Introduction

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From the outset of the international human rights movement with the proclamation of the Universal Declaration of Human Rights, an abiding theme has been that of implementation. How might the human rights commitments made by states be translated into protection for individuals in practice? Sixty years after the Declaration was proclaimed it remains the central challenge. Human rights institutions, international, regional, and national, provide an indispensable means to meet that challenge and hence their importance for study.

It is a characteristic of sovereignty that it is for the state alone to secure its international commitments within its jurisdiction. But the entitlement of the international community to monitor or hold the state to account for its human rights failings has emerged as an accepted fact in international relations, even if remains an uneasily established principle and one which still provokes claims of interference in internal affairs. More accepted, and perhaps more productive, is the willingness of states to request international assistance in the implementation of human rights commitments including with the creation of effective institutions or with institutional reform.

Nevertheless, with the agreement of states, institutions, and mechanisms have been created at global and regional levels which have given substance to the idea of international protection. States in turn have been influenced to establish at national level a range of institutions for human rights protection. The totality of these institutional arrangements within and beyond the state can be thought of as constituting, however imperfectly, a highly connected if not yet a single system of human rights protection. The constant exchange of ideas and information including judicial precedents, vertically and horizontally between institutions, which has accelerated enormously with new communications technology, and the entitlement of different actors including Non-Governmental Organizations (NGOs) and National Human Rights Institutions (NIHRIs) to participate at all levels, represent hopeful developments. Alfredsson's account of the normative and institutional advances of minority rights through the Council of Europe and the Organisation for Security and Co-Operation in Europe (OSCE) as well as within the UN, demonstrates well this interconnectedness of protection efforts.

The problem, however, is that these developments have had but limited impact on effective implementation. One cause for celebration of the Universal Declaration is the global recognition of its enduring values and aspirations. But

the credibility of human rights remains highly vulnerable when measured against the reality of violation and the failure of states to respect the corpus of international law obligations that has been so painstakingly established.

A little acknowledged but powerful diagnosis of the conditions which human rights institutions, national and international, exist to remedy was produced in 2005 by the UN High Commissioner for Human Rights.[1] Prepared as part of the process of UN institutional reform launched by the former Secretary General, Kofi Annan, its analysis provides a sobering context for the challenges that face both old and new human rights institutions. The Plan identifies the 'implementation gap' between the agreed human rights principles and norms and the experience of perhaps the majority of humankind who are denied their protection. It recites a number of challenges that account for the gap including, above all, poverty which affects a billion people and undermines the universality of human rights. Poverty, the Report notes, is a reflection of global inequalities as well as the persistence of discrimination practiced or tolerated on all the grounds prohibited in international law. A connected challenge is that of the suffering and human rights abuse that arises from armed conflict and violence including terrorism. Civilians are the predominant victims of conflicts and are subject to indiscriminate killings, disappearances, massacres, ethnic cleansing, and forced displacement. The repressive responses by states result in a further challenge, that of impunity. While there has been positive progress in establishing accountability for the worst atrocities through international criminal prosecutions, impunity for torture, rape, and arbitrary killings at national level represents the depressing norm. To this catalogue the Report adds the challenges of the weakness of democratic systems in many countries alongside the absence of the Rule of Law. Effective governmental institutions including executive authorities, parliaments, judicial, and policing systems are needed if human rights are to be realized. But too often, the High Commissioner notes, such institutions are weak, corrupt, and inefficient. Against this backdrop of global human rights and development realities, the challenges for human rights institutions whether at UN, regional, or national levels are formidable.

The High Commissioner's analysis of implementation challenges acknowledged the influence of Kofi Annan's central thesis on UN reform, that progress on human rights protection was directly linked to the pursuit of the other purposes for which the United Nations was established; development, peace, and security. Changing the world's human rights record requires deep change in the global economic and political order. Change is not a matter of institutional reform alone but requires the full commitment of states to the cooperation which the UN Charter requires if global peace and social justice is to be achieved. In concrete terms this should mean, for example, a determination to achieve the Millennium Development Goals (MDGs) by 2015. While all states endorsed the MDGs in

[1] *The OHCHR Plan of Action: Protection and Empowerment* (Geneva, 2005).

the Millennium Summit and its follow up in 2005, their full realization in that time scale remains a remote prospect.

