

**TOWARDS A UN HUMAN
RIGHTS COUNCIL:
OPTIONS AND PERSPECTIVES**

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I. Introduction

Why should the United Nations Commission on Human Rights (hereinafter Commission) be reformed? There are two main arguments in support of reform:

The first concerns the limited efficiency and effectiveness of the present procedures. Some critics maintain that they are slow, increasingly political and do not always have the desired impact. The ongoing discussions regarding the reform of the Commission try to address at least some of these issues but there are some doubts as to whether the real problems of the Commission can be solved by incremental reforms.

The second argument relates to the subordinate position of the Commission in the hierarchy of UN organs and its corresponding lack of authority, as well as to the length of decision-making procedures in cases where ECOSOC and the General Assembly have to approve decisions taken by the Commission. In fact, according to Article 1 of the Charter of the United Nations (hereinafter the Charter), the promotion and protection of human rights is one of the main goals of the UN, but it is relegated to a subsidiary body of the Economic and Social Council (ECOSOC). As a functional commission of ECOSOC, the Commission on Human Rights is limited in its effectiveness and authority, which may negatively affect the ability of the UN system to respond adequately when a new human rights crisis emerges in some part of the world. A solution to these problems could be the transformation of the existing Commission on Human Rights into a **Human Rights Council** as one of the **principal organs** of the United Nations, a step that would require amending the Charter. This would give institutional recognition to the paramount importance of the human rights goal of Article 1(3) of the Charter today.

This short paper outlines the main issues and options that would need to be addressed if a Human Rights Council were created as a new principal organ, and outlines three possible models. It does, however, not propose or advocate any one of these models, nor does it develop a full argument in favour of such a body.

II. Powers and Tasks

Form should follow function, i.e. the form, composition and organizational set-up of the Human Rights Council should be framed according to its tasks.

As a minimum, the Human Rights Council should keep the functions exercised by the present Commission on Human Rights. These are mainly:

- *Standard-setting*, i.e. preparing texts for new conventions or declarations on specific human rights guarantees or procedures for the implementation of human rights.
- *Monitoring the situation of human rights in the world and responding to violations*, in particular on the basis of country-oriented or thematic mandates and country-related resolutions within the framework of special procedures according to ECOSOC resolution 1235 (XLII).
- *Promoting human rights* through studies and seminars, calling for the ratification of human rights treaties, or providing advisory services and technical cooperation in the field of human rights.

- *Clarifying conceptual issues* by means of studies, working groups, special thematic procedures and standard setting activities.
- *Providing a forum able to publicly address all contemporary issues related to human rights* by holding public sessions where non-governmental organizations (NGOs) and national human rights institutions are allowed to take the floor and participate in the discussions.

Of course, it would be possible to limit the functions of a new Human Rights Council to those of the present Commission on Human Rights. However, the creation of a principal organ of the UN in the area of human rights should be seen as an opportunity to strengthen the body responsible for human rights matters and give it more authority. How the powers of the Council should be expanded and what new instruments it should be given would, of course, require very thorough discussion. Because of its nature as an intergovernmental body and its political tasks, the Human Rights Council must not and should not become a sort of quasi-judicial body taking binding decisions as to whether human rights have been violated in individual cases. However, there are many areas in which the Council could be given decision-making powers. A possible expansion of the tasks of the UN body responsible for human rights matters could take different directions:

1. In terms of *instruments* there is an obvious need to give the UN body dealing with human rights more “teeth” in order to make sure that its findings and recommendations are taken up and implemented. In this regard, the Human Rights Council could, e.g. be given the power:
 - to make authoritative findings that a State *is failing to meet its obligations to co-operate* with the Council, with the Office of the High Commissioner for Human Rights (OHCHR), or with the treaty bodies set up under the different UN human rights conventions; or even to take – with a qualified majority – binding decisions regarding such co-operation (e.g. to allow a special rapporteur to conduct a mission to the country, and to grant him or her access to specific persons, locations or parts of that country; to submit information on specific events, etc.).
 - to bring especially serious situations of human rights violations that amount to a threat to international peace *to the attention of the Security Council* and to recommend, where appropriate, specific steps to be taken against the perpetrators;
 - to request the International Court of Justice to give an *advisory opinion* on any legal question arising within its scope of activities;
 - to *recommend to the Prosecutor* of the International Criminal Court and other relevant international tribunals to initiate investigations *proprio motu* on crimes within the jurisdiction of these courts where the Council receives information on such crimes.
2. In terms of *thematic* areas, the present Commission on Human Rights often touches upon questions of international humanitarian law and humanitarian affairs, or of refugee law and policy. Taking into account the growing relevance of international human rights law during times of armed conflict and in situations of

flight and displacement, it would make sense to clarify/enlarge the mandate of the Human Rights Council to encompass at least those important aspects of humanitarian affairs that have a direct link with human rights. In this case, the new body would become a *Human Rights and Humanitarian Affairs Council*.

