

NEW CHALLENGES FOR THE UN  
HUMAN RIGHTS MACHINERY

What Future for the UN Treaty  
Body System and the Human Rights  
Council Procedures?

M. Cherif BASSIOUNI  
William A. SCHABAS  
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M. Cherif Bassiouni and William A. Schabas (eds.)

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# CONTENTS

## *Foreword*

Navanethem PILLAY .....	v
-------------------------	---

## *From the Editors*

William A. SCHABAS .....	vii
--------------------------	-----

## A Critical Introduction Assessment of the UN Human Rights Mechanisms

M. Cherif BASSIOUNI .....	1
---------------------------	---

## PART I.

### UN TREATY BODIES – WHAT FUTURE?

#### *Section I. The Place and Role of Human Rights Treaty Bodies in the UN*

<i>Institutional System of Protection of Human Rights</i> .....	15
---	----

#### Chapter 1. It's Time for a World Court of Human Rights

Manfred NOWAK .....	17
---------------------	----

I. Introduction .....	17
II. Human Rights Achievements by the United Nations during the Cold War .....	18
III. Developments after the End of the Cold War .....	20
IV. The “Arab Spring” as a New Window of Opportunities .....	25
V. The Need for a World Court of Human Rights .....	26
VI. The Swiss Initiative for a UN Agenda for Human Rights .....	28
VII. The Main Features of the Consolidated Draft Statute for a World Court of Human Rights .....	29
VIII. Conclusions .....	32

<i>Section II. Strengthening the UN Treaty Bodies Reporting Process</i> .....	35
---	----

#### Chapter 2. Periodic Reporting: The Backbone of the UN Treaty Body Review Procedures

Michael O’FLAHERTY and Pei-Lun TSAI .....	37
---	----

I. Introduction .....	37
II. The UN Treaty Bodies Reporting Procedure: An Overview .....	38

III.	The Impact of the Reporting Procedure . . . . .	44
IV.	Challenges for the Reporting Procedure. . . . .	45
V.	UPR and the Treaty Body Reporting Procedure . . . . .	47
VI.	Strengthening the Reporting Procedure. . . . .	49
	A. Preparation of States Parties' Reports . . . . .	50
	B. Interaction of Treaty Bodies with State Parties and Other Stakeholders . . . . .	50
	C. Implementation of Recommendations on the Ground and Follow-Up . . . . .	52
VII.	Perspectives for the Future . . . . .	53
VIII.	Conclusion . . . . .	56

*Section III. Harmonizing the Working Procedures of the UN Treaty Bodies . . . . 57*

Chapter 3. Streamlining the Constructive Dialogue: Efficiency from States' Perspectives

	Rachael Lorna JOHNSTONE. . . . .	59
I.	Introduction . . . . .	59
II.	A Proposal for the Operation of a Single Periodic Report and Meeting . . . . .	63
	A. Overlap and Repetition . . . . .	63
	B. Some Remarks on the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED) . . . . .	65
	C. Reporting to a Single Periodic Meeting. . . . .	70
	D. Managing a Single Periodic Meeting. . . . .	79
	E. Consolidated Concluding Observations . . . . .	84
	F. Staffing . . . . .	86
III.	An Itinerant Treaty Body . . . . .	86
	A. Organization of Regular Regional Meetings . . . . .	87
	B. Advantages of Regional Meetings . . . . .	88
	C. Difficulties of Regional Meetings . . . . .	89
IV.	Distance Meetings . . . . .	90
V.	Concluding Comments . . . . .	92

*Section IV. Enhancing the Implementation of UN Treaty Bodies' Recommendations and Views. . . . . 95*

Chapter 4. On the Binding Nature of the Findings of the Treaty Bodies

	William A. SCHABAS. . . . .	97
--	-----------------------------	----

Chapter 5. Implementing Treaty Body Recommendations: Establishing Better Follow-Up Procedures	
Felice D. GAER .....	107
I. Treaty Body Powers: From Receiving Reports to Active Implementation? .....	107
II. Treaty Reform: Procedure or Substance? .....	108
A. UN Criticisms .....	108
B. Criticisms of Effectiveness of Treaty Bodies .....	109
C. Authoritativeness of Treaty Body Oversight .....	111
III. Follow-Up Procedures .....	114
A. What the Follow-Up Achieves .....	117
B. Follow-Up Should Identify and Follow Essential Issues .....	118
 Chapter 6. Accessing Justice by All Means: Individual Communications before UN Treaty Bodies – A Case Study of CERD	
Chris Maina PETER .....	123
I. Introduction .....	123
II. Combating Racism Seriously .....	124
III. Committee on Elimination of All Forms of Racial Discrimination (CERD) .....	125
A. Establishment and Mandate .....	125
B. State Reports before CERD .....	126
C. Individual Complaints Procedure .....	128
D. Other Activities of CERD .....	129
IV. Lack of Awareness on the Existence of ICERD and CERD .....	130
V. Possible Contribution to the Work of CERD by Other Institutions ...	130
A. The Civil Society Actors at International and National Levels ...	131
B. Academic and Higher Education Institutions .....	132
VI. Conclusion .....	133
VII. Selected References .....	134
 Chapter 7. The Complementary Role of General Comments in Enhancing the Implementation of Treaty Bodies’ Recommendations and Views (the Example of CESCR)	
Aslan ABASHIDZE .....	137
I. The <i>sui generis</i> Nature of CESCR .....	137
II. Increasing the Use of General Comments as a Tool for Enhancing the Implementation of Treaty Bodies’ Recommendations and Views ..	139
A. Objectives of the Reporting Process .....	140
B. Nature of the Legal Obligations Undertaken by States Parties ...	142

C.	Ways of Domestic Implementation of Treaty Obligations . . . . .	144
D.	Issues not Directly Reflected in Existing Treaties (the Cases of the Rights of Persons with Disabilities and the Rights of the Elderly Persons) . . . . .	145
III.	Conclusions . . . . .	147

	<i>Section V. Strengthening the Representativeness of Treaty Body Membership</i> . . . . .	149
--	--	-----

Chapter 8. Universal Suffrage and the International Human Rights Treaty Bodies: Where are the Women?		
	Alice EDWARDS . . . . .	151
I.	Introduction . . . . .	151
II.	Where are the Women? The Treaty Body Record on Women’s Representation and Participation . . . . .	152
III.	Why the Absence of Women? Feminist Explanations for the Absence of Women in Decision-Making Roles and Why Their Representation and Participation is Crucial . . . . .	154
A.	Equal Representation as a Human Right. . . . .	156
B.	Equal Representation, Democracy and Universality. . . . .	158
C.	Feminist ‘Dissent’ and Women’s Impact on Decision-Making. . . . .	158
D.	Female Decision-Makers as Role Models . . . . .	163
IV.	How Can More Women Be Elected to the Treaty Bodies? How Can We Achieve Parity in Committee Membership? . . . . .	164
A.	The International Criminal Court . . . . .	164
B.	The European Court of Human Rights . . . . .	165
C.	Lessons for the Treaty Bodies and Ways Forward. . . . .	167
V.	Conclusion. . . . .	170

	<i>Section VI. Strengthening the Role of Stakeholders (Civil Society)</i> . . . . .	171
--	---	-----

Chapter 9. Taking Human Rights from the Grassroots to Geneva... and Back: Strengthening the Relationship between UN Treaty Bodies and NGOs		
	Philip LYNCH and Ben SCHOKMAN. . . . .	173
I.	Introduction . . . . .	173
II.	Some Principles to Guide Treaty Body Strengthening from an NGO Perspective. . . . .	177
III.	Cross-Cutting Recommendations and Reforms . . . . .	180
A.	Awareness and Visibility . . . . .	180
B.	Accessibility . . . . .	182

C.	Protection of Human Rights Defenders and Prevention of Reprisals . . . . .	184
D.	Impact and Utility of Recommendations and Remedies . . . . .	185
E.	Implementation and Follow-Up . . . . .	186
1.	Domestic Implementation and Follow-Up . . . . .	186
2.	International Follow-Up . . . . .	187
IV.	Recommendations on General Comments and Individual Communications . . . . .	189
A.	General Comments . . . . .	189
B.	Individual Communications . . . . .	190
V.	Conclusion . . . . .	192
Chapter 10. Strengthening of the UN Treaty Bodies' Complaint Procedures: Elements for a Reform Agenda from an NGO Perspective		
	Gabriela KLETZEL, Camila BARRETTO MAIA and Mónica ZWAIG . . . . .	193
I.	Foreword . . . . .	193
II.	Towards a Victim-Centered Approach . . . . .	197
A.	Ensuring Full Accessibility . . . . .	199
B.	The Need to Clarify the Admissibility Criteria . . . . .	202
C.	Enhancing Interaction . . . . .	205
III.	Ensuring Effective Redress . . . . .	209
A.	Improve the Quality of the Decisions: Identify Specific and Comprehensive Remedies . . . . .	210
B.	The Utmost Relevance of Devising Remedies Meant as Guarantees of Non-Recurrence . . . . .	213
C.	Friendly Settlements . . . . .	220
IV.	The Need for a Comprehensive and Effective Follow-Up System . . . . .	223
A.	Current Features . . . . .	225
B.	Enhancing the Effectiveness of Follow-Up Procedures . . . . .	228
1.	Institutionalize a Comprehensive Involvement of the Victim and the Participation of Civil Society at the Follow-Up Stage . . . . .	228
2.	Develop a Comprehensive Database on Follow-Up to Views – Carry out Periodic Assessments . . . . .	230
3.	Develop Reporting Guidelines for Follow-Up . . . . .	231
4.	Assess State Parties' Institutional Mechanisms for Implementation . . . . .	232
C.	The Development of Adequate Enforcement Mechanisms at the National Level . . . . .	232
1.	Intergovernmental Coordination . . . . .	234
2.	National Focal Point . . . . .	234
3.	A Roadmap for Implementation . . . . .	234
V.	Final Remarks . . . . .	235

PART II.

