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Diplomatic manoeuvres involved in the creation of the United Nations Human

hael C. Ogwezzzy

Introduction

The UN Human Rights Commission ('the Commission') was the primary intergovernmental policymaking body under the UN System saddled with the responsibility for promoting human rights issues before it was replaced by the UN Human Rights Council ('the Council') in 2006.¹ Created in 1946 as a subsidiary body of the UN Economic and Social Council ('ECOSOC'),² the Commission's initial mandate was to establish international human rights standards and develop an international bill of rights. One of the Commission's notable successes was establishing the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.³ During its tenure, the Commission played a key role in developing a comprehensive body of human rights laws and regulations.⁴ Over time, its work evolved to address specific human rights violations and complaints as well as broader human rights issues. It developed a system of special procedures to monitor, analyse and report on human rights violations. The procedures addressed country-specific human rights violations, as well as 'thematic' cross-cutting human rights abuses such as racial discrimination, religious intolerance, and denial of freedom of expression.⁵

¹ Luisa Blanchfield, "CRS Report for Congress: The United Nations Human Rights Council" Congressional Research Service Order Code RL33608 8 August 2006, at 1-2

² The ECOSOC is a principal organ of the United Nations that coordinates the economic and social work of the specialised UN agencies. It is composed of 54 member governments elected for three-year terms by the UN General Assembly.

³ The Universal Declaration of Human Rights was adopted by General Assembly Resolution 217 A (III), 10 December 1948. Available at <http://www.un.org/Overview/rights.html> Visited 18 January 2012.

⁴ This includes the International Covenant on Civil and Political Rights, which entered into force on 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights, which entered into force on 3 January 1976. The United States signed both treaties on 5 October 1977 and ratified the Covenant on Civil and Political Rights on 8 June 1992.

⁵ See H.J. Steiner and P. Alston, *International Human Rights in Context: Law Politics and Morals*, 2nd edn. Oxford: Oxford University Press, 2000, at 600.

In its last years, and especially since 1998, these controversies plagued the Commission's operations and resulted in a rancorous debate among governments, often reflecting a North-South split.⁶ Controversy developed over the human rights records of Commission members. Countries widely perceived as systematic abusers of human rights were elected as members.⁷ In 2001, Sudan was elected, despite being a country broadly criticised by governments and human rights groups for ethnic cleansing in the Darfur region. Sudan was re-elected in 2004, prompting outrage from human rights organisations and causing the United States' diplomats to walk out of the Commission chamber in protest.⁸ These instances significantly affected the Commission's credibility. It was alleged that countries had used their membership to deflect attention from their own human rights violations by questioning the records of others. Some members were accused of bloc voting and excessive procedural manipulation to prevent debate on their human rights abuses.⁹ In 2005, the collective impact of these controversies led UN Secretary-General Kofi Annan to propose the idea of a new and smaller Council to replace the Commission. On 15 March 2006, the UN General Assembly approved a resolution to dissolve the Commission and create the Council in its place. The Commission held its final meeting in Geneva, Switzerland, on 16 June 2006, where among other actions it transferred its reports and responsibilities to the new Council.

⁶ Michael Jordan, "New Calls for Reform of UN Rights Commission; Cuba's Re-Election Last Week to the Commission on Human Rights is Drawing Criticism from Rights Groups", *Christian Science Monitor* Boston, 7 May 2003, 7. Such accusations are clearly acknowledged in the wording of the resolution establishing the new Council, in which the General Assembly explicitly recognises the importance of "the elimination of double standards and politicization": Human Rights Council, GA Res 60/251, UN GAOR, 60th Session, 72nd Plenary Meeting, Agenda Items 46 and 120, UN Doc A/RES/60/251 of 3 April 2006 at 2. (see Philip Alston, *op. cit.*)

⁷ See the report of the Secretary-General of the UN, "In Larger freedom: Towards Development, Security and Human Rights for All", 24 March 2005, at 45: "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". The composition of the Commission was of 53 states representatives, elected by the ECOSOC for three renewable years. Quite often states with highly negative outcomes regarding human rights were sitting on the Commission.

⁸ Mark Lagon, "Deputy Assistant Secretary of State for International Organization Affairs, U.S. Department of State", press briefing of 25 April 2006

⁹ "A New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council", International Service for Human Rights and Friedrich-Ebert-Stiftung, June 2006

