“To Preserve and Build on its Achievements and to Redress its Shortcomings”: The Journey from the Commission on Human Rights to the Human Rights Council

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ABSTRACT

In recent years the UN Commission on Human Rights has been widely and severely castigated for its failures to live up to the vision of being a genuine protector of victims of human rights abuses and instead becoming a shield for the violators. This article provides an assessment of these criticisms of the Commission by exploring its historical beginnings, its notable achievements, and its manifest shortcomings, and then analyzes how these and other factors came into play when the membership of the United Nations decided to replace the Commission with the new Human Rights Council.

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The author would like to thank the individuals who granted interviews for this assessment, including those very close both to the Commission on Human Rights and to the recent negotiations over the creation of the Human Rights Council who wish to remain anonymous, to those who are acknowledged in the notes that follow, and to those who offered comments and suggestions, especially the members of the Columbia University Human Rights Seminar.
I. INTRODUCTION

Stark headlines and editorial opinions during 2005–2006 revealed the mood about the United Nations Commission on Human Rights quickly and sharply enough. The National Review described the body as one that has chosen “to give diplomatic cover to some of the planet’s worst tyrants. In so doing, it has been actively destructive to the interests of human rights.”

US Ambassador to the United Nations John Bolton, in one of his calmer moments, portrayed it as “a completely broken mechanism for intergovernmental decision-making on human rights.” Journalist Mark Steyn depicted the Commission as no more than a “Eurowimp talking shop manned by African thugs” and its work as “a lifetime-achievement awards ceremony for the world’s torturers.”

Given the political orientation of these and other noted critics of international institutions and efforts, such comments might not seem particularly striking. What is unusual is that they often were echoed by active supporters and defenders of the United Nations. The normally sympathetic Stanley Foundation, for example, declared “the success of human rights-abusing governments in using seats on the commission to deflect pressure for improvement in their own practices is surely one of the most cynical games in international politics,” and described the Commission as “dysfunctional” and “a black mark on the organization as a whole.” As a consequence, it recommends that the Commission actually be “scrapped and replaced.”

Amnesty International accused the body of routinely resorting to double standards, declaring “membership is too often used to shield the Commission members from human rights scrutiny instead of to protect and promote human rights.” A special United Nations task force created to study threats, challenges, and change concluded that the Commission on Human Rights had lost its credibility and professionalism, and felt compelled to write:

We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns.

In great frustration, even Secretary-General Kofi Annan, a strong and deeply committed supporter of human rights, spoke openly of a “credibility deficit” and declared publicly:

We have reached a point at which the Commission’s declining credibility has cast a shadow on the reputation of the United Nations system. Unless we re-make our human rights machinery, we may be unable to renew public confidence in the United Nations itself.  

Given this widespread condemnation from many sources, it would appear reasonable to ask several important questions: Are the criticisms leveled against the Commission accurate and fair? If so, how is it that the Commission on Human Rights came to drift so far from the original vision of its strongest supporters and reach this point of castigation? Can an assessment be made about the achievements as well as the shortcomings? And, what has been done with the creation of the new Human Rights Council in an attempt to correct the perceived problems for the future?

II. THE BEGINNINGS

It is not difficult to imagine how those strong human rights advocates who created the Commission on Human Rights would react if they could hear the criticisms of today. They likely would be terribly disappointed that the vision they had foreseen had not been fully realized as they had hoped. They would be disappointed—but probably not surprised. They knew from the very beginning that the tasks before them would be incredibly challenging, and that only the most serious political will could ever make their dreams a reality.

Their horrifying experiences of warfare and genocide during the course of the Second World War had convinced them that an intimate connection existed between individual human rights and international peace and security. These nations that violated the rights of their own people, they came to believe, endangered their neighbors and the international system as a whole. For this reason, those called upon to create a viable system of peace and security after the war quickly established the Commission on Human Rights under the terms of the United Nations Charter. In the euphoria of victory, some of the founders hoped that it would become the most important pro-

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tector of victims of human rights abuses in the world. In fact, US Secretary of State Edward Stettinius declared that the creation of the Commission “may well prove one of the most important and significant achievements of the San Francisco Conference. . . . It is a promise from this generation to generations yet unborn that this war, fought in the cause of freedom, will not have been fought in vain.”

Some indication of the enormous hope that people initially placed in the Commission on Human Rights can be seen in the fact that the nine, unusually-qualified and experienced individuals named to serve on the very first special “nuclear,” or preparatory commission, immediately and by acclamation elected as their chairperson none other than Eleanor Roosevelt, the former First Lady of the United States and a remarkable woman already well known for her outspoken and often courageous positions on human rights. Her enormous popularity and prestige attracted considerable attention, but it was her refreshing idealism, lack of cynicism, and contagious enthusiasm for the goodness of people and for a world that might be that generated inspiration and offered hope. Indeed, according to her son, even in her most private moments her nightly prayer always concluded with these words: “make us sure of the good we cannot see and of the hidden good in the world. . . . Save us from ourselves and show us a vision of a world made new.”

She possessed that rare combination of a deep appreciation of pragmatic politics with an even deeper understanding of the power of visions of human rights. People sensed her gift of profound sincerity and her capacity to care for and understand the human condition and thus wrote to her that they shared her hope in what the United Nations might do as a protector of the victims of human rights abuses.

However, in the process of creating the Commission on Human Rights, Roosevelt and her colleagues knew all too well that it would not be easy.


They were most certainly not wild-eyed idealists unfamiliar with the world of politics. Indeed, they personally had just survived the most brutal war in history and had seen mankind at its worst. Nazism, fascism, and militarism—with their claims of the power of the state over individual lives—had nearly destroyed them and colonialism remained a harsh reality for millions of people across the globe. They understood perfectly well that prejudices run deep, that traditions and prevailing practices inhibit innovation, and that those who enjoy the exercise of power rarely want to share or restrain it. Of all the obstacles that confronted them, and as noted by the authors of the earlier wartime proposal entitled *International Safeguard of Human Rights* advocating the creation of a strong Commission with enforcement mechanisms, there was one that warranted particular attention: “the bogey of national sovereignty.”

This came as no surprise. In fact, many observers had accurately predicted in advance that national sovereignty, which had inhibited so many efforts on behalf of international human rights in the past, would continue to plague the United Nations. “We have taught the layman to worship the arch-fiction of the sovereign state,” forewarned legal scholar Philip C. Jessup, “and thereby have built a Maginot line against the invasion of new ideas in the international world, and behind that rampart the demagogue and the reactionary are enthroned.”

This doctrine of sovereignty enabled national leaders to declare that what they did to their own people was their own business, making them immune from any international effort that might try to hold them responsible for violations of human rights. Indeed, as expressed so directly by former US Secretary of State Robert Lansing, “The essence of sovereignty is the absence of responsibility.”

The eminent historian at the Carnegie Endowment for International Peace, James Shotwell, similarly observed that “each state, jealous of its sovereignty, had regarded any expression of foreign interest in the welfare of its citizens at home, as interference in its own affairs” and would likely continue to do so. Seeking to dispel any doubts on this point, Arthur Vandenberg of the US delegation to the San Francisco Conference served notice that national sovereignty and the prevention of outside interference into domestic affairs were matters “dear to our hearts.”

15. For a discussion of efforts during the nineteenth century and those of the League of Nations during the early twentieth century, see Lauren, *supra* note 8, at 37–134.
The tension between those who desired to advance international human rights, on the one hand, and those who insisted on protecting national sovereignty, on the other, filled the politics and diplomacy of the San Francisco Conference and could be seen in the resulting United Nations Charter itself. Article 1 committed the members of the organization to promote and encourage respect for international human rights and fundamental freedoms around the world without discrimination. Those very members, however, were nation-states, the most likely source of human rights abuses in the first place, and Article 2 (7) sought to protect them by stating:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement.20

This provision thereby enabled the members to continue claiming the special privilege of national sovereignty and impunity that would prevent the organization from interfering into their internal affairs. This provided them with a means to shield themselves from outside interference into any domestic human rights abuses that they might commit within their own borders. In other words, the fundamental problem and ultimate paradox, was that those very governments most guilty of violating the human rights of their own people were being asked to provide protection against themselves.

The acute tension between international human rights and national sovereignty thus emerged from the very beginning of the United Nations and the language of the Charter. From that time to the present, members of the organization have struggled with the politically-charged process of defining the meaning of “human rights” and determining exactly what lies “essentially within the domestic jurisdiction of any state.”

