UNITED NATIONS ASSOCIATION FLANDERS BELGIUM

The UN Human Rights Council at work: From high hopes back to reality

Veronique Joosten

60 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Dignity and justice for all of us

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Inaugural Meeting of Human Rights Council Opens in Switzerland

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The UN Human Rights Council at work: from high hopes back to reality[•]

In 2006, the United Nations embarked on a new chapter in its history of human rights protection with the establishment of the Human Rights Council.[1] The more than sixty years old Commission on Human Rights was replaced by a Human Rights Council that had a challenging time ahead: a lot of details of the reform still needed to be decided upon. As the barely two years old Council is still setting up its own practices and searching its place within the UN system, it is too early to pass a final judgement on the reform. Nevertheless, time has come to take stock of the Council's work thus far and to verify whether the high expectations were met. From the outset, the provisional nature of such an appraisal has to be underlined.

In its first year of work, the Council has been mainly preoccupied by further elaborating the reform. After one year of intense and complex negotiations, the Council reached an agreement concerning the institution-building package on 18 June 2007, i.e. one day before the successor of the must criticised Commission on Human Rights commenced its second year of work.[2] The main elements of this institution-building work will form the central part of the paper. Though the Council's work thus far consists mainly of institution-building work, it also entails a considerable part of substantive work, which will be addressed as well. But before assessing the institution-building and substantive work that the Human Rights Council has accomplished up till now, this paper will first briefly situate the context leading up to the recent reform process, followed by a discussion of its outcome, i.e. the main features of the new Human Rights Council, with special emphasis on its composition.

I. From Commission on Human Rights to Human Rights Council

The end of the Cold War marked a new era for the United Nations. At the one hand, there was great optimism about the progress that could be realised in the field of human rights because the United Nations were no longer paralysed by the classical East-West confrontations. On

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[1] At the opening session on 19 June 2006 of the Council's first session, Secretary-General Kofi Annan, High Commissioner for Human Rights Louise Arbour as well as the President of the General Assembly, Jan Eliasson, referred in their addresses to the establishment of the Council as a new chapter or era in the human rights work of the UN.

[2] Cf. A/HRC/5/21. On 19 June 2007, the mandate of the first President, de Alba, took an end, while the term of the fourteen newly elected members of the Human Rights Council just began.

the other hand, criticism on the functioning of the United Nations' human rights institutions was rising. Suggestions were made to reform or at least change the working methods of the treaty bodies as well as the Charter-based organs. A flow of studies, reports, resolutions and recommendations followed. Certain changes were indeed introduced[3], but an in-dept reform did not take place until recently.

The UN Secretary-General initiated the current, extensive reform process by creating the High-level Panel on Threats, Challenges and Change. The Panel's task was to assess current threats to international peace and security and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century. In its report *A more secure world: Our shared responsibility,* the Panel presented a vision of '*a United Nations for the twenty -first century'* and made recommendations for change in a number of UN organs, including the Commission on Human Rights.

The Panel concluded that '*the Commission's capacity to perform [its] tasks has been undermined by eroding credibility and professionalism'*. It expressed concern that *'in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.'*[4] The Panel identified the question of membership in many ways as *'the most difficult and sensitive issue relating to the Commission on Human Rights'*. As *'proposals for membership criteria have little chance of changing these dynamics and indeed risk further politicising the issue'*, the Panel rather recommended as a short-term solution *'that the membership of the Commission on Human Rights be expanded to universal membership'*.[5] *'In the longer term, Member States should consider upgrading the Commission to become a "Human Rights Council" that is no longer subsidiary to the Economic and Social Council but a Charter body standing alongside it and the Security Council'*.[6] The Panel further proposed that all members of the Commission on Human Rights designate prominent and experienced human rights figures as the heads of their delegations, as was the practice in the first half of

[3] E.g. the so-called 'Selebi reform' in 1999-2000. For more, see H. MAGRO, 'La réforme Selebi', in E. DECAUX (ed.), *Les Nations Unies et les droits de l'homme. Enjeux et défis d'une reforme,* Paris, Editions A. Pedone, 2006, 201-209.
[4] UNITED NATIONS, A more secure world: Our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change, New York, United Nations Department of Public Information, 2004, § 283.
[5] *Ibid.,* §285.
[6] *Ibid.,* §291.

the Commission's history. A last suggestion from the Panel is that the High Commissioner be called upon to prepare an annual report on the situation of human rights worldwide. Such a report could serve as a basis for a comprehensive discussion with the Commission.[7]

In his own report *In larger freedom*, the Secretary-General agreed that with respect to the Commission on Human Rights *'a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole'*. He also pointed out that certain *'States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others'*.[8] However, his solution differed from that of the High-level Panel. According to Kofi Annan, *'Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council'*. Whether this new Council would become a principal organ of the United Nations or a subsidiary body of the General Assembly, was up to the Member States to decide. In either case the Secretary-General felt that its members should be elected directly by the General Assembly by a two-thirds majority of members present and voting. It is also up to the Member States to determine the composition of the Council and the term of office of its members. The Secretary-General concluded by stating that *'those elected to the Council should undertake to abide by the highest human rights standards'*.[9]

Eventually, the Heads of State and Government gathered in New York for the 2005 World Summit merely decided to create a Human Rights Council without giving any more details. All further modalities were left to the General Assembly with the request to its President *'to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council'*.[10]

II. Main features of the new Human Rights Council

On 15 March 2006, negotiations in the General Assembly led to the adoption of resolution

[7] *Ibid.,* §286 and 288.
[8] ANNAN, K., *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General,* A/59/2005, § 182.
[9] *Ibid.,* § 183.
[10] A/RES/60/1, § 160.

60/251[11] establishing the new Human Rights Council to replace the Commission on Human Rights. Firstly, it has to be mentioned that General Assembly resolution 60/251 puts human rights next to peace and security and development by acknowledging these three sectors as the pillars of the United Nations system and by recognizing that they are interlinked and mutually reinforcing.[12] But at the same time, negotiators were unable to elevate the status of the Council to that of a principal organ. As a temporally solution, the Council was made a subsidiary organ of the General Assembly while stipulating that within five years a review would be undertaken. Such temporarily, half-hearted situations are never a good option, especially when they operate in a legal vacuum. On top of this, the United Nations Charter will need to be revised to turn the Council into a principal organ. This is not an everyday undertaking that should be taken lightly.

The Council is composed of 47 members, elected for three-year terms by the General Assembly, again taking into account an equitable geographical distribution among the five regional groups (13 seats for Africa, 13 for Asia, 6 for Eastern Europe, 8 for Latin America, 7 for Western European and others). Candidates will need an absolute majority of the entire membership of the General Assembly to get elected. Unlike the members of the Commission, members of the Council cannot serve for an unlimited number of successive terms: they will not be eligible for immediate re-election after two consecutive terms. Two other novelties can be mentioned. First, members elected to the Council will have to uphold the highest standards in the promotion and protection of human rights. Therefore, candidate members make voluntary pledges and commitments. In addition, members of the Council will be evaluated under the new universal periodic review mechanism (UPR). Second, if a Council member has persistently committed gross and systematic human rights violations during its term of membership, the General Assembly can suspend that Council Members' rights and privileges by a two-thirds majority vote.

Every year, the Council will have to convene no fewer than three sessions for a total period of no less than ten weeks. Like the Commission, the Council will be able to hold special sessions. Such a special session will take place at the request of a member of the Council with

[11] For a practical commentary on this resolution, see H. UPTON, 'The Human Rights Council: First impressions and future challenges', *Human Rights Law Review* 2007, No. 1, 30-35.
[12] A/RES/60/251, PP 6.

the support of one third of the membership of the Council. The special procedures' system of the Commission on Human Rights will be maintained by the Council to avoid a protection gap in the transition phase, although the Council will conduct a review within one year to examine ways to rationalize and strengthen the special procedures. The participation of NGOs in the proceedings of the Council will be arranged in the same way as in the Commission on Human Rights.

III. The composition of the Human Rights Council: no criteria for membership

At the outset, mainly the United States but also other Western countries insisted on criteria for membership. In fact, one of the main reasons for the United States to vote against the resolution was the absence of a guarantee that the worst abusers would be excluded from membership.[13] Besides the practical question how such criteria can be established and measured, there is the fundamental question whether the advancement of human rights would benefit from turning the Council into an exclusive club of *'good'* countries instead of keeping a diverse gathering of countries that make up the world today.[14]

As the introduction of criteria for membership turned out to be a politically unattainable enterprise, the reform introduced the concept of voluntary pledges and commitments as an alternative.[15] Taking into consideration the legally binding commitments an ever-increasing majority of UN member States have made by ratifying one or – as is frequently the case - more human rights treaties, the added value of these good *'intentions'* can be seriously

[13] See explanation of vote by Ambassador John R. Bolton, U.S. Permanent Representative to the United Nations, 15 March 2006, http://www.state.gov/p/io/rls/rm/63143.htm

[14] See ALSTON, P., 'Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council', *Journal of Transnational Law and Policy* 2005/06, vol. 15(1), 49-96. Philip Alston is also of the opinion that criteria for membership *'seem unlikely to be workable and certainly unlikely to be effective'*. Instead, after citing the examples of the Human Development Index and the Environmental Sustainability Index, he is proposing the creation of a human rights accountability index. Such an index, whose components are described in detail, would facilitate the task of promoting at least a basic form of procedural accountability on the part of those governments which are elected to the new Council. The feasibility of membership criteria is also adressed in ALSTON, P., 'Reconceiving the UN Human Rights Regime: Challenges confronting the New UN Human Rights Council', *Melbourne Journal of International law* 2006, vol. 7(1), 191-198 and C. CALLEJON, 'La réforme de la Commission des droits de l'homme', in DECAUX, E. (ed.), *Les Nations Unies et les droits de l'homme. Enjeux et défis d'une reforme,* Paris, Editions A. Pedone, 2006, 91-92.

[15] To compensate the failure to introduce such criteria, the EU members and some other States voluntarily committed at the first election not to cast votes in favour of any candidate that is the subject of a sanctions regime imposed by the Security Council for human rights-related reasons. See H. UPTON, *op. cit.*, '33. For more on the compromise reached concerning membership, see ALSTON, P., 'Reconceiving the UN Human Rights Regime: Challenges confronting the New UN Human Rights Council', *Melbourne Journal of International law* 2006, vol. 7(1), 198-203.

questioned.[16] The generally disappointing quality of the pledges, often containing only empty words, reinforces this doubt. Admittedly, the notion of pledges seems to have been an incentive for some NGOs to perform their function as watchdog. When electing the first members of the Council, they made sure UN Member States took into account *'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'*[17] by carefully scrutinising the pledges of the 64 candidate-members for the new Council and putting them to the test by reporting on the actual situation in some of the countries concerned.[18] A year later, this scrutiny was continued when the second elections of fourteen new members took place.[19] Some NGOs[20] even wrote letters to the members of the General Assembly urging them to vote only for those candidates that are genuinely committed to upholding the requirement articulated in resolution 60/251 and that have made credible pledges. A joint letter was issued to express concern over the use of a *'clean slate'*[21] in four out of the five electoral regions.[22] On the other hand, the practice of NGOs scrutinising the human rights records of members of the Commission on Human Rights existed already. Even without pledges, NGOs would – or at least, should – have continued to denounce deplorable human rights situations within the territory of Council members. What is more, the scrutiny does not need to be confined to election times or Council members, as Human Rights Watch demonstrated. At the occasion of the fourth Council session, Human Rights Watch prepared a briefing paper, in which it provided short summaries of serious human rights concerns in twenty-six countries, not all of them members of the Council.[23] The only difference now is that NGOs can refer to the requirements set in the resolution establishing the Human Rights Council in election times. One can hardly argue that the pledges have led to a big improvement in the quality of the membership of the new Council, though one of the central aims of the reform.

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[16] They have even been described as 'an ordinary political manifesto', 'campaign materials', and 'political aims without normative force'. See J-P. OBEMBO, 'Recreating the Human Rights Commission with only a name change while replicating its main flaw', *Journal of International Law of Peace and Armed Conflict* 2007, Vol. 20, n° 2, 102.

[17] See A/RES/60/251, OP 8.

[18] For example, Human Rights Watch at their website, http://www.hrw.org; The South Asia Human Rights Documentation Centre with contributions in *Human Rights Features* tackling the human rights policy of Algeria, China, Malaysia, Saudi Arabia and Sri Lanka, all newly elected members of the Human Rights Council. See http://www.hrdc.net/sahrdc/hrfeatures.htm.

[19] AMNESTY INTERNATIONAL, *2007 Elections to the Human Rights Council: Background information on candidate countries* and *Overview of election pledges*. Both can be found on AI's website: http://www.amnesty.org.

[20] AI on 16 April 2007 and FIDH on 12 April 2007.

[21] This means that the number of candidates equals the number of seats available for those regions.

[22] On 3 May 2007, this letter was sent by eight NGOs.

[23] HUMAN RIGHTS WATCH, *More Business Than Usual: The Work Which Awaits the Human Rights Council,* http://www.hrw.org.

