights abuses committed by Hezbollah in using indiscriminate rocket attacks against Israeli civilians. This was a clear example of the "selectivity" and "double standards and politicization" that Resolution 60/251 seeks to eliminate. Moreover, the nearly exclusive focus of these special sessions on Israel, at the cost of disregarding equally if not more egregious human rights situations elsewhere in the world, started to raise serious questions regarding the council's credibility.

More recently, however, the council has begun to steer a more balanced course. Prompted by exceptionally strong statements by Secretary-General Annan as well as the High Commissioner for Human Rights, the council eventually convened a long overdue Special Session on Darfur on December 12–13, 2006, resulting in a decision calling for action in Darfur. Particularly encouraging is that no fewer than thirty-three members, representing all regions of the council, cosponsored the call for the Darfur special session—a higher number than the three previous calls for a special session, which were twenty-one, sixteen, and twenty-four, respectively. Moreover, the thirty-three included a significant number of African countries: Algeria, Gabon, Ghana, Mauritius, Nigeria, South Africa, and Zambia. Although the decision adopted (S-4/101) was not as strong as many observers felt it should have been (it failed to identify the Sudanese government and the Janjaweed as responsible for the serious human rights abuses), it is nevertheless the only resolution or decision adopted unanimously by the council in any special session to date. (In a move of defiance of the council's will, the Sudanese government in February 2007 refused to grant visas to

the high-level fact-finding mission that the council despatched to Darfur. Equally regrettable, in December, Israel refused access to the fact-finding mission created to investigate the Beit Hanoun killings.)

In all four special sessions the council decided to send inquiry commissions to investigate the situations and report back, suggesting that the council is serious about looking at new ways to address pressing human rights situations rather than simply sitting in Geneva and adopting condemnatory resolutions.

Meanwhile, the council also continued its work in regular sessions, holding no fewer than three regular sessions in 2006 (June, September/October, and November/December). These sessions concentrated on procedural decisions, institution building, and some thematic issues. Generally, these regular sessions have not yet resulted in concrete outcomes to protect human rights in specific countries, even in such pressing situations as Sri Lanka. The resumed second regular session addressed Israeli actions in the occupied Syrian Golan and the Palestinian Territories. It took two consensus decisions, on Nepal and Afghanistan, urging these countries to cooperate with the High Commissioner for Human Rights and asking her to report on these countries to future sessions. At the end of that session, on November 28, the council also took a decision (2/115) on Sudan (Darfur), which was pushed through by Algeria as chair of the African Group, notwithstanding attempts by one African and many other countries to strengthen the text. The decision was unacceptably weak, failing to identify the Sudanese government's responsibility for the gross violations committed; and it lacked any operational mechanism—such as an immediate call for action by the High Commissioner or follow-up by the council itself—to address the particularly grave situation in Darfur. Dissatisfaction with the bland decision prompted an immediate and successful call for a Special Session on Darfur, as described above.

A human rights threat of symbolic proportions, as posed by Guantanamo Bay, has not yet surfaced in the council. Chronic and widespread human rights violations, such as in North Korea, Iraq, and Myanmar (Burma), also stand out to be addressed. The case of Myanmar will be an immediate test for the Human Rights Council's resolve to address such serious situations. Two of its members, Indonesia and Russia, which are also members of the Security Council, told the Security Council on January 12, 2007, that they favored action on Myanmar in the Human Rights Council after both countries failed to vote for a Security Council resolution that would have called for the release of all political prisoners

in Myanmar. (In the Security Council vote, Russia vetoed the resolution and Indonesia abstained.) This once more illustrates that the Human Rights Council cannot postpone acting on these and other serious country situations any longer. If it fails to do so, the Third Committee of the General Assembly, which also deals with human rights, will increasingly become the focus for country-specific human rights resolutions, detracting from the council's primacy as the UN's foremost human rights body.

