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ABSTRACT

In 2006, the Human Rights Council was established within the United Nations to replace the Commission on Human Rights, which had been in existence since 1946. The creation of the new body was justified by the need to combat some of the weaknesses of the Commission, particularly its excessive “politicization”, and to establish a body that could respond more quickly to situations of human rights violations. This article aims to critically analyze the impact of the changes introduced in these early years of the Council’s work, while also questioning the validity of politicization as an argument for the dissolution of the UN’s main human rights body. The article is based on the conclusions of the author’s doctoral thesis on the same subject, defended in December 2011 at the Carlos III University of Madrid.

Original in Portuguese. Translated by Barney Whiteoak.

Received in March 2013. Accepted in May 2013.

KEYWORDS

UN Human Rights Council – International protection systems – Politicization – Institutional transition



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THE UNITED NATIONS HUMAN RIGHTS COUNCIL: SIX YEARS ON*

Marisa Viegas e Silva

1 Introduction

As is widely known, the United Nations human rights protection system in 2006 underwent major institutional reform: the Commission on Human Rights was dissolved and in its place the Human Rights Council was created.

The Commission on Human Rights had functioned for 60 years as the principal body concerned with the defense of human rights within the universal protection system. It was essentially a political and intergovernmental body, which gained ground and expanded its functions over the years. It was responsible for the creation of the principal human rights treaties (such as the Universal Declaration) and the development of the non-conventional human rights protection mechanisms, including the 1503 complaint procedure and the special procedures (special rapporteurs, working groups, among others).

Despite the recognized achievements of the Commission over the course of its tenure, in its later years the body was the target of numerous criticisms. These were primarily related to the excessive political interference in decision making, which is known in UN lingo as “politicization.” These criticisms culminated in the UN reform process and in the need to establish a body with a greater capacity to react to human rights violations. This was the context that led to the replacement of the Commission with a Council, in 2006.

The first years of the Council’s work involved an initial stage of institution-building, when the mechanisms and procedures of the new system were defined, the subsidiary bodies were dissolved and renewed, the mandates of the special rapporteurs were reviewed and a new procedure was put in place – the Universal Periodic Review, which is frequently described as the major distinction of the new

*This article summarizes the main ideas defended in the doctoral thesis “El Consejo de Derecho Humanos de las Naciones Unidas”, defended at the Carlos III University of Madrid, Spain, in December 2011.

system. The document resulting from this restructuring process was Human Rights Council Resolution A/HRC/5/1 of 2007. This document, together with Resolution 60/251 of 2006, establishes the foundations for the work of the newly-created body.

Observing the provisions of Resolution 60/251, in the first half of 2011 the Council submitted itself to a double review process, which included an internal review of its work and functioning in its first five years of existence and a review by the General Assembly of the pertinence of raising the status of the Council to a subsidiary body of the UN.

The UN Human Rights Council maintained its headquarters in the city of Geneva, in Switzerland (in the same offices as the Commission), and began its activities in the same year it was created. It was tasked with consolidating a system of human rights protection based on the advances of the Commission, while overcoming the problems that hindered its predecessor. Consequently, the Council differs from the Commission in the following ways, among others:

- 1) Concerning its *structure*, the Council was created as a *subsidiary body of the General Assembly*, not of the Economic and Social Council like the Commission. This modification is directly related to the proposal for the Human Rights Council to be a principal organ of the UN;
- 2) The Council began to enjoy a *semi-permanent status*, in the sense that the regular sessions of the body are split up, so the Council can meet several times a year instead of just once, as was the custom for the former body. Therefore, the Council holds three regular sessions per year, with a total duration of at least ten weeks, and it also has the flexibility to hold a special session at any time. This change is related to the need to establish a body that can provide quicker responses to situations of human rights violations;
- 3) The new body also suffered a *slight modification in the number of members and in the selection criteria of its members*. The number of members was reduced from fifty-three at the time of the Commission to the current number of forty-seven. Similarly, a direct, individual and secret ballot system was established to select these members; the number of seats per regional group was modified; the number of reelections was restricted to prevent the existence of *de facto* permanent members, a problem which was common in the Commission; State candidates were encouraged to make voluntary campaign commitments and pledges; the obligation was established for Council members to be the first to submit to the Universal Periodic Review; and the possibility was introduced to suspend member States that commit serious human rights violations;
- 4) The subsidiary bodies that existed at the time of the Commission on Human Rights were either dissolved or renewed, most notable being the dissolution of the Commission's primary technical advisory body: the Sub-Commission on the Promotion and Protection of Human Rights;
- 5) In relation to the non-conventional mechanisms, General Assembly Resolution