THE UN HUMAN RIGHTS COUNCIL AT A TURNING POINT

*Section I. Strengthening Working Procedures of the UN Human Rights Council*..... 239

Chapter 1. Building a Universal System for the Protection of Human Rights: The Way Forward  
 Olivier DE FROUVILLE..... 241

I. Change or Continuity: Has the Establishment of the Council Really Changed Anything in the Universal System of Human Rights Protection?..... 243  
 A. Negative Elements..... 245  
 B. Positive Elements..... 245  
 C. Developing Trends ..... 248  
 II. Is the UPR of Real Added Value to the System? ..... 250  
 III. Why the Council does not Represent a Real Progress for the Universal Human Rights Protection System ..... 255  
 IV. Towards Progress: How Could the System for the Protection of Human Rights Evolve in the Future? ..... 261

Chapter 2. Making the Connection: Security and Human Rights  
 Elvira DOMÍNGUEZ-REDONDO ..... 267

I. Introduction ..... 267  
 II. Using International Humanitarian Law to Monitor States ..... 268  
 III. Subsidiary Bodies' and Armed Conflict Scenarios ..... 271  
 IV. Bridging the Gap Between the UN Commission on Human Rights and the Security Council ..... 274  
 A. Carlsson, the Fall of Srebrenica and Brahimi Reports ..... 274  
 B. Mainstreaming Human Rights – 1997 UN Reform ..... 276  
 C. Engaging the Security Council with the Commission on Human Rights ..... 277  
 V. The Human Rights Council's New Tools to Address Armed Conflict and Insecurity ..... 282  
 A. Proliferation of Special Sessions ..... 283  
 B. Universal Periodic Review..... 284  
 C. Responsibility to Protect and Reforming the Security Council ... 285  
 D. Peacebuilding Commission..... 287  
 VI. Conclusions and Some Reflections on the Way Forward..... 288



*Section II. The Work of the UN Human Rights Council Through International Commissions of Investigation of Violations of International Human Rights Law.* . . . . . 291

Chapter 3. The Work of the International Commission of Inquiry for Libya  
Philippe KIRSCH . . . . . 293

I. Events in Libya . . . . . 295  
 A. Demonstrations and Repression. . . . . 296  
 B. Armed Conflict . . . . . 297  
 II. The Commission’s Approach . . . . . 297  
 III. First Phase (April–June 2011) . . . . . 299  
 A. The First Field Mission . . . . . 299  
 B. Challenges . . . . . 300  
 C. Legal Framework. . . . . 302  
 D. Findings . . . . . 305  
 1. Violations of Human Rights Law . . . . . 305  
 2. Violations of International Humanitarian Law . . . . . 306  
 3. Outstanding Issues . . . . . 307  
 E. End of the First Phase. . . . . 310  
 IV. Second Phase (from June 2011 on). . . . . 312  
 A. Changing Circumstances. . . . . 312  
 B. Challenges and Prospects . . . . . 315

Chapter 4. What Should Be the UN Human Rights Council’s Role in Investigating Genocide, War Crimes and Crimes Against Humanity?  
Lyal S. SUNGA. . . . . 319

I. Aim of the Present Inquiry . . . . . 319  
 II. How the International Community’s Responses to the Crises in the Former Yugoslavia and Rwanda have Reoriented UN Human Rights Investigations . . . . . 322  
 A. UN Human Rights Investigations Prior to the Former Yugoslavia and Rwanda Situations. . . . . 322  
 B. Investigations in the Former Yugoslavia and Rwanda . . . . . 326  
 III. Post-Yugoslavia and Rwanda UN Human Rights Investigations into Situations Possibly Involving Genocide, War Crimes or Crimes Against Humanity . . . . . 330  
 A. Darfur . . . . . 330  
 B. Israeli Occupied Palestinian Territories . . . . . 333  
 C. Côte d’Ivoire . . . . . 335  
 D. Libya . . . . . 338  
 E. Syria. . . . . 341

IV.	The Complementary Roles of UN Human Rights Investigation and International Criminal Investigation .....	342
V.	Practical Recommendations .....	346
A.	Prevention and Early Warning .....	347
B.	Appropriate Channels for Investigative Response .....	347
C.	Tightening Up of Inquiry Procedures .....	348
D.	Training in Fact-Finding and Investigations .....	348
E.	Training of Criminal Prosecutors and Investigators .....	349
F.	Training of Peacekeepers .....	349
G.	Lessons Learned and Best Practices .....	349
 <i>Section III. The Added Value of the Mechanism of the Universal Periodic Review of the Human Rights Council</i> .....		 351
 Chapter 5. Peer Review in the Mix: How the UPR Transforms Human Rights Discourse		
	Constance DE LA VEGA and Tamara N. LEWIS .....	353
I.	A New Instrument for the New Millennium .....	353
A.	Introduction .....	353
B.	Chapter Outline .....	357
II.	The Mission of the UPR .....	357
A.	Founding Resolutions .....	357
B.	Standards for the Review .....	359
C.	Periodicity and Phases of the Review .....	359
1.	Pre-Review .....	360
2.	Review and Interactive Dialogue .....	360
3.	Adoption of the Final Outcome .....	361
D.	Implementation .....	362
III.	Peer Review: Accountability in Governance Through Multilateral Surveillance and Peer Pressure .....	363
A.	Peer Review's Role in National Policy-Making .....	364
1.	OECD and EU: Examples of Peer Review Used for Policy Diffusion/Convergence .....	364
2.	UPR Success Measured Through its Influence on National Human Rights Policy .....	366
IV.	The First Cycle of the UPR: Accountability for Human Rights Obligations .....	367
A.	Data Gathering .....	368
B.	National Consultations .....	369
C.	Constructive Final Recommendations .....	371

1.	Wording of Recommendations has Become More Specific . . .	371
2.	The Recommendations Reinforce Treaty Body and Special Procedures . . . . .	372
3.	Wide Breadth of the Subject Matter Covered by Recommendations . . . . .	374
D.	Transparency . . . . .	376
V.	Improving the Universal Periodic Review . . . . .	377
A.	Three Recommendations for Improving the UPR . . . . .	377
1.	Reconsider the Roles of the Secretariat and the Troika . . . . .	378
a.	OHCHR Secretariat as Theme and Agenda Setter . . . . .	378
b.	The Troika as the Review Facilitators . . . . .	379
2.	Theme-Related, Time-Specific Recommendations . . . . .	380
a.	Limiting the Number of Recommendations . . . . .	380
b.	Time-Specificity . . . . .	383
3.	Establish the Modalities for a Formal Follow-Up Procedure . .	383
VI.	Conclusion . . . . .	384

<i>Section IV. Enhancing the Work of the Special Procedures of the Human Rights Council . . . . .</i>	<i>387</i>
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Chapter 6. The System of the UN Special Procedures: Some Proposals  
for Change

Ingrid NIFOSI-SUTTON . . . . .	389	
I.	Introduction . . . . .	389
II.	The UN SPs: Main Characteristics . . . . .	390
III.	The Subject Matter of Thematic Mandates . . . . .	390
A.	Thematic Mandates and Implementation . . . . .	391
IV.	The Subject Matter of Country Mandates . . . . .	397
A.	Implementation of Country Mandates . . . . .	397
V.	The SPs and the Universal Periodic Review . . . . .	399
VI.	The Review of the Human Rights Council . . . . .	400
VII.	Coordination Among the SPs . . . . .	402
VIII.	The SPs and Treaty Bodies . . . . .	405
IX.	The Strengths and Flaws of the SPs . . . . .	406
X.	Conclusions and Recommendations . . . . .	413
A.	The Conceptual Framework of the SPs . . . . .	413
B.	The Structure of the System of the SPs . . . . .	414
C.	The Effectiveness of the SPs . . . . .	415
D.	Management . . . . .	417
E.	Contribution to the Work of Treaty Bodies . . . . .	417

