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# REVIEW OF THE COUNCIL

General Assembly status review another lost opportunity



Photo: Kevin Labianco

The Manhattan, New York skyline, including the United Nations headquarters.

**O**n 17 June 2011, the General Assembly adopted a resolution on the review of the Human Rights Council (Council), 154 votes in favour and four against, with no abstentions.<sup>1</sup> The vote ended seven months of negotiations in New York on the review of the 'status' of the Council.<sup>2</sup> This followed the Council's adoption by consensus of the outcome document of the five-year review of the Council's work and functioning on 25 March in Geneva.<sup>3</sup>

Although it was clear early on that the review would not be used to elevate the 'status' of the Council from a subsidiary body of the General Assembly to a principal body of the United Nations (UN),<sup>4</sup> it was possible the General Assembly would use the process to give fuller effect to the election-related provisions in Resolution 60/251, the founding document of the Council.<sup>5</sup> Many human rights organisations advocated that the General Assembly reaffirm and make commitments to a competitive and principled process for future Council elections, and establish a public pledge review mechanism, among other improvements.<sup>6</sup> However the adopted resolution contains only a few bureaucratic changes and offers no new measures that would help enforce the high membership standards envisaged by *Resolution 60/251*. This result compounded the disappointment felt by many about the weak outcome of the Geneva phase of the review.<sup>7</sup>

The procedural changes that will occur as a result of the adoption of the resolution include:

- The annual report of the Council will cover the period from 1 October to 30 September;<sup>8</sup>
- The Council's cycle will be aligned with the calendar year instead of starting in June each year;
- The previous ad-hoc arrangements of the Council's reporting to both the General Assembly's plenary and its Third Committee will be institutionalised.

## THE PROCESS AND NGO PARTICIPATION

In March 2010, the President of the General Assembly appointed two co-facilitators (the Ambassador of Liechtenstein and the Ambassador of Morocco) to conduct the New York review process.

Discussions on broad topics took place between December 2010 and May 2011, with broad participation at the ambassadorial level. The topics of these discussions included the financing of Council decisions, the reporting lines between the Council and the General Assembly, and membership-related issues. In the final month, the 'expert' delegates took over and negotiated the

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1 Resolution A/65/L.78, available at <http://bit.ly/kh6fmF>. The four States to vote against the resolution were Canada, Israel, US, and Palau.

2 Operative Paragraph 1 of A/RES/60/251 provides for a status review of the Council by the General Assembly. See <http://bit.ly/h4sQpE>.

3 A/HRC/RES/16/21, available at <http://bit.ly/oilnnp>.

4 A previous ISHR article on the Council review process analyses why an elevation of status was an unlikely outcome. Available at <http://bit.ly/jWvErA>.

5 See <http://bit.ly/h4sQpE>.

6 Joint NGO statements made during the process are available at <http://bit.ly/kllW7X>.

7 An article on the Geneva segment of the review process is available at <http://bit.ly/pigW1T>.

8 The Council's annual reporting cycle was previously 1 July to 30 June. The new reporting cycle ensures the September session will be included in the report considered by the General Assembly.

draft texts paragraph by paragraph. Throughout the process, the co-facilitators held bilateral and group consultations with States and NGOs.

Several working documents were central to the negotiations.<sup>9</sup> On 23 November 2010, the co-facilitators circulated their first non-paper, which outlined possible topics to be covered by the review. A further non-paper on funding arrangements for the Council's decisions formed the basis for discussions in late January. On 12 April the co-facilitators issued another draft non-paper that laid out elements that could be included in a resolution. A 5 May 'zero draft' contained suggested language for a draft resolution, as did the 31 May 'take two' revised draft.

NGOs in New York effectively participated in the review process, even exercising speaking rights in the informal plenary 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.