Nature, Functions and Achievements of the UN Commission on Human Rights

The establishment of the Commission¹⁰ was mandated by the *Charter of the United Nations*.¹¹ After its first session in 1946, its many achievements included the drafting of the *Universal Declaration of Human Rights* ('UDHR') and a plethora of subsequent human rights treaties.¹² It was one of the six commissions established by Economic and Social Council ('ECOSOC') and under its terms of reference the commission was directed to prepare recommendations and reports on: an International Bill of Human Rights; International Conventions or Declarations on Civil Liberties, the status of women, freedom of information and similar other matters; the protection of minorities; the prevention of discrimination on the basis of race, sex, language or religion; and other matters relating to human rights.¹³ The UN Commission on Human Rights was an inter-governmental body consisting of government representatives¹⁴ and, having grown in size, it eventually consisted of 53 members, elected on a rotating basis for three-year terms by the ECOSOC.¹⁵ It met annually for six weeks in Geneva from mid-March to late April, although after 1992 there were also provisions for emergency sessions before it was wound up in 2006.¹⁶ In a UN report, the Commission's functions was described thus: It is entrusted with promoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in build-

¹⁰ Philip Alston, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council" Centre for Human Rights and Global Justice, Working Paper Number 4, 2006 at 2-3

¹¹ See Article 68 of the "Charter of the United Nations and the Statutes of the International Court of Justice", Department of Public Information DPI/511 Reprint, New York: United Nations, October, 1997

¹² Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3rd Session, 183rd Plenary Meeting, UN Doc A/RES/217A (III) (10 December 1948). For a detailed history of the Commission, see Philip Alston, "The Commission on Human Rights" in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992) 126; Jean-Bernard Marie, *La Commission des droits de l'homme de l'ONU* (1975); Howard Tolley, *The UN Commission on Human Rights* (1987)

¹³ S.P. Gupta, *International Law and Human Rights*, 1st edn, Faridabad (Haryana): Allahabad Law Agency, 2009 at 582

¹⁴ A. Maheshwari and M.B. Bhagwat, *Understanding Human Rights*, 8th edn. Mumbai: Vipul Prakashan, 2007 at 86

¹⁵ The Commission began with a membership of 18 in 1946 and was subsequently expanded to 21 in 1962, 32 in 1967, 43 in 1980 and 53 in 1992. For details of its membership over time, see Office of the United Nations High Commissioner for Human Rights, *Membership* (2006). Available online at <http://www.ohchr.org/english/bodies/chr/membership.htm>. Visited 20 January 2012

¹⁶ H.J. Steiner and P. Alston, op. cit.,

ing their human rights capacity.¹⁷ Its tasks of fostering cooperation and building capacity were uncontroversial at least in principle, although not always in practice. In contrast, its mandate to promote global respect for human rights and to respond to rights violations was intrinsically controversial because it required it to monitor and call to account many of the countries that sat as members of the Commission. While many critics called for a conciliatory approach to avoid confrontation with governments, others impugned its credibility precisely because it had failed to condemn governments they considered to be responsible for egregious human rights violations.¹⁸

At the Commission's 2004 session, the US delegation took up this theme and insisted that "this important body should not be allowed to become a protected sanctuary for human rights violators who aim to pervert and distort its work". It argued that only "real democracies" should enjoy the privilege of membership.¹⁹

Nature and Functions of the United Nations Human Rights Council

The Human Rights Council is a new body and the most important of the UN's human rights institutions. In September 2005, a summit of the United Nations member states agreed to abolish the Commission on Human Rights and replace it with a Human Rights Council.²⁰ On 15 March 2006, the United Nations General Assembly approved the creation of the Human Rights Council, whose mandate is to promote universal respect for human rights and address situations of violations of human rights. In operation since June 2006, the Council is supposed to address the Commission's shortcomings with a slightly more rigorous election proce-

¹⁷ Kofi Annan, High-Level Panel on Threats, Challenges and Change, A More Secure World Our Shared Responsibility, UN Doc A/59/565 (2 December, 2004) at 282 ("Report of the High Level Panel")

¹⁸ See the Editorial "Changing the UN", The Washington Post (Washington DC, US), 3 May 2003, A22; Colum Lynch, "US Protests Sudan's Election to Human Rights Panel", The Washington Post Washington DC., 5 May 2004, A 30; also see Michael Coultan, "Zimbabwe's UN Rights Role Raises Ire", The Age (Melbourne, Australia), 29 April 2005, at 11

¹⁹ Ambassador Richard Williamson, US Representative to the United Nations for Special Political Affairs, US Government Delegation to the 60th Commission on Human Rights, Item 4: Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights (2004). Available online at <<http://www.humanrightssusa.net/statements/0319Williamson.htm>> Visited 22 January 2012

²⁰ Karen E. Smith, "The European Union and the Review of the Human Rights Council", EXPO/B/DROI/2010/06 /February/ 2011 at 4. Available online at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> Visited 23 January 2012

ture and a Universal Periodic Review of the human rights records of all UN member states.

Diplomatic Manoeuvres in Creation of the UN Human Rights Council (HRC)

In order to illustrate the many hurdles in the way of the new HRC, this paper will discuss the necessary open and secret diplomatic efforts made by the United Nations and the Swiss government to bring about the needed changes and the creation of the new Human Rights Council of the United Nations with the aim of remedying the defects of the defunct Commission in order to create enabling opportunities for enhancing the protection of human rights among nations.