Chapter 7. The Unfinished Business of a Special Procedures System	
Tania BALDWIN-PASK and Patrizia SCANNELLA . . . . .	419
I. Summary . . . . .	419
II. Introduction: Special Procedures – A Cornerstone of Human Rights Protection. . . . .	420
III. Rationalization, Duplication and “Filling The Gaps” . . . . .	424
A. Rationalizing, Reviewing and Improving the Mandates . . . . .	425
B. Minding the Gaps . . . . .	427
C. Conclusion . . . . .	428
IV. Dealing with the Challenge of Uncoordinated Proliferation and Gaps in Coverage . . . . .	430
A. Criteria to Guide the Creation of New Thematic Mandates. . . . .	430
B. Gaps in Country Scrutiny . . . . .	432
C. The Creation of Country Mandates . . . . .	432
D. Duration of Country Mandates . . . . .	435
E. Conclusion . . . . .	437
V. Early Warning, Emergency Response and the Special Procedures . . . . .	437
A. Conclusion . . . . .	439
VI. The Principle of Cooperation . . . . .	440
A. Standing Invitations – Mask or Measure of Cooperation?. . . . .	442
B. Urgent Appeals and Communications . . . . .	444
C. Conclusion . . . . .	445
VII. The Paramount Importance of Follow-Up . . . . .	446
A. Follow-Up to Communications . . . . .	446
B. Follow-Up to Country Visits . . . . .	447
C. Follow-Up at the Political Level . . . . .	449
D. Conclusion . . . . .	452
VIII. Appointment of Mandate-Holders . . . . .	452
A. Broadening the Pool of Candidates . . . . .	459
B. Dealing with Unexpected Vacancies and Appointment of Country Mandates . . . . .	461
IX. Of Codes and Conduct . . . . .	463
A. Conclusion . . . . .	470
X. The Resources Gap . . . . .	470
A. Transparency of Funding . . . . .	474
B. Determining Requirements and Allocations . . . . .	476
XI. Conclusion . . . . .	478
<i>List of Contributors</i> . . . . .	479

# CHAPTER 1

## BUILDING A UNIVERSAL SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: THE WAY FORWARD

Olivier DE FROUVILLE\*

*“States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.”*

Those words from Kofi Annan, then Secretary General of the United Nations spelled the end of the Commission on Human Rights.

In his 2005 report “In Larger Freedom: Development, Security and Respect for Human Rights”, the Secretary General, while recognizing that the Commission on Human Rights was a unique global forum for the discussion of human rights issues, expressed strong criticisms. Kofi Annan stressed that the Commission “[had] been increasingly undermined by its declining credibility and professionalism.” He then proposed the replacement of the Commission by a “Human Rights Council” that would be “a principal organ of the United Nations or a subsidiary body of the General Assembly” and whose members “would be elected directly by the General Assembly by a two-thirds majority of members present and voting.” Annan moreover suggested that “[t]hose elected to the Council should undertake to abide by the highest human rights standards.”<sup>1</sup> This idea was taken up by some states and promoted by the then High Commissioner for Human Rights, Louise Arbour. The United Nations General Assembly, on the occasion of its September 2005 High-Level Plenary Meeting, proposed the creation of a new Human Rights Council. One vague and general section of the Outcome Document, which did not reflect the Secretary General’s proposals stated:

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\* Professor at the University of Montpellier; Vice-Chair of the United Nations Working Group on Enforced or Involuntary Disappearances; Member of the French National Consultative Commission on Human Rights. The opinions expressed in this paper are personal.

<sup>1</sup> Doc. A/59/2005, §§182–183.

“157. Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council.

158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.

159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.

160. We request the President of the General Assembly 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”.<sup>2</sup>

One must remember the prevailing atmosphere at that time. A conflictual consensus had emerged. For different reasons, sometimes for totally opposing reasons, nearly all States demanded the end of the Human Rights Commission (Commission). At the eve of the 21<sup>st</sup> Century, there was a frenzy for reform. Unfortunately, there was no consensus on the kind of reform to be adopted: reforming the Security Council is still in debate today; and bringing other than strictly technical adjustments to the General Assembly or the Economic and Social Council seemed hopeless. The only body about which a consensus seemed possible was the Commission, because everyone agreed that it should disappear! The Commission was not *credible anymore*. It was wholly “discredited”.

Once the deed was done, it was time to think about what should happen next. The expectations were clearly stated: the Commission had been too politicized, so the Human Rights Council (Council) would have to be non politicized; the Commission had been an arena for political confrontation among States, so the Council would have to be an effective tool for human rights protection, responding to serious human rights violations in a spirit of impartiality and non selectivity. The diplomats in New-York and Geneva<sup>3</sup> would invent the new structure and somehow make it workable. Tribute should be paid to the diplomats, because they succeeded, in a short time and on a somewhat thin foundation, to build an institution that is indeed workable.

Five years after its creation, this chapter reviews the initial promises to see whether the expectations have been fulfilled. In this chapter, I explain why the

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<sup>2</sup> Resolution 60/1, 16 September 2005, §§157–130. Compare with the draft outcome document, dated 22 July, prepared by the Secretariat: §§130–132.

<sup>3</sup> In New York, General Assembly Resolution 60/251 of 15 March 2006 established the Human Rights Council; while in Geneva, the Council itself, after difficult negotiations, adopted resolution 5/1 of 18 June 2007 containing the “Institution Building Package” – better known as the *IB Package* or *IBP* – which sets more precise rules on a certain number of topics.

creation of the Council did not bring a qualitative change to what existed before. While recognizing that some improvements have been achieved, including those acknowledged in the recent reviews<sup>1</sup>, the major modifications sought by the Secretary General were not forthcoming (1°). This chapter explores the case of the emblematic innovation brought by the establishment of the Council --, the *Universal Periodic Review* (UPR). This paper argues that, in its present form, the UPR does not constitute a major innovation in the human rights system (2°); and then reflecting on the notion of “progress” of the system, identifies the deficiencies of the Council that prevent it from achieving real progress (°3). Defending the idea that any reform should be based on sound theoretical basis, I will conclude by trying to make some constructive proposals on how the system should evolve in the future.

## I. CHANGE OR CONTINUITY: HAS THE ESTABLISHMENT OF THE COUNCIL REALLY CHANGED ANYTHING IN THE UNIVERSAL SYSTEM OF HUMAN RIGHTS PROTECTION?

It was hoped that the Council would help to resolve the main problem that hampered the Commission’s ability to effectively protect human rights: its politicisation. I will argue in this section that one characteristic of the recent evolution of this system is that there is generally no vision for its future (although this probably began to change with the review processes). One needs to say that actually the Commission has been in a constant process of reform since the late 90’s. The most important of these reforms – the so-called “Selebi reform” (named after the South African ambassador of that time who chaired the Commission), had also been prompted by criticisms of the Commission’s politicisation and selectivity.<sup>2</sup> At that time there was a broad division between those who wanted to limit the number and powers of special procedures, and those who, on the contrary, promoted the development of those procedures for the protection of human rights. A balance was reached at the end of the process. Some argued that “les meubles ont été sauvés”, but the “reform” was not based on any specific concept of how to improve the organisation of the system or how to enable it to protect human rights more efficiently.

<sup>1</sup> There have been two reviews of the HRC, one in Geneva and the other in New York. The outcome of the “Geneva Review” is included in the resolution of the Council 16/21 of 25 March 2011, adopted without a vote; the outcome of the “New York Review” is found in General Assembly resolution 65/281 of 17 June 2011, adopted with 154 votes in favour and 4 against (Canada, Israel, Palau, United States of America).

<sup>2</sup> See O. de Frouville, “Les organes subsidiaires de la Commission des droits de l’homme des Nations Unies. Rapport général”, in E. Decaux, *Les Nations Unies et les droits de l’Homme: enjeux et défis d’une réforme*, Pedone, coll. “FMDH”, 2006, pp. 171–199.

In 2005, the Secretary General submitted a concrete – although brief – proposal in order to reach that goal: the creation of a smaller body, composed of States whose human rights records would be undisputable.<sup>3</sup> Although supported by the US and some other States, the proposal was both unrealistic and unconvincing. Unrealistic because it was unbelievable to think that the great majority of the 193 member States of the UN would accept to see their cases considered by a small number of their peers, no matter how virtuous they could be. Unconvincing because the proposed solution did not attack the main cause of the identified problem as being the previous “politicisation” of the system. In its essence, the proposal consisted in changing the size of the body, but not its nature: the new Human Rights Council would still be an intergovernmental body, just as the Commission. Since States are, in essence, politicized institutions, in the sense that their acts are mainly driven by their national interest, the truth is that, in a body composed of States, the public discussion on any topic, but strictly technical, can only be politicized. Even though human rights as such are part of the legal discipline, this topic is of course particularly sensitive to politicization.

Nevertheless, this very thin proposal was sent as a working basis to diplomats in New York and Geneva, who did their best to make something out of it. The result is certainly totally different from what was initially expected, as confirmed by the practice of the Council in the first years of activity. The Council appeared to be a highly politicized and polarised body, focussing on certain country situations while ignoring others, failing to react to certain crisis, while over-reacting to others... At the same time, the General Assembly resolution 60/251<sup>4</sup> and the Council’s resolutions 5/1<sup>5</sup> brought a certain number of novelties, some of which can be considered as improvements, others as drawbacks, and most of them having both positive and negative aspects.

This chapter does not discuss the details of this assessment<sup>6</sup> but selects a few striking examples for discussion (the UPR will be specifically discussed in the next section).

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<sup>3</sup> See the Introduction above.

<sup>4</sup> “Human Rights Council”, 15 March 2006.

<sup>5</sup> The “Institution building of the United Nations Human Rights Council”, that is commonly known as the *Institution Building Package* or *IB Package*.

<sup>6</sup> For a detailed assessment with regards both to the “acquis” of the Commission and to the innovations introduced through the Council, see the Opinion of the French National Commission for Human Rights (CNCDH), September 2010, on the Commission’s website: [www.cncdh.fr/](http://www.cncdh.fr/).