The first members of the new Council were elected on 9 May 2006.[24] An often heard argument is that several notorious human rights violators with a seat in the old Commission, like Libya, Sudan and Zimbabwe, were discouraged by the new membership standards and election procedures to even run for election. A more cynical observer could note that these countries do not feel the need anymore to seek membership so as to protect themselves against a potential condemnation. While Human Rights Watch announced with satisfaction that it had only expressed opposition to six of the new Council members on human rights grounds, death penalty abolitionists will have taken a slightly different view with 17 of the Council's first members retaining the death penalty for ordinary crimes.[25] On a positive note, the Government of the Philippines stated in its pledge that it *'shall seek to strengthen domestic support for the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights'*. However, one swallow does not make a summer. This is demonstrated by the fact that the special rapporteur on torture, Manfred Nowak, upon returning from a visit to Jordan, serving as a vice chair on the Council in its first year, spoke of a *'general impunity for torture and ill-treatment'* in that country.[26] When the second election took place one year later, the General Assembly elected 14 new members to the Human Rights Council. This time, the new membership standards and pledge system did not discourage Belarus, well-known for its bad human rights record, to stand for election. Eventually, Belarus lost in the second voting round from Bosnia-Herzegovina, which only submitted its candidacy one week before the elections after pressure from several Western governments who absolutely wanted to prevent Belarus from attaining a seat in the Human Rights Council. With an additional candidate for the Eastern European Group, the practice of a *'clean slate'*[27], which has been employed by most regional groups to avoid genuine elections, could not be sustained. Despite support for Belarus from numerous members of the Non-Aligned Movement, the Western lobbying efforts paid off.[28] This case clearly demonstrates that political will is far more important than institutional reforms to advance in the human rights field.

[24] For the membership of the new Council: see Annexes 1 and 2.
[25] A consultation of the death penalty pages of Amnesty International's website, http://web.amnesty.org, learns that those members are Bangladesh, Cameroon, China, Cuba, Gabon, Ghana, Guatemala, India, Indonesia, Japan, Jordan, Malaysia, Nigeria, Pakistan, Republic of Korea, Saudi Arabia, Zambia. 19 members are abolitionist for all crimes; 3 for ordinary crimes only; 7 are abolitionist in practice.
[26] UN Press release of 3 July 2006.
[27] See *supra*, note 20.
[28] See ReformtheUN.org Latest Development, Issue #194, which can be consulted at http://www.reformtheun.org

In the end, irrespective of the pledges, the redistribution of the seats will have the biggest impact on the future substantive work of the Council. Instead of the 53 seats of the Commission, the Council will have 47 members. This slightly smaller number of seats will have a negligible impact. It is the way those seats are distributed between the regional groups that makes a big difference. Inevitably, the relative power of the Western States has diminished.[29] As they are usually in the forefront to advance the human rights cause and basically the sole initiators of country resolutions, this is not good news for victims of human rights violations. On the positive side, re-election after two consecutive terms has been made impossible. This brings an end to the unwritten rule that a seat is secured for the permanent members of the Security Council. Another positive novelty is that the General Assembly may suspend the rights of membership in the Council of a member that commits gross and systematic violations of human rights.[30] Unfortunately, as such a suspension is only possible with a two-thirds majority it will have a merely symbolic function.[31] The argument of president de Alba that such a majority prevents abuse of this mechanism for political reasons has some merit, but is not entirely convincing.[32]

IV. The Human Rights Council at work

Up until now, the Council has had a very busy schedule with six regular sessions[33], five special sessions and numerous informal meetings. In 2006, the Council gathered for three regular sessions (first session: 19 - 30 June; second session: 18 September – 6 October, resumed 27 - 28 November; third session: 29 November – 8 December) and no less than four special sessions. Three of those four special sessions dealt with the tensed situation in the Middle East (the first one on 5 and 6 July as well as the third one on 15 November addressed

[29] For a more detailed analysis of this shift in power, see M. BOSSUYT, 'The new Human Rights Council: a first appraisal', *NQHR* 2006, 552; M. BOSSUYT, 'Le Conseil des droits de l'homme: une réforme douteuse?', in X., *Droit du pouvoir, pouvoir du droit (Mélanges offerts à Jean Salmon),* Brussels, Bruylant, 2007, 1188-1189; M. BOSSUYT, *Op het kruispunt van recht en politiek. Een persoonlijke terugblik op 35 jaar mensenrechtenbescherming,* Antwerpen, Intersentia, 2007, p. 21, note 123.

[30] A/RES/60/251, OP 8.

[31] Concurring with the opinion that this threshold will be very difficult to meet: ALSTON, P., 'Reconceiving the UN Human Rights Regime: Challenges confronting the New UN Human Rights Council', *Melbourne Journal of International law* 2006, vol. 7(1), 202; M. BOSSUYT, 'The new …, *op. cit*., 554; J-P. OBEMBO, ', *op. cit.*, 103; H. UPTON*, op. cit*., 33; C. VILLÁN DURÁN, 'The new Human Rights Council', in ALMQVIST, J. and GOMEZ, F. (eds), *The Human Rights Council: Challenges and Opportunities,* Madrid, Fride, 2006, 35.

[32] X, 'HRC process a reflection of reality', *Human Rights Features* issue 1541-2482, p. 2. (interview with president de Alba).

[33] The references to the reports of these sessions are: A/61/53; A/HRC/2/9; A/HRC/3/7; A/HRC/4/123; A/HRC/5/21; A/HRC/6/L.11 (draft).

the situation in the occupied Palestinian territories, while the second on 11 August concerned the situation in Lebanon); only the last one, on 12 and 13 December, stepped out of line by discussing the Darfur crisis. In 2007, the Council convened again for three regular sessions (fourth session: 12 – 30 March; fifth session: 11 – 18 June 2007; sixth session: 10 – 28 September, resumed 10 –14 December) but for only one special session (2 October), this time in order to address the human rights situation in Myanmar. Taking all these meetings together the Council has been almost permanently in session in the first one and a half year of its existence.

During this time, the Council was facing a serious dilemma caused by the hasty manner that the reform was decided upon at the United Nations' political headquarters. On the one hand, to avoid getting caught up solely in procedural matters and leaving a protection gap, the Council had to move forward with working out the details of the reform. In the past, procedural matters have already proven to be the perfect excuse not to talk about substance. On the other hand, the Council had to consider its decisions carefully as they will determine its future success. In the field of human rights extra alertness is always required because reform efforts are often hijacked by those opposing a strengthening of the human rights apparatus. On top of this, the Council inherited the Commission's unfinished business, i.e. in the first place the reports that the special rapporteurs were scheduled to present at the Commission's 62nd session. Both the institutional progress and the substantive work undertaken since the establishment of the Council will be discussed in what follows.

A. Institutional work

In its first year of work, the Council has been mainly preoccupied by further elaborating the reform, since the resolution of the General Assembly establishing the Human Rights Council remained very vague on all kinds of issues. As a transitional measure, the Council first extended all the existing mandates of special rapporteurs and workings groups for one year.[34] To work out the further modalities of the reform process, the Council also decided to establish two open-ended intergovernmental working groups at its first session. One working group was charged to develop the modalities of the universal periodic review mechanism[35], while the other working group had to formulate concrete recommendations on the review of all

[34] Decision 1/102.
[35] Decision 1/103.

mechanisms and mandates.[36] In April 2007, when the Council was originally – and unrealistically - scheduled to take decisions on all the institutional issues[37], the discussions continued in three open-ended working groups with the work divided up into six areas, each led by a facilitator: the review of the system of special procedures and of the existing mandates; the review of the complaints system; the review of the system of expert advice; the development of the UPR system; the development of the Council's agenda and program of work; and, the development of the Council's methods of work and rules of procedure. On 4 June 2007, just before the start of the fifth session, the President of the Council was able to present his text on institution building. Two weeks later, after one year of intense and complex negotiations, the Council reached an agreement concerning the institution-building package at the final moment, namely literally on the last minute of the last day of the first cycle, i.e. at midnight on 18 June 2007.[38] This agreement only came in place after repeated warnings from the President that the text had to be adopted as a whole[39], otherwise it would be withdrawn in its entirety, and after a procedural discussion initiated by Canada[40]. The comprehensive package on the institution-building is laid down in the annex of resolution 5/1[41] and affects the establishment of a revised complaint procedure, the creation of an Advisory Committee, the review of the special procedures, and the UPR system. A second resolution contains the Code of Conduct for Special Procedures Mandate-Holders in its annex.[42] At the first part of the sixth session, the Council established further criteria for mandate-holders of the special procedures and members of the Advisory Committee.[43] The future of most working groups of the former Sub-Commission was also decided on. With regard to the UPR, the Council agreed on a mechanism to select the States to be reviewed, determined the sequence of their reviews, and adopted the general guidelines for the preparation of information. This left the identification of candidates for the Advisory Committee, the fate of the working group on indigenous populations, the setting up of the

[36] Decision 1/104.
[37] According to an unrealistic timetable set at the Council's first session.
[38] See A/HRC/5/21. On 19 June 2007, the mandate of the first President, de Alba, took an end, while the term of the fourteen newly elected members of the Human Rights Council just began.
[39] See Council Monitor, Daily updates, 15 and 17 June 2007, 2. The President also gave this warning in a letter addressed to the Council Members on 17 June 2007.
[40] The day after the *'midnight'* agreement was reached, Canada raised a point of order when the President wanted to proceed with *'the necessary follow-up concerning the agreement on the package'* at the first day of the second cycle. Questioning the President's interpretation, Canada insisted that *'agreement'* did not constitute *'adoption'*, which – in their view - still had to take place. In the end, a vote took place, with Canada being the only member to vote against the President's interpretation of the facts. See Council Monitor, Daily update, 19 June 2007, 2.
[41] A/HRC/5/21, p. 4-36.
[42] A/HRC/5/21, p. 36-44.
[43] HRC decision 6/102.

public list for eligible candidates for special procedure mandates, and the preparation for the first session of the UPR pending.

a. <u>The revised complaint procedure</u>

In his address to the first session of the Human Rights Council, Secretary-General Kofi Annan rightly spoke in favour of retaining and strengthening a complaint procedure like the 1503-procedure, whereas several observers have put the usefulness of preserving this 35-years old procedure into question. The slightly revised complaint procedure was, nevertheless, one of the easier aspects to reach agreement upon.[44] Resolution 1503 continues to serve as a working basis and has been improved where necessary; this implies, unfortunately and presently unnecessarily, that the procedure retains its confidential nature, with a view to enhancing cooperation with the State concerned. The objective of the confidential complaint procedure is still, appropriately, to address consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances.[45] Indeed, in view of the various complaint and communication mechanisms that currently exist on the global as well as on the regional level, a change of focus to individual violations is not warranted.[46]

As regards the admissibility criteria[47] for communications submitted under the complaints procedure, the reform comes rather down to a more detailed codification of the already existing practice.[48] In the past, the vagueness of those criteria gave a considerable discretionary power to the instance responsible for the first screening of the communications. As before, such a communication may not be manifestly politically motivated and its object has to be consist with the Charter, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; it has to give a factual description of

[44] See e.g. Council Monitor, Daily updates, 15 and 17 June 2007, 4. This does not mean that all participants were in favour of this procedure. For example, at a certain stage of the negotiations China remarked that it still considered the complaint procedure to be a deficiency in the draft. It referred in particular to the then still included provision that members of the Working Group on Communications would have to abstain if a communication concerning their own State was considered. See Council Monitor, Daily update, 13 June 2007, 12.
[45] HRC resolution 5/1, §§ 80-81.
[46] See in this sense, H. HANNUN, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights', *Human Rights Law Review* 2007, No.1, 79-88, who gives his opinion on how a Council complaint procedure should look like.
[47] HRC resolution 5/1, § 82.
[48] See for example the remark of China in the negotiations that the admissibility criteria have to be clearly laid out. Council Monitor, Daily update, 14 June 2007, 4.

the alleged violations, including the rights which are alleged to be violated; it may not be exclusively based on reports disseminated by mass media; its language may not be abusive, though after deletion of such language, a communication may still be considered. Furthermore, a communication cannot refer to a case that appears to reveal a consistent pattern of gross and reliably attested human rights violations already being dealt with by a special procedure, a treaty body or other UN or similar regional complaints procedure. Domestic remedies have to be exhausted as well, unless it appears that such remedies would be ineffective or unreasonably prolonged. Not only a person or a group of persons claiming to have suffered human rights violations may submit a communication but also any person or group of persons, including NGOs, acting in good faith, not resorting to politically motivated stands contrary to the provisions of the Charter and claiming to have direct and reliable knowledge of the violations concerned. Reliably attested communications are, moreover, not inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence. In addition, national human rights institutions, established and operating under the Paris principles, may serve as effective means of addressing individual human rights violations.

