



## ***"Peer Review and State Performance in the new Human Rights Council: Building new compliance mechanisms."***

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### **SUMMARY OF DISCUSSION DECEMBER 7, 2005**

At the UN World Summit in September 2005, as part of a UN reform package, heads of state agreed to form a Human Rights Council to replace what many had increasingly found to be a frustrating, politicized, and discredited Commission on Human Rights. The notion of "peer review" - that states would establish criteria and procedures to review each others' compliance with internationally-recognized human rights standards - was central to the notion of reform held by many of them. This new focus on "peer review" was intended to move away from the process of negotiating and passing country-specific resolutions, which many had come to see as politicized - although when such resolutions could properly address the world's worst human rights violators, human rights advocates greeted them as a triumph over those political obstacles.

Still, the resolutions often tended to become retaliatory and were the subjects of trade-offs. Diplomats increasingly found they lacked the stamina to gain the political consensus needed to mount even the most urgent condemnations of blatantly obvious human rights crises such as in Sudan.

Although they were reaching for a concept of impartial review drawn from other settings, such as rigorous academic scrutiny of publications, when states promoted "peer review" in the multilateral context, they were moving into relatively uncharted waters. Only a few international bodies use peer review mechanisms, and those that do have developed resource-intensive and often complex procedures, such as communications and fact-finding visits, to ensure the process remains unbiased.

Mindful of the extensive expertise and resources needed for such peer review, which, to some extent is already practiced in the UN's treaty bodies, the JBI prepared a background paper, "Peer Review and Human Rights" (December 2005) and invited experts to meet with UN ambassadors

negotiating for the establishment of the new Human Rights Council, to help them navigate the complexities involved in the fresh emphasis on "peer review".

On December 7, 2005, JBI convened a panel discussion for 27 ambassadors and diplomats and various experts in the field to analyze the reform proposal to establish a "peer review" system for the United Nations to assess state performance in meeting human rights commitments. The session, entitled "Peer Review and State Performance in the New Human Rights Council: Building new compliance mechanisms" was one in JBI's series of strategy meetings on a new UN Human Rights Council.

Three experts provided insights and comparative perspectives on peer review mechanisms in diverse international organizations, outlining some of the advantages and disadvantages to such systems for adaptation in the UN setting.

Fabrizio Pagani, the Senior Legal Adviser at the Organization for Economic Cooperation and Development (OECD) described his organization's process of assessment based on benchmarks and across a wide range of topics: from macroeconomic policies to environment, from competition policy to development cooperation. He also emphasized how the OECD peer review relies on an informed and engaged Secretariat, as its "historical memory" of past reviews can safeguard consistency.

Lee Swepston, Senior Advisor on Human Rights at the International Labour Office (ILO) addressed the ILO peer review mechanism, which relies heavily on intensive staff work and technical analysis, and has a direct questioning process for only some of the countries concerned.

Kakuna Kerina, Senior Program Director and Senior Advisor for Africa at the International League for Human Rights assessed the African Peer Review Mechanism of NEPAD, which has enthusiastic support from those countries wishing to change, but lacked civil society participation and sufficient resources.

## **Introduction**

Felice Gaer, JBI's Director, welcomed the participants and introduced the topic of peer review, highlighting the Blaustein Institute's historical involvement in UN human rights institutions, and ongoing concern that in the name of reform and shedding of political biases, the crucial role of bringing attention to the victims of the world's worst human rights violators must not be abandoned.

She described the negotiations to date on the concept for the new body. UN Secretary-General Kofi Annan proposed that the Human Rights Council have a peer review function. The idea was included in various drafts of the outcome document, and has been elaborated on to some degree in "non-papers" by the Canadian Mission to the UN. Gaer described some of the problems that the UN Commission on Human Rights has faced in the past, and stated that it has been described as "politicized" and "unprofessional" due to its failure to act on some country situations, exaggeration of other country situations, and insufficient criticism of still others. Negotiations

about the Human Rights Council have included much discussion about the size and membership of the Council, but very little about the actual modalities of peer review itself.

