

The New Human Rights Council: The First Two Years

Workshop organized by the European University Institute,
Istituto Affari Internazionali, and the Institute for
Human Rights at Åbo Akademi University¹

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Substantive Report

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Table of contents

1	Introduction	1
2	The Human Rights Council and its institutional framework	2
2.1	The Council's membership rules	2
2.1.1	The irrelevant membership requirements.....	3
2.1.2	New geographical distribution of seats requires new strategy.....	4
2.2	The Council's mandate	4
2.2.1	Action in the field of international humanitarian law	5
2.2.2	Is the Council interfering in issues outside its mandate?	5
2.3	The Council's institutional status	6
2.3.1	One step forward in a half a century long debate.....	6
2.3.2	The Council as a subsidiary organ of the General Assembly	8
2.3.3	The institutional status should not be emphasized too much.....	9
2.4	The Council's relationship with other bodies and organs.....	10
2.4.1	Other United Nations organs.....	10
2.4.2	Alternative and complementing frameworks	12
3	Tools available for the Human Rights Council to address country situations	13
3.1	Universal Periodic Review	14
3.1.1	Resemblance with an earlier procedure that was found obsolete.....	14
3.1.2	There is a potential concern everywhere.....	15
3.1.3	Need for an implementation oriented mechanism.....	16
3.2	Special Procedures	17
3.2.1	Review of special procedure mandates	18
3.2.2	Selection and appointment of mandate-holders	19
3.2.3	The new code of conduct: the least harmful among really bad options	20
3.3	Special Sessions	21
4	Economic, social and cultural rights	22
4.1	Cultural rights: a world still to be discovered	22
4.2	Can the economic interests of the individual be better protected?.....	24
5	The work and role of non-governmental organization	25
5.1	Non-governmental organizations and the United Nations reform	25
5.2	Non-governmental organizations and the Human Rights Council.....	26
6	Recommendations	28

List of Participants

1 Introduction²

The European University Institute, the Istituto Affari Internazionali, and the Institute for Human Rights at Åbo Akademi University organized a workshop "The New Human Rights Council: The First Two Years" on 7-8 November 2007 in Florence. The purpose of the workshop was to evaluate and assess the potentials of the newly established United Nations Human Rights Council in promoting universal respect for the protection of all human rights and fundamental freedoms.

The establishment of the Human Rights Council has been welcomed as an opportunity for a new and fresh start. The participants discussed, in particular, the issue of whether the process that replaced the Commission on Human Rights with the Human Rights Council really brought any significant change to the Charter based human rights machinery of the United Nations or whether the process was merely a reminder of the fact that politics, not the promotion and protection of human rights, comes first. This, again, would have turned the reviewing process to a struggle for merely defending the already achieved procedures and mechanisms without any realistic opportunity to contribute to an improvement of the allegedly dysfunctional system.

In October 2005, the Istituto Affari Internazionali together with the European Commission (Rome Office), the European University Institute and the United Nations Interregional Crime and Justice Research Institute had organized an international conference on "The EU, the US and the Reform of the United Nations: Challenges and Perspectives". The conference, attended by experts, scholars, and officials from around the world, outlined, in particular, the role played by the European Union and the United States at the World Summit of September 2005 and, more generally, the transatlantic approach to the reform process of the United Nations.³ The workshop held in November 2007 can be considered as a continuation, but certainly not an end, to that debate.

As a continuation to the workshop, it was considered useful to proceed towards a comprehensive scholarly volume on the role and function of the Human Rights Council in promoting and encouraging international respect for human rights. The participants of the workshop agreed that this comprehensive study ought to be finalized well in advance of the five-year review of the Human Rights Council that will take place in 2011.⁴ This report should be seen as a preparatory stage in the production of the forthcoming scholarly volume.

² The present substantive report was drafted by Dr. Miko Lempinen of Åbo Akademi University and thereafter revised and approved by Professor Martin Scheinin (Åbo Akademi University). The European University Institute and Istituto Affari Internazionali will be consulted before the launch of a public version of the report.

³ For the conference report of the 2005 meeting, see EUI Working Papers, Law No. 2006/12, by Raffaello Matarazzo and Emanuele Rebasti.

⁴ In its resolution 60/251 of 15 March 2006, the General Assembly decided that the Assembly shall review the status of the Human Rights Council within five years and that the Council shall review its own "work and functioning" also after five years and report to the Assembly.

2 The Human Rights Council and its institutional framework

The Commission on Human Rights was for much of its existence under the control of the very same countries that ought to have been under the Commission's scrutiny. The composition of the Commission was favourable to all those who did not find it appropriate to place governments under public country-specific scrutiny. It is likely that this will be true for the Human rights Council as well, despite the fact that by replacing the Commission on Human Rights with the Human Rights Council, key stakeholders believed, or at least gave the appearance that they believed, that the Council would be able to work free from any of the factors that were allegedly so harmful for the work of the Commission.

When the outcome of the reform process was announced, key stakeholders presented the understanding that the fact that the Council which is to enjoy higher institutional status and which has membership requirements that are to ensure that the members elected to the Council will "uphold the highest standards in the promotion and protection of human rights" will promote and encourage respect for human rights more efficiently than its predecessor.

As was pointed out at the workshop, in many respects it is still too early to judge whether the outcome of the reform process brought any significant change to the manner in which key stakeholders interact with, and contribute to the work of, the Human Rights Council. It was, nonetheless, stressed that the Human Rights Council, as its predecessor, is primarily intended as a forum for political exchange of views and negotiations contributing to placing human rights on the agenda of states. Because of the inherently political nature of any Charter based human rights body, be it a commission or a council, it is, it was pointed out, crucial to make a clear distinction between these political human rights fora and the judicial or quasi-judicial instruments.

2.1 The Council's membership rules⁵

The main critique of the Commission on Human Rights was directed toward its composition which allowed major human rights violators to be among its members, even chairing it, consequently leading, among other things, to an allegedly harmful selectivity in placing governments and their human rights record under international scrutiny. During the reform process, governments tried to solve this assumed handicap by certain membership requirements regulating the election of the membership of the Human Rights Council.

As agreed in the General Assembly resolution of 15 March 2006 establishing the Human Rights Council, members of the Council "shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly". This means that at least 96 votes are required for being elected. The members serve, as previously, for a period of three years, but shall not be eligible for immediate re-election after two consecutive terms.⁶ This hinders the allegedly harmful practice of certain governments enjoying an almost permanent seat at the main intergovernmental human rights body of the United Nations. Under the new rules, governments must, in other words, step down for at least one year after having served for two consecutive three year terms.

⁵ Written contributions on the new membership rules were presented by Emanuele Rebasti and Miko Lempinen.

⁶ General Assembly resolution 60/251, paragraph 7.

In addition, the new membership requirements designed for ensuring a higher degree of human rights compliance by governments being elected to the Council provide not only that when electing members, governments "shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto" but also that "members elected to 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".

2.1.1 The irrelevant membership requirements

At the workshop, it was pointed out that the way members of the Human Rights Council are elected is, indeed, innovative. It was, however, noted that we still only have the same governments to choose from. Participants were also reminded of the fact that it is not realistic to expect a situation where the worst human rights violators would not run for membership. It was also considered unlikely that the requirement attached to the membership of the Council according to which members elected shall "be reviewed under the universal periodic review mechanism during their term of membership" would result in certain countries with a less impressive human rights record deciding not to apply for membership. It was pointed out that governments will be placed under the universal periodic review anyway, irrespective of whether they are members or not. The participants of the workshop were reminded of the fact that it is still, as it was during the Commission on Human Rights, more tempting to be among the members of the Council than to be among the observers.

It was noted that the new membership rules are toothless in restricting the governments with the worst human rights record from becoming elected to the Human Rights Council and that these governments are not only eager to become members of the Council but quite often they are also likely to get elected. The opinion was, therefore, put forth that it might be worth fighting for universal membership for the Council when the General Assembly will review the Council's status in 2011.⁷ Although the geographical balance is not necessarily any better at the General Assembly with regard to the promotion of certain innovative initiatives, a Human Rights Council with universal membership would at least abolish the political game and horse trading attached to the election procedure.

It was noted that it is at the election of the Council members that Member States of the United Nations may, if they choose, "take into account the contribution of the candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto". It is true that certain countries with a less impressive human rights record have failed to become elected to the Human Rights Council.⁸ This may, indeed, be due to the new election procedure. It is equally true, however, that an equally large number of countries with a poor human rights record and with a marginal, if any, commitment and contribution to the promotion and protection of human rights have been elected to the Council. As was noted at the workshop, the elections held so far have not, in other words, revealed any real change in the composition of the Council as compared to the composition of the Commission. The perhaps most significant difference in the composition of the Council compared to the

⁷ The High-level Panel on Threats, Challenges and Change proposed, in its report "A more secure world: Our shared responsibility" submitted in December 2004 that the membership of the Commission on Human Rights be expanded to universal membership.

⁸ Elections have so far been held on 9 May 2006 and 17 May 2007.

composition of the Commission is that the United States has not stood for election to the body whose establishment it ultimately opposed.⁹

It would, indeed, be a considerable breakthrough in the foreign human rights policy of states and in international relations more generally if human rights were placed so high on the agenda of states that other qualifications and relations between states had become less important than the human rights record of a state. It was noted that the requirement attached to the election process – the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto – is not always relevant. The voluntary pledges so far submitted are indeed impressive. They do, however, rarely contain anything in the field of substantive human rights that would not belong to the international obligations that the government concerned already was bound by. It was underlined that there is no need for member states of the United Nations to recommit themselves to anything. What they need to do is to start fulfilling their already undertaken commitments. To that end, voluntary pledges in procedural matters, such as the acceptance of optional procedures for individual complaints under human rights treaties or a standing invitation to special procedures, may prove to be the ones with real effect.