To process the communications, the system of two working groups, one on communications and one on situations, is kept in place.[49] At the level of the Advisory Committee, a Working Group on Communications will decide on the admissibility of a communication and will assess the merits of the allegations of violations.[50] Before transmitting them to the States concerned, the Chairperson of this working group, together with the secretariat, will undertake an initial screening of communications received. Manifestly ill-founded or anonymous communications are to be screened out. [51] At the level of the Human Rights Council, the Working Group on Situations will be provided with a file containing all admissible communications as well as recommendations thereon. When a case requires further consideration or additional information, both working groups may keep the situation under review until its next session and request such information from the State concerned. They may also decide to dismiss a case.[52] The Working Group on Situations will present the Council with a report on consistent patterns of gross and reliably attested human rights violations and will make recommendations on the course of action to take, normally in the

[49] HRC resolution 5/1, § 89.
[50] *Ibid.,* § 95.
[51] *Ibid.,* § 89.
[52] *Ibid., §*§ 90 & 93.

form of a draft resolution or decision with respect to the situations referred to it.[53] It is emphasised that the two working groups will to the greatest possible extent work on the basis of consensus.[54]

The composition of both working groups has not been changed either: each working group is composed of five members, one from each regional group. Members of the Working Group on Communications are appointed for three years, while the members of the Working Group on Situations only have a mandate of one year. The mandates for both groups are renewable only once and the members serve in their personal capacity.[55] While both working groups will hold two meetings a year of five working days each, the Council shall consider consistent patterns of gross and reliably attested human rights violations brought to its attention as frequently as needed, but at least once a year. [56]

In response to the criticism on the old complaint procedure that was considered to be too secretive, time-consuming, and unequal, the Council presented certain novelties. Firstly, the obligation to motivate decisions has been introduced. In a perspective of accountability and transparency, the Chairperson has to provide all the members of the Working Group on Communications with a list of all communications rejected after initial screening. The list shall indicate the grounds of all decisions resulting in the rejection of a communication.[57] With respect to the Working Group on Situations, it has been stipulated that all decisions have to be duly justified and indicate why the consideration of a situation has been discontinued or action recommended thereon.[58] Secondly, the lengthiness of the procedure has been addressed by introducing time-limits, though not of a very compelling nature. On the one hand, a reply by the State concerned should be provided not later than three months after the request but this period may be extended at the request of the State.[59] On the other hand, the period of time between the transmission of the complaint to the State concerned and consideration by the Council shall not, *in principle*, exceed 24 months.[60] Thirdly, the involvement of the complainant in the proceeding of the communications has been guaranteed. The complainant has to be informed when his/her communication is registered. The author of the

[53] *Ibid.,* § 93.
[54] *Ibid.,*, § 90.
[55] *Ibid.,* §§ 86, 88, 91 & 92.
[56] *Ibid.,* §§ 93 & 98.
[57] *Ibid.,* § 89.
[58] *Ibid.,* § 94.
[59] *Ibid.,* § 96.
[60] *Ibid.,* § 100.

communication as well as the State concerned will also be informed of the proceedings at certain key stages: when a communication is deemed inadmissible by the Working Group on Communications or when it is taken up for consideration by the Working Group on Situations; or when a communication is kept pending by one of the Working Groups or by the Council; and, at the final outcome.[61]

Finally, since the Sub-Commission has already been dissolved and the members of the Advisory Committee have not been elected yet, a protection gap developed with respect to the communications that continued to be submitted, which already resulted in a considerable backlog. Therefore, the Council extended – though only at its sixth session - the mandate of the members of the Sub-Commission's working group until the new Working Group is established.[62] The old working group has convened from 19 until 23 November 2007.

In short, the old confidential complaint procedure stays in place though with some alterations and clarifications. On paper, these changes constitute an enhancement of the procedure, but it remains to be seen whether they are really able to remedy the shortcomings in practice. A first indication will be whether NGOs are convinced by the measures taken and will be persuaded to turn to the complaint procedure again after fading enthusiasm prevailing within the NGO community, especially in the last decade, led to less and less submissions. The detailed writing down of the admissibility criteria and of the procedure to follow effectively diminishes the discretionary powers of working groups processing the communications but it also renders the confidential complaint procedure more of a quasi-judicial character, which may raise unrealistic expectations with the complainants and the public at large. It might give the impression that a victim of a human rights violation can obtain a remedy through a judgement by a judicial instance, while in reality the end goal of the procedure has remained unchanged, namely to establish whether there exists a consistent pattern of gross and reliably attested violations.

b. Reviewing the special procedures

The most negative language in General Assembly resolution 60/251 was reserved for the

[61] *Ibid.,* §§ 101-102.
[62] HRC decision 6/101. See e.g. Council Monitor, Daily update, 12 September 2007, 4, for a short overview of the three core options discussed by the Council; Council Monitor, Daily update, 18 September 2007, p. 6 reports the President's announcement of broad agreement for the option that has eventually been chosen.

existing mechanisms, especially the special procedures. The Council is instructed to *'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'*.[63]

At the time of the Commission's last meeting, there were 41 special procedure mechanisms in force, covering 28 thematic mandates and 13 country mandates. All these procedures developed in an *ad hoc* way. Therefore, the decision of the General Assembly that a review should be conducted did not come as a surprise. Whilst the need for a review as such is not questioned, the danger exists and has by now already materialised that some countries will try to take advantage of this review to attack the procedures that they would like to see disappear. First and foremost, the country-oriented procedures find themselves in the danger zone, especially considering the establishment of the new mechanism of universal periodic review. In recent years, the Commission on Human Rights has witnessed a decreasing willingness to hold States accountable for their human rights record. Country resolutions were even described by China as *'the chronic disease of the Commission on Human Rights'*.[64] Against this background, the continued existence of the system of special rapporteurs, even though under the condition of review, - whereto all mandates, country-oriented as well as thematic ones, will be subjected - can be regarded as a positive outcome. The country-oriented procedures were heavily under fire and have barely survived the negotiations regarding the institution-building package. At the eleventh hour, it came to a trial of strength between China, which demanded a two third majority for each country resolution, and the EU, which was resolutely opposed against such a special majority.[65] Considering the new balances of power in the Council, where the Western countries' votes – traditionally the ones who take the initiative – have lost weight in comparison to the Commission, the Chinese requirement would have meant the death-blow to the country mandates. Eventually, a compromise was reached in the form of a specific requirement regarding the working culture: *'proposers of a country resolution have to secure the broadest possible support for their initiatives – preferably of 15 out of 47 members - , before action can be taken concerning a draft*

[63] A/60/251, OP 6.
[64] In the speech by the Chinese delegate at the first session of the Human Rights Council.
[65] See ReformtheUN.org Latest Development, Issue #200.

resolution'.[66] While the Chinese demand did enjoy the support of other Council members, two other factors made it possible to settle for this less rigorous condition. Firstly, there was a general preference to reach consensus on the package, especially after President de Alba made it repeatedly clear that the Council had to take a decision on the text as a whole, otherwise the text would be withdrawn in its entirety.[67] Secondly, the Chinese proposal is not favourable for raising the Palestinian issue, which the Arab and other Islamic countries wish to put on the agenda by a simple majority. Finally, it can be considered regrettable that, as part of the deal, two of the existing country-oriented procedures have not survived the transitional period. It is no coincidence that the mandates of the special rapporteurs for the human rights situation in Belarus and in Cuba have been terminated, i.e. precisely those mandates that the Commission could not reach a consensus about. However unfortunate, nothing prevents the adoption of new resolutions concerning the human rights situation in those two countries in the near future. Within three months after the termination of the special procedure focusing on its country, Cuba announced its intention to sign the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights in early 2008.[68]

The actual review of the special procedures is advancing with great difficulty. During the sixth session, discussions centred on three major issues: the methodology and process of the review, the country mandates, and the occupied Palestinian territories.

On the first issue, the language of resolution 5/1 stayed rather noncommittal: no clear process or criteria for the conduct of the review were provided.[69] All the same, there was agreement to conduct the review, rationalisation and improvement of each mandate in the context of the negotiations of the relevant resolutions, though an assessment of the mandate may take place in a separate segment of the interactive dialogue between the Council and special procedures mandate-holders.[70] But immediately after commencing the review at the sixth session, this agreement was put into question by certain groups who commented on the methodology of

[66] Annex VI methods of work, § 112 (d).
[67] Council Monitor, Daily update, 15 and 17 June 2007, 2 and 7.
[68] Council Monitor, Daily update, 10 december 2007, 2 and 3.
[69] Note that early on in the negotiations, NGOs have advocated for clear criteria for the review, in order to preserve the coherence of the system of special procedures, but that many States rejected this demand. See Council Monitor, Session overview, 10 to 28 September 2007, p. 5. See also H. HANNUN, '*op. cit.*, 78-82, who refers to General Assembly resolution 41/120, setting forth a number of principles to guide States in developing new international human rights instruments, as a worthwhile starting point.
[70] HRC resolution 5/1, § 55.

the review at every possible occasion. Eventually, a separate debate took place on the process of the review. This debate was dominated by Egypt and Pakistan who respectively spoke on behalf of the African Group and the Organisation of Islamic Conference (OIC). Both groups, who were later joined by the Non-Aligned Movement[71], questioned the staggered approach that was used and stated their preference for a uniform approach. In other words, instead of reviewing separate mandates over the course of the year across several sessions, the two groups favoured a comprehensive review with an omnibus resolution covering the review of all mandates at once.[72] China also supported such a *'package'* solution, while the Western and Latin American groups opposed it.[73] Obviously, the proponents of a holistic and coherent review had their reasons to advocate this strategy. Besides the obvious delaying tactics behind this reckoning, they probably thought that it would be easier to get ride of certain *'undesirable'* mandates, i.e. especially country mandates, in the context of a comprehensive review. In a reaction to the comments from these groups, president Costea tried to explain the situation. He underscored that the institution-building package contained guidelines on the goal of the process and how it should be carried out. He considered that the special procedures mandates were too diverse to be treated in the exact same way. Although the process of review had begun, he admitted that the Council was still exploring how it could best be done. According to him, the review should be *'learning by doing'*. Accordingly, he opposed the elaboration of a detailed plan applicable to each mandate.[74]

When the Council continued to apply the staggered approach, the same group of countries repeatedly insisted that the review and renewal of mandates should be taken care of in a separate resolution determining the future of the mandate. Especially during informal consultations regarding the draft resolution on religious freedom, this remark was made. The EU, who acted as the main sponsor for this draft resolution, disagreed with this view and opted for a substantial resolution dealing with freedom of religion and belief in general, with only one operative paragraph renewing the mandate.[75] As a seemingly unsolvable deadlock emerged, a decision on the draft, and thus on the review and renewal, was postponed. At the resumed part of the sixth session in December 2007, the postponed draft resolution extending the mandate of the special rapporteur was finally adopted with 29 votes in favour and 18

[71] See resumed sixth session where Cuba, on behalf of the NAM, also asked for the establishment of a common framework for the review process. Council Monitor, Daily update, 11 December 2007, 11.
[72] See Council Monitor, Daily Update, 17 September 2007, 5, 18 September 2007, 8, and 27 September 2007, 6.
[73] See Council Monitor, Daily update, 17 September 2007, 5, 19 September 2007, 12, and 27 September 2007, 6.
[74] Council Monitor, Daily update, 17 September 2007, 11 and 26 September 2007, 12.
[75] Council Monitor, Daily update, 17 September 2007, 6 and 11, and 19 September 2007, 12.

abstentions.[76] It can be considered unfortunate that one of the more contentious thematic mandates was among the first to be reviewed. If a more consensual theme had been up for review first, the result may have been different. Although it has to be taken into account that reviewing a first mandate without clear instructions remains a challenging matter because certain States are afraid to set a precedent with the first case and to prejudice the review of the outstanding mandates. In any case, separate resolutions did address the renewal of the mandates of the special rapporteur on the right to food, on indigenous populations, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, on the situation of human rights in the Sudan, and the mandate of the representative of the Secretary-General on the human rights of internally displaced persons.[77] These considerably shorter resolutions did not discuss in detail the rights concerned, but did determine the future focus areas of the mandate in question. Lastly, whenever a draft resolution extending a particular mandate was discussed, the Russian Federation in particular – though others made the suggestion as well[78] - relentlessly stressed that the Code of Conduct for Special Procedures Mandate-holders should be taken into account. The Russian Federation presented new language referring to the Code of Conduct at every possible occasion[79] and even announced that it would make this suggestion for all the special procedures mandates.[80] Despite protest from other delegations[81], the Russian strategy partially paid its way as all resolutions renewing a special procedure mandate at the sixth session - i.e. just over a dozen resolutions - do contain a reference to the Code of Conduct, though only in their preambular paragraphs.[82] However, after the consideration of all draft resolutions, Slovenia stated on behalf of the EU Council members that including such references to the Code of Conduct in those resolutions in order to make the Code of Conduct legally binding was unnecessary as it

[76] A/HRC/6/L.11/Add.1, p. 49.
[77] See respectively HRC resolutions 6/2, 6/12, 6/28, 6/34, and 6/32. See also Council Monitor, Daily update, 26 September 2007, 9.
[78] E.g the Philippines in informal consultations on the mandate of the special rapporteur on indigenous populations. See Council Monitor, Daily update, 18 September 2007, p. 9. Or, the Philippines and China together with the Russian Federation in informal consultations regarding the proposed special rapporteur on slavery. See Council Monitor, Daily Update , 25 September 2007, 11.
[79] Council Monitor, Daily Update, 17 September 2007, 4-5; *Ibid.,* 19 September 2007, 12-13; *Ibid.,* 21 September 2007, 11.
[80] Council Monitor, Daily Update, 20 September 2007, 14.
[81] E.g Guatemala and Mexico. See Council Monitor, Daily update, 19 September 2007, 13 and 20 September 2007, 14.
[82] See HRC resolutions 6/2, PP 3 (food), 6/3, PP 2 (international solidarity), 6/4, PP 5 (arbitrary detention), 6/5, PP 3 (Burundi), 6/12, PP 2 (indigenous populations), 6/14, PP 9 (slavery), 6/27, PP 4 (adequate housing), 6/28, PP 2 (countering terrorism), 6/29, PP 12 (health), 6/31, PP 3 (Liberia), 6/32, PP 4 (IDPs), 6/34, PP 5 (Sudan), 6/37, PP 17 (religion or belief).

