
REVIEW OF THE COUNCIL

Months of discussions lead to a disappointing outcome



Photo: Kevin Utting

On 25 March 2011 the Human Rights Council (the Council) adopted by consensus the outcome document of the five-year review of the Council's work and functioning.¹ The resolution states that the outcome will form a supplement to the institution-building package of the Council.² The review process is continuing in New York, where it is predicted that a final text on issues related to the status of the Council will be presented to the General Assembly in early May.

THE PROCESS

The review process officially began with the first meeting of the Open-ended Intergovernmental Working Group on the review (the Working Group).³ In the months leading up to this meeting, however, there had been a series of informal and formal consultations concerning the modalities by which the review process would be conducted. More information on those discussions can be found in the July 2010 edition of the *Human Rights Monitor Quarterly*.⁴

Timeline

- First session of Working Group, 25-29 October 2010
- Series of informal consultations, November 2010
- Ambassadorial retreat, Bangkok, 8-10 December 2010⁵
- Series of informal consultations, January 2011
- Second session of Working Group, 7, 17-18, 23-24 February 2011
- Adoption of outcome document by the Working Group, 24 February 2011
- Adoption of the outcome document, 25 March 2011

The process was structured around thematic clusters of issues. The five issues identified were: special procedures, the universal periodic review (UPR), agenda and programme of work, methods of work, and the Advisory Committee and complaints procedure. After the first meeting of the Working Group, each issue was assigned a facilitator who led informal discussions and reported to the second meeting of the Working Group.⁶

1 A/HRC/RES/16/21, at <http://bit.ly/eASgGi>.

2 A/HRC/RES/5/1, Institution-building of the United Nations Human Rights Council, at <http://bit.ly/i0GGvn>.

3 A/HRC/RES/12/1, at <http://bit.ly/eWF2sv>.

4 Available at <http://bit.ly/eSG32M>.

5 This was held at the initiative of the President of the Council, and was intended as an opportunity for States to reflect on the discussions to date and begin to move beyond reiterating their proposals. The President asked ambassadors to focus their deliberations on three questions: how can we make the Council more effective and efficient and improve the culture of work? How can we increase the impact of the Council on the ground? And, how can the Council better respond to emergency country situations? The format represented an opportunity for States to think beyond the review process's five thematic issues and to develop innovative ways of addressing country situations. Unfortunately this outcome did not materialise.

6 The five facilitators were Mr Omar Hilale, Morocco (UPR), Ms Maria Ciobanu, Romania (Advisory Committee and complaint procedure), Mr Hannu Himanen, Finland (special procedures), Mr Gopinathan Achamkulangare, India (agenda and programme of work), and Ms Maria Nazareth Farani Azevêdo, Brazil (working methods). Mr Idriss Jazairy, Algeria, was appointed to coordinate with the process in New York.

NGO PARTICIPATION

The process was in general open to the participation of all stakeholders, however this was not always taken for granted and non-governmental organisations (NGOs) often felt they had to fight for their place in meetings. The tone was set early on in the discussions on the modalities for the Working Group, when the Russian Federation presented a paper according to which NGOs would not be able to speak during the Working Group's meetings.⁷ While the proposal did not gain wide support, it was nevertheless indicative of the attitudes of a number of States in the Council towards civil society contributions. Unfortunately, the President was not as strong as he should have been in support of NGO and NHRI participation and, as a result, this remained an issue throughout the review process.

Further challenges were faced during the second round of informal meetings, held in January 2011. Unlike the November 2010 informal discussions, which were planned in a transparent manner and publicised well in advance, scheduling for the second round of informal discussions was left in the hands of the various facilitators. The result was that meetings were often announced to civil society with very little notice, sometimes as late as the evening before the meeting, making it difficult to ensure attendance. The fact that the second meeting of the Working Group was split into three 'mini-sessions', rather than one full week, created further logistical difficulties.