3. The importance of the human rights components of UN peace-keeping and peace-building missions has been growing in recent years; at the same time, the UN can potentially violate such rights in situations where it is directly or indirectly exercising formal or *de facto* executive powers. There is a need to approach these issues more systematically and with more expertise. A Human Rights Council could play an important role in this area if it were consulted by the Security Council on the human rights component of UN peace-keeping and peace-building operations and asked to make recommendations in this regard.
4. One problem in the area of human rights and humanitarian affairs is the lack of coordination between the several specialized agencies of the UN, especially in emergency or post-conflict situations. The existing mechanism (OCHA - Office for the Coordination of Humanitarian Affairs) works well in bringing the relevant agencies together but has not enough authority to ensure effective coordination in cases where such coordination is not achieved on a voluntary basis. A Human Rights Council could be given the power to decide in a binding manner about coordination (including designating the lead agency) in situations where the Security Council is involved or has not addressed this issue in one of its resolutions. However, this would only be appropriate if the Council were empowered to deal not only with human rights matters but also with certain humanitarian affairs.

III. Three Possible Models

If the UN body responsible for human rights were to be elevated to one of the principal organs of the United Nations, it would have to fit into the present organizational set-up. It would therefore be wise to take inspiration from the existing organs (Charter Art. 7), i.e. the General Assembly, the Security Council, the Economic and Social Council (ECOSOC) and the Trusteeship Council. While a body comparable to the Security Council with permanent members and possessing special decision-making powers and far-reaching competences to adopt coercive measures is currently not thinkable in the area of human rights, the three other organs, in terms of their size and function, offer three possible models:

- **Model A** is a small body with a limited number of members elected by the General Assembly and a well-defined mandate, which can take certain decisions on its own but has to refer others to the General Assembly or even to the Security Council (similar to the Trusteeship Council).
- **Model B** is a body with an intermediate number of members and a well-defined mandate, which can take certain decisions on its own but has to refer others to the General Assembly or even to the Security Council (similar to ECOSOC).
- **Model C** is a body with universal membership, a wide mandate and extensive decision making powers (similar to the General Assembly).

- **Models A+, B+ and C+** are Models A - C with an extension of the mandate to cover certain humanitarian affairs.

What are the particular strengths and weaknesses of the three models? In order to have the necessary authority, the Human Rights Council would need to be legitimate, to be able to represent the different regional groups, to have the necessary expertise to carry out its tasks, and to have the means to work efficiently. The three models combine the elements of legitimacy, representation, expertise and efficiency to different degrees:

- A small body with less approx. 15 - 25 members (Model A) would be able to work efficiently and would involve lower costs. However, it would be less representative and less legitimate, as it would be difficult to accept that a small number of States could decide about matters that might directly affect many if not all States at a domestic level. In contrast to the area of international security, no State can claim to be a "natural" leader in matters of human rights that must be a member of the Council in any case. With such a small membership, it might also be difficult to make sure that the Council had the necessary expertise. This obstacle could, however, be largely overcome by adopting a solution analogous to UN Charter Article 86 para. 2 which provides that each member of the Trusteeship Council designates one specially qualified person to represent it therein. This would ensure that the individuals making up the Human Rights Council would provide the necessary expertise while still representing their State.
- A body with an approx. 50 - 60 members (Model B) would be less efficient but more representative and therefore could take final decisions on many issues. However, it would lack the legitimacy to take final decisions in matters such as new treaties or UN declarations on human rights matters (i.e. such decisions would still be taken by the General Assembly). There would be an increased danger that members would take an overly political approach to human rights issues and this could negatively affect the Council's expertise.
- A body with universal membership (Model C) would be highly representative and legitimate. This would allow it to take final decisions in most matters. In particular, it could adopt new treaties and declarations. The disadvantages of universal membership are the lack of efficiency in its proceedings. Decision-making would probably often be more political than based on expertise.

In the case of Models A+, B+ and C+ the Council would be able to take, in the absence of Security Council resolutions, binding decisions regarding the coordination of the activities of specialized agencies in emergency and post-conflict situations. Because of the fact that the necessary input for such decisions would be provided by the OCHA process, and taking into account the rather technical character of such decisions, not only a universal but also Council with an intermediate or small number of members would have enough authority to do that.