## A. NEGATIVE ELEMENTS

On the negative side, the creation of the Council meant the end of the *Sub Commission for the Promotion and Protection of Human Rights* and its replacement by the “Advisory Committee”. The Sub Commission had virtually no one to defend it. Some states found that it was too pro-active and took too many (disturbing) initiatives; some others felt, on the contrary, that its members were not independent and that it was also too “politicized”, particularly when it insisted on the importance of economic, social and cultural rights, the rights of minorities or the protection of indigenous peoples.

Despite its shortcomings – which were real – the Sub Commission had also been a very creative think-tank, which not only initiated most of the standard-setting procedures that took place within the Commission, but also gave the impulse for the creation of a great number of special procedures, such as the Working Group on arbitrary detention, the Special Rapporteur on freedom of expression or the Special Rapporteur on adequate housing. Not to mention the work done by the Sub Commission on countries which, far from duplicating the work done by the Commission, complemented it in dealing with countries that, in a political body, were totally immune to criticisms or supervision.<sup>7</sup>

The Advisory Committee is deprived of what made the Sub Commission such a creative body: its unique one-month session in August, its capacity to initiate studies and appoint special rapporteurs or working groups, its power to vote resolutions on themes or countries... No need to say more: for those who knew the days of the Sub Commission, it's enough to have a walk in Room XX of the Palais des Nations. The room is almost empty, States have almost deserted the place and, what is even more striking, very few NGOs are attending those meetings. The members of the Advisory Committee have, since the beginning, done their utmost to make their institution meaningful again, but the situation remains challenging. It is to hope that the Advisory Committee will, in the future, be able to gain more autonomy vis-à-vis its parent body – the Human Rights Council.

## B. POSITIVE ELEMENTS

Other measures taken by creating the Council can be considered as improvements, at least if properly implemented. In this regard, the review processes conducted at the end of the first five years of activity of the Council

<sup>7</sup> See Olivier de Frouville, “Les organes subsidiaires de la Commission des droits de l’homme des Nations Unies. Rapport general”, *supra* note 5.

helped to set the potential for this mechanism in motion. Among other positive elements, one can note:

i) **The upgrading of the status of the Council**, which is now a subsidiary body of the UN General Assembly, as compared to the Commission which was a subsidiary organ of the Economic and Social Council, is on its face an improvement, as it places an institutional foundation below the concept put forward by the UN Secretary General of the indivisibility between Security, Development and Human Rights. However, even if we put aside the controversial fact that the closing down of the Commission without amending the UN Charter and its article 68 could be considered unconstitutional, still other problems resurfaced.

Some of the problems were solved from the very beginning – such as the issue of participation of NGOs in the session of the Council<sup>8</sup> – whereas others are still pending, such as the mode of interaction between the Council, the UN General Assembly, and its third Committee. On this issue, the General Assembly Review process failed to reach a consensus and the present *status quo* was more or less preserved with some slight modifications, which bring little to the main issue: the dispute about whether the Council should report to the 3<sup>rd</sup> Committee or directly to the plenary will probably go on in the near future.<sup>9</sup> The funding problem is also still pending, essentially because some decisions of the Council having financial implications can only be approved once in the year by the UN General Assembly, following deliberations by the 5<sup>th</sup> Committee. However, as many decisions requiring funding are taken as the events unfold throughout the year, this creates insurmountable problems for the budget of the Office of the High Commissioner.<sup>10</sup>

ii) **The principle of election of the members of the Council by a majority of the General Assembly's members and the practice of "pledges" by States<sup>11</sup>** can also be considered as improvements. This raised great enthusiasm in the beginning among observers. However, it soon appeared to be quite ineffective, mainly for two reasons: first, the regional groups would in general present "single already agreed candidates" to the elections, so called 'clean slates', thus leaving no space for competition between States on the basis of their pledges; second, the UN

<sup>8</sup> In Resolution 60/251, the General Assembly 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".

<sup>9</sup> See op. para. 6 of Resolution 65/281 (New York Review).

<sup>10</sup> See op. para. 8 and 9 of Resolution 65/281.

<sup>11</sup> That is the States commitments to undertake certain reforms or to take certain measures to promote and to protect human rights during their term, if elected to the Council.

General Assembly or the Council did not set any mechanism to assess the effective implementation of the pledges. These two shortcomings were much discussed during the New York Review Process, although eventually no consensus could be reached on a way to enhance the election procedure. Despite the fact that we are very far from the initial idea of a Council made up of virtuous States, the practice in the General Assembly, under the influence of some States, has discouraged the candidacy of a number of States whose human rights records were particularly poor. But while this could be considered “progress” for someone who knows the system well, the same view would certainly not be shared by an outside observer (“the general public”), who would still ask why other States whose records are not particularly brilliant, but who are more influential in world’s politics, continue to have a seat on the Council.

iii) **The initiation of special sessions has been facilitated.** Whereas special sessions of the Commission could only be initiated by a majority of States<sup>12</sup>, now only one third of the Council member States (at least 16) can agree to convene a special session... with the result that, since 2006, seventeen special sessions have been held, mostly on country situations (compared with the five special sessions held by the Commission during its entirety). This is certainly a major improvement, although the 11<sup>th</sup> special session on Sri Lanka in May 2009 has showed that the most difficult issue remains to find a consensus on an appropriate reaction to a situation of violations of human rights.<sup>13</sup> Faced with the recent political unrest in certain countries, the Council took effective action on Ivory Coast, Libya and Syria. But it remained silent on Tunisia, Egypt and Bahrain (and is less proactive in the case of Yemen, not to speak about China)... It is a fact that special sessions did not totally cure the “selectivity syndrome”.<sup>14</sup>

iv) **The selection process of Special procedures mandate holders has been totally reviewed, in order to make it more formal and transparent.** This is clearly an improvement if compared to the opaque procedure that prevailed under the Commission. The early practice, however, created quite a lot of discontent, with what seemed often to be arbitrary selections either by the “Consultative Group” of ambassadors, or by the Chair, who would sometimes choose another candidate rather than the one recommended by the Group, without any apparent or rational justification. This is one of the issues

<sup>12</sup> See the ECOSOC resolution 1990/48 of 25 May 1990, authorizing the Commission to hold special sessions.

<sup>13</sup> See the account in the 2009 *Human Rights Monitor* published by the International Service for Human Rights, p. 26.

<sup>14</sup> See Human Rights Watch, *Curing the Selectivity Syndrome: the 2011 Review of the Human Rights Council*, 24 June 2010.

streamlined by the Geneva Review process.<sup>15</sup> The last appointment report of the Consultative Group is a clear evidence of this qualitative step.<sup>16</sup>

v) **The consolidation of the practice set by the Commission to hold “interactive dialogues” with the Special procedures** is also a positive contribution of the reform process. Still the practice of interactive dialogue by the Council has been so far disappointing, with the “clustering” of several Special procedures which makes the debate very confusing and difficult to follow. Besides, time constraints result in the “interactive dialogue” not being a real “dialogue” and even less an “interactive” dialogue: each mandate holder has only ten minutes to present its report (plus 2 minutes for each addendum). Thereafter the States take the floor for hours, and then the “other stakeholders” (NGOs and NHRIs). The process leaves only five minutes for each mandate holder to respond at the end of the statements!

### C. DEVELOPING TRENDS

Finally, one can identify some “trends” that appeared in the last years of the Commission and which were strengthened in the first years of the Council.

A *first trend* is the challenge to the Special procedures’ independence and impartiality. Statements by States against Special procedures mandate holders were already frequent in the late years of the Commission, but became almost general practice in the Council. This trend materialized in the adoption of the *Code of Conduct for Special Procedures Mandate Holders of the Human Rights Council*<sup>17</sup> and by the more recent proposal to set up a “supervisory body” that would deal with State complaints of violations of the *Code* by Special procedures mandate holders. This issue was seriously discussed during the Geneva Review process. The need for mandate holders to scrupulously respect the *Code of Conduct* was counterbalanced with the obligation of States to fully cooperate with the Special procedures. This obligation – which, by the way, can be inferred from Articles 55 and 56 of the UN Charter – was recalled in the *outcome*

<sup>15</sup> See the outcome of the review contained in Resolution 16/21 of the Council, par. 22: from now on, each candidate shall submit an application for each specific mandate and is to be interviewed by the Consultative Group. The Group, on its side, shall “consider, in a transparent manner, candidates having applied” whereas the President “shall justify his/her decision if he/she decides not to follow the order of priority proposed by the Consultative group”.

<sup>16</sup> See the Letter of the Chair of the Human Rights Council transmitting the report of the Consultative Group relating to the Special Procedures mandate holders to be appointed at the 18<sup>th</sup> session of the Human Rights Council.

<sup>17</sup> Resolution 5/2 of the Human Rights Council, 18 June 2007.

*document*<sup>18</sup>, a wording which appears to be one of the most important achievements of the Geneva Review process.

