

PEER REVIEW AND HUMAN RIGHTS

This Human Rights Discussion Paper, prepared by Allison S. Cohen, JBI's International Human Rights Officer, discusses the proposal to establish a peer review process to review compliance of countries with human rights standards. It reviews the use of peer review in three international institutions, and explores whether such a procedure should be included in the work of the new UN Human Rights Council. The paper concludes with some questions that should be considered in the establishment of the peer review mechanism in order to promote more effective compliance with human rights norms.

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The 2005 UN World Summit Outcome Document establishes a standing body – the UN Human Rights Council – to replace the Commission on Human Rights. It is intended that this body would raise the status of human rights within the UN.

UN Secretary-General Kofi Annan proposed that the Human Rights Council have a peer review function. The concept of a peer review mechanism has been 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.

The UN Commission on Human Rights has been described as “politicized” and, in the words of the UN Secretary-General, “unprofessional”. The proposal to establish a smaller, standing body to review human rights in all countries and address all human rights situations – including the most grave – holds promise. This paper seeks to look at one aspect of the proposal – the introduction of a peer review mechanism at the UN Human Rights Council.

There are still many open questions about what peer review might look like in a UN Human Rights Council and relatively little available research on and evaluations of peer review mechanisms at other international institutions.

Country scrutiny in UN human rights bodies has long been controversial because governments resist criticism of their own countries or even having to reach a decision on whether to formally criticize another. This is especially true of “violator” countries, which have battled to be elected to the Commission in order to prevent scrutiny. Peer review or universal review has been proposed as a fair, transparent, and depoliticized process that would assess the human rights performance of every State. The work of other peer review mechanisms at other international institutions may offer some guidance.

What is peer review?¹

In its most basic form, the definition of peer review is a process by which peers assess the performance of other peers on the basis of some agreed upon set of norms, standards or principles. The process itself can vary greatly. Perhaps the most common form of peer review has been in academic journals, tenure decisions, etc. There, peer review processes are frequently used as a blind basis for review of academic articles (meaning that the reviewers do not know who the author is that they are reviewing). Other examples include peer review mechanisms used among scientists and physicians.

Peer Review at International Institutions

Several international institutions use some form of peer review mechanism through which States assess performance of other States. Three institutions that have peer review procedures are the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and the New Partnership for Africa's Development (NEPAD).

Some peer review processes in international organizations are non-adversarial and based on a foundation of shared confidence in the process. The primary goal in a peer review process in the context of international organizations is to promote compliance with international obligations. 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.

ILO²

The Organization: The International Labor Organization is a specialized agency of the UN which promotes internationally recognized labor rights. The ILO is made up of labor unions, employers, and States (all three categories are members).

Basic Principles: The ILO has adopted 185 conventions that form the basis of peer review. Member countries have to submit regular reports on their compliance with the conventions that they have ratified.

Process: The review system at the ILO begins with the Committee of Experts on the Application of Conventions and Recommendations, made up of 23 experts in the field of

¹ Pagani, Fabrizio. "Peer Review: A Tool for Co-operation and Change", Organization for Economic Co-operation and Development, Directorate for Legal Affairs, September 11, 2002, discusses the general concept of peer review in-depth, pages 4-6.

² Please see www.ilo.org for more information. Swepston, Lee. "Supervisory Mechanisms of the International Labor Organization: Peer Review as a mechanism", International Labour Organization, discusses this procedure in detail.

labor law and social questions.³ The result of the meeting of the Committee of Experts is an in-depth report highlighting the serious problems in each country.⁴ The next step of the review process is the Conference Committee on the Application of Conventions and Recommendations, made up of workers unions, employers, and States. The most serious problems are identified (usually about 25 cases) and discussed with this tripartite group. States are asked to respond, and at the end of the process, the Committee's report is published in the Proceedings of the International Labour Conference. There is no ranking or quantitative review, but there is a series of special lists of concern on which countries are placed, depending on their records. While it is not part of the review process per se, the ILO has a separate procedure to conduct country visits (with the country's agreement) when there are very serious problem cases.⁵ Based on interviews with individuals who have close experience with the ILO review process, it appears that the review process is extremely labor intensive.

*OECD*⁶

The Organization: The Organization for Economic Cooperation and Development is made up of 30 member countries that share a commitment to democratic government and the market economy. The work being done at the OECD runs the gamut from environment, trade and energy policies, combating bribery, educational policy, and adapting to an ageing society.

Basic Principles: The standards against which the State is reviewed can be implementation of policy recommendations, specific indicators or quantitative benchmarks, or international legal norms. In addition to these standards, the country's own record and progress since the previous review is a basis for review and dialogue.