2.1.2 New geographical distribution of seats requires new strategy

The view was presented according to which Western governments have, due to the new geographical distribution of seats, changed their strategy at the United Nations in order to better guarantee the success of their initiatives. It was considered that there has been a clear reduction in the number of initiatives by Western governments and the initiatives presented at present are on less controversial issues where it is relatively seen easier to find consensus.

This is, however, a trend that was visible already for some time at the Commission on Human Rights. The reluctance among member states of the European Union, since 1997, to table a draft resolution on the situation of human rights in China or on any other well documented violations of human rights in different parts of the world mainly because of a calculation made in advance of a probable loss in votes illustrate this more than well. This approach undermines the role of the Human Rights Council as a forum where already the submission of a country-specific draft resolution together with the process attached to this, as such, may be understood as amounting to international exposure of the targeted government and its human rights record. As was also noted at the workshop, a draft resolution on a politically significant country hardly goes unnoticed, irrespective of the fact that the draft in the end is defeated. The lively debate caused by such a draft may be more significant than an adopted resolution which is not given proper attention.

2.2 The Council's mandate¹⁰

In its resolution 60/251 of 15 March 2006, the General Assembly decided that the Human Rights Council shall be responsible for "promoting universal respect for the protection of all human rights and fundamental freedoms". The mandate entrusted the Council is, more or less, identical with the mandate of the Commission on Human Rights as modified over the years.

⁹ United States of America, together with its closest allies, Israel, Marshall Islands and Palau, voted against General Assembly resolution 60/251 of 15 March 2006 establishing the Human Rights Council.

¹⁰ Written contributions on the mandate of the Human Rights Council were presented by Federico Lenzerini and Zhu Wenqi.

In addition to all issues that were specified in its mandate, the Commission was, however, also mandated to deal with "any other matter concerning human rights" that was not specifically entrusted to it.¹¹ The mandate of the Human Rights Council lacks a similar provision.

At the workshop, the discussion among participants concerning the mandate of the Human Rights Council limited itself to the reference to humanitarian law as found in the institution-building document adopted by the Council in June 2007 and to a concern that the Council might be interfering in issues not belonging to its mandate.

2.2.1 Action in the field of international humanitarian law

Participants of the workshop were presented with the argument that it might not be fully appropriate that the Human Rights Council, as a body with a specific mandate in the field of human rights, extends its action to the related but well differentiated sector of international humanitarian law. According to this argument, there are no direct objections to the Council exercising its competence also in the field of international humanitarian law, but because certain strict conditions need to be met, it might be more suitable for it not to take action on situations falling under international humanitarian law. Otherwise, it was argued, the Human Rights Council runs the risk of losing its authority and credibility.

Also a counter-argument to the above interpretation was presented during the discussion at the workshop. This counter-argument was that, given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the reference to "applicable international humanitarian law" as a basis when undertaking the universal periodic review is a correct one and does not cause any confusion. This reference to humanitarian law, it was noted, is appropriate, among other things, to ensure that a government cannot escape scrutiny by announcing a state of emergency.

With regard to the issue of torture occurring in places of detention, the view was presented according to which the work of the International Committee of the Red Cross, on the one hand, and different human rights mechanisms, on the other, has revealed situations where both legal regimes were applicable and where both types of bodies found themselves acting in parallel. It was noted that the manner in which the visits to places of detention are conducted is more or less similar for all mechanisms, irrespective of whether they are working under humanitarian or human rights law. Although the International Committee of the Red Cross and human rights mechanisms may, in theory, have been expected to intervene in different and almost completely separate situations, their action may also be parallel and complementary. The actions under the two regimes, it was noted, has led to operations that are truly complementary in nature, to the benefit of the individual that has been deprived of his or her liberty.

2.2.2 Is the Council interfering in issues outside its mandate?

Concern was also expressed about the fact that it appears as if the Human Rights Council would exceed its mandate by interfering in questions of micro-management of the Office of the High Commissioner for Human Rights. The example given to participants of the workshop was a resolution adopted by the Council at its sixth session in September 2007 in which the Council decided "to realign the work and name of the Anti-Discrimination Unit in

¹¹ Economic and Social Council resolution 9 (II) of 21 June 1946.

the Office of the United Nations High Commissioner for Human Rights consistent with its mandate and that henceforth, this Unit shall be known as “The Anti-Racial Discrimination Unit”, and that its operational activities shall focus exclusively on racism, racial discrimination, xenophobia and related intolerance, as defined in paragraphs 1 and 2 of the Durban Declaration”.¹²

2.3 The Council's institutional status¹³

In its resolution 60/251 of 15 March 2006, the General Assembly decided to establish the Human Rights Council "as a subsidiary organ of the General Assembly". The General Assembly also decided that it shall review the Council's status within five years.

During its entire existence, the Commission on Human Rights demonstrated an impressive creativity in establishing different procedures and mechanisms for the promotion and protection of human rights. The status of the Human Rights Council leaves ample room to make a good or a bad job for human rights. It is now up to the stakeholders to ensure that good and constructive work is conducted.

2.3.1 One step forward in a half a century long debate

The Human Rights Council's predecessor, the Commission on Human Rights, had been established in 1946 by the Economic and Social Council.¹⁴ This had been done in accordance with Article 68 of the Charter of the United Nations in which the Council was, among other things, given the task to set up a commission for the *promotion of human rights*. The establishment of the Commission on Human Rights was, in other words, mandatory.

The debate on the institutional status of the main human rights body of the United Nations began almost immediately. Hersch Lauterpacht noted in 1950 that the United Nations would not meet the expectations set forth in the Charter of the United Nations concerning the promotion and encouraging respect for human rights until the Commission on Human Rights was transformed into a body with the status of a council.¹⁵ Also John Humphrey, the first Director of the United Nations Division of Human Rights, noted that the main human rights body of the Organizations should not be a functional commission of the Economic and Social Council but rather a “Council of Human Rights”.¹⁶ An interesting point was also raised by Jean-Bernard Marie when he noted that the Commission could well be transformed into a

¹² Human Rights Council resolution 6/22 of 28 September 2007 [Adopted by a recorded vote of 28 to 13, with 5 abstentions].

¹³ Written contribution on the institutional status of the Human Rights Council was presented by Geir Ulfstein.

¹⁴ Economic and Social Council resolution 5 (I) of 16 February 1946 established the Commission on Human Rights in "nuclear" form and in Economic and Social Council resolution 9 (II) of 21 June 1946 the Commission on Human Rights was set up as a full commission. For more on the establishment of the Commission on Human Rights, see, for instance, Miko Lempinen *The United Nations Commission on Human Rights and the Different Treatment of Governments: An Inseparable Part of Promoting and Encouraging Respect for Human Rights?* Åbo Akademi University Press, 2005, pp. 12-33.

¹⁵ Hersch Lauterpacht, *International Law and Human Rights*. Stevens & Sons Limited, London, 1950, p. 254.

¹⁶ John Humphrey, *Human Rights & the United Nations: a great adventure*. Transnational Publishers Inc., Dobbs Ferry, 1984, p. 56.

council that would, as the Economic and Social Council, be assisted by functional commissions.¹⁷

The so far most comprehensive reform process of the United Nations as a whole began when the High-level Panel on Threats, Challenges and Change issued its report "A more secure world: Our shared responsibility" in December 2004. After having stated that the Commission on Human Rights had lost its credibility and was in need of reform, the High-level Panel suggested that member states of the United Nations, in the longer term, "should consider upgrading the Commission to become a "Human Rights Council" that is no longer subsidiary to the Economic and Social Council but a Charter body standing alongside it and the Security Council".

When the Secretary-General transmitted the report of the High-level Panel to the member states of the United Nations, he did not yet take up the idea of creating a human rights council. Instead, the Secretary-General only spoke about the need of "restoring the credibility and effectiveness of our human rights mechanisms".¹⁸ However, the next step in the process of running down the Commission on Human Rights was taken just three months later when the Secretary-General presented his view, in his report "In larger freedom" published in March 2005, according to which "Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council" in order for the United Nations to "meet the expectations of men and women everywhere". The Secretary-General remained silent about the institutional status of this Human Rights Council. This was left to the member states of the United Nations to decide whether they wanted the Council to be a new principal organ of the United Nations or a subsidiary organ of the General Assembly.¹⁹

The view was presented at the workshop according to which the Secretary-General's proposal was mere fantasy with no connection to reality, and, as was also noted, most of the arguments put forward by the Secretary-General were anything but convincing. The view was presented that the conclusions made would rather have supported a reform of the Commission on Human Rights that would have preserved its institutional affiliation with the Economic and Social Council. To establish the Human Rights Council as a subsidiary organ of the General Assembly did not find support, it was argued, even in the Secretary-General's own assessments of what would improve the overall performance of the human rights work at the United Nations.

The political decision to create a Human Rights Council was finally taken in September 2005 when the World Summit decided that a Human Rights Council ought to be created, without, however, stating anything about its institutional status.²⁰ This was left for the General Assembly which in March 2006 adopted resolution 60/251 establishing the Human Rights Council as a subsidiary organ of the Assembly.

