

HUMAN RIGHTS MONITOR

QUARTERLY

ISHR | INTERNATIONAL SERVICE FOR HUMAN RIGHTS

ISSUE 2/3 | JULY 2010

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Key moments in the life of the Human Rights Council. Can you guess who's who and what's what? Look inside to find out!

When it established the Human Rights Council (the Council) in 2006, the General Assembly decided that the Council should be reviewed five years later. The review involves both an assessment of the Council's work and functioning to be carried out by the Council itself, and a re-assessment of its status by the General Assembly. The review processes that will be conducted in Geneva and New York respectively are still being defined in terms of their structure, scope, and modalities.

The General Assembly did not give much guidance on how the General Assembly or the Council should structure, coordinate, or sequence the review processes. The resolution also provides inconsistent timeframes for each process. Nevertheless, States and NGOs have already begun reflections and discussions on many of the key issues that are likely to be considered during the review. ISHR will play an active role in those discussions. We hope that through this overview of the review process, human rights defenders will be able to engage with the process and offer their reflections and proposals for how the Council could be made more effective.

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Photos from cover page, from left to right:

1. The Human Rights Council's 1st special session on the situation in the Palestinian and other occupied Arab territories, Assembly Hall, Palais des Nations, Geneva.
2. First President of the Human Rights Council, Ambassador Luis Alfonso de Alba (Mexico) at the adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance*.
3. Ceiling of Room 20, the Council's Chamber at Palais des Nations.
4. Adivasi woman from the Kutia Kondh tribal group in Orissa, India. The Council adopted the UN *Declaration on the Rights of Indigenous Peoples*.
5. UN Secretary-General Ban Ki-moon confers with Doru Costea, President of the Council, Mr Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, and Ms Louise Arbour, UN High Commissioner for Human Rights before the opening of the 7th session of the Council.
6. The Madres de Plaza de Mayo, an association of Argentinean mothers seeking information and justice about their disappeared relatives during the military dictatorship between 1976 and 1983.
7. Archbishop Desmond Tutu, Head of the high-level fact-finding mission to the southern Gaza Strip town of Beit Hanoun, addresses the 9th session of the Council.
8. Mr Farah Mustafa, representative of the Sudan to the UN at the Council's 4th special session on the situation of human rights in Darfur.
9. Mr Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar.
10. Mr Olivier De Schutter, Special Rapporteur on the right to food.
11. Mr Hisham Badr, Permanent Representative of Egypt to the UN addresses the 9th special session of the Council on the situation in Gaza.
12. Mr Doru Romulus Costea (Romania), second President of the Council.
13. Ms Charlotte Abaka, former Independent Expert on the human rights situation in Liberia.
14. Ms Navanethem Pillay, UN High Commissioner for Human Rights and Mr Martin Uhomoibhi, third President the Council.
15. Mr Philip Alston, UN Special Rapporteur on extrajudicial, summary, or arbitrary executions.
16. Rasmata, 25, with her newborn baby in Ouagadougou, Burkina Faso. Maternal mortality has been a key issue raised by the Council.
17. Ms Esther Brimmer, US Assistant Secretary of State for International Organization Affairs, addresses the opening session of the high-level segment of the Human Rights Council. In her statement she affirmed the United States' commitment to the Council.
18. Mr Martin Scheinin, Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism.
19. Mr Mahinda Samarasinghe, Minister for Disaster Management and Human Rights of Sri Lanka, addresses the Council's special session on the situation of human rights in Sri Lanka.
20. Parallel event taking stock of the Council's performance with Mr Martin Uhomoibhi, Julie de Rivero (Human Rights Watch), and Katrine Thomasen (ISHR) among others.
21. Mr Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.
22. Mr Richard Goldstone, Head of the fact-finding mission on the Gaza Conflict.
23. Mr Alex Van Meeuwen (Belgium), fourth President of the Council.
24. Mr Michel Forst, Independent Expert on the situation of human rights in Haiti, addresses the Council's special session on the support to the recovery process in Haiti.
25. Ms Sima Samar, former Special Rapporteur on the situation of human rights in the Sudan.
26. Human Rights Council observes moment of silence for Haiti quake victims.
27. Mr Vítit Muntarhorn, former Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea.
28. Mr Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
29. NGOs lining up to sign up to comment on the UPR outcome of Iran.
30. Mr Sihasak Phuangketkeow (Thailand), elected as the fifth President of the Council presidency.

HUMAN RIGHTS COUNCIL REVIEW *Continued from cover page.*

The two review processes are based:

- on the one hand on General Assembly *Resolution 60/251*, para. 16, which 'Decides further that the Council shall review its work and functioning five years after its establishment and report to the General Assembly'
- on the other on General Assembly *Resolution 60/251*, para. 1, which 'Decides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years'.