The overwhelming majority of nation-states thus began their whole postwar life as members of the United Nations by claiming that they supported international human rights norms while, at the same time, remaining unwilling to sacrifice elements of their own national sovereignty to the extent that it might authorize the international community to intervene in their own internal affairs.21 The United States thus could speak eloquently about civil rights throughout the world, for example,—but not if that exacerbated what John Foster Dulles called “the Negro problem in the South.”22

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British had no trouble supporting the principle of extending political rights for others—but not if it applied to their empire. The Soviets could support economic and social rights with enthusiasm—but not if they threatened to impose any restrictions on Stalin’s dictatorship. The Chinese could strongly advocate the right of self-determination and racial equality in European colonial possessions—but not if this forced domestic reforms at home. This hypocrisy could not simply be laid at the doorstep of the Great Powers alone. The Australians and New Zealanders could endorse a broad extension of human rights for the globe—but not if this jeopardized control over their own immigration policies against Asians or their respective treatment of Aborigines or Maori. Jan Smuts of South Africa could enthusiastically draft the language about the rights of all people for the preamble of the UN Charter—but not if it committed his country to giving equal treatment to blacks. The Indians could argue passionately for the rights of all people everywhere—but not if it required them to eliminate their caste system. The Iranians could declare their agreement with the principles of equality and justice—but not if it forced them to modify their policies toward women. The Cubans had no trouble supporting an international declaration of the rights and duties of individuals—but not if this threatened the strong-armed rule of Fulgencio Batista. As Herbert Evatt, the foreign minister of Australia, remarked during an extremely candid moment, “Every country represented . . . has its own internal problems, its own vital spheres of domestic policy in which it cannot, without forfeiting its very existence as a state, permit external intervention.”

This was the extremely challenging setting in which the founders of the Commission on Human Rights found themselves. They clearly understood the impact of politics and diplomacy upon the San Francisco Conference and the formulation of the UN Charter. From the very beginning they were asked to achieve two mutually incompatible goals: serve as protector of the victims of human rights abuses and, at the same time, not threaten the shield of national sovereignty claimed by member states. Eleanor Roosevelt and her colleagues understood perfectly well that, given these factors, they could not please everyone and that not all people and governments would like the results. As she declared publicly and with the voice containing a mixture of hope and realism based upon her practical experience in politics:

Sometimes issues arise where one has to advocate something that may be difficult for one’s own government to carry through, and yet, if one believes it is right, I think one should advocate it, hoping that if it would be good for the

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world, it would, therefore, in the end, be good for one’s own government and
one’s own people too.\textsuperscript{24}

With this thought very much in their minds, the members of the “nuclear”
commission set out to do their best to advocate an ambitious program for the
Commission on Human Rights. One of their most daring recommendations
was that the Commission be composed of individual experts genuinely inter-
ested and knowledgeable about human rights rather than representatives of
governments interested in maintaining national sovereignty. They hoped that
by such means the Commission would acquire much greater independence
and integrity, enabling it to challenge governments if necessary and actively
serve as protector of the victims of human rights abuses. This proposal met
with immediate hostility by member states who feared that it was far too
ambitious and too threatening to their own sovereignty and domestic jurisdic-
tion. They had created the Commission as an intergovernmental organiza-
tion for discussion, not enforcement, and wanted to keep it that way. Thus,
the delegate from Britain received ciphered instructions to be very careful
about this “extremely delicate” subject with enormous implications while
at the same time being warned “not to give the impression that we are be-
ing obstructive. We suggest our right course is to play for time, leaving it to
other delegations to bring out the difficulties.”\textsuperscript{25} The British need not have
worried, for others quickly did jump into the fray, including the Soviets, who
insisted adamantly that they would never accept individual experts acting
in their own capacity instead of state-appointed representatives. It was thus
decided from the very beginning that the Commission on Human Rights
would operate under the authority of the Economic and Social Council and
would be composed of eighteen members serving as representatives of their
respective governments following official “position papers” and “letters of
instruction” on behalf of highly politicized agendas.\textsuperscript{26} Their meetings con-
sequently became the focus not only of what the participants themselves
called “fireworks,” but major “battles.”\textsuperscript{27}

One of the first of these battles emerged over the extremely sensitive
issue of petitions. Even before it began to officially meet, the Commission
on Human Rights found itself as the unexpected recipient of a veritable
flood of thousands of written appeals from all over the world begging for

\textsuperscript{24} Id.
\textsuperscript{25} Britain, Public Record Office, Foreign Office, 371/57318, Telegram No. 599 from Ward
to Cadogan (14 June 1946); Telegram No. 616 from Foreign Office to UN Delegation
(16 June 1946).
\textsuperscript{26} See US National Archives, Department of State, Record Group 84, Records of the US
Delegation to the United Nations, Box 103, File IO:ECOSOC: Human Rights, 1946–1949,
Telegram No. 103 to Eleanor Roosevelt (25 May 1948).
\textsuperscript{27} Franklin Roosevelt Library, Eleanor Roosevelt Papers, Box 4561, Diary Entry (4 Feb. 1946);
Britain, Public Record Office, Foreign Office, 371/59740, Human Rights Commission
(Memorandum), filed (11 Sept. 1946).
help against the abuses of their own governments and pleading that the 
human rights provisions of the Charter be applied to them.28 Many of these 
petitions were addressed personally to Eleanor Roosevelt.29 It is difficult to 
read these petitions, even today, without feeling the pain, sensing both the 
desperation and the hope, and being reminded of the very human face of 
human rights among those writing to her. They implored her and the other 
members of the Commission to be their protector.

Governments thus suddenly found themselves being criticized by their 
own people before the eyes of the international community. If individual 
petitions could be received and heard before the United Nations, they be-
lieved, it would create a gigantic “complaint bureau” for human rights, fuel 
进一步 dissent at home or in the colonies, embarrass them in front of the 
world, and increase the risk of outside interference into what they regarded 
as their own internal affairs. If individuals could go over the heads of their 
own governments and seek redress from the international community, they 
argued, there would be no end of challenges to national sovereignty. Over 
the objections of certain members of the Commission—Carlos Romulo of 
the Philippines, Hansa Mehta of India, René Cassin of France, and Eleanor 
Roosevelt herself, who responded with great sympathy toward these urgent 
and often desperate appeals—governments quickly put a stop to this particular 
practice of petitions. They issued explicit instructions to their representatives 
to publicly declare that the Commission had no power to take any action 
in regard to complaints submitted by individual petitioners about alleged 
violations of human rights at the hands of national governments.30 This pre-
cluded the possibility of reprisals against the authors of such appeals, but it 
also prevented the Commission from making serious charges and criticism 
public. Thus, from the very beginning, politics forced the Commission on 
Human Rights, in the words of one authority, to make “a critical declaration 
of impotence” when it came to the matter of accepting and acting upon 
individual petitions submitted by victims of human rights abuses.31

These powerful political forces, increasingly exacerbated by the emerging 
Cold War, severely constrained the Commission on Human Rights in other 
ways as well. The members of the Commission, for example, initially were 
charged with the task of drafting and then opening for signature what was 
called an “international bill of rights.” After considerable discussion, they

28. Edward Lawson, who served on the Division of Human Rights during these early years, 
used the expression, “thousands,” EDWARD LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS, at x (1991); United Nations, Department of Public Information, Background Paper No. 25, 
Commission on Human Rights 10 (18 Nov. 1947).
30. See United Nations Archives/New York, Branch Registries, Series: Commission on Hu-
man Rights, RAG 2/169, Box 168–7, File 169/5/01.
determined that this would require three components: a declaration of standards, a binding convention, and specific mechanisms for implementation and enforcement. However, once it became evident that binding obligations might appear in a treaty or that actual enforcement measures might be created, many governments feared an overly ambitious human rights program and began to mount serious resistance every step of the way. The Soviet representative, for example, warned sternly of the danger of “embarking on a voyage which would lead it in a direction where it might cross the border which divides international from internal law—the border which divides the inter-relationships of governments from the field where the sovereign rights of nations must prevail.”

For its part, the American government felt exactly the same way. After months of work in good faith on the international bill of rights, Eleanor Roosevelt received the most unwelcome instructions telling her to back away from any binding obligations and to focus instead on a declaration of principles, where the United States felt “on safer ground” and where any discussion about legal commitments and enforcement “should be kept on a tentative level and should not involve any commitments by this Government.”

It is important to remember, therefore, that when the Commission on Human Rights began its work, member states of the United Nations had already decided the Commission would be composed of representatives of governments following instructions rather than independent experts on human rights; individual petitions complaining about human rights abuses by governments would not be openly received or acted upon; and its work be confined to general statements of principle rather than any binding commitments or enforcement mechanisms that would meaningfully protect human rights. Thus, conscientious members of the Commission found themselves constantly caught between wanting to serve as protectors of the victims of human rights abuses while at the same time serving under instructions to shield what one diplomat described as “their own sacred cows.”

Governments openly complained that human rights proposals generated by the Commission “trespass upon matters which should be left where they belong, in the domestic sphere of the member states,” voicing their opposition to what they described as “violent objection” and “determined opposition” to what they


regarded as “completely unacceptable.”

When these constraints and this inauspicious beginning are considered fully, what is remarkable is not that the Commission on Human Rights would eventually fall short of the dreams of its most ardent supporters, but that it would accomplish anything at all. Indeed, at times its successes far exceeded the fears of its opponents.