¹⁷ Jean-Bernard Marie, *La Commission des Droits de l'Homme de l' O.N.U.* Paris. A. Pedone (D), 1975, p. 320.

¹⁸ UN doc. A/59/565, paragraph 15.

¹⁹ UN doc. A/59/2005, paragraph 182.

²⁰ General Assembly resolution 60/1 of 16 September 2005.

2.3.2 The Council as a subsidiary organ of the General Assembly

The question was discussed as to what extent the problems and shortcomings experienced with the Commission on Human Rights have been resolved by the creation of the Human Rights Council. The participants were presented with a view according to which none of the alleged shortcomings behind the critique on the Commission on Human Rights had anything to do with the Commission's institutional status or would have pointed in the direction that the relationship between the Commission on Human Rights, the Economic and Social Council, and the General Assembly needed any rearrangement. It was thought that the creation of the Human Rights Council as a subsidiary body of the General Assembly had merely addressed form, but not substance.

With regard to the relationship between the Human Rights Council and the General Assembly, it was noted that it is still too early to say anything on whether the Council's interaction with the General Assembly will be for better or worse. It was, nonetheless, noted that the decision according to which the Council shall be *responsible* for "promoting universal respect for the protection of all human rights" could indicate that the Council should be the body primarily responsible for human rights within the United Nation system. It was also considered possible that the wording could indicate a desire that the General Assembly should not interfere too much with the work of the Council.

The participants of the workshop were, however, reminded of the fact that because the Council is a subsidiary organ of the General Assembly, the Assembly possesses the power to complement and even to over-rule decisions by the Council and that decisions directed to the Council should be considered as binding for the Council, despite the fact that such interference could undermine the Council's authority and the political compromises reached at its the lengthy negotiations. This is, for instance, precisely what happened when the Council after having adopted the draft Declaration on the Rights of Indigenous Peoples recommended it to the General Assembly for adoption²¹ but where the General Assembly decided to defer consideration and action on that draft²² and did not adopt it before September 2007 after having made few changes to it.²³ The General Assembly proved immediately, in other words, that it was not merely the "rubber stamp" that the Economic and Social Council had been for so many years.

Participants were presented with a view according to which the close interaction between the Human Rights Council and the General Assembly may, indeed, have its good sides, but also its bad sides. The good side, it was considered, could be that the General Assembly will be more involved in human rights questions and that the close interaction may also increase the status of the Council's action. The less good side of the coin could be that there will be considerable overlap and that human rights may become even more politicized than before.

It was, however, considered that the higher institutional status given to the Human Rights Council should be seen as an affirmation of the high status of human rights in the United Nations system. It was thought that if the Human Rights Council were to be elevated to become a principal organ of the United Nations, despite the problems with amending the

²¹ Human Rights Council resolution 1/2 of 29 June 2006.

²² General Assembly resolution 61/178 of 20 December 2006.

²³ General Assembly resolution 61/295 of 13 September 2007.

Charter of the United Nations, this would accord human rights even higher standing. But, as was also noted, a change in formal status does not necessarily mean a more efficient protection of human rights and it does certainly not resolve the problems and shortcomings for which the Commission on Human Rights was so heavily criticized for.

2.3.3 The institutional status should not be emphasized too much

It was noted that too much emphasis should not be placed on the institutional status of the main human rights organ of the Organization. According to this view, it would be misleading to believe that the creation of a new body that enjoys higher institutional status would “accord human rights a more authoritative position”, as the Secretary-General put it in his report “In larger freedom”.²⁴

It was pointed out that the Commission on Human Rights was an exceptional body and that it received more attention than any other subsidiary organ of the United Nations. Accordingly, it was not a handicap for the promotion and protection of human rights that the Commission on Human Rights was a functional commission of the Economic and Social Council. It was pointed out that it has, in fact, been seen even as an advantage that there was a certain institutional distance between the Commission and the General Assembly.²⁵

The participants were reminded of the fact that it is not the structures that have been created that should be blamed if and when something goes wrong. Instead, as was pointed out, there is a need to look at the governments that are responsible for an alleged failure. One cannot, for example, criticise the Commission on Human Rights for not having condemned discrimination based on a person’s sexual orientation or for not having publicly condemned the atrocities committed by the regime of Idi Amin's Uganda. Instead, it is those who hindered the Commission from doing it that ought to be criticized.

Participants of the workshop were reminded of the fact that the High Commissioner for Human Rights had, in her statement of 23 February 2006, noted precisely on this point that “even an institution that is perfect on paper cannot succeed if the international community does not make the necessary change in the culture of defending human rights”. The High Commissioner continued by noting that it was the inability of the international community to respect its commitments that caused the continuous disappointments towards the Commission’s work. It was, in other words, the Member States of the United Nations that failed, not the institutional structure they had created. It was pointed out that rather than the Commission on Human Rights it was the Member States of the United Nations, or at least some of them, who had lost their credibility and professionalism and that had brought discredit not only upon the Commission on Human Rights but upon the United Nations as a whole.

It was noted that credibility is not something to be adopted or declared, but something to be earned and deserved. The new mechanisms of the Human Rights Council have great potential.

²⁴ UN doc. A/59/2005, paragraph 183.

²⁵ See, for example, the written contributions from 1978 by France, Australia, the German Democratic Republic, the Federal Republic of Germany, and India. UN docs. E/CN.4/1318 and E/CN.4/1318/Add.1.

It is now up to the stakeholders to live up to the expectations in securing human rights a prominent place in the United Nations and to do their best.²⁶

It was also noted that in the absence of an amendment of the Charter of the United Nations, the powers of the Economic and Social Council in the field of human rights have remained unchanged. The powers given to it could not be limited or abolished by means of a resolution by the General Assembly. Accordingly, the General Assembly could only *recommend* that the Economic and Social Council "request the Commission on Human Rights to conclude its work...and that it [the Economic and Social Council] abolish the Commission on 16 June 2006".²⁷ The Council complied with that request, but as was noted at the workshop, it was under no legal obligation to do so. To the contrary, the members of the Economic and Social Council could have argued that the duty as defined in the Charter of the United Nations is still in place. The Council is still, among other things, entitled to make recommendations for the purpose of promoting respect for human rights, to prepare draft conventions concerning human rights, to call international conferences on human rights matters as defined in the Charter, or, if it chooses, to set up a commission for the promotion of human rights.²⁸ The view was, however, presented that it is possible but highly unlikely that a reformed Economic and Social Council will reactivate its functions in the field of human rights as provided for in Chapters IX and X of the Charter of the United Nations.

2.4 The Council's relationship with other bodies and organs²⁹

With regard to the Human Rights Council's relationship with other bodies and organs, participants of the workshop discussed, in particular the Council's relationship with the Security Council and the newly created Peacebuilding Commission. The discussion included also a part on alternative and complementing frameworks for the promotion and protection of human rights under which, in particular, the fragmentation of international law and its forms in the field of human rights was elaborated.

2.4.1 Other United Nations organs

In his proposal, the Secretary-General had suggested that the Human Rights Council "should have the authority to recommend policy measures to other organs of the United Nations".³⁰ It was explained that, for good reasons, the General Assembly abstained from including such a

²⁶ In the statement delivered after the adoption of draft resolution A/60/L.48 on the Human Rights Council, on 15 March 2006, the delegate of Brazil reminded other delegates of the fact that the creation of the Human Rights Council should not be understood as an end in itself because "at the end of the day, the members of the old and often criticized Commission on Human Rights will be the very same members of the new Council". UN doc. A/60/PV.72.

²⁷ General Assembly resolution 60/251, paragraph 13.

²⁸ The duty of the Economic and Social Council to set up a commission on human rights is found in the Charter of the United Nations as a mandatory provision. Hence, the request by the General Assembly, as found in its resolution 60/251 of 15 March 2006, and the subsequent decision by the Economic and Social Council to abolish the Commission on Human Rights with effect of 16 June 2006, as found in its resolution 2006/2 of 22 March 2006, could be interpreted as an amendment of the Charter.

²⁹ Written contributions on the Human Rights Council and other bodies and arrangements were presented by Bardo Fassbender, Natalino Ronzitti, and Sia Åkermark-Spiliopoulou.

³⁰ UN doc. A/59/2005, Add.1, paragraph 10.

provision in the catalogue of the Council's powers and responsibilities. This is the case, as was explained at the workshop, because the relationship of the Human Rights Council with other United Nations organs is determined by the Council's status as a subsidiary organ of the General Assembly. The legal relationship of the Human Rights Council with other United Nations organs, in particular the Security Council, the Economic and Social Council, and the new Peacebuilding Commission is determined by the Charter of the United Nations and its provisions about the relationship between the General Assembly and other organs. It was noted that it was, therefore, logically consistent that in establishing the Human Rights Council, the General Assembly only dealt with the relationship between the Council and itself, and not with that between the Council and other principal organs, an issue outside the competence of the General Assembly.

Participants of the workshop learned that the Human Rights Council does not have a standing of its own vis-à-vis the Security Council. However, in accordance with Rule 39 of its Provisional Rules of Procedure, the Security Council "may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". On that basis, the Security Council may involve members of the Human Rights Council, special rapporteurs appointed by it, or Secretariat officials supporting the Human Rights Council.³¹ The view was, however, expressed that the Human Rights Council will probably have only few opportunities to get into direct working relationship with the Security Council. Whether or not the Security Council involves the Human Rights Council in its work depends entirely on its own assessment of the usefulness of such an involvement. But as was noted, the Security Council is more likely to rely on relevant information provided by the Secretary-General and the High Commissioner for Human Rights.

