

## **What to do about the Sub-Commission?**

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What will happen to the Sub-Commission in the transition to a new Human Rights Council? What should happen to it? What would be the best result? Can a future Sub-Commission make a valuable contribution to a stronger, more effective UN human rights system?

### **Supporters and detractors**

The current Sub-Commission on the Promotion and Protection of Human Rights appears to have both its supporters and detractors in all segments of the current human rights community – whether it be amongst governments, NGOs, experts, or UN staff.

Clearly improvements can be made to the existing selection process and operational modalities of the Sub-Commission. But as an NGO representative who has been working closely with Sub-Commission proceedings for the last 15 years I would like to make the case for retaining a major role for either the Sub-Commission or for a comparable body of experts in its place.

### **Key elements of an expert body**

Any body that replaces the Sub-Commission should be expert, independent, geographically representative of the countries in the UN system, able to operate collegially in its discussions (hence in plenary and subgroups, and through papers written both singly and jointly in collaboration with others), be able to deal with a broad mandate of relevant human rights issues, and be able to incorporate the working group, expert study, working paper, and other key elements of the existing Sub-Commission structure.

And perhaps most importantly, any such body should repeat and build on the Sub-Commission's success of opening its doors, listening to, and offering meaningful participation for all interested stakeholders in the human rights world – whether they be NGOs credentialed under ECOSOC, non-credentialed NGOs, academics, the human rights treaty bodies, national human rights institutions, intergovernmental organizations, national courts, or experts and advocates from other social, economic and cultural fields touching upon human rights.

### **Time schedule – next session – election limbo**

The 57<sup>th</sup> session of the Sub-Commission met last year, from July 27 to August 12, 2005. Its next session is tentatively scheduled this summer from August 7 to August 25, 2006. Sessions of its working groups on minorities, contemporary forms of slavery, indigenous populations, and the Social Forum are scheduled to meet in June and July.

The terms of half of the 26 members of the Sub-Commission were also scheduled for re-election or replacement at the Spring 2006 session of the Commission on Human Rights, but no elections were held by the Commission, leaving the fate of the Sub-Commission in limbo. Unless acted upon by the Human Rights Council soon, the terms of the 13 outgoing members will expire before the next Sub-Commission session, depriving the Sub-Commission of its quorum, as well as of many of the valuable papers, studies and working group tasks for which these outgoing members were responsible.

For persons interested in following developments of the Sub-Commission this year, please consult [www.ProjectEleanor.com/2006](http://www.ProjectEleanor.com/2006). If the Sub-Commission meets this summer, we will host an NGO workshop the weekend before the session begins, to acquaint NGOs with last minute developments,

and provide other orientation information, discussion and analysis for the session. As last year, the workshop may also include several members of the Sub-Commission itself.

### **Joint work on essential elements of a successor body**

At the end of the 57<sup>th</sup> session, with UN reform initiatives hovering, both the expert members themselves and the NGOs most actively engaged in the 57<sup>th</sup> session identified, in separate consensus documents, remarkably similar and complementary “essential elements” of the current Sub-Commission structure that they believed should be retained in any successor body. The Sub-Commission experts’ document is Decision 2005/114 and is included in the Sub-Commission’s Report to the Commission, E/CN.4/2006/2. The Joint NGO document has been submitted by Minnesota Advocates for Human Rights as document E/CN.4/2006/NGO/251.

Among the key aspects that one or both papers identified were the following:

- Active working groups (including the Social Forum), expert studies and working papers, in which civil society is permitted to actively participate, receive information in an open and transparent manner, submit comments, and contribute to discussions
- Widest possible access and participation by civil society
- Working groups should be primarily intersessional so that they do not compete with plenary discussions of other substantive agenda items
- Credentialing procedures for meetings should be flexible, including continuing the practice of permitting non-accredited NGOs, indigenous peoples groups, and other representatives of civil society to attend the Social Forum and the working groups of the Sub-Commission
- Mandate should include the identification of gaps in standard-setting and methods of monitoring and the preparation of new norms and guidelines relating to implementation
- The body should be structured in a manner to permit a thorough discussion and vetting of new standards before they are considered by a political body
- The strong emphasis on economic, social and cultural rights should be maintained
- The expert body should be sufficiently large in size to be able to function effectively in several working groups as well as in plenary, and geographically to represent different regions, as well as differences within the regions
- The sessions should be at least three weeks long, hopefully longer, and scheduled in the July-August time period when students, academicians and other relevant representatives of civil society can best attend this type of session
- The sessions should receive full resourcing and support from the OHCHR in carrying out its work
- A selection process should be established by the Human Rights Council with the purpose of selecting members of the expert body in a fair, impartial manner, with a view to balancing different regions, gender and expertise, protecting the independence and impartiality of the experts, and preserving continuity of the work from session to session. Terms should be at least 4 years in order to be able to complete 3-year studies during a single term.
- If no new elections are possible in Spring 2006, the existing members of the Sub-Commission should continue to serve until a new selection process is implemented.
- To avoid disruption of work, current studies and working papers begun by a member of the Sub-Commission should be completed by that member (if he or she so wishes). All work existing and ongoing in the 57th session should be continued in the 58th session.
- NGOs should be consulted and should be afforded full participation in the deliberations that establish working methods for any new or replacement bodies to the Sub-Commission