Open Diplomatic Manoeuvres by the United Nations Hierarchy

Creating the HRC was an arduous and complex process that involved several diplomatic manoeuvres and intrigues that culminated in the spring of 2006, but whose first stone was laid more than a year earlier, in December 2004, with the publication of the report by the High Level Panel on Threats, Challenges and Change set up by UN Secretary General Kofi Annan. Previously, the erosion of the Commission's credibility as a result of the poor human rights records of its members, many of whom sought membership to protect themselves against scrutiny, led to much talk about the need for reform, but no action.²¹ The report by the High Level Panel was the first serious attempt by the UN itself to shape such an aspiration by substituting the Commission with a new Human Rights Council and solidly place the reform of the UN human rights system at the forefront of the world body's agenda.²²

Although the High Level Panel report included specific proposals on the Human Rights Council (HRC) such as the establishment of universal membership for the new Council, the compulsory

²¹ Angel Alonso Arroba, "The New United Nations Human Rights Council: What Has Changed?" Democracy Coalition Project, Washington DC. 2006 Crossroads Vol. 6, No. 2 at 66-86, 68:72

²² United Nations General Assembly, A More Secure World: Our Shared Responsibility. Report by the High-level Panel on Threats, Challenges and Change (UNGA A/59/565), New York, December 2004, paras. 285-291

designation of experienced human rights figures as heads of the national delegations, the creation of an advisory council of experts, and the production of annual reports and periodic reviews on the situation of human rights worldwide, the report's definition of the new body was still vague and envisioned its establishment as a long-term goal. According to Alonso Arroba, it was Kofi Annan who set forth a more comprehensive, detailed plan to establish the HRC in his subsequent document *In Larger Freedom*, published in March 2005. Annan's proposal was an ambitious one: it stipulated a new body that would ideally be a principal organ of the UN, or at least a standing subsidiary body of the United Nations General Assembly, with a much smaller number of members elected by a two-thirds majority of the United Nations General Assembly and abided by the highest human rights standards. His proposal also contemplated giving the Council a broader implementation mandate and means to respond to urgent breaches of human rights.²³

Further discussion at the United Nations General Assembly during the spring and summer of 2005 paved the way to a progressive definition of the characteristics of the new body, following arduous negotiations brokered by the then United Nations General Assembly President, Gabonese Jean Ping. Ping's effort concentrated on producing a final document that would translate Annan's blueprint on security, development and human rights into practical reform proposals that could be agreed upon by all UN member states. He hoped the final document would be solemnly adopted at the World Summit in September 2005, which was to celebrate the 60th Anniversary of the United Nations. Ping produced up to three drafts of the Outcome Documents for the summit – dated 3 June, 22 July, and 10 August 2005 – none of which received full endorsement by UN members. The last round of consultations following the 10 August draft document were particularly difficult, especially with the arrival in New York of John Bolton, President Bush's recess appointment as US Permanent Representative to the UN. Just three weeks before the opening of the World Summit, Ambassador Bolton opened Pandora's Box. Bolton's more than 750 edits to the 38-page document circulated by President Ping proved to be a real last-minute blow to the delicate consen-

²³ United Nations General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All Report of the Secretary-General (A/59/2005)*, New York, March 2005, para.183)

sus brokered during the previous months, reopening the negotiations and creating an opportunity for spoilers like Algeria, Cuba, Egypt, India, Iran, Pakistan and Venezuela to undermine deeper reforms that would have run against the interests of their governments. Bolton's manoeuvre cast a shadow on his real commitment to work in favour of improving the UN.²⁴ His polemic deletion of all references to the Millennium Development Goals (MDGs), for instance, is hard to explain. It causes suspicion about the agenda of a man who once said that there is no such thing as the United Nations and the collapse of the top ten stories of the UN Secretary building in New York would not make a bit of difference.²⁵

The final 2005 World Summit Declaration was agreed to just hours before the Summit's start. Following a frantic final week of negotiations, it was a less ambitious document that weakened some of the reforms initially envisioned by the UN Secretary General with respect to human rights reform; it endorsed the creation of the HRC. But unlike initially intended, the declaration postponed the creation of the new body, tasking the United Nations General Assembly with defining the specific issues of status, size, election mechanism, membership criteria, mandate, working methods and special procedures.²⁶ As a consolation prize, the Summit agreed to double the budget of the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), which has been coordinating human rights activities throughout the UN system since its creation in 1993. Other proposed reforms included the establishment of a Peace Building Commission, reinforcement of the development agenda and the Millennium Development Goals, enhanced counterterrorism efforts, reform of the UN management system, and implementation of the responsibility to protect doctrine and stronger mechanisms to prevent genocide.