There was also a failure to create a genuine negotiating space, which made it difficult for NGOs to gain any traction with their own proposals. Negotiations instead took place bilaterally or in small groups outside the plenary meetings, with the result being a lack of real discussion in the sessions where constructive proposals could be properly considered. Consequently it was difficult for NGO proposals to become a part of the review discourse. Despite NGOs offering detailed suggestions on the negotiating text and States referring to these during the second meeting of the Working Group, the outcome document failed to reflect those suggestions.

Meanwhile, NGOs in New York have effectively participated in the review process. NGOs even enjoyed and exercised speaking rights in the informal discussions, an unusual development for General Assembly meetings addressing human rights issues. This was largely due to the commitment to accountable and transparent proceedings by the co-facilitators of the New York review process, Ambassador Christian Wenaweser (Liechtenstein) and Ambassador Mohammed Loulichki (Morocco).

⁷ Russian Federation non-paper on modalities of the review of the Human Rights Council, 18 May 2010 at <http://bit.ly/e0QHTZ>.

KEY DISCUSSIONS

Chronic and emergency human rights situations

One of the most contentious areas of discussion was the issue of the Council's responsiveness to emergency and chronic human rights situations. Many, including NGOs and NHRIs, held this to be the key benchmark against which the success of the review in improving the Council's effectiveness would be judged. For States on both sides of the divide, the way in which this issue would be handled became crucial to whether or not they could join consensus on the final outcome.

However, concrete proposals in this area were only discussed late in the process, immediately prior to the second meeting of the Working Group. At this point, the facilitator of the cluster of issues on methods of work, the Ambassador of Brazil, presented her own suggestion for discussion. The suggestion was put to the Working Group and incorporated by the President in the negotiating text that he developed on the basis of all proposals made to the Working Group. The mechanism would have been a loose one, whereby the President would, at the request of one or several States, consult both member States and the concerned State to reach a decision, within 72 hours, on the Council's response to the situation of concern. Crucially, in the negotiating text, that response was held to require the consent of the concerned State. In addition, the description of the process as 'intergovernmental' was cause for concern, especially given the obstacles faced in ensuring NGO participation within the 'intergovernmental' process of review.

Several States did take NGO concerns on board. Hungary (on behalf of the EU), Argentina, Canada, France, Ireland, Japan, the Netherlands, and the UK called for the proposal to ensure space for NGOs and NHRIs to participate. The States also called for removal of the consent requirement in favour of calling on the concerned State to cooperate with the process. However, for others the proposal already went too far. These States (Nigeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Cuba, the Philippines, and the Russian Federation) called for the deletion of the proposal, claiming that existing tools for addressing urgent situations are sufficient.

In light of the Council's often weak and divisive responses to urgent or chronic situations, the claim that existing tools are sufficient was unconvincing. Interestingly, however, the day after the outcome was adopted by the Working Group, the Council held a special session on Libya, which demonstrated just what it is capable of doing with the tools it already has. In contrast to previous special sessions, this session was notable for its unanimous condemnation of Gaddafi's regime and the adoption of a strong resolution by consensus. While this offers hope that existing tools are sufficient, the Council needs to demonstrate this point by consistently responding to future urgent or chronic situations in a strong and unified manner.

As far as the final outcome is concerned, it was the Council's responsiveness to emergency and chronic human rights situations that had the greatest impact on the debate. In the final days and nights before adoption of the outcome by the Working Group, discussions broke down on this issue, with the consequence that agreement was also lost on other less controversial proposals. The result is the very limited outcome that the Council finally adopted.