60/251 that created the Council provided for a review and improvement of the system of Special Procedures and of Procedure 1503 (complaint procedure);

- 6) Concerning the functions of the Council, the new body has basically the same mandate as the Commission, which consisted of activities related to drafting resolutions, promotion and protection, with the addition of the Universal Periodic Review;
- 7) Finally, a mechanism was introduced called the Universal Periodic Review, to examine the human rights situation of all UN Member States. This universal examination was conducted over a four-year period in the first cycle and, for the second cycle, it is expected to take four and a half years. The objective of the review is to permit all States to be treated equally and to avoid partiality when it comes to deciding which countries will have their human rights situations evaluated by the Council, a matter directly related to the debate on combating politicization.

In this article, we shall not revisit the details of the already much-debated institutional transition from Commission to Council. Instead, we shall move directly to a reflection on the impact of the modifications introduced by the Council in its early years of activity, in order to demonstrate both *the weakness of the politicization argument as a justification to dissolve the Commission and the inadequacy of the remedies used to achieve the proposed objective to combat politicization*. Let us, then, analyze these modifications.

2 On the status as a subsidiary body of the General Assembly

Although the Human Rights Council has maintained the same subsidiary nature as the Commission on Human Rights, it was created as a subsidiary body of the General Assembly instead of the Economic and Social Council in order to increase its legitimacy and importance. Even though this did not represent a major change in the status of the new body from a purely formal point of view, it was significant from a political perspective (BOYLE, 2009, p. 12).

This is due to the authority of the General Assembly as the primary UN forum, as well as being the only one where all member nations are represented, which gives human rights a new visibility, an essential requirement for the international protection of these rights. In this sense, the change of name from Commission to Council was a political strategy, and not simply nominal, to bring the Human Rights Council closer to the Security Council and the Economic and Social Council.

It is important to put into context the debate that called for the Human Rights Council to be a principal organ of the United Nations. A central part of what prompted the reform of the human rights institutions in the UN can be attributed to the growing importance that these rights had been acquiring in the organization over the decades, until they were recognized as one of the pillars of the UN system, together with development and security. According to this logic, if the other two pillars have their own councils (Security Council and Economic and Social Council) recognized in the United Nations Charter as principal organs, then human rights should likewise have their own council, also with the status of a principal organ.

In formal terms, it is worth noting that Resolution 60/251, which created the Human Rights Council, stipulated that the subsidiary status was to be reviewed after five years, in order to decide whether to elevate its status to a principal organ of the UN. The difficulty of such an upgrade lies not only in the political consequences of the decision, but also in formal issues, such as the difficulty of modifying the United Nations Charter, a fundamental condition for creating a new principal organ.

In its 2011 review, *the General Assembly decided to retain the Council as a subsidiary body, while providing for a new debate in the future*, which shall occur between 10 and 15 years after this first review. Therefore, despite the unquestionable consistency of the claims that human rights, just like development and security, should have their own principal organ within the UN system, it can be concluded based on the 2011 review process that the outlook of the various different UN Member States has not evolved substantially in recent years. In this respect, without overlooking the importance of giving human rights the institutional status they deserve in the UN, we do not believe, from a practical point of view, that raising the status of the Council to a principal organ is either crucial for the effective functioning of the body or to correct the weaknesses that affected its predecessor.

This is because if we look at the work of the Commission on Human Rights, in its role as a subsidiary body of the Economic and Social Council, there is little denying that it was an operative and functional body that achieved many important results over its sixty-year existence. Indeed, the Commission amassed so many positive results over the years that a movement emerged to weaken it as a system. In this context, its status as a subsidiary body of a principal organ of the UN does not appear to have posed a serious obstacle to the performance of its functions. Neither can it be said that elevating the status of the Council to a principal organ would help achieve the declared objective of the reform: to combat politicization.