The Process: The OECD peer review systems are complex. There are a variety of different procedures in the various subsidiary bodies of the organization. The OECD emphasizes that there must be a high degree of trust and cooperation of Member States in the peer review processes.⁷ Generally two States are appointed as lead examiners in the process; they, in turn, often appoint experts to conduct the review. Procedures vary, but there is usually a preparatory phase in which background analysis is prepared and a questionnaire is provided to the reviewed State by the Secretariat. The next consultation phase involves dialogue between the examiners, the reviewed country, and civil society.

³ The Committee of Experts meets privately once a year to assess the States' reports (each country comes up every 4 years). Workers and employers union organizations also submit assessments on the States' application of the Conventions.

⁴ If there are problems to highlight, the Committee of Experts can then make "Direct Requests" which the State can respond to before the report is made public, or for more serious problems, the Committee can make "Observations" which are published.

⁵ These investigations are conducted by experts in the field with the aim of working with the Government.

⁶ Please see "Peer Review: A Tool for Cooperation and Change – an Analysis of an OECD Working Method" by, Fabrizio Pagani, September 11, 2002 for an analysis of the OECD peer review system.

⁷ The review process can be initiated by an OECD subsidiary body, the Ministerial Council, or international treaties themselves can establish the periodicity for review. The actors involved are some combination of the reviewed country, the examiner countries, and the Secretariat.

In many cases there are on-site country visits. Lastly, there is an assessment phase in which the examiners and reviewed State discuss the draft report in a public session and eventually adopt a final report. The recommendations of the final report form an important basis for follow-up and a subsequent peer review.

*NEPAD*⁸

The Organization: The New Partnership for Africa's Development (NEPAD) is a "vision and strategic framework for Africa's renewal".⁹ The organization works to eradicate poverty, promote sustainable growth and development, promote the integration of Africa into the global economy, and promote the empowerment of women.

APRM: NEPAD has created a special secretariat to coordinate the peer review process and provide technical support: The African Peer Review Mechanism (APRM). The APRM's mandate is: to ensure that the policies of participating States conform to the political, economic, and corporate governance codes of NEPAD. The aim of the APRM is to promote the sharing of experiences among countries and promote positive examples. The following areas are included in the voluntary review: democracy and political governance, corporate governance, and socioeconomic development.¹⁰

Basic Principles: The basis of the review is two-fold. As in the OECD, there is a self-assessment process that countries carry out for themselves with the assistance of the Secretariat, guided by a questionnaire. This self-assessment process is then followed by the development of a preliminary Program of Action based on existing programs and projects. While this national process is taking place, the Secretariat prepares the country dossier based on available information (including from NGO's) on the country's situation.

The Process: The components of the APRM process are: 1.) preparation and country consultations, including the seeking of advice from national committees. This includes the self-assessment process described above. During this phase there is wide-ranging interaction and buy-in with a variety of stakeholders. Involvement of all levels of civil society is very important during this phase; 2.) country visits of the peer review team (including both rural and urban areas); 3.) preparation of findings; and 4.) discussion and adoption of peer review reports by NEPAD structure. The process is overseen by a

⁸ Please see African Peers in Self-Review, Daily Trust (Abuja), June 7, 2005, African peer review is taking shape, African Renewal, February 2003; States call each other to account, African Renewal, January 2005, and The African Peer Review Mechanism: Process and Procedures, African Security Review, 2002; and "Guidelines for Countries to Prepare for and Participate in the African Peer Review Mechanism" (<http://www.nepad.org/2005/files/aprm/aprmguidelinesforcountryreview200104final.pdf>), for more information.

⁹ <http://www.nepad.org/2005/files/inbrief.php>

¹⁰ The NEPAD peer review system is very new and is in the early phases of being implemented. Only two countries (Ghana and Rwanda) have completed the process, and there are two countries that are currently undergoing review (Kenya and Mauritius). Six other countries are scheduled to be next in line (Algeria, Mali, Mozambique, Nigeria, Senegal, and South Africa).

panel of eminent persons, with technical assistance from the Secretariat. According to an interview with a representative of NEPAD, these reviews are very comprehensive and take a large amount of time and resources.