was already binding in itself.[83] All the same, the Russian Federation did not let go of the issue. At the Third Committee of the General Assembly, it raised its concern when the draft resolution on the Council report only referred to the institution-building package of the Council and not to the Code of Conduct. Cuba introduced an amendment to address this concern, which was adopted without a vote, but with Israel and the US disassociating themselves from consensus on the amendment.[84]

A second, unsurprising point at issue was the country mandates. As expected, several States pleaded yet again for the elimination of these procedures. Throughout the entire reform negotiations, the African group and the OIC, supported by other countries, favoured closing down the country mandates, which they considered superfluous in view of the new UPR mechanism. Conversely, the EU and other members of the WEOG, as well as most Latin-American countries were very much in favour of upholding the country mandates.[85] Ultimately, GA resolution 60/251 as well as Council resolution 5/1 containing the institution building package affirmed the preservation of the country mandates. But at the Council's fifth session, where the later package was discussed, Pakistan on behalf of the OIC, joined by China on behalf of the Like-Minded Group challenged the very concept of country-oriented mandates again and repeated their call for the termination of all country mandates.[86] Against this setting, the review of country specific mandates promised to be one of the most controversial issues. Four country mandates were scheduled for review at the first part of the sixth session. Not coincidentally two out of three mandates whose review and renewal was postponed concerned those country mandates, namely the mandates regarding the Democratic Republic of the Congo (DRC) and regarding the Sudan. At the request of Egypt on behalf of the African group, subsequently supported by the Asian group, consideration of the draft resolution extending the mandate of the independent expert on the situation of human rights in the DRC was deferred to the seventh session in March 2008.[87]

When the report of the Expert Group on the human rights situation in Darfur was up for consideration, Egypt (on behalf of the African group) took the lead again. It considered that the expert group would be sufficient and thus that the mandate of the special rapporteur could

[83] Council Monitor, Daily update, 28 September 2007, 4.
[84] New York Monitor, GA update, 16 November 2007, 1.
[85] See DEMOCRACY COALITION PROJECT, *Human Rights Council report card. Government positions on key issues 2006-2007*, pp. 3-4.
[86] Council Monitor, Daily update, 14 June 2007, 3 and 15 and 17 June 2007, 3.
[87] Council Monitor, Daily update, 27 September 2007, 2.

be terminated. One of the arguments used by Egypt to justify its proposal was the new UPR mechanism that the Sudan would also have to undergo.[88] It did not take long before the UPR mechanism was exploited to undermine the country mandates. This time, Egypt's attack on the mandate of the special rapporteur on the human rights situation in the Sudan resulted in the postponement of a decision on the mandate to the December part of the session.[89] In December, the mandate of the special rapporteur was renewed for one year and even enlarged in scope, but this renewal came at a price: seemingly as part of a deal that had been closed behind the scenes, the mandate of the Expert Group on the human rights in Darfur was terminated. After the adoption of these decisions, Egypt warned that review of the mandate in question was a continuous exercise and that the mandate would be examined again in the future.[90] It is disappointing that such a newly established, innovative mechanism with great potential, like the expert group on Darfur, had to be sacrificed to keep the special rapporteur for Sudan in place. An even more worrying development is that such a trade off in relation to one of the most pressing human rights situations of today took place with consensus. The EU, as the main force behind the establishment of the expert group, failed to stand up for the group in a vote, though it commended the expert group's work by describing it as *'a major step forward in creating a mechanism that can have a concrete impact in the lives of the people'*. In this context, its call on the Sudanese government to intensify its efforts to implement the recommendations by the expert group looses a lot of its credibility.[91] The question is what will happen to the other country mandates under the *'violations'* item that are still awaiting review, and that do not have an additional supervisory mechanism at their disposal as a trade-off to safeguard their future.

The three other country mandates that have been reviewed and extended for the time-being all concern the less controversial area of advisory services and technical assistance. The independent experts on the situation of human rights in Burundi, Haiti and Liberia all saw their mandate renewed. In all three cases, the governments concerned showed strong support for the continuation of the mandate. Whilst Burundi's Minister for national solidarity, human rights and women's rights, addressed the Council, Liberia sent its Ambassador to France to

[88] Council Monitor, Daily update, 24 September 2007, 3.
[89] Council Monitor, Session overview, 10 to 28 September 2007, 6.
[90] Council Monitor, Daily update, 14 December 2007, 1 and 3.
[91] See Council Monitor, Daily update, 14 December 2007, 8.

attend the relevant Council session.[92] But even then, Egypt on behalf of the African group felt compelled to make certain reservations revealing its reluctance vis-à-vis country mandates. When it became clear that the first mandate up for review, i.e. the mandate concerning Haiti, would be renewed, Egypt immediately pointed out that this may not be the case with all other similar mandates. It went on to characterise country mandates as a *'political label'* that did not provide the optimum avenue to achieving human rights objectives, especially when other means existed to address country situations. It ended by declaring that the existence of a mandate should neither be the goal of the review process, nor was it a guarantee of the improvement of the human rights situation in a particular country.[93] As regards the mandates relating to the African countries Burundi and Liberia, Egypt made clear that it chose *'not to oppose'* the renewal of these mandates, given the unequivocal support from the two governments concerned. A number of States went even further and used this expression of support to assert – not only with disregard for established practice by the former Commission, but also in contravention of the institution-building text and the spirit of the negotiations - that *'the express will of the country concerned'*, was vital for the continuation of any country mandate.[94]

In sum, the review and renewal of country mandates has proven to be very difficult, but not impossible. Noticeable is the destructive role that Egypt, as coordinator of the African group, played with its continuing attempts to question the very existence of the country mandates. Fortunately not all African countries share this point of view, as Burundi and Liberia have clearly demonstrated.

Another, ever returning issue concerns the occupied Palestinian territories. This highly politicised question has already been on the agenda of the Council's predecessor for decades. It came to the Commission's attention around the same time as the deplorable human rights situations in Chile under the dictatorship and in South Africa under the *apartheid* regime. All three situations were addressed in separate agenda items. After the situation in Chile and South Africa changed for the better, the unresolved Israeli-Palestinian conflict remained the only separate item dealing with a country situation on the Commission's agenda, much to the

[92] Council Monitor, Session overview, 10 to 28 September 2007, 6; Council Monitor, Daily update, 14 December 2007, 8-9.
[93] Council Monitor, Session overview, 10 to 28 September 2007, 6.
[94] Council Monitor, Session overview, 10 to 28 September 2007, 6; Council Monitor, Daily update, 14 December 2007, 2.

discontent of Israel who felt singled out. On top of this, the tenure of the special rapporteur's mandate is very unusual, namely *'until the end of the Israeli occupation of those territories'*[95], whereas country mandates normally have to be renewed every year. This lack of a time-limit to the special rapporteurs' mandate is another disparity causing friction with Israel.[96] At a time of heightened tensions in the Middle East, the inclusion of a special agenda item on Palestine in the agenda of the Commission's successor as well caused a lot of controversy during the final negotiations on the institution-building package. The issue divided the members of the Council along the traditional lines and nearly undermined the consensual adoption of the text. Despite strong opposition, item 7 on the human rights situation in Palestine and other occupied Arab territories was listed on the agenda after calls to do so by a large number of States.[97] Interestingly enough, those countries that are determined to ensure the further existence of a specific agenda item enabling them to criticise Israel, are also the ones deeply opposing the practice of country mandates. The often used argument to justify this inconsistency is that the issue of the occupied Palestinian territories concerns the theme of foreign occupation and therefore has to be considered as a thematic rather than a country mandate, which moreover has to be maintained until the end of the occupation.[98] Bearing in mind the existence of a separate agenda item concerning self-determination on the Commission's agenda, this reasoning is not convincing. While the separate agenda item dealing with the occupied Palestinian territories on the Commission's agenda has – as explained above – historical origins rather than an anti-Israeli bias as a basis, the Council cannot base itself anymore on this historical explanation. It is worthwhile to note that several human rights NGOs[99] have also expressed reservation about having such a specific agenda item. As far as the term of the mandate is concerned, there is no reason why the mandate of this one particular rapporteur does not get a clear time-limit when the mandates of all other country rapporteurs have to be renewed annually. Both disparities make the Council vulnerable to reproaches of partiality and selectivity, which are reinforced by the fact that four of the six special sessions held to date concern Israel. As could be expected, discussions under

[95] E/CN.4/RES/1993/2, Question of the violation of human rights in the occupied Arab territories, including Palestine, 19 February 1993.
[96] Mission of Israel to the UN, *Israel and the Un – An Uneasy Relationship,* http://www.israel-un.org/Israelun/isrun.
[97] Council Monitor, Daily update, 15 and 17 June 2007, 4-5; Council Monitor, Daily update, 20 September 2007, 3; Council Monitor, Session overview, 10 to 28 September 2007, 17.
[98] See P. SCANNELLA, and P. SPLINTER, 'The United Nations Human Rights Council: A Promise to be Fulfilled', *Human Rights Law Review* 2007, 45. For recent expressions of this point of view by a.o. the OIC, see Council Monitor, Daily update, 14 June 2007, 3; Council Monitor, Daily update, 15 and 17 June 2007, 3.
[99] E.g. FIDH and ICJ.

the separate item 7 turned out to be very politically charged during subsequent sessions of the Council. At the sixth session, the debate on item 7 was even elevated to an assessment of the credibility of the Council by States on both sides of the spectrum. While Canada claimed that the existence of item 7 stood in the way of a credible Council that would address all situations around the world equally, Egypt countered that the Council's credibility would be undermined if it could not implement its own resolutions.[100]

The politically charged Israeli-Palestinian issue is unmistakably a prime example that institutional reform alone does not bring about change and that the Council is as politicised as its predecessor. In fact, when observing how the Council has handled this topic hitherto, it is clear that little has changed since the Commission's days, which is all the more regrettable because the approach chosen has not only a detrimental effect on the credibility of the Human Rights Council but is also disadvantageous to the Palestinian quest.

c. Curtailing the mandate-holders

The suspicious stance towards the special procedures can especially be felt with respect to the special rapporteurs. Since these independent experts play a pivotal role in the special procedures system, attempts by certain Council members to gain more control over these key figures should not come as a surprise. A principal means thereto is, of course, governing the selection process. Therefore, most innovations have been introduced in the selection and appointment of mandate-holders. The general criteria of paramount importance for mandate-holders are considered to be expertise, experience in the field of the mandate, independence, impartiality, personal integrity, and objectivity.[101] Next to these general criteria, three chief principles have been established: the exclusion of individuals holding decision-making positions in Government or in any other organisation or entity which may give rise to a conflict of interest; the principle of non-accumulation of human rights functions at a time; and, a tenure of a mandate-holder in a given function of no longer than six years.[102] As before, thematic mandate periods will be of three years, while country mandate periods will be of one

[100] Council Monitor, Daily update, 20 September 2007, 5.
[101] HRC resolution 5/1, § 34.
[102] HRC resolution 5/1, §§ 44-46.

year.[103] New is that a mandate-holder's tenure in a given function can be no longer than six years.[104]

Remarkable in the selection process is that alongside Governments, not only regional groups, international organisations, other human rights bodies but even NGOs figure as entities that may nominate candidates.[105] The Office of the High Commissioner for Human Rights (OHCHR) has to prepare, maintain and update a public list of eligible candidates.[106] One of the most contentious elements during the negotiations was the creation of a consultative group, to which each regional group appoints a member, to propose to the President a list of candidates.[107] This group will consider candidates included in the public list. However, under exceptional circumstances and if a particular post justifies it, the group may consider additional nominations with equal or more suitable qualifications for the post.[108] The fact that the Consultative Group will *'take into account, as appropriate, the views of stakeholders'* and will have to make public and substantiated recommendations does not make this power less debatable.[109] On the basis of the recommendations of the consultative group but also following broad consultations, the President shall identify an appropriate candidate for each vacancy. Eventually, the appointment will be completed upon the subsequent approval of the Council.[110]

Under impulse of and insistence by the African Group[111], the Human Rights Council also adopted a code of conduct for special procedures mandate-holders at the fifth session.[112] Officially, the purpose of the Code is to enhance the effectiveness of the system of special procedures by defining the standards of ethical behaviour and professional conduct that mandate-holders shall observe.[113] When the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people – whose mandate was just renewed -

[103] HRC resolution 5/1, § 60.
[104] HRC resolution 5/1, § 45.
[105] HRC resolution 5/1, § 37.
[106] HRC resolution 5/1, § 38.
[107] HRC resolution 5/1, §§ 42 & 44. See e.g. Council Monitor, Daily updates, 15 and 17 June 2007, 3.
[108] HRC resolution 5/1, § 45.
[109] HRC resolution 5/1, §§ 45 & 46.
[110] HRC resolution 5/1, §§ 47 & 48.
[111] See resolution 2/1, OP 3, which was adopted by 30 votes in favour, 15 against (mainly EU and other Western members), and 2 abstentions.
[112] See annex of HRC resolution 5/2 for the text of the Code of Conduct. See also M. TARDU, 'Le nouveau Conseil des Droits de l'Homme aux Nations Unies: Décadence ou résurrection?', *Rev. trim. dr. h.* 2007, 979-981.
[113] Code of conduct, Article 1.

presented his report at the resumed sixth session of the Council, the real intentions behind the code of conduct became clear. Next to a traditional progress report, Mr Stavenhagen also presented, in an annexed report, his general study on the situation of the rights of indigenous people in Asia, which was not well received by the members of the Asian group. The members of this group claim that the report has been drafted in contravention with the code of conduct for special procedures because they have not been consulted, while Article 6 (b) of the code requires that special procedures *'take into account in a comprehensive and timely manner, in particular information provided by the State concerned'*.[114] Apparently it did not take long before the code of conduct turned into an additional tool for some Council members to undermine the work of the special rapporteurs.