A fresh opportunity at the global level for leadership and a new impetus for human rights implementation has arisen from the establishment of the United Nations Human Rights Council in 2006. This new intergovernmental institution replaced the former Commission on Human Rights that had been in existence for the previous 60 years. As Boyle notes the agreement on creating a new Human Rights Council at the 2005 UN Summit, seen against the failure of larger institutional reform goals that were in prospect in particular in respect of the Security Council, was a relatively minor achievement. The case for expansion of permanent membership of the Security Council is acknowledged by the international community. But disagreements over which states from the South should have permanent seats and over deeper reforms of the Council left the issue unresolved. Continued failure to achieve an expanded Council, to reflect the new geopolitical and economic conditions of the 21st century, must diminish the capacity of the United Nations to be the effective multilateral forum it needs to be if its interconnected goals of global security and peace, development, and universal human rights are to be achieved.

The pressure for the abolition of the Commission on Human Rights on the claim that it had become increasingly politicized and ineffective was generated by Western states led by the United States. However the decision to replace it was not resisted by other states. A consensus does appear to have emerged that the Commission's authority and standing had much diminished and that the new Council offered a fresh opportunity to assert a higher priority for UN human rights work.

Those who promoted the new Human Rights Council hoped it might be constituted with equal status to the other Councils, the Security Council, and the Economic and Social Council giving an institutional reflection of the equal and connected nature of UN purposes. That was agreed to be a possible option for the future when the institution falls for review in 2011. For now, the Council is established as a subsidiary body of the General Assembly whereas its predecessor the Commission was answerable to the Economic and Social Council. The elevated status of the new Council, along with the greater frequency of its meetings as compared with the Commission, are key differences distinguishing it from its predecessor.

General Assembly Resolution 60/251 establishing the Human Rights Council enjoined it 'to preserve and build on the achievements [of the Commission] and to redress its shortcomings'. The Commission's standard setting achievements as the body that drafted the Universal Declaration of Human Rights and its later contributions, including through its Sub-Commission, to much of the corpus of international law of human rights built on the Declaration, are well known. Its role over the decades in the development of the system of special procedures which have come to represent an indispensable vehicle of international scrutiny and

protection as well as for the development of international human rights norms is a further achievement. That system has been reviewed by the new Human Rights Council and has been preserved. In the review process, however, the pressure from some states to constrain the freedom of action of the special procedures was starkly evident and is unlikely to abate in the years ahead. The competence of the former Commission to receive, assess, and respond to complaints of gross and reliably attested violations of human rights has also been preserved, albeit it is too early to determine what use NGOs and victims will make of this confidential complaint procedure and whether Council members will cooperate across the regional groups to develop its potential.

The shortcomings of the former Commission on Human Rights relate to the intrusion of the political divisions between states and their regional groups and political blocs into its meetings. Its downfall arose from these tensions and the new Council was formally directed to ensure that it was guided by the principles of 'universality, impartiality, objectivity and non selectivity' in its work. These principles are much invoked by states in the Council's sessions to date, but they have hardly been successful in suppressing political differences from emerging. Scepticism over the possibility of the Council transcending the faults of the Commission remains. The United States, the chief critic of the former Commission, has already withdrawn from the Council as an observer state (it has not stood for election), citing in particular the excessive targeting of Israel. A key issue is how the new Administration in Washington after the November 2008 presidential elections will behave. As Boyle notes, the largely negative posture of the current US Administration towards the council from its inception dishonours that country's proud history as the progenitor of the Commission on Human Rights. It is not a constructive position to write off this central pillar of the United Nations human rights system and is not one followed by the European Union. The majority of the state members elected to the Human Rights Council are from the Asian and African regional groups and many are members of cross-regional blocs such as the Organisation of the Islamic Conference (OIC) and the Non-Aligned Movement (NAM). That was also the case in the last decades of the former Commission but in the somewhat reduced size of the Council their dominance is more pronounced. It is therefore the human rights priorities and policies of the developing world which dominate and will continue to dominate the Council, not those of developed states. Hence the need for the other principle which the Council is enjoined to uphold, 'constructive international dialogue and co-operation'. Nevertheless the Human Rights Council will face considerable challenges if the most powerful state in the world persists in its boycott of the new body.