As Alston argues, in the first decades of its existence, a period when it exerted a more technical function and avoided taking major political decisions, the Commission could work without being criticized for being overly political. With time, as it expanded its functions, its number of members increased and thus it started to reflect in a more realistic manner the international tensions and struggles for power, the attacks began (ALSTON, 1992, p. 129-130). Also Humphrey points out that the politicization argument began to be used only when States started taking the work of the Commission more seriously (HUMPHREY, 1989, p. 203). In addition, the concept of politicization varied depending on the group employing the term (CHETAIL, 2007, p. 140). These reasons, among others, indicate that the argument of politicization has been used to weaken the Commission.

3 The semi-permanence of the Human Rights Council

The second aspect of the Council that was considered an improvement in its legal and institutional nature was the duration of the sessions and their distribution over the course of the year. The Commission on Human Rights only met once a year for a period of six weeks, meaning that all the important issues were concentrated in one session, which resulted in that these issues were often left aside for the rest of the year (KALĪN; JIMENEZ, 2003, p. 14).

In addition to the difficulties of time management due to the concentration of its activities in a single session, there were also difficulties in reacting to serious situations that occurred in the period between the sessions as well as shortcomings when it came to following up on existing situations (SCANNELA; SPLINTER, 2007, p. 46).

With this concern in mind, Resolution 60/251 stipulated that the Council would meet at least three times over the course of the year, including a main session, for a total duration of no less than ten weeks. Moreover, the new body was given the flexibility to hold special sessions at any time, so it can quickly address issues related to imminent and particularly serious crises. Although the structure of the new body was intended to be semi-permanent, *in practice it functions like a permanent body*, due to the frequency with which it meets.

During the review process in the first half of 2011, although proposals were made to reduce the number of regular sessions to two a year instead of the originally stipulated three, no such change was made.

The fact is that the semi-permanent nature of the body has effectively resulted in an *important increase in its activity* compared to the Commission, enabling *a more immediate response to emergency human rights situations*, as we can observe in the resolutions approved by the Council on matters such as the coup in Honduras, the earthquake in Haiti, and the human rights situations in Libya and Syria.

Among the downsides of the new semi-permanent status, we can highlight the dilution of the publicity and attention that used to surround the single session, which brought together numerous actors from different parts of the world to exchange ideas and lodge complaints. Another important factor is the increased costs for the participants – whether non-governmental organizations, national human rights institutions or small and medium States – that come mainly from other parts of the world and find it difficult to regularly attend the sessions of the Council. (INTERNATIONAL SERVICE FOR HUMAN RIGHTS, 2010, 2011)

4 The composition of the Human Rights Council

As we have already mentioned, one of the most criticized aspects of the former Commission was its composition, since one of the main justifications for dissolving the Commission was the alleged “bad quality” of some of its members that had a track record of bad conduct in the application of human rights (ALMQVIST, GOMEZ ISA, 2006, p. 42).

It is important to note that the debates on the composition of the Council centered in large part on quantitative aspects. More specifically, they focused on the number of members and the geographical distribution of the seats. However, the debates also concerned qualitative aspects of the Council.

In relation to the *quantitative aspects*, the two main suggestions on the matter (to universalize the composition of the Council, on one hand, and to reduce the number of members considerably, on the other) were disregarded, and the Council was created with practically the same number of seats as the Commission, with a slight reduction to 47 members.

In relation to the *qualitative aspects*, the dilemma revolved around whether the Human Rights Council should be comprised of members selected based on

their genuine commitment to the work of the body or, in contrast, on the principle of sovereign equality of States. This issue was first raised during the times of the Commission and it became more pronounced in the debate over the new body.

In the first place, it is interesting to mention that this dilemma is the result of the implicit recognition of the value and evolution of the work of the Commission on Human Rights, since such a concern did not exist beforehand (ALSTON, 2006, p. 191). At the start of its activities, the Commission limited itself to drafting international human rights instruments, avoiding for many years any political review of internal human rights situations or similar topics. Over time, however, the Commission extended its field of action and gradually incorporated new activities, such as the non-conventional protection mechanisms and the analysis of human rights situations in individual countries, which led some States to attempt to weaken the work and the authority of the body. One way of doing this was for States to use their participation on the Commission as protection from criticism, exploiting their member status and weakening the credibility of the body (NACIONES UNIDAS, 2005, para. 182).

The final outcome of this debate on the structure of the Council was, as we have seen, the approval of eligibility criteria for membership, the establishment of commitments for elected Member States, a restriction on the number of reelections (to prevent the existence of *de facto* permanent members) and the possibility of suspending members based on serious human rights violations (NACIONES UNIDAS, 2006, para. 7, 8 e 9).

