



INAUGURAL SESSION OF THE HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE: ASSERTING ITS INDEPENDENT ROLE

INTRODUCTION

The inauguration of the Human Rights Council Advisory Committee (the Advisory Committee) in 2008 marked another step towards the finalisation of the institution-building process of the Human Rights Council (the Council). The Council elected the members of the Advisory Committee in March, and the Advisory Committee held its first meeting on 4-15 August. The Chairperson of the Advisory Committee reported orally on the progress achieved at this meeting at the 9th session of the Council in September.

The 1st session of the Advisory Committee saw it grappling with its own identity as an independent expert mechanism kept on a tight rein by its parent body. The Advisory Committee actively solicited input from a range of observers, including non-governmental organisations (NGOs) and United Nations (UN) agencies. In several cases, the Advisory Committee interpreted broadly the requests made to it by the Council and volunteered itself for further action. In formulating its recommendations to the Council, however, it conscientiously sought to balance two potentially conflicting priorities, namely real substantive contribution and acceptability to its parent body.

The Council's action with regard to the Advisory

Committee has thus far largely been disappointing. Of the 18 experts it elected, less than one quarter are women. Moreover, three quarters were elected without a vote and more than one third were members of the former Sub-Commission on the promotion and protection of human rights (the Sub-Commission). The Council's reaction to the work of the Advisory Committee has not been much more heartening. At its 9th session, which followed the 1st session of the Advisory Committee, the Council decided to defer by half a year the consideration of all of the recommendations made to it by the Advisory Committee. This included some which requested its immediate attention, which will in turn hamper the Advisory Committee's work at its 2nd session, in late January 2009.

BACKGROUND

General Assembly *Resolution 60/251* establishing the Council provided that it should 'maintain a system of ... expert advice', as had been offered by the Sub-Commission.¹ The use of the term 'system of expert advice' and the absence of any reference to the continuation of the Sub-Commission meant that the Council was not required, under the terms of the resolution, to

¹ Para. 6, General Assembly *Resolution 60/251*.

² For background information on the Advisory Committee, see ISHR, *Human Rights Monitor 2007*, 'The Council's institution-building work, the end of a long process', available at www.ishr.ch/hrm07. Also see Meghna Abraham, *A New Chapter for Human Rights*, ISHR and the Friedrich Ebert Stiftung (Geneva), pp. 51-60.

³ Part III, Human Rights Council *Resolution 5/1*.

⁴ For an account of the election process, see ISHR's *Daily Update* of 26 March 2008, available at www.ishr.ch/daily_updates.

⁵ As of 2005, the Sub-Commission had 26 members (seven experts from Africa, five from Asia, five from Latin America (GRULAC), three from Eastern Europe, and six from Western European and Other States (WEOG)). The regional quotas for the Advisory Committee are as follows: five experts from Africa, five from Asia, three from GRULAC, two from Eastern Europe, and three from WEOG.

⁶ 'Clean slates' are those where the number of candidates is equal to the number of seats to be filled.

⁷ The full list of members is available at www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/membership.htm.

⁸ There are only four women on the Advisory Committee, representing less than one quarter of the membership.

⁹ Mr José Antonio Bengoa Cabello, Mr Shiqiu Chen, Ms Chung Chinsung, Mr Emmanuel Decaux, Mr Vladimir Kartashkin, Mr Miguel Alfonso Martínez, Ms Halima Embarek Warzazi.

¹⁰ One observer has calculated that the seven Advisory Committee experts who were on the Sub-Commission have a total of 100 years of service between them as members or alternates. Rachel Brett, *Digging Foundations or Trenches? UN Human Rights Council: Year 2*, Quaker United Nations Office (Geneva, 2008), p.8.

¹¹ Chairperson: Mr Martínez; Vice-Chairpersons: Ms Mona Zulficar, Ms Chinsung, Mr Kartashkin; Rapporteur: Mr Decaux.

¹² Mr Chen, Mr Decaux, Mr Kartashkin, Ms Warzazi, Mr Martínez.

