

THE COUNCIL'S INSTITUTION-BUILDING WORK, THE END OF A LONG PROCESS

INTRODUCTION

When the Human Rights Council (the Council) was established on 19 June 2006, it faced a heavy programme of work for its first year. It was to review, rationalise and improve the former Commission on Human Rights' (the Commission) system of special procedures, expert advice and complaint procedure, set up a new universal periodic review (UPR) mechanism, and to develop its own agenda, programme of work, and rules of procedure. These tasks were to be completed by 18 June 2007 when the membership of the Council would also change.¹

While the Council had embarked on the process of reviewing mandates and establishing the UPR from its very first session, it had only achieved limited progress in the discussions in the Working Groups² by early 2007.³ At its 3rd session, the Council also established a separate Working Group to develop its agenda, rules of procedure and methods of work.⁴

The first President of the Council, Ambassador Luis Alfonso de Alba of Mexico had appointed a facilitator to lead the discussions on each of the main issues. He steered the process with remarkable skill through extremely complex and challenging circumstances due to the Council's highly politically charged environment.

Positions in the Council have been divided along regional and more often political groupings. The institution-building year saw sustained attempts at eliminating and restricting the role of independent experts in all aspects of the Council's work. This is highly regrettable since independent expertise could play an important role in overcoming the overly political environment of the Council and ensure that it is guided by genuine and expert human rights analysis and reflection, rather than by political considerations.

The outcome of this protracted and difficult process was a compromise that did not satisfy the hopes of human rights defenders, but was more than could reasonably have been expected at the beginning of the institution-building year. The adoption of the institution-building package at midnight on 18 June was itself a controversial process that many feared would be re-opened, and consequently undone, by the General Assembly.⁵ So when the General Assembly finally endorsed the package on 22 December 2007 the first part of the institution-building process finally came to an end.⁶

This chapter looks at the last phase of the institution-building process from April to June 2007 and analyses its outcomes in more detail.⁷ It also examines the Council's continued institution-building work through the implementation of the

¹ One third of the members of the Council were only elected for one year and their term expired on 18 June. For a discussion of whether the Council had until 18 June or 30 June 2007 to complete these tasks, see Rachel Brett, *Neither Mountain nor Molehill: UN Human Rights Council: One Year On*. Quaker United Nations Office (Geneva, August 2007) p. 3.

² The Council decided at its first session to set up two working groups. One was tasked with the review of all of the mechanisms and mandates of the former Commission (Council *Decision 1/104*). The other was mandated to develop the modalities for the UPR mechanism (Council *Decision 1/103*).

³ For an overview of the progress made in the Working Groups until the end of February 2007, please see International Service for Human Rights (ISHR), *Human Rights Monitor 2006*. A stocktaking of the Human Rights Council's Institution-building Process, available on www.ishr.ch. For detailed reports on the discussions in all of the Working Groups, see www.ishr.ch.

⁴ Council *Resolution 3/4*.

⁵ For a detailed overview of the events and discussions surrounding the adoption of the institution-building text by the Council, please see ISHR's *Daily Updates* of 18 and 19 June 2007 as well as the report on the conclusion of the 5th session and the organisational meeting of the Council, available at www.ishr.ch.

⁶ The General Assembly voted to adopt the report of the Human Rights Council on its institution-building package, *Resolution 62/434*. It was adopted by 150 votes in favour, seven against (Australia, Canada, Federated States of Micronesia, Israel, Marshall Islands, Palau, United States of America (US)) and one abstention (Nauru).

institution-building package, and the challenges that lie ahead. The substantive developments in the Council's work in 2007 are covered in a separate chapter.

REVIEW OF MANDATES AND MECHANISMS

At its 1st session, the Council set up an inter-governmental Working Group to 'formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaint procedure, in conformity with General Assembly resolution 60/251'.⁷ The Working Group was mandated to meet for 20 days. It had previously met from 13 to 24 November 2006 and from 5 to 16 February 2007.⁸ It met for its final session from 10 to 27 April 2007.