As regards the general principles of conduct, the Code of Conduct repeatedly confirms the independence of the mandate-holders. Besides defining the mandate-holders as independent United Nations experts, the Code stipulates that they have to *'act in an independent capacity'; 'neither seek nor accept instructions from any Government, individual, governmental or non-governmental organisation or pressure group whatsoever'; 'refrain from using their office or knowledge gained from their functions for private gain'; and, 'not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of his/her mandate'*.[115] Though at the same time, the mandate-holders are told to *'exercise their functions in accordance with their mandate'* and to *'focus exclusively on the implementation of their mandate'*.[116] Article 7, further, declares that *'it is incumbent on the mandate-holders to exercise their function in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself'*. On top of this, prior to assuming their functions, mandate-holders also have to make a solemn declaration in writing.[117]

The most detailed instructions, however, concern the information-gathering activities and the resulting recommendations and conclusions. The principle aim of these instructions seems to be the safeguarding of the rights of the State concerned, even if other concerns, like the protection of witnesses[118], are not forgotten. In their information-gathering activities, for

[114] Council Monitor, Daily update, 12 December 2007, 7.
[115] Code of conduct, Article 3, (a), (f), (i), (j)
[116] *Ibid.,* Article 3, (c), (d).
[117] *Ibid.,* Article 5.
[118] *Ibid.,* Article 8 (b).

example, mandate-holders always have to seek to establish the facts, based on objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible, and take into account information provided by the State concerned.[119] When reporting on a certain State, the recommendations and conclusions do not only have to indicate fairly what responses were given by the concerned State, the mandate-holders also have to ensure that the concerned government authorities are the first recipients of these conclusions and recommendations and that their declarations on the human rights situation in the country are at all times compatible with their mandate.[120] Regarding letters of allegation, the same criteria as established for communications under the revised complaint procedure have to be applied.[121] Possible field visits[122] are also regulated with self-evidentiary prescriptions that the visit has to be conducted in compliance with the terms of reference of the mandate and can only take place with the consent, or at the invitation, of the State concerned. After many delegations expressed concern regarding the provision specifying that mandate-holders should be under official security protection for their own safety[123], the language changed to the mandate-holders having *'access upon their own request,… to official security protection during their visit, without prejudice to the privacy and confidentiality that mandate-holders require to fulfil their mandate'*. Lastly, mandate-holders are reminded that they are accountable to the Council.[124]

As if a Code of Conduct was not enough, the June agreement held out the prospect of more detailed technical and objective requirements for eligible candidates at the sixth session.[125] However, when informally discussing a non-paper on the subject, a vast majority of States became critical of the level of detail contained in the paper.[126] In the end, the Council sufficed to list the following four elements as technical and objective requirements that should be considered: qualifications; relevant expertise; established competence; flexibility/readiness and availability of time to perform effectively the functions of the mandate and to respond to its requirements.[127]

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[119] *Ibid.,* Article 6.
[120] *Ibid.,* Article 13.
[121] *Ibid.,* Article 9.
[122] *Ibid.,* Article 11.
[123] Council Monitor, Daily updates, 15 and 17 June 2007, 6.
[124] Code of conduct, Article 15.
[125] HRC resolution 5/1, § 41.
[126] Council Monitor, Daily update, 11 September 2007, 6.
[127] HRC decision 6/102.

All in all, the reform process has not turned out too badly for the special rapporteurs. At least, the selection and appointment procedure will be more transparent, even if the consultative group has been given the questionable power to consider additional nominations. The whole procedure has also been made unnecessarily complex. Unmistakably intended by the initiating group as an instrument to restrain and control the mandate-holders, the final Code of Conduct clearly constitutes a compromise. The end result is an acceptable, though not ideal code of conduct as the recent behaviour of the Asian Group demonstrates. Whereas the Code of Conduct is overemphasising the mandate-holders' duty to stay within their mandate and is too intrusive in their working methods, it leaves the crucial independence of the experts intact. Similarly, the emphasis on safeguarding the position of the concerned State is balanced by explicating the obligation for States to cooperate.

d. The new Advisory Committee

That the former Sub-Commission was not well regarded by most members of the Council – or other observers who questioned its continued usefulness[128] - is demonstrated by the clipping of its successor's wings without great or lengthy discussions.[129] Firstly, the Advisory Committee's number of members has been cut back. It will be composed of 18 – instead of 26 – members serving in their personal capacity.[130] The following geographical distribution will be employed: 5 seats for the African and Asian Group; 3 seats for the GRULAC and the WEOG; and 2 seats for the Eastern European Group.[131] The likely consequence for the groups with only 2 or 3 seats will be that only the big powers will be served to the disadvantage of smaller States. The election by the Council will take place in secret ballot; the members will be elected for a period of three years instead of four and unlike before they will be eligible for re-election only once.[132] Another novelty is that States shall consult their national human rights institutions and civil society organisations when selecting their candidates.[133] Like for the mandate-holders, the exclusion of individuals holding decision-making positions in Government or in any other organisation or entity which might give rise to a conflict of

[128] For arguments in favour of its replacement, see H. HANNUN, op. cit., 88-89.
[129] In fact, only a few States commented on this aspect of the reform proposals. See Council Monitor, Daily updates, 15 and 17 June 2007, 4.
[130] HRC resolution 5/1, § 65.
[131] HRC resolution 5/1, § 73.
[132] HRC resolution 5/1, §§ 70 & 74.
[133] HRC resolution 5/1, § 66.

interest[134], and the principle of non-accumulation of human rights mandates are inscribed.[135] Does the latter entail that combining membership of the Advisory Committee with being a special rapporteur, like for example Paulo Sérgio Pinheiro combined his membership of the Sub-Commission with being a special rapporteur for the human rights situation in Myanmar, is no longer possible? The technical and objective requirements include four criteria: recognised competence and experience in the field of human rights, which comprises among others a substantial experience of at least five years – thus, a slightly higher standard than for the special procedures mandate holders - ; high moral standing; independence and impartiality; and under the denominator *'other considerations'* again the principle of non-accumulation of human rights functions as well as gender balance and the classical geographic balance.[136]

In comparison with its predecessor, the Advisory Committee's meeting time and competence have been reduced considerably as well. The subsidiary organ of the Council can only convene for maximum two sessions comprising a total of ten working days each year, although additional sessions may be scheduled on an ad hoc basis with prior approval of the Council.[137] Members of the Advisory Committee are encouraged to communicate between sessions, but they cannot establish subsidiary bodies without authorisation by the Council, who may also request the Advisory Committee to undertake certain tasks through a smaller team or individually.[138] Initially, the future of the thematic working groups established by the Sub-Commission was uncertain, but the Council eventually came to a decision at the sixth session. The Social Forum is preserved *'as a unique space for interactive dialogue between the UN human rights machinery and various stakeholders'*[139], while a Forum on Minority Issues substitutes the former Working Group on Minorities[140] and a Special Rapporteur replaces the Working Group on Contemporary Forms of Slavery[141]. Only the fate of the Working Group on Indigenous Populations was initially left undecided. An informal meeting was convened to exchange views on the most appropriate mechanisms to continue the work of

[134] Note that this exclusion is repeated in the technical requirements for the members of the Advisory Committee, unlike for the mandate holders of the special procedures.
[135] HRC resolution 5/1, §§ 68 & 69.
[136] HRC decision 6/102.
[137] HRC resolution 5/1, § 79.
[138] HRC resolution 5/1, §§ 80 & 81.
[139] HRC resolution 6/13. The question on the relationship between this Forum and the Advisory Committee has been left open for now. See Council Monitor, Daily update, 20 September 2007, 14.
[140] HRC resolution 6/15. The aim of this forum is to mainstream minority issues in the work of the Council. It cannot adopt binding decisions. See Council Monitor, Daily update, 20 September 2007, 15.
[141] HRC resolution 6/14.

the Working Group on Indigenous Populations,[142] while in the meantime the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people had already been extended.[143] Finally, the expert mechanism on the rights of indigenous people was created to replace the working group.[144] The Advisory Committee will primarily function as a think-tank for the Council.[145] The functions of the Advisory Committee consist of – as the name already reveals – giving advice to the Council. Such expertise has to be provided in the manner and form requested by the Council, focusing mainly on studies and research-based advice; it can be rendered only upon request of the Council, who shall issue specific guidelines when it requests a substantive contribution. The scope of this advice has to be limited to thematic subjects that belong to the mandate of the Council. To top it all, the Advisory Committee is even not allowed to adopt its own resolutions or decisions.[146]

Thus, the Sub-Commission's successor is held on a very short leash. In fact, compared with the Sub-Commission, the Advisory Committee's power has been eroded in such a way that one can even wonder if the Advisory Committee can be regarded as its full-fledged successor. It will be up to the members of the Advisory Committee, who will be elected in March 2008 and who will convene for the first time after the commencement of the third cycle in August 2008, to sound out the boundaries of this new body's competence.

e. The universal periodic review mechanism *('UPR')*[147]

When the new Council was established, there was mostly great indistinctness about the *'universal periodic review',* a novel concept that was largely pushed by the African countries, after former Secretary-General Kofi Annan introduced the concept in his explanatory note on the Human Rights Council[148]. With this mechanism of peer review, the Council got authorisation to examine the achievements of UN Member States in the field of human rights. The intention was to address the reproaches of double standards, politicisation and selectivity

[142] HRC resolution 6/16.
[143] HRC resolution 6/12.
[144] HRC resolution 6/36.
[145] HRC resolution 5/1, § 65.
[146] HRC resolution 5/1, §§ 75-77.
[147] For a detailed description of the coming into being of the UPR, an analysis of its possible added value and its relationship with the treaty body system, see F. GAER, 'A voice not an echo: Universal Periodic Review and the UN Treaty Body System', *Human Rights Law Review* 2007, No.1, 109-139.
[148] A/59/2005/Add.1, § 6.

that the Commission on Human Rights increasingly had to endure. This intent became clear during the high-level segment of the Council's first session. Leitmotiv in almost all statements was the concept of *'constructive dialogue and cooperation'*, which ostensibly form the new guiding principles for the successor of the Commission, which was perceived to be characterised by a confrontational approach of *'naming and shaming'*. As a possible mechanism for dialogue and cooperation, the universal periodic review got a lot of attention. This new concept is seen by many delegations as one of the main innovations of the reform and a tool to address those deficiencies of the Commission. That is why the UPR mechanism is being described in resolution 5/1 as a cooperative mechanism based on objective and reliable information, where equal treatment of all States and interactive dialogue take a central place.[149] Some States even hoped – secretively or openly - that this new mechanism would become an alternative for the so contested country-oriented special procedures that were the main target of the above-mentioned reproaches. While resolution 5/1 neither confirms nor denies such a possible replacement, the principle that the new mechanism will complement and not duplicate other human rights mechanisms, thus representing an added value, has been explicitly included.[150] Another more controversial principle clearly carrying the signature from the South is that the level of development and specificities of countries has to be taken into account.[151]

One of the main – and laudable – objectives of the UPR mechanism is the improvement of the human rights situation on the ground.[152] The only problem is that nobody really seems to know how this periodical review will precisely be conducted. Establishing the modalities of the universal periodic review has therefore been one of the priorities of the new Council. Certain is that with the periodicity of the review being established at four years for the first cycle, each year no less than 48 countries have to be reviewed by the UPR working group of the Council.[153] At the sixth session, a timetable with the order in which States will be reviewed, was finally available. The first session of the working group, which is composed of all members of the Council, will take place from 7 until 18 April 2008, followed by a second session in May 2008. The UPR working group, which is composed of all 47 member States of the Council, will conduct the review with the assistance of a group of three rapporteurs that

[149] HRC resolution 5/1, § 3 (b) and (c).
[150] *Ibid.,* § 3 (f).
[151] *Ibid.,* § 3 (l).
[152] *Ibid.,* § 4 (a).
[153] *Ibid.,* § 14.

shall be established to facilitate each review. This troika will be selected by the drawing of lots among the members of the Council, but the concerned State may reject one of the rapporteurs and may request that one of the three rapporteurs will be selected from its own regional group.[154] The working group will only gather three times a year during two weeks each time. On top of this, the working group may only spend three hours to each country, while the Council itself can only add one additional hour.[155] With so little time available, one can wonder what the added value of this supplementary supervisory mechanism will be. Then again, this meagre one additional hour for each review will have disproportionate consequences for the overall agenda of the Council. For example, more than half of the two weeks available for the June 2008 session of the Council, will probably be spent to consider the outcome of the review that has been conducted for 32 countries in the two spring sessions of the UPR working group. A positive aspect of the UPR mechanism is that no country can escape from review as all UN member States will be reviewed. It will be interesting to see what the outcome of this review will be in relation to countries that have been able to avoid scrutiny by the old Commission on Human Rights. We will not have to wait long since countries like Algeria, Bahrain, Japan and Pakistan are up for review at these spring sessions.