Peer Review and the UN Human Rights Council

In a speech to the Commission on Human Rights on April 7, 2005, UN Secretary-General Kofi Annan stated that the proposed UN Human Rights Council should have an explicitly defined function as a chamber of peer review. He stated that equal attention should be paid to civil and political rights as to economic and social rights in this process, and that the peer review process outcome would be technical assistance to States as well as policy advice to States and the UN system in general. At a meeting of the Commission on Human Rights in Geneva in June 2005, High Commissioner for Human Rights Louise Arbour stated that her Office had drawn up a plan of action for the Council that included, the “exercise (of) universal scrutiny of the implementation by all Member States of all their human rights obligations through a peer-review mechanism based upon fair, transparent and non-selective procedures”.¹¹

Various drafts of the World Summit Outcome Document referred to peer review or universal review. The Draft Resolution issued by the co-chairs (entitled: “Compilation Text: Human Rights Council”, November 28, 2005) says:

Decides that the Council will inter alia... (d) undertake universal periodic review of the fulfillment by each State of its human rights obligations (*which would ensure universality of coverage, equal treatment and frequency of assessments of human rights situations with respect to all Member States – Belarus*) (*periodic review should only be confined to the candidate and/or members of the Council membership – ROK*) i. through a cooperative mechanism; ii. [based on reports (*replace “reports by inputs – EU, Mexico, US*) submitted by Member States (*relevant specialized agencies, funds, and programs with activities on the ground – Columbia*) and the High Commissioner for Human Rights [including an annual report – *delete US*](*treaty bodies and special procedure and mechanisms reports and final remarks – Mexico*) (*delete ii – Japan*)] (*replace ii. by: through the presentation by the reviewed State of its human rights situation and commitments, followed by an interactive dialogue with members, non-members and NGO’s – Switzerland*); iii. review should not duplicate (*and undermine – Belarus*) the work of the Treaty Bodies (*but contribute to the implementation of Treaty Bodies and special procedures recommendations – Switzerland*).

The Canadian Mission to the UN has previously elaborated on its own proposal for peer review in two non-papers.¹² Canada reminds States that every State has human rights obligations and therefore all should be subject to scrutiny. The peer review mechanism proposal has as one of its aims to move the culture of human rights at the UN away from

¹¹ Commission on Human Rights Holds Informal Meeting on Secretary-General’s Reform Proposals, June 20, 2005, <http://www.globalpolicy.org/reform/topics/hrc/0620meeting.htm>.

¹² “Human Rights Peer Review: Draft Concepts and Options Paper”, prepared by the Canadian Mission to the UN.

the contentious adoption of country specific resolutions and alleged “politicization” and toward “cooperation”.

The size, membership, and staffing proposed by Canada would consist of twelve members of the Human Rights Council, with a small professional/secretarial staff from the Office of the High Commissioner for Human Rights (OHCHR). Canada proposed the following four part procedure:

1.) the OHCHR would prepare a country dossier of information based on the work of the treaty bodies and rapporteurs; 2.) the State makes statement prior to dialogue; 3.) the Committee holds interactive dialogue with the State; and 3.) A rapporteur writes up a summary of discussion; State gives final written response; 4.) Official summary of the process is then given to the Human Rights Council which may take additional steps.

The Canadian paper proposes that each State be examined at intervals of approximately every 3 years. Depending on the resources devoted to the review and the time each review takes, the interval might be even longer.

Peer Review and other UN Bodies and Procedures

The US is among the States that have expressed support for the peer review proposal. The US has stated that it supports peer review that “does not duplicate existing UN activities or consume or distract the new Council”.¹³ Similarly, the Canadian proposal for a peer review mechanism within the UN Human Rights Council explicitly states that it “should complement” other mechanisms and not replace nor duplicate them. It is proposed that it will use existing information from UN human rights bodies. The OHCHR would compile information which would likely be derived from the conclusions and recommendations of the seven UN treaty bodies, as well as the reports of the special rapporteurs and representatives.

There appear to be two main functional differences between the peer review process and the work of the treaty bodies. First, the basis of review for the Canadian proposed peer review process would be the Universal Declaration of Human Rights and the UN Charter whereas the basis of review in the treaty bodies are legal commitments under each of the UN’s seven human rights treaties. Second, the treaty bodies are made up of independent experts whereas the peer review panel would be made up of representatives of the member States themselves. It is not clear whether these “experts” would be Ambassadors, technical experts from the mission, or eminent independent experts appointed explicitly to serve for this purpose. This proposal aims to complement the work of the treaty bodies, but would likely function in a manner that is very similar.

¹³ The US Mission to the UN’s statement on Human Rights Reform is available at <http://www.un.int/usa/reform-un-jrb-ltr-rights-8-05.pdf>.

Concluding Thoughts and Questions:

A peer review mechanism in the proposed UN Human Rights Council would differ from the practice of the Commission on Human Rights which produces resolutions critical of governments, but which is not based on a systematic examination of country performance. The Commission 1503 procedure, which is entirely confidential, is based on a review of complaints submitted mainly by NGO's. The public scrutiny of countries, under a variety of agenda items, follows no formal process or review. If the peer review system is poorly constructed, however, there is a danger of creating a body with a different name but the same problems – alleged “selectivity” and “politicization” – as its predecessor. To properly assess the peer review proposal, it is important to look at what is needed to create the mechanism with the strongest capacity to assess and thus promote and protect international human rights standards at the national level, and what the possible benefits and constraints of such a system could be.