III. THE COMMISSION AS A PROTECTOR OF VICTIMS

Despite these enormous obstacles and constant maneuvering by certain member states to thwart meaningful checks upon their own authority and shield their own abuses, those advocates of human rights who served on the Commission pushed hard to advance the international human rights of Article 1 against the national sovereignty and domestic jurisdiction of Article 2 in the UN Charter. In this process, they learned to appreciate the meaning of the observation that “diplomacy is the art of the possible.” Their efforts received the gratitude and the praise of many. Human rights NGOs, in particular, who had followed the work of the Commission since its inception, paid tribute to what they described as its “remarkable achievements.” “Few, if any, United Nations organs,” declared one leading and long-standing NGO, for example, “can point to a more successful record in responding to people’s concerns.”

The many accomplishments of the Commission on Human Rights over the course of sixty years are well documented and much better known than its early beginnings, and thus need not be fully treated here. Nevertheless, there are certain achievements that must be duly acknowledged.

Despite all of the nearly overwhelming roadblocks thrown in their way, Eleanor Roosevelt and her colleagues persisted in their efforts and drafted

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35. UN Archives/Geneva, SOA 317/1/01 (1), Box 346, Part B, letter from the Union of South Africa to the Secretary-General (23 Apr. 1948); National Archives of New Zealand, EA 2, File 108/11/13/1 (2), Report by the New Zealand Observer on the Third Session of the Commission on Human Rights [Colin Aikman] (Memorandum) (1 July 1948). The author is grateful to Mr. Aikman for a number of personal interviews in Wellington during April of 1994 on his experience with the Commission at this time.

36. See LAUREN, CRAIG, & GEORGE, supra note 9, at 77, 144, 194, 216, 245, 261, 269, and 274.


language for what they hoped would become “a common standard of achievement” in the form of the Universal Declaration of Human Rights. For example, when they met with the General Assembly in Paris during its September–December 1948 session, they had to confront the reality of the ominous fall of Czechoslovakia to a Communist coup, an emerging nuclear arms race with weapons of mass destruction, and the frightful risk of war resulting from the Soviet blockade of Berlin that created a plummeting and terrifying frigidity to the Cold War. Added to these were anti-colonial uprisings, division on the Korean peninsula, advances by the forces of Mao Zedong in China, violence between India and Pakistan, and armed conflict in Palestine between the new state of Israel and its Arab neighbors. At exactly the same time, the representatives of member states exchanged accusations over whether human rights were abused more in colonial empires, or behind the Iron Curtain, or in the racially segregated United States. They argued about the impact upon national sovereignty, debated over whether any human rights violation could ever be considered to be “exclusively within the domestic jurisdiction” of any state. Further, they discussed the possibility of what one Soviet delegate described as “the destruction of governments” should the human rights agenda be pushed too far.39

Given all of these events and the highly political nature of human rights themselves, it is hardly surprising that delegates with the United Nations would describe the resulting onslaught as “the great debate.”40 Even normally bland official accounts described it as one in which representatives “thrashed out” their differences and pored over the draft text “line by line” and “word by word.”41

However, those who wanted to provide some form of protection for the victims of human rights abuses persisted in the face of these many international crises, political resistance, and the attempts to portray the thirty separate articles of the draft declaration as no more than a “mere” statement of principle without any legally binding authority whatsoever. They were determined but also deeply worried that they faced a narrow window of opportunity and that time was running out. In the end, their bold vision of the Universal Declaration of Human Rights proclaiming that “all human beings are born free and equal in dignity and rights” struck a powerful chord.42 When the vote was finally taken, forty-eight voted in favor, eight abstained, and not one voted against. In response, the delegates arose to give Eleanor Roosevelt and her colleagues on the Commission a standing ovation.

39. Humphrey, supra note 32, at 42.
40. See Johannes Morsink, World War Two and the Universal Declaration, 15 Hum. RTS. Q. 357 (1993); Humphrey, supra note 32, at 66.
Many observers praised the declaration as an unprecedented achievement in the historical evolution of international human rights, and marveled that it had accomplished “the very near impossible.”\textsuperscript{43} Exactly as its advocates hoped, and its critics feared, the declaration quickly came to take on a life of its own and to assume growing moral, political, and even legal force through customary law. This, in turn, inspired a veritable revolution in international, regional, and national actions on behalf of human rights. Indeed, it is precisely for this reason that the vision of the Universal Declaration of Human Rights drafted by the Commission on Human Rights came to be the most translated single document in history and is still described as “the greatest achievement of the United Nations” and as “one of the greatest steps forward in the process of global civilization.”\textsuperscript{44}

In order to make the vision of the declaration a reality, those members of the Commission deeply committed to human rights set to work on a vast program of establishing international human rights norms and setting standards, despite powerful political forces that presented resistance every step of the way. As one participant with intimate experience in the process noted, this effort to create global protection for human rights “represents a radical departure from traditional thinking and practice. . . . We are in effect asking States to submit to international supervision their relationship with their own citizens, something which has been traditionally regarded as an absolute prerogative of national sovereignty.”\textsuperscript{45} At the insistence of delegates from Asia, Africa, and Latin America, who themselves had suffered severely as a result of racial discrimination and its history of subjugation, exploitation, enslavement, segregation, and exclusion—and, not insignificantly, who eventually by the mid-1960s as a result of decolonization had gained the majority in the United Nations—the Commission drafted the ground-breaking International Convention on the Elimination of All Forms of Racial Discrimination. When the General Assembly adopted this convention in 1965, they marked for the first time in history a standard-setting and binding treaty that defined racial discrimination, pledged themselves to adopt all necessary measures to prevent and eradicate it, agreed that they could be subject to criticism from other states party to the Convention and individual petitioners, and, significantly, authorized the creation of the first international machinery for any United Nations-sponsored human rights instrument to implement compliance with the treaty itself.\textsuperscript{46}

\textsuperscript{43} See UN Archives/Geneva, SOA 317/1/01 (4), Box 350.

\textsuperscript{44} See Johannes Morink, The Universal Declaration of Human Rights (1999); Glendon, supra note 12; Humphrey, supra note 32, at 76; The Universal Declaration of Human Rights 5 (Asbjørn Eide, et al. eds., 1992); Albert Verdoodt, La Naissance et Signification de la Déclaration Universelle des Droits de L’homme (1964).


\textsuperscript{46} See Lauren, The Evolution of International Human Rights, supra note 8, at 239–44; Lauren, Power and Prejudice, supra note 22, at 239–50.
This particular treaty broke the logjam which had existed for years and demonstrated that if the political will existed among the majority, the Commission on Human Rights and the United Nations as a whole could move forward in extending rights and setting standards. As the spokeswoman from Colombia observed:

> There has been an awakening of the world conscience to a duty that cannot be denied, an awakening of peoples to a clear right—that of strengthening the foundations of justice, society based on equality, the obligations of States to promote conditions that will permit every person the full enjoyment of his rights.  

Consequently, and with the full and active support of an ever-growing number of human rights NGOs assisting the Commission in a variety of ways, work resumed on other standard-setting instruments. This resulted in the landmark International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that were adopted and opened for signature by the General Assembly in 1966. These were followed by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the International Convention on the Suppression and the Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Some members of the Commission also helped to draft the path-breaking Rome Statute of the International Criminal Court creating a permanent, independent, international criminal court to enforce the emerging and growing body of international criminal law holding individuals—rather than states—responsible for war crimes, genocide, and crimes against humanity. Never before in history had human rights been so clearly articulated and incorporated into legal instruments, and most of these created specific mechanisms composed of experts rather than government representatives designed to monitor and implement the actual treaty provisions. In recognizing the inherent dignity of the human person, and in specifying what was necessary for this dignity to be realized and protected, the Commission helped to reposition, quite fundamentally, the individual vis-à-vis the state. This, in the words of one expert, marked a development “of truly revolutionary importance.”

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As impressive as these legal instruments and treaty-based mechanisms might be in establishing a far-reaching and broadly encompassing normative framework for international human rights protection, however, they certainly could not solve all of the problems of protecting victims from human rights abuses. Governments could sign the treaties, but then refuse to ratify them. Or, they could become parties to the conventions, but only with certain attached conditions or reservations. Or, when the pressures became too great, governments could try to claim special privileges, refuse to acknowledge the competence of a particular monitoring body, or take refuge under a derogation clause exempting it from obligations in times of emergencies. For all these reasons, the serious advocates of international human rights, including many who served on the Commission on Human Rights, understood that they could not rely exclusively on their achievements in creating legal instruments or rest on their laurels in creating convention-based mechanisms. Toward this end, they set about to establish a number of extremely significant non-treaty procedures and mechanisms as well.