The autumn of 2005 therefore again witnessed frenetic diplomatic activity to define the final parameters of the new HRC. Negotiations began in New York in October 2005 under the leadership of Ping's successor as President of the General Assembly, the Swede Jan Eliasson. The process was even more intricate and divisive than the one leading to the World Summit, with backstage

²⁴ D. Schorr, *United Nations Reform in Context*, Muscatine: Stanley Foundation, February 2006, at 10-12

²⁵ "Bush Nominates Bolton as U.N. Ambassador", CNN, 8 March 2005

²⁶ United Nations General Assembly, *World Summit Outcome (A/60/L.1)*, New York, September 2005, paras.157-160)

deals, compromises and manoeuvres making agreement over a final text very difficult. Six different drafts were considered during the negotiations, which extended over five months and encompassed more than 30 rounds of consultations. Many of the statements released by various UN Permanent Missions on the negotiations and their positions throughout the process reflect the complexity of the discussions and the difficulty of reaching a compromise on the final text.²⁷

US Ambassador John Bolton was once more an obstacle to the talks, in sharp contrast with the leadership former US-UN representatives had usually exerted in such situations, particularly as human rights champions since the creation of the UN. To begin with, out of the aforementioned 30 plus negotiating sessions over the HRC, Bolton only attended one, with Deputy Assistant Secretary of State Mark Lagon and other lower-ranking US Foreign Service officials taking his place in a few others and the US chair remaining empty at many meetings.²⁸ The US Ambassador's threat to withhold US approval of the UN budget unless the UN institutions implemented substantial management reforms coupled with proposed US Congressional legislation to condition the payment of US dues to the UN on the implementation of reforms, like the Hyde²⁹ and Coleman Lugar bills³⁰ precipitated the budgetary crisis and did not help facilitate a favourable negotiation environment at the time. Finally, during the final stage of the negotiations in early 2006, Bolton pressed for the granting of permanent HRC membership to the five Security Council permanent members, a terrible measure that not only would have further alienated the G-77

²⁷ J. Almqvist, *The Human Rights Council: A Bold Step towards Effective Rights for All*, FRIDE Comment, Madrid: FRIDE, 2006, at 1

²⁸ Bolton Watch, 2006 Available online at Bolton Watch Blog: <http://boltonwatch.tpmcafe.com> Visited 25 January 2012

²⁹ (H.R. 2745, 2005) The Henry J. Hyde UN Reform Act in 2005, H.R. 2745 passed in the House of Representatives with a vote of 221 to 184. It would withhold 50% of US assessed dues to the UN regular budget if a series of reforms were not implemented. Specifically, the act states that a UN member country would be ineligible for membership on any UN human rights body if it is under Security Council sanctions or under UN investigation for human rights abuses. (United States House of Representatives legislation related to the funding and reform of the Human Rights Council in the 109th Congress, 2005)

³⁰ (S. 1383, 2005) S. 1383 calls for "urgent and essential reform of the United Nations". It would give the President the authority to withhold 50% of US contributions to the United Nations if he determined that the United Nations was not making adequate progress on reforms. It states, among other things, that countries subjected to sanctions by the UN Security Council or under UN investigation for human rights violations should be ineligible for Council membership. The bill was introduced by Senator Norm Coleman on 12 July 2005 and was referred to the Committee on Foreign Relations. (United States legislation related to the funding and reform of the Human Rights Council in the 109th Congress, 2005)

against excessive power enjoyed by the so-called P-5, but would have also granted unchallenged representation at the Council to blatant human rights violators like China and Russia.³¹

Following a decisive campaign by human rights groups in the United States, it was the direct decision by US Secretary of State Condoleezza Rice to become directly involved in the negotiations that prevented Bolton from again annihilating the consensus reached over the characteristics of the new HRC at the last moment.³² Although the US Ambassador still compared the proposed HRC to a “caterpillar” while arguing that the US could only accept a “butterfly”,³³ and despite the fact that the United States was one of the only four states to vote against the text of the resolution submitted by Eliasson to the General Assembly on 24 February (the other three were Israel, the Marshall Islands and Palau, with Belarus, Iran and Venezuela abstaining), the new Council was finally approved by the General Assembly on 15 March 2006, with 170 votes in favour.