Although the establishment of a firm commitment to cooperate was a positive sign, the legal provision is too abstract and vague. In order to make the formulation more objective, Member States were required to participate in the Universal Periodic Review during their mandate and the possibility was created to suspend members of the Council that commit gross and systematic human rights violations during the time they serve as members, a possibility that was used in the case of Libya (NAÇÕES UNIDAS, 2011).

To suspend a member of the Council, a two-third majority of the members present and voting in the General Assembly is required, while the election of members requires a two-third majority. The denounced human rights situation must be truly serious and a large margin of votes is required for the suspension to occur. Moreover, there is no provision, under any circumstances, for the expulsion of members, only their suspension. Nevertheless, the mere recognition of this possibility by Resolution 60/251 should be viewed as something positive.

5 The Advisory Committee as the technical assistance body of the Human Rights Council

As we mentioned earlier, Resolution 60/251 determined that the Human Rights Council assume and review the mandates and responsibilities of the Council's subsidiary and technical assistance bodies. As we have seen, this provision resulted in the dissolution of the Sub-Commission on the Promotion and Protection of Human Rights and in the creation of the Human Rights Council Advisory Committee.

The Committee was created with a smaller number of members – just 18, a significant reduction compared to the 26 members that existed at the time of the Commission – and with the authority to hold two sessions per year, with a maximum of

10 days each – instead of the single three-week annual session of the Sub-Commission. As far as the selection of the members is concerned, the process is still exclusively intergovernmental, despite several proposals to include other actors in this system.

Concerning its functions, the Advisory Committee maintained the mandate to generate knowledge for the Council through studies and reports. As such, in its first six years of activity, the Committee has examined a wide range of issues, resulting in an extensive normative production that includes the preparation of draft declarations and guidelines, final studies, as well as analysis of a variety of other topics of a substantive nature.

It is essential to recall that Resolution A/HRC/RES/5/1 of 2007 (NACIONES UNIDAS, 2007) explicitly limited the role of the Committee, requiring it to work exclusively on cases requested by the Human Rights Council. In other words, it eliminated the right of initiative that was created and consolidated within the Sub-Commission and that, as is commonly known, contributed so much to the evolution of international human rights protection.

Another important modification was the ban on the establishment of subsidiary bodies (those that existed at the time of the Sub-Commission were dissolved or transformed into subsidiary bodies of the new Human Rights Council) and the adoption of its own resolutions or decisions (NACIONES UNIDAS, 2007, para. 77, 81). Therefore, we can conclude that, at least in the case of the Advisory Committee, the transition from Commission to Council resulted in a significant reduction of the body's prerogatives and capacity for action, influencing the production of an independent and high quality academic reflection within the UN's main human rights body.

6 The special procedures in the early years of the Council's activity

As we have already mentioned, and as was to be expected given the importance of these mechanisms in the Commission on Human Rights, the resolution that created the Council maintained the special procedures, and also provided for a review and improvement of the system.

As such, a process of review, creation and extinction of mandates marked the initial stage of the special procedures in the Council. Concerning the review of the mandates, this did not involve a real reflection of the content and effectiveness of the mandates, since in general terms the system remained largely the same, with the extinction of some mandates, such as the mandate of the Democratic Republic of Congo, and the creation of others, such as the mandate on the right to safe drinking water and sanitation and the mandate on contemporary forms of slavery.

The review of the *thematic mandates* ran relatively smoothly, with the exception of some issues, such as freedom of religion and belief, the situation of human rights defenders, freedom of opinion and expression, torture and other cruel, inhuman or degrading treatment or punishment and extrajudicial, summary or arbitrary executions, in which there was tension and hostility against the experts. The case of the country mandates, one of the most controversial topics since the time of the Commission, was also fraught with tension, as was to be expected.

In relation to the *country situations*, it is worth noting that these were also addressed at the special sessions of the Council, which were frequent in these early years. In this period, therefore, the Council examined the human rights situation in Palestine and Other Occupied Arab Territories, in Sudan, in the Democratic Republic of Congo, in Ivory Coast, in Libya and in Syria, among others. Of these, the issue that most occupied the attention of the Council in this period, just like during the times of the Commission, was Palestine and Other Occupied Arab Territories, which was the subject of the majority of the special sessions and of a large number of resolutions, decisions and studies.