Despite enormous opposition from governments who argued that national sovereignty would be seriously threatened, the majority gathered remarkable political will and decided that the Commission on Human Rights should be allowed to address petitions and complaints from individuals, groups, or NGOs if and when widespread patterns of “gross violations” of human rights occur. By this decision, they opened a critical door that had been slammed shut from the very beginning, and the Commission began to work through a process of receiving, considering, and acting upon what has been described as “thousands, thousands, and thousands” of communications. Some governments, like those of the Shah of Iran, Fidel Castro of Cuba, and Ferdinand Marcos of the Philippines, dug in their heels and tried to launch a counteroffensive to divert the attention of the Commission. However, the Commission’s efforts in receiving petitions, when combined with letter-writing campaigns and information gathering by human rights NGOs, attracted considerable global attention to a number of highly visible and politically charged situations. Moving testimony, such as that of the Mothers of the Plaza de Mayo, subsequently emboldened the Commission to create fact-finding missions and reach out to protect any number of victims of human rights abuses. Among others, these included those who suffered from apartheid under South Africa’s white minority regime; Palestinians from their treatment in occupied territories by Israel; political opponents tortured by the brutal dictatorship of Augusto Pinochet in Chile; and victims of “disappearances”

49. Interviews with Jakob Möller, former Chief of the Communications Unit of the International Instruments and Procedures Section, in Geneva (Apr. 1997) (on file with author). The author is grateful to Mr. Möller for sharing his observations from extensive experience on this matter.
and arbitrary executions during the “dirty war” launched by the military junta in Argentina.

The procedures and machinery developed by the Commission in the 1970s and 1980s created an extremely important means to deal with gross human rights violations that up to this point in history had always remained beyond the reach of the international community. Indeed, they still provide the only means available that many victims of human rights may invoke to have their situation heard by the world at large. They were recently revised in 2000 and mechanisms were created to utilize the Internet and modern communication technology in order to make them even more effective. 50

Today there are few governments who believe that they can get away with claiming that national sovereignty somehow renders them unaccountable or completely immune from scrutiny under international human rights standards. None are anxious to be forced to go through an elaborate and highly embarrassing process that shames them before other governments that might decide to launch a formal investigation against them. For this reason, considerable effort was expended by governments in preparing official responses to charges of violations, often sending ministers of foreign affairs or justice, prime ministers, or even presidents to actually address the Commission on Human Rights rather than dismissing it. In fact, it was the importance of the Commission in this regard, rather than its presumed impotence, that made dictatorial and authoritarian regimes campaign within their respective regional blocs to actually seek membership on the Commission itself.

Not content with these remarkable developments, the majority of the Commission decided to push even further in developing still other non-treaty procedures, mechanisms, and machinery to protect victims of human rights abuses. They decided that they would not let abusers hide simply because they might not be a party to a particular treaty. Instead, they determined that they would create a number of new means collectively described as “special procedures.” These were all designed to monitor, analyze, and bring to public attention particularly egregious cases of human rights violations. They included a number of working groups dealing with both country-specific problems as well as broad-based thematic issues across a wide spectrum of human rights, including enforced or involuntary disappearances, arbitrary detention, structural adjustment programs for economic, social, and cultural rights, and the right to development. Others drafted new standard-setting

instruments such as a declaration on human rights defenders and optional protocols for the International Convention Against Torture and the International Convention on the Rights of the Child. Working groups, independent experts and investigators, or special rapporteurs, were also appointed by the Commission to investigate such wide-ranging issues as summary or arbitrary executions, torture, religious intolerance, the use of mercenaries, child prostitution and pornography, freedom of opinion and expression, violence against women, racism and xenophobia, internally displaced persons, independence of the judiciary, the illicit movement and dumping of toxic and dangerous products, cultural property of indigenous peoples, discrimination against those with HIV or AIDS, and conscientious objection. In creating these special procedures, the majority of Commission members courageously refused to back away from some of the most sensitive violations of human rights in the world and established special rapporteurs or representatives for specific countries, including Burundi, Cambodia, Chile, Cuba, Guatemala, Haiti, Iran, Iraq, the Israel-occupied territory of Palestine, Myanmar (Burma), Rwanda, Somalia, Sudan, the former Yugoslavia, and Zaire. More recently, they also included Kosovo and East Timor.

These special procedures grew to include still other non-treaty mechanisms and efforts. Among these were a wide range of advisory services, technical assistance, and field operations. Human rights experts were sent to various countries to help develop the capacity for building national and regional human rights infrastructures, strengthening democratic institutions, drafting new constitutions, explaining international obligations and reporting procedures, creating confidence-building measures in often fragile societies, reforming penal and correctional institutions, training officials and security forces, conducting seminars for judges and lawyers, developing educational strategies and materials, and assisting the media in covering human rights issues. Special field operations were created to address particularly serious violations of human rights in such places as Haiti, Guatemala, Bosnia, and Herzegovina. Similarly, in response to the shocking slaughter and extensive carnage inflicted by the Hutus against the Tutsis in Rwanda, the Commission on Human Rights and the High Commissioner for Human Rights established the Human Rights Field Operation in Rwanda. Each of these field operations was staffed with specialists mandated to investigate breaches of international human rights and humanitarian law, assist refugees and internally displaced persons.

persons, help NGOs, offer expertise on reforming law enforcement, and provide public information and education on behalf of democratization initiatives and human rights. Indeed, the extraordinary range, geographical scope, and complexity of these many activities became so extensive that great effort needed to be made to coordinate them all.

The Commission on Human Rights also worked closely with the Secretariat, the Division of Human Rights, then the Centre for Human Rights, and eventually the High Commissioner for Human Rights engaged in considerable efforts to promote human rights around the world. As Under Secretary-General Jan Mårtenson observed: "[A] key element in the realization of human rights is the knowledge by each person of his or her inalienable rights, and the means that exist to protect them."52 Toward this end, the Commission sponsored numerous publications, public events, seminars, workshops, educational programs, and special studies on human rights. It actively supported the World Conference on Human Rights in 1993, attracting over two thousand delegates and nearly four thousand representatives of NGOs, and resulting in the Vienna Declaration and Program of Action, boldly rejecting the old claims of domestic jurisdiction by asserting that all human rights represented a legitimate international concern. Moreover, members of the Commission corroborated in working to promote the World Conference on Women, the Decades to Combat Racism and Racial Discrimination, and the United Nations Decade for Human Rights Education, among others. Further promotion occurred when the United Nations produced its first CD-ROM, under the title of *Human Rights: Bibliographical Data and International Instruments*, revealing a total of seventeen thousand references to documents and publications dealing with international human rights.

Promotion, transparency, and breadth had yet another dimension. That is, the Commission did more than any other body within the United Nations to open its deliberations to and invite comments from human rights NGOs. Although the Charter spoke in glowing terms about “we the peoples,” it often appeared as though only the Commission on Human Rights took the charge seriously. Through time, the majority of members came to view NGOs as effective partners in promoting human rights and thus gave them access and recognized status to constructively engage in presenting evidence of violations by governments against their own people, representing elements of larger civil society, speaking truth to power, and giving voice to voiceless victims.53

When conducting all of these activities in public, the Commission on Human Rights increasingly began to be the most important global forum in the world for discussion about international human rights. Its annual sessions uniquely brought together perhaps as many as 800 people into the large, circular, wood-paneled Salle XVII of the Palais des Nations in Geneva for its sessions. Participants included delegations from the states members of the Commission, representatives from most other countries of the world (including many high-ranking and senior government officials), staff from the Secretariat and specialized agencies of the United Nations, occasionally the secretary-general himself, victims of abuses, and those representatives from civil society and many human rights NGOs trying to find a seat or a place just to stand in the packed room. At times the deliberations received widespread coverage by television cameras beaming transmission signals to overhead satellites for instantaneous broadcasts around the globe.

All this began to provide not only its own kind of promotion and enhancement of human rights but an influential deterrent value; few nations relished the prospect of standing before this huge and potentially hostile assemblage and being called upon to publicly defend their record on human rights in light of internationally established norms before the eyes of the world. In fact, it normally proved sufficient to compel most governments to expend considerable energy trying to avoid being placed in this position in the first place and thereby comply with at least some of the standards in advance. Whatever its failings, the Commission became the world’s premier political forum in which to create a dialogue about the direction of human rights, to confront governments over reports of serious violations, to name and shame them, and to draw attention to the need for corrective action to stand up and protect victims of human rights abuses.  

IV. THE COMMISSION AS A SHIELD FOR VIOLATORS

These many, pioneering, and (especially when one considers the active resistance and obstacles cast in the way) often extraordinary achievements of the Commission on Human Rights during the course of sixty years cannot be simply ignored or cynically dismissed. They played absolutely vital roles in the evolution of international human rights and in the transformation of victims of human rights abuses from being mere objects of international pity into becoming actual subjects of international law. By the same token, however, it is important to acknowledge that the many efforts of the Com-

mission could not and did not solve all difficulties or protect all victims and, in some cases, created new problems in the process.

Some of the problems that emerged were practical in nature. The expansive growth of activities and initiatives in standard setting, implementation through treaty-based mechanisms and special non-treaty procedures, and promotion around the entire world led through time to enormous complexity. It became very difficult to coordinate all these multifaceted activities. This problem was exacerbated by a small and seriously underfunded staff who became increasingly overwhelmed with the number and the magnitude of the tasks assigned to them. In addition, the Commission on Human Rights had expanded from an original eighteen members to a total of fifty-three, and although this made the body theoretically more representative of all geographical regions, its size nevertheless complicated its ability to complete the tasks set before it. To make matters worse, the Commission only met once a year for a frenzied period of six weeks. This not only resulted in what was often described as a “circus” of confusion, but in the fact that the body could not adjust quickly enough in real time to problems that arose between sessions. As a consequence, abusers could stall for time, knowing full well that the Commission’s meetings would soon end and that eleven months might transpire until the Commission had the opportunity to examine the problem again and engage in any follow-up activities. Thus, even conscientious delegates could not possibly or seriously address the many and often highly complex challenges or issues related to human rights around the world.