Special procedures

The special procedures were set up by the former Commission to examine, monitor, and publicly report on human rights issues or on human rights situations in specific countries. All of the mechanisms and mandates of the Commission were assumed by the Council when it was established. The Council was asked by the General Assembly to review, and where necessary, improve and rationalise these mandates, and to maintain a system of special procedures.

Ambassador Tomas Husak of the Czech Republic was appointed as the Facilitator for this review.

Background and continued negotiations

During the early discussions in the Working Group many States articulated a 'negative reform agenda'¹⁰ aiming at limiting the independence and integrity of the special procedures.¹¹ The proposals included the direct election of special procedures mandate holders to the special procedures by the Council and restricting their working methods,

including through a code of conduct. Many of these negative proposals had been put forward on behalf of all States belonging to certain regional or political groupings. A majority of States were, at least on the basis of their contributions, supportive of these proposals.

This tendency towards group and bloc politics continued to influence the last phase of discussions in the Working Group and be an obstacle to more open negotiations and better compromises. The States that had articulated a more positive reform agenda to address the challenges faced by the special procedures had generally been less successful in gathering broad support for their proposals.

The Working Group had addressed a wide range of topics relating to all aspects of the work of the special procedures in its previous discussions in November 2006 and February 2007. These included: selection and appointment of mandate holders; review, rationalisation and harmonisation of mandates; regulating the work of special procedures; working methods; cooperation by and with governments; relationship with the Council and other human rights mechanisms and actors; support from the Office of the High Commissioner for Human Rights (OHCHR). It was clear from an early point that it would be difficult, if not impossible, to reach consensus on all of the points discussed, and at the March 2007 session many States agreed that the Working Group should identify priorities for its work to be able to make progress on key issues.¹²

During its April meetings, the Working Group did not achieve any substantial progress in reviewing the system of special procedures or in reaching agreement on any of the many issues under discussion. Despite being presented with a revised non-paper that had been prepared by the Facilitator and which addressed many of the key issues outlined above, the Working Group discussion did not rely on or even follow the structure of the non-paper. Instead, much time was spent, and lost, on procedural matters such as which document should form the basis for discussion and the scope and focus of the debate. The African Group's proposal of a code of conduct for the special procedures also took up much of the Working Group's time, but again without significant progress towards an agreement.

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For an overview of the progress made in the Working Groups until the end of February 2007, please see ISHR, *Human Rights Monitor 2006*, A stocktaking of the Human Rights Council's Institution-building Process, available on www.ishr.ch.

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Council Decision 1/104.

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For a detailed overview of the discussions in the Working Group, please see www.ishr.ch.

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Meghna Abraham, *A New Chapter for Human Rights*, ISHR and the Friedrich Ebert Stiftung (Geneva) p. 41.

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See ISHR's report on the first session of the Working Group.

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The Facilitator convened informal consultations during the 4th session of the Council. For an overview of these discussions, please see ISHR's *Daily Updates* of 22 and 28 March 2007.

The most difficult and controversial issues were the process for the selection of mandate holders, regulating the work of special procedures, including through a code of conduct, and how to review individual mandates.

Selection and appointment of special procedures

The process for the selection and appointment of mandate holders was not even discussed during the April session of the Working Group. The diverging positions of States had remained polarised and entrenched since the previous sessions of the Working Group. One group of States¹³ had suggested changing the previous appointment process by the Chairperson of the Commission to a process of direct election by the Council. They had argued that election would enhance the credibility and legitimacy of the mandate holders. Other States¹⁴ suggested that the existing appointment system should be maintained but improved through greater transparency. The European Union (EU) and some other States¹⁵ had argued that the High Commissioner for Human Rights (the High Commissioner) should appoint the mandate holders as this would ensure independence and expertise.