In relation to the special procedures' *protection* tasks, they consisted of continuing the practice of establishing interactive dialogue with mandate holders, defining and establishing a new process for nominating and selecting the experts, as well drafting and approving a Code of Conduct for them. In this respect, the new nomination process has the advantage of being more transparent compared to the process used by the Commission, and of permitting both greater State participation and greater political control over the decision of the President of the Council. However, as is to be expected in a body of eminently political nature, as is the Council's case, political negotiations play an undeniable role in the nomination process.

With respect to the Code of Conduct for the special procedures, the drafting of this document generated, from the outset, a great deal of controversy, particularly given the concern that it would be used as a means to weaken the system. As experience has shown, despite the advantage of lending predictability to the performance of the special procedures, taking a step forward in their institutionalization, the document also runs the risk of serving as a means to restrict the independence of the special procedures mandate holders. As a result, in the work of the Council, all the renewed mandates started to include a reference to the Code, and in its second year of activities the Council established a formal instrument for vetoing the automatic re-nomination of a mandate holder in the event of suspected non-compliance with the Code of Conduct. Similarly, in its 11th session, the Council once again approved a resolution reminding mandate holders of the obligation to perform their functions in strict compliance with this document. Moreover, in these early years of the Council's work, reference to the Code of Conduct was practically obligatory in resolutions to create or renew mandates and it has been used as a means to criticize the work of the experts, in cases of disagreement with the content of a study or with a particular practice adopted by a mandate holder.

7 The complaint procedure in the early years of the Council's activity

Just as occurred with the special procedures, the Human Rights Council maintained a complaints procedure albeit under a "new" guise. However, that procedure is quite similar to the previous system, principally because it maintains the questionable principle confidentiality. Confidentiality meant that only the names of the countries that were being examined or ceased being investigated through procedure 1503 were made public, meaning that not even the author of a denunciation could follow the process. With the institutional transition to a Council, in addition to the name change to "new" complaint procedure, definitively leaving out any

reference to “procedure 1503”, the new developments that have been introduced to the system include the easing of admissibility requirements, the greater frequency of meetings of the working groups responsible for analyzing the cases, the amount of information that must be provided to the complainant (slightly more, despite the limits of confidentiality), the possibility for the complainant to request that their identity not be revealed to the State, the establishment of time frames (both for the State to present information and for the Council to review the case) and the possibility for the Council to recommend, as a final solution, that the Office of the High Commissioner for Human Rights provide technical assistance to the State concerned.

In relation to the complaint procedure *in practice*, after an initial structuring period, the Council was relatively productive in analyzing and deciding on the situations presented through this mechanism. Given the lack of public data to evaluate whether the modifications introduced through the “new” procedure have effectively improved the complaint mechanism (for example, whether the more flexible admissibility requirements have in fact resulted in an increase in the number of complaints submitted, or whether the fact that the complainants are being informed more frequently about the steps of the procedure has resulted in a greater degree of satisfaction with the system), based on the information available in the annual reports of the Council, we can only affirm that most of the cases it examined were discontinued.

Generally speaking, it can be concluded that the lack of public data – a direct consequence of confidentiality – has resulted in a general disinterest in the procedure, which can be clearly observed in what little NGO and academic research is available on the topic. During the first six years of the Council, it was virtually impossible to find any reference to procedure 1503 going beyond a mere description of the general character of the transition. This is true not only of reports written by organizations such as Human Rights Watch, International Service for Human Rights and Conectas, all of whom regularly follow the work of the Commission, but also of numerous scholars who studied the issue and even of the Council’s own annual reports. Even though the new complaint procedure has addressed – at least partially – two important problems of procedure 1503 (namely the lengthiness of the complaint process and the lack of information for the complainant), from our point of view a real improvement in the procedure must necessarily involve relaxing the confidentiality, a change that does not seem very likely at the moment, given the lost opportunity during the review of the work and functioning of the Council, completed in March 2011, which kept the complaint procedure intact.

8 The Universal Periodic Review

The Universal Periodic Review (UPR) is considered a new development because it did not exist at the time of the Commission. For this reason, and also because it was proposed as one of the main mechanisms to combat politicization – if not the main one – its introduction into the UN human rights protection system was widely celebrated. Among its most important characteristics, we can highlight: the analysis

of the human rights situation of all UN Member States in cycles of four years (first cycle) and four and a half years (from the second cycle onwards), the cooperative and strongly intergovernmental nature of the review, the full participation in the review by the State under examination and the non-binding nature of the recommendations, among others.