Another problem was created by the voting procedure for membership. Technically, those seeming to become members of the Commission needed to secure only twenty-eight votes from the Economic and Social Council. This low threshold was made even worse by the practice of having candidates being forwarded on closed slate by regional groups and then, so as to not offend the sensitivities of that group, generally approved or rubber-stamped without any debate about their commitment to human rights. As Kenneth Roth of Human Rights Watch described it: “Abusive governments joined the Commission by convincing a handful of governments in their region to support them in a backroom deal.”

The most serious problems of and for the Commission on Human Rights, however, were not practical but remained political. Over the course of the history of the Commission, most nations in the world came to realize that a revolution in international human rights was occurring before their eyes and that they intended to be a part of it. They came to believe that human rights were related to peace and security and that they had responsibilities to

protect not only their own people, but also victims of human rights abuses in other parts of the world. For this reason, they were willing to place greater emphasis upon the human rights provisions in Article 1 of the UN Charter rather than the provisions about domestic jurisdiction in Article 2 and, in the process, generated sufficient political will to surrender a certain measure of their own national sovereignty in order to protect human rights.

But not all nations were willing to participate on the Commission in this way. Instead, they continued to insist that national sovereignty protected them against external interference, to use either their membership on the Commission or their influence to deflect any outside scrutiny or criticism of their abuses of human rights, to arrange for the election of similarly-minded governments to the Commission, or to utilize double standards by selectively focusing attention on the practices and problems of others while ignoring their own or those of their friends.

These political problems, of course and as we have seen, had been evident from the very beginning of the Commission on Human Rights where its members sat as both judges and defendants. Those states with significant clout like China, the Soviet Union, and then Russia, and the United States, for example, always had been able, through a combination of threats and inducements, to keep other members from taking meaningful action against them or their allies. Smaller states with little influence or power were easier to target for criticism and punishment before the eyes of the world. But in more recent years, an unusual number of irregularities and quite obvious excesses ominously foreshadowed emerging problems and dangers. Dictatorial and authoritarian regimes increasingly appeared to vote together on the Commission in order to shield themselves from scrutiny by using “no action” motions which took a resolution against them off the table for consideration. They also turned away from country-specific resolutions which singled out individual countries for human rights violations (with the exception of Agenda Item 8 which regularly and specifically focused on Israel). Moreover, after the terrorist attacks against targets in the United States on 11 September 2001, there emerged a preoccupation with security and the “war on terrorism” that conveniently allowed governments to brand their opponents as “terrorists” and often ran roughshod over human rights efforts of the Commission.

This general political direction became particularly evident by several deeply troublesome developments beginning in 2001. During the Commission’s annual session of this year, Sudan, Sierra Leone, Uganda, and Togo were all elected to membership despite their well-known human rights abuses against domestic political opponents. At the same time, the United States conveyed a general lack of interest in the work of the Commission, sometimes bordering on contempt, and failed to do the diplomatic legwork necessary to secure a renewal of its seat, thereby losing its bid to be reelected
for membership—the first time since the earliest meetings of the Commission in 1946. As Joanna Weschler, the United Nations representative of Human Rights Watch described the situation, one could understand why the United States was not reelected, but to reward these particular countries at exactly the same time appeared to be nothing short of “absurd.” If this continued, she noted, the Commission was increasingly becoming “a rogues’ gallery of human rights abusers.”

Kenneth Roth, the Executive Director of Human Rights Watch put an even sharper edge on this development by declaring that countries with poor human rights records were seeking seats on the Commission on Human Rights not to strengthen protection for victims of abuses, but rather to shield themselves from criticism. “Imagine a jury,” he wrote, “that includes murderers and rapists, or a police force run in large part by suspected murders and rapists who are determined to stymie any investigation of their crimes.”

Other scandals occurred in 2003. In the first instance, this was the year that the representative of Libya, Najat Al-Hajjaji, was elected to chair the Commission on Human Rights. This happened despite the fact that the dictatorship of Col. Muammar Gaddafi was widely known to support terrorism and to flagrantly abuse human rights by banning opposition political parties, muzzling the press, arresting political prisoners, mistreating and torturing detainees, and refusing to become a party to many of the international human rights conventions, among other practices. Despite the vocal opposition of human rights NGOs and the fact that, for the first time, a nomination was actually subjected to a vote, the African group’s choice of Libya was ratified by thirty-three votes to three, with seventeen abstentions, including those members from the European Union who opted for a cautious neutrality under the pretext of “not offending the African states.” Reporters Without Borders, immediately issued a statement declaring:

The UN has finally appointed someone who knows what she is talking about! What credibility will remain for a body headed by the representative of a country that abuses human rights every day. By putting Libya at the helm, the commission shows that it is ready to cover up the brutalities of some of its members through dirty deals.

At the same time, the repressive regimes represented on the Commission took full advantage of the lack of conviction and courage among the

democracies who were reluctant to speak out and condemn serious human rights abuses if doing so might harm their perceived economic, political, or security interests. They thus combined forces and moved the body in a particular direction, electing Zimbabwe to membership in 2003 and thereby according a position on the Commission for the widely condemned dictatorial government of Robert Mugabe. No meaningful resolutions were passed to condemn human rights violations by China, Cuba, Indonesia, Pakistan, Russia, Saudi Arabia, Sudan, or Syria. A disillusioned Human Rights Watch observing this “non-action” accused the worst violators of human rights of callously protecting each other, and felt compelled to announce: “An ‘abusers club’ of governments hostile to human rights has further consolidated its position” within the Commission on Human Rights.59

The same year, of course, also witnessed the launching of a preventive war by the United States against Saddam Hussein and Iraq. The administration of George W. Bush claimed that a nexus existed between Iraq and the al-Qaida terrorist network and that Saddam possessed stockpiles of weapons of mass destruction which posed an imminent threat to peace and security. It desperately wanted to gain allies and create a “coalition of the willing” in this highly unpopular war, and thus it did not exert any serious pressure in the Commission against China, Russia, or Saudi Arabia, among others, for their known human rights abuses.60 At the same time, the United States devoted considerable effort in trying to shield itself from condemnation for the war and its subsequently related human rights violations involving the killing of civilians, the abuse and torture of prisoners, and the extraordinary rendition of “enemy combatants” to clandestine “black sites” in other countries for interrogation outside the rule of law.61

All of these political trends continued. Repressive regimes banded together on the Commission, as did Islamic countries. Democratic countries often appeared to lose their nerve and refused to take measures that would have strengthened the Commission. Furthermore, the United States, as the world’s only remaining superpower, continued to throw its vast weight around. At times, the United States under George W. Bush seemed interested in protecting human rights either by condemning the most egregious abusers and taking positive action within the Commission on Human Rights or by threatening to leave the Commission entirely unless major reforms occurred. As President Bush observed before the General Assembly itself:

When this great institution’s member states choose notorious abusers of human rights to sit on the U.N. Human Rights Commission, they discredit a noble effort, and undermine the credibility of the whole organization. If member countries want the United Nations to be respected—respected and effective, they should begin by making sure it is worthy of respect.62

Yet, on other occasions, the United States appeared to move in just the opposite direction as it pursued unilateralist policies that harmed human rights, deliberately invoking the claims of national sovereignty, frequently reminding Americans that their country had been unceremoniously defeated in its bid for membership of the Commission in 2001, engaging in United Nations-bashing and criticism of the Commission on Human Rights for domestic political purposes,63 claiming a unique “exceptionalism” from international norms, and “unsigning” itself from the treaty establishing the International Criminal Court. At the same time, the United States shielded its allies like Israel, Pakistan, Saudi Arabia, Turkey, and Uzbekistan, among others, from criticisms of their human rights violations; and, despite overwhelming documentary and photographic evidence to the contrary, denied that it was abusing or torturing detainees in Afghanistan, the naval base of Guantanamo Bay in Cuba, and at the Abu Ghraib prison in Iraq.