GENEVA PROCESS

INFORMAL PREPARATIONS

Various informal preparations for the review have been underway for some time. Individual States and groupings of States, and others,¹ have convened informal meetings to discuss issues related to the review. These gatherings have included some level of NGO participation, with the notable exception of a meeting organised by Algeria in Algiers. Although NGO participation has generally been restricted, the outcomes of many of the meetings have been made public thus at least providing transparency.²

Meetings so far

- Reflection Group on the Strengthening of the Human Rights Council: Mexico City, 29-30 October 2009³
- Wilton Park Conference on Reviewing the Work and Functioning of the Human Rights Council: 14-16 January 2010⁴
- Reflection Group on the Strengthening of the Human Rights Council: Paris, 25-26 January 2010
- Retreat of Algiers on the review of the work and functioning of the Human Rights Council: 19-21 February 2010⁵
- Open-ended seminar on the review of the Human Rights Council: Montreux, 20 April 2010⁶
- Reflection Group on the Strengthening of the Human Rights Council: Rabat, 27-28 May 2010
- Reflection Group on the Strengthening of the Human Rights Council: Seoul, 14-16 July 2010

THE REVIEW PROCESS

The process for the Council's own review of its work and functioning was initiated by the Russian Federation. As early as September 2009 it presented a resolution to establish an inter-governmental open-ended working group to carry out the review.⁷ Although the General Assembly had asked that the Council carry out its review five years *after* it was established in April 2006, namely after April 2011,⁸ the working group on the review will instead meet in October 2010 and January 2011, and will report to the Council in June 2011 on the outcome of its discussions.

In the coming months the review process is likely to consume a great deal of the time of delegations, both governmental and non-governmental. It should not, however, pre-occupy the Council to the extent that it is distracted from implementing its mandate, an effect that some States have expressed a commitment to avoiding.⁹

Structure of the review

The President of the Council has been asked to undertake 'transparent and all-inclusive consultations prior to the working group session on the modalities of the review'. Those consultations resulted in the former President, Ambassador Alex Van Meeuwen (Belgium), drafting a roadmap on the review process and its modalities.¹⁰ However, when the roadmap was presented to the

1 One grouping is referred to as the 'Reflection Group on the Strengthening of the Human Rights Council'. It is made up of Argentina, Brazil, Costa Rica, France, Ghana, India, Jordan, Mexico, Morocco, Nigeria, Republic of Korea, Romania, Spain, Switzerland, Ukraine, UK, US, and representatives of the Office of the High Commissioner for Human Rights (OHCHR) and NGOs.

2 The documents related to the review are available at: <http://bit.ly/ctLlpT>, and on the OHCHR Extranet: <http://bit.ly/bOdE89>.

3 <http://bit.ly/bYfRlj>.

4 <http://bit.ly/bUWxaO>.

5 <http://bit.ly/a1z8Zc>.

6 <http://bit.ly/bxZSO3>.

7 *Resolution 12/1*. The membership of the working group is not restricted.

8 Para. 16 of General Assembly *Resolution 60/251*.

9 Austria, Azerbaijan, China.

10 The roadmap is available on the OHCHR extranet.

Council at an informal meeting on 14 June 2010, it met with significant resistance from States, and was not adopted.¹¹

This was no doubt in part due to the President's diminishing authority as his term was to end only a few days later. But it also demonstrated broader disagreements about how to structure the review process. It will now be up to the new President, Ambassador Sihasak Phuanketkeow (Thailand),¹² to carry out consultations and ensure agreement on the structure and modalities of the review. He has expressed his intention to further develop the roadmap.

The Russian Federation in mid-May, in a so-called 'non-paper', presented its quite detailed proposals for the structure of the review process.¹³ It proposed that the topics for discussion should be same as those covered when the Council's institutional framework was elaborated in 2006-2007, namely the universal periodic review (UPR), special procedures, Advisory Committee, complaint procedure, agenda and programme of work, and the methods of work and rules of procedure.¹⁴ This approach has been endorsed by a number of States.¹⁵ In putting forward such detailed proposals, the Russian Federation seems to be seeking a prominent role for itself in the review process. It would be no surprise if it were to be appointed as a facilitator for part of the review process.

Others, including Switzerland, Norway, and many NGOs,¹⁶ have suggested that the review should be structured around the Council's mandate as given to it by the General Assembly, and should examine how far this has been fulfilled.

