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ABSTRACT

The Human Rights Council was founded with a provisional status, since only within the period of a year will it decide on the future of the system of special procedures, the individual complaints procedure through extra-conventional protection mechanisms and the Sub-Commission on the Promotion and Protection of Human Rights. Some decisions, however, have already been taken, such as the creation of a "universal periodic review mechanism" that will serve to evaluate the human rights situation in all countries. Furthermore, some additional changes relating to the new Council also need to be made. To ensure that NGOs keep their advisory status, articles 68 and 71 of the UN Charter need to be amended, while permanent observer status in the Human Rights Council should be granted the seven committees created by international treaties.

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KEYWORDS

Human Rights Council – Commission on Human Rights – Reform of the United Nations

LIGHTS AND SHADOWS OF THE NEW UNITED NATIONS HUMAN RIGHTS COUNCIL

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Introduction

The second Summit of Heads of State, held within the framework of the United Nations General Assembly, approved on 16 September 2005 the creation of a "Human Rights Council" that will be responsible for "promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner"; addressing situations of "gross and systematic violations" of human rights and "making recommendations thereon"; and also promoting "effective coordination and the mainstreaming of human rights within the United Nations system".[1]

Nevertheless, lack of agreement prevented a better clarification of the mandate, modalities, functions, size, composition, membership, working methods and procedures of the new Human Rights Council. The Heads of State entrusted the President of the General Assembly with the task of continuing negotiations on all these details.[2] The negotiations culminated, at least partially, on 15 March 2006, in the adoption of an important General Assembly resolution that establishes the first rules of procedure for the Human Rights Council[3] on the basis of an agreement on the minimum parameters.

However, negotiations will proceed since the Human Rights Council was established with a provisional status. It now has a year to decide what to do about the three key issues it has inherited from the Commission on Human Rights: the system of special procedures, the individual complaints procedure through extra-conventional protection mechanisms, and the future of the Sub-

See the notes to this text as from page 15.

Commission on the Promotion and Protection of Human Rights.[4] Furthermore, it was also agreed that the General Assembly will review the status of the Human Rights Council "within five years" of its creation.[5]

Membership criteria

According to the resolution that was finally adopted, the Human Rights Council will have its headquarters in Geneva and replace the Commission on Human Rights.[6] Unlike the latter body, the Council was founded as a subsidiary organ of the General Assembly, to which it will report annually, making recommendations concerning the promotion and protection of human rights.

Besides the ambiguity of the expression "make recommendations", it is clear that these recommendations should be expressly directed to the General Assembly, which leads us to lament the exclusion of any liaison between the new Human Rights Council and the Security Council. In this vein, the General Assembly's very resolution is contradictory, since it acknowledges the existence of a close relation between gross human rights violations and the maintenance of international peace and security.[7]

Disregarding the recommendations made to him by the High-Level Panel on Threats, Challenges and Change,[8] the Secretary General proposed that the Commission on Human Rights (53 States) be replaced with a smaller and permanent Human Rights Council whose members would be elected by the General Assembly by a two-thirds majority.[9] As such, the Secretary General's proposal was in line with the preferences manifested by the United States and some of its allies.

Finally, it was decided that the Human Rights Council would be composed of 47 States, based on equitable geographical distribution.[10] They would be elected for a period of three years in a secret ballot[11] and by a majority of the members of the General Assembly. There would be no permanent members of the Human Rights Council, since no State may run for reelection immediately after serving two consecutive mandates.

Although membership of the Human Rights Council is formally open to all United Nations Member States, the same resolution innovates by introducing three changes designed to prevent the problems of excessive politicization in the composition of the former Commission on Human Rights. Nevertheless, the effectiveness of these changes appears doubtful.

First, when electing members of the Human Rights Council, "Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto".[12] This clause is drafted in excessively ambiguous terms,[13] since it is the result of long negotiations during the course of which more objective and better-defined criteria were proposed, such as requiring State candidates to ratify the seven basic human rights treaties.

Second, one provision enables the General Assembly to suspend by a two-thirds majority any member of the Council "that commits gross and systematic violations of human rights".[14] While this clause may be innovative, its practical efficiency will be limited, since it requires a qualified majority – which it extremely difficult to achieve – to determine that a State has committed systematic human rights violations. It would be preferable for this decision to come from an independent expert (special country rapporteur), thereby preventing the inevitable politicization that a vote of this nature would produce within the General Assembly.