V. CREATING THE HUMAN RIGHTS COUNCIL

For all of these many reasons, it is hardly surprising that when serious discussion took place from 2004 to 2006 about the need for a variety of wide-ranging reforms at the United Nations, enormous attention would focus upon the Commission on Human Rights. Indeed, in the midst of considerable work, as discussed at length in the report from the High-Level Panel on Threats, Challenges, and Change entitled A More Secure World: Our Shared Responsibility64 and the reports from the Secretary-General himself,65 the particular issue reforming the Commission on Human Rights was described as “the linchpin,” “the centerpiece,” “a key component,” and a “litmus test” of any serious United Nations reform or renewal.66

After extensive work and lengthy consultations, the High-Level Panel made several very specific recommendations. They clearly reaffirmed the critical importance of human rights to peace and security in the world and proposed that the High Commissioner of Human Rights be called upon to prepare an annual report on the situation of human rights worldwide, that the Security Council should more actively involve the High Commissioner in its own deliberations, and that the level of funding be increased to more accurately match the rapidly growing and nearly overwhelming obligations of the United Nations in international human rights. With particular reference to the Commission on Human Rights, they recommended: (1) that, given the highly difficult and sensitive issue of who should be included or excluded from serving as members of the Commission on Human Rights, the membership should become universal and include all states; (2) that all members designate prominent and experienced human rights figures as the heads of their delegations; (3) that work be supported by an advisory council or panel of independent experts; and (4) that members should consider upgrading the Commission to become a “Human Rights Council” no longer subsidiary to the Economic and Social Council but a Charter body standing along side it and the Security Council, and thereby reflect the weight given to human rights along with security and economic issues as provided in the Preamble of the Charter. 67

Secretary-General Kofi Annan took these proposals under consideration, consulted with the member states of the United Nations and his own staff, listened to the concerns of many interested parties, and then unveiling his own vision and recommendations in a four-page note to all delegations and in his highly publicized report entitled In Larger Freedom: Towards Development, Security, and Human Rights for All in March 2005. Human Rights Watch declared that he had done “the unthinkable” and called his proposed reforms “courageous.” 68 Other human rights advocates and NGOs described the proposals as “bold,” a “bombshell,” and as precisely the remedy that could have “a transformative impact on human rights worldwide.” 69

Annan stated his fundamental proposal in direct and bold print, asserting:

67. UNITED NATIONS, A MORE SECURE WORLD, supra note 6, at 89–90.
If the United Nations is to meet the expectations of men and women everywhere—and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development—then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council.70

States, he observed, would need to decide if they wanted the Human Rights Council to be a principal organ of the United Nations or a subsidiary body of the General Assembly, “but in either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting.”71 The creation of a Human Rights Council would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member states, he continued, should determine the composition of the Council and the terms of office of its members who he hoped would constitute a “society of the committed” and who would regard membership as a reward for their demonstrated support for human rights. “Those elected to the Council,” he concluded, “should undertake to abide by the highest human rights standards.”72

The Secretary-General’s recommendations then were submitted to governments for their consideration prior to the World Summit, the largest gathering of global leaders in history. Between the time of his recommendations and the summit held in September 2005, the anticipated politics and diplomacy of human rights among member states came into play, and the negotiators worked for several months to see whether they could reach any agreement. Most agreed that the Commission on Human Rights should be replaced, but greatly disagreed about its status within the United Nations organization, its size and composition, whether a nation’s human rights record should be an eligibility requirement for membership, whether regional or geographic criteria should be used in determining membership, whether the permanent Big Five powers should be automatically guaranteed a seat on the Council, the procedures to elect members, the length of time for membership, the scope of the new body’s mandate, the powers that it should possess, and whether and how to retain special procedures and mechanisms for the active involvement of NGOs in any deliberations. The various changes and compromises could be seen in several drafts73 as well as the final version of the World Summit’s Outcome Document. Here, governments acknowledged human rights as one of the three pillars of the United Nations system, and that these—development, peace and security,

70. UNITED NATIONS, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY, AND HUMAN RIGHTS FOR ALL 45–46 (2005).
71. Id.
72. Id.
and human rights—were inextricably interlinked and mutually reinforcing. They consequently declared directly: “We resolve . . . to strengthen the United Nations human rights machinery.” Toward this end, they decided to recognize their broader “responsibility to protect” victims, to strengthen the Office of the High Commissioner for Human Rights by doubling its budget within five years, and, importantly, to create a new Human Rights Council. They requested that the president of the General Assembly immediately begin conducting negotiations that would make this body a reality.

With this monumental charge before him, General Assembly President Jan Eliasson of Sweden, along with co-chairs for the Human Rights Council negotiations, Ambassador Dumisani Kumalo of South Africa and Ambassador Ricardo Alberto Arias of Panama, began a task that would take months of intense and difficult labor in the face of bitter criticism, delaying tactics and efforts at sabotage, significantly different visions of what the new Human Rights Council should be, and the continued politics and diplomacy of human rights. Indeed, Eliasson portrayed it as “a long and arduous road.” The British Broadcasting Corporation politely described it as “months of difficult negotiations.” Amnesty International and other human rights NGOs, for example, vehemently condemned what they regarded as the capitulation of leaders at the World Summit to political pressure from China and Russia trying to hide their serious human rights abuses, from dictatorial regimes like those in Sudan or Zimbabwe who wanted to continue to shield themselves from criticism by weakening the entire reform effort, from Cuba who denounced any changes as representing only “imperialistic interests,” and from the actions by John Bolton serving as US Ambassador (by a recess appointment rather than by Senate confirmation).

There were times when Bolton appeared to propose constructive reforms to strengthen the Council such as banning from membership any country subject to United Nations sanctions due to human rights violations. On almost all other occasions, however, he conveyed unconcealed hostility to the entire United Nations enterprise, skipped nearly all of the negotiating sessions but then fiercely complained in holier-than-thou tones about the “manifest deficiencies” of any reform proposals other than his own, persistently introduced new amendments and tried to reopen the text of the operative resolution in ways that were widely regarded by other delegations as crude delaying tactics, argued that the United States and the other

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75. Eliasson, supra note 66.
permanent members of the Security Council were entitled to automatically possess “guaranteed seating” on the new Human Rights Council (and thus never be barred from membership), and constantly denied in the face of overwhelming evidence to the contrary that the United States employed double standards and was engaged in serious human rights abuses in its war against Iraq or its “war on terrorism.” The cumulative effect of all these developments deeply worried human rights advocates like Amnesty’s UN specialist, Yvonne Terlingen, who wrote:

> If world leaders do nothing more than adopt a broad, vague text that defers all substantive decisions to the General Assembly, they will have squandered a historic opportunity. Such a damning failure of global leadership will cast a dark shadow [. . . and represent] a betrayal of millions of the world’s most vulnerable people.

Despite the opposition, the many obstacles, and what Human Rights Watch described as “the death-by-a-thousand-cuts tactics” of certain governments, many individuals, NGOs, governments (especially some of those in the Convening Group of the UN Democracy Caucus), and key officials and their staffs within the Secretariat worked hard and at a speed rarely seen within the international community to create a compromise package. This was finally negotiated and then approved by the General Assembly by means of an actual vote (rather than the normal procedure of seeking a general consensus) on 15 March 2006. One hundred and seventy nations voted yes in support. Three abstained (Belarus, Iran, and Venezuela) and four voted no (Israel, Marshall Islands, Palau, and the United States, who opposed the resolution but promised to cooperate and not attack the decision as it did over the similarly lopsided vote on the International Criminal Court). Among other matters, the resolution attempted to answer precisely the question of whether the Commission on Human Rights be regarded as a protector of the victims or a shield for the violators. In the end, their answer was that its actions manifested characteristics of both. For this reason, the member states

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acknowledged the many accomplishments of the Commission on Human Rights but—in language that serves as the title of this article—expressed their determination for the future “to preserve and build on its achievements and to redress its shortcomings.”

In order to achieve this objective, the members of the United Nations decided to establish a new Human Rights Council as a replacement for the Commission on Human Rights. It will continue to be based in Geneva, but will be a subsidiary organ to the entire membership of the United Nations as represented in the General Assembly rather than just the Economic and Social Council. This was seen as not only elevating the status of human rights and mainstreaming them within the organization as a whole, but also making the Council more universal, more transparent, more representative, and more legitimate than in the past.

The Council will be composed of forty-seven members continuing to serve as representatives of their respective governments and thus be somewhat smaller than the fifty-three members of the Commission. This marks the first time that the membership of any United Nations body has ever been reduced in order to achieve greater effectiveness. Membership is open to all states, but these will be competitively and genuinely elected (as compared to selection by acclamation) by individual and direct votes. In order to provide some measure of protection against coercion by the most powerful states, the voting will be by secret ballot. Moreover, election will require an absolute majority of the General Assembly, or ninety-seven votes out of one hundred and ninety-two. This is not the two-thirds majority originally proposed by Kofi Annan and supported by many human rights groups, nor is it the same as the process of an open ballot requiring only twenty-eight votes out of the fifty-four members of the Economic and Social Council employed by the former Commission. It thus represents a much higher threshold of an affirmative vote and thus an opportunity for human rights supporters to block the election of states that severely violate human rights. Members of the new Council will serve for a period of three years and will not be eligible for immediate re-election after two consecutive terms. As a consequence, there are term limits and rotations that ensure against any state holding a permanent seat.