A proposal by 18 NGOs recommends that the review be structured around four clusters of elements of the Council's mandate:

- Promoting international human rights law, its development and its implementation
- Addressing and preventing human rights violations
- Promoting coordination and mainstreaming of human rights
- Working methods and rules of procedure

The diverging approaches reflect fundamentally different ways of evaluating the Council's work and functioning. The approach favoured by the Russian Federation and others implies an evaluation of implementation of the Council's institutional framework (*Council Resolution 5/1*). The opposing view proposes an evaluation of the implementation of the Council's mandate (General Assembly Resolution 60/251). The structure of the review is likely to have a significant impact on the issues that will be discussed. If the discussions focus on the institutional

framework, there is every likelihood that this will result in *Resolution 5/1* being reopened, an outcome that many States, NGOs and the High Commissioner for Human Rights have warned against (see below). Such an approach is also likely to result in less discussion of how the Council has fulfilled important aspects of its mandate, such as addressing human rights violations, preventing violations, and mainstreaming human rights within the UN system. However, regardless of how the process is structured, a broad range of common issues is likely to be discussed. The difference in approach will primarily affect the yardstick against which the assessment of the Council's work and functioning is carried out.

The Council President's draft roadmap attempts to strike a balance between these different approaches. It suggests that the Council carries out an evaluation of how it has fulfilled its mandate in key areas, and then moves on to identify concrete gaps and shortcomings in relation to its mechanisms. While the roadmap may not have found the ideal balance, it generally seems to propose a constructive approach that would allow for a substantive assessment of achievements and shortcomings. This should be at the heart of the review if it is to be meaningful.

Scope of the review

There is broad agreement that the Council's institutional framework should not be re-negotiated through the review process. States have underlined that it is a process of review, and not 'reform' or 'rebuilding'. This seems to indicate that they do not want a comprehensive process of re-examination of the institutional framework, which was agreed only after lengthy and delicate negotiations. The Non-Aligned Movement (NAM) has suggested that the review should be restricted to issues where States agree there is a need for 'fine-tuning'.

At the same time, it is clear that States would like new elements included in the Council's institutional framework. Any new proposals should only be adopted if they substantially add to the Council's ability to fulfill its mandate. Supplements or explanations that detract from the current framework or from the Council's capacity to perform its mandate should therefore not be accepted.

One of the areas where States have identified a need for changes and clarifications is the UPR. However, the review of the UPR is complicated by the fact that *Resolution 5/1* suggests that the Council may review the modalities and periodicity of the UPR after the first cycle of reviews.¹⁷ That will only be completed in October 2011. On this basis some States, including Algeria and Switzerland, have argued that the review of the UPR should take place at a later stage. On the other hand, NAM wants the UPR to be included now, although it wishes for any changes to be implemented only after the first UPR cycle. It is yet to be decided whether the UPR will be included at this stage of the review.

11 The statements made by States during the informal meeting can be accessed on the OHCHR extranet: <http://bit.ly/bOdE89>.

12 Ambassador Sihasak Phuanketkeow replaced Mr Van Meeuwen on 21 June 2010.

13 Non-paper on modalities of the review of the Human Rights Council, 18 May 2010.

14 The Council's institutional framework is contained in *Resolution 5/1*.

15 Pakistan, on behalf of the Organisation of the Islamic Conference (OIC), Egypt, on behalf of the Non-Aligned Movement (NAM).

16 See NGO proposal on the Structure for the 2011 Review of the Human Rights Council's Work and Functioning, <http://bit.ly/ctLlpT>.

17 See footnote a) to para. 14.

Modalities

The review process will be carried out by the working group and will be chaired and led by the President of the Council. However, there are differing views on how the working group and the discussions should be conducted.

In its non-paper, the Russian Federation suggests that the President in consultation with States should appoint five facilitators on the topics for discussion, mentioned above. Many others, including NAM and Switzerland, have expressed the view that it is too early to appoint facilitators.¹⁸ The President's roadmap recognises that the President may call on the assistance of facilitators but leaves the timing open. In addition, it suggests that States could also invite the President to call on specific expert input to the working group session, for example from special procedures or the Advisory Committee.

The Russian Federation also suggested that the substantive work of the working group should be carried out in two parallel sessions. This idea has met with considerable opposition from States, in particular small delegations, as well as NGOs.¹⁹ They fear not being able to effectively contribute to the process if it is taking place in parallel meetings.

In between the two sessions of the working group additional informal meetings may be held.

The President's roadmap proposes that the review process will be transparent, constructive, and consensual. That the outcome should be adopted by consensus has found broad agreement amongst States. This is important as it provides a safeguard against negative proposals that may enjoy majority support and could otherwise be forced through.