### **Impact of the Sub-Commission**

Many NGOs and civil society organizations have participated in the Sub-Commission sessions, including its working groups and the Social Forum. The working group structures of the Sub-Commission, taken as a whole, are some of the most innovative, effective bodies in the UN system, with more than 20 years of experience, key lessons learned, a development of valuable best practices, and with a history of pushing the envelope toward new and broader levels of participation by civil society. The blend of diversity, expertise and civil society participation makes the Sub-Commission structure an extremely useful structure to preserve in the new human rights system, as well as

potentially to study and replicate for other UN structures. Not all current working groups are performing at a high level of participation and quality, but many are. The present working group structure of the Sub-Commission is worth studying for possible application to other fields.

### **Common criticisms – not an excuse**

For those who are critical of the quality of the Sub-Commission and its work over the years, it is important to recognize that poor quality should not be a reason to remove a Sub-Commission type of structure from the overall UN human rights system. Some of the quality problems in the selection of experts and work overlap may be “self-corrected” by the presence of a more effective, standing Human Rights Council. For some of the expertise problems, the new Council must be willing to take a hard look in the mirror – these problems can be overcome with more disciplined adherence by the Council to the principles of nominating and selecting truly independent, impartial, and expert candidates to the expert body.

### **Size helps quality**

It is also important to recognize that to the extent the election of poor quality candidates continues under the new Council, the larger the size of the expert body the less the likelihood that poor candidates will control the work of the overall body (unless they are all poor candidates, in which case we should go back to the mirror and ask ourselves why the selection process itself has become so poor). Even during some of the Sub-Commission’s “darkest” quality days, good quality studies emerged from some of the members. Good quality rises to the top, and leaves an enduring legacy.

It is submitted that high quality studies of this nature could not have been produced in other bodies that do not have the key institutional strengths of the Sub-Commission -- it is the blend of a well-authored paper; being reviewed and critiqued in a collegial forum by experts and civil society; and being then revised, reviewed and re-published in a three-to-five year format that ultimately produces the kinds of high quality work that the Sub-Commission has been able to produce over the years. This type of interactive collegial process also fosters a higher quality follow up, delineation of next steps, and a gap analysis of other topics that should be studied. If the process becomes too academic, leaving out the reality check of civil society’s views and experience, or if it becomes too limited in member size, meeting time, or mandate, preventing an in depth analysis, it can not produce credible, reputable, inclusive work of value to the other parts of the UN system.

### **Tendency to focus on wrong thing**

There is a tendency by some in criticizing the Sub-Commission’s work to focus on a few studies that were poorly written, had no value, and went nowhere after being published, or to focus on a few members who never produced any studies and didn’t add much value in reviewing others’ work. In fact it is submitted this is a natural part of any research and analytical process. Some members don’t perform at the peak level that others have performed. The focus instead should be on those studies that went well, added value, and led to further positive developments. How can we nurture and produce more of those types of works?

### **Criticism of overlap with Commission’s work**

Another common criticism is the overlap of the Sub-Commission’s work with the work of the Commission. The Sub-Commission has done much to address these concerns in the last ten years. A more effective Human Rights Council will certainly remove the need for the Sub-Commission to look at some areas it has examined in the past, but until the Council and other human rights bodies are truly functioning in an effective manner, it is certainly the NGO viewpoint that more overlap is better than less in this respect. The weak spots in the system can be avoided and the stronger parts can be utilized

if there are overlapping mandates. A certain amount of overlap is inevitable and beneficial in a human rights system.

To use overlap as a reason for removing an expert body from the architecture of the system, or for severely limiting the mandate of such a body, will undermine the inclusiveness and effectiveness of the collegial and expert nature of such a body. Human rights are complex, multi-dimensional problems. To limit an expert body to only certain “slices” of these human rights problems is to materially weaken that body’s analytical effectiveness. Such a “slicing of rights” approach also goes against the fundamental principle of interdependence and indivisibility of all rights.

### **Criticism of difficult personalities**

Still another criticism often heard concerns the outspokenness or “difficult” personalities of a few members of the Sub-Commission. Here the selection process itself is of course most to blame, not the structure of the Sub-Commission, or the concept of an expert body. But it is also submitted that concerns of this nature are an anathema to human rights. Such views border on a lack of tolerance and lack of respect for different types of persons, different approaches, different cultures, and different viewpoints. Every expert body, especially one in a human rights field, should be willing to tolerate and exchange views with different types of individuals and viewpoints. Someone expressing the view that the Sub-Commission should be abolished or replaced in order to remove a particular personality or a particular expert is not honoring the human rights values on which this entire system is founded.

### **Conclusion**

To conclude, from this NGO perspective, I would call on the new Council to select members for the thirteen seats up for election this year or to extend the terms of the 13 outgoing members, in order to support the proposal for the Sub-Commission to meet as scheduled this summer so that the work is not interrupted, to include an expert body like the Sub-Commission in its working methods going forward, and to include deep NGO and civil society consultation and involvement in the process of establishing any such future expert body.

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