¹³ According to Human Rights Council *Resolution 5/1*, the Advisory Committee can meet up to ten working days per year. Additional sessions may be scheduled with the prior approval of

retain this body. Accordingly, the Sub-Commission was abolished and replaced by the Advisory Committee. The Sub-Commission held its last session in August 2006.²

In its *Resolution 5/1*, the Council established the Advisory Committee as its 'think-tank' meant to provide expertise to the Council in 'the manner and form requested by the Council, focusing mainly on studies and research-based advice'.³ The powers of the Advisory Committee are limited compared to those of its predecessor. Virtually all aspects of its work, from the studies to be conducted to the establishment of subsidiary bodies, require the prior authorisation of the Council. Moreover, the Advisory Committee is not entitled to address country situations or adopt any resolutions or decisions. At its 1st session, therefore, the Advisory Committee adopted 'recommendations'. The implications of this semantic detail are yet unclear.

Overall, the capacity of the expert mechanism to address gaps in the international human rights system has been greatly curtailed. Both at the meetings of the Advisory Committee itself and during the Council's discussions on it, States constantly reminded the Advisory Committee of this fact and cautioned it not to overstep its mandate.

Election of members⁴

Council *Resolution 5/1* outlines the process for the nomination and election of the 18 members of the Advisory Committee,⁵ and Council *Decision 6/102* lists the technical and objective requirements for candidates. Regrettably, the list of candidates proposed by the African Group, Asian Group, and the Group of Latin American and Caribbean States (GRULAC) were 'clean slates'⁶ and there was no choice of candidates. Thus, effectively, three quarters of the membership was elected to the Advisory Committee by acclamation.⁷ Moreover, despite the explicit provision in Council *Resolution 5/1* that the Council give 'due consideration' to gender balance, there is a striking paucity of women on the Advisory Committee.⁸ Also of note is the large number of former Sub-Commission members who have been elected onto this new body.⁹ Considering that Council *Resolution 5/1* introduced a limit of two three-year terms, it seems contradictory to

elect several experts who have served more than six years on the former Sub-Commission.¹⁰

OVERVIEW OF THE 1ST SESSION OF THE ADVISORY COMMITTEE

Procedural matters

Election of officers

The Advisory Committee decided to elect its bureau on the principle of a rotating presidency, with three Vice-Chairpersons and a Rapporteur, each from different regional groups.¹¹ It is notable that all but one member of the bureau were on the former Sub-Commission.

The Advisory Committee also elected by acclamation five of its members to the Working Group on Communications.¹²

Rules of procedure and working methods

During its 1st session, the Advisory Committee largely followed the rules of procedure of the former Sub-Commission. Emphasis was placed, most heavily by the Chairperson, Mr Miguel Alfonso Martínez, on collegiality and consensual decision-making. However, the Advisory Committee will have to balance these values with the time constraint that it is under.¹³ Although all of the recommendations made at the 1st session were adopted by consensus, the delicacy of the current approach was clearly demonstrated when Mr Martínez forced through the draft recommendation on the right of peoples to self-determination.¹⁴

A new method of work employed by the Advisory Committee was the preparation of background documents and an oral introduction by the Secretariat in order to facilitate discussions on substantive issues. Despite this, the comments on most of the substantive topics remained general and, inevitably, the quality of debate in the plenary was relatively low.

Observing the Advisory Committee's discussions on its rules of procedure and methods of work, States suggested that the Advisory Committee merely reiterate the provisions in *Resolution 5/1*.¹⁵ Following on from this, some experts suggested that, since the rules of procedure and working methods of the Advisory Committee had to be in conformity with Council *Resolution 5/1*, they should be submitted to the Council for approval.¹⁶ Others strongly disagreed, arguing that this was an internal matter that required neither submission to nor approval by any other body.¹⁷ In the end, a drafting group with five members was set up to work inter-sessionally and present a document to be discussed and adopted by the plenary at its next session.¹⁸

Agenda and annual programme of work

The Advisory Committee decided by consensus that it was not yet in a position to decide its agenda or annual programme of work, as these depended largely on the tasks assigned to it by the Council. Therefore, no action was proposed on this point.

Status of studies to be carried out by the Sub-Commission

The Sub-Commission had requested the Council to task the Advisory Committee with the continuation of a dozen studies.¹⁹ However, as the Council had not yet taken any action on these, the members of the Advisory Committee and observers alike agreed that an explicit authorisation from the Council was necessary to continue the studies pending from the Sub-Commission.