NGO PARTICIPATION

The Russian Federation's non-paper suggests that during the working group, States and groups of States would present their positions and concrete proposals. There is no mention of NGOs, national human rights institutions (NHRIs), or others contributing to the debate. However, an earlier version of the non-paper made it explicit that NGOs would not speak during the working group. This suggestion is in stark contrast to the active role played by NGOs in the Council's work. The Russian Federation's proposal is no doubt evidence of its views about NGO participation in general, and while probably shared by several other States, is unlikely to gain broad support. At the informal meeting organised by the President in June there was broad endorsement by States of the principle that the review process should follow the same modalities for NGO participation as those used during the institution-building process. NAM has also endorsed this in its position paper.²⁰

¹⁸ In an earlier version of its paper, dated 12 May 2010, the Russian Federation proposed that the facilitators could already be appointed in May and begin consultations with States. The later version does not make this suggestion.

¹⁹ EU, NAM.

²⁰ NAM position paper on the modalities of the HRC Review, 6 June

NGOs in consultative status with the Economic and Social Council (ECOSOC), and NHRIs granted A-status by the International Coordination Committee, will be able to attend the working group's sessions. The working group was established as 'open ended'. According to standard UN practice this means that all observers can participate. Based on the practices from the institution-building process, NGOs will be able to take the floor during the working group's sessions.²¹

KEY ISSUES

The following issues are likely to be at the core of the review discussions in Geneva. This overview does not seek to be comprehensive.

Addressing human rights violations

Without attempting here a full assessment of the Council's performance, it is fair to say that it has not done well in addressing and preventing human rights violations around the world.²² For human rights defenders this will therefore be one of the main issues to be addressed during the review process. The Council's shortcomings in this area are not generally due to a lack of relevant tools. Rather what needs to be enhanced is the political will of States.

The review process may also present an opportunity to explore the many under-utilised tools that are already available to the Council.²³ At the same time, some innovative proposals have been put forward that may help overcome some of the resistance to taking up country situations by making such decisions more objective and less political. These include establishing regional special procedures and enhancing the role for the High Commissioner for Human Rights in bringing situations of concern to the Council. There has also been discussion about introducing objective criteria to assist the Council in deciding when to address a situation, or developing a list of trigger indicators that would result in automatic consideration.

Special procedures

The special procedures were subject to an in-depth review during the Council's institution-building process.²⁴ Many of the topics discussed then are likely to also come up during this review, including their relationship with the Council, their working methods, State cooperation and follow-up to recommendations, and resources.

2010, para. 6.

²¹ The practices of the institution-building working groups varied considerably. Some sessions were very interactive with no distinctions drawn between State and NGO speakers. At other sessions NGOs spoke on each topic after States, or at the end of the 3-hour meeting.

²² See for example, Human Rights Watch, *Curing the Selectivity Syndrome: The 2011 Review of the Human Rights Council*, <http://bit.ly/b0JMDb>.

²³ The institution-building text already allows for the holding of panels, seminars, roundtables, and other work formats. These are available on a case-by-case basis, and their use only qualified in that they should be used to enhance dialogue and mutual understanding.

²⁴ For more information see, <http://bit.ly/ayu9u5>.

A number of NGOs have put forward a set of ten principles to guide a successful outcome of the review as it relates to special procedures.²⁵

In the last couple of years there have been an increasing number of allegations by States that the special procedures have breached the Code of Conduct for Special Procedures, which was adopted in 2007.²⁶ This has resulted in some calling for an oversight mechanism that would address complaints of non-compliance. A proposal has been made in this regard for a committee of magistrates or jurists.²⁷ However, there are serious concerns about the risk of politicisation of such a procedure and its potential negative impact on the independence of special procedures. Moreover, with the limited use of the existing procedure set up by the special procedures, to review their practices and working methods (Internal Advisory Procedure)²⁸ it is not clear that there is a need for a new procedure. Nevertheless, this is likely to be one of the key issues for the review of special procedures. While much State attention has been on the behaviour of special procedures, NGOs have highlighted the serious lack of State cooperation with these mechanisms. Some have even called for a code of conduct for States.

UPR

One of the key issues for the review of the UPR is likely to be how the second cycle will function. The Council's institution-building text provides little guidance in this regard. It merely states that subsequent reviews should focus, among other issues, on implementation of the outcome of previous reviews.²⁹ The Council review is therefore likely to examine how to include follow-up to previous reviews in the UPR process, while also undertaking a 'new' examination of recent developments.