## MAIN ISSUES

### Membership

The membership issue proved to be the most divisive topic of the New York portion of the review. Although a majority of States,<sup>10</sup> argued that election-related issues fell outside of the review mandate of the General Assembly, a large cross-regional group of States<sup>11</sup> supported using the review process to elaborate on how States could best implement the election-related provisions of *Resolution 60/251*.<sup>12</sup>

Specific proposals included calls 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 a call for language promoting the use or presentation of 'open slates' by regional groups during Council elections.<sup>13</sup>

Despite the strong stance of Canada, the EU and the US that the outcome should include substantive elements on

membership, even a weak election-related provision<sup>14</sup> was eventually traded off against negative cross regional proposals<sup>15</sup> that proved unacceptable to these States. These proposals sought to establish Council oversight of the special procedures, and to create a supervisory relationship over the Office of the High Commissioner for Human Rights (OHCHR) by the Council, among others.<sup>16</sup> The proposals built on those from the Geneva phase of the review, when the Non-Aligned Movement (NAM), Organization of the Islamic Conference (OIC) and the Russian Federation called for the creation of a legal committee to report on compliance with the Code of Conduct for special procedures. The standoff between States on these issues led to the removal of all language that would have substantively strengthened the Council.<sup>17</sup>

### Council's annual report

Since the Council's creation, States have engaged in contentious debates each year on which body should consider the Council's annual report.<sup>18</sup> The same discussion played out during the review process. Some States<sup>19</sup> preferred that the Council report directly to the General Assembly plenary, in line with its status as a subsidiary body to the General Assembly. Others favored the Council reporting to the Third Committee,<sup>20</sup> arguing that the Third Committee has the human rights expertise to address the relevant issues and recommendations in the Council's report. In the end, the status quo was retained, except for the addition of an interactive dialogue between the President of the Council and the Third Committee. This new element was viewed positively by States with limited representation in Geneva as an opportunity to more meaningfully participate in debate regarding the Council's work.

9 First non-paper (23 Nov 2010) available at <http://bit.ly/kvlzgl>. Non-paper on funding arrangements for the Council's decisions (Jan 2011) available at <http://bit.ly/kspcmK>. Non-paper (12 April) available at <http://bit.ly/f6N3oV>. 'Zero draft' (5 May) available at <http://bit.ly/kgJ3ib>. Revised draft (31 May) available at <http://bit.ly/k6TROc>.

10 Led by Arab Group, the African Group, OIC, and Russian Federation. Also Non-Aligned Movement (NAM), China, Cuba, Iran, Nicaragua, Pakistan, Philippines, Syria, and Venezuela.

11 Led by Canada, EU, and US. Also Albania, Australia, Bulgaria, Brazil, Chile, Costa Rica, Croatia, Hungary, Iceland, Israel, Italy, Japan, Republic of Korea, Ireland, Maldives, Macedonia, Moldova, New Zealand, Mexico, Norway, Peru, Serbia, Sweden, Switzerland, and UK.

12 Operative paragraphs 8 and 9.

13 Open slates require regional groups to present more candidates than there are vacant seats available. Running closed slates can all but guarantee victories for candidates, regardless of their human rights records.

14 'Underlines the importance of creating an opportunity for States to present to the membership their voluntary pledges and commitments made in connection with their candidatures to the Human Rights Council.'

15 Russia led a cross-regional group comprised of China, Pakistan, Venezuela, Bolivia, Nicaragua, Belarus, Syria, Iran, Vietnam, Algeria, and Yemen. Many of the group's proposals appeared to be bargaining tools to gain concessions on membership-related language.

16 Another Russian-led proposal, supported by the OIC, Arab Group, and African Group, sought to include a clause that would require all candidates for the Council to declare their candidature within 45 days of elections. The US forcefully opposed this, arguing that it was a thinly veiled attempt to protect abuser states from being pressured out of candidatures, as happened with Syria in the most recent Council elections.

17 Brazil and Singapore (supported by some non-EU Western States and Argentina and Mexico) unsuccessfully attempted to bridge the gaps with compromise language on the OHCHR. However, this language was rejected by many States and deemed unsatisfactory by human rights organisations. They were concerned that even the softer language represented a risk to OHCHR's independence since the Council could interpret or build on it to exceed its authority in relation to OHCHR in the future.

18 More information available at <http://bit.ly/a6hqCi>.

19 Argentina, Canada, Costa Rica, the EU, Japan, Lichtenstein, Mexico, New Zealand, Switzerland, and Uruguay.

20 The African Group, the Caribbean Community and Common Market (CARICOM), OIC, Egypt, Cuba, Russian Federation, US, and China.