Underground/Secret Manoeuvres of the Swiss Government (DFA)

This subheading will examine what appears to be underground or secret manoeuvring efforts mainly led by the Swiss government's Department of Foreign Affairs (DFA) in facilitating the creation of the United Nations Human Rights Council in 2006. Switzerland made frantic efforts towards the creation of this new body, which on 19 June 2006 took over from the Human Rights Commission in Geneva. If there is one outstanding fact about the creation of the new UN Human Rights Council, it is the exceptional celerity with which the international community acted. Never before in the 60-year history of the United Nations had such an important organ seen the light of day so swiftly and painlessly.³⁴

In March 2003 the Head of the Swiss Federal Department of Foreign Affairs (DFA), Micheline Calmy-Rey, addressed the 59th session of the Human Rights Commission. She spoke of the urgent need to reform the Commission and this led to a mandate in spring 2003 by the Swiss DFA to Professor Walter Kälin of the

³¹ “A Caterpillar in Lipstick”, *The Economist*, Editorial, 2 March 2006, at 1

³² “Better UN Rights Monitor”, *Boston Globe*, 25 February 2006

³³ “The Wrong Approach to Human Rights”, *The Economist*, Editorial, 2 March 2006, at 2

³⁴ KOFF Swisspeace, “UN Human Rights Council – Chronicle of a Swiss Diplomatic Initiative” KOFF-Newsletter No. 46., 1 April 2006, at 6-7

Institute of Public Law, the University of Bern, to investigate the possibility of reforming the Commission, which he did in a study entitled “Reform of the UN Commission on Human Rights”, *where the idea of creating a new Human Rights Council appears for the first time*.³⁵

Another effort was made in March 2004 whereby Calmy-Rey addressed the 60th session of the Human Rights Commission and put forward some ideas for the creation of a Human Rights Council. In the same year in August, Professor Walter Kälin was mandated by the Swiss DFA to study a reform programme for the UN Human Rights Council and he presented a second study, “Towards a Human Rights Council: Options and Perspectives”, which proposed three possible models for the creation of such a Council, while in September 2004 the Kälin study was submitted by Calmy-Rey to the Secretary General of the UN and the High Level Panel on Threats, Challenges and Change.³⁶

In November 2004, a Human Rights Council Task Force was created within the Swiss DFA. It operated as a work base, a strategic ‘think-tank’ and a coordination platform between the DFA head office and the various Swiss missions abroad, in particular the Permanent Missions of New York, Geneva and Brussels. Thereafter, on 1 December 2004 the report of the High Level Panel, which saw the creation of a Human Rights Council as a long-term option, was published.

On 21 March 2005 there was the presentation of the report of the UN Secretary-General concerning his project to reform the United Nations. This report endorsed the idea of replacing the Commission by a Human Rights Council. Between 2 May and 7 June 2005, Switzerland hosted two seminars in Lausanne to discuss the creation of a Human Rights Council with all interested States. Between 14-16 September 2005 at the World Summit 2005 (M+5) held at the UN headquarters in New York, an outcome document was adopted in which the Heads of State and Government asked the President of the General Assembly to organise open and transparent negotiations to determine the mandate and organisational methods of the Human Rights Council. Interestingly, on 3

³⁵ Ibid. (My emphasis)

³⁶ Departament Federal D’Affars Exteriurs, “Creation of a UN Human Rights Council: Course of a Diplomatic Initiative for the Creation of a UN Human Rights Council: Historical Background” Documentation DFA Information, Berne, March, 2006, at 1-4. Available online at www.dfae.admin.ch Visited 25 January 2012

October 2005 Switzerland offered the services of Rachel Groux, a Swiss human rights expert, to the President of the General Assembly, Jan Eliasson to provide inputs for the negotiation strategy adopted by the President of the General Assembly on the reforms and establishment of the Human Rights Council and on 11 October 2005 the President of the 60th Session of the General Assembly appointed the Permanent Representatives of Panama and South Africa as co-Presidents to speed up the negotiations and at the same time present his full working programme for the reforms. This marks the beginning of a period of intense negotiations.

On 3 November 2005, the President of the General Assembly presented a document with 'ways and means' options for the future Human Rights Council on the basis of proposals put forward by the States. Again between 24-26 November 2005, Switzerland organised a two-day seminar in Geneva for all French-speaking States. The aim was to make the delegations aware of the importance of "International Geneva" and to discuss other points of substance. One participant in the seminar was the Personal Advisor to the then President of the General Assembly, Mr. Parfait Onanga-Anyanga.³⁷

At the end of 2005 till January 2006, the deadline proposed by the President of the General Assembly for wrapping up the negotiations was missed. The delegations with the most extreme negotiating positions were not yet ready to make concessions, and no solution had been found. On 1 February 2006, the two co-Presidents put forward a new text suggesting a compromise on a number of questions that remained open. Much work was done behind the scenes and with constructive proposal put forward by Switzerland and several other countries suggesting they were ready to be flexible, the text was fairly well received, although certain differences remained.