All three models would depend on strong support from the Office of the High Commissioner for Human Rights. This Office would not only assist the secretariat of the new body but would also implement certain of its decisions.

IV. Place and Time of Meetings

Since the Office of the High Commissioner for Human Rights and most of the treaty bodies are located in Geneva, the Human Rights Council should in any case meet there, regardless of the model adopted. This would offer the advantage of centralizing all human rights institutions in one place, thus facilitating exchange and communication between the different actors and especially with the OHCHR.

Because of its small size, Model A could meet permanently. The present pattern of one regular annual session of six weeks, plus extraordinary sessions when needed, could be maintained if Models B or C were adopted. However, it would be preferable that the new Council would for two or even three regular sessions of shorter duration and have extraordinary sessions whenever needed. In all cases, it would be desirable to create an expanded bureau with some decision-making powers which could operate between sessions.

V. Relationship of the Human Rights Council to Other UN Organs

Today, the UN system assigns competences in human rights issues to a variety of organs and bodies: mainly the General Assembly (GA), ECOSOC and the Commission on Human Rights. The GA bears the main responsibility for human rights issues and has the right of ultimate decision, while on paper ECOSOC is the main organ that deals with human rights. In fact, most of the human rights work is done by the Commission on Human Rights which was set up as one of the functional commissions subordinate to ECOSOC (UN Charter Article 68). The Security Council is only involved with human rights when violations are serious enough to constitute a threat to peace according to Article 39 of the Charter. The creation of a Human Rights Council would change these relationships:

1. The relationship between the Human Rights Council *and ECOSOC* would end, and ECOSOC would no longer deal with human rights matters.
2. The relationship between the Human Rights Council *and the General Assembly* would not be the same under the different models. In Model C, the Human Rights Council would fully replace the General Assembly in human rights matters and would therefore take final decisions in all situations. If models A or B were adopted the GA would retain at least some of the functions it has today (particularly adoption of human rights treaties and declarations). In these instances, the Human Rights Council would report directly to the GA and would no longer have to transmit its proposals (in particular those for new standards) through ECOSOC.
3. The relationship between the Human Rights Council *and the Security Council* would be limited to those human rights matters that are related to a threat to peace. As mentioned above, the protection of human rights would be strengthened if the Security Council had to consult the Human Rights Council on the human rights components of peace-keeping and peace-building missions and if the Human Rights Council could refer to the Security Council human rights violations that are serious enough to constitute a threat to peace. These proposals would probably work well with Models A and B but might create problems if Model C was adopted as this could affect the independent position of the Security Council.

4. The relationship between the Human Rights Council *and the International Court of Justice (ICJ)* would be limited, as mentioned above, to the power of the Council to request advisory options from the ICJ.
5. The relationship between the Human Rights Council *and the treaty bodies* could be strengthened by requiring the treaty bodies to submit their annual reports to the Council instead of sending them to the General Assembly.
6. *The Sub-Commission on the Promotion and Protection of Human Rights* could be kept as a subsidiary organ of the Council, i.e. its role would not necessarily or automatically be affected by the reform.

VI. Role of NGOs

Under ECOSOC Resolution 1996/31 and the related consultative arrangements made with the organizations, NGOs can contribute in different ways to the work of the present Commission on Human Rights: They can submit written statements, deliver oral interventions, and propose issues to be discussed by the Commission. Furthermore it is often NGOs that provide the impetus for the initiation and implementation of special procedures. Despite some criticism of the oral statements made during meetings (too many, too repetitive, sometimes too polemical), it is generally uncontested that NGOs are indispensable to the effective functioning of the Commission.

Creating a principal organ of the UN responsible for human rights issues should not lead to a reduction of the role of NGOs. While it is true that NGOs cannot participate in the deliberations of the other principal organs (with the exception of ECOSOC), maintaining their role in the Human Rights Council finds a special justification in the preamble of the 1948 Universal Declaration of Human Rights, in which the General Assembly declared “*that every individual and every organ of society [...] shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance [...], both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction*”. This is a clear indication that, in contrast to other areas, the special role of civil society organizations at the international level has always been recognized.

VII. Role of National Human Rights Institutions

National human rights institutions play an increasingly important role in the effective implementation of human rights at the domestic level. Their potential to function as an important link between the international and national levels of human rights implementation should be allowed to contribute to the work of the Human Rights Council. They should therefore be able to participate in the discussions of the Council and to contribute to its work, regardless of the model adopted.