*A second more worrying trend* takes the form of progressive restrictions imposed on the NGOs' contributions to the Council. NGOs have always been the object of attacks during the Commission period, when they criticized the human rights situations prevailing in some countries. Furthermore, the phenomenon of "GONGOs" (i.e. "Government Operated NGOs", NGOs aligning their positions with that of their national governments) has always been of some concern, as it contributed to discredit the whole NGO community which the result that their speaking time is being reduced now.<sup>19</sup> The overall situation for NGOs in the Council, instead of improving became even worse in certain aspects, so much that nowadays NGOs at times are simply left out of the negotiations, which the last Geneva Review process attests.<sup>20</sup> The fact that the Council is now holding three sessions, in addition to the UPR working groups, and the special sessions has been straining NGOs resources. At a time when even Geneva-based NGOs experience difficulties following the work of the Council, it is not difficult to presuppose that the situation has become much worse for national or small international NGOs. NGOs, which used to attend systematically the sessions of the Commission on human rights have to use alternative means to monitor the activities of the Council. The Webcast has certainly been playing a significant role in this respect. So did those NGOs which specialized in informing about the activities of the UN in the field of human rights, notably the already veteran *International Service*, but also some others, whose creation was prompted by the setting up of the Council. Nonetheless, the modalities of participation of NGOs remain unsatisfactory, compared to the recent practice of other institutions. Resolution 96/31 of the ECOSOC (which serves as a basis for NGOs participation in the work of the Council) seemed very advanced in its time<sup>21</sup>, but is now mostly outdated and needs reviewing.<sup>22</sup>

<sup>18</sup> See Resolution 16/21, par. 26: "States are urged to cooperate with and assist special procedures by responding in a timely manner to requests for information and visits, and to study carefully the conclusions and recommendations addressed to them by the special procedures."

<sup>19</sup> See our contribution: "Domesticating Civil Society in the United Nations", in Pierre-Marie Dupuy, Luisa Vierucci, NGOs in International Law. Efficiency in Flexibility?, Cheltenham/Northampton, Edward Elgard, 2008, pp. 71–115.

<sup>20</sup> See the account by the International Service for Human Rights, *Human Rights Monitor Quarterly*, Issue 2, 2011, p. 8.

<sup>21</sup> See: Sara Guillet (winter 1999), "Les relations entre les ONG et l'ONU dans le domaine des droits de l'Homme: un partenariat en mutation", *L'Observateur des Nations Unies*, n° 7.

<sup>22</sup> In fact such a process was started in 2004 when the Secretary General decided to "assemble a group of eminent persons representing a variety of perspectives and experiences to review past and current practices and recommend improvements for the future in order to make the interaction between civil society and the United Nations more meaningful." (A/57/387, §141.) The report was handed down to the Secretary General in June 2004 (A/58/817). The Secretary

## II. IS THE UPR OF REAL ADDED VALUE TO THE SYSTEM?

The UPR needs special attention, as it appears to be the “flagship” of the Council, its most visible innovation. The “Human Right Council” concept was initially quite empty as we have seen (except the Secretary General proposal described above related to the composition of the Council), but the idea of setting up a “peer review” helped to give it more substance. It was also, apparently, a correct answer to the critics of “politicization”, as the UPR would impose some kind of supervision of the human rights situation in all States of the United Nations, on an equal footing. The UPR, it’s a fact, formally gives no room for selectivity, as the review program is systematic and does not reflect the concerns of particular States or groups of States at a certain moment. This systematic character can also create discontent or difficulties: what would happen, for instance, if a State goes through a serious crisis, with numerous human rights violations that prompt, for instance, the holding of a special session and the appointment of a special country mechanism? A recent example is Syria (the human rights situation in that country was reviewed at the 12<sup>th</sup> session, in October 2011 following two special sessions on Syria that had previously taken place.

The UPR was supposed to give an overview of the human rights situation in the world. It was also supposed to be a tool to trigger work towards the “improvement of the human rights situation on the ground”<sup>23</sup> by subjecting all States to a continuing oversight of the measures taken. As fears were expressed that the UPR may somewhat duplicate existing mechanisms (in particular the treaty bodies and the special procedures), language was included in resolution 5/1 to ensure that the future procedure would “complement rather than duplicate” other human rights mechanisms, thus offering an “added value”.<sup>24</sup>

In fact, the UPR has failed to live up to the expectations. Certainly, some may argue that a real assessment will only be possible at the end of the second cycle. That is partially true, since the Council will be following up on the recommendations made during the first cycle. However, it is possible at this stage to draw three preliminary conclusions.

**a) The “complementarity” and the “added value” of the UPR is far from being proved.** There is no real complementarity because there is no real interaction between the UPR and the other mechanisms for the protection of human rights.

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General responded to it in a report published in September 2004 (A/59/354). The reports were transmitted to the General Assembly for consideration. But no action was ever taken.

<sup>23</sup> See Resolution 5/1, Annex, para. 4-a.

<sup>24</sup> See Resolution 5/1, Annex, para. 3-f.

For sure, one of the three reports used as a basis for the review is a “compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned”<sup>25</sup> But this ten pages document is not a real “compilation” but a brief and sometimes selective summary of some observations and comments made by the independent experts’ bodies. Additionally it is only one of the three reports used as a basis. Two others are the State’s report, and the report compiling the documents submitted by “other stakeholders”, i.e. mainly NGOs and NHRIs. Furthermore, the reviewing states would only pick up, among those recommendations, a few that they consider to be consistent with their own purpose. At the end, the hard work made by the treaty bodies and the special procedures is totally simplified, summarized, diluted.

But this is certainly not yet the worst that could have happened. The worst is that far from being complementary, the UPR is overshadowing the work of the treaty bodies and of the special procedures. It is overshadowing it in the most immediate sense, through the media and the general public, who now tend to identify the UN human rights system with the UPR. As a result the UPR session of one country usually attracts much more media and general public attention than the review of the periodic report of that same country before a treaty body, for example the Human Rights Committee. This means that, for a given country, the UPR outcome documents adopted by the Council’s 47 member States is more visible than the “concluding observations” of a committee of independent experts. This is all the more unfortunate since, when one compares the two documents (i.e. the UPR outcome document and Treaty Body Concluding observations), one is left at times with the impression that they do not address the same country situation. Pre-revolutionary Tunisia was a striking example, when the representatives of Mr. Ben Ali’s regime presented almost simultaneously their UPR report to the Human Rights Council and their periodic report before the Human Rights Committee. The comparison between the two documents coming out from those procedures talks for itself, and it is shameful for the UPR.<sup>26</sup> Whereas the Committee pointed out areas of concern and made recommendations in the most accurate manner, the immense majority of the States taking the floor during the UPR focused on praising this country for its great achievements in the field of human rights, including its “pluralist” democracy, the freedom of the media and the interaction with civil society...

<sup>25</sup> See Resolution 5/1, Annex, para. 15-b.

<sup>26</sup> Report of the UPR Working Group: A/HRC/8/21 and Corr.1 (2008) and Concluding observation of the Human Rights Committee on Tunisia, CCPR/C/TUN/CO/5.

This situation is all the more worrying since the working group's meetings have in some cases been below the required level because of the complacency of the statements made by some states. The procedure originally set to establish the list of speakers aggravated this phenomenon: the principle "first come, first served" allowed the most "friendly" states to register before the others, in an attempt to monopolize the speaking time.<sup>27</sup> Fortunately, this is one of those "technical" issues that the Geneva review has fixed up by imposing the passage of speakers in the alphabetical order.<sup>28</sup> Retrospectively, watching the UPR of Libya is surrealistic (as well as reading the outcome document), with a series of statements congratulating the Jamahiriya for its progress in the field of human rights! Is it really the image that the United Nations wants to give of itself? Wouldn't it be better to webcast the meetings of the Human Rights Committee or of other committees, during which the good questions are put to the government in relation with the real state of human rights in the country? To this regard, how can it be explained that that all the Council's sessions and all the UPR working groups' session are "webcasted", and not the sessions of the treaty bodies?

It is somehow ironic that, today, the treaty bodies and some special procedures are quoting "accepted" recommendations by States during their UPR, in what seems to be an attempt to give some legitimacy to their own identical recommendations, which had been previously released, sometimes years before. Can someone call this circular type of cross-references, when different organs cite each other's recommendations "complementarity"?

The UPR is also materially overshadowing the other mechanisms and I can testify, as a member of the Working Group on Enforced or Involuntary Disappearances, one of the Council's special procedures, that we have often waited translations of important documents for months, because the translators were all busy with translating the hundreds of documents needed for the UPR process.<sup>29</sup> It is not only the victims of human rights violation that are caused prejudice by these delays, but also the states, whose answers to our questions and

<sup>27</sup> It must also be said that, on the contrary, it happened sometimes that the most "unfriendly" would do their best to register first. See for instance the UPR of the US where Cuba took the floor as the first speaker during the working group and the plenary meetings.

<sup>28</sup> See the Appendix of the Outcome and Decision 17/119 of 17 June 2011, par. 8.

<sup>29</sup> In 1947, the Commission of Human Rights decided not to respond to human rights complaints that were addressed to it. The Secretary General of the UN was only tasked to transmit those complaints to the members of the Commission once in a year, but no action would ever be taken. John Humphrey, who happened to be the first "Director of Human Rights" in the UN and one of the inspirers of the UDHR "characterized the restrictive procedure as "probably the most elaborate wastepaper basket ever invented", quoted in Tolley Jr. H., *The U.N. Commission on Human Rights*, Westview Special Studies in International Relations, Westview Press/Boulder & London, 1987, p. 18. One can wonder whether the UPR has not broken the record set by this previous procedure.



requests are not translated in time to be taken into account by us, and thus are sometimes not even included in our annual report. By the way, how can someone explain that mission reports by special procedures are not translated in all official languages of the UN? That follow-up reports and communications reports are not translated either? If the means put in the UPR process would have been affected to the special procedures (including staff members which are always scarce), this would have certainly gave much more strength to those procedures. There is, here, a cost/benefit test to implement, to see whether the funds used for the UPR would not be used with more benefit to human rights if diverted to other activities.