Much of the discussion was held in private and resulted in two separate proposals to the Council. First, the Advisory Committee submitted a short-list of studies which it wished to follow up.²⁰ Second, it recommended that the Council authorise the publication of all the Sub-Commission studies which have not yet been published.²¹

Substantive matters

Human rights education and training

At its 6th session, the Council requested the Advisory Committee to 'prepare a draft declaration on human rights education and training' upon consultations with various stakeholders, including States, the Office of the High Commissioner for Human Rights (OHCHR), and civil society.²² A drafting group composed of five members²³ prepared a paper 'containing the elements of the conceptual framework for further work and consultations' for submission to the Council.²⁴

Right to food

At its March 2008 session, the Council requested the Advisory Committee to 'consider potential recommendations for approval by the Council on possible further measures to enhance the realization of the right to food, bearing in mind the priority importance of promoting the implementation of existing standards'.²⁵

Speakers drew attention to diverse aspects of the right to food which the Advisory Committee should consider, including areas which the Council has so far overlooked, such as hunger refugees, a convention on peasants' rights, development, and ensuring cooperation and coordination with the UN Special Rapporteur on the right to food to avoid duplication and to ensure coherence in their messages to the Council.

A drafting group of five members was constituted to work on this topic.²⁶ The group held consultations with representatives of the UN Conference on Trade and Development (UNCTAD) and the Office of the UN High Commissioner for Refugees (UNHCR) and prepared three draft recommendations for submission to the Council. First, it urged the Council to appeal to its member States to increase their voluntary contributions to enable UNHCR to fulfil its mandate.²⁷ Second, it suggested that the Council launch an appeal to the UN Secretary-General and to States to 'make available their good offices so as to guarantee to hunger refugees the right to non-refoulement'.²⁸ Finally, it asked for the Council's approval to prepare studies on the current food crisis, hunger refugees, and rights of peasants.

the Council. Both Advisory Committee members and States were of the view that having two one-week sessions each year is preferable to the alternative of having one two-week session.

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See below at p. 57.

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India, Philippines, Bangladesh, Egypt.

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Mr Bengoa, Mr Martinez, Mr Kartashkin. Supported by Egypt, India.

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Mr Latif Hüseyinov, Ms Warzazi.

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The members of the drafting group are Mr Wolfgang Stefan Heinz, Ms Zulficar, Mr Ansar Ahmed Burney, and Mr Hüseyinov. The representative of GRULAC is yet to be appointed. Ms Zulficar agreed to participate in the group provisionally, pending discussions with absent experts of the African Group.

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A/HRC/2/2 A/HRC/Sub.1/58/36, 'Report of the Sub-Commission on the promotion and protection of human rights on its fifty-eight session'. Available at www2.ohchr.org/english/bodies/subcom/index.htm.

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Advisory Committee *Recommendation 1/13*, A/HRC/AC/2008/1/L.11, 'Report of the 1st session of the Human Rights Council Advisory Committee, available at www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm.

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Advisory Committee *Recommendation 1/10*, A/HRC/AC/2008/1/L.11.

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Para. 1, Council *Resolution 6/10*.

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The members of the drafting group are Mr Decaux, Ms Warzazi, Mr Kartashkin, Mr Héctor Felipe Fix Ferrero, and Ms Quisumbing.

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Annex, A/HRC/AC/2008/1/L.7.

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Para. 34, Council *Resolution 7/14*.

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The members of the drafting group are Mr Ziegler, Mr Bengoa, Ms Zulficar, Ms Chung, and Mr Hüseyinov.

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Advisory Committee *Recommendation 1/7*, 'Realization of the right to food in United Nations refugee camps', A/HRC/AC/2008/1/L.14.

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Advisory Committee *Recommendation 1/6*, 'Hunger refugees: good offices of the Human Rights Council and the Secretary-General', A/HRC/AC/2008/1/L.13.

Human rights of women

On this issue, the Advisory Committee interpreted broadly its mandate to 'regularly and systematically integrate a gender perspective' into the implementation of its mandate.²⁹ It requested of the Council to allow three of its members³⁰ to prepare 'a set of draft guidelines on methods to operationalize gender mainstreaming at all levels (...) in the implementation of the Committee's mandate', as well as to 'identify proposals for concrete action in specific areas, special procedures or further measures needed to enhance substantive gender equality within the United Nations system'.³¹ The Advisory Committee's readiness to carry out more tasks than was originally requested by the Council is encouraging.