Key issues that emerged from the discussion with experts included:

- The primary goal of peer review in the context of the UN Human Rights Council must be to promote compliance with international obligations, which must be clearly articulated. Other goals might include the improvement of policy-making, exchange of information, learning from best practices, the promotion of transparency, and the opening of opportunities for technical assistance and capacity building.
- The experiences of the OECD, ILO, and NEPAD with peer review demonstrate that the process is highly resource-intensive, in terms of expense, time, and staffing expertise.
- The mandate of a peer review mechanism, and the scope of issues that it assess, must be narrow in order for the process to be successful.
- It is crucial that any peer review process enhance, but not duplicate, the work of the UN treaty bodies.

## **Organization for Economic Cooperation and Development**

Fabrizio Pagani, Senior Legal Adviser at the OECD, described the methods of review used at the OECD. The OECD, which focuses on social and economic policies, does not do human rights work per se. While the vast numbers of cases that go through the peer review mechanism involve 30 member states that share a commitment to democracy and a market economy, there have been several cases that have involved a non-member state, such as China, Chile, Brazil, South Africa, etc.

Mr. Pagani described the purpose of peer review as the systematic assessment of the performance of states based on particular benchmarks. Peer review can be a forum for governments to help other governments to improve their policies and adopt best practices. Mr. Pagani stressed that peer review is never adversarial, and that there is almost never “naming and shaming” in the process. There are different reviews in each of the Committees of the OECD, each of which have a different theme (macroeconomic policies, environment, energy, development aid, regulatory policies, territorial development, agriculture, etc.). Frequency of review can vary: some reviews can occur every 18 months, whereas others occur every 6-7 years.

Mr. Pagani laid out three key elements of peer review:

- 1.) An agreed set of principles and criteria that serve as the basis for review. These can include legally binding principles, formal guidelines, quantitative benchmarks, or national laws.
- 2.) Actors: the collective body, the reviewed country, examiner countries, and the OECD Secretariat. Mr. Pagani described the role of the Secretariat as crucial, since it has the

historical memory of the previous reviews and can safeguard consistency and fairness. This “historical memory” is particularly important, since the reviews are cyclical and a states’ performance is assessed against the previous review.

- 3.) Procedure: While the procedures vary, in general, there is a preparatory phase, a consultation phase in which the dialogue between states occurs, and lastly, a reporting /assessment phase.

According to Mr. Pagani, the following factors make OECD peer review effective: Value sharing, adequate level of commitment, mutual trust, and credibility.

Mr. Pagani concluded that peer review can serve the following purposes: policy dialogue, transparency, capacity building, and compliance. In this regard, it can serve as a stimulus to incremental change and improvement. Through the accompanying effect of peer pressure – including both persuasion by other countries and the stimulus of domestic public opinion – peer review can create a catalyst for performance enhancement which can be far-reaching and open-ended.

### **International Labor Organization**

Lee Swepston, Senior Advisor on Human Rights at the ILO, stated that the specialized agencies, including the ILO, are looking with great interest at the proposal for the UN Human Rights Council. The ILO is anxious to see what role they might play in the process, and how their work might be helpful to the work of the Council.

Mr. Swepston explained that the ILO is a tripartite organization, which includes labor unions, employers’ organizations and states. The ILO uses various forms of peer review to assess state’s adherence to the Conventions that they have ratified and to the Organization’s basic principles. There are 20 experts in law and social policy appointed by the Director-General of the ILO, and approved by the Governing Body, to assess compliance with ratified Conventions. A standing committee of the International Labour Conference meets every year to select 25-30 particularly serious cases for public review.

Mr. Swepston explained that some parts of the various peer review mechanisms at the ILO are purely “paper based” exercises in which there is no direct questioning. There is a mix of procedures, including country visits, technical reviews and legal analysis, which constitute a very intensive process to which the Organization devotes substantial funding.

There are also additional review mechanisms based on labor-rights principles for those countries that have not ratified all 8 of the fundamental human rights Conventions (only 64 countries have not yet ratified all of them, though most states have ratified 5, 6 or 7 of the 8). This is a cooperative and promotional process, and the ILO works with all these countries to help them move toward ratification.

In speaking generally about the peer review processes of the ILO, Mr. Swepston said that it has been effective in pushing states toward enhanced compliance. Peer review, he said, is very

resource intensive, and is most effective when it is done based on precise obligations, rather than general principles.

### **NEPAD: The African Peer Review Mechanism (APRM)**

Kakuna Kerina, Senior Program Director and Senior Advisor for Africa at the International League for Human Rights (ILHR), discussed the APRM process at NEPAD. 24 states have agreed to participate in the APRM process. This is a high-level process, and countries participate at the level of heads of state. The process is run by a panel of eminent persons.