Some of the UPR's current shortcomings are also likely to be discussed. These include the problems with the list of speakers, the large number of recommendations that many States find unmanageable to implement, and the lack of sufficient technical assistance to States in relation to implementation. The problems with the list of speakers have prompted suggestions that the time for each examination should be extended to allow all States wishing to speak to do so. There are also proposals to extend the periodicity of the review from four to five years, allowing States more time to implement outcomes. As attention turns to implementation at the national level, national human rights institutions could be given an increased role in the UPR process at the Council in recognition of the critical role they play in supporting human rights implementation.

There is also likely to be discussion about how to make the UPR process more relevant by bringing more expertise to the review of each State, including by strengthening the role of the troika. The current role of the group of three Ambassadors who facilitate the drafting of the outcome report, has fittingly been referred to as a 'glorified mailbox'. The UPR process would certainly benefit from greater expert input and involvement.

Human Rights Council Advisory Committee

In informal discussions so far, little attention has been paid to the functioning of the Advisory Committee. One of its members has expressed the view that it should be allowed to initiate work and make suggestions for research and study to the Council, as its predecessor did.³⁰ During its 5th session in August 2010, the Advisory Committee will discuss its work and functioning. It can be expected to present relevant recommendations on how to further improve its work to the Council. While its annual report is to be presented to the Council in March 2011, it will hopefully make its recommendations available for the working group session in October. This might prompt greater discussion of how the Advisory Committee could become a more relevant mechanism.

Complaint procedure

It is generally felt that the complaint procedure is not working effectively. This has led to two suggested solutions; either abolish it or make it work. Some have suggested that the best way to improve the procedure would be to change its confidential nature and make it a public procedure. While the complaint procedure has many shortcomings, one of its advantages is the high response rate of States subject to the procedure, reportedly more than 90%. In comparison, the response rate to special procedures is on average 32%.³¹ The Council should consider how to overcome the procedure's shortcomings while maintaining State cooperation.

Other issues

Other important issues that will be discussed during the review include: the need to strengthen the Office of the President; the need to streamline the Council's heavy programme of work (proposals have been made to reduce the Council's sessions to two from the current three, and for short one or two day monthly sessions); the need to streamline the agenda (proposals have been made to merge all agenda items dealing with country situations); and the role of the High Commissioner and her Office in supporting the Council's work. The latter issue is likely to generate controversy as States are divided on what the relationship between the High Commissioner and the Council should be. Some would like to see a greater role for States in setting OHCHR priorities, while others see this as the High Commissioner's independent prerogative.

25 Ten Principles to Guide a successful outcome of the review of the Human Rights Council as it relates to the Special Procedures, <http://bit.ly/d036bb>.

26 Council Resolution 5/2, <http://bit.ly/ayp03Q>.

27 Retreat of Algiers on the review of the work and functioning of the Human Rights Council, p. 25.

28 <http://bit.ly/98NL9N>.

29 Resolution 5/1, para. 34.

30 The Advisory Committee replaced the Sub-Committee on the Promotion and Protection of Human Rights.

31 UN Special Procedures, Facts and Figures 2009, <http://bit.ly/aGqX3y>.

NEW YORK PROCESS

The General Assembly may have to push back its deadline for review of the Council's status (15 March 2011) to the end of the 65th session (mid-September 2011) to accommodate the Council's proposed delivery schedule of its report to the General Assembly in June 2011.³² States are divided about whether to undertake the review processes concurrently or consecutively, despite a proposal to undertake an aligned and parallel process by the President of the General Assembly and the former President of the Council. As with the Council's own review of its work and functioning, the Resolution is silent on the scope and content of the General Assembly's review of the Council's 'status'. Many stakeholders have not yet weighed in on the range of issues and questions that this review should incorporate.

PROCESS AND KEY ACTORS

In March 2010, the President of the General Assembly, Mr Ali Abdussalam Treki (Libya), appointed two co-facilitators to conduct consultations in New York on the review process.³³ The President then indicated that the co-facilitators would conduct the review in an 'open, inclusive and transparent' manner, and 'work closely with the Human Rights Council'.³⁴ The co-facilitators have since affirmed that the two review processes are complementary, and require a coordinated approach.³⁵

On 15 June, the General Assembly President³⁶ and the former President of the Council, Ambassador Van Meeuwen, publicly expressed in a letter their support for linking the two processes, on grounds that they are 'mutually reinforcing' and will ultimately merge in the General Assembly.³⁷ They particularly encouraged visits by each president to their counterpart's respective consultations. Though not a ringing endorsement of a parallel process, the joint letter provides the necessary support for the co-facilitators to initiate their consultations alongside the Council's.

