

The United Nations Human Rights Council: politics, power and human rights

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Introduction¹

In September 2008 the United Nations Human Rights Council, the new Geneva-based inter-governmental institution charged with global promotion and protection of human rights, put in place the last piece of its architecture, a Minority Rights Forum.² This body replaced the Working Group on Minorities of the former Sub-Commission on Human Rights, which had for over a decade operated highly successfully as a vehicle for dialogue between governments and minorities.³ By his participation in the sessions of the Working Group on Minorities, Tom Hadden made a significant contribution at international level to human rights protection. Operating as an expert through the Office of the High Commissioner for Human Rights (OHCHR), he made many practical suggestions for involving minority participants and prepared influential research papers. His continuing commitment to strengthening minority rights and to establishing their greater visibility within the United Nations human rights system is widely recognised and appreciated by minorities, NGOs and governments.

The United Nations Human Rights Council was created in 2006. It can still claim to be a new body, at least as compared with its predecessor, the United Nations Commission on Human Rights which lasted 60 years before its abolition. But, even at this early stage, for some Western diplomats and human rights activists the good will and hopes invested in the council's creation have dissipated to be replaced with degrees of scepticism and even hostility. Under the Bush administration, the United States had declared a boycott of the

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1 This article draws on the author's chapter, "The United Nations Human Rights Council: origins, antecedents and prospects" in K Boyle (ed), *New Institutions for Human Rights Protection*, Collected Courses of the Academy of European Law (Oxford: Oxford University Press 2009). I am grateful to Koldo Casla, LL.M student at the University of Essex, for research assistance.

2 A/HRC/Res/6/13, 28 September 2007. The forum met for the first time in December 2008.

3 See T Hadden, "The United Nations Working Group on Minorities" (2007) 14 *International Journal on Minority and Group Rights* 285.

council's meetings over the council's disproportionate focus on Israel.⁴ That position has now been reversed by President Obama.⁵ The source of the problem is politics. The Human Rights Council's newly dedicated room in Geneva, the "Chamber for Human Rights and for the Alliance of Civilisations", has become yet another international forum in which global divisions between the major powers, other states, regions and political blocs have come to dominate. Its predecessor, the Commission on Human Rights, was wound up largely because it was accused of having become irretrievably politicised and of having as a result fatally lost credibility. The Human Rights Council was intended as a fresh beginning with new opportunities given to the world's states to transcend political differences. Yet the same accusations of political considerations subordinating its human rights mission are now being made of the council as were made of the former commission.

The balance of power on the Human Rights Council, which was constituted as a subsidiary organ of the General Assembly of the United Nations, mirrors that of the assembly. The majority of its 47 members are from the developing world, and representatives of the Western developed states make up only a small minority – seven elected members. The council was born at a less than propitious time for global co-operation on improving human rights protection – the aftermath of the 9/11 attacks and the pursuit by the United States of its "War on Terror". The global financial crisis has added a further divisive dimension.⁶ But the idea of an apolitical global forum where human rights could be debated and policies agreed without dissension was always unrealistic. The issues which divide the developed and developing worlds, and which for generations have been rehearsed by diplomats in General Assembly debates, have inevitably found their reflection on the floor of the Human Rights Council as they did in the former commission. Western countries have yet to recognise fully that global human rights policy will not for the future be set by them alone. Other regional groupings will have the predominant influence. In order to secure support for their priorities, which include civil and political rights and the rule of law, Western countries must also fully engage with what is becoming a changing global human rights agenda, one that places priority on economic and social rights and on such development issues as foreign debt, trade and migration. Admittedly there are states on the council whose actions seem to be directed at reducing its effectiveness and any international scrutiny of human rights. The response to this challenge lies in deeper co-operation between states serving on the council and other states from all regions committed to human rights. The European Union in particular needs to make more effort to build cross-regional alliances to advance human rights.⁷

4 A US embassy spokesperson offered the following comment on the decision to an NGO: "The US remains deeply dedicated to human rights around the world but unfortunately the UN Human Rights Council has repeatedly demonstrated an unwillingness to serve that purpose. Instead it continues to refuse to address grave and ongoing human rights violations including Zimbabwe, Iran and taken only weak and ineffective action on Sudan while passing twenty unbalanced resolutions against a single country: Israel." *Human Rights Tribune*, 11 June 2008 www.humanrights-geneva.com.

5 See, "US posture toward the Durban Review Conference and participation in the UN Human Rights Council", Acting Department Spokesman, Washington, DC, 27 February 2009, at www.state.gov/r/pa/prs/ps/2009/02/119892.htm.

6 At the 10th special session of the Human Rights Council, on the global financial crisis, a resolution was adopted by 31 votes in favour from developing countries with 14 abstentions from developed countries; A/HRC/S-10/2, 5 March 2009.

7 On the need for a new European Union approach in the United Nations see, *A Global Force for Human Rights? An audit of European power at the UN*, report by the European Council on Foreign Relations, September 2008, http://ecfr.eu/content/entry/the_european_union_at_the_united_nations.

This article will return to the politics of the Human Rights Council and its implications for its future. But first it will offer a brief account of the origins of the council and its formative first years, during which, to its considerable credit, a comprehensive institutional foundation for global protection of human rights was negotiated by its members. Admittedly, this was largely built from the inheritance left to the council by the former commission, particularly the institution known as the “special procedures”, the independent and unpaid experts who monitor and report to the council on human rights crises and problems across the world. Space does not allow a focus on this well-established institution of protection.⁸ Rather the focus will be on the most hopeful innovation in international human rights protection for many years, the council’s peer review system of the human rights performance of all UN member states, Universal Periodic Review (UPR). It is this mechanism which holds out the promise of at least reducing the political tensions that attend the council’s work and of improving human rights protection in a world that sorely needs such improvement.

The international protection system

The Human Rights Council is one limb of a three-limb international human rights protection system which in its evolution has hardly reflected any blueprint.⁹ The other two limbs are the treaty system and the institution of the UN High Commissioner for Human Rights. The treaty system at global level now comprises some eight multilateral treaties which have been, for the most part, widely ratified and which share a common scheme of implementation. States undertake to secure the treaty’s provisions within their jurisdiction and each treaty establishes a treaty body, a committee of independent experts elected by the states party to the treaty to monitor those commitments. States are obligated to submit periodic reports to each committee on their progress in implementing the instrument and, in turn, through “constructive dialogue” with the relevant government officials who present the reports, the committees offer their assessment and make recommendations for action. A number of the treaties provide an optional complaint mechanism and, where this is agreed to by states, individuals may complain to the committee over alleged violations which they have suffered.

The position of UN High Commissioner for Human Rights, and his or her Office (OHCHR), was created in 1993.¹⁰ The High Commissioner is the principal official of the UN Secretariat responsible for human rights.¹¹ Appointed by the General Assembly, the High Commissioner is based in Geneva with an office also in New York. The High Commissioner has an independent promotion and protection mandate but at the same time provides secretariat functions to both the Human Rights Council and to the treaty

8 On the special procedures system, see J Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In search of community* (Aldershot: Ashgate 2006), G Oberleitner, *Global Human Rights Institutions* (Cambridge: Polity Press 2007).

9 For a comprehensive account see P Alston and F Mégret (eds), *The United Nations and Human Rights: A critical appraisal* 2nd edn (Oxford: Oxford University Press 2010). On the work of the different bodies, see the UN High Commissioner for Human Rights website, www.ohchr.org.

10 GA/RES 48/141, High Commissioner for the Promotion and Protection of Human Rights, 20 December 1993. See, K Boyle (ed.), *A Voice for Human Rights: Mary Robinson* (Philadelphia, PA: University of Pennsylvania Press 2006).

11 The current High Commissioner Navi Pillay was appointed on 28 July 2008. She is the fifth appointee to the post and serves for a term of four years which is renewable once.

bodies. OHCHR received a major boost in the 2005 UN summit when states approved a doubling of its budget.¹²

The Human Rights Council, like its predecessor the Commission on Human Rights, has a broad mandate both to prepare new international human rights standards and to respond to human rights violations anywhere in the world. In contrast to the other limbs of the international system, the Human Rights Council is made up of government representatives elected by the General Assembly. Thus, whereas the High Commissioner and her staff are international officials and the treaty bodies are comprised of independent experts, the council is an arena for diplomats who follow instructions from their capitals. It might have been otherwise. In 1946, in the earliest meetings of the former Commission on Human Rights, the case was put for its membership to be comprised of experts rather than government representatives. An independent expert commission, it was argued, could more effectively address human rights violations and state accountability without the political restraints that would face diplomats.¹³ Governments would nevertheless remain in control through their membership of the Economic and Social Council (ECOSOC) and the General Assembly, to which the commission would report. But the idea was rejected by ECOSOC.¹⁴ Expertise was, however, provided to the former commission by its establishment of a sub-commission. This expert body made a huge contribution over many years to the development of international human rights standards. It has now been replaced by an Advisory Committee to the Human Rights Council that hopefully will play a similar role.¹⁵ But the most important expert input to the Human Rights Council comes from the system of special procedures, the independent experts it appoints and who are currently responsible for some 30 thematic and eight country mandates. Consideration of their reports constitutes a major activity of the council.

There is no opportunity here to address the question of how far these UN human rights bodies with their different institutional foundations operate as a coherent system. Complimentary rather than competitive roles have been espoused and largely pursued by the different bodies.¹⁶

The origins of the Human Rights Council

Dissatisfaction with the former commission had been growing for a number of years, voiced mainly by Western countries, in particular by the United States, as well as by civil society organisations. Some states with notorious human rights records were accused of seeking election to the commission to avoid being the target of criticism or condemnation or better to attack their perceived foes.¹⁷ A further criticism was that the commission was

12 2005 World Summit Outcome, UN Doc. A/60/1(2005), para. 124, see the section headed "Origins of the Human Rights Council", below.

13 P G Lauren, "'To Preserve and Build on its Achievements and to Redress its Shortcoming': the Journey from the Commission on Human Rights to the Human Rights Council" 29 *Human Rights Quarterly* 307, at 314.

14 P Alston, "Re-conceiving the UN human rights regime: challenges confronting the new UN Human Rights Council" (2006) 7 *Melbourne Journal of International Law* 185, at 190.

15 Described as a think tank to the Human Rights Council, the Advisory Committee consists of 18 experts with a set allocation by geographical region and elected by the council. It meets for two weeks only per year and held its second meeting in January 2009.

16 For an analysis of the relationship between treaty bodies and the special procedures, see, N Rodley, "United Nations Human Rights Council, its special procedures and their relationship with the treaty bodies – complementarity or competition" in Boyle (ed.), *New Institutions*, n. 1 above, 49–73.

17 See Report of the High Level Panel, *Threats, Challenges and Change, A More Secure World: Our shared responsibility*, UN Doc. A/59/565 (2004), para. 283.

selective in the countries which it targeted for condemnation, with Israel in particular being constantly in the dock and others, such as China or Saudi Arabia, rarely if ever.

The decision in principle to replace the United Nations Human Rights Commission with a Human Rights Council was formally taken by a summit of world leaders meeting as the General Assembly of the United Nations in September 2005.¹⁸ The abolition of the commission and its replacement with the council was one of a number of reforms of the United Nations that had been prepared for the summit by the former Secretary General, Kofi Annan.¹⁹ Following difficult negotiations, in March 2006 the General Assembly adopted resolution 60/251 establishing the Human Rights Council.²⁰ The new Human Rights Council held its inaugural session in Geneva from 9–30 June 2006.²¹ By the end of its fifth session in June 2007, it had agreed a major document on its institutional architecture, including a formal agenda and programme of work.²² The council held its 10th regular session from 2–27 March 2009, having held in addition no less than 10 special or emergency sessions since its creation.²³

Council compared to commission

The Human Rights Council is comprised of representatives of 47 member states. At its abolition the commission had 53 members. Those promoting the new council, particularly the UN Secretary General and the United States, would have preferred a much smaller body. That proved unacceptable to the majority of states. However, there are a number of features of the council which, taken together, give rise to some optimism for its longer-term prospect of strengthening international human rights protection. First, the council is established as a subsidiary organ of the General Assembly, whereas the former commission was one of a number of subsidiary bodies of ECOSOC. This enhanced status for the council is intended to have the effect of making its deliberations more authoritative, visible and influential within the United Nations as well as outside it. Within five years, the General Assembly will review the status of the council and the original hope of reformers that it might become a full council in its own right alongside the existing Security Council and ECOSOC will be an option.²⁴ Second, the council is virtually a standing body; it is required to meet for 10 weeks per year over at least three sessions, with the option of holding special sessions at the request of a third of its membership.²⁵ In contrast, the Commission on Human Rights met for a single six-week session each year. Third, the council, as mentioned, was given a new task of immense potential, that of establishing and conducting for all UN member states a peer review system, the UPR, in respect of their human rights obligations and commitments.

18 2005 World Summit Outcome, UN Doc. A/60/1 (2005), paras 157–9.

19 Report of the Secretary General, *In Larger Freedom: Towards development, security and human rights for all*, (2005) UN Doc. A/59/2005.

20 GA/RES/60/251, 15 March 2006. The resolution was not adopted by consensus, the preferred approach in the UN. The US represented by its controversial ambassador John Bolton forced a vote. The resolution was passed with the US, and its close allies Israel, the Marshall Islands and Palau voting against; 171 states voted in favour and with three abstentions, Belarus, Iran and Venezuela. For an account of the negotiations see D Hannay, *New World Disorder: The UN after the Cold War: an insider's view* (New York/London: I B Tauris 2008), pp. 211–70.

21 A/61/53 (2006), First Report of the Human Rights Council.

22 A/HRC/RES/ 5/1 Human Rights Council, 18 June 2007.

23 On the Human Rights Council and its sessions to date see OHCHR website, www.ohchr.org.

24 GA/RES/60/251, para. 1.

25 Ibid. para. 10.

Elections to the Human Rights Council

A further important difference between the former commission and the council lies in the system of election of its members and the standards to be met by candidate states. Members of the council are to be elected for the allocated regional distribution of seats “directly and individually” by secret ballot and by a simple majority of the General Assembly’s 192 members.²⁶ The commission’s membership had been elected by the smaller electorate of ECOSOC, with its 54 members, and was often agreed upon without election from previously agreed regional “clean slates” of candidates. Where this resulted in the presence on the commission of states with questionable human rights records, controversy flared.²⁷

When electing members of the council, states are directed to weigh candidate states’ human rights records and voluntary pledges that they have made on improving national human rights protection.²⁸ No such standards existed for election to the commission. To date all candidates for elections have made such voluntary pledges. All states elected as council members will be considered under the UPR process during their tenure on the council. Where a state elected to the council is responsible for gross and systematic violations of human rights, the General Assembly can suspend that state from the council.²⁹ To encourage rotation of council members, no state can be elected for more than two terms without leaving the council.³⁰ One effect of this last-mentioned rule is to put an end to a convention or practice that had operated intermittently under the Commission on Human Rights, whereby the permanent five on the Security Council would be assured of a seat.³¹ At present all five are elected members of the new council, with the significant exception of the United States. The United States voted against resolution 60/251 creating the council, on the grounds that the council was flawed.³² It decided not to stand for election but promised to participate in the council’s meetings and to work constructively with it.³³ The United States did not stand for election in 2007 and in June 2008 it announced an effective withdrawal from the council.³⁴ As already noted, that policy has been reversed by the Obama administration, a significant signal of the United States’ welcome re-engagement with the United Nations.³⁵ The US Secretary of State Hilary Clinton and UN

26 Thus, a state would have to obtain at least 96 votes of support in the secret ballot to be elected.

27 For example, in 2003, Jean Kirkpatrick, who headed the US delegation to the commission’s 58th session, attacked the election of human rights-violating countries to the commission. The US forced a vote, which it lost, on the choice of Libya, nominated by the African Group, to take the chair of the commission. See J Kirkpatrick “UN human rights panel needs some entry standards”, *International Herald Tribune*, 14 May 2003.

28 GA/RES/60/251, para. 8.

29 Ibid. para. 8. A two-thirds majority vote of members present and voting is required.

30 Ibid. para. 7. However, it seems that absence from the council need be for no more than one year after serving a second term. A term is for a period of three years.

31 The US supported an unsuccessful proposal for permanent seats on the council for the permanent members of the Security Council: G L Burci, “The United Nations Human Rights Council”, *Italian Yearbook of International Law*, vol. 15 (The Hague: Martinus Nijhoff 2005), p. 32.

32 Explanation of vote by Ambassador John R Bolton, US Permanent Representative to the United Nations on the Human Rights Council Draft Resolution, in the General Assembly, 15 March 2006: www.state.gov/p/io/rls/rm/63143.htm.

33 US Department of State, “The United States will not seek election to the UN Human Rights Council” (press release, 6 April 2006): www.state.gov/r/pa/prs/ps/2006/. For the political background to the decision see Lauren, “To Preserve and Build”, n. 13 above, 338–40.

34 See n. 4 above and accompanying text.

35 On 10 March 2009, the Secretary General Ban Ki-moon met with US President Barack Obama. Deeper co-operation for the future with the United Nations was confirmed, UN Press Release SG/SM/1213.

Ambassador Susan Rice jointly announced on 31 March that the United States would stand for election to the council at the next round of elections in May 2009.³⁶

The politics of human rights

That human rights and politics are often intertwined is hardly a novel idea in Northern Ireland or, indeed, the rest of the United Kingdom. The Bill of Rights debate which has been ongoing since the Belfast Agreement has reflected directly communal and political divisions.³⁷ In Great Britain there have been calls for the Human Rights Act incorporating the European Convention on Human Rights to be repealed.³⁸ One grievance promoted by the popular press has been over the supposed intrusion of external authority in the form of the European Court of Human Rights into domestic affairs.³⁹ A remarkable judicial endorsement of this complaint was delivered in a recent lecture by the retiring Law Lord, Lord Hoffmann.⁴⁰ At international level the parallel is exact. The entire United Nations human rights system is based on the International Bill of Human Rights and the machinery which has evolved from it to oversee the commitment of states to secure those rights and freedoms within their jurisdictions. To enable such external scrutiny states must accept a diminution of their sovereignty and that remains for many, especially the significant number of UN member states that have experienced colonial domination, a sensitive matter.

International accountability versus state sovereignty

Thus, an enduring issue that has faced the United Nations from its inception has been how to reconcile its authority and the obligations of its members to address matters of human rights at the international level with the sovereignty of the same member states. The United Nations and particularly its human rights institutions have been and continue to be shaped by the tension between provisions in its Charter which address the issue.⁴¹ Article 1 sets out as one purpose of the body that of achieving international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”. By virtue of Article 55(c) the United Nations is directed to promote “universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion”. In turn Article 56 provides that all member states “pledge themselves to take joint and separate action in cooperation with the Organisation” to achieve this purpose.

Article 2 of the Charter enshrines the principle of the sovereign equality of member states and includes the stricture in Article 2(7) denying the UN authority “to intervene in matters essentially within the domestic jurisdiction of any state or [to require members] to submit such matters to settlement under the present Charter”.⁴²

36 The United States was elected to the council on 12 May 2009. See S E Rice, “Remarks on the election of the US to the Human Rights Council”, www.state.gov/p/io/rls/rm/2009/123295.htm.

37 See *Final Report* (Belfast: Bill of Rights Forum, 31 March 2008) available at www.billofrightsforum.org/borf_final_report.pdf.

38 “Cameron calls for repeal of Human Rights Act”, *The Guardian*, 12 May 2006.

39 For an analysis of press treatment of human rights, see R Maiman, “Images of human rights lawyers in the British press”, in A Sarat and S Scheingold (eds), *The Cultural Lives of Cause Lawyers* (Cambridge: Cambridge University Press 2008), pp. 141–70.

40 Lord Hoffmann, “The Universality of Human Rights”, Judicial Studies Board Annual Lecture 2009, available at www.jsboard.co.uk/aboutus/annuallectures.htm.

41 UN Charter, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119.

42 Article 2(7) adds the important proviso that “this principle shall not prejudice the application of enforcement measures under Chapter VII”.

Throughout its history member states have proved extraordinarily effective at negotiating, drafting and agreeing norms on human rights and freedoms. However, seeking to address violations of international human rights standards within member states has been an altogether different experience. The original idea was to permit human rights issues to be addressed at the level of principle but not to enable the United Nations to become a forum for inquiry or redress for victims such as would offend the principle of state sovereignty. It had been the great powers which had inserted the shield of Article 2(7) of the Charter, fearing that their internal human rights practices might be a target of criticism or “meddling”.⁴³ It was the new independent countries in Africa which would first seek to circumvent this restriction in their campaign to challenge South Africa and apartheid and whose efforts would create the foundations on which the Human Rights Commission’s system of special procedures and its complaint mechanism would be built.⁴⁴ Thus, the history of international progress on human rights has been built through shifting understanding of the interplay between Articles 1 and 2(7) of the Charter. At a high point of post-Cold War consensus in 1993, the World Conference on Human Rights held in Vienna could agree that “the promotion and protection of all human rights and fundamental freedoms . . . is a legitimate concern of the international community”.⁴⁵ But, equally, states emphasised that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.⁴⁶

The process of seeking to apply these principles has proved enormously difficult.⁴⁷ No country welcomes external scrutiny. Accusations of selectivity and double standards in the countries that became the focus of the commission’s attention became a staple feature at its meetings. Powerful countries were able to avoid the attention of the commission while the least powerful were not. The resentments which developed over what were experienced as double standards and politicisation undermined the credibility, authority and effectiveness of the commission.⁴⁸

However, the Human Rights Council, just as the former commission, has the responsibility to address human rights violations, including gross and systematic violations, and to make recommendations.⁴⁹ With this mandate in mind the founding texts adopted by the General Assembly and by the new council are replete with references to objectivity, transparency, non-selectivity, genuine dialogue and the elimination of politicisation in the work of the council. Hopes for that goal rest, above all, on the system of UPR of states, discussed below.

Politics and the role of groups

The United Nations Charter enshrines the principle of the sovereign equality of all its members.⁵⁰ This principle is reflected in the rule that each member state has the right to

43 The USSR, the UK and the US insisted upon the language of Article 2(7) of the Charter: A W B Simpson, *Human Rights and the End of Empire: Britain and the genesis of the European Convention* (Oxford: Oxford University Press 2001), pp. 264–8; Lauren, “To Preserve and Build”, n. 13 above, pp. 312–13.

44 H Tolley Jr, *The UN Commission on Human Rights* (Boulder, CO: Westview Press 1987), pp. 55–82.

45 A/CONF/157/24 Declaration and Programme of Action, World Conference on Human Rights, para. 4.

46 Ibid. para. 5.

47 For a detailed account of the early efforts to address human rights violations see P Alston, “The Commission on Human Rights”, in P Alston (ed.), *The United Nations and Human Rights: A critical appraisal* (Oxford: Clarendon Press 1992), pp. 126–210.

48 Lauren, “To preserve and build”, n. 13 above, at p. 325.

49 GA/RES/60/251, para. 4.3.

50 UN Charter, Article 2 1.

one vote only in decision making. But the United Nations' 192 members do not act in pursuit of their interests only as individual states; rather they operate through a variety of groupings and alliances, in particular regional and political interest groups or blocs.⁵¹ As a universal body, the United Nations is based on the principle of full participation in its work by all its members. Arrangements to ensure such participation in decision making within the organisation are built around the requirement of the "equitable geographical distribution" of membership of committees and positions for all regions of the world organised through elections or rotation.⁵²

Equitable representation reflects weighting based on the number of states in each region. The five geographical groupings – Africa, Asia, East European, Latin American and Caribbean, and the group "Western European and Others" (WEOG) – were established in 1963.⁵³ Since then, these groupings have been used throughout the United Nations system for the purpose of election to seats including to the Security Council, General Assembly, ECOSOC, the former Commission on Human Rights and now the Human Rights Council.⁵⁴

The most evident impact that regional groupings have had over the history of the United Nations has resulted from increased membership mainly from the developing world. Whereas at its creation in 1945, when there were 51 states, the United Nations was predominantly a body of European and Latin American states, there has been a gradual emergence of a new political majority in its 192 members from Asia and Africa. This majority has been able to reflect its concerns and influence across the entire field of United Nations activities and now is dominant in the Human Rights Council. In the distribution of seats in the new council, this dominance has even been strengthened when compared to the former commission. The majority of seats, 26 out of 47, are held by Africa and Asia. The reduction of Latin American and Caribbean seats (eight compared to 11) and the Western Group seats (seven from 10) has meant that even if there is support from all Eastern European countries (six seats) these groups cannot win a vote without the support of at least three other states from the African or Asian groups.⁵⁵

Political groupings

The nature of "other" states in the WEOG – Australia, New Zealand and Canada – signals clearly that there are more than objective geographical criteria involved in the composition of such groupings.⁵⁶ States are linked by political and other interests and affinities which in some cases, such as Africa, coincide with geography, but other groups, such as Eastern Europe, once reflected in its membership the geo-political realities of the former Soviet Union. There are multiple overlapping blocs and political caucuses of states both large and small, inside and outside the United Nations. These include, for

51 For an account of the operation of all manner of groups in the United Nations, see C B Smith, *Politics and Process and the United Nations: The global dance* (London: Lynne Rienner 2006), pp. 53–78.

52 The term "equitable geographical distribution" is used in Article 23(1) of the UN Charter with respect to elections to the Security Council.

53 GA Res 1991 (XVIII) (1963), S Daws, "The origins and development of UN electoral groups" in R Thakur (ed.), *What is Equitable Geographical Distribution in the 21st Century* (New York: United Nations University 1999), pp. 11–29.

54 The groupings and their allocation of seats on the Human Rights Council are: Group of African States (13), Group of Asian States (13), Group of Eastern European States (6), Group of Latin American and Caribbean States (8), and Group of Western European and Other States (7).

55 Y Terlingen, "The Human Rights Council: a new era in UN human rights work" (2006) 21 *Ethics and International Affairs* 167, at 171.

56 The US does not formally belong to any group but participates in the WEOG for election purposes. Israel is a "guest" member of the WEOG.

example, economic groupings such as the “G 8” and the “G 20”, the Council for a Community of Democracies (CCD), the Association of South East Nations (Asean), the Arab League, the European Union, the African Union, and two groupings which have emerged as major forces in the Human Rights Council, the Non-Aligned Movement (NAM) and the Organisation of the Islamic Conference (OIC).⁵⁷

It is the interaction and negotiation between such groupings, regional and political, that have largely shaped the global human rights agenda of the past and will continue to do so for the future. The visibility of regional and political groupings is as evident in the Human Rights Council sessions to date as it was in the former commission. Council members offer collective rather than individual positions on most issues. In the former commission the influence, or indeed control of its membership by regional groups, manifested in block voting on resolutions and initiatives, was much criticised as restricting and frustrating its work. It was and remains, for example, the policy of the African Group that it alone may table a resolution on an African state and the group’s rules require that the state in question should be consulted over any resolution.⁵⁸ In the European Union case, policy and voting positions by its small number of members on the council is determined by the EU states as a whole as part of EU common foreign and security policy. In effect, states do not have freedom to act as individual members of the council; solidarity with the positions of regional and political groupings determines votes, especially where a resolution or decision involves another state which is also a member of the group. One result is that groups are controlled by the more extreme members, “who effectively dictate the policy of the whole Group and then, because of group solidarity, every member or almost every member of the Group votes as part of that block”.⁵⁹

Co-ordination between the NAM and OIC blocs in voting on the council ensures a majority for any resolution or decision they favour. The long-running campaign led by the OIC to promote a new norm limiting freedom of expression to prohibit “defamation of religion” has found consistent support from the NAM countries and equally consistent opposition from Western countries.⁶⁰ The polarisation between these groups has been most evident in the Special Sessions of the Council, notably over Israel and the Occupied Territories and Sudan.⁶¹

Universal Periodic Review

As already noted, the idea of all states submitting to a review of their human rights record was taken up as an answer to the grievances of less powerful states that scrutiny of their problems was unfair when more powerful countries with equally or more serious human rights records avoided such international attention.

57 The NAM grew out of the Cold War representing states unaligned to the West or the Soviet Union. It has 117 members. The OIC is an organisation of 56 Muslim majority countries. For details of these groupings see Smith, *Politics and Process*, n. 49 above, pp. 53–78, and for listing of state membership of groups see www.eyeontheun.org/view.asp?l=11&p=55.

58 M Abraham, *A New Chapter for Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council* (Geneva: International Service for Human Rights and Friedrich Ebert Stiftung 2006), p. 28. It is noteworthy that there has been no discussion of Zimbabwe in the Human Rights Council.

59 Ibid.

60 On this controversy, see the most recent resolution, A/HRC/10/L.2 Rev.1, 26 March 2009, and the joint report of the special rapporteurs on freedom of religion or belief and on contemporary forms of racism to the Second Session of the Human Rights Council, A/HRC/2/3, 20 September 2006.

61 Space does not permit discussion of Special Sessions. See Boyle, *New Institutions*, n. 1 above, and the Human Rights Council website: www.ohchr.org.

The cycle for review of all states is four years, which requires 48 states to be reviewed each year over the three regular sessions of the council. All members of the council are to be reviewed during their period in office. The first session of UPR was held in April 2008. By February 2009, when the fourth session had taken place, the human rights situation in 64 countries had been addressed through this mechanism, that is, one-third of the 192 UN member states.

The UPR process is governed by General Assembly Resolution 60/251⁶² and by more detailed modalities adopted by the Human Rights Council in its Resolution 5/1.⁶³ Resolution 60/251 decided that the Human Rights Council shall:

[u]ndertake a universal periodic review, 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; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs . . .⁶⁴

PRINCIPLES AND OBJECTIVES

Some 12 principles are set out in Resolution 5/1 to guide UPR. Only some can be touched upon here. Participation of the country under review is axiomatic, but the need to involve NGOs as well as National Human Rights Institutions (NHRIs) is noteworthy. UPR should ensure a gender perspective and also take into account “the level of development and specificities of countries”. The review should be conducted in “an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner”. The objectives of the review include improvement of human rights on the ground as well as fulfilment of the state’s human rights obligations and, at the state’s request, enhancement of capacity and technical assistance.

SOURCES FOR UPR

Resolution 5/1 provides that there will be three documents generated as the basis of the review of the state. First, a national report is prepared by the state with a maximum length of 20 pages. The second document is to consist of information from treaty bodies and the special procedures prepared by the OHCHR with a maximum length of 10 pages. A third 10-page document, also prepared by the OHCHR, is based on information provided by “other stakeholders”, including NGOs and NHRIs.⁶⁵ In Decision 6/102 the council provided guidelines for the preparation of this documentation.⁶⁶ States are advised to provide information on what consultation took place within the country in preparing a national report. They are advised *inter alia* to give the legislative background of the country, especially for the promotion and protection of human rights, as well as information on human rights infrastructure, including NHRIs. The states should include information on implementation of international human rights obligations as well as action on voluntary

62 A/RE/60/251, 3 April 2006.

63 Universal Periodic Review Mechanism, A/HRC/RES/ 5/1, 18 June 2007.

64 Ibid. 5(e).

65 Human Rights Watch submitted reports on 34 of the 64 countries examined in the first four UPR sessions. In the fourth session, in February 2009, Amnesty International submitted comments on 12 of the 16 countries under scrutiny.

66 Decision 6/102, Follow-up to the Human Rights Council Resolution 5/1, adopted 20th meeting, 27 September 2007.

commitments made on election to the council and on its co-operation with other human rights mechanisms. States are also encouraged to identify achievements, best practices, challenges and constraints, as well as saying how they propose to overcome challenges and “improve the human rights situation on the ground”. Finally, states may indicate what their capacity building needs are and any request for technical assistance.

REVIEW HEARINGS

The review hearing is conducted in a plenary working group of the council, chaired by the president, with member and observer states being free to participate in the interactive dialogue. NGOs and other stakeholders may attend but may not participate at this stage. The rules provide for three rapporteurs from different regional groups chosen by lot (the troika), who have the task of facilitating the review and preparing the working group report on the state in question. The review hearing is allocated three hours and a further hour is allocated for the adoption of the working group’s report. The outcome report, considered by the plenary council at a later meeting, comprises a summary of the review process along with recommendations and/or conclusions and voluntary commitments. The opportunity is also provided for NGOs to comment at this stage. In addition to recommendations about steps to be taken by the state under review, the Human Rights Council can recommend capacity-building measures in order to implement human rights obligations, including through technical assistance programmes. This has been done in the case of Zambia, Guatemala and Botswana, among others. Prior to the adoption of the “outcome” document of the review, the state is to be fully involved and may make further comments on the draft report. Recommendations accepted by the state in question will be identified and those which it does not accept will also be recorded.

FOLLOW-UP

The true test of the effectiveness of UPR will emerge only with evidence of fulfilment of commitments made by states. UPR will be a standing item on the council’s agenda and it is the intention that there should be scrutiny of the extent to which recommendations are implemented by the state reviewed. In formal terms, that must await the second cycle of UPR, namely after four years, when it is planned that the focus will be on the implementation of commitments. Persistent non-cooperation by a state with the mechanism, including failure to fulfil recommendations accepted, will be addressed by the council.⁶⁷

ASSESSMENT⁶⁸

While the mechanism is at an early stage, it is clear that states under review and other council members in the three hours of inter-active dialogue have made serious efforts to give the process meaning and depth. The atmosphere in the sessions has been constructive and the issues raised for scrutiny have addressed both strengths and weaknesses of the countries in question. There is evidence, nonetheless, that not all states are committed to the UPR and there have been examples of states indulging in excessive praise of allies rather than in honest questioning. But what is most interesting, and of longer-term significance, has been the extent to which most countries under review have been both self-critical and have accepted recommendations made by other states for positive action, including the ratification of international instruments. Most states have sent high-level delegations from their capitals for their UPR. So far, most recommendations made in the reviews have been

⁶⁷ A/HRC/RES/5/1, para. 36.

⁶⁸ For a thorough assessment of UPR sessions in 2008, see International Service for Human Rights, Human Rights Monitor No. 66, 2008 (Geneva 2009).

accepted by most states. The Ecuadorian Minister of Justice and Human Rights noted that the “exercise has been useful for the inspiration of public policies in the country”.⁶⁹ The United Kingdom accepted most of the recommendations received from the council in the first UPR session,⁷⁰ as did Pakistan.⁷¹

It is a paradox that, while the Human Rights Council has been accused of being as politicised as its predecessor, the potential of UPR rests directly on the political pressure which states can exert on one another in a public forum to take their human rights commitments seriously. Time, and another cycle of review, will tell if they in fact do so. But there can be cautious optimism that the UPR can contribute to positive policy changes at home. The UPR process is likely also to strengthen the parallel human rights treaty system, as many of the recommendations from the UPR have incorporated the conclusions of treaty bodies on measures that a state should undertake. NGOs have found that many states have been willing to respond to their interventions during the dialogue and a positive opportunity has opened up for NGOs and NHRIs in following up at national level on a state’s commitments made in the UPR.⁷²

Conclusion

A perceptive and experienced observer of the transition from Human Rights Commission to Human Rights Council summed up the first year of the council as “neither a mountain nor a mole hill”.⁷³ That continues to be an apposite verdict after the third year of its existence. The Human Rights Council has neither fulfilled the highest expectations nor has it dashed them completely. The decision of the new United States administration to stand for election to the council is a crucial development. The previous administration had damaged international institutions and international relations with its disregard for human rights and international law. It will be important for the future of the Human Rights Council that the United States should be elected. But the single most important challenge facing the council is reducing the control of individual states by the competing political and regional blocs to which they belong. States are formally elected individually to the council but for the most part thereafter vote as members of groups. Until commitment to international human rights overrides political solidarity and leads to cross-regional voting by enough states, the council will continue to struggle to fulfil the mission entrusted to it.

69 UPR Working Group on Ecuador, UN doc. A/HRC/8/20, 13 May 2008, para. 58.

70 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the state under review, UN Doc. A/HRC/8/25/Add.1, 13 August 2008.

71 Statement by Ambassador Masood Khan, Permanent Representative of Pakistan, on the outcome report of UPR of Pakistan, UN Doc. A/HRC/8/42/Add.1, 13 August 2008.

72 International Service for Human Rights, n. 68 above, p. 79.

73 R Brett, *Neither Mountain nor Mole Hill: review of the Human Rights Council one year on* (Geneva: Quaker United Nations Office 2007).