Among the many questions that require further consideration are:

- What does “peer” mean exactly (i.e. who are the peers)? Will they consist of a body of the whole? If not, how will they be selected?
- What “information” will serve as a basis for the peer review? Who will compile it? What role will the State have? Will NGO's have a role regarding information?
- Can all human rights norms be evaluated in a single process or must the range of norms reviewed be narrowed to enhance effectiveness?
- Should there be frequent reviews of each country or should each review be more in-depth?
- It is clear from the experiences of the other international institutions that have peer review procedures that the public nature of the process is very important to making the outcome effective. What elements of the procedure will be public at the UN Human Rights Council?
- What will the follow-up procedure be to foster the implementation of the recommendations that result from the review? If technical assistance is proposed, would it be mandatory? What will happen to resistant States? Would sanctions or rewards be needed? Would they be accepted?
- How labor and resource intensive will the process be? Will it require a substantial increase in UN staffing, travel, and meeting resources? What time and resources do these processes take? Country visits would certainly facilitate an effective and thorough review procedure, but they would add to the expense. If country visits are included, should there be country visits for all States undergoing review or only for States with the most serious cases of human rights abuses? Who will decide?
- What would be the first countries to be reviewed?

There are several elements that must be present for a peer review mechanism to be successful. First of all, political will and cooperation of the participants is clearly

important to the review's success.¹⁴ A country's ability and will to provide information, discuss it, and follow-up on the recommendations of the review and implement policy changes fully as a result of the review are essential.

Expertise of the "peers", and, as Professor Ravi Kanbur of Cornell University argues, the technical competence of the staff would be crucial.¹⁵

Narrowness of scope would also be important: If the scope of review is too broad or too detailed, the task will be unwieldy and impossible.

The peer review process will only be viewed as credible if the reviewers are viewed as independent and not influenced by political considerations. Robust civil society involvement will enhance the work of the process, and this must be clearly defined.

Lastly, it has been argued that a peer review mechanism will be most effective if it is part of a range of other evaluation and assessment methods. Professor Kanbur argues that when peer review is one part of a rich dialogue on human rights practices, the stakes will be lower, there is a greater opportunity for mutual trust, and the outcome will be more effective.¹⁶

What are the potential benefits of a peer review system? According to Fabrizio Pagani of the OECD¹⁷, peer review is a powerful tool to influence and persuade States to improve policies. The mix of public scrutiny, comparisons, informal dialogue and formal recommendations creates "soft persuasion" as an incentive for change as opposed to "naming and shaming". Peer review can offer a good opportunity for candid reflection, mutual learning, and best practices sharing between the examined and the examiners. Peer review creates a space for dialogue about current challenges and an opportunity for the sharing of best practices. Pagani describes an effect that often accompanies the process as "peer pressure". Opportunities for technical assistance can also be identified.

What are the constraints of a peer review mechanism? If the work of the other peer review mechanisms at other international institutions is to provide any guidance on this, it appears that such a mechanism is likely to be very expensive (both in terms of financial expenditures and in terms of human resources required) and time consuming. Other constraints might include "consultation fatigue" – where States become overwhelmed by reporting requirements. An effective peer review requires mutual trust between the reviewed State and the reviewing "peers". This has not been a characteristic of the Commission on Human Rights. If there are no membership criteria for the members of the Human Rights Council, the aims of the participants may work at cross purposes.

¹⁴ Manby, Bronwen. "The African Union, NEPAD, and Human Rights: The Missing Agenda", *Human Rights Quarterly* 26 (2004), The Johns Hopkins University Press, p. 998.

¹⁵ Kanbur, Ravi. "The African Peer Review Mechanism (APRM): An Assessment of Concept and Design", Cornell University, January 2004.

¹⁶ Kanbur, Ravi.

¹⁷ Based on JBI's interview with Mr. Pagani on September 8, 2005 and "Peer Review: A Tool for Cooperation and Change – an Analysis of an OECD Working Method" by, Fabrizio Pagani, September 11, 2002.

Another constraint is the possibility that a peer review procedure would duplicate the work already done by the treaty bodies and special procedures. If the peer review mechanism will use the work of the treaty bodies as its basis, would strengthening the existing treaty bodies be a more effective way to accomplish the aims of those proposing peer review? It is worth assessing whether the OHCHR should compile all of the recommendations of the treaty bodies, analyze the findings and the differences among them, and whether the member States should enhance the powers of these existing bodies and authorize the OHCHR to take action to implement their recommendations.