## Financing Council decisions

Another element of contention was how to best ensure that Council decisions are funded adequately and in a timely manner. Due to the lack of a clearly-defined procedure to assess and approve resources required to implement Council decisions, such as fact-finding missions,<sup>21</sup> OHCHR has only been able to carry out these tasks by diverting funds away from other activities. Some States<sup>22</sup> proposed the creation of a 'contingency' mechanism for unexpected expenses, which would be managed by the Secretary General.<sup>23</sup> However this did not find broad support because many States preferred that budgetary decisions remain in the inter-governmental forum of the Fifth Committee.<sup>24</sup> Ultimately, the General Assembly did not take any decision and postponed addressing the issue again until the 2011-12 General Assembly session.<sup>25</sup>

## Future review of the Council

The timetable for another review was also controversial. Several Latin American States wanted the Council reviewed again in five to ten years. There was concern that efforts to limit future reviews were attempts to prevent the Council from gaining status as a principle body of the UN. Others, notably Russia, advocated for ambiguous language that set no clear timetable for another review. Most States preferred no review at all, arguing that the General Assembly has the authority to call a review at any time and therefore text to spell this out further ought not to be necessary. The compromise allowed for a new review in 10 to 15 years.<sup>26</sup>

## The Geneva outcome

Though the final resolution was stripped of the membership-related issues that had spurred the major controversies among States, the US remained unhappy with the provision that referred to the Geneva review outcome. The US wanted a more 'neutral' tone and sought language that 'took note' of the outcome, rather than adopting or endorsing it. Its key concern was the Council's specific focus on the situation in the Occupied Palestinian Territories and Israel through the retention of agenda Item 7. The co-facilitators compromise of 'adopting the outcome' in the final resolution did not satisfy the US, though it was Israel that called for the vote.

21 Such as the Commission of Inquiry on Côte d'Ivoire.

22 Kazakhstan, Peru, Mexico, Chile, Iceland, and Switzerland.

23 The type of mechanism the Security Council uses for 'unforeseen and extraordinary' activities that fall under the need to maintain peace and security.

24 Another underlying tension is that Geneva-based Council delegates want to see their decisions implemented immediately, while New York's Fifth Committee delegates evaluate their decisions in a much broader context of the UN budget in general.

25 The General Assembly hereby requests the Secretary-General to present possible options on financing 'unforeseen and extraordinary expenses' to the Fifth Committee in the 66<sup>th</sup> session.

26 'Decides to consider again the question of whether to maintain this status...at a time no sooner than ten years and no later than fifteen years.'

## ADOPTION

Supporting Israel, Canada and the US explained their vote by criticising the institutional bias of the Council in regard to Item 7, and the lack of measures to improve the Council's membership.<sup>27</sup> Comments after the vote divided into two basic themes: States that felt the review represented a major missed opportunity to enhance the legitimacy of the Council, and States that bemoaned that consensus was not achieved on an important document. Several Latin American States<sup>28</sup> also reiterated their views that the Council's annual report should only be presented in the plenary<sup>29</sup> and that the Council should be transformed into a principal organ of the UN.

## LOOKING FORWARD

The final outcome of the lengthy review was a watered down document that failed to address many of the key issues discussed during the negotiation process. However, as the Ambassador of Liechtenstein stated following the resolution's adoption, the process of the review has planted the seed on ways to improve candidatures for the Council, and ideas raised may evolve further in another context.

Human rights organisations also pointed out that States can still immediately implement measures that respect the spirit and letter of *Resolution 60/251* that do not require the adoption of a separate text. These include regional groups running open slates in all future Council elections, and States committing to presenting and discussing their pledges in the General Assembly before future elections.<sup>30</sup> In particular those States that made proposals in this regard, should be expected to do so. ■

27 Australia and the EU also expressed criticism.

28 Uruguay, Peru and Chile.

29 Also supported by EU and Mexico.

30 Letter to States from NGOs available at <http://bit.ly/kIIW7X>.