On 6 February 2006, the President of the General Assembly took personal charge of the negotiating process and began informal bilateral consultations with the various delegations so as to be able to put forward a text based on consensus before the end of the month. On 23 February 2006 the President Jan Eliasson presented his draft

³⁷ On 23 December 2005: approval of the 2006-2007 budget of the UN in New York. The request of the High Commissioner for Human Rights, Mrs. Louise Arbour, for an increase in human resources (91 new posts) as well as for extra funding (an additional USD 86m), is accepted. The Swiss delegation in New York was particularly active in the General Assembly Budget Committee in support of this objective.

resolution to the General Assembly meeting in a plenary session, and the Head of the Swiss Mission in New York began intensive lobbying to facilitate the adoption of the text. Finally, on 15 March 2006 the UN General Assembly adopted the resolution to create a Human Rights Council, with its head office in Geneva.³⁸

Composition, Working Methods and Mandate of the Human Rights Council

i. Composition and Membership

The Council is composed of 47 members apportioned by geographic regions as follows: 13 from African states; 13 from Asian states; six from Eastern European states; eight from Latin America and the Caribbean states; and seven from Western European and other states. Members are elected for a period of three years and may not hold a Council seat for more than two consecutive terms. If a Council member commits “gross and systematic violations of human rights”, the General Assembly may suspend membership with a two-thirds vote of members present. All UN member states are eligible for Council membership, not only those with a good human rights track record or those which have ratified the majority of international human rights instruments and cooperate with respective monitoring mechanisms.³⁹ The old Commission was composed of 53 member states elected by members of the ECOSOC. Countries served three-year terms with no term limits. Like the Council, the Commission created a formula to ensure the equitable distribution of seats by region.

ii. Mandate

On 15 March 2006, the UN General Assembly passed resolution A/RES/60/251 which established the Council and outlined its

³⁸ On 15 March 2006, 170 of the 191 (now 193) of the UN member states voted in favour of the creation of a Human Rights Council. Only four states voted against this proposal, while three abstained. Switzerland's strong commitment played a significant part in this development: representatives of Switzerland were more involved in both initiation of the concept as well as in the subsequent adopted form of the new Council. (Atelier Bundi Boll, Switzerland Peace and Human Rights Promotion, Bern: Federal Department of Foreign Affairs (FDFA) Directorate of Political Affairs DP, June 2007 at 21)

³⁹ Daniel Moeckli et al. (eds.), *International Human Rights Law*, Oxford: Oxford University Press, 2010 at 394

purpose and responsibilities.⁴⁰ Under the resolution, the Council is 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”. The Council will “address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon”. It will also promote and coordinate the mainstreaming of human rights within the UN system. In order to achieve the above goals, the Council will undertake a universal periodic review of each UN member state’s fulfilment of its human rights obligations and commitments. The review will be a “cooperative mechanism” based on dialogue between the reviewers and the countries involved. Each member will undergo a periodic review during the term of its membership. The Council is tasked with developing guidelines for the universal periodic review process within one year of its first session.⁴¹ According to Moeckli et al., it has been emphasised that when fulfilling this mandate the Council’s work should be based on the principles of transparency, non-selectivity, inclusiveness and de-politicisation.⁴²

The resolution also ensures adequate transition of responsibilities from the Commission on Human Rights to the new Council. Like the Commission, the Council will continue to collaborate with the Office of the High Commissioner for Human Rights (‘OHCHR’). It will work to maintain and improve the system of special mandates, expert advice, and complaint procedures instituted by the Commission. The Council shall also: review all the mandates, mechanisms and functions of the Commission within one year of its first session; promote human rights education, advisory services, technical assistance, and capacity building with relevant member states; serve as a forum for dialogue on thematic human rights issues and recommend opportunities for the development of international human rights law to the UN General Assembly; and promote the full implementation of human rights obligations by member states, and follow-up on human rights commitments from other UN conferences and summits.⁴³ In order to discharge

⁴⁰ One hundred and seventy parties voted in favour of the UN General Assembly resolution creating the Council, four voted against (Israel, Marshall Islands, Palau, and the United States), and three abstained (Belarus, Iran, and Venezuela).

⁴¹ Departament Federal D’Affars Exteriors op. cit., at 4

⁴² Daniel Moeckli et al. (eds.), loc. cit., at 395

⁴³ The mandates and responsibilities are drawn from UN document, A/RES/60/251, 15 March 2006.

DIGNITAS ■ Diplomatic manoeuvres involved in the creation of the United Nations, its mandate, the Council meets regularly throughout the year with at least three standard annual sessions. There must be at least ten weeks of scheduled sessions to allow the Council to adopt a comprehensive approach to human rights and respond effectively to human rights situations as they develop. In addition, special ad hoc sessions lasting one or two days at a time may be scheduled at the request of a Council member that has gathered the support of at least one-third of the Council membership.⁴⁴

iii. Election to the Council

All UN member states are eligible to run for election to the Council. Countries are elected by secret ballot by the General Assembly with an absolute majority (97 out of 192 votes). When voting, the resolution instructs countries to consider “the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments”. Countries submitting their names for election must affirm their commitment to human rights with written pledges. A key difference between the Council and the Commission is the direct election of Council members by the UN General Assembly. Under the Commission, candidates were first nominated by their regional groups and then the nominees were submitted for election by members of the ECOSOC.