However, NAM representatives in Geneva have disregarded the Presidents' recommendation and are calling instead for consecutive reviews.³⁸ They have requested their counterparts in New York to introduce a short procedural decision at the General Assembly. This decision would call for the General Assembly review process to be delayed until the Council has completed its own review. However, it is unclear if the NAM in New York would act on this request,³⁹ or more importantly, if the General Assembly would approve it. Subsequently, the incoming President of the Council, Ambassador Sihasak Phuangketkeow, backedpedalled on his predecessor's commitment to concurrent processes.⁴⁰

It is not clear why the NAM representatives in Geneva prefer to arrange the reviews consecutively. It may be that they view the reviews through a competitive lens and are concerned that the General Assembly will 'encroach' on the Council's mandate if they are carried out concurrently. Conversely, the co-facilitators, who prefer a parallel process, may be indicating that they think the General Assembly should not merely 'rubber stamp' the Council's report, but should be genuinely engaged in all aspects of the review.

NGO PARTICIPATION

To date, neither the co-facilitators nor the General Assembly President has proposed modalities for the process in New York, including the role of NGOs in the review. Five years ago, during negotiations on the establishment of the Council, States met in mostly closed consultations often at the ambassadorial level. There were no formal arrangements for substantive NGO input.⁴¹

32 This may require the General Assembly to adopt a new resolution or decision.

33 Ambassador Christian Wenaweser (Liechtenstein) and Ambassador Mohammed Loulichki (Morocco).

34 Letter from the President of the General Assembly to all Permanent Missions in New York introducing the co-facilitators for the review of the Human Rights Council, 15 March, available at <http://bit.ly/acOLgM>.

35 The co-facilitators made these comments at the Swiss mission in New York during a May 2010 meeting to discuss the summary report of the open-ended Seminar on the Review of the Human Rights Council held in Montreux, Switzerland on 20 April 2010, available at <http://bit.ly/bxZSO3>. The seminar was organised by Switzerland and took place on 20 April 2010 in Montreux.

36 Ambassador Joseph Deiss of Switzerland was elected President of the 65th session of the General Assembly in June. He will begin his term in September 2010.

37 Joint Letter from the President of the General Assembly and the President of the Human Rights Council to all Permanent Missions in New York, 15 June, available at <http://bit.ly/cvSrll>.

38 Letter from Egypt on behalf of the Geneva chapter of the Non-Aligned Movement (NAM) to the President of the Council, and copied to NAM counterparts in New York. The letter criticises the presidents' position in their joint letter, and asks the new President of the Council, Mr Phuangketkeow, to convene an urgent meeting with coordinators of regional groups to further discuss the process and modalities of the review.

39 The NAM chapter in Geneva has requested the New York Coordinating Bureau of the NAM in New York to intervene with the President of the General Assembly to this effect and to persuade NAM membership to support the introduction of such a decision.

40 Letter from the new President of the Human Rights Council to the President of the General Assembly, 29 June 2010. The letter states that the 'predominant view' of Geneva delegations is that the New York review should await the completion of Geneva's work, and that there is a 'common understanding' that the previous joint letter of the Presidents should 'not prejudge the question of the sequencing of the processes.

41 Although no opportunity was provided for NGOs to speak formally at the consultations, over one hundred NGOs from around the world communicated their concerns and recommendations in writing to the General Assembly President and governments during the negotiations. However NGOs were not permitted to observe the proceedings, and had limited access to delegates and documents. The then President of the General

ECOSOC *Resolution 1996/31* grants accredited NGOs the right to observe and obtain documents during meetings of the General Assembly on human rights.⁴² Informally some States and the co-facilitators have expressed support for NGOs' participation in the review process in line with *Resolution 1996/31*. However, other States could try to obstruct or restrict such participation. NGOs should thus call on friendly States and other supporters to help ensure their effective access to and participation in the process.

KEY ISSUES FOR THE REVIEW

In *Resolution 60/251*, the Council was created as a subsidiary organ to the General Assembly.⁴³ The question of the Council's status divided the General Assembly during negotiations on the Council's establishment. Some States,⁴⁴ with the support of NGOs, advocated that the Council become a principal organ, alongside the General Assembly, Security Council, and ECOSOC. Others⁴⁵ preferred a human rights body with lesser standing in the UN system. Ultimately, the compromise was to establish the Council as a subsidiary body, with the agreement that the General Assembly would review its status in five years.⁴⁶

The Council's status

Given that human rights constitutes one of the three pillars of the UN, along with peace and security, and economic and social development, the elevation of the Council to a principal organ is a potential, but unlikely, outcome of the review. A considerable obstacle to elevating its status is that it would require an amendment to the UN Charter, which is a difficult process.⁴⁷

States are not inclined to consider promoting the Council based on the principle of the three pillars framework alone. Instead, as the co-facilitators have indicated,⁴⁸ the General Assembly will

Assembly and the co-Chairs of the negotiations visited Geneva for two days to consult with the human rights community there, including with NGOs. However this meeting provided little opportunity for substantive and sustained dialogue. The letter is available on the OHCHR extranet: <http://bit.ly/bOde89>.