Third, the members of the Council "shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership".[15] As a matter of fact, this clause is redundant since it places the same generic obligations on the Members of the Human Rights Council that all States have already assumed as Members of the United Nations. Added to this, as we shall see later, the periodic review mechanism runs the risk of becoming a purely rhetorical examination conducted between peers (ie, between the States themselves).

Although the Human Rights Council was intended to be classified as a principal and permanent organ of the United Nations, with the same political visibility as the Security Council, ECOSOC and the General Assembly, after lengthy negotiations it was downgraded. In fact, we have already mentioned that the Human Rights Council was established as a subsidiary organ of the General Assembly.[16] Neither will it be permanent, since it "shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks".[17] Moreover, as with the Commission on Human Rights, the Human Rights Council may, when needed, hold special sessions "at the request of a member of the Council with the support of one third of the membership".[18]

Responsibilities and functions

As the Summit of Heads of State had already asserted, the General Assembly reiterates here that the Human Rights Council "shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner".[19] More specifically, the Human Rights Council shall:

- address situations of violations of human rights, including gross and systematic violations;
- promote the coordination and the mainstreaming of human rights within the United Nations system;

- enhance the promotion and protection of all human rights, including the right to development;
- promote human rights education;
- provide advisory services with the consent of Member States concerned;
- serve as a forum for dialogue on thematic issues on all human rights;
- contribute to the development of international law in the field of human rights;
- promote the full implementation of human rights obligations undertaken by States;
- facilitate the follow-up to the goals and commitments related to human rights emanating from United Nations conferences and summits;
- prevent human rights violations;
- respond promptly to human rights emergencies; and
- supervise the work of the Office of the United Nations High Commissioner on Human Rights.[20]

It should be remembered that all these functions were already performed *de jure* or *de facto* by the Commission on Human Rights; therefore, the additional advantage of the Human Rights Council is its foreseeable greater political visibility (by being a subsidiary organ of the General Assembly instead of reporting to ECOSOC) and its greater number of regular sessions (at least three per year). The minimum duration of the regular sessions will also increase from six to ten weeks per year.

The universal periodic review mechanism

A criterion by which the Human Rights Council will evaluate each State's fulfillment of their human rights obligations and commitments will be a "universal periodic review". According to the resolution we are examining here, this mechanism will be "based on objective and reliable information", and will be undertaken by Member States of the Human Rights Council themselves. Furthermore, the procedure ensures "universality of coverage and equal treatment with respect to all States"; and shall be based on an "interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs".[21]

But the mechanism as it stands now fails to resolve four basic issues: First, it does not identify how States will measure the fulfillment of their human rights obligations. It would have been more logical at least to stipulate that the evaluation be based on the obligations assumed under the United Nations Charter, the Universal Declaration of Human Rights and the specific obligations contracted by each State upon ratifying human rights treaties. This would have

assured the continuation of the well established work conducted by the Commission on Human Rights.

Second, neither is it clear how the Human Rights Council will be provided with "objective and reliable information" on the real situation in each country. For example, the High Commissioner suggested in her plan of action that this information could be provided by her own Office, in the form of an "annual thematic global human rights report".[22]

In our opinion, it would be preferable for this information to be contained in an annual report on the human rights situation in all United Nations Member States, for this report to be presented before the Human Rights Council by a commission of independent experts[23] (perhaps the Sub-Commission itself) and for this commission to work in close proximity with the system of special rapporteurs and working groups currently existing within the framework of the Commission on Human Rights, and with the oversight bodies established by international human rights treaties.

The aforesaid commission of experts should also enlist the technical support not only of the Office of the High Commissioner for Human Rights, but also the other specialized[24] and subsidiary[25] organizations of the United Nations system, and the departments of the United Nations Secretariat[26] that enjoy a broad presence in all countries across the world. An annual report drafted in this way would definitively avoid selectiveness among countries, guarantee a fair evaluation of all States and also constitute a real step forward in the coordination of the entire United Nations system in matters dealing with human rights.

Third, the same resolution limits itself to stating that the evaluation shall be conducted "by the Human Rights Council Member States themselves", although it does not specify whether this will be done in a public session (subjected to the scrutiny of accredited observers, including human rights non-governmental organizations) or a closed session. If, in practice, the Human Rights Council decides to conduct this evaluation behind closed doors, the procedure would be a mere repetition of the infamous "1503 procedure" set up by ECOSOC in 1970 to conduct "dialogue" behind closed doors with States in violation of human rights, and which produced no effective results.