Since very few states have been through this process (to date, only Rwanda and Ghana, both of which currently have relatively good human rights records, the judicial legacy of Rwanda's genocide, notwithstanding), it is hard to judge its effectiveness in general terms. In the countries where the peer review process has been completed, there has been a positive perception about its effectiveness and a positive impact on government institutions that engaged in the peer review process. It remains to be seen what the results will be in countries under dictatorial rule or those emerging from decades of conflict or military rule and/or nation's with poor human rights records. Will these states be able to summon the political will and resources needed to develop policies and change practice based on recommendations of the APRM?

Some constraints of the APRM are:

- 1.) The mandate of the APRM is extremely broad. It includes democracy and political governance, corporate governance, and socioeconomic development. In order to properly carry out a review, each area requires technical expertise and resources. Ms. Kerina argues that the APRM should initially limit the review to democracy and political governance.
- 2.) The participation of civil society has been limited, and there are not ample opportunities for their involvement built into all stages of the process. At present, civil society participation only occurs before and after the review, but not during the critical phase of the process where the official report is under review prior to its release.
- 3.) There are insufficient resources and great difficulty accessing technical assistance with the level of expertise needed to ensure a thorough review.
- 4.) There have been some complaints of "consultation fatigue": For example, Rwanda held the NEPAD and International Monetary Fund reviews simultaneously. Both institutions engaged with the same branches of government thus placing an extreme burden on officials and agencies involved during the preparatory and implementation phases of the reviews.

### **Discussion: How could Peer Review be made most effective at the Human Rights Council?**

Those present at the meeting then addressed the practical issues involved in implementing a peer review mechanism in the new Human Rights Council. Much of the discussion focused on the question of resources. Clearly, these existing peer-review mechanisms must keep employed an engaged and informed secretariat able to manage the considerable paper-flow of information-

gathering communications and responses, contacts with reviewing countries and reviewed countries, and take them through the phases of preparation, consultation, and final assessment involved in peer review. They must commission and prepare accurate and full country studies and recommendations; they must deploy experts either for coherent questioning or for well-briefed country trips; and they must have the management capacity to produce effective and timely reports that will justify the time and resource expenditures for all concerned, in the form of useful documents that can actually promote and protect human rights.

Many of the participants were surprised by the required resources (both in terms of time and staffing) of peer review at the OECD, ILO, and NEPAD and asked how feasible it would be to implement this mechanism at the UN. What are the resources that will be necessary to match the complexity of the process? How will budget support be found and expert staff allocated?

A number of participants agreed that since this is such a resource-intensive process, it is important to ensure that a large share of the funding and staff support for human rights at the UN is not siphoned off to this process to the detriment of the overall effectiveness of all UN human rights programs. There was concern expressed by a number of participants that the resource and time requirements necessary to make peer review effective might be too much of a stress on the Office of the High Commissioner unless major new funds are dedicated to this.

Some participants noted that it is important that the mandate of the peer review be narrow enough to be effective. Many affirmed the importance of ensuring that the peer review process enhances and deepens, but does not duplicate, the work of the treaty bodies. One participant stated that it might make sense to consider means to strengthen the work of the treaty bodies and use additional resources to bolster the bodies that already exist.

Kakuna Kerina of the ILHR stressed the importance of having resources available to promote the participation of civil society in the review. There are no such resources in the African Peer Review Mechanism, and it has been to the detriment to the process.

One negotiator in the process said that many are framing peer review as the remedy to all of the problems of the Commission; it may not sustain the strain of such expectations. Another negotiator noted that there is a great difference between what was in the original draft World Summit Outcome Document texts about peer review and the language currently being negotiated for the Human Rights Council – this was in part explained by lack of coherence about the very concept of peer review and the demands it entails. Discussants noted that it is essential to be clear about what the added value of doing peer review at the Human Rights Council is, what exactly will be gained by this procedure, and what elements are essential for it to be effective. Another negotiator stressed the importance of ensuring that any peer review process adopted does not suffer from the politicization problems of the Commission on Human Rights.