According to Article 12 (1) of the Charter of the United Nations, the General Assembly shall not make any recommendation with regard to a dispute or situation which is being dealt with by the Security Council, unless the Council so requests. This provision also applies to the Human Rights Council in its capacity as a subsidiary organ of the Assembly. Consequently, the Human Rights Council may discuss the human rights aspects of an international dispute or situation pending before the Security Council but must abstain from making recommendations, unless there is a specific request of the Security Council. It was noted that for this reason the Human Rights Council approached the limits of its powers when it adopted, at its fourth special session in December 2006, a decision to dispatch a High-Level Mission to assess the human rights situation in Darfur, after having expressed its concern regarding the seriousness of the human rights and humanitarian situation in Darfur.³²

The view was expressed that the legal relationship between the Human Rights Council and the Peacebuilding Commission is a very special, and somewhat peculiar, one. It is the relationship of a subsidiary organ of the General Assembly with another subsidiary organ of the same Assembly which at the same time is also a subsidiary organ of the Security Council.

³¹ So far, direct contacts between the High Commissioner for Human Rights and the Security Council have been relatively rare. The first time the High Commissioner was invited to address the Council was in September 1999, during an open debate on the protection of civilians in armed conflict. Further briefings took place in April 2001, and twice each in 2002, 2003, 2004 and 2005, respectively. See 'Security Council Report': Update Report on Briefings by the High Commissioner for Human Rights to the Security Council and the Peacebuilding Commission, 29 May 2007, at 2 et seq. (available at: <http://www.securitycouncilreport.org>).

³² Human Rights Council decision S-4/101 of 13 December 2006.

As noted, this is a construction entirely new to the United Nations and it represents a construction oriented towards deliberation and coordination but not decision-making.

If one compares the different possibilities of the Human Rights Council to influence the work of other United Nations organs, it was considered that it seems that the opportunities are especially favourable in the case of the Peacebuilding Commission. It was argued that the Human Rights Council should make every effort to bring its specific competence to bear in the work of the Peacebuilding Commission which in the context of post-conflict peace building will encounter human rights issues on a regular basis. The idea was, therefore, presented that if the Council would manage to find such a place in the work of the Peacebuilding Commission, this would, perhaps also pave the way for the Council to get the attention of the Security Council in matters other than peace building. It was also considered that the provision of the founding resolution of the Peacebuilding Commission could give guidance for the future relation between the Human Rights Council and the Security Council. Here it is stated that in situations that are on the agenda of the Security Council and with which it is actively seized the main purpose of the Peacebuilding Commission will be to provide advice to the Council at its request.³³

2.4.2 Alternative and complementing frameworks

The issue of alternative and complementing frameworks for the promotion and protection of human rights was discussed with reference to the fragmentation of international law. With regard to fragmentation of international law and in particular as it appears in and affects the field of human rights, participants of the workshop were presented with the view according to which the work carried out by the International Law Commission did not address the multiple faces of fragmentation as they appear in the field of human rights. It was noted that this was the case despite the fact that the human rights regime could be considered the reason why the International Law Commission became involved with the issue of fragmentation in the first place.

The divergent interpretation and application of human rights standards along regional or cultural lines as it appears in the debate on cultural relativism, the procedural fragmentation caused by the proliferation of international courts, tribunals and so-called quasi-judicial organs interpreting and applying these standards as well as the fact that an ever increasing number of actors produce human rights norms were mentioned as examples of fragmentation as it appears in the field of human rights but which did not necessarily receive the attention they perhaps ought to have deserved in the work of the International Law Commission.

With regard to the Human Rights Council and the recent reform process, it was noted that because international law and human rights law are currently struggling with the issue of legitimacy, one could have expected more thorough debate on the need to strengthen the international political fora where continuous debates and negotiations can take place. As noted at the workshop, we saw nothing of this during the recent exercise to reform the human rights work of the United Nations.

Participants of the workshop were also reminded of Chapter VIII of the Charter of the United Nations which deals with regional arrangements for the maintenance of international peace and security but which does not mention human rights. Although the Charter does not address

³³ General Assembly resolution 60/180 and Security Council resolution 1645 (2005) both of 20 December 2005, paragraph 16.

regional structures and cooperation for the promotion and protection of human rights, the numerous existing regional arrangements in the field of human rights have evolved parallel with the universal level.

With regard to alternative frameworks, participants of the workshop learned that within the Community of Democracies (CD) – a coalition of states sharing common values that was established in 2000 – a United Nations Democratic Caucus was established in 2004. The purpose of this Caucus is not to substitute the existing regional arrangements within the United Nations but rather to improve the coordination among the members of the Community of Democracies at the United Nations. In particular, the mission of such a Caucus is to consult, coordinate possible actions and foster cooperation to deepen democratic governance, protect human rights, and to promote and improve democratic practices, and to strengthen the international mechanisms to support democracy. Doubt was, nonetheless, expressed about whether this new international arrangement is in any way contributing to the handling of international affairs. This contribution is, in particular, doubtful as the quality of the members of the Community of Democracies is not necessarily meeting the standards of the founding purpose. Since the major problems of the CD are representation and effectiveness, it was noted that the CD capacity to influence the decision-making of universal institutions in the field of human rights is yet to be seen. On this point the Human Rights Council is paradigmatic. Focusing on action of the Caucus members within the new body, it was pointed out that CD members have not distinguished themselves as a group in addressing serious human rights abuses since they have not yet developed a unified strategy; moreover, they have not demonstrated the willingness or ability to coordinate positions and the Caucus has not convened a single public meeting since the Council's establishment.

The assessment of the existence and the usefulness of alternative or complementing structures to the current system of human rights protection emphasized that new international structures based on soft law cannot substitute the existing international bodies for protection of human rights. The aim of those international structures may consist in stimulating the work of the existing international bodies. They may be conceived as a tool to create new categories of rights which may be thereafter be transformed into legal instruments.

3 Tools available for the Human Rights Council to address country situations

The ability and willingness of the allegedly discredited Commission on Human Rights to respond to violations of human rights in particular countries is the benchmark most frequently used when evaluating the Commission's success or possible failure. It is likely that this will be true for the Human Rights Council as well.

It was noted at the workshop that, in addition to several items on the agenda under which country situations can be raised, the Human Rights Council has at its disposal a number of tools for addressing country-specific situations. Most of the tools are the same or modifications of the tools that the Commission on Human Rights had at its possession. It is up to the same stakeholders whether they can or want to take advantage of these tools.

The role and functioning of the universal periodic review, the system of special procedures and the special sessions in encouraging international respect for human rights were discussed at length at the workshop. The modified confidential complaint procedure "to address consistent patterns of gross and reliably attested violations of all human rights and all

fundamental freedoms occurring in any part of the world and under any circumstances"³⁴ that has replaced the previous 1503-procedure as well as the future role of the Advisory Committee that, in turn, has replaced the Sub-Commission on the Promotion and Protection of Human Rights whose advisory function has been limited to thematic issues only, were addressed only in passing and are, therefore, not dealt with in the present report.

3.1 Universal Periodic Review³⁵

In its resolution 60/251 of 15 March 2006 establishing the Human Rights Council, the General Assembly decided, among other things, that the Council 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". At its fifth session, the Human Rights Council adopted more detailed provisions as to the review mechanism.³⁶

3.1.1 Resemblance with an earlier procedure that was found obsolete

The universal periodic review to be carried out by the Human Rights Council is by no means the first time that governments undertake a universal reporting process within the framework of the United Nations human rights programme. There is namely a striking resemblance between the universal periodic review mechanism of the Human Rights Council and the exercise of periodic reporting undertaken by the Commission on Human Rights between 1956 and 1981.³⁷ According to this system of periodic reporting, states were requested to submit reports on measures taken by them to implement human rights. The Commission's role was not to criticize individual governments, but to ascertain general developments and progress achieved in the field of human rights.

When the proposal for establishing a system of periodic reporting was debated, doubt was, rightfully, expressed as to whether the system was necessary or practicable. It was noted, as it was noted also half a century later, that the preparation of reports covering the whole field of human rights presented a heavy and time-consuming task for governments and the preparation of the required summaries presented a heavy burden for the Secretariat with financial implications that were by no means insignificant.³⁸

Despite the time and energy invested in the system of periodic reporting, the system failed – together with a number of other devices of a promotional nature – to sufficiently attract the attention of governments so that it could have contributed to the efforts of the United Nations to promote the respect for human rights. It came, therefore, as no surprise to anyone that when the Commission decided to discontinue its consideration of the periodic reporting system in

³⁴ Human Rights Council resolution 5/1, annex, Part IV.

³⁵ Contributions on the universal periodic review mechanism were presented by Martin Scheinin, Nigel Rodley, Riccardo Pisillo Mazzeschi and Ruth Wedgwood.

³⁶ Human Rights Council resolution 5/1 of 18 June 2007. The General Assembly is yet to adopt the provisions proposed by the Human Rights Council.

³⁷ For the establishment of the reporting procedure, see Commission on Human Rights resolution I of 1956; Economic and Social Council resolutions 624 B (XXII) of 1 August 1956, 728 C of 30 July 1959, 1074 C (XXXIX) of 28 July 1965, 1596 (L) of 21 May 1971, 1978/20 of 5 May 1978.

³⁸ UN doc. E/2844; E/CN.4/731, paragraphs 23-46.