The review itself shall be based on information prepared by the State concerned, who is obliged to prepare yet another report.[156] General guidelines for the preparation of information under the UPR contain a set of seven guidelines that are very much State centric as they refer to the type of information that governments have to prepare for the review and the format in which it has to be submitted.[157] Subject of much discussion[158] was the additional task assigned to the OHCHR, namely to provide a compilation of the information contained in the reports of the treaty bodies, special procedures and other relevant UN documents. Even more problematic is that the OHCHR has to prepare a summary - that may not exceed 10 pages - of additional credible and reliable information provided by other relevant stakeholders.[159] Besides adding to the already considerable workload, those assignments put the OHCHR, whose relationship with the Council has been left in the dark, in a difficult position. The Office runs the risk to become more susceptible for criticism and its impartial stance can become compromised. The outcome of the review process will be yet another report to add to

[154] *Ibid.,* § 18, (a) and (d), and § 19.
[155] *Ibid.,* §§ 22 and 23.
[156] *Ibid.,* § 15 (a).
[157] HRC decision 6/102.
[158] See Council Monitor, Daily update, 11 September 2007, 3.
[159] HRC resolution 5/1, § 15 (b) and (c).

the paper pile.[160] In line with the advocated non-confrontational approach, many States, among whom China and the members of the OIC, have already emphasised the need for the outcome of the UPR to be adopted by consensus and in agreement with the country under review.[161] The question is whether this position is very realistic. As resolution 5/1 mentions, the outcome has to be implemented primarily by the State concerned.[162] The possibility exists and has not been overlooked that certain States will neglect to follow-up on this outcome: *'after exhausting all efforts to encourage a State to cooperate with the UPR mechanism, the Council shall address, as appropriate, cases of persistent non-cooperation with the mechanism'*.[163] How does this relate to the country resolutions? Are the latter ones in future only possible after such a persistent non-cooperation by a State with the UPR mechanism? What about the special procedures in general? As it is perceived now - at least on paper - the UPR mechanism should become a political forum where the recommendations of – among others - the special procedures get a political follow up[164], which is very much needed, but the big question is whether this is an achievable, realistic prospect in the current context.

At times, the UPR mechanism resembled the rabbit that was conjured of a hat in the course of the reform negotiations, while in fact periodic reports submitted by Member States concerning the state of human rights in their territory are not a new phenomenon. On the contrary, a periodic reporting system was set in place during the mid 1950s but was eventually terminated in 1981 after several attempts to revitalize this unproductive implementation mechanism failed.[165] Apparently, this unsuccessful episode has been forgotten, especially since its main deficiency, namely its intergovernmental nature excluding every input of an independent expert or body, has been retained.[166] It is too early to tell whether the UPR mechanism will do better but the early indications are not reassuring. It is

[160] *Ibid.,* § 26.
[161] Council Monitor, Daily update, 14 June 2007, 2, and 15 and 17 June 2007, 2.
[162] HRC resolution 5/1, § 33.
[163] HRC resolution 5/1, § 38.
[164] For more on the UPR as a (political) follow-up mechanism and NOWAK's related plea to establish a stronger counter-part in the form of a World Court of Human Rights, see N. MONTILLOT, 'UPR: what added value?', *Human Rights Features,* issue 1541-2482, 5; N. MONTILLOT, 'UPR: the scope of obligations', *Human Rights Features,* issue 1541-2482, 10; M. NOWAK, 'The need for a World Court of Human Rights', in ALMQVIST, J. and GOMEZ, F. (eds), *The Human Rights Council: Challenges and Opportunities,* Madrid, Fride, 2006, 58-70.
[165] See GA resolution 35/209 of 17 December 1980. For more on the UPR's predecessor, see ALSTON, P., 'Reconceiving the UN Human Rights Regime: Challenges confronting the New UN Human Rights Council', *Melbourne Journal of International law* 2006, vol. 7(1), 207-213; J.-B. MARIE, *La commission des droits de l'homme de l'ONU,* Parijs, Pedone, 1975,127, 190-199 and H. TOLLEY, *The UN Commission on Human Rights,* Boulder, Westview Press, 1987, 32, 36, 42-43, 87, 170-171.
[166] See also M. TARDU, 'Le nouveau Conseil des Droits de l'Homme aux Nations Unies: Décadence ou résurrection?', *Rev. trim. dr. h.* 2007, 975.

very likely that the UPR mechanism will end up as another waist of time and paper rather than reaching its goal to improve the human rights situation on the ground.

f. NGO-participation

When dissatisfaction with the functioning of the Commission grew in the post Cold War period, NGOs were among the most critical voices. Therefore, it came as no surprise that NGOs were very much in favour of the establishment of the new Council to replace the Commission. One week before the adoption of the General Assembly resolution 60/251, NGOs even made a joint appeal to UN member States to back this resolution, which they described as *'a sound basis to strengthen the UN's human rights machinery'*.[167] Notwithstanding this plea in favour of the new Council, the NGO community realised that the reform plans brought them in a difficult situation: on the one hand, NGOs had to be enthusiastic about the dissolution of an organ they considered discredited; on the other hand, they feared to lose the unique rights and privileges acquired at that same organ.[168] As NGOs were not actively involved in the initial phase of the reform process, this fear was not unfounded.

Defining the role of NGOs in the new Council was clearly not a priority for the New York negotiators. General Assembly resolution 60/251 sufficed by *'acknowledging that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights'*.[169] Because the Council is established as a subsidiary body of the General Assembly[170], the rules of procedure for committees of the General Assembly apply[171]. But without further explanation, an exception was immediately made for observers, including NGOs. It was decided that *'the participation of and 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'.*[172] This language is only partly reassuring. As NGO's were not directly involved in the reform process, the maintenance of a *status quo* with

[167] The full text of the appeal, signed by 63 NGOs, can be consulted at http://www.reformtheun.org.
[168] See R. BLOEM: 'A chance or a threat for NGO participation?', *Human Rights Features*, issue 1541-2482, 8.
[169] A/RES/60/251, PP 11.
[170] *Ibid.,* OP 1.
[171] *Ibid.,* OP 11.
[172] *Ibid.,* OP 11.

references to the *'arrangement*s*'* as well as the *'practices'* of the Commission is a satisfactory outcome. Nonetheless, the key question remains what aspects of NGO-participation will qualify as *'arrangements'* and *'practices'* observed by the Commission.[173] Besides providing a solid legal basis for NGO-participation in the Council, the reference to ECOSOC resolution 1996/31 suggests that NGOs can basically start in the Council where they left off in the Commission. Conversely, the addition of the last phrase *'while ensuring the most effective contribution of these entities'* indicates that rules for NGO-participation could change in ways that NGOs not necessarily favour.[174] Thus, although NGO-participation is guaranteed for the time-being, NGOs will have to be at their guard, especially when the Council will review its work and functioning five years after its establishment[175] and even more when the Council will be upgraded to the status of principal organ[176] because then a revision of Article 71 of the Charter seems unavoidable.

Presently, Article 71 explicitly mandates the ECOSOC and not any of the other UN organs to consult with NGOs. A formal accreditation of NGOs with the General Assembly or its subsidiary bodies is nonexistent. So, the aforementioned exclusion of NGOs in the early negotiating process is logical because the reform was negotiated in the General Assembly, where the level of NGO-participation is incomparable to the one in the former Commission on Human Rights. The openness of this functional commission of ECOSOC towards NGOs is not met by any other UN- or other intergovernmental body. Or, as former Secretary-General Kofi Annan put it: *'the Commission's close engagement with hundreds of civil society organizations provides an opportunity for working with civil society that does not exist elsewhere'*.[177] Indeed, the participation of NGOs in the activities of the Commission had reached an impressive level, though it did end in disillusionment, as the Commission concluded its work, on 27 March 2006, in one three hour session, where only one NGO-statement was permitted. As NGOs were not able to reach an agreement on a joint declaration, one minute silence was kept in memory of human rights defenders and victims of human rights violations. Ambassador de Alba, the first President of the new Human Rights

[173] See M., ABRAHAM, *A new chapter for human rights. A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council,* Geneva, ISHR & FES, 2006, 91.
[174] See P. SCANNELLA, and P. SPLINTER, *op. cit*., 65; Y. TERLINGEN, 'The role of non-governmental organisations', in ALMQVIST, J. and GOMEZ, F. (eds), *The Human Rights Council: Challenges and Opportunities,* Madrid, Fride, 2006, 72.
[175] Such a review is provided for in A/RES/60/251, OP 16.
[176] Such an upgrade is implied in A/RES/60/251, OP 1.
[177] In larger freedom, A/59/2005, § 181.

Council, admitted that *'the lack of flexibility regarding NGO-participation at the closure of the Commission led to a very bad atmosphere'.*[178]

At the first session of the Council[179], Ambassador de Alba tried to turn the tide with his invitation to NGOs to take part in the high-level and general segments. Despite the restriction of the invitation to only a handful of human rights defenders[180], this novelty underscored the crucial role of NGOs at an important moment. By allowing NGOs to partake in segments traditionally reserved to dignitaries, the President paid tribute to their contribution in the work of the Commission and acknowledged their potential significance as a key actor in the future Council's undertakings. That recognition was confirmed by the inclusion of NGOs in the institution-building activities of the Council. The two working groups created to devise the further modalities of the reform, were instructed to undertake *'open-ended, intersessional, transparent, well-scheduled and inclusive consultations with the participation of all stakeholders'.*[181] This wording gave NGOs the chance to join the informal consultations aimed at developing the universal periodic review and reviewing the inherited mandates and mechanisms. After their exclusion from the negotiations in New York, such an involvement of NGOs in the institution-building activities of the Council is, of course, a positive development. Yet, one has to keep in mind that this way of working just constitutes a continuation of practices at the Commission, where NGOs were allowed to attend and participate in negotiations on resolutions, unless the negotiations were specifically designated as being open to a specific group, for example the co-sponsors of a resolution.[182] In any case, the involvement in the negotiations concerning the institution-building package seemed to have paid off. As mentioned above, NGOs are better informed and have the possibility to submit additional information under the revised complaint procedure. As regards the Advisory Committee, a reference to ECOSOC resolution 1996/31 guarantees the same participation of all relevant stakeholders, including NGOs, as before in the Sub-Commission, though again under the condition of *'ensuring the most effective contribution'.*[183] The only question is whether the Advisory Committee - considering its very limited mandate - will be

[178] See '"HRC process a reflection of reality", interview with de Alba', *Human Rights Features* 2006, issue 1541-2482, 2.
[179] For more on NGO-participation at the first session of the Council, see P. SCANNELLA, and P. SPLINTER, ' *op. cit*., 52-53 and 65-66.
[180] Mr. Arnold Tsunga, Ms. Natasa Kandic, Ms. Sunila Abyesekera, and Ms. Marta Ocampo de Vásquez were designated speakers by NGOs. See A/61/53, § 14.
[181] HRC Decision 1/103, OP 3; HRC Decision 1/104, OP 1.
[182] M., ABRAHAM, *op. cit*., 88 and 94.
[183] HRC resolution 5/1, § 83.

able to attract the same huge numbers of NGOs to attend its sessions as its predecessor. With respect to the new UPR mechanism, the participation of all relevant stakeholders, including NGOs, has been ensured as well with again a reference to ECOSOC resolution 1996/31 of 25 July 1996. [184] NGOs can provide additional, credible and reliable information to the review, though the Office of the High Commissioner will have to prepare a summary of this information that may not exceed 10 pages. They will also have the opportunity to attend – this does not imply the right to speak – the review in the working group and to make general comments before the adoption of the outcome of the review by the plenary.[185] The real novelty was realised with respect to the special procedures: NGOs are mentioned among the entities that may nominate candidates as mandate-holders.[186]

NGOs were also among the participants in interactive dialogues with the High Commissioner and with representatives of the treaty bodies, of the special procedures and of the Sub-Commission during the first session.[187] By introducing these interactive dialogues the Council complies with the stipulation of General Assembly resolution 60/251 that its methods of work should *'enable genuine dialogue, […] and also allow for substantive interaction with special procedures and mechanisms'*.[188] With this innovation in working methods, the Council also meets the demand of some NGOs to reconsider the idea that statements are the primary vehicle for NGO-participation. While some NGO representatives found the succession of individual, time-limited statements in the Commission a useful instrument to inform the international community of human rights violations committed by governments, others saw only limited value in this formal way of working and emphasised the need to develop more inventive and meaningful means of intervention and interaction, like interactive dialogues.[189]