Much of the work of the Council in its first and 'institution building year' 2006–7 has been codification and simplification of the inherited practices and mechanisms of the former Commission. Alfredsson expresses concern that the process in the case of minorities, which has seen the replacement of the former

Working Group on Minorities with a Minorities Forum, will diminish not enhance the Council's engagement with minority rights. But there has been innovation also, in particular the new mechanism of universal periodic review (UPR). Under this mechanism all UN member states will submit to a periodic review of their human rights performance to be conducted by their peers on the Human Rights Council over a cycle of four years. The idea was born in response to the most persistent complaint that had undermined the legitimacy of the Commission on Human Rights, namely that the powerful could avoid being the target of international attention or action over their human rights problems and violations but weaker states could not. The intention was to institute UPR as a cooperative mechanism to review the practice of all states as regards their human rights obligations and commitments. UPR it was hoped might help not only to diminish the palpable politicization and the claims of double standards that had dogged the Commission, but might also prove more effective in inducing states to strengthen human rights protection at home. Boyle notes the positive features of the first reviews which began in 2008 in terms of the constructive atmosphere of the process, the degree of self-criticism, and the relative openness of at least some of the states under review to address issues raised on their performance by other states. Bernaz, while acknowledging the inherently political nature of the United Nations as an intergovernmental body, seeks to study the new UPR mechanism from the standpoint of public international law. One part of her contribution is to examine the sources on which the UPR is to be conducted. In particular she questions the inclusion in the sources of review of both treaty-based commitments of states and soft law sources such as their voluntary commitments and pledges. One value of this contribution is that it documents the arguments in the Council over the potential sources for evaluating human rights performance by states. Whether as practice evolves states will seek to confine their responsibilities to such obligations which arise from treaty commitments alone will be interesting to observe. But Bernaz does note that one positive result of the voluntary commitments, such as those made by states when standing for election to the Council, arises when the commitment made is to become party to human rights treaties. Indeed announcement by states that they intend to ratify treaties has been a feature of a number of UPR sessions to date.

Creating or re-designing institutions, whether global, regional, or national, inevitably raises issues over the impact of change on other bodies and actors that work in the same field. Questions that may appear bureaucratic and technical concerning overlapping functions and duplication often disguise concerns over institutional competition. This theme arises in Rodley's account of the United Nations system, in de Schutter's study of the genesis of the new European Union Fundamental Rights Agency, and equally Rorive's analysis of national level human rights equality bodies in EU countries. Rodley reminds us that the UN human rights protection efforts as they have evolved are bifurcated between a treaty-based system and the intergovernmental institution of the Human Rights

Council. He explores first the question of potential conflict or complementarity between the new Council and the treaty bodies which supervise the implementation of the human rights treaties. The particular focus of interest is the UPR system. In establishing the Council, the General Assembly directed that UPR should 'complement and not duplicate the work of the treaty bodies'. But as Rodley notes, no guidance was given as to how this was to be achieved. The similarities in the UPR mechanism, which is primarily based on the state's own report, and the report prepared by a state for a treaty body are, he concedes, considerable. A fear expressed had been that if a recommendation made to the state under review by a state participating in UPR review consisted of a request to implement a recommendation made in the 'conclusions' of a treaty body and the state rejected this, then the authority of the treaty body would be undermined. Whether this will arise or not, some states conducting the UPR have recommended that the state under review implement treaty body proposals, which suggests a positive and reinforcing use of the work of the treaty bodies in the UPR. A further concern expressed was over the possibility that the Council would itself adopt 'conclusions' under UPR which might be different or even conflict with those of treaty bodies. In the event, the outcome document of UPR does not take this latter approach, listing only the recommendations made to the state and identifying those which the concerned state accepts and those it does not, as well as recording any voluntary commitments it has made. However, UPR is in its earliest phase and it is premature to judge how this new mechanism may ultimately relate to the treaty system.