In relation to the practical application of the UPR during the first cycle, it was marked by the indefiniteness that typically accompanies newly-established mechanisms of a body that itself is equally young. Concerning the formulated recommendations, which are individual in nature, these were characterized by heterogeneity (recommendations of all kinds were presented: objective, overly general, empty and even some that conflicted with human rights norms)¹ and abundance (the number of recommendations was quite high).² Equally varied were the responses to the recommendations by States that, besides either rejecting or accepting each one, also frequently used the tactic of postponing their assessment of a recommendation until a later date or subtly rejecting it. This means that the aspects supposedly presented as positive (such as the large number of formulated recommendations and the high percentage of accepted recommendations) are only relative indicators of the effectiveness of the procedure.

Concerning the development of the UPR, in the interactive dialogue that occurs during the review process, the following trends, among others, have been observed: the presence of “friendly States” to issue favorable comments during the review, thereby avoiding a more in-depth debate on the other issues of real interest; the shortage of truly critical comments and the predominance of complimentary comments;³ and the tendency among States to concentrate on topics of their own interest instead of concentrating on the human rights problems of the State under examination.

It is worth noting that the purpose of the UPR is not to duplicate the work already performed by the human rights treaty bodies and by the special procedures, but to complement it. In this sense, the UPR differs from these other mechanisms in a number of ways, such as its essentially inter-State character, i.e. the recommendations are issued by States individually and not by the Council as a body; the possibility for the State under review to accept or reject each recommendation, with the consequence that only accepted recommendations need to be implemented; and, the universality of the review and of the rights under review. Moreover, during these early years of activity, there have been instances of positive exchanges of information between the UPR and the other mechanisms – for example, some recommendations formulated during the UPR have been used by the human rights treaty bodies or by the special procedures and, conversely, several States have used their participation in the UPR to comment on their activities before these mechanisms, or to make recommendations to other countries related to these mechanisms.⁴ We can also affirm that the Universal Periodic Review has, to some extent, served as an incentive to implement the obligations of the special procedures and the treaty bodies.⁵

As positive aspects of these early years of the UPR, we would highlight, among other things, the possibility of reviewing the human rights situation in all

UN Member States; the broad participation of States in the process; the possibility of establishing dialogue between States and NGOs; and, the creation of a sense of connection with the UN human rights protection system. As shortcomings, we would emphasize the insufficiency and misdistribution of time for the review; the excessive number of recommendations and their heterogeneity; the lack of assistance from human rights experts during the process (TARDU, 2007, p. 975); the limited opportunity for participation by such non-State actors as NGOs; and, the questionable financial sustainability of the mechanism (INTERNATIONAL SERVICE FOR HUMAN RIGHTS, 2009, p. 7-8).

In relation to the first issue, if one observes the time offered to member states and observers during the review process, one can see that demand exceeded opportunities to intervene. In China's review during the first cycle, for example, 115 delegations registered to speak during the interactive dialogue; in Cuba's case, there were 110 requests to speak; and, in the case of the Russian Federation, there were 73. The participation of all those who enrolled to speak was clearly unfeasible, taking into account that the procedure allowed for two hours of debate. In relation to the excessive number of recommendations, until the 8th UPR session, in May 2010, 12.384 recommendations had been made, an average of 1.548 recommendations per session.

Concerning the reduced room for participation of other non-state actors, it is worth noting that ONGs cannot intervene directly in the UPR interactive dialogue. Their contribution is restricted to the option of presenting a report of up to five pages, whose content may be used to support the OHCHR when it writes a document which will serve as a basis for the examined state. The other opportunity for collaboration occurs during 20 minutes in the debate about the final report in the Council. The limited opportunities for NGO participation makes direct lobby the most obvious work strategy, especially with "friendly delegations", so as to achieve that they intervene in other States reviews regarding themes that the organizations work on.

The second cycle of the UPR began in May 2012 and included some new procedures introduced after the 2011 review of the work and functioning of the Council. As a result, the length of the sessions increased by half an hour (with an extra 10 minutes for the State under examination and an additional 20 minutes for the other States) and new rules were put in place for the list of speakers. The number of recommendations remained high throughout the first and second cycle, without this resulting in greater precision or clarity of the recommendations.