Special procedures

The cluster of issues on special procedures was similarly divisive. The Ambassador of Finland presented an ambitious package of proposals to the second meeting of the Working Group, including a strong section on the need for State cooperation with special procedures. During the meeting, however, the NAM, OIC and African Group, made repeated efforts to weaken the text. In particular, they requested that language saying States be 'urged' to cooperate with special procedures be replaced by 'encouraged', and that a proposal that the Office of the High Commissioner for Human Rights (OHCHR) should compile statistics on cooperation by States with special procedures, backed by Japan and the US, be removed. Additionally the NAM, OIC and the Russian Federation repeated their continuing calls for the creation of a legal committee to report on compliance with the Code of Conduct for special procedures. While this latter proposal did not make it into the outcome, the section on cooperation was significantly weakened.

A proposal to de-cluster⁸ interactive dialogues with special procedures, a suggestion that was said to have unanimous support throughout almost the entire process, was one of the sacrifices of the breakdown in negotiations prior to the adoption of the outcome.

Ultimately, the most significant change to the work of the special procedures to be included in the outcome document was to the appointments procedure. A requirement was added that those nominated to a mandate must submit a letter of motivation and undergo an interview.

Advisory Committee and complaint procedure

In the case of both the Advisory Committee and the complaint procedure, the final document represents business as usual. Proposals on the Advisory Committee ranged from abolishing the Committee altogether, to improving the appointments procedure so the Committee would have relevant expertise available to it. These proposals stood in contrast to calls to maintain the status quo, put forward by Nigeria (on

behalf of the African Group), Pakistan (on behalf of the OIC), Egypt (on behalf of the NAM), Indonesia (on behalf of ASEAN), Azerbaijan, China, Cuba, Lebanon, Nepal, the Philippines, the Russian Federation, Saudi Arabia, South Africa, and Vietnam. The main outcome to emerge is the rescheduling of the current January meeting to immediately prior to the March session of the Council each year, in an attempt to improve interaction between the two bodies.

Regarding the complaint procedure, two key proposals were made: to abolish the Working Group on situations, and to increase the transparency of the procedure by requiring regular reports to the Council. This latter proposal faced broad opposition from Indonesia (on behalf of ASEAN), Nigeria (on behalf of the African Group), Egypt (on behalf of the NAM), Pakistan (on behalf of the OIC), China, Lebanon, Nepal, the Philippines, Saudi Arabia, and Vietnam. The outcome sees the status quo maintained in every respect.

Agenda and programme of work

For some weeks during the discussions on the agenda and programme of work it appeared that the Working Group might be moving towards agreeing to have two rather than three sessions of the Council a year. Opposition to this proposal came from Hungary (on behalf of the EU), Australia, Canada, and the US, who felt that any reduction in the number of sessions would be unacceptable unless alternative mechanisms were put in place to ensure a prompt response to emergency situations in the periods while the Council was not sitting.

A proposal was also made to hold UPR adoptions outside the regular plenary sessions of the Council. Opposition to this proposal came largely from NGOs. They expressed concern at the impact this may have on civil society participation since many NGOs may be reluctant to travel to Geneva to deliver short statements when they have no guarantee of being able to speak.

Neither of these proposals was included in the outcome, which sees the agenda and programme of work maintained as in the institution-building package. The dropping of these proposals is likely to have also been part of the fall-out from the final few days of negotiations. One particularly contentious issue, which may cause further difficulties now that the process has moved to New York, was the US's opposition to Item 7, on Palestine and other occupied Arab territories. The US proposed that Item 7 be abolished and that all country situations of concern be discussed under item 4.⁹ The lack of support for this proposal caused the US to disassociate itself from the outcome document.

⁸ At present, interactive dialogues in the Council are held with between two to three special procedures at a time. The statements delivered by States and NGOs will then refer to any one or more of the reports presented, making it difficult at times to follow the dialogue. The proposal to 'de-cluster' the interactive dialogues envisaged each special procedure being given a dedicated slot to present their report and receive comments and questions from States.

⁹ Human rights situations that require the Council's attention.

Other areas of interest

The UPR was one of the most disappointing discussions of the review. Further information can be found in the article on the UPR in this edition of the *Quarterly* (p. 11).