42 ECOSOC *Resolution 1996/31* (para. 67(f)) does not grant accredited NGOs speaking rights at the General Assembly.

43 The Council's predecessor, the Commission on Human Rights had a lower status. It reported to the ECOSOC, which in turn reported to the General Assembly.

44 EU, Iceland, Argentina, Chile, Mexico, Turkey, Japan, Norway, Azerbaijan.

45 African Group, Iran, Egypt, Bangladesh, India, Saudi Arabia, Yemen, Cameroon, China, Russian Federation, El Salvador, Malaysia, Cuba, Syria, Pakistan, Indonesia, Sudan, Venezuela, Algeria, Belarus, Mongolia.

46 During the establishment of the Council, some States did not express support for the elevation of the Council to a principal body immediately, but supported a compromise solution whereby States would make a strong commitment to elevating the body to a principal organ in five years. These States included Liechtenstein, Switzerland, Republic of Korea, Jordan, Brazil, Vietnam, Israel, Armenia, Costa Rica, and Uruguay. However the General Assembly ultimately did not include the proposed amendment 'with a view to elevate to a principal organ' at the end of the adopted provision: 'the Assembly shall review the status of the Council within five years'.

47 An amendment to the Charter must be adopted by a vote of two thirds of the members of the General Assembly, followed by ratification by two thirds of the member States, including all the permanent members of the Security Council. Amendments to the UN Charter can be made by a procedure set out in Article 108, Chapter XVIII of the UN Charter.

48 The co-facilitators view the question of status as 'inextricably linked'

probably use the opportunity to tie the review of 'status' to an assessment of the Council's work and functioning, and whether it has yet 'earned' a place next to the other principal UN bodies.

States' views on the question of status do not appear to have changed considerably over the past five years. Some key developing States continue to hold the decision to modify the Council's status hostage to other unresolved institutional matters, including reform of the Security Council.⁴⁹ The permanent members of the Security Council are invested in maintaining the status quo, and ensuring that States bestow the greatest level of attention and urgency to security matters, rather than respect for human rights.

Nonetheless, the General Assembly could use the review process as an opportunity to ensure a more central and strategic place within the overall UN system for the Council. This could include supporting practical and concrete ways to enhance the Council's direct working relationship with the Security Council and Peacebuilding Commission. The General Assembly could also identify ways for the Council to better contribute its expertise to the human rights work of the Secretariat and other UN bodies and agencies. This would further the goal of mainstreaming human rights throughout the UN's work.

Membership

Resolution 60/251 is silent on whether issues relating to membership, such as the Council's size and composition, and criteria for election, fall within the purview of the review of 'status'. However, since the quality of membership has a clear impact on the Council's functioning, the General Assembly could consider these issues in the context of enhancing the implementation of the Council's mandate. Although changing the size of the Council is unlikely to garner broad support, the General Assembly could strengthen the criteria for membership, including by requiring candidate States to present pledges, something which is only voluntary at present, and supporting measures to ensure Council members cooperate with the special procedures. Election procedures and practices could also be improved, such as ensuring competitive elections⁵⁰ and evaluating the implementation of election pledges.

Relationship between the Council and the General Assembly

The division of labour between the Council and the Third Committee⁵¹ would be another worthy topic for the review.⁵²

to the evaluation of the Council's work and functioning. Comments made at the Swiss mission in New York during a May 2010 meeting to discuss the summary report of the open-ended Seminar on the Review of the Human Rights Council.

49 Brazil, Egypt, Germany, India, Japan, Nigeria and South Africa are among the States seeking permanent seats on the Security Council.

50 In 2010, for the first time since 2006 when the Council was established, each of the five geographic regions the same number of candidates as the number of available seats.

51 This is one of the six Main Committees of the General Assembly. It has responsibility for dealing with social, humanitarian affairs, and human rights issues on the General Assembly's agenda.

52 *Resolution 60/251* establishes the Council as a subsidiary body of the General Assembly, but it does not articulate what if any relationship the

Both the Third Committee and the Council are subsidiary bodies of the General Assembly. In many instances their work is duplicative, with both bodies discussing and adopting similar thematic resolutions. States could thus consider how the Third Committee's work could complement and add value to that of the Council. However, the risk here is that some States, which consider the Council's UPR process as the only appropriate forum for consideration of country situations,⁵³ may use any such discussion to challenge adoption of country specific resolutions at the General Assembly.