iv. Structure of the Human Rights Council

At the inaugural session, the Council elects a president for a one-year term. The president will preside over the election of four vice-presidents representing other regional groups in the Council. The president and vice presidents form the Council ‘Bureau’. The presidency rotates among different Bureau members on an annual basis. The president appoints experts, rapporteurs and working groups to examine human rights issues. Under the Commission, the role of ‘President’ was held by a Chairman.

v. Meetings, Reporting and Rules of Procedure of the Council

The Council is headquartered in Geneva, Switzerland, and meets for three or more sessions per year for ten weeks or more,

⁴⁴ Daniel Moeckli et al. (eds.), loc. cit.

including a main session. It can hold special sessions at the request of any Council member with the support of one-third of the Council membership. By contrast, the Commission on Human Rights met in Geneva once a year for approximately six weeks, and after 1990 special sessions were held upon request.⁴⁵

The Council will submit annual reports directly to the General Assembly. In five years, the Council is also required to review and report to the General Assembly on its “work and functioning”. The Commission submitted reports primarily to the ECOSOC, a limited membership body, which reported the Commission’s activities to the General Assembly.

The Council will follow the rules of procedure created for committees of the General Assembly.⁴⁶ Procedures that relate to the participation of observer states, international organisations, non-governmental organisations (NGOs), specialised agencies, and human rights institutions fall under the practices observed by the Commission.⁴⁷ These rules encourage consultation and interaction at Council sessions among Council members, observing UN member states, NGOs, and other relevant organisations. Countries that are not Council members do not have voting rights.

Universal Periodic Review Mechanism

The UN General Assembly resolution 60/251, establishing the HRC in 2006, introduced a major innovation when stating that the HRC shall *“undertake 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*

⁴⁵ Examples of Special Sessions under the Commission included the situation of human rights in the territories of the former Yugoslavia (1992); the situation of human rights in Rwanda (1994); the situation in East Timor (1999); and “Grave and massive violations” of the human rights of the Palestinian people by Israel (2000). See H.J. Steiner and P. Alston, op. cit., at 601. (More information on these sessions is available at <http://www.ohchr.org/english/bodies/chr/special-sessions.htm> Visited 26 January 2012)

⁴⁶ The General Assembly Rules of Procedure can be obtained at http://www.ohchr.org/english/bodies/hrcouncil/docs/gaA.520.Rev.15_En.pdf Visited 26 January 2012

⁴⁷ The Commission on Human Rights followed the ECOSOC rules of procedure that can be accessed at http://www.ohchr.org/english/bodies/hrcouncil/docs/ECOSOC.rules_En.pdf Visited 26 January 2012

its capacity-building needs;...⁴⁸ On 18 June 2007, the HRC adopted a resolution establishing detailed procedure rules (periodicities, modalities, basis, outcomes, objectives etc.) during its fifth session.⁴⁹ The UPR will work on a 4-year cycle basis, during which all of the 192 (now 193) UN member states will be examined under this procedure. The basis of the review includes: The Charter of the United Nations; the Universal Declaration of Human Rights; human rights instruments to which a state is party; voluntary pledges and commitments made by states, including those undertaken when presenting their candidates for election to the Human Rights Council. In addition, the review will take into account applicable international humanitarian law given the complimentary and mutually interrelated nature of international human rights and international humanitarian law. Further, the principles of the review include the following: to promote the universality, interdependence, indivisibility and interrelatedness of all human rights; to become a cooperative mechanism based on objective and reliable information and on interactive dialogue; to ensure universal coverage and equal treatment of all states; to be an intergovernmental process that is United Nations member states-driven and action-oriented; and to fully involve the country under review among others.⁵⁰ The objectives of the review include: the improvement of the human rights situation on the ground; fulfilment of states' human rights obligations and commitments and assessment of positive developments and challenges faced by the state; the enhancement of states' capacity and of technical assistance in consultation with and with the consent of the state concerned. Other objectives of the UPR are sharing best practice among states and other stakeholders; support for cooperation in the promotion and protection of human rights and encouragement of all cooperation and engagement with the Council, other human rights bodies and the office of the UN High Commissioner for Human Rights.⁵¹

⁴⁸ UN General Assembly, Res. A/RES/60/251, 3 April 2006, para. 5(e)

⁴⁹ UN Human Rights Council, Res. A/HRC/RES/5/1, 18 June 2007

⁵⁰ One of the main principles of the UN HRC Universal Periodic Review is to ensure the participation of all relevant stakeholders, including nongovernmental organisations and national human rights institutions, in accordance with General Assembly Resolutions 60/251 of 15 March 2006 and Economic and Social Council Resolution of 1996 (3) of 25 July, 1996, as well as any decision the Council may take in this regard.