The outcome of the negotiations on the selection and appointment of mandate holders is a compromise that involves elements of both of the major proposals. It was agreed that OHCHR would set up a public list of eligible candidates that could be put forward by States, non-governmental organisations (NGOs) or even the candidates themselves. The candidates must meet certain technical and objective criteria that were adopted by the Council at its 6th session in September.¹⁶ From this list, a Consultative Group made up of a representative from each of the five regional groups serving in their personal capacity would make recommendations for the appointment of candidates for each of the vacancies.¹⁷ The President would then select one candidate for each vacancy and seek the Council's endorsement after broad consultations, in particular through the regional coordinators.

The first appointments of new mandate holders will take place at the Council's 7th session in March 2008. It will be interesting to see to what

extent the improvements to the transparency and publicity of the appointment process will produce better and broader representation of candidates from all regions and diverse backgrounds.

Review, rationalisation and harmonisation

As mentioned, very little progress was achieved in the discussions on the review, rationalisation and harmonisation of all of the special procedures mandates. The review of individual mandates and of the system of special procedures as a whole was at the core of the task given to the Council and entrusted to the Working Group. At the end of the April session, it became clear that the Working Group would not be able to fulfil this mandate before the 18 June deadline.

During the Working Group discussions, India put forward several interesting and concrete proposals to attempt to break the deadlock that the Working Group seemed to find itself in on this issue.¹⁸ However, despite these attempts to review the entire system of special procedures, the Council was unable to undertake the thorough and comprehensive review that was seen by many NGOs as an important opportunity to address overlaps and fill gaps in the existing system. While there had been much discussion of the need for a thorough review of the special procedures, many States used the review process to promote a 'negative reform agenda'. This involved attacks on individual mandates and attempts at restricting the working methods and independence of the special procedures and at reducing the number of mandates. In the end neither the negative nor the more positive reform agenda succeeded in bringing major changes to the special procedures system.

In light of the lack of achievements in the review of mandates, it was no surprise that the Council in the end decided that the review of individual mandates would continue after the formal end of the institution-building process. It decided that the review would take place in the context of the negotiations of the relevant resolutions that would renew the mandates of the special procedures and in accordance with the Council's programme of work.¹⁹ This approach to the review is unfortunately not likely to allow the Council to construct an integrated special

13 Algeria (on behalf of the African Group), Saudi Arabia (on behalf of the Asian Group), Pakistan (on behalf of the Organization of the Islamic Conference (OIC)), Azerbaijan, Bangladesh, China, Colombia, Cuba, Democratic People's Republic of Korea (DPRK), Egypt, Indonesia, Iran, Malaysia, Morocco, Philippines, Singapore, South Africa, Tunisia.

14 Argentina, Chile, Mexico, Republic of Korea, Russian Federation, Slovenia, Switzerland.

15 Australia, Canada, Israel, Japan, Norway, Poland, Portugal, United Kingdom (UK), US.

16 Council *Decision 6/104*.

17 The members of the Consultative Group are the permanent representatives in Geneva of Algeria, Chile, Pakistan, the Russian Federation, and Switzerland.

18 For an overview of these proposals, please see ISHR update report on the review of special procedures from the 3rd session of the Working Group, available at www.ishr.ch.

19 Council *Resolution 5/1*, para. 55.

procedures system. However, the institution-building text provides that efforts will be made to avoid unnecessary duplication and that areas that constitute thematic gaps will be identified and addressed.²⁰ It is not yet clear how this will be ensured through the continued review process. Many gaps in the special procedures system were identified during the institution-building process and States and NGOs may want to revisit and consider filling some of these in the years to come.²¹

Despite the many calls for a reduction of the number of special procedures mandates, a new mandate was created in September 2007. During the discussions in the Working Group, some NGOs had argued in favour of replacing the former Sub-Commission on the Promotion and Protection of Human Rights' (the Sub-Commission) Working Group on contemporary forms of slavery with a new special rapporteur mandate. At the initiative of the United Kingdom (UK) and with the unanimous support of the Council, this new special procedure was established.²²

The Council has placed extraordinary expectations on the mandate holders over the past year and a half during which the entire system has been under review, and often under attack. The uncertainty of the future of the system and of individual mandates made it difficult for the mandate holders to