**b) The global efficiency of the mechanism is wholly dependent upon the good will of the state under review.** In that sense the UPR is not as equalitarian as it pretends to be. States who want to take it seriously will be very much involved in the process and will certainly profit from it. That is certainly the case for those who held prior consultations with civil society in preparation of the report at the domestic level, and who would thereafter set up a domestic inclusive process oriented to the implementation of the recommendations. This is also true of those who would present a mid-term assessment on the implementation to the General Assembly, and, hopefully, take some positive steps in conformity with the recommendations. But on the contrary, it is very doubtful that the UPR can be of any use in the case of those who are not really willing to participate and who only will be striving to escape criticism as much as they can. One aspect that seems crucial, in particular, is how the state will interact with its domestic civil society along the process. The participation of national civil society is key to get some positive results. But this will never happen in states where the only kind of relationship existing in between the government and the civil society is that of repression or denial.

In the State's point of view, it may seem a bit paradoxical that the States who take it the most seriously and who are the most honest are also those who may carry the most heavy burden in terms of obligations and who may get the more criticized in the end. Debating with civil society, committing itself to implement recommendations at the national level, setting up some specific mechanisms to this regard is costly. On the opposite the dishonest state whose firm intention from the very beginning is only to "look as if" might get a bit stressed before the working group's debate, but will shortly be reassured when all his "friends" will take the floor to congratulate it on its achievements (expecting they will get the same treatment in return). Those states are fundamentally unequal: the honest state is punished while the dishonest state is rewarded. This cannot happen before the treaty bodies or the special procedure. On the contrary, the non-cooperative state will be clearly singled out and "punished", for instance by

having its periodic report reviewed in its absence. It is the same price for all. Thus, whereas the UPR is formally “non selective” and equalitarian in nature, it in fact treats some states “more equally than others”.

**c) The third remark concerns the nature of the process.** It is a “political” process, in the sense that, as the *Institution Building Package IBP* (resolution 5/1 of the Council) puts it, it is “an intergovernmental process, United Nations Member-driven” (para. 3-d). There is nothing bad in this: again, the UN is an intergovernmental organization and, as such, aside the Secretariat, is composed of political organs, and it is quite logical that political debates are held in those political organs. However, human rights are legal norms and the UPR, according to the IBP, also aims at “[t]he fulfilment of the State’s human rights obligations and commitments” (par. 4-b). Furthermore the “basis” of the review are:

- “(a) The Charter of the United Nations;
- (b) The Universal Declaration of Human Rights;
- (c) Human rights instruments to which a State is party;
- (d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council (hereinafter “the Council”).”

It is obviously very difficult for a political entity to address legal norms, as the interpretation it will give of those norms will always be oriented by extra-legal considerations and in particular, as far as states are concerned, by their national interest. This can be seen clearly in the practice of the UPR. One concern which has been often raised, even by some states, is that the “recommendations” made by individual states may be infra standard, i.e. it would impose a lesser degree of duty than what the legal obligation requires. This is all the more worrying since states, according to the UPR rules, can either “accept” or “reject” recommendations, with the risk that some recommendations, in fact corresponding to a legal obligation of the state, would be rejected. It is not only, here, that the UPR would not be “complementary” to the treaty bodies of the special procedure: in these cases, the UPR would really undermine the work of these mechanisms in allowing the state to reject obligations which are binding on it.

It is all the same clear that it is almost impossible for an intergovernmental body to formulate a genuine legal assessment of a situation, devoid of any political resonance. Besides, in general, those types of bodies would be reluctant to express such an assessment. The IBP provides that the outcome document of the review must contain “[a]n assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country”. But this has

never happened. The result of this is that the legal dimension of the process gets totally lost in the middle. With the effect that state's obligations are in fact diluted and weakened by the UPR process. States can now play the UPR against the treaty bodies and the special procedure. And they can do that all the more that, as we have said above, the public's attention is focussed on the UPR and not on the work of the independent experts.

After this short review, it appears clearly that the Council has not lived up to its promises. The Council is a politicized body, just as the Commission was. A certain number of improvements have been achieved, but the creation of the Council has not really changed the of human rights protection system. The nature of the system is still fundamentally the same.

This paper will now identify the reasons why there has been no real progress in creating the Council. The final section will give some insights of how the system for the protection of human rights could evolve in the future.

### III. WHY THE COUNCIL DOES NOT REPRESENT A REAL PROGRESS FOR THE UNIVERSAL HUMAN RIGHTS PROTECTION SYSTEM

The notion of "progress" might seem to be mostly subjective. It is difficult to speak of progress when applied to certain matters, like art, for instance. But when applied to other objects, like tools or technologies, progress gets a clearer meaning. Of course, one may say that each "progress" has its positive and its negative sides. For instance, the discovery of nuclear fission certainly represented a progress for science, but among other applications, some of them "positive", it also led to the invention of the nuclear bomb.

But still progress is something objective (apart from any value judgement) when, in relation to a certain univocal purpose, the method used to reach this purpose has improved in terms of efficiency.<sup>30</sup> For instance, if the purpose is to travel as fast as possible from point A to point B, high speed trains are clearly a "progress" in comparison to steam trains. This kind of notion of "progress" can be applied to procedures: as procedures are a set of rules oriented towards the realization of certain purposes, a procedure can be said to have made progress when it is more efficient in realizing its own purpose, at least when this purpose is clearly

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<sup>30</sup> See the discussion of notion of progress by Raymond Aron, in *Dix-huit leçons sur la société industrielle*, coll. Idées, Gallimard, 1962, p. 82.

identified and univocal.<sup>31</sup> Progress is of course a function of certain external parameters (like the political situation prevailing at a certain time that favours the realization of the said goal), but it is also a function of internal parameters, like the composition of the organs of the procedure and how the relationship between those organs is organized. Since Montesquieu, we know for instance that the balance of powers between the different organs of the State is a key element in constitutional engineering. The same kind of principles holds true for other types of institutions and procedures.

The purposes of the Human Rights Council are stated in General Assembly resolution 60/251, paragraph 5:

- “(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;
- (b) Serve as a forum for dialogue on thematic issues on all human rights;
- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- (d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- (e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;
- (f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
- (g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for

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<sup>31</sup> The notion cannot be applied in relation to procedures that would have a plurality of purposes, some of them conflicting with the others. For instance, one can speak of “progress” in relation to a procedure whose relation is the “settlement of dispute” or the “protection of the physical integrity of persons who are threatened in their lives and limbs”. But one would find it hard to speak of “progress” for a procedure which purpose would be both to “make justice” and to bring peace, two purposes which are often found to be conflicting, even though they might coincide in some cases. Measuring “progress” would then need to address both purposes separately. See Raymond Aron, note 33 above, about the plurality of purposes of the economic activity and thus, the difficulty of applying the concept of “progress” to it.

- Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;
- (h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;
  - (i) Make recommendations with regard to the promotion and protection of human rights;
  - (j) Submit an annual report to the General Assembly;”

I don't think that any of these multiple purposes are in conflict with each others. They all tend to the same global goal which might be summed up as the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”, to take up the language of article 55-c of the UN Charter.

The main argument here is that the Council has not achieved real progress in comparison with the Commission, because its efficiency in reaching that purpose has not fundamentally improved. This is so because the system's structure remains essentially the same.

Schematically the system has four components: the “states” component, the “independent experts” component, the “institutional” components (that is to say the UN as an “integrated” organization, represented by its Secretariat) and the “civil society” component. The “states” component is composed of individual states and of intergovernmental bodies: as we have seen above, states are mainly driven by their national interests and see human rights as vectors to defend their own interests (including when their own interest are closely linked to the defence of human rights, where then a situation of “dédoulement fonctionnel” occurs<sup>32</sup>); their approach of human rights is thus mainly politicized – and not legal – and the debate they have on human rights has a political character and find its conclusion in political compromises. The “independent experts” component is composed of individuals and collective independent bodies, whose mandate is to give a legal interpretation of legal norms and to apply those norms to particular cases in a systematic and non selective manner. In certain cases, those experts can also have a broader mandate of proposing new standards for states to

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<sup>32</sup> “Dédoulement fonctionnel” refers to the French publicist George Scelle's doctrine which showed that the “inorganic” nature of the international legal order was compensated by states who would, in certain matters and circumstances, act as “organs of the international society”. Of course, for that to happen, the national interest of the state and the “international interest” of the international society have to coincide at a certain point. See also Olivier de Frouville, “La Cour pénale internationale. Une humanité souveraine?”, *Les Temps modernes*, n° 610 La souveraineté, automne 2000, pp. 257–288; “Le paradigme de la constitutionnalisation vu du droit international”, in Stéphanie Hennette-Vauchez (dir.), *Les droits de l'Homme ont-ils “constitutionnalisés le monde”? Réflexions à l'occasion du 60ème anniversaire de la Convention européenne des droits de l'Homme*, Brussels, Bruylant, 2011.

approve. They can also have a more “mediator”-like mandate in certain country situations, however always within the framework of the international legal order. Independent experts, as long as they are truly independent, do not serve any state’s interest or even institutional interest (for instance the UN’s interest as an integrated organization). Of course that doesn’t mean that the experts are not part of the political debate, this term being understood in a broad sense – discussions on public affairs, i.e. on how should people live together in a society. But their intervention in the political debate is normally restricted to the reassertion and implementation of the general constraints (among others, legal) within which political decisions can be taken.