With reference to the critical and sensitive issue of eligibility criteria for membership on the Human Rights Council, several important decisions were made. One of these is a geographical distribution that reflects the political and population facts of international life in the twenty-first century and the membership in the United Nations itself. Thus, thirteen seats are reserved for Africa, thirteen for Asia, six for Eastern Europe, eight for Latin America and the Caribbean, and seven for Western Europe and Other Countries (including

82. Id.
the United States and Canada). In sharp contrast to the old system, regional groups may nominate states if they choose, but they alone cannot dictate the choice of members from their region. Other states can make nominations if they wish and each individual candidate must still win an absolute majority from the entire United Nations membership.

Of much greater importance was the determination that the actual behavior of governments would serve as the ultimate criteria for membership. The resolution declared the principle—seemingly intuitive, but never before officially pronounced—that “Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto” and that all members elected to the Council “shall uphold the highest standards in the promotion and protection of human rights.” This provision is obviously designed to exclude the most serious abusers. Moreover, members are expected to “fully cooperate” with the Council and its various human rights procedures and mechanisms, thus prohibiting the practice under the Commission whereby some members simply refused to grant unimpeded access to UN human rights investigators. Of particular significance, they must pledge to subject themselves to be first in line for scrutiny under an entirely new and universal, periodic peer review “based on objective and reliable information” of their own human rights record during their term on the Council. This provision provides, for the first time, the opportunity to examine the human rights records of even the most powerful countries in the world (including permanent members of the Security Council) and thereby to provide an important opportunity for addressing the double standards that the Commission often was accused of using. The United Nations High Commissioner for Human Rights Louise Arbour noted this critical difference immediately: “No country will be beyond scrutiny, and no longer will countries be able to use membership of the UN’s premier human rights body to shield themselves or allies from criticism or censure for rights breaches.” If members are found guilty of gross and systematic human rights violations, they may be actually removed from membership upon the decision of a two-thirds majority of those present and voting in the General Assembly.

The founding resolution also established that the Council will not be restrained by the frenzied six-week annual session of the former Commission, but instead will meet regularly throughout the year and schedule not fewer than three sessions for a total duration of no less than ten weeks and

83. Id.
84. Id.
shall be able to hold special sessions for urgent situations when needed or requested with the support of one-third of its members. This provision is designed to allow more sustained and serious attention to existing human rights problems, to act preventively, to follow up on the implementation of resolutions and recommendations, to allow greater and more sustained interaction with the rest of the United Nations system, and to respond more quickly to new crises as they emerge.

In making these changes of reform, the members of the United Nations also wanted to acknowledge some of the more impressive achievements of the Commission on Human Rights. These included the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and the international covenants on human rights, among others, and wanted to retain those innovations that had been developed by the Commission over the course of sixty years that had yielded particularly valuable results. For this reason, they charged the new Human Rights Council to assume, review, and, where necessary, improve the mechanisms and programs for human rights promotion and education, recommendations for the further development of international law in the field of human rights, advisory services, technical assistance and capacity-building, special procedures, expert advice, and petition or complaint procedures, among many others. They also reaffirmed the Council’s authority to address serious human rights situations by means of country-specific resolutions. Moreover, they mandated that the Council build upon past successes by working closely with the UN High Commissioner for Human Rights and maintain the arrangements and practices developed by the former Commission for dealing with NGOs, intergovernmental organizations, national human rights institutions, and specialized agencies in advancing human rights.

Once these important decisions of process and structure were approved, attention immediately focused upon the critical issue of membership. All states, NGOs, and interested parties understood perfectly well that no resolution, document, rule, agreement, or institutional body is any better than the quality of those called upon to implement them and make them work. For this reason, the credibility of the new Human Rights Council would rest upon its membership. The first election scheduled for 9 May 2006 thus not only presented an opportunity for candidates and the electorate alike but also held great importance.

Some governments with excellent human rights records sought membership and actually campaigned in the hope that they might make a positive difference on the new Council and its work. Others had more questionable motives for running, including China, Cuba, and Iran. Still others with abysmal human rights records—like Belarus, Nepal, North Korea, Sudan, Syria, Uzbekistan, and Zimbabwe who had been members on the old Commission on Human Rights—understood that they could not possibly obtain enough
votes in the General Assembly under the new system and thus decided not to put themselves forward as candidates at all. In the end, sixty-seven states stood for election for forty-seven seats.

In order to assist the process of applying the new criteria and standards as established by the founding resolution of evaluating potential members and transparently scrutinizing them in advance, and thereby help to change the political culture surrounding the election and enable the Council to be led by states more truly committed to human rights, websites were created to post and reveal each candidate’s human rights record. The United Nations High Commissioner for Human Rights issued a document entitled “Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council” urging all of those seeking membership to publicly present their records and positions. In addition, NGOs like Amnesty International and the Women’s International League for Peace and Freedom displayed charts that visually demonstrated for all to see what candidates for membership promised to do if elected.

In the dynamics of this process of determining the membership of the new Council, no country and its position attracted more attention than the United States. Would the world’s sole remaining superpower decide to stand for election and actively participate, or would it refuse to do so and stand on the sidelines? Many governments and human rights NGOs, despite their reservations about American foreign policy, actively encouraged the United States to announce that it would be a candidate for the Human Rights Council. Even some Republicans in Congress who in the past had been among the harshest vocal opponents of the United Nations pressed for membership in order that the United States not deprive itself of the opportunity to shape the new Council during its critical first year. These included Senator Norman Coleman (R-Minnesota), widely known for his frequent calls for Kofi Annan to resign, and Congressman Henry Hyde (R-Illinois), Chair of the House International Relations Committee and the sponsor of a bill that would withhold United States dues from the United Nations. The Chair of the Senate Foreign Relations Committee, Senator Richard Lugar (R-Indiana), normally a strong supporter of President George W. Bush, asserted that although the reforms still contained flaws, they marked a significant improvement over the earlier Commission and that “the United States must remain engaged in the debate.” He declared, “I urge the Administration,

having now voiced its frustration with the Council, to get on with the job of promoting human rights—a job that can best be achieved by seeking election to the new Council.”

US Senate Majority Leader Bill Frist (R-Tennessee), on the other hand, publicly opposed membership and introduced a resolution calling for the United States to reject participation in the new Council, to withhold any financial support for its work, and to create some completely different body “outside the United Nations system.” The Bush Administration itself was sharply divided on the issue. Some opponents so disdained the United Nations in general that they discounted any reforms and resisted any meaningful cooperation with the organization at all. Others feared any number of specific risks and uncertain elements that could result if the United States actively participated in this new and untried body. One of these was that membership on the Council, according to the new standards, would require the United States to undergo what would likely be an intense international review of its own recent human rights record. Even those within the administration who supported membership, however, feared that given the vehemence and nearly universal criticism over the American-led war in Iraq, the abuse of prisoners, and the refusal to fully cooperate with the request of a special rapporteur of the United Nations to visit prison facilities at Guantanamo Bay, there was a very strong possibility that the United States might actually fail to win a sufficient number of votes in a secret ballot to gain a seat if it stood for election and thereby bring considerable international political embarrassment upon itself.

Whatever the specific reason or combination of reasons, the administration officially announced its much-awaited decision in early April. Sean McCormack, the State Department spokesman, began by boldly claiming that “the United States has led the effort to promote human rights at the UN” from the time of Eleanor Roosevelt “to the present day.” He then stated that although the United States would help provide financial support, it definitely would not seek a seat on the new Human Rights Council. This marked the first time in sixty years that the United States had chosen not to pursue membership on the principal human rights body within the United Nations.

Some welcomed this decision to not participate. Senator Frist, for example, applauded President Bush for taking what he described as “a principled stand,” a “positive step in the right direction,” and a position that would “deny the Council unwarranted legitimacy.” 93 Those who often vocally opposed any United States participation with the United Nations also praised the decision. 94 Most human rights advocates clearly did not. Human Rights Watch declared it to be a “regrettable decision.” 95 Timothy Wirth, the President of the United Nations Foundation, maintained that it was “profoundly regrettable” and one that ran contradictory to common sense, history, foreign policy interests, the encouragement of key US allies, and the administration’s own pledge “to make the Council as strong and effective as it can be.” 96 Representative Robert Wexler (D-Florida) of the House International Relations Committee described it as a “colossal diplomatic failure” and asserted: “It’s a national disgrace for America that we will not be a presence in guiding and leading that Council in a productive direction, and that under Bolton’s leadership at the U.N., the world’s single superpower cannot muster up the necessary votes to win an election.” 97 His colleague and the founding co-chair of the Congressional Human Rights Caucus, Representative Tom Lantos (D-California), described it as a “self-inflicted wound,” to a domestic ideological agenda opposed to international cooperation, and a “disgrace.” “With this recent decision,” he wrote, “we have broadcast to the world that the United States has turned its back on more than half a century of consistent and conscientious efforts to use the United Nations to promote and protect human rights.” 98

On 9 May 2006 the entire General Assembly—with all one hundred and ninety-one countries taking part in the voting—elected the very first forty-seven members to the new Human Rights Council. All regions, with the exception of the Eastern European States, obtained or exceeded the required ninety-six-vote majority required to fill their allocated number of

97. Hoge, supra note 90.
members. Each was elected directly and individually. Germany obtained the largest number of votes from the Western European and Other States, which included Britain, Canada, and France. Ghana received the most votes for the African seats, which also included Algeria and South Africa. India secured the largest number of votes for the Asian seats, which also included China, Japan, Pakistan, and Saudi Arabia. Brazil topped the voting for the Latin American and Caribbean seats, which also included Cuba and Uruguay. Russia, Poland, and the Czech Republic won seats on the first ballot for their region, while Ukraine, Azerbaijan, and Romania were elected in the second round.