Fourth, and finally, the proposed mechanism specifies that the evaluation be conducted for the purpose of identifying the needs of each State in relation to the development of their institutional capacity, instead of identifying the real degree of fulfillment of their international human rights obligations. As such, the international community would be sacrificing an international inspection mechanism that was already being used by Commission on Human Rights, by albeit imperfect system of thematic rapporteurs and country rapporteurs.

Preserving the achievements of the Commission

The Human Rights Council proposed by General Assembly Resolution 60/251 does not sufficiently preserve the record of achievements made by the Commission on Human Rights throughout its long existence of more than 60 years. The next few years need to be utilized to the fullest to review the state of the Human Rights Council so as to preserve and improve this record in four ways:

First, the Commission on Human Rights did a remarkable job of progressive codification and development of International Human Rights Law, which the future Human Rights Council should continue and could even improve upon. We should not forget that only in 2005 did the Commission on Human Rights successfully complete the codification of the "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law".[27] The Commission on Human Rights also took note of the "Set of principles for the protection and promotion of human rights through action to combat impunity" as guidelines to help States develop effective measures to tackle impunity.[28] Finally, a Working Group of the Commission on Human Rights approved on 23 September 2005 the draft "International Convention for the protection of all persons from enforced disappearances".[29]

The Human Rights Council is expected to make the definitive approval of this important draft convention against disappearances a matter of priority, since figuring among its functions is to make recommendations to the General Assembly "for the further development of international law in the field of human rights".[30]

However, it is rather worrisome that Resolution 60/251 does not preserve the current codification architecture of the Commission on Human Rights, in which the Sub-Commission on the Promotion and Protection of Human Rights plays a vital role by acting as an panel of independent experts that, having closer contact with the needs of civil society, should advise the intergovernmental body (previously the Commission on Human Rights, now the Human Rights Council) on the priorities and the matters to be codified and developed progressively in the field of International Human Rights Law.[31] The weak reference to the fact that the Human Rights Council will maintain "expert advice"[32] is clearly insufficient to assure the continuity of the work of the Sub-Commission.

Second, there should be no discussion about the continuation of the extremely valuable system of special rapporteurs and working groups (currently 17 country mandates and 31 thematic mandates) of the Human Rights Council, nor about the procedure for individual complaints that was

painstakingly crafted within the framework of extra-conventional protection. This procedure was developed with the commitment of various special rapporteurs and working groups, particularly the thematic mandates, taking its inspiration from the effectiveness of the Working Group on Arbitrary Detentions. Given the lack of an agreement between States, negotiations were extended for another year,[33] causing uncertainty to continue to hover over the nerve center of the extra-conventional protection system.[34]

Third, after lengthy negotiations, the General Assembly now acknowledges the crucial importance of human rights NGOs. As such, they will continue to benefit from at least the same participation arrangements with the future Human Rights Council that they now enjoy with the Commission on Human Rights. Until now, the advisory status of NGOs – determined in Articles 68 and 71 of the UN Charter – has linked them to the Economic and Social Council (ECOSOC), while the practical aspects have been regulated in accordance with the rules of procedure established by Resolution 1996/31 of ECOSOC.[35]

Also pending is the problem concerning the legislative technique employed by the General Assembly in its Resolution 60/251, which is in stark contrast to that established in Articles 68 and 71 of the UN Charter. As a result, by establishing the Human Rights Council as a subsidiary organ of the General Assembly, it will be necessary to modify these terms of the Charter to extend the advisory status of NGOs to the General Assembly and its subsidiary organs. Whatever the outcome, the United Nations requires the endorsement of civil society, so consequently its legitimate representatives need urgently to be admitted into the deliberations of the General Assembly and, by extension, its new Human Rights Council and also the Security Council.

Fourth, and finally, the main oversight of the new Human Rights Council – unlike, for example, national human rights institutions – is the conventional system of human rights protection. In fact, Resolution 60/251 makes only a single reference to this important protection system, and a negative one at that: the universal periodic review mechanism "shall not duplicate the work of treaty bodies".[36]

On the contrary, it would be highly desirable for the upcoming review of the status of the Human Rights Council to consider the coordination of its work with these various bodies. Along these lines, it would be desirable to establish permanent institutional working relations that include the recognition of a permanent observer status in the Human Rights Council for the seven UN treaty committees, since both protection systems (conventional and extra-conventional) are complementary and pursue the same objective: the international protection of human rights.