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Summary: The Three Models in Overview

<i>Model</i>	Model A and Model A+¹ (small membership analogous to Trusteeship Council)	Model B and Model B+¹ (intermediate membership analogous to ECOSOC)	Model C and Model C+¹ (universal membership analogous to General Assembly)
<i>Size</i>	15 - 25 members (states represented by individual experts)	50 - 60 members	all UN member states
<i>Mandate</i>	human rights [<i>and humanitarian affairs</i>]	human rights [<i>and humanitarian affairs</i>]	human rights [<i>and humanitarian affairs</i>]
<i>Tasks</i>	<ul style="list-style-type: none"> - preparation of new standards (treaties to be adopted by GA and GA declarations) - promotion of human rights including technical assistance - responding to human rights violations through special procedures/resolutions - developing and clarifying conceptual issues relating to human rights matters - decisions regarding the failure of a State to co-operate with treaty bodies / the HR Council / OHCHR - decision to bring a situation to the attention of the Security Council - proposals to SC regarding human rights component of UN peace keeping and peace-building missions - decision to ask ICJ for an advisory opinion on legal issues pertaining to human rights - recommendation to international criminal tribunals to initiate specific investigations - [<i>mandates / coordination of specialized agencies in specific situations</i>] 	<ul style="list-style-type: none"> - preparation of new standards (treaties to be adopted by GA and GA declarations) - promotion of human rights including technical assistance - responding to human rights violations through special procedures/resolutions - developing and clarifying conceptual issues relating to human rights matters - decisions regarding the failure of a State to co-operate with treaty bodies / the HR Council / OHCHR - decision to bring a situation to the attention of the Security Council - proposals to SC regarding human rights component of UN peace keeping and peace-building missions - decision to ask ICJ for an advisory opinion on legal issues pertaining to human rights - recommendation to international criminal tribunals to initiate specific investigations - [<i>mandates / coordination of specialized agencies in specific situations</i>] 	<ul style="list-style-type: none"> - preparation and adoption of new standards (treaties and declarations) - promotion of human rights including technical assistance - responding to human rights violations through special procedures/resolutions - developing and clarifying conceptual issues relating to human rights matters - decisions regarding the failure of a State to co-operate with treaty bodies / the HR Council / OHCHR - decision to bring a situation to the attention of the Security Council - proposals to SC regarding human rights component of UN peace keeping and peace-building missions - decision to ask ICJ for an advisory opinion on legal issues pertaining to human rights - recommendation to international criminal tribunals to initiate specific investigations - [<i>mandates / coordination of specialized agencies in specific situations</i>]

¹ Models A+, B+ and C+ would be Models A - C plus an expansion of the mandate to certain humanitarian affairs. Elements confined to the + Models are in *italics* and in square brackets.

Sessions	Meetings whenever needed	<ul style="list-style-type: none"> - 1–3 ordinary session totalling 6 weeks - extraordinary meetings when needed - expanded bureau with some decision-making power between sessions 	<ul style="list-style-type: none"> - 1–3 ordinary sessions totalling 6-8 weeks - extraordinary meetings when needed - expanded bureau with certain decision-making powers between sessions
Location	Geneva	Geneva	Geneva
Relationship to other organs	<ul style="list-style-type: none"> - operating under the authority of the GA and assisting it - replaces ECOSOC in area of human rights matters - may bring situations to the attention of the security Council where appropriate - may ask ICJ for advisory opinion 	<ul style="list-style-type: none"> - operating under the authority of the GA and assisting it - replaces ECOSOC in area of human rights matters - may bring situations to the attention of the security Council where appropriate - may ask ICJ for advisory opinion 	<ul style="list-style-type: none"> - replacing GA in the area of human rights and humanitarian affairs (final decisions) - replaces ECOSOC in area of human rights and humanitarian affairs - may bring situations to the attention of the security Council where appropriate - may ask ICJ for advisory opinion
Relationship to treaty bodies / specialized agencies	<ul style="list-style-type: none"> - authoritative finding that a State fails to co-operate with treaty bodies 	<ul style="list-style-type: none"> - authoritative finding that a State fails to co-operate with treaty bodies 	<ul style="list-style-type: none"> - Treaty bodies report to Council instead of General Assembly - authoritative finding that a State fails to co-operate with treaty bodies - <i>[Council coordinates activities of specialized agencies where appropriate]</i>
Role of NGOs	Observer status with right to speak	Observer status with right to speak	Observer status with right to speak
Strengths	Permanency, flexibility, efficiency and expertise	Relatively representative and relatively flexible	Highly representative Criteria for membership not an issue
Weaknesses	Not sufficiently representative	Necessary expertise not assured	Lack of flexibility and efficiency