Promotion of a democratic and equitable international order

At its June 2008 session, the Council mandated the Advisory Committee to pay due attention to its *Resolution 8/5* on the promotion of a democratic and equitable international order, and 'to make contributions towards its implementation'.³² The members disagreed on whether the Advisory Committee ought to take a modest approach, namely identifying those issues upon which agreement can be achieved and defining concepts in a way which can be acceptable to all States. This debate starkly demonstrated the tension that exists in the very mandate of this body, between acting as an independent think-tank and serving as a subsidiary mechanism which is tightly controlled by the Council.

At its September session, the Council expanded on its original request to the Advisory Committee, tasking it with preparing 'inputs to contribute to the elaboration of the draft declaration on the right of peoples and individuals to international solidarity, and to the further development of guidelines, standards, norms and principles with a view to promoting and protecting this right'.³³

Missing persons

In March 2008, the Council decided to hold a panel discussion on the question of missing

persons at its September 2008 session and to task the Advisory Committee, at the same session, with the preparation of a study on best practices in the matter.³⁴

The main debate in the Advisory Committee was on the distinction between missing persons and victims of enforced disappearance, and whether the mandate from the Council included the latter. The majority of States that spoke were of the view that missing persons fell under international humanitarian law, whereas enforced disappearance was a question of international human rights law, and that the Advisory Committee should only deal with the former.³⁵

At its September session, the Council held a panel on missing persons,³⁶ and requested the Advisory Committee to prepare a study on best practices based on the report to be prepared by OHCHR.³⁷

Human rights of persons with disabilities

Mexico, a co-sponsor of the original Council resolution,³⁸ confirmed that the mandate of the Advisory Committee involves the mainstreaming of the consideration of the human rights of persons with disabilities in its work on all issues. The Advisory Committee made no recommendation to the Council on this matter.

Elimination of discrimination against persons affected by leprosy and their family members

At its session in June 2008, the Council requested OHCHR to prepare a report on measures taken by governments to eliminate discrimination against persons affected by leprosy and their family members.³⁹ It requested the Advisory Committee to examine this report and 'formulate a draft set of principles and guidelines for the elimination of discrimination against persons affected by leprosy and their family members' and to submit it to the September 2009 session of the Council.⁴⁰

Mr Shigeki Sakamoto volunteered to work on this issue as special rapporteur.⁴¹

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Para 18, Human Rights Council
Resolution 6/30.

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Ms Chinsung, Ms Quisumbing, and
Ms Zulficar.

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Advisory Committee Recommendation
1/4, A/HRC/AC/2008/1/L.11.

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Para. 11, Council *Resolution 8/5*.

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A/HRC/9/L.19.

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Para. 11, Council *Resolution 7/28*.

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Russian Federation, Mexico, France.
Also Mr Hüseyinov. The only State that
differed from this view was Nigeria,
which urged the Advisory Committee to
study the situation of missing persons
both in conflict and in time of peace.

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See ISHR's *Daily Update* of 22
September 2008, available at www.ishr.ch/daily_updates.

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A/HRC/9/L.5.

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Para. 5, Council *Resolution 7/9*.

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Para. 4, Council *Resolution 8/13*.

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Para. 5, *Ibid.*

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Advisory Committee Recommendation
1/5, A/HRC/AC/2008/1/L.11.

The right of peoples to self-determination

Responding to repeated calls by NGOs to address the issue of the right of peoples to self-determination, Mr Jean Ziegler prepared a draft recommendation on this matter.⁴² Despite Mr Ziegler and Ms Mona Zulficar's emphasis that no concrete proposals are being made at this stage, some members expressed their concern that such a proposal was beyond the mandate of the Advisory Committee. The General Assembly resolution⁴³ referred to in the draft text requested that the Council, not its subsidiary bodies, give special attention to self-determination. Therefore, in their view, the Advisory Committee was not entitled to consider this issue without an explicit mandate from the Council.

Despite strong disagreements among experts, Mr Martínez declared that the recommendation was adopted by consensus. His heavy-handed chairing and his forcing through this document 'by consensus' dampened the collegiality that he championed.