Human rights advocates in general welcomed the results. The new procedures and standards produced what Human Rights Watch described as a “substantial improvement” of membership on the new Council as compared to the old Commission on Human Rights. Those with a demonstrable commitment to human rights were elected readily and easily to membership by the General Assembly. Some of the most notorious abusers refused to stand for election at all. Others, like major oil producers such as Iran, with its very poor human rights record, and Venezuela, which remarkably declared that it would not be bound by the Council’s new standards, sought membership but were defeated. Nevertheless, some politically powerful violators like China and Russia were elected; and although Azerbaijan, Cuba, and Saudi Arabia came in near the bottom of voting in their regional groupings and represented only a small number of the total membership, they nevertheless secured seats on the Council. Despite these few disappointments, Ambassador Eliasson reminded his listeners at a press conference that the overwhelming majority of members possessed solid credentials and that each and every member must now subject themselves to a review of its human rights record for all the world to see. Secretary-General Kofi Annan concluded that the full participation of all members of the General Assembly and the specific result of the first election demonstrated:

[A] widely shared commitment to replace the previous Commission on Human Rights with a body that can work more effectively, and can embody human rights ideals with more credibility; and that the Council elected today offers the United Nations a unique opportunity to make a fresh start in its vital work of upholding the highest standards of human rights.

101. Id.
Once the new members were selected, two further tasks remained to make this “fresh start”: end the old Commission on Human Rights and then begin the new Human Rights Council. This proved to be much more difficult than it sounded, for considerable confusion and mixed feelings reigned during the last session of the Commission. The desire by some of the members to address ongoing human rights problems and preventing any gaps or delays in protection was tempered by the fact that they knew that they soon would cease to exist as a body and that whatever decisions they might make could have little effect at all. In addition, and as many governments and NGOs observed, little attention had been given during all of the discussions and negotiations over creating the new Council to actually planning a transition; to the many practical and logistical details of a handover; to the possibility that a vacuum of political support and expertise might be created in the shift; or to any analysis of the advantages and disadvantages of locating operations in New York or Geneva. There was a great deal to do in only a few weeks. Moreover, some members desired to spend time during the final session acknowledging and celebrating the many accomplishments of the Commission as a protector of victims and thereby have an appropriate and respectful “funeral,” as some called it, for a body that lived and operated for sixty years. Others focused more on its failures and its role as a shield for abusers, and could hardly wait to leave the Commission unceremoniously behind and move on. In the end, the Commission on Human Rights concluded its work on 15 June 2006, as required by the General Assembly and the Economic and Social Council.

The new Human Rights Council met for the very first time on 19 June 2006 in the midst of widespread international attention, made even more intense by the participation of many national representatives, the interest of hundreds of NGOs and spokespersons for civil society, extensive media coverage, and live Webcasts. As a result of the new election procedure and vote by the General Assembly as a whole, the public pledges of its members, its new mandate for universal period review, its new elevated structure within the United Nations system, its new and expanded schedule, and the new opportunities for calling special sessions and for suspending members who engage in gross human rights violations; expectations ran high. In addition, the selection of Ambassador Luis Alfonso de Alba of Mexico, a strong human rights advocate, as the first president of the Council was seen as a sign that the majority of members meant business. Many voices thus spoke about a “historical turning point,” a “major stride forward,” a “significant improvement over its predecessor,” a “new era,” and the achievement of a “landmark” with “enormous potential” for advancing human rights in the world.102

But lest these expectations run too high, become overly exaggerated, or lead to the belief that dramatic transformations would occur overnight, those speakers with experience with the politics and diplomacy of international human rights reminded their listeners at the inaugural session of the Council of not only the opportunities but also the challenges that lay ahead. From her perspective in the Office of the High Commissioner for Human Rights, for example, Louise Arbour observed that the creation of the new Council marked a “momentous achievement” and that it was “uniquely positioned to redress the shortcomings of the past.” She nevertheless warned that there was much to do and that many issues and problems needed to be confronted, declaring: “the hard work is just beginning.” All of the carefully negotiated reforms, she and others noted, would amount to very little unless members of the new Council were able to muster sufficient political will to look beyond the pursuit of narrow national self-interest and regional factionalism, to act on principle, to make difficult choices, and to avoid empty declarative gestures by transforming words into deeds that embraced the cause of human rights worldwide. “This Council represents a great new chance for the United Nations, and humanity, to renew the struggle for human rights,” declared Kofi Annan. But he solemnly concluded: “I implore you, do not let the opportunity be squandered.”

VI. CONCLUSION

Those involved in assessing the achievements and the shortcomings of the Commission on Human Rights—in deciding whether it served as a protector of victims or a shield for violators—and in the negotiations leading to the creation of the Human Rights Council correctly observed time and time again that the results could never be perfect. All of the arrangements, including the most recent, came about as a consequence of many, many compromises. Indeed, as Jan Eliasson noted with reference to the new Human Rights Council, no nation on earth obtained everything that it wanted, often including certain provisions on which they sometimes held very strong opinions.


104. For a thoughtful discussion of many of the issues and tasks that need to be confronted, see Human Rights Watch, Human Rights Council: No More Business as Usual, available at http://hrw.org/background/un/un0506. See also NGO Information and Coordination website at www.ngocongo.org.


In this regard, the lessons and perspective of history provides an invaluable reminder that exactly the same observation was made at the time of the creation of the United Nations, the Commission on Human Rights, the Universal Declaration of Human Rights, and every other international treaty, instrument, mechanism, or procedure dealing with human rights. The reason is that all of these have been the result of political decisions made by the representatives of sovereign states, each with their own human rights problems and each with a variety of interests and agendas, including domestic and foreign policies, economics, security, religion, culture, and the value placed on human life and dignity, among other elements. The Commission on Human Rights was—and the Human Rights Council is—an intergovernmental, political body in which all of these elements interact and come into play.

It is not at all surprising, therefore, to hear many advocates of human rights constantly despair over the heavy influence of states and politics. They accuse governments of being interested only in “political motivations” that seek self-serving advantages or narrow interests instead of the intrinsic merits of human rights. They expressed their “disappointment and consternation” over the persistent tendency of members of the United Nations to resort to weakened compromises of politics or expediency rather than determined stands of principle, to intimidation or seduction by power, and to selectively applying standards by criticizing comparatively small countries while allowing stronger and bigger states to escape serious scrutiny. They deplore the role of official representatives of states on human rights bodies as being no more than “striped-pants dignitaries rather than people of substance,” criticizing them for playing “a ping-pong game of diplomacy between nation-states” and nothing more than a “circus of hypocrisy and rhetoric.” If only it were not for states and politics, they argue, international human rights would be much further advanced than it is today.

These complaints and arguments are understandable, and in some cases have considerable merit, for political forces often have seriously hindered and obstructed the evolution of human rights. But it is also the case that whatever advances have been made in this evolution are also the result of politics and those states who do promote, protect, and enforce human rights standards. Regardless of the motives, both the noble and the base, none of the many achievements in the area of human rights would have taken place.

107. For more discussion on this point, see Lauren, Craig, & George, Force and Statecraft, supra note 9, at 137–51.
108. These expressions are common in discussions that take place in the hallways outside the meetings of the Commission on Human Rights in Geneva, especially among human rights NGOs.
109. For more discussion, see Lauren, The Evolution of International Human Rights, supra note 8, passim.
without the political will necessary to make them happen. The reason for this is that human rights relate to human beings as they live together not as they live their lives separately, and thus are always an integral part of some of the most profound of all political issues in the world. Human rights are inherently controversial, for they challenge the authority of the state over its own people, attempt to impose defined limitations or restraints upon the arbitrary exercise of power, endeavor to eliminate special privileges, and seek to hold governments claiming sovereignty to be held responsible to certain principles and norms of behavior.

This perspective is essential to bear in mind. Whether the new Human Rights Council will truly live up to the expectations that have been set before it and thereby mark what Louise Arbour has called “a momentous” change and “a historic opportunity,” and become what Kofi Annan has described as “the chance—a much-needed chance—to make a new beginning in its work of human rights around the world,” or shrink into a merely cosmetic makeover of structure and working methods, will become evident in a number of very specific ways. Among these, it will be particularly revealing to observe which states are elected to membership, whether the special procedures and country-specific mandates from the past are continued, and how the new peer review process is actually implemented in practice. The responses to these critical indicators will provide the ultimate test of whether the efforts expended on the journey from the Commission on Human Rights to the Human Rights Council were worth it or not. But, what happens in the future will depend—as it always has in the past—upon the political will of the actors and their level of serious commitment to international human rights.