One outcome of the review should be the clarification of reporting lines from the Council to the General Assembly.⁵⁴ Since the Council's creation, States have disagreed on this topic and have engaged in contentious debates each year on which body should consider the Council's annual report.⁵⁵ Some States⁵⁶ prefer the Council to report directly to the General Assembly plenary, in line with its status, whereas others favour it reporting to the Third Committee.⁵⁷

To reflect the letter and spirit of *Resolution 60/251*, the Council should report to the General Assembly plenary. This would affirm its status as the premier human rights organ of the UN system, and allow the Third Committee's highly politicised environment to be circumvented. This would avoid the risk of the Third Committee 'reopening' Council decisions, but at the same time matters that would benefit from further expert discussion could still be delegated by the plenary to the Third Committee.

Financing of the Council's work

If the Council were to report to the plenary it would also reinforce the General Assembly's financial responsibility to support the work of the Council and its mechanisms. Only the General Assembly has the authority to approve the allocation of financial resources to implement Council recommendations. However, in recent years, the General Assembly has not allocated the appropriate funds to implement some recommendations.⁵⁸ Although politics in the Third Committee is no doubt playing a role in stalling the approval of funds, the weak support of some Council members for its own recommendations has also likely influenced this outcome.⁵⁹

Another related budget problem is the reporting cycle of the Council, which is not in sync with that of the General Assembly.⁶⁰ As a result, some Council recommendations have been shelved.⁶¹ The review process presents a valuable opportunity to correct this timetabling problem.

CONCLUSION

The review of the Council's status provides a unique opportunity for States to demonstrate the political will to raise human rights to the priority accorded them in the UN Charter. Although this political will was reaffirmed at the World Summit in 2005 when the Council was first conceived, the review provides a welcome opportunity to realise the full potential of *Resolution 60/251* for a stronger and more effective human rights body. Now is the time for States to commit to and take steps to ensure that neither politicisation nor a sense of rivalry between Geneva and New York hamper their negotiations. It is also the time for States to make good on their promises to work in partnership with civil society at the UN, by putting in place meaningful opportunities for civil society participation in the deliberations that will shape the future of the Council. ■

Council should have with the General Assembly's Third Committee.

53 This position is based on the argument that only the UPR process promotes the principles of objectivity, non-selectivity and equal treatment of all states.

54 Joint letter, June 15, from the President of the General Assembly and the President of the Council to Permanent Missions in New York. In the letter, the presidents state that the review process offers 'a unique opportunity to make the reporting line between the Human Rights Council and the General Assembly more regular, clear and transparent, in full respect of the role of the General Assembly and the mandate of the Human Rights Council', <http://bit.ly/cvSrll>.

55 In the previous two years, the General Assembly, while stipulating its decisions would not set a precedent, has allocated the Council's annual report to the Third Committee for action on the recommendations, and the General Assembly plenary to consider the report as a whole. More detailed reports on these developments at the 64th and 63rd sessions of the General Assembly are available at <http://bit.ly/a6hqCi>.

56 The EU, Japan, Lichtenstein, and New Zealand.

57 The African Group, Cuba, Russian Federation, US, and China. One argument of these States is that the Third Committee, rather than the plenary, has the human rights expertise to address the relevant issues and recommendations in the Council's report.

58 The General Assembly's practice of only 'taking note' of the annual report of the Council and 'acknowledging' its recommendations, rather than 'welcoming' and 'endorsing them' respectively, has been interpreted as an insufficient level of support to warrant the allocation of funds. General Assembly *Resolution 64/143* (2009) and *Resolution 63/160*, available at <http://bit.ly/U53GO>.

59 For example, the General Assembly has not approved the funds to implement a 2008 Council decision, which calls for the establishment and resourcing of an Office of the President of the Human Rights Council. In 2009, at the initiative of Switzerland, the General Assembly (*Resolution 64/144*) requested that the Council 'address the question of the establishment and the modalities' of such an office as part of its review of its work and functioning.

60 The Council's reporting cycle is July-June each year. In the General Assembly, for budgetary purposes, each budgetary biennium operates along a January-December basis.

61 The Council's annual report (adopted at its June session) only reaches the General Assembly plenary in December. Technically, this means that Council resolutions adopted at and subsequent to its September session have to wait until the General Assembly session the following year for endorsement and related funding. This delay has sometimes resulted in the recommendations of those sessions being considered 'earlier' than the General Assembly would have considered them. However, where this has not been possible, 'creative' interim funding arrangements have had to be found, or the recommendations have been shelved.