1981, this was done quietly without any debate and in accordance with the proposal made by the Secretary-General to discontinue any activities that were obsolete or of marginal importance.³⁹ As noted by Philip Alston, despite their modest significance to the promotion of respect for human rights, the periodic reports succeeded at least in "giving the appearance that all governments were making themselves accountable to the Commission."⁴⁰

3.1.2 There is a potential concern everywhere

The discussion among participants of the workshop on the universal periodic review revealed that almost everything with regard to the universal periodic review mechanism might contain a concern.

A particular concern expressed was that there might be a fear that the universal periodic review will be used merely to undermine and second-guess the findings made by the treaty monitoring bodies or other expert mechanisms. This concern was considered genuine, despite the express intention to avoid duplication and in providing added value.⁴¹ On the other hand, and despite the actual contents of the periodic review by the Human Rights Council, it may be given all the attention, consequently resulting in the undermining of the work carried out by, for example, the treaty monitoring bodies. If, however, the Council is unable to produce an outcome document that looks serious, this concern, it was noted, should not be so huge. It was also noted that the Human Rights Council may merely end up adding a politically flavoured evaluation of the realization of some, but surely not all, of the human rights, and that in this scenario there hardly is any fear that the Council will duplicate the work of the treaty bodies. However, it was considered equally unlikely that it will considerably complement their work either.

Concern was also expressed with regard to the documentation prepared and used for the review process. It was considered that the twenty page report prepared by the government under review has assumed a too dominant a role and that it should rather be a response to the facts and assessments presented than a report prepared in advance on mere intentions. Doubt was also expressed with regard to the seriousness of such an abbreviated review that is based on a ten page summary of the findings by the treaty bodies, special procedures and other relevant official United Nations documents as well as on a ten page summary on "additional credible and reliable information provided by other stakeholders". Although the Human Rights Council has decided that the documents on which the review will be based are the summaries referred to above, it is essential, however, to note that nothing explicitly prohibits the members of the Human Rights Council to use, in addition to the documentation prepared by the Secretariat, also other material provided directly to them by other relevant

³⁹ Commission on Human Rights decision 10 (XXXVII) of 13 March 1981; Economic and Social Council decision 1981/151 of 8 May 1981. See UN doc A/C.5/35/40 and Add.1, for the Secretary-General's report, prepared in 1980, on the identification of activities that have been completed or are obsolete, of marginal usefulness or ineffective. In the report, the Secretary-General noted, in rather cautious terms, that the reporting procedure "yielded modest results" and that the procedure was considered to be of "marginal usefulness and somewhat ineffective". UN doc. A/C.5/35/40, annex, table 1 (summary of the activities which are considered to be obsolete, of marginal usefulness or ineffective in the programme budget for the biennium 1980-1981).

⁴⁰ Philip Alston, *Reconceiving the UN Human rights Regime: Challenges Confronting the New UN Human Rights Council*, in *Melbourne Journal of International Law*, volume 7, issue 1, May 2006.

⁴¹ The periodic review mechanism "shall complement and not duplicate the work of treaty bodies". General Assembly resolution 60/251, paragraph 5 (e).

stakeholders, including, for example, national human rights institutions and non-governmental organizations.

In addition, the fact that the review is completely reserved for states and that no role has been reserved for non-governmental organizations or national human rights institutions, not to mention independent experts, was considered a serious weakness of the universal periodic review mechanism. According to the agreed institution-building package, relevant stakeholders, including non-governmental organizations and national human rights institutions, can merely attend, but not participate in, the review process. Because of this, it was argued, the review mechanism would lose its credibility as an instrument of normative assessment on the compliance and fulfilment of a government's human rights obligations and commitments. Reducing the role of the universal periodic review to be merely a politically and diplomatically oriented exercise was considered a weakness. The opposite understanding was also presented according to which the role of the Human Rights Council ought to be precisely that of a political control mechanism that produces political pressure on governments under review.

A further concern identified was that States will not necessarily be reviewed on the basis of universal and equal parameters and standards as has been indicated, but rather on the basis of those standards applicable to the State under review. There is, in other words, and as was observed, the fear that States with more extensive human rights obligations are being reviewed more extensively than those with less treaty commitments, this possibly leading to a rather unfair process. The universal periodic review would not, however, be the first procedure or mechanism which would turn out to be most effective where least needed and least effective where most needed.

It was also considered unlikely that the first round of review will provide any substantive results. It was assumed, however, that already the second round of review may focus on the implementation of the recommendations of the previous round, provided that the recommendations of the previous round are useful for a serious consideration. It was further noted that in case the outcome of the universal periodic review is not serious enough, the exercise can at least provide a forum for addressing issues of concern.⁴²

One way to avoid undermining the work of the treaty monitoring bodies would be for the reviewing process to avoid reaching conclusions in respect of rights covered by a State's actual reporting under its treaty obligations and merely adopt recommendations as regards rights not effectively monitored by treaty bodies in respect of the State in question.

3.1.3 Need for an implementation oriented mechanism

In order for the universal periodic review not to duplicate or question the findings by expert monitoring bodies and mechanisms, the opinion was put forth that the reviewing process ought to be strictly an implementation-oriented mechanism. For this to be possible, the provision adopted by the General Assembly on a universal periodic review "based on objective and reliable information, of the fulfilment by each State of its human rights

⁴² With regard to the discussion on the Human Rights Council as a forum and an actor, it might be of interest to note that in its resolution 60/251 establishing the Human Rights Council, the General Assembly decided, in paragraph 3 of that resolution, that "the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon", but reserves the role of the Council as a forum to thematic issues only by deciding, in paragraph 5 (b), that the Council shall "serve as a forum for dialogue on thematic issues on all human rights".

obligations and commitments" would require a specific reading. According to this interpretation, the reference to "objective and reliable information" must not be understood as merely covering empirical facts, but also the normative assessment of those facts made by independent human rights experts. In addition, the reference to "human rights obligations" should be read as to refer to the legally binding human rights obligations as covered by human rights treaties binding on the country concerned and by customary international law, both as they have been interpreted by treaty monitoring bodies or other expert mechanisms, like the special procedures, either specifically in respect of the country concerned or in other contexts, such as through established case law. Furthermore, the reference to "commitments" should be interpreted as to include also the voluntary pledges and commitments made by the country concerned when running for membership on the Council and, finally, the reference to "fulfilment" must be understood as "implementation".

It was noted that the task given to the Human Rights Council according to this interpretation would resemble the task performed by the Committee of Ministers within the Council of Europe framework. In short, the Human Rights Council's main function would be to provide an oversight of the effective and non-conditional implementation of the findings made by independent expert mechanisms. At its best, the Human Rights Council would, in other words, produce political pressure on individual governments to implement promptly their human rights obligations.

There was, however, general scepticism with regard to the meaningfulness of the whole exercise of the universal periodic review. Although it is true that it is still too early to make any assessment of the role and function of the universal periodic review in the overall work of the Human Rights Council, it has been agreed, by the Human Rights Council, as was also noted at the workshop, that the review should not be "overly burdensome to the concerned State" nor "overly long" in order not to place too heavy a burden on governments in their allegedly sincere efforts to promote and protect human rights. In short, a general understanding among participants of the workshop was that governments are simply not good at reviewing themselves.

3.2 Special Procedures⁴³

When establishing the Human Rights Council in March 2006, the General Assembly, among other things, decided that the Council "shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human rights in order to maintain a system of special procedures". So far, the system of special procedures has survived the reform process fairly well.

It was generally noted among participants of the workshop that the biggest failure of the reform of the system of special procedures was that not a single one of the positive or innovative proposals presented were in the end included in the institution-building package adopted by the Human Rights Council in June 2007.⁴⁴ However, it was also noted that there ought to have been no realistic expectations for a reviewing process that would have resulted in any meaningful strengthening of the special procedures. Rather, the process was, as all previous reform processes affecting the Commission on Human Rights and its system of

⁴³ Written contributions on the special procedures were presented by Martin Scheinin and Jonas Grimheden.

⁴⁴ See also Meghna Abraham in *Building the New Human Rights Council: Outcome and analysis of the institution-building year*. Friedrich-Ebert-Stiftung, Dialogue on Globalization, No. 33, August 2007.

special procedures, about defending the already existing system from being weakened or scrapped altogether. This should not have come as a surprise to anyone who was even marginally involved with the work of the allegedly so discredited Commission on Human Rights.

3.2.1 Review of special procedure mandates

Participants of the workshop learned that the establishment of the Human Rights Council immediately created a situation where the special procedures suffered a blow on their legitimacy. Special procedure mandate-holders were referred to as special rapporteurs of the discredited Commission on Human Rights and many governments adopted a wait-and-see approach in respect of cooperating with the special procedures, among other things, in the context of country visits. As was pointed out at the workshop, it has not been uncommon to hear a statement according to which a government is announcing its reluctance to invite a special rapporteur to carry out a country visit because the human rights record of the government concerned will, in the coming years, be reviewed under the universal periodic review mechanism. This together with the fairly slow process of the Council reviewing the special procedure mandates has not only hampered the practical operation of the procedures but has also benefited those governments who feel them as an inconvenience.

By now, it has been decided to assume and renew all special procedure mandates, except the country specific mandates on Cuba and Belarus which were dropped. The participants of the workshop learned, however, that this was only the first round of the review of mandates. This blanket renewal of the special procedure mandates only postponed the review of each individual mandate to the time when a mandate-holder's term will come to an end. This means, participants were told, that the operation of a special rapporteur appointed, for instance in 2005 for a three-year term, will be continuously under review for the whole duration of the mandate, except for the very first months. Again, this situation, it was considered, certainly benefits governments that are less enthusiastic about the work carried out by the independent human rights experts.