The “institutional” component is formed by the members of the Secretariat of the United Nations, who will always tend to represent the Organization as a person, with its own interests and purposes. The Secretariat also has an obligation of “neutrality” towards States that makes its work particularly difficult and sensitive. That is what fundamentally differentiates the work of the “independent experts” from the work of the international bureaucracy: if both serve “international” interests as displayed in international legal norms, the international bureaucracy cannot take sides without being suspected of failing to its mandate. Whereas the independent experts are expected to take sides, as their role is precisely to remind states of their obligations and to denounce the violations.

Finally, the “civil society component” is composed of individuals and organisations representing the diversity of the international society and of the domestic societies. Civil society organizations may represent a great range of interests, sometimes purely private but in some other cases of a public nature.<sup>33</sup> More importantly, they produce a great diversity of point of views, interpretations and factual information on a number of subjects of public interests. Faced with the univocal discourse of the State, civil society discourse clearly represents a precious alternative, which is necessary to reach a reasoned assessment of a situation and thus, rational decisions.

Based on the foregoing, it is possible to identify two main deficiencies in the present system.

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<sup>33</sup> Here we understand “civil society” as including both business organizations and non profit organizations. For a more thorough study of the notion of “civil society”, see our article “La place de la société civile dans les organisations internationales: quelle stratégie pour la France au XXIème siècle?”, in G. Cahin, S. Szurek, F. Poirat, *La France et les organisations internationales au XXIème siècle*, Paris, Pedone, to be published in 2012.

a) **The first aspect concerns the status and participation of civil society.** As we have said above, the universal system for the protection of human rights has given some space to the civil society to express itself and participate. Successively, resolution 1296 (XLIV) and resolution 96/31 of the ECOSOC on the “consultative status” of NGOs have set up the legal framework under which accredited organizations of the civil society could come and actively participate the intergovernmental meetings held in Geneva. The relative “liberal” atmosphere prevailing in Geneva as far as NGOs participation is concerned (if compared to the more restrictive attitude of states in New York) was a major factor of development for the human rights regime, both normative and institutional. NGOs participation gave the impulse for a number of new treaties and instruments, as well as most of the new protection mechanisms, from the Convention (and the Committee) against torture to the Convention (and the Committee) against enforced disappearances, from the “Joinet” Principles on impunity to the Declaration (and the Special Rapporteur) for the protection of human rights defenders, among many other examples. In the middle of the 90’s, the ECOSOC-NGO consultation scheme was still one of the most evolved in all international organizations. However, this came to evolve very fast: as new and more “participatory” models were developed in different regimes and organizations<sup>34</sup>, the participation of NGOs to the Council became more difficult. It sounds as an extraordinary paradox and at the same time is quite revealing that NGO participation was easier in the “New York Review Process” than in the Geneva Review Process, although the General Assembly has no special arrangements for the participation of NGOs.<sup>35</sup> This of course does not affect the special arrangements made with expert bodies, which in general have evolved in a satisfactory way, even if this evolution is far from being homogenous, taking into account that each body sets its own rules on the matter.

If the purpose of NGO participation is also to enhance the efficiency of the UN machinery for the protection of human rights, progress would imply that the rules for NGOs participation in the Council should be drastically improved. This would mean at least suppressing the UN inter-governmental body deciding upon the NGOs’ applications for consultative status to the UN – the “NGO Committee” and replacing it with a more appropriate body of supervision. It would also imply the definition of new arrangements, promoting the participation of NGOs, rather than their “consultation”, and whereby NGOs could be considered not only as “stakeholders” but as both counter powers and partners. *Counter powers* because

<sup>34</sup> See Nicolas Angelet et al., *Société civile et démocratisation des organisations internationales*, Gent, Academia Press, 2005; Laurence Boisson de Chazournes, Rostane Mehdi (dir.), *Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?*, coll. CERIC, Bruxelles, Bruylant, 2005 and our study quoted at note 32.

<sup>35</sup> See the account by the International Service for Human Rights on this point in the *Human Rights Monitor Quarterly*, July 2011, p. 7.

NGOs bring the contradiction in the public debate of human rights and provides alternative views and information to those delivered by the states and the UN system; *partners* in the sense that the civil society is a key actor in the process of implementation of human rights and in the supervision of this implementation by international bodies.

b) **The second aspect concerns the relationship between the “states” component and the “independent experts” component.** During the history of the UN human rights system, States have progressively set up – very often under the pressure of NGOs – a range of procedures and bodies composed of so-called “independent experts”. Why have they done so? Why haven’t they given those competences to interstate bodies? Because they thought that it was appropriate to trust independent experts and not states to fulfil such mandates: they decided themselves to “de-politicize” part of the activity of the human rights system, with the clear understanding that this would produce more efficiency in terms of protection of human rights. At the same time, in this process of continuous creation, the issue of the relationship between those independent bodies and the intergovernmental organs was never reflected upon. This was probably caused partly by the empirical character of the process, and also partly by a wilful omission on the part of the states, who were not very keen to bind themselves to the decisions of experts. The result was the creation of what can be depicted as almost two separate and isolated systems: a “states system” and an “independent system”. The truth is that today the two components coexist side by side, but do not interact effectively, because the states component is not clearly coordinated with the independent component. The instances where this absence of coordination and interaction are the more obvious are the situations in which urgent action would be needed, because serious violations are either on the verge of occurring, or are already taking place. In these situations, the independent experts would “ring the alert bell” in order to trigger preventive measures, or call to the political component to take measures of sanctions and intimidation against the faulting state. But in the present state of things, no specific mechanism is set for these signals to be taken into account and to trigger action on the part of the political body. There is no clear articulation between the two, no systematic inter-relation. Thus the two components, in a way, live a life on their own, independent from each other: the political component might or might not use the information and the signals brought to it by the independent component; conversely, the independent component is only erratically relayed by the state component in its recommendations and its pressures towards member states.

If a real change is to take place, it should tackle this specific problem by establishing systematic links between the two components, at all levels. For instance, the UPR, as we have seen, should not be seen as a quasi-autonomous process, almost totally disconnected from the conclusions and recommendations



of the independent experts bodies. The UPR should be mainly conceived as an intergovernmental process aimed at supervising the implementation of recommendations and decisions made by those independent expert bodies. It is only by conceiving the peer review in close link with the independent component that it would be able to give some “added value” to the system.

Similarly, the syndrome of selectivity can only be cured by setting automatic triggering mechanisms under which, for instance, the special procedures or the treaty bodies would be in a position to put on the agenda some situations according to specific criteria.<sup>36</sup> And this would be just the beginning of a necessary evolution...

#### IV. TOWARDS PROGRESS: HOW COULD THE SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS EVOLVE IN THE FUTURE?

It is a well known fact to any international lawyer that States do not like to be bound by the decisions of “independent” personalities. States want to preserve their “sovereignty”. That is why they would like to keep the privilege of the

<sup>36</sup> See the specific proposal made by the French National Consultative Commission in its opinion:

“R35. Allow a set number of Special Procedures or the Coordination Committee called upon for this purpose by one or more members, or even a treaty body with majority rule, to put an issue or situation on the Council’s agenda or, in emergency cases, to summon an extraordinary Council session.

R36. On this basis, authorize the Council to hold a debate, either in an ordinary session or an extraordinary session summoned for this purpose. Following the debate, the Council would determine a procedural resolution that contains modalities of monitoring the situation based on the proposal issued by the mandate holders that initiated the referral or by the coordination committee or the members of the committee who issue the referral. The monitoring methods could in particular take the form of creating a special geographic mechanism, including regionally (special rapporteurs, special investigation commission, etc.) or a joint visit based on several thematic mandates.

R37. Allow a set number of Special procedures or the Coordination Committee called upon for this purpose by one or more members, or even a treaty body with majority rule to make an emergency referral to the Council President so he may take appropriate measures and, in particular, take action against the State in question. More specifically, this procedure could be implemented when individuals cooperating with members are the victims of threats or reprisals.

See also, in the context of the Review, the proposals made by Human Rights Watch in *Curing the Selectivity Syndrome...*, op. cit., and by Amnesty International in *Making it Work: the Reviews of the UN Human Rights Council*, 2011; See also Olivier de Frouville, “Les organes subsidiaires de la Commission des droits de l’homme des Nations Unies. Rapport général”, note n° 5; and the 1998 report of F.I.D.H., co-authored with Sara Guillet in the context of the “Selebi” reform process: *Strengthening the Mechanisms of the Commission on Human Rights: Towards a More Effective Protection of the Victims. A contribution to the Review of the Mechanisms of the Commission on Human Rights*, July 1998.

interpretation of law. At the same time, law only comes to life in society, among a plurality of persons with diverging interests. The function of law is precisely to conciliate those diverging interests and to allow the subjects to exercise their freedom while respecting the freedom of others, whatever their strength and their general ability to impose their will. So even the “sovereign” State knows that, in certain instances, where there is a conflict of interpretation, the best solution is to entrust a third party the authority to give an interpretation of law that might have the chance to be accepted by all. Still, in the interstate relations, the state will remain cautious and would generally prefer to use its power or influence to impose its point of view, if it may, and, if it may not, use other sorts of “non judicial” and non binding procedures for the settlement of disputes, like mediation or conciliation. The case of the international law of human rights is however specific in many ways. Some specificities are shared with other fields of international law, like its transnational character. Like matters relating to the environment, issues of human rights often have consequences outside the borders of a state, when, for instance, it provokes a flow of refugees. Serious human rights violations generally affect the global peace and security and governments who persecute their own population are a threat for humanity as a whole. Another specificity of human rights is the triangular character of the relation it establishes between subjects of law: turning human rights into an obligation of international law first creates an interstate obligation. Each state bound by the obligation has an obligation towards the other states bound by the same obligation to respect human rights. And conversely, each other state has a right to demand respect for those rights (this is generally what is known as the *erga omnes* character of the norm, either *erga omnes omnium* if the norm pertains to international customary law, or *erga omnes partes* if the norm is contained in an international treaty). Furthermore, the international law of human rights also creates an obligation of the State towards the persons who are under its jurisdiction. Correlatively, each individual depending on the jurisdiction of the State has a right towards that state to see his/her rights respected, protected and fulfilled.