When the special rapporteurs came to present their reports at the second session of the Council, the innovative concept of interactive dialogues was continued and further developed. As a result, the Council had more time available than the Commission to deal with each individual special procedure. Not only were NGOs allowed to participate – be it in limited numbers - in the dialogues with the special procedures, they could also raise country concerns in these dialogues without being challenged by governments for doing this. Of course, a few

[184] *Ibid.,* § 3 (m).
[185] *Ibid.,* §§ 15 (c), 18 (c) and 31.
[186] *Ibid.,* § 42 (d).
[187] See A/61/53, § 33 (c) and § 37 (c).
[188] A/RES/60/251, OP 12.
[189] M., ABRAHAM, *op. cit*., 93-94.

countries exercised their right to reply to rebut the substance of some NGOs' comments.[190] The only contentious issue concerned the input of NGOs in interactive dialogues with country rapporteurs, to which some delegations were opposed. Pakistan, supported by China, suggested letting NGOs speak in a separate session.[191] Considering several countries' hostile attitudes towards the country procedures, often combined with an equal aversion to active NGO-participation in general, such opposition could be expected to manifest itself. Fortunately, the President joined by Council members supportive of NGO-participation was able to counter these NGO-unfriendly interferences.[192] A compromise was reached that allowed NGOs to address the Council for a period of ten minutes, with a speaking time of only two minutes for each intervention. Eventually, nineteen NGOs intervened under the agenda item.[193] It was explicitly added that these arrangements were exclusively made for this session. In this period of transition for the Council, they would not set a precedent for future sessions.[194] However, when new reports of some country rapporteurs were presented at subsequent sessions of the Council, NGOs were again able to make statements during the ensuing interactive dialogue.[195]

When looking at the figures of NGOs attending the first sessions of the Human Rights Council, a considerable decrease can be observed in the number of NGOs participating in the Council's proceedings compared to its predecessor. The first two sessions were attended by 154 NGOs; the third session only attracted 99 NGOs, while 181 NGOs registered for the fourth session.[196] Time will tell whether this will be a lasting change or one that can be attributed to the transitional period with its uncertainties concerning agenda, timing and working methods. The fact remains that the replacement of the Commission's one six weeks long annual session by more though shorter Council sessions spread throughout the year, presents certain challenges to NGOs not represented in Geneva.[197]

All in all, the provisional balance regarding NGO-participation in the Human Rights Council is relatively positive, and surely better than initially expected. NGOs were able to consolidate their privileged position in the proceedings of the Commission in those of the Council, though

[190] P. SCANNELLA, and P. SPLINTER, *op. cit.*, '57 and 65-66.
[191] A/HRC/2/SR.5, §§ 4 and 5.
[192] P. SCANNELLA, and P. SPLINTER, *op. cit.*, 58 and 67.
[193] A/HRC/2/9, § 129.
[194] A/HRC/2/SR.4, § 1.
[195] A/HRC/4/L.10, §§ 105 (c), 107, 120, 121 (d).
[196] See A/HRC/1/INF.1, pp. 40-58; A/HRC/2/INF., pp. 37-59; A/HRC/3/7, pp. 42-43; A/HRC/4/INF., pp. 45-74.
[197] P. SCANNELLA, and P. SPLINTER, *op. cit.*, 66.

they contribute less through the classical oral statements known from the Commission and more through alternative ways, like the interactive dialogues. Only their participation in the discussion of country procedures was, fortunately unsuccessfully, challenged by some States, which should be seen by NGOs as a warning sign to stay vigilant.

In conclusion, it is noteworthy to refer to the developments in New York in the autumn of 2007. How fragile the compromise worked out by the Council in June 2007 really is, is demonstrated there by the fact that discussions were reopened in the Third Committee of the General Assembly, where Israel called for a vote on the draft resolution concerning the Council report, which was adopted with 167 States voting in favour, 7 opposing, and three abstaining.[198]

B. Substantive work[199]

Despite its preoccupation with institution-building, the Human Rights Council also found time to do some substantive work, although the Council achieved very little substantive work at its first session as only five thematic working groups presented their reports. Consequently, the formal outcome of the Council's first session is not encouraging: only five resolutions, seven decisions and two statements by the President can be found in its report to the General Assembly.[200] Coincidently, the adoption of the Convention on Enforced Disappearances and of the Declaration on the Rights of Indigenous People occurred during the Council's first session. However, it is the Commission on Human Rights that deserves the credit for these achievements, as it was the Commission who took the initiative for those standard-setting activities.

The intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearances was established in 2002 to develop a legally binding instrument.[201] Four years later, the draft instrument was

[198] New York Monitor, GA update, 16 November 2007, 2.
[199] A brief account of the Council's substantive work during the first two regular and special sessions can be found in H. UPTON, *op. cit.*, 35-39.
[200] A/61/53.
[201] The issue of enforced disappearances formed the object of the Commission's first thematic procedure with the establishment of the Working Group on Enforced Disappearances in 1980. This Working Group drafted a non-binding declaration, adopted by the General Assembly in 1992.

transmitted to the successor of the Commission.[202] The Convention provides for a definition of the crime *'enforced disappearance'* and qualifies the widespread or systematic practice of enforced disappearance as a crime against humanity. It also sets up its own monitoring body, the Committee on Enforced Disappearances, consisting of ten independent experts and having competence to receive State reports and individual complaints, to conduct country visits and urgent actions, and to refer a matter to the General Assembly via the Secretary-General.[203] The Convention was adopted by consensus.[204]

A matter much longer on the agenda of the Commission on Human Rights and of a more contentious nature is the draft United Nations declaration on the rights of indigenous peoples. The Sub-Commission already adopted a draft twelve years ago. At the first session of the Council, the chairperson-rapporteur of the Working Group on the draft declaration introduced the report of already the eleventh session.[205] He decided to present the revised chairman's proposals to the Council with the hope that they would be considered as a final compromise text. However, adoption of the draft declaration by consensus seemed not feasible. Though not a legally binding instrument, the declaration can clear the road for the possible future development of a binding Convention. Therefore, several States took a cautious attitude. Ultimately, the declaration was adopted with 30 votes in favour, two against, namely Canada and the Russian Federation, and 12 abstentions.[206]

The matter of an optional protocol to the International Covenant on Economic, Social and Cultural Rights is also already on the agenda of the Commission on Human Rights for some time. In 1997, the Committee on Economic, Social and Cultural Rights referred its draft to the Commission on Human Rights, who subsequently appointed an independent expert and a Working Group, the latter with a mandate to consider options regarding the elaboration of an optional protocol.[207] The report of the Working Group's third session was presented to the Council at its first session.[208] Traditionally, different views prevail among States about the

[202] See E/CN.4/2006/57.
[203] See E. WATSON HOWE, 'No more secrets. Time for the Convention on Enforced Disappearances', *Human Rights Features* issue 1541-2482, 4-5.
[204] Subsequently, the General Assembly adopted this Convention, which has not entered into force yet, on 20 December 2006. See UN Press release GA/10563.
[205] E/CN.4/2006/79.
[206] The General Assembly only adopted the Declaration on 13 September 2007, Australia, Canada, New-Zealand and the United States casting a vote against. See UN Press release GA/10612.
[207] G. SWEENEY, 'Adding substance to procedure. The Optional Protocol to the ICESCR is on the brink of doing just that', *Human Rights Features* issue 1541-2482, 3.
[208] E/CN.4/2006/47.

need for such an optional protocol.[209] The diverse opinions were also reflected in resolution 1/3 – adopted by consensus - extending the mandate of the Working Group for two years. This time, the extension is given in order to elaborate an optional protocol, but in preparing a first draft the chairperson is requested to take into account all views expressed during the sessions of the Working Group. At the Council's resumed sixth session, the fourth report of the working group containing a detailed description of the comments made on each article of the draft optional protocol was presented.[210] Next, a debate took place on the rectification of the legal status of the Committee on Economic, Social and Cultural Rights, which received mixed reactions from States.[211]

In addition, the mandates of the working group on the right to development and of the intergovernmental working group on the effective implementation of the Durban Declaration and Programme of Action were renewed unanimously for respectively one and three years.[212] Both working groups also presented their latest report.[213] The issue of complementary international standards and the recommendation to appoint five experts in this respect contained in the report of the Durban Working Group generated differing reactions among the Council members. The final aim could entail an optional protocol with CERD. The African Group, GRULAC and the OIC were favourable of this recommendation, while the EU adopted a waiting attitude and the United States was averse to the proposal. The added value of such an additional instrument is doubtful. Still, resolution 1/5, introduced by the African Group and adopted with consensus, requests the Office of the High Commissioner to select five highly qualified experts to study the content and scope of the substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance. The base document produced by these experts should contain concrete recommendations on the means and avenues to bridge these gaps, including but not limited to drafting a new optional protocol or the adoption of new instruments such as conventions and declarations. Largely due to the positions taken by the African Group, the otherwise non-contentious issue of racism continued to cause friction among Council members. At the Council's sixth session, the North-South divide became painfully clear. The European Union

[209] The initiative enjoys strong support from GRULAC and the African Group, while EU Member States are divided on the question.
[210] A/HRC/6/8.
[211] Council Monitor, Daily update, 11 December 2007, 4 and 5.
[212] See HRC resolutions 1/4 and 1/5.
[213] E/CN.4/2006/26 (right to development) and E/CN.4/2006/18 (Durban).

called for a vote on three racism-related draft resolutions[214] introduced by the African Group, and each time, its Council members did cast a *'no'* vote. The power shift in favour of the African Group seems to have incited this group to reckless actions. Instead of striving for consensus, the African Group, encouraged by its new preponderance, is seeking a more confrontational approach that will not pay off in the long run. On the contrary, this strategy will be counterproductive as it causes polarisation and even politicisation of the relevant issues. Even the African Group with its 13 seats will have to rely on other partners than the OIC, with whom it has formed an alliance to consider defamation of religion within the context of racial discrimination, to realise its plans. The African Group is not only antagonising other members of the Human Rights Council but also the Office of the High Commissioner. Illustrative of the uncontrolled behaviour by the African Group is its interference in the work of the Office of the High Commissioner for Human Rights by trying to micromanage its work. By renaming the Anti-Discrimination Unit in the Office into *'The Anti-Racial Discrimination Unit'* and by refocusing its operational activities exclusively on racism[215], the African Group is really stepping out of line.

At its second session, the Council finally found the time to consider the reports of the special procedures as well as the reports from the 1503-procedure[216] and the Sub-Commission. The General Assembly resolution creating the Human Rights Council was only voted upon in New York on 15 March 2006, a time when the Commission on Human Rights was supposed to be in session in Geneva. In principle, this overlap should not have caused any difficulties. But the lack of any transitional measures, gave rise to confusion. In the end, the Bureau of the Commission on Human Rights decided to suspend the 62nd session at a very late stage, i.e. only on the Friday preceding the Commission's commencement. Besides practical inconveniences, like stakeholders having to change arrangements taken to attend the session at the last minute, this suspension left at the very least the appearance of a protection gap. Unfortunately, human rights violators do not have the habit to take a break. A plea from the Office of the High Commissioner in favour of holding a final – be it shortened – session

[214] The three resolutions are : resolution 6/21 'Elaboration of International Complementary Standards to the International Convention on the Elimination of All forms of Racial Discrimination Elaboration of International Complementary Standards to the International Convention on the Elimination of All forms of Racial Discrimination'; resolution 6/22 'From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance'; and, resolution 6/23 'Preparations for the Durban Review Conference'.
[215] See HRC resolution 6/22, OP 1.
[216] The Council decided to keep the situations in Uzbekistan and Iran pending under this procedure, while the consideration of the situation in Kyrgyzstan was ended. See HRC decision 2/101.

would have been welcome. There was no reason why the Commission on Human Rights could not proceed with its last session. On the contrary, it would have been an occasion to wind up elegantly and to tie up any loose ends. Instead, the reports of the special procedures meant to be presented at the 62nd session of the Commission on Human Rights were presented at the second session of the Council. At subsequent sessions, new reports of thematic as well as country-oriented procedures were presented. Each time a more interactive process of dialogue instigated by the President of the Council took place. Such an interactive dialogue in a United Nations' context remains an artificial event. In practice, it comes down to another round of formal statements with a smaller number of them containing some questions and an opportunity for the special rapporteur in question to address the Council a second time after all the statements have been made. Unfortunately, these interactive dialogues have also proven to be an opportunity for certain member States to take position against country procedures. Especially at the fifth session, when five country reports were presented, attacks on the country mandates aggravated. The two most controversial reports concerned Belarus and Cuba, as the other three reports concerned advisory services. Interactive dialogues with the two special rapporteurs concerned were used to question yet again the further existence of country mandates, instead of addressing the substance of the reports.[217]