Participants of the workshop were also told that from the way the review of individual special procedure mandates began at the Human Rights Council's sixth session in September 2007, it looks as if this renewal will also mainly take place without the Council discussing and deciding on issues of substance. It looks, it was noted, as if mandates are being renewed by renewing the resolutions by the Commission on Human Rights, without acting upon the reports prepared by the mandate-holders, including the possible recommendations included therein.

It was also noted that it appears that this approach will result in a third round of reviewing the special procedure mandates on the next occasion that a substantive resolution related to a particular mandate comes up, if ever. It was also considered that there is a risk that the Council will fail to address issues of substance meanwhile. During 2006 and 2007, the reports prepared by the special procedures – which are in the heart of their function and which often include detailed recommendations for the Council – have as a rule not been acted upon by the Council.

Despite all the negative experiences affecting the system of special procedures, participants of the workshop were also, however, reminded of the fact that things could have gone worse. The Human Rights Council could, for example, have lost the system of country-specific special procedures altogether because many government were of the view that the situation of

human rights in particular countries should only be addressed through the universal periodic review mechanism, through a confidential complaints procedure, or, in exceptional cases, through special sessions, but certainly not by the appointment of country-specific special procedures.

The reform was, again, in other words, about defending the already existing procedures and mechanisms. This is a reason why many stakeholders, for example, expressed their concern when the General Assembly decided, in its resolution establishing the Human Rights Council, to maintain "a system of special procedures" instead of "the system of special procedures" which had already, despite its minor flaws, proven its strengths. By maintaining "a system" of independent experts there was namely no assurance that the control that government were to extend over the work of the experts would not jeopardize their independence and impartiality. At worst, the review could, in other words, have resulted in the abolition of all country-specific special procedure mandates and in the issuing of such control mechanisms over the rapporteurs which, in practice, would have meant the end of the "eyes and ears" of the United Nations human rights system.

Participants of the workshop learned that, so far, the price for maintaining the system of country-specific special procedures has been the termination of the mandate of the Personal Representative of the High Commissioner for Human rights on the situation of human rights in Cuba and of the mandate of the Special Rapporteur on the situation of human rights in Belarus. It remains to be seen whether other country-specific special procedure mandates will be renewed when their term comes to an end or whether the majority of the governments members of the Human Rights Council consider it more appropriate not to renew them. It is evident, as was also acknowledged by participants of the workshop, that because of the new geographical distribution of seats it will be even more difficult to establish new or maintain already existing country-specific special procedure mandates than it was before.

3.2.2 Selection and appointment of mandate-holders

The participants of the workshop learned that the institution-building package adopted by the Human Rights Council in June 2007 emphasizes, perhaps surprisingly, more the qualities and the selection of mandate-holders than the review of the special procedure mandates themselves.

Under the previous system, the Chair of the Commission on Human Rights appointed a special procedure mandate-holder after having consulted the Commission's Bureau and the regional groups. Despite the possible lack of sufficient transparency of this previous procedure, governments that emphasize the importance of expertise, independence and impartiality of mandate-holders opposed, during the reviewing process, any proposals that would have created a system according to which the Human Rights Council would have elected a special procedure mandate-holder.⁴⁵

The procedure for the selection and appointment of a special procedure mandate-holder as agreed upon in June 2007 provides for a system where the appointment is still made by the President of the Human Rights Council, but with considerably more political control and subject to approval by the Council compared to the previous arrangement.

⁴⁵ These governments were of the opinion that the best way to ensure the expertise and independence of the mandate-holders would be if the appointment was made by the High Commissioner for Human Rights.

The agreement also contained the welcomed provision that an individual holding a decision-making position in government, which clearly gives rise to a conflict of interest with the responsibilities inherent to the special procedure mandate, is excluded. The provision states also, however, that also an individual who holds a decision-making position "in any other organization or entity which could give rise to a conflict of interest" shall also be excluded. This provision can, it was noted at the workshop, lead to the exclusion of many individuals working for non-governmental organizations. This is the case although it is difficult, albeit not impossible, to see when or how the interest of a non-governmental organization would give rise to such a conflict of interest.⁴⁶

3.2.3 The new code of conduct: the least harmful among really bad options

Concern was expressed over the code of conduct for special procedure mandate-holders of the Human Rights Council. The code of conduct as adopted as part of the institution-building package represents a negative development in respect of the independent and effective functioning of the special procedures. In addition to the possible restrictions concerning the free use of sources by the special procedures, it was noted that the principle was maintained in the code according to which those governments subject to scrutiny may regulate the behaviour of those conducting the scrutiny. This, as was noted, is reflected in article 1 of the code of conduct which states that "[T]he purpose of the present Code of Conduct is to enhance the effectiveness of the system of special procedures by defining the standards of ethical behaviour and professional conduct that special procedures mandate-holders of the Human Rights Council...shall observe whilst discharging their mandates."

It was, nonetheless, noted that the code of conduct should not be considered that catastrophic. The first draft of the code of conduct that had been submitted by the African Group in March 2007 would have caused much more damage by restricting the independent conduct of the special procedure mandate-holders. The version finally agreed upon is, in this respect, comparatively harmless.

Responding also to the concern expressed, it was noted that the code of conduct as adopted by the Human Rights Council in June 2007⁴⁷ should not be seen as restricting the work of the special procedures. It was noted that the code of conduct in fact allows more freedom than a serious human rights investigator should allow him- or herself. The adopted version of the code of conduct contains, however, the unfortunate provision according to which special procedure mandate-holders "shall address all their communications to concerned Governments through diplomatic channels unless agreed otherwise between individual Governments and the Office of the High Commissioner for Human Rights".⁴⁸ This, as was also underlined at the workshop, is a regrettable development. One of the strengths of the procedure of urgent appeals has been precisely the possibility of mandate-holders to contact directly those best placed within a concerned administration requesting for immediate action. The requirement that also all urgent appeals must be communicated through diplomatic

⁴⁶ In their statement adopted at the thirteenth annual meeting of special procedure mandate-holders in June 2006 on the occasion of the establishment of the Human Rights Council, the special procedure mandate-holders had noted that a requirement in ensuring the independence of mandate-holders is that they "are not in decision-making positions within the executive or legislative branches of their Governments". No mention of other organizations or entities was, in other words, included in this statement. UN doc. A/HRC/4/43, annex II.

⁴⁷ Human Rights Council resolution 5/2 of 18 June 2007, annex.

⁴⁸ Article 14 of the code of conduct.

channels may create delays in the transmission of appeals with devastating effects on the individual concerned.

As stated in Article 2 of the code of conduct, the provisions of the code complement the provisions found in the code of conduct adopted by the General Assembly in 2002⁴⁹ despite the fact that, as was also noted, some of the provisions are contradictory with each other.

It was also noted that the previous comparable instrument adopted by the General Assembly in 2002 was at least as problematic as the new code. In addition, together with its explanatory part, the old document was also much more detailed than the new code of conduct. Because participants of the workshop had not come across that governments would have made any reference to the previous code of conduct, it was considered probable, although not certain, that mandate-holders would also in the future be given freedom to work without additional interferences.

It was generally felt that the adopted code of conduct was the least harmful among the bad options presented during the reviewing process. Its impact on the work of the special procedure mandate-holders will only appear over time. Fortunately, the code of conduct is, above all, a failure to all those who want to clip the wings of the system of special procedures.

3.3 Special Sessions⁵⁰

In 1990, the Economic and Social Council authorized the Commission on Human Rights to meet "exceptionally between its regular sessions, provided that a majority of States members of the Commission so agree".⁵¹

When establishing the Human Rights Council, the General Assembly decided that the Council "shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council".⁵² The calling for special sessions was, in other words, made easier, although it is worth recalling that not a single request for a special session of the Commission on Human Rights was ever denied.

A general feeling among participants of the workshop was that the provision regulating the Human Rights Council's holding of special sessions, according to which a request to hold such a session needs the support on merely one third of the members of the Council, is a positive development. This will, it was considered, provide more opportunities for the Human Rights Council to act promptly on urgent situations of concern.

On the other hand, it was also noted that the current system for calling on special sessions is also more vulnerable for misuse. To illustrate this concern, it was noted that between 1990 and 2006, the Commission held no more than five special sessions; the first two, in August and December 1992 on the situation in the territories of the former Yugoslavia, the third in May 1994 on the situation in Rwanda, the fourth in September 1999 on the situation in East Timor, and the fifth in October 2000 on grave and massive violations committed by the

⁴⁹ General Assembly resolution 56/280 of 27 March 2002.

⁵⁰ A written contribution on the issue of special sessions was presented by Nigel Rodley.

⁵¹ Economic and Social Council resolution 1990/48 of 25 May 1990.

⁵² General Assembly resolution 60/251, paragraph 10.

Government of Israel of the human rights of the Palestinian people.⁵³ The Human Rights Council, on the other hand, needed less than two years to hold its first five special sessions.⁵⁴ The three first special sessions were on human rights violations caused by the Government of Israel. This despite the fact that the traditional priority given to the issues around the Middle East, reflected, among other things, in a standing agenda item, continue as before and despite the fact that the Human Rights Council is holding three annual sessions where the situation in the Middle East can be debated, instead of only one session as previously.

4 Economic, social and cultural rights⁵⁵

Despite its strong emphasis on institutional issues, the workshop also dealt with two questions with regard to economic, social and cultural rights. The questions were the role of the Human Rights Council in the codification and development of cultural rights and the issue on how the Human Rights Council is linking the individual with his or her economic interests.