Bernaz offers the interesting speculation that should the UPR mechanism over time be judged successful and if attention returns to rationalization of the different components of the UN human rights machinery, then UPR might conceivably come to replace the system of reporting to the treaty bodies. Rodley notes that had the former Commission on Human Rights achieved a comprehensive supervisory function over states' human rights commitments at the outset, the later treaty body reporting system might not have been created. There is no doubt that the treaty system which now includes eight core treaties constitutes a significant burden on states in terms of reporting obligations. To that has now been added the UPR report. The former High Commissioner Louise Arbour strongly supported treaty body reform and promoted the option of one standing treaty body receiving a single report from states relating to their multiple human rights treaty commitments. That proposal has not been supported by states and, for now, it seems likely that the two-track system, the treaties, and the Human Rights Council with its new mechanism of UPR, will continue to operate. Apart from the innovation of UPR, the parallel functioning of the Council and treaty bodies raises a further issue namely that of the respective roles of the Council's independent experts, the special procedures, and the treaty bodies. Rodley recalls that once the treaty bodies had come into existence, concern was expressed over duplication and the continued need for the special procedures

was even questioned by some states. In the event, the special procedures prospered and represent the most important protection mechanism inherited from the former Commission on Human Rights. Rodley's detailed study finds that the overlap between the system of special procedures and the treaty bodies is minimal in practice and that synergy between both has grown through better communication, such as has been engendered by the now annual meeting of chairs of treaty bodies and the special procedures.

But with the arrival of the Human Rights Council, the plurality of specialist human rights institutions and mechanisms within the United Nations (and to the list should be added the significantly expanded Office of the High Commissioner for Human Rights) will need to address how their common mission is advanced rather than impeded by their separate institutional foundations. One role given by the General Assembly to the new Council is to work for the better coordination as well as mainstreaming of human rights within the United Nations system as a whole. The High Commissioner for Human Rights has a similar mandate. The tensions which have already emerged in the relationship between the High Commissioner and the Council suggest, however, that progress on coordination and rationalization of the UN system will neither be immediate nor dramatic.

The unique density and complexity of the human rights institutions of Europe, as compared to other regions, is well known. One challenge, as in the case of the UN, is how to ensure harmonious co-existence and cooperation rather than duplication and competition between institutions. De Schutter's account of the genesis of the new EU Fundamental Rights Agency (FRA) reviews the extensive consultations between the EU and the Council of Europe over the concerns that the latter might suffer an eclipse in its human rights mission in particular, were the FRA to develop an active monitoring function for EU member states (and accession states), all of which are also members of the Council of Europe and subject to its monitoring mechanisms. He notes that similar concerns were expressed by the Council of Europe during the negotiations over the EU Charter of Fundamental Rights in 1999–2000. All EU member states, in addition to their Council of Europe commitments, are also subject to the monitoring mechanisms of the UN human rights system, including now UPR. De Schutter argues that such duplication as exists with UN and Council of Europe instruments has not proved to be a problem and has not resulted in the reduction of human rights standards.

Nevertheless, while the concerns of the Council of Europe may have been misplaced, the ultimate mandate given the FRA steered away from any explicit monitoring of EU human rights standards such as under the EU Charter. The new institution will undertake thematic studies rather than country-specific studies, in deference to the Council of Europe's country work. FRA builds upon its predecessor body, the European Union Monitoring Centre on Racism and Xenophobia (EMUC), and will offer assistance and expertise to EU bodies and member states on fundamental rights when implementing Community law.

FRA is directed to cooperate closely with the Council of Europe, as well as other organizations including the OSCE and the United Nations. The special relationship of the Council of Europe with the FRA is expressed additionally by its right to appoint an independent person to the FRA's Executive and Management Boards. De Schutter is confident that the FRA, which is now operational, will develop a significant role in enhancing the promotion and protection of fundamental rights within an enlarged and more diverse Union. It should also contribute to the deepening of cooperation on human rights between the EU, the Council of Europe, and the OSCE.