Next to its regular sessions, the Council is mandated, like its predecessor, to organise special sessions in order to address urgent human rights situations. The kick off of the Human Rights Council coincided with increased tensions in the Middle East in the summer of 2000, first between Israel and Lebanon, later in Gaza. Events directly following the first session, demonstrate that old habits die hard. In less than six months time, three special sessions were convened, on the initiative of the League of Arab States joined by the OIC, to address the deteriorating situation in the Middle East.[218] Another, fourth special session concerning Gaza followed in early 2008. This meeting was again initiated by the Arab States and the OIC and was boycotted by Israel and the US. On the positive side, these special sessions constitute an early, clear confirmation of the Council's competence to address urgent country-specific situations.[219] On the other hand, at all these occasions, it was business as usual: the rhetoric of constructive dialogue and cooperation seemed forgotten as States lapsed into the familiar confrontational approach, which is illustrated by the fact that none of the resulting resolutions

[217] Council Monitor, Daily update, 12 June 2007, 9-10.
[218] Namely on 5 and 6 July 2006, 11 August 2006, and on 15 November 2006.
[219] H. UPTON, *op. cit.*, 39

could be adopted by consensus.[220] Due to this disagreement and even polarisation, follow-up to the mechanisms created by these resolutions, i.e. a urgent fact-finding mission headed by the special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, a high-level commission of inquiry to Lebanon, and a high-level fact finding mission to Beit Hanoun, was practically non-existent.[221] As expected, institutional change does not automatically bring about a change of culture. Entirely independent from these initiatives, four thematic mandate-holders undertook a joint mission to Israel and Lebanon and presented their report to the second session of the Council.[222] These rapporteurs were probably inspired by a similar initiative of five thematic rapporteurs concerning the situation in Guantánamo, taken in the days of the Commission on Human Rights.[223] Such joint efforts of thematic rapporteurs to deal with country situations certainly have added value and should be explored more often. Therefore, it is unfortunate that the rapporteurs were aimed at by Israel, the African Group and the OIC in the interactive dialogue. They were unjustly criticised for stepping outside their competence *ratione materiae* by undertaking this initiative.[224] After three successive special sessions were dedicated to the tensed situation in the Middle East, the EU brought some balance in this one-sidedness by requesting a special session to tackle the precarious situation in Darfur. This special session took place on 12 and 13 December 2006. Following the violent repression of peaceful demonstrations in Myanmar, another special session was convened, again initiated by the EU, on 2 October 2007. A positive outcome of this special session was that the special rapporteur, Mr. Pinheiro, who had not been granted access to the country since November 2003, was able to render a five-day visit to Myanmar in November 2007. With respect to Darfur, the Council established a high-level mission, which the Sudan refused to give permission to enter the country. When the mission presented its report[225] at the fourth session, some countries opposed the admissibility of the report on procedural grounds. Eventually, the Council members agreed to *'take note'* of the report and to dispatch another mission to Darfur composed of seven

[220] HRC resolution S-1/1 was adopted with a vote of 29 in favour, 11 against and 5 abstentions; S-2/1 with 27 votes in favour, 11 against and 8 abstentions; S-3/1 with 32 votes in favour, 8 against and 6 abstentions; S-6/1 with 30 votes in favour, 1 against and 15 abstentions.
[221] See HRC resolution S-1/1, OP 6, S-2/1, OP 7, S-3/1, OP 7. To illustrate this lack of implementation and follow-up, one can mention resolutions 3/1 and 4/2, calling for the dispatching of the urgent fact-finding mission as requested in resolution S-1/1.
[222] I.e. the rapporteurs dealing with arbitrary executions, housing, health and IDPs. For the report, see AH/HRC/2/7.
[223] For the report, see E/CN.4/2006/120.
[224] See also M. TARDU, 'Le nouveau Conseil des Droits de l'Homme aux Nations Unies: Décadence ou résurrection?', *Rev. trim. dr. h.* 2007, 982.
[225] A/HRC/4/80.

thematic experts and led by the special rapporteur on the Sudan.[226] This expert group took an innovative approach by focusing on the implementation of existing recommendations. Because of its choice for a very practical, result-oriented methodology, which included reviewing all pre-existing UN human rights recommendations, selecting a number of recommendations for priority areas, outlining practical steps that should be taken by the Government, identifying indicators to measure the status of implementation, and the outlining of a time frame, the approach of this expert group had great potential. Unfortunately, in a political trade-off negotiated behind the scenes of the second part of the sixth session, the mandate of the Expert group was terminated in order to safeguard the continuance of the mandate of the special rapporteur.[227]

In general, the substantive outcome of the first Council sessions has been minimal, except for the sixth session when action was taken on 31 draft decisions and resolutions. During earlier sessions, action on a lot of draft proposals was postponed, which is an indication of the diverging opinions among Council members. The shift in power between the regional groups can clearly be felt in the choice of and dealing with thematic issues, but even more in the positions towards the handling of country situations, which remains a very difficult exercise. The weight of the African group and of the OIC has grown considerably, which often leads them to dominate and polarise the debates. The often polarised atmosphere puts the WEOG, or more precisely the EU, in a defensive position, because the US[228] is not engaged at all. It has not put forward its candidacy for membership at the first two elections. The earlier commitment expressed by the United States to *'work cooperatively with other Member States to make the Council as strong and effective as it can be'*, seems forgotten and has not been demonstrated. On the contrary, the United States' delegation in Geneva almost appears invisible at the Human Rights Council.[229]

[226] HRC resolution 4/8, OP 6.
[227] See Council Monitor, Daily update, 13 June 2007, 7; DEMOCRACY COALITION PROJECT, Human Rights Council report card. Government positions on key issues 2006-2007, 4.
[228] On the ambivalent position of the US, especially in the lead up to the establishment of the Council, see ALSTON, P., 'Reconceiving the UN Human Rights Regime: Challenges confronting the New UN Human Rights Council', *Melbourne Journal of International law* 2006, vol. 7(1), 203-204.
[229] See in the same sense, H. UPTON, *op. cit*., 31.

V. Conclusion: from high hopes back to reality

In 2006, the United Nations embarked on a dangerous undertaking by replacing the sixty year old Commission on Human Rights by a new Human Rights Council. Indeed, *'dangerous'* as in the field of human rights extra alertness is always required because reform efforts are often hijacked by those opposing a strengthening of the human rights apparatus.[230] In this case the danger for a drawback in the human rights protection was reinforced by the fact that the reform had been decided upon in a hasty manner at the United Nations' political headquarters, leaving it up to the Council itself to decide on the further details of the reform. Main - at least claimed - incentive for the reform was the *'politicisation'* of the Commission on Human Rights. But if evaluated from that point of view, the reform has been – not surprisingly – futile and should not even have been pursued. By the very nature of its composition, the Council is, just like its predecessor, a political organ. However, Secretary-General Kofi Annan, who addressed the Council at its inaugural meeting, claimed that the big change would take place in the way of working: a culture of cooperation and dialogue would replace the culture of confrontation and distrust, which dominated the Commission in recent years. He could not have been more wrong. As the above-conducted analysis of the Council's work hitherto demonstrates, the Council is more politicised than ever. The elaboration of the institutional reform as well as the substantive work often took place in a polarised atmosphere. Unfortunately, there are no signs to assume that this will change in the near future. Therefore, it is still highly questionable whether the Council will effectively constitute an improvement for the protection of human rights.

[230] Even before the plans for the creation of the Human Rights Council unfolded, warning was given by V. JOOSTEN, 'De VN en mensenrechten' in WOUTERS, J. en RYNGAERT, C. (red.), *De Verenigde Naties. Een wereld van verschil?,* Leuven, Acco, 2005, 163. See also H. HANNUN, *op. cit*., 73 and 92.

Links for more information:

United Nations:	http://www.ohchr.org
	http://www.un.org/reform
NGO's:	http://www.reformtheun.org
	http://www.ishr.ch
	http://www.hrw.org/un
	http://www.amnesty.org

Annex 1: Composition of the Human Rights Council in its first year

African States	***Latin American & Caribbean States***
Algeria (2007) Cameroon Djibouti (2009) Gabon (2008) Ghana (2008) Mali (2008) Mauritius (2009) Morocco (2007) Nigeria (2009) Senegal (2009) South Africa (2007) Tunisia (2007) Zambia (2008)	Argentina (2007) Brazil (2008) Cuba (2009) Ecuador (2007) Guatemala (2008) Mexico (2009) Peru (2008) Uruguay (2009)
Asian States	**Western Europe & other States**
Bahrain (2007) Bangladesh (2009) China (2009) India (2007) Indonesia (2007) Japan (2008) Jordan (2009) Malaysia (2009) Pakistan (2008) Philippines (2007) Republic of Korea (2008) Saudi Arabia (2009) Sri Lanka (2008)	Canada (2009) Finland (2007) France (2008) Germany (2009) Netherlands (2007) Switzerland (2009) United Kingdom (2008)
Eastern European States	
Azerbaijan (2009) Czech Republic (2007) Poland (2007) Romania (2008) Russian Federation (2009) Ukraine (2008)	

Annex 2: Composition of the Human Rights Council in its second year

African States	***Latin American & Caribbean States***
Angola (2010) Cameroon Djibouti (2009) Egypt (2010) Gabon (2008) Ghana (2008) Madagascar (2010) Mali (2008) Mauritius (2009) Nigeria (2009) Senegal (2009) South Africa (2010) Zambia (2008)	Bolivia (2010) Brazil (2008) Cuba (2009) Guatemala (2008) Mexico (2009) Nicaragua (2010) Peru (2008) Uruguay (2009)
Asian States	**Western Europe & other States**
Bangladesh (2009) China (2009) India (2010) Indonesia (2010) Japan (2008) Jordan (2009) Malaysia (2009) Pakistan (2008) Philippines (2010) Qatar (2010) Republic of Korea (2008) Saudi Arabia (2009) Sri Lanka (2008)	Canada (2009) France (2008) Germany (2009) Italy (2010) Netherlands (2007) Switzerland (2009) United Kingdom (2008)
Eastern European States	
Azerbaijan (2009) Bosnia and Herzegovina (2010) Romania (2008) Russian Federation (2009) Slovenia (2010) Ukraine (2008)	

Human Rights Council Universal Periodic Review

	1st Session (2008)	2nd Session (2008)	3rd Session (2008)	4th Session (2009)	5th Session (2009)	6th Session (2009)	7th Session (2010)	8th Session (2010)	9th Session (2010)	10th Session (2011)	11th Session (2011)	12th Session (2011)
1	Morocco	Gabon	Botswana	Cameroon	Central African Republic	Côte d'Ivoire	Angola	Guinea	Liberia	Mozambique	Seychelles	Swaziland
2	South Africa	Ghana	Burkina Faso	Djibouti	Chad	Democratic Republic of the Congo	Egypt	Guinea-Bissau	Libyan Arab Jamahiriya	Namibia	Sierra Leone	Togo
3	Tunisia	Mali	Burundi	Mauritius	Comoros	Equatorial Guinea	Madagascar	Kenya	Malawi	Niger	Somalia	Uganda
4	Algeria	Zambia	Cape Verde	Nigeria	Congo	Eritrea	Gambia	Lesotho	Mauritania	Rwanda	Sudan	United Republic of Tanzania
5	Bahrain	Benin	Turkmenistan	Senegal	Vanuatu	Ethiopia	Qatar	Kiribati	Lebanon	Sao Tome and Principe	Palau	Zimbabwe
6	India	Japan	Tuvalu	Bangladesh	Viet Nam	Bhutan	Fiji	Kuwait	Maldives	Myanmar	Papua New Guinea	Syrian Arab Republic
7	Indonesia	Pakistan	United Arab Emirates	China	Yemen	Brunei Darussalam	Iran (Islamic Republic of)	Kyrgyzstan	Marshall Islands	Nauru	Samoa	Tajikistan
8	Philippines	Republic of Korea	Uzbekistan	Jordan	Afghanistan	Cambodia	Iraq	Lao People's Democratic Republic	Micronesia (Federated States of)	Nepal	Singapore	Thailand
9	Argentina	Sri Lanka	Colombia	Malaysia	Uruguay	Cyprus	Kazakhstan	Grenada	Mongolia	Oman	Solomon Islands	Timor Leste
10	Ecuador	Tonga	Bahamas	Saudi Arabia	Belize	Democratic People's Republic of Korea	Bolivia	Guyana	Honduras	Paraguay	Saint Vincent and the Grenadines	Trinidad and Tobago
11	Brazil	Guatemala	Barbados	Cuba	Chile	Costa Rica	Nicaragua	Haiti	Jamaica	Saint Kitts and Nevis	Suriname	Venezuela (Bolivarian Republic of)
12	Netherlands	Peru	Israel	Mexico	Malta	Dominica	El Salvador	Spain	Panama	Saint Lucia	Belgium	Antigua and Barbuda
13	Finland	France	Liechtenstein	Canada	Monaco	Dominican Republic	Italy	Sweden	United States	Australia	Denmark	Iceland
14	United Kingdom	Switzerland	Luxembourg	Germany	New Zealand	Norway	San Marino	Turkey	Andorra	Austria	Greece	Ireland
15	Poland	Romania	Montenegro	Russian Federation	Slovakia	Portugal	Slovenia	Armenia	Bulgaria	Estonia	Hungary	Lithuania
16	Czech Republic	Ukraine	Serbia	Azerbaijan	The Former Yugoslav Republic of Macedonia	Albania	Bosnia and Herzegovina	Belarus	Croatia	Georgia	Latvia	Moldova

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