First oral report to the Council

Mr Martínez reported orally to the September 2008 session of the Council and stressed that the Advisory Committee had acted 'with full respect' of its mandate. Nevertheless, several States took this opportunity to insist that the Advisory Committee work in conformity with the relevant resolutions of the General Assembly and the Council.⁴⁴ For instance, France (on behalf of the EU) emphasised that all actions of the Advisory Committee had to be 'channelled through the Council', while India stressed that the Advisory Committee must not adopt resolutions or decisions. India furthermore lamented that, in spite of a 'clear directive from the Council', the Advisory Committee 'by and large followed the same measures as the Sub-Commission' and insisted that this needed to be 'rectified'.

States and NGOs also commented on the substantive issues dealt with by the Advisory Committee, welcoming its treatment of, among others, the right to food, human rights education and training, and studies pending from the Sub-Commission. NGOs welcomed the initiative

shown by the Advisory Committee in addressing the right to self-determination, while States were noticeably silent on this issue. NGOs also encouraged the Council to task the Advisory Committee to work on linguistic rights.⁴⁵ It remains to be seen whether a trend will develop, whereby States and NGOs will use Item 5 of the Council's agenda (on human rights bodies and mechanisms) to draw attention to general issues of concern.

Despite a general assumption among members that their recommendations would be considered by the Council at its 9th session in September 2008, States indicated that no decisions related to the Advisory Committee would be taken until its next session in March 2009, when the Advisory Committee submits its final report. Nevertheless, given the urgency of some of the recommendations, the Secretariat submitted three draft decisions on behalf of the Advisory Committee for consideration by the Council at its 9th session.⁴⁶ During the Council session, India strongly questioned this procedure and the draft decisions were postponed until March 2009.⁴⁷

The Council's decision to only accept recommendations from the Advisory Committee once a year has exposed a contradiction inherent in its *Resolution 5/1*. On the one hand, the members of the Advisory Committee are encouraged to 'communicate between sessions'. On the other hand, any additional sessions must have the prior approval of the Council. At the 9th session, the Advisory Committee requested the Council to authorise some of its members to meet in January 2009,⁴⁸ a decision which the Council will now, absurdly, consider in March 2009.

CONCLUDING REMARKS

In 2008, the Advisory Committee took its first tentative steps towards establishing itself as an independent expert body. While much introspection and improvement is still needed, it has already demonstrated some positive trends. These include its openness to the participation of NGOs and other observers, as well as the sense of initiative already displayed in addressing certain issues.

⁴² Advisory Committee Recommendation 1/12, A/HRC/AC/2008/1/L.11.

⁴³ General Assembly Resolution 62/14.

⁴⁴ France, on behalf of the European Union (EU), Pakistan, on behalf of the Organization of the Islamic Conference (OIC), India, Switzerland, Russian Federation, Nigeria, Morocco.

⁴⁵ European Bureau for Lesser Used Languages, International Pen.

⁴⁶ 'Realization of the right to food in United Nations refugee camps', 'Drafting group on the right to food: programme of work', and 'Official summary records'. All available on the OHCHR extranet, which can be accessed (fill out the form on the page to receive the user name and password) at www.ohchr.org/english/bodies/hrcouncil/form.htm.

⁴⁷ See ISHR's *Daily Update* of 24 September 2008, available at www.ishr.ch/daily_updates.

⁴⁸ Advisory Committee Recommendation 1/8, A/HRC/AC/2008/1/L.11.

In 2008, the Advisory Committee will have to give priority attention to the development of its methods of work and rules of procedure. Consensual decision-making is particularly important in a body like the Advisory Committee, where experts from various backgrounds examine and advise on potentially contentious issues. Nevertheless, this principle should not be so rigidly adhered to that it overrides genuine debate among the experts.

For their part, States have tended to interpret the resolution of the Council establishing the Advisory Committee in a conservative way. Some have openly and repeatedly attempted to further narrow the Advisory Committee's already limited mandate. The Council's current domineering approach should be revised if the Advisory Committee is to be an effective and truly independent body. The response of the Council to its first set of recommendations will be central to ascertaining the Advisory Committee's niche within the UN human rights system. This, in turn, will give NGOs an early indication of the value of engaging with this new body.