The FRA mandate explicitly continues EMUC's work on racism, xenophobia, and related intolerance. This is consonant with the Union's long established commitment to equality and the elimination of ethnic, racial, and sex discrimination. With respect to sex discrimination, that commitment is reflected in a further new European level institution, the European Gender Equality Institute established by Regulation (EC) No 1922/2006. Based in Vilnius, the Institute is directed to work cooperatively with the FRA. At national level, the two Equality Directives of 2000—the Racial Equality Directive and the Employment Equality Directive—required member states to designate or establish equality bodies to promote equality of treatment. In analysing these specialized bodies Rorive notes the great diversity of their origins and mandates. Some existed prior to the Directives, others were a response to them. A general trend now to be discerned is the creation of comprehensive bodies that work across all discrimination grounds through the merging of existing single discrimination ground bodies. Many national equality bodies are given implementation authority beyond research and advisory work. They can have investigatory powers, initiate litigation on behalf of victims, and can undertake dispute resolution as well as training and promotional campaigns. It is of interest to note, as Rorive brings out, that many equality bodies have been influenced in their attributes, particularly as regards their independence, by the UN Paris Principles 1993 drawn up for specialized human rights bodies or national human rights institutions. Indeed an emerging further stage of reordering of national bodies in Europe could be the amalgamation of equality and human rights bodies such as has occurred in Britain and has been proposed in Ireland.

The focus of the essays in this volume is on recent developments in respect to global and also European human rights institution. But there is ongoing debate, reform, and innovation in respect of human rights institutions involving states in other world regions which should be noted. Thus, in 2006, the General Assembly of the Organization of American States initiated a dialogue between the organs of the Inter-American Convention on Human Rights, the Commission and the Court, and state parties to the Convention, with the aim of agreeing procedural reforms of the Inter American system.

The Arab League, which comprises 22 states, adopted a revised Human Rights Charter in May 2004, to replace a much criticized 1994 text that had never entered into force and which was not consistent with international human rights

standards. The revised Charter received its seventh ratification on 15 January 2008, and entered into force on 15 March 2008. The Charter establishes a committee of seven members which will review state reports. Members are required to be expert and will serve for a four-year term in their personal capacity. The Committee, which is yet to be formed, will review state reports. When established it will be the first independent human rights institution to supervise the implementation of a human rights treaty within the League of Arab States.

In June 1998, the states parties to the African Charter on Human and Peoples Rights adopted a Protocol establishing an African Court of Human and Peoples' Rights, alongside the African Commission. This protocol entered into force in January 2004 with the Court coming into existence in 2006. In a decision motivated by financial considerations, African Union leaders then decided that the new African Human Rights Court should merge with the African Court of Justice of the African Union. This will be achieved by a further protocol which has now been agreed by the African Union and has been opened for adoption by member states. However, the limited number of states to date which have ratified the 1998 protocol suggests that an African Union Court with continent-wide human rights jurisdiction will not be achieved easily or soon.

In Asia, the United Nations has over several decades encouraged states to establish both national level human rights institutions and regional human rights protection arrangements. There has been progress in the establishment of national human rights institutions in a number of countries. At regional level, an important step occurred in November 2007 when the Association of South East Asian States (ASEAN) adopted a Charter for this grouping at its 13th Summit in Singapore. The Charter aims to provide ASEAN with a legal personality and to establish more clearly its institutional framework and rules of procedure. Ratification of the Charter by the ten member states of ASEAN is expected by December 2008. The Charter provides for the establishment of a human rights body. Agreement on the latter's creation and its mandate is expected by the end of 2009. Meanwhile, in the Pacific, NGOs continue to promote debate with governments over the need for a regional charter and ultimately a regional human rights commission or other protection mechanism for the 22 Pacific islands and territories.

The creation of new human rights institutions or the reform of existing human rights bodies properly induces a degree of optimism about the strengthening of human rights protection and the continued commitment of states to that goal. The essays collected here address primarily the institutional features of such initiatives. But the added value of such institutions must ultimately be measured by what improvement is registered in the implementation of human rights norms for the benefit of individuals and communities. The gap between aspiration and achievement in the field of human rights remains the challenge for the entire international community.