Fabrizio Pagani of the OECD responded that peer review is most effective when there is trust among the participants. Several of the participants remarked that there is a deficit of trust and mutual respect between states in the Commission on Human Rights. To what extent can peer review be a trust and capacity-building measure? Would the creation of a peer review mechanism present an opportunity to promote an atmosphere conducive and mutual respect and

trust, or an obstacle? One of the participants remarked that some of the countries in the negotiation are interested in peer review as a mechanism that can enhance scrutiny, while others want it to be a way to avoid scrutiny. Kakuna Kerina of the ILHR asked whether the current state of the Commission on Human Rights would lead one to question whether it is possible to create such an environment of trust when there are sanctions against governments.

One element of the “value added” of a peer review mechanism in comparison to the Commission on Human Rights is its universality: Every country is to be up for periodic review. But, what about states that are not party to the UN human rights treaties? What standards would they be reviewed on? Lee Swepston described a process at the ILO established in 1998 in which the performances of countries that have not ratified the treaties are reviewed. The purpose of this process is to assist these countries in moving toward a point where they can ratify the treaty. This system has been successful, and states frequently will provide information on the steps that they are taking toward ratification. The Human Rights Council could implement a similar “aspirational” system of review for countries that have not ratified the human rights instruments. Fabrizio Pagani stated that non-members of the OECD, like China or Brazil, have been part of the peer review process there as well when it requests to have a review conducted. In this case, since China accepts the principles that are the basis of the OECD review, it is in its interest to have a review conducted.

A question was raised about how it is decided which countries will review which other countries. While there are no hard-and-fast rules on this at the OECD, for example, there is an unspoken rule in many OECD Committees that when a big country is reviewed there will be at least one other big country among the lead examiners.

Ultimately, ambassadors and experts at the meeting concluded that the resource intensity of the existing examples of fairly successful peer review mechanisms in settings with fewer members (the APRM process has only 24 participants) or which deal with fewer cases (the ILO only addresses 25-30 of the worst cases each year in public session, though all ratifications are reviewed in various ways) provided some very good practices to reference in the establishment of the Human Rights Council. These mechanisms may not be practical or scaleable in attempting to manage the system for a body of some 50 countries that may be charged in theory with examining practices in all 194 member states. To summarize:

- The role of an informed, engaged, and well-resourced secretariat is crucial to the “historical memory” and efficacy of the labor-intensive communication and reporting involved in any peer-review process.
- Peer review works best when there is trust among participants, at least to the extent that they will be measured against agreed benchmarks.
- Peer review is most effective when it addresses the “worst cases” or the instances of the worst violations of the accepted standards, rather than diluting its limited resources with scatter shots or attempts to substitute the quantity of assessing all members with the quality of assessment both the worst cases and the cases of those where intervention is most effective.

- Peer review depends on the good will of examiners, their own knowledge and expertise coupled with sufficient briefing by secretariat, and security from pressure by the country under review.
- If there is no questioning and/or examining process in person, more country visits and examinations of communications become necessary.
- “Aspiration” processes can be built into the peer review by those who indicate their desire for assistance in meeting bench-marks.
- Assessments should be issued against a uniform set of criteria in a professional manner, so as not to be later impugned as “politicized” by those who have violated the criteria already accepted by all.
- The participation of civil society is crucial, and should be established, ensured and resourced, because non-governmental groups bring vital information, questions, and ideas to the table.
- To avoid waste and duplication, the peer reviewers of the Human Rights Council should build upon, rather than duplicate the existing work of treaty bodies and other international supervisory processes. Indeed, the existence of the HRC could encourage the treaty bodies to begin functioning in a more coherent and productive fashion as they may now turn to the Human Rights Council’s peer review for follow-up. The HRC could carve out its role in enhancing the effectiveness of the treaty body conclusions by addressing chronic failures to abide by treaty-body recommendations, and looking for ways to strengthen follow-up mechanisms.

In fashioning the new Human Rights Council, to avoid the pitfalls of the old Commission, the Council need not abandon country resolutions, which are still required to bring urgent attention and focus on the world’s worst human rights situations, and also to address ongoing, chronic concerns that can not be allowed to fall from sight for the sake of the victims involved.

In its country assessments in peer-review work, to be effective, the new Human Rights Council should also establish an effective focus – not to be mistaken for unfair “selectivity” – which addresses those situations where standards are most egregiously violated as well as those situations where its intervention will have greatest efficacy.