This brief overview shows that calling for a special session is now the *de facto* way to generate council action to protect human rights in specific countries. Many other human rights situations have been discussed in the council in the context of the reports presented by the Special Rapporteurs, however, and these have generated many more proposed country visits—illustrating how essential the Special Rapporteurs are to the council's work. One of the most positive developments so far is the substantive “interactive dialogue” with Special Rapporteurs that the council held at its second regular session in September 2006. As these UN debates go, they were unprecedented in their vitality, the depth of interaction with the Special Rapporteurs, and the level and nature of participation. Many missions participated at the ambassadorial level, and national human rights institutions and NGOs took part in the debate. This is unprecedented in Geneva, and NGOs remain unable to speak in similar dialogues with the Special Rapporteurs in the General Assembly's Third Committee in New York. Unfortunately, these debates have so far failed to lead to concrete outcomes to promote and protect human rights in the countries discussed and thus give effect to the recommendations made by the council's own thematic and country-specific Special Rapporteurs. This will be a key challenge for the council in the future.

Another remarkable development is that the council is in fact becoming the “standing” body to address human rights situations whenever necessary, as Annan had in mind. The result of the flurry of calls for special sessions—whatever one may think of the highly politicized selection criteria—combined with the ongoing substantive regular sessions is that the council was in session every single month of 2006 since it opened its doors on June 19, 2006. The much greater frequency of sessions (compared to the once-yearly session of the commission) has created a range of options to swiftly react to human rights situations in countries that need urgent attention, including keeping the situations under review for the next session, depending on whether the governments concerned take steps to improve their human rights performance. Another interesting

development is the recent proposal made by the president of the council, Luis Alfonso de Alba of Mexico, to use the presence of ministers at the high-level debate to start roundtable discussions on topical human rights issues, and to schedule thematic debates throughout the year to allow more in-depth attention to a specific theme related to the council's work. Regrettably, these proposals for innovation have, so far, broadly met with skepticism. Nevertheless, the council now has different tools at its disposal that will be developed over time, and some members are thinking about how to use them creatively.

WHERE TO GO FROM HERE?

It is generally agreed that institution building has to be the council's highest priority. There must be an understanding of the time and effort that council members need to spend on this highly complex task, in which non-council members and NGOs are also playing a substantive role. Two imperatives stand out for the council's new human rights architecture. The first is to build an effective system of Universal Periodic Review to assess human rights performance in all countries. The second is to preserve and strengthen the system of Special Rapporteurs and to defeat attempts by some members to weaken their independence.

Concentrating on institution building alone, however, is not the way to create a better human rights body. As was the case with the commission, many members of the council have shown a tendency to put politics, and sometimes regional politics, above human rights. Many council discussions have been marked by suspicion and distrust, and the voices of some members have been stifled by regional or other group positions, leading Annan to caution the council last November that "States that are truly determined to uphold human rights must be prepared to take action even when that means, as it sometimes will, giving offense to other States within their own region."

The former UN Deputy Secretary-General, Louise Frechette, precisely identified the current predicament in an interview of January 17, 2007:

To a certain extent we have sought institutional responses, institutional fixes, through reform to problems that are more fundamental and more political. . . . The Human Rights Commission was deemed to be ineffective by a lot of countries. The answer was to transform it into a new institution called the Human Rights Council. But it's not performing all that much better than the Human Rights Commission because the world is composed of countries that have very different views on human rights. And unless there's real political action to really strengthen the solidarity of all the countries

that do believe in human rights across the North-South divide, you shouldn't be surprised that you have the exact same results. I think there's not enough attention paid to building this political consensus among countries that share the same views, and too much on the machinery.

As Frechette makes clear, the Human Rights Council must find new ways to work across regions. It must identify common human rights concerns and adopt confidence-building measures to address them on their merits, such as creating ad hoc cross-regional groups. A future challenge also is to link the work of the Human Rights Council to that of the Security Council. Once well established, the Human Rights Council should also hold one of its sessions in New York. For the new council, this is a crucial period of construction and exploring new ways of operating. At the same time, those suffering human rights violations in all regions of the world need protection now. They and human rights defenders cannot wait. The council needs informed and critical support to help it to be impartial and effective. Civil society and opinion makers worldwide can do much to remind all forty-seven council members that they have been elected, individually, to promote and protect the highest human rights standards, not to play power politics.