4.1 Cultural rights: a world still to be discovered

Participants of the workshop learned that cultural rights as such did not receive much attention by the Commission on Human Rights. Achievements with respect to cultural rights were mainly related to questions relevant to the rights of minorities or, to a somewhat lesser degree, with respect to the rights of indigenous peoples.

The view was, however, presented that, during its first two years of existence, the Human Rights Council has signalled a more intense interest in cultural rights and in rights that are dependent or closely related to the practice and development of culture. For illustrating the contribution of the Human Rights Council to the codification and development of cultural rights, five different areas of action by the Council were presented.

The first area of the Human Rights Council's activity presented was that of the rights of minorities. It was noted that the establishment of the Forum on Minority Issues⁵⁶ which shall provide thematic contributions and expertise to the independent expert on minority issues guarantees, albeit being merely procedural in character, the continuation of the work previously undertaken by the Sub-Commission on the Promotion and Protection of Human Rights and its Working Group on Minorities.

⁵³ In addition to its special sessions, the Commission on Human Rights occasionally held a "special sitting" during its sessions. The Commission's first "special sitting" – an arrangement finding no support in the rules of procedure of the functional commissions of the Economic and Social Council – was held at its fifty-eighth session in 2002, on 5 April 2002, on the situation of human rights in the occupied Palestinian territory and the second "special sitting" during the Commission's sixtieth session in 2004, on 24 March 2004, to consider the situation in the occupied Palestinian Territory resulting from the assassination of Sheikh Ahmed Yassin.

⁵⁴ The Human Rights Council's three first special sessions were on human rights violations caused by the Government of Israel (July 2006, August 2006, and November 2006), the fourth special session held in December 2006 was on the situation in Darfur and the fifth special session held in October 2007 was on the situation in Myanmar.

⁵⁵ Written contributions on economic, social and cultural rights were presented by Ernst-Ulrich Petersmann and Francesco Francioni.

⁵⁶ Human Rights Council resolution 6/15 of 28 September 2007.

The second area presented was that of the rights of indigenous peoples. The view was presented according to which the adoption of the draft Declaration on the Rights of Indigenous Peoples represents the most influential contribution of the Human Rights Council to the development of cultural rights. It was underlined that the rights contained in the Declaration are important indicators in the development of constitutional guarantees for indigenous peoples and for the development of judicial practices that can make cultural rights effective in national law. The view was underlined that the overwhelming majority by which the Declaration was adopted, both by the Human Rights Council⁵⁷ and by the General Assembly,⁵⁸ undisputedly signals that, in spite of the opposition of some countries with a significant indigenous population, such as Australia, Canada, New Zealand, and the United States, the prevailing *opinio iuris* of the international community strongly supports the recognition as a matter of right of the cultural autonomy of indigenous peoples.

The third area that was presented where the Human Rights Council has already contributed to the development of cultural rights was that of religion and intolerance. Here, it was noted, the Council's record is, however, rather mixed, and the message sent by the Council to the international community is not only ambiguous but also contradictory. It was noted that the prevailing situation has been caused by the many unbalanced texts adopted for instance on the follow-up and effective implementation of the Durban Declaration and Programme of Action,⁵⁹ on combating defamation of religions,⁶⁰ or on the elimination of all forms of intolerance based on religion or belief.⁶¹ As underlined at the workshop, many of these texts unnecessarily duplicate or are in direct conflict with one another, consequently leading to a situation where the Council's credibility suffers and where it is at least debatable to what extent, if at all, the Council contributes to the development of the issues concerned.

The fourth area of importance for cultural rights that was presented was that of cultural diversity and globalization. It was noted that two resolutions adopted by the Human Rights Council are in this regard of particular importance. The first resolution of importance is that on globalization and its impact on the full enjoyment of all human rights which deals with the inadequacy of the present system to alleviate poverty and underdevelopment,⁶² and the second resolution concerns the promotion of cultural rights and the respect for cultural diversity where, among other things, it is noted that the appointment of a special procedure in the field of cultural rights could be of assistance in the implementation of the present resolution.⁶³

The fifth and last area of interest for the development of cultural rights that was presented at the workshop was that of cultural heritage as an element of cultural rights. Also here, two

⁵⁷ Human Rights Council resolution 1/2 of 29 June 2006.

⁵⁸ General Assembly resolution 61/295 of 13 September 2007.

⁵⁹ Human Rights Council decision 3/103 of 8 December 2006.

⁶⁰ Human Rights Council resolution 4/9 of 30 March 2007.

⁶¹ Human Rights Council resolution 4/10 of 30 March 2007.

⁶² Human Rights Council resolution 4/5 of 30 March 2007.

⁶³ Human Rights Council resolution 6/6 of 28 September 2007. The member states of the European Union gave an explanation of position with regard to draft resolution A/HRC/6/L.3/Rev.1 in which it was, among other things, noted that "the EU remains concerned at the envisaged establishment of a thematic procedure on cultural rights".

resolutions were mentioned as particularly essential. The first resolution adopted by the Human Rights Council at its sixth session concerns the commitment to protect cultural rights and property in situations of armed conflict⁶⁴ and the second resolution, also adopted at the Council's sixth session concerns the protection of cultural heritage as an important component of the promotion and protection of cultural rights.⁶⁵ Both resolutions were adopted without a vote. With regard to the latter resolution, however, the member states of the European Union gave an explanation of position in which it was noted that they consider the linkage between the protection of cultural heritage and human rights established in the draft resolution as unclear and that the issue addressed can best be dealt with by other bodies, such as the United Nations Educational, Scientific and Cultural Organization or the International Conference of the Red Cross. In the explanation of position it was further noted that the member states of the European Union consider the draft resolution as part of an undesirable proliferation of initiatives brought before the Human Rights Council which have little or no connection with the Council's mandate and do not contribute to the promotion and encouraging respect of human rights.⁶⁶

The view was presented at the workshop that this statement ignores the dynamic evolution of the concept of cultural heritage from mere cultural objects and property to living culture and social processes and structures that are at the heart of the identity of people and thus of the foundation of human rights. It was further noted that the statement also ignores the process of international criminalization of certain offences against cultural heritage, thus assimilating them to serious violations of human rights. It was considered quite extraordinary that such a position has been presented by member states of the European Union which considers itself an organization that has been on the forefront of the recognition of the importance of cultural heritage for peoples and minorities and has included cultural diversity among the values that must be taken into account in the development of its policies.

4.2 Can the economic interests of the individual be better protected?

The argument was presented at the workshop according to which the universal recognition of inalienable and indivisible human rights together with the allegedly obvious failure of human rights law of the United Nations to offer the individual effective legal and judicial remedies against extreme poverty and against the widespread violations of human rights call for, what was called, a citizen-oriented constitutional reform of the United Nations system.

It was argued that the institutional changes in the composition, procedures and practices of the Human Rights Council compared with those of its predecessor do not change the structural weakness of the human rights law of the United Nations and its marginal role that it has at the national level of many member states of the United Nations. It was considered doubtful whether the Human Rights Council is capable of acting as a political leader for empowering the individual in his or her struggle for a more effective protection of human rights, for increasing resources necessary for the enjoyment of human rights, and for a human rights approach to intergovernmental economic governance.

⁶⁴ Human Rights Council resolution 6/1 of 27 September 2007.

⁶⁵ Human Rights Council resolution 6/11 of 28 September 2007.

⁶⁶ Explanation of position on draft resolution A/HRC/6/L.33 delivered by the representative of Slovenia on behalf of the European Union Member States that are members of the Human Rights Council at the twenty-first meeting of the sixth session of the Human Rights Council on 28 September 2007.

It was further pointed out that the indivisibility of human rights and economic freedoms are protected neither in the fragmented human rights treaty system of the United Nations nor in the law of the World Trade Organization. The question was, thus, raised whether not the Human Rights Council should encourage bodies of economic dispute settlement to take more seriously their legal obligation to settle disputes "in conformity with the principles of justice and international law", as recalled in the Preamble of the Vienna Convention on the Law of Treaties, and in "encouraging respect for human rights and for fundamental freedoms for all", as recalled in Article 1 of the Charter of the United Nations.

5 The work and role of non-governmental organization⁶⁷

Non-governmental organizations play an irreplaceable role in the human rights work of the United Nations. There are numerous examples on how non-governmental organizations have played an essential role in the development of new human rights standards or in challenging some of the most critical issues when it comes to promotion and encouraging respect for human rights. At the Commission on Human Rights, non-governmental organizations enjoyed a rather well established role with a number of unwritten arrangements and practices which extended their possibilities to participate actively in the Commission's work far beyond what was provided for in the rules of procedures governing the Commission's consultation with and representation of non-governmental organizations.

5.1 Non-governmental organizations and the United Nations reform

The reform proposal by the then Secretary-General Kofi Annan presented in his report "In Larger Freedom" was, in general welcomed by non-governmental organizations. As was pointed out at the workshop, some but certainly not all of the proposals put forth by the Secretary-General had been floating around for years as requests elaborated by non-governmental organizations.

It was, perhaps even surprisingly so, pointed out that non-governmental organizations who had for years spoken for the need to reform the Commission on Human Rights were unable to anticipate the reform. The reform took them by surprise. It was pointed out that non-governmental organizations were trapped during the reform process unable to really contribute to it in any manner. The outcome of the reform process was a disappointment for many non-governmental organizations. But so it was for many other stakeholders as well.