Finally, as the main challenge for the mechanism's future, we would point to the need to strike a balance between the notion of cooperative dialogue and the application of constructive criticism and, more importantly, the imperative to eliminate the practice employed by a large number of States to use the Universal Periodic Review as a political instrument to defend their own interests and not as an instrument to promote and protect human rights, which is the function for which it was created. Another crucial issue, and in our opinion decisive for assessing the real success of the UPR in the future, is the need to ensure effective follow-up to the recommendations formulated during the previous review cycle.

9 Some thoughts on politicization as a justification for dissolving the Commission and creating the Council

We appreciate that a proper analysis of the results of the modifications introduced by the Council is not possible without addressing the matter of politicization, which was the reason (at least the alleged reason) for making the change. In this respect, we consider it questionable that combating politicization was one of the main justifications given for dissolving the Commission and creating the Council, and we also argue that the remedies created to mitigate the problem are inadequate.

On this point, it is essential to recall that both the Commission and the Council were created as intergovernmental political bodies comprised of representatives of various UN Member States. This confers an essentially political nature on their activities, which cannot be eliminated merely with formal modifications to the structure.

Therefore, it is no coincidence that the same criticisms that were leveled at the Commission are now being leveled at its successor (“business as usual”). The accusation of politicization is due, in essence, to the political nature of the body and this cannot be automatically resolved by a few essentially formal institutional fixes. Even though, when the Commission was dissolved, there was a unanimous agreement that the political influence on its work was excessive, the same unanimity did not apply to the reasons why each group reached this diagnosis, with opinions varying between those that believed that politicization was due to excessive interference and selective involvement by the Commission in countries and those that, in contrast, defended that the Commission ought to have a more active inspection role. In a context such as this, any attempt to end politicization in a body like the Human Rights Council is unrealistic, if not naïve or fallacious.

This political option has been obvious from the initial decision in 1946 to establish the Commission on Human Rights as an intergovernmental body through to the decision of the UN General Assembly in 2006 to maintain this same structure for the Human Rights Council. On this point, it is worth noting that the fact that the Council is an intergovernmental body is not necessarily bad. As we know, the decisions adopted by a body comprised by State representatives has the advantage of being already equipped with an important dose of political realism, and they have more chance of being implemented than decisions adopted by bodies comprised exclusively by experts. Indeed, the Commission on Human Rights serves as a good example, since it was an intergovernmental body that, despite all the criticism it received and the restrictions of its mandate, played an important part in the evolution of International Human Rights Law. There is nothing to stop the same thing from happening with the Council, although any such assertion at this stage would be premature.

If the objective of the reform had really been to lessen the impact of political influence on the work of the new body, the approach should have been to introduce more participation by experts in the work of the Council, through measures to strengthen the activities of the Advisory Committee or the special procedures system, which did not happen. Instead, what actually occurred, in the case of the Advisory Committee, was a significant reduction of its prerogatives and capacity for action,

and, in the case of the special procedures, the fear of a possible restriction of its independence through the newly approved code of conduct.

Another example of the persistence of the excessive political influence on the work of the Council is the Universal Periodic Review. Considered the major innovation of the new body and the primary mechanism created to combat politicization, one of the main characteristics of the UPR is its excessively intergovernmental nature and the near absence of human rights experts. Moreover, as we have mentioned, during the first cycle of the new procedure, the practice emerged of avoiding criticism of the States under review through an alliance with friendly States, which were urged to participate in the review with favorable comments. In other words, political negotiations predominate in the UPR, a mechanism that is supposedly intended to reduce them. This is one of the reasons why it is difficult to defend with any conviction that the institutional transition served the political ends it claimed to pursue.

10 Conclusions

This brief analysis gives us a general overview of the impact of the main modifications that occurred on account of the dissolution of the Commission on Human Rights and the creation of the Human Rights Council to replace it. Without discrediting the importance of some truly positive aspects and bearing in mind that it is still too early to conclusively assess the Human Rights Council (taking into account that the Commission took six decades to develop its mechanisms for the promotion and protection of human rights), we contend that the impact of the modifications introduced in these early years of the Council's activity leave a good deal to be desired.