⁵¹ Sandy Ghandhi (ed.), *Blackstone's International Human Rights Documents* 7th edn. Oxford: Oxford University Press, 2010 at 247-248

The UPR mechanism operates as follows. Each member state is reviewed once every four years. The Human Rights Council will thus review 48 states per year. Reviews are to take place during the three two weeks sessions held each year, with 16 states being reviewed in each session. The review is conducted by the UPR Working Group, which consist of all members of the Council and is chaired by the President of the Human Rights Council. Each review is facilitated by a group of three Council members, each from a different regional group, who are drawn by lot. This group is referred to as the "troika".⁵²

Distinctions between the UN Human Rights Council and its Predecessor, 'the Commission'?

The Commission on Human Rights had many proud accomplishments, particularly in setting global human rights standards. But its many new features make the new Council an even stronger body. For example, the Commission's members were really selected behind closed doors and then 'elected' by acclamation. By contrast, the new members of the Council had to compete for seats, and successful candidates needed to win the support of a majority of all member states in a secret ballot. For the first time ever, candidates gave voluntary commitments to promote and uphold human rights, and will be expected to meet them or face possible suspension from the Council.⁵³ The resolution establishing the Council also stressed the importance of ending double-standards, a problem that plagued the Commission. Thus, the Council established a new universal periodic review mechanism which will offer the Council and the world the opportunity to examine the records of all 192 (now 193) member states of the United Nations. Unlike before, no country can escape scrutiny. In addition, the Council will meet throughout the year, whereas the Commission's limited six-week schedule severely impaired its effectiveness and flexibility. With this precious additional time, the Council will be able to undertake preventive initiatives to defuse simmering crises, and to respond quickly to emerging human rights crises.⁵⁴

⁵² Daniel Moeckli et al. (eds.), op. cit., at 395

⁵³ Frequently Asked Questions., Human Rights Council, Information Office, United Nations Office in Geneva, Available online at www.unog.ch/news and www.ohchr.org/english Visited 28 January 2012

⁵⁴ Ibid.

In distinguishing the main futures of the new Council from the old Commission, Prof Kolb identified four main issues, namely: institutional change, membership change, greater frequency and length of sessions, and a new evaluation procedure (peer review).⁵⁵

Under institutional change he stated that the Council is a subsidiary organ of the General Assembly of the United Nations and not the Economic and Social Council (ECOSOC) and that the greater importance of the General Assembly, as the United Nations plenary organ, reflects the significance of this institutional change. As for membership change, he posited that the Human Rights Council is composed of 47 states elected by the General Assembly by a simple majority of votes for a term of three years, once renewable. A state must then wait one term before it can be re-elected to the Council. In order to be elected, as a member, a candidate state must “uphold the highest standards” of human rights matters. This condition is a response to the express wish not to elect states to the Council that have little respect for human rights. The new Council has a greater frequency and length of sessions than the old Commission. It meets for at least ten weeks in total. In addition, each member may propose holding (extraordinary) emergency sessions. Such sessions take place if a third of the Council members vote in favour. Further, the new Human Rights Council has created a new evaluation procedure (peer review) which evaluates respect for human rights obligations promised by all member states of the United Nations on the basis of cooperation, discussion and technical assistance, namely respect for the old principles of constructive dialogue.⁵⁶

Conclusion

The author has observed from the above analysis that the United Nations hierarchy and the Swiss Government’s Department of Foreign Affairs (DFA) were the catalytic forces behind the creation of the new United Nations Human Rights Council that replaced the old UN Commission on Human Rights. Evidence shows that

⁵⁵ R. Kolb, *An Introduction to the Law of the United Nations*, Oxford: Hart Publishing, 2010 at 130-131

⁵⁶ *Ibid.* This is what is called Universal Periodic Review mechanism under paragraph 5(e) of Resolution 5/1 passed by the Council on 18 June 2007.

the open diplomatic negotiations and dialogue of the United Nations hierarchy, particularly the influence of former UN Secretary General Kofi Annan, former President of the United Nations General Assembly Jean Ping, his successor Jan Eliasson and John Bolton, US Permanent Representative to the UN who took a hard line against the establishment of the new UN Human Rights Council before the arrival on the scene of US Secretary of State Condoleezza Rice who got directly involved in the negotiations, eventually paved the way for the open diplomatic measures that led to the establishment of the new UN Human Rights Council. The underground diplomatic initiatives can be attributed more to the diplomatic steps taken by the Swiss Government's Department of Foreign Affairs considering the efforts of Micheline Calmy-Rey, the Head of the Swiss Federal Department of Foreign Affairs (DFA), and Professor Walter Kälin of the Institute of Public Law of the University of Bern who investigated the possibility of reforming the Commission under the mandate of the Swiss DFA, and Rachel Groux, a Swiss human rights expert who made inputs into the negotiation strategies adopted by then President of the General Assembly Jan Eliasson on the reforms and establishment of the new Human Rights Council.

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