Conclusions

The Human Rights Council was evidently founded with a provisional character, since after a one year period decisions will have to have been made concerning the three basic issues inherited from the Commission on Human Rights, namely: the future of the special procedures, the individual complaints procedure through extra-conventional protection mechanisms and the Sub-Commission on the Promotion and Protection of Human Rights. In addition, both the General Assembly and the Human Rights Council itself will review its status within five years.
Consequently, these opportunities should be seized in the coming years to ensure that:

- the Human Rights Council is classified as a principal and permanent organ of the United Nations, having a universal composition and enjoying the same political visibility as the Security Council, ECOSOC and the General Assembly.
- the Human Rights Council and the Security Council develop a direct, horizontal and fluid working relationship, in virtue of the acknowledgement of the close relationship existing between gross human rights violations and the maintenance of international peace and security.
- provisionally, while the goal of a universal composition for the Human Rights Council is not achieved, State candidates should be required to have ratified at least seven basic human rights treaties and their corresponding optional protocols.
- the decision whether or not a State has committed systematic human rights violations, for the purposes of its suspension as a Member State of the Human Rights Council, should come from an independent expert (special country rapporteur).

Concerning the "universal periodic review mechanism", it should be specified that:

- the evaluation of each State shall be conducted based on the obligations assumed under the United Nations Charter, the Universal Declaration of Human Rights and the specific obligations contracted upon ratifying the human rights treaties.
- the source of information shall be an annual report on the human rights situation in all United Nations Member States, to be prepared by a commission of independent experts – potentially a conveniently renewed version of the Sub-Commission itself.
- the Human Rights Council shall hold public sessions, subjected to the scrutiny of human rights NGOs.
- the main objective of the periodic review among peers shall be to evaluate the human rights situation in each country and, subsequently, identify appropriate measures of technical training and institutional development.

Additionally, the Human Rights Council should clarify the doubts surrounding four key issues:

First, the progressive codification and development of International Human Rights Law. It should immediately approve the draft International Convention for the Protection of all Persons from Enforced Disappearances. It should also expedite the codification of the draft Declaration on the Rights of Indigenous Peoples and the proposed optional protocol to the International Covenant on Economic, Social and Cultural Rights. Looking to the future, it should preserve the codification architecture inherited from the Commission on Human Rights, in which the Sub-Commission on the Promotion and Protection of Human Rights used to play a vital role by maintaining close contact with civil society.

Second, the continuity of the valuable system of special rapporteurs and working groups of the Human Rights Council (currently 17 country mandates and 31 thematic mandates). The Human Rights Council should immediately, in 2006, renew the mandate of 21 of these special procedures, many of which are qualified to receive individual complaints through the extra-conventional protection system.

Third, it should assure that human rights NGOs continue to enjoy the same participation arrangements as with the Human Rights Council. For this to occur, it will be necessary to amend Articles 68 and 71 of the UN Charter.

Fourth, the seven committees established by international human rights treaties should be granted the status of permanent observers in the Human Rights Council, so as to assure a permanent and institutionalized working relationship between the two international human rights protection systems (conventional and extra-conventional).

NOTES

1. General Assembly, Resolution 60/1 entitled "2005 World Summit Outcome", of September 16 2005, paragraphs 157-159.

2. Ibid., paragraph 160.

3. General Assembly, Resolution 60/251, approved on March 15, 2006 by 170 votes in favor, 4 against (United States, Israel, Marshall Islands and Palau Island) and 3 abstentions (Byelorussia, Iran and Venezuela). The budget implications of this resolution were an additional appropriation of 4,328,700 dollars (doc. A/60/721, 15 March 2006, paragraph 4).

4. General Assembly, Res. 60/251, paragraph 6.

5. Ibid., paragraph 1 *in fine*. Meanwhile, the Human Rights Council itself shall also "review its work and

functioning five years after its establishment and report to the General Assembly" (paragraph 16).

6. The Human Rights Commission shall be abolished by ECOSOC on 16 June 2006 (paragraph 13 of Res. 60/251). According to paragraph 15, the elections of the first members of the Human Rights Council shall be held on 9 May 2006 and that the first session of the Council shall be convened on 19 June 2006.

7. As established in preambular paragraph 6 of Res. 60/251: "Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing, [...]."