This specificity of the structure of human rights makes it practically more difficult to avoid third party settlements of disputes in case of a violation of human rights. Indeed, in both cases, it is very difficult to imagine how such a dispute could be settled efficiently by an interstate mechanism. There are schematically two possibilities: a) the other state(s) have an interest in the case – because, for instance, the victim is one of their nationals, or because the orientation of their foreign policy makes it interesting for them to criticise the violating state, or even, more genuinely, to “act in favour of human rights”: in any case, the intervening state will be exploiting the case – or at least be perceived as exploiting the case for its own interests; b) the other state(s) have no interest in the case, and will not intervene at all, leaving the victim to face his/her persecutor

alone. This specificity probably explains why the development of independent-third parties mechanisms went faster in this field of international law than in others. In fact, if we take sometimes to look backward into the history of human rights in the international sphere, what do we see? First, the development of a normative *corpus* of norms, that allowed the passage of human rights from the status of moral norms to the status of legal norms – thus being subject to “objective” determination.<sup>37</sup> Second, the creation of a number of independent bodies, ranging from “special rapporteurs” to international tribunals, at the regional or universal level, to assess, monitor and decide upon, in an “objective” manner, whether states have implemented their obligations in the field of human rights.

One aspect of the progress of the international human rights regime can thus be clearly identified: it is realized when individuals and groups gain the capacity to refer their case to a body which has no state-like interest and which can make an objective determination of whether a legal right has been violated or not.

The way the regional systems for the protection of human rights evolved are, to this regard, significant. The three existing systems – European, American, African – progressively saw their centre of gravity displaced from the political bodies of the organization, to the independent bodies that were progressively set up, and which competences were slowly diversified.

My argument is that the same should happen at the universal level. Not because there is some kind of predestination. But because it corresponds to the internal logic of such kinds of institutional regimes, taking into account its specific purpose and constraints. Of course, there are external factor that may affect this evolution, the more obvious being the state of international relations. September 11<sup>th</sup> took us 10 years backward. It seems today (although one should remain *very cautious* when talking about the future, see below) that the “Arab Spring” might impulse a leap forward...

It is then probably high time to do again, as Jean Rivero proposed in 1950, “l’apologie des faiseurs de systèmes.”<sup>38</sup>

<sup>37</sup> This was a key to the development of a truly international order: as long as human rights were not part of positive international law, it could be easily used to serve the national interests of those states who would invoke it against other states. “Humanity” appeared to be the pretext of intervention and imperialism. As Habermas has rightly shown the fact that human rights have become legal norms is a first step against that trend, although it needs to be completed by effective procedures: see J. Habermas, “La paix perpétuelle. Le bicentenaire d’une idée kantienne”, in *L’intégration républicaine*, Paris, Fayard, 1998, p. 199.

<sup>38</sup> J. Rivero, “Apologie pour les faiseurs de systèmes”, *Dalloz*, 1951, Chronique, p. 99.

The main sin of the 2006 reform is that it was led without any clear vision or plans. There was no concept and no sense of progress behind those words “human rights council”: only a slogan that was used to satisfy an urgent political need for reform at the eve of the 60<sup>th</sup> anniversary of the World Organization.

How should then the universal system of protection of tomorrow look like?

*First*, the empirical development of the treaty bodies has reached its limit. Furthermore, most of the “core conventions” are now widely ratified and should be universally ratified in the coming decades. It is thus high time to think about and to work on how to give this coherent body of law a stronger institutional basis.

*Second*, the reform must preserve the various functions presently undertaken by the existing bodies, that is to say, among others: the review of periodic reports, in order to follow up on progress made and put a constant pressure on implementation; the review of individual complaints, in order to settle particular disputes; the provisory measures in the form of urgent actions, so as to preserve the life, physical or mental integrity of those who are threatened; the on site visits for different purposes (global evaluation of the situation; monitoring of trials; visits of prisons); the follow-up on individual cases and general situations; the reviewing of specific issues, in particular “new” or unexplored topics with a view to develop and codify international law.

*Third*, it is necessary to find a new balance between the states component and the independent experts component, so that the states component can be used as means to implement the recommendations or decisions made by the independent experts.

Under those principles, there is no single scheme, and one scheme, however sophisticated, may not exactly comes to reality. Building a house can always reserve some surprises and need some adjustments. This said, I would make an attempt, although it is not possible, given the limits assigned to this contribution, to get into many details at this stage. This might be the subject of another contribution.

The idea of *creating a World Court of Human Rights* immediately comes to mind. To this regard, the works of Manfred Nowak and Martin Scheinin should be commended.<sup>39</sup> The Court would be based on an autonomous treaty, negotiated within the UN. It would be composed of permanent judges and would undertake the “individual complaint” function presently devoted to some committees.

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<sup>39</sup> See Julia Kozma, Manfred Nowak, Martin Scheinin, *A World Court of Human Rights, Consolidated Statute and Commentary*, 2010.

States would have the choice to recognize its competence to do so and would in consequence withdraw the acceptance of the competence of the corresponding committee. It would of course be attributed the competence to issue provisional measures in relation to the cases which are transmitted to it. It would have its own secretariat (a Registry).

But, as a judicial body, the World Court would not be the appropriate organ to undertake monitoring functions, such as the review of periodic reports, the onsite visits (except if needed for the establishment of facts in a particular case, of course) and continuous dialogue, follow-up of general issues, or development of international law. To undertake such functions, a *World Commission of Human Rights* should be created as a subsidiary body of the General Assembly. It should be composed of a certain number of independent experts. This Commission would act as a collective body, with its own opinions and decision, but the commissioners may also be appointed for special mandates, as appropriate, country or thematic oriented, to fulfil the role which is generally attributed to special procedures.

In front of these two independent bodies, the Council would keep its general competences and attributions, but generally reoriented towards the implementation of the recommendations and decisions taken by the Court and the Commission. The UPR would thus become a peer review mechanism that would greatly enhance the effectivity of those recommendations and decisions. Similarly, in case of urgent matters, the Council would be called to use its political influence either to ensure the security of a threatened individual, or to try to stop a government perpetrating serious human rights violations against its own people. The Council would also be at the interface in between the independent bodies and the other political bodies of the UN. But again, triggering mechanisms based on specific criteria should be set up, so to ensure that the Council would not be in position to withhold the information. On the contrary, the Human Rights Council should be expressly tasked with the mission to implement mainstreaming within the organization, which means, for instance, more regular contacts and exchanges with the Security Council and the General Assembly.

This paper concludes with responses to two possible objections that will certainly immediately come to the mind of the reader. The first one would be that this framework is deeply marked with the illusion that the work of the “experts”, that is to say of rational agents, can replace politics and political decisions in solving the problems of society. Of course, experts are no better human beings than statesmen and the proposal is certainly not that philosophers become kings, to take up Plato’s utopia. Politics is the art of making humans live together in the same society. The temptation to replace politics by pure rationality is of course

not only a utopia but also a dangerous idea, leading us straight to the “brave new world”. This is not what it is about. In the field of human rights, the political discussion has been on going for almost 70 years and it led up to the adoption, by political actors, of a certain number of rules: the UDHR and all the human rights conventions are among those, as well as the UN Charter and its principles. Legal rules are made in order to keep the political activity within a certain framework. Doing politics can never be understood as an activity that would allow the rules to be violated. Rules can be changed, but once they are settled, they must be respected, taking into account the instances where those rules provides for their derogation. To this regard, it is not the role of experts to do politics in the place of the political players, but to remind those of the rules they have given themselves, and which are meant to serve as a framework for their political debates and decisions.

A second objection would be to say that this framework is “utopian”, i.e. that in a “realistic” perspective it has no chance to be ever implemented. However, it is not realistic to pretend that one can predict the future. Many said during the Cold War that the Berlin Wall would never fall, and it fell. Some realists predicted that there would never be such thing as a “permanent criminal court”, and the ICC was created... A “utopia” is, at first, a model on the basis of which the existing institutions can be criticized; it is also a model to be followed when one tries to bring reforms, something that was cruelly missing in 2006. It can also mean an ideal which might be out of reach, but which should nevertheless be kept in sight when taking decisions. Caution is required before launching the “realist” anathema, for the utopians of today might well become the realists of tomorrow.