On the one hand, the Council embodies changes that we consider positive, such as its semi-permanent status, the adjustments to the process of selecting members and the possibility of suspending them, the UPR itself and the possibility of reviewing the human rights situation of all UN Member States. On the other hand, as we have already mentioned, it is repeating the same problems that existed under the Commission and that justified the reform – namely politicization and the use of double standards. Furthermore, and most importantly, the intergovernmental nature of the body was strengthened and a tendency to restrict the role of civil society can be observed.

In relation to the politicization and the use of double standards, as we have already indicated, these are political problems that are largely associated with the intergovernmental nature of the body, but also with the same fundamental paradox that has accompanied international human rights protection since the outset: it involves asking States to monitor the human rights violations they themselves have committed, by action or omission.

These considerations allow us to affirm that the argument of ending politicization as the primary justification for extinguishing the Commission on Human Rights is an empty one. It is a product of the political interests that prevailed in the Commission at the time of the approval of the reform.

In these early years of activity, the occasions when the Council has adopted a decisive and active posture, such the suspension of Libya's membership of the body, have been a consequence of the political will and the work of some State

delegations to achieve a Human Rights Council that is more committed to the implementation of its mandate.

Based on the long evolution of the Commission on Human Rights, the short history of the Human Rights Council, the fact that the political environment in the Council corresponds to the reality of international relations in recent years and that the formal and structural conditions of the body, while relevant, may be molded to fit the dominant political will of the time, it is natural to conclude that the way in which the Council will be remembered in history will depend, ultimately, on the evolution of politics and international relations in the years to come.

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NOTES

1. See Naciones Unidas (2009a), paragraph 95; A/HRC/8/48, of June 5, 2008, paragraph 58.
2. Until the 13th session, 2,479 recommendations had been proposed. Cfr. <http://www.upr-info.org/database/statistics/>, consulted on May 7, 2013.
3. See: Naciones Unidas (2008), paragraphs 19 (Palestine), 20 (India), 21 (Pakistan), 22 (Qatar), 23 (Tunisia), 24 (United Arab Emirates), 25 (Saudi Arabia), 26 (Turkey), 27 (Malaysia) and 30 (Libya), among others.
4. See Naciones Unidas (2009b), paragraph 81, recommendation 33.
5. See the final document of the 17th meeting of special rapporteurs/representatives, experts and chairs of working groups of the special procedures with the chairs and members of treaty bodies, (Naciones Unidas, 2010, Annex II, paragraph 41)

RESUMO

No ano de 2006, estabeleceu-se no seio da ONU um Conselho de Direitos Humanos, em substituição à Comissão de Direitos Humanos, que existia desde 1946. A criação do novo órgão justificou-se pela necessidade de combater algumas debilidades existentes na época da Comissão, em especial a excessiva “politização”, e de contar com um órgão que respondesse mais ágilmente às situações de violação de direitos humanos. O artigo busca analisar de forma crítica o impacto das mudanças introduzidas nesses primeiros anos de atuação, questionando também a validade da politização como argumento para a extinção do principal órgão de defesa dos direitos humanos na ONU. O artigo se baseia nas conclusões da tese de doutorado da autora sobre este mesmo tema, defendida em dezembro de 2011 na Universidade Carlos III de Madri.

PALAVRAS-CHAVE

Conselho de Direitos Humanos da ONU – Sistemas Internacionais de Proteção – Politização – Transição institucional

RESUMEN

En 2006, se estableció en el seno de la ONU un Consejo de Derechos Humanos, en lugar de la Comisión de Derechos Humanos, que existía desde 1946. La creación de este nuevo órgano se justificó por la necesidad de combatir algunas debilidades que existían en la época de la Comisión, especialmente la excesiva “politización”, y por la necesidad de contar con un órgano que respondiera más ágilmente a las situaciones de violación de los derechos humanos. Este artículo busca analizar de forma crítica el impacto de los cambios incorporados en estos primeros años de funcionamiento, cuestionando también la validez de la politización como argumento para la extinción del principal órgano de defensa de los derechos humanos de la ONU. Este artículo se basa en las conclusiones de la tesis de doctorado de la autora sobre el mismo tema, defendida en diciembre de 2011 en la Universidad Carlos III de Madrid.

PALABRAS CLAVE

Consejo de Derechos Humanos de la ONU – Sistemas Internacionales de Protección – Politización – Transición Institucional