The issue of reprisals gained a certain degree of prominence during the review process, in particular in the discussions on special procedures facilitated by the Ambassador of Finland. NGOs made efforts to broaden the scope of discussions on this issue and to have it included as a cross-cutting issue in the outcome document. Some States, including Switzerland, the UK, and the US, did pick up on the proposal, however lack of further State support means mention of reprisals remains confined to the context of cooperation with special procedures.

The outcome document also calls on the Council to explore the feasibility of the use of information technology, such as video-conferencing and video-messaging, in order to enhance participation by all stakeholders, including NGOs and NHRIs. A task force, which will also examine issues relating to access of persons with disabilities and the improvement of the Council's secretariat service, will be created to study the issue further and will report to the 19th session of the Council. One issue to be addressed by this taskforce in relation to the use of video-conferencing will be the concern raised during the second meeting of the Working Group, by NAM, OIC and African Group, about how to ensure, at a distance, that a person purporting to speak on behalf of an accredited NGO does indeed represent that NGO.

THE ADOPTION

The outcome of the review of the work and functioning of the Council was adopted by consensus at the 16th session of the Council in March 2011. Many States (including Hungary on behalf of the EU, Nigeria (on behalf of the African Group), Argentina, Brazil, Japan, and Switzerland) expressed dissatisfaction with the outcome. However, only the US disassociated itself from the document. The US's key concern is with the agenda and programme of work of the Council, in particular with Item 7 on the situation in the human rights situation in Palestine and other occupied Arab territories. The US holds that singling out one country situation on the agenda is a severe detraction from the supposed objective and non-selective approach of the Council.

THE NEW YORK PROCESS

The review process is continuing in New York, where discussions have focused over the last four months on issues related to the review of the status of the Council.

The General Assembly has held a series of informal meetings on topics including the financing of Council decisions by the General Assembly; the relationship between the Council and

the General Assembly, including the reporting lines from the Council to the General Assembly; membership issues, including better respect of membership standards and election procedures set out in General Assembly Resolution 60/251,¹⁰ which established the Council.

The membership issue has proved to be the most divisive topic of the review in New York. Some States¹¹ argue that election-related issues fall outside of the review mandate of the General Assembly, while many others¹² advocate that the review is an appropriate forum to elaborate how States can best implement the election-related provisions of *Resolution 60/251*. A key proposal in this respect is the call for the establishment of a public 'pledge review' mechanism to improve Council members' accountability for fulfilling pledges and the standards in *Resolution 60/251*, and to encourage candidates that have made a serious and demonstrable commitment to human rights to run for election to the Council.

Following informal consultations with States and NGOs, the co-facilitators (the Ambassador of Liechtenstein and the Ambassador of Morocco) presented a draft paper on 12 April¹³ in an informal meeting of the General Assembly. It is expected that States will provide comments on the draft, and more informal consultations will follow. The co-facilitators will convene another meeting to discuss the revised draft on 15 April, after which further consultations and further revisions of the text may take place. They predicted that a final text could be presented to the General Assembly in early May.

At the seventh informal meeting on 24 March, the co-facilitators reiterated their hope that the General Assembly would adopt the text – as a supplement to *Resolution 60/251* – by consensus. It is envisaged that the Geneva outcome will be adopted without amendment as part of the General Assembly resolution. ■

10 A/RES/60/251, at <http://bit.ly/euhYvW>.

11 China, Cuba, Iran, Nicaragua, Non-Aligned Movement (NAM), Philippines, Syria, and Venezuela.

12 Albania, Australia, Bulgaria, Canada, Chile, Costa Rica, Croatia, EU, Hungary, Israel, Italy, Japan, Republic of Korea, Ireland, Macedonia, Moldova, New Zealand, Norway, Peru, Russia, Sweden, UK, and US. This representation of State positions is accurate at date of publication, but there continues to be movement. Russia's position, for example, appears to be weakening.

13 A copy of the paper is available at <http://bit.ly/f6N3oV>.