Participants of the workshop were presented with the view that, in a way, it is rather surprising that non-governmental organizations were trapped. It is surprising, it was thought, because the idea of reform of the United Nations human rights system and of the Commission on Human Rights in particular had been on its way for some time. The repeated attacks both on the system of special procedures and on the working methods of the Commission experienced during the past decade illustrate this more than well.

It was considered surprising that during these years non-governmental organizations did not elaborate any ambitious plans for reform although they would have had plenty of time to do so. Instead, they continued to use and work with the existing procedures and mechanisms and in this way, perhaps even rightly so, defend the existing procedures that were constantly under attack. It was considered that because non-governmental organizations defended the

⁶⁷ Written contributions on the work and role of non-governmental organizations were presented by Matteo Mecacci and Olivier de Frouville.

Commission's existing procedures and mechanisms, they were unable to contribute to the negotiations.

It was further pointed out that after the Secretary-General had presented his illusionary illustration of a more effective human rights body consisting only of peace loving nations, non-governmental organizations, as well as all other stakeholders, had to accept the idea of creating a new council if they wanted to have the slightest influence on the outcome of the reform. The alternative was, it was considered, "ça passé ou ça casse". Not pushing for the option of a council would have meant taking the risk of having nothing at the end, as the Commission on Human Rights had already been summarily executed without trial, because, as was pointed out, the majority of governments wanted the Commission to die rapidly and in silence, and, although the conception of the Human Rights Council had taken place, it had not yet been born.

5.2 Non-governmental organizations and the Human Rights Council

When negotiating the new arrangements that would govern the role of non-governmental organizations in the work of the Human Rights Council, a number of key stakeholders considered it of utmost importance that these arrangements would not be weakened from those arrangements non-governmental organizations had with the Commission on Human Rights.

In his report "In larger Freedom", the Secretary-General outlines the importance of the role that non-governmental organizations ought to play at the future work of the Human Rights Council, in order to guarantee more transparency and independence in the Council's decision making process. The participants of the workshop were informed that, despite its good intentions, the reform proposal by the Secretary-General has not been translated into any improvement in the manner in which non-governmental organizations interact and contribute to the work of the Human Rights Council. On the one hand, it was, in other words, considered a drawback that the reform did nothing that would have strengthened the role of non-governmental organizations at the main intergovernmental body of the United Nations.

It was noted that the rules governing the participation and consultative status of non-governmental organizations in the Human Rights Council are the same as those governing their work during the sessions of the Commission on Human Rights. In its resolution 60/251, the General Assembly had namely decided that the Human Rights Council's consultation with non-governmental organizations "shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities".⁶⁸

Participants of the workshop were informed about some of the concerns with regard to the work of the Economic and Social Council's Committee on Non-Governmental Organizations and the rules governing the consultative status of non-governmental organizations as contained in Economic and Social Council resolution 1996/31 of 25 July 1996. It was also noted that it will be of utmost importance to provide a clear programme of work so that non-governmental organizations not based in Geneva are able to attend the relevant sessions now that the Human Rights Council is annually at least three times in session.

⁶⁸ General Assembly resolution 60/251, paragraph 11.

On the other hand, the fact that the rules governing the consultative status of non-governmental organizations did remain untouched was also, however, considered a relief. This is the case because, as the participants were told, there were, during the reform process, several attempts to further limit and diminish the possibilities of non-governmental organizations to influence the work of the Human Rights Council. Things could, in other words, have got even worse.

Nonetheless, it was pointed out that although the rules applying to non-governmental organizations have remained the same, the first sessions of the Human Rights Council have revealed increasing difficulties for non-governmental organizations to participate in the work of the Council. Apart from the assumed temporary problems that are linked to the fact that the Council's work has to a large degree focused on procedural negotiations, with less focus on substantive debate, participants learned that there has been a general reduction of the time allocated to non-governmental organizations to address specific issues, in particular violations in particular countries.

Participants of the workshop expressed also their concern about the rather limited role that non-governmental organizations have been given, for example, in the universal periodic review. As agreed during the institution-building process, the participation of all relevant stakeholders, including that of non-governmental organizations, should be ensured, "in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard". With regard to the documentation on which the review shall be based, the Secretariat will prepare a summary of any additional credible and reliable information provided by other stakeholders. It was noted that the biggest shortcoming in the institution-building package is precisely the provision of the documentation used in the review. Nothing, however, explicitly prohibits the members of the Human Rights Council to use, in addition to the documentation prepared by the Secretariat, also other material provided directly to them by non-governmental organizations.

In addition, the fact that other relevant stakeholders, including in other words also non-governmental organizations, can attend, but not participate actively in, the conduct of the universal periodic review in the Council's Working Group carrying out the review and that other stakeholders, including non-governmental organizations, will have the opportunity merely to make general comments before the adoption of the outcome of the review by the plenary of the Council, was considered anything but satisfactory.

A general understanding among participants of the workshop was that the experience of the first two years of the Human Right Council's work and its relationship with non-governmental organizations seems to reveal an increasing lack of appreciation towards the work and contribution of non-governmental organizations.

6 Recommendations

Special procedures

- 1) Respecting the independence and impartiality of the special procedure mandate-holders is crucial for the effective functioning of the system. The justification for a code of conduct for special procedure mandate holders is to enhance the effectiveness and integrity of the special procedures. It must not be used to jeopardize the independent work carried out by the special procedures.
- 2) Urgent action is an essential part of the work of the special procedures. There is a need to ensure that the provision according to which all communications, including urgent appeals, are to be addressed through diplomatic channels does not create delays in the action requested. Governments should make an agreement with the Office of the High Commissioner for Human Rights that possible urgent appeals may be directed directly to the appropriate authority.
- 3) The Human Rights Council should take full advantage of its special procedures. Each special procedure mandate holder should be provided the opportunity to interact directly and effectively with the Council, among other things, by at least one-hour interactive dialogue with the Council. The Council needs to act upon the reports and recommendations presented by mandate holders, not just discuss them.
- 4) Competence, independence and objectivity should be the primary criteria when selecting and appointing a special procedure mandate-holder. An individual should not be excluded merely because he or she is holding a position in a non-governmental organization.
- 5) It has been recognized that the Code of Conduct as adopted by the Human Rights Council in June 2007 is to complement the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission adopted by the General Assembly in 2002. Due to the fact that certain provisions in these two documents are conflicting, it is recommended that the interrelationship of these two documents and possible contradictions and inconsistencies are clarified.
- 6) Any protection gaps caused, for example, by the absence of a special procedure mandate, inadequate governmental cooperation, or by insufficient resources allocated to the support of mandates need to be addressed by the Human Rights Council and related organs. When reviewing special procedure mandates, it is important to ensure that no protection gaps are created or perpetuated.

Universal periodic review

- 7) The findings and recommendations of the treaty monitoring bodies, the special procedures and other human rights expert bodies should have a central place at the universal periodic review.
- 8) The main function of the Human Rights Council during the universal periodic review should be strictly limited to the providing of an oversight of the effective and non-conditional implementation of the findings made by independent expert mechanisms. The Council should not make any substantial interpretations of the rights being examined nor undermine or question the findings made by the treaty monitoring bodies or other expert mechanisms.

Rather, the Council should create political pressure on governments being reviewed in order to ensure that they implement promptly their human rights obligations and commitments.

9) State reports prepared for the universal periodic review should be a response to what has been done with regard to issues of concern raised by different monitoring bodies, not a report on mere intentions.

10) There is a need to guarantee the free use of additional documentation submitted, for example, by non-governmental organizations and national human rights institutions to be used during the universal periodic review in addition to the ten page summary prepared by the Office of the High Commissioner for Human Rights.

Non-governmental organizations and national human rights institutions

11) The Human Rights Council should recognize the role of non-governmental organizations and national human rights institutions as key partners in the common effort to promote and encourage respect for human rights. The arrangements and practices for non-governmental organizations and national human rights institutions regulating their relationship with the Human Rights Council should be maintained and enhanced as an indispensable element of the Council's effectiveness.

Addressing human rights violations in any part of the world

12) The General Assembly has decided that the Human Rights Council "should address situations of violations of human rights". In following the mandate entrusted to the Human Rights Council, governments members of the Council should use country-specific resolutions and other procedures and mechanisms at their disposal when placing situations of concern under international scrutiny. Governments should not, for instance, allow calculations of possible forthcoming defeats in voting affect the decision of whether or not the presentation of a country-specific initiative is feasible.

Miscellaneous

13) Governments need to recognize their obligation, stemming from the Charter of the United Nations, to cooperate with all appropriate organs of the Organization, including not only the Human Rights Council but also its special procedures, in their effort to promote and protect human rights.

14) Stakeholders should avoid criticizing the structures they have created if and when something goes wrong. The occasional failure of the Human Rights Council to adopt a certain initiative should not be understood as reducing its authority and credibility. Rather, it is the authority and credibility of those governments that vote against these initiatives that suffer, not that of the Council. Therefore, the Human Rights Council should not be abolished like the Commission on Human Rights was, although the Council's work will, in next to no time, be accused for inefficiency, hypocrisy, selectivity, lack of imagination, for applying double standards, and for politicizing human rights.

15) There is a need to beware of creating illusions and false expectations that only lead to more disappointment. Caution should, therefore, be had about any future reforms. The current political environment allows very little room for genuine improvement of the United Nations human rights programme. During the past decade, all reforms have, in the end, only been about defending the already existing and achieved procedures and mechanisms.

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