8. The so-called "Panyarachun Report" defended that the Commission on Human Rights should continue to exist, although membership should be made universal, that is, to embrace the 192 Member States. *Cfr.* Doc. A/59/565, of 2 December 2004, paragraph 285. In the longer term, the same Panel considered that the Commission should be upgraded to become a Human Rights Council, a main freestanding Charter body like the Security Council (Ibid., paragraph 291).

9. Doc. A/59/2005, "In larger freedom: towards development, security and human rights for all", of 21 March 2005, page 67, paragraph 8 (e).

10. Paragraph 7 of Resolution 60/251 establishes the geographical distribution. After the first election held on 9 May 2006, the Human Rights Council is configured as follows: Group of African States: 13 seats (Algeria, Cameroon, Djibouti, Gabon, Ghana, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia); Group of Asian States: 13 seats (Bahrain, Bangladesh, China, India, Indonesia, Japan, Jordan, Malaysia, Pakistan, Philippines, Republic of Korea, Saudi Arabia and Sri Lanka); Group of Eastern European States: 6 seats (Azerbaijan, Czech Republic, Poland, Romania, Russian Federation and Ukraine); Group of Latin American and Caribbean States: 8 seats (Argentina, Brazil, Cuba, Ecuador, Guatemala, Mexico, Peru and Uruguay); Group of Western European and other States: 7 seats (Canada, Finland, France, Germany, Netherlands, Switzerland and the United Kingdom of Great Britain and Northern Ireland).

11. The secret ballot is an important new development since it enables States to vote consciously, free of the usual political pressure from large powers. The risk becoming politically illegitimatized by the international community is presumably what led the United States to announce that it would not be presenting its candidacy, even though this announcement is in line with its vote against the creation of the Human Rights Council (General Assembly, Res. 60/25).

12. General Assembly, Res. 60/251, paragraph 8.

13. An ambiguity that was exploited by State candidates in the first election, which only published their "conquests" in the field of human rights and made fairly hollow pledges.

14. Ibid., paragraph 8 *in fine*. At least 26 of the States elected on 9 May 2006 (*vide supra*, footnote 10) have been found to have committed gross and systematic violations of numerous of human rights.

15. Ibid., paragraph 9.

16. Ibid., paragraph 1. The Human Rights Council is established with a provisional status. As we have already seen, it is stated that "the Assembly shall review the status of the Council within five years".

17. Ibid., paragraph 10. Nevertheless, this represents some progress in relation to the Commission on Human Rights, which was authorized to meet only once each year in regular session for six weeks.

18. Ibid., paragraph 10 in fine.

19. Ibid., paragraph 2.

20. Ibid., paragraphs 3-5.

21. Ibid,. paragraph 5.e). It also determines that the Human Rights Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.

22. *Vide* doc. A/59/2005/Add.3, 26 May 2005, paragraph 86.

23. One valuable example is the Committee of Experts on the Application of Conventions and Recommendations, of the ILO, made up of 20 independent experts. This commission reports annually to the International Labor Conference on the fulfillment of international labor conventions by each Member State.

24. ILO, UNESCO, FAO, WHO.

25. UNDP, UNICEF, UNHCR, WFP, Peacebuilding Commission.

26. In particular the Department of Peacekeeping Operations or the Department of Humanitarian Affairs.

27. Commission of Human Rights, Res. 2005/35, of 19 April 2005, Annex. These principles were endorsed by ECOSOC and by the General Assembly towards the end of 2005.

28. Commission of Human Rights, Res. 2005/81, paragraph 20, of 21 April 2005. These principles had been updated by Professor Diane Orentlicher, an independent expert. The principles may be consulted in doc. E/CN.4/2005/102/Add.1, of 8 February 2005.

29. The text of the upcoming Convention is available on the website of the High Commissioner: <www.ohchr.org>, accessed on 15 August 2006. This project is expected to be formally approved by the Human Rights Council in June 2006 and then by the General Assembly in December 2006.

30. General Assembly, Res. 60/251, paragraph 5.c).

31. See, for example, decision 2005/114 of the Sub-Commission.

32. General Assembly, Res. 60/251, paragraph 6.

33. Ibid., paragraph 6 *in fine.*

34. The Commission on Human Rights was due to renew in 2006 the mandate of 21 of these special procedures, although the premature suspension of its sessions in March 2006 prevented it from pronouncing on this extremely important matter, leaving the decision in the hands of the Human Rights Council.

35. Ibid., paragraph 11 in fine.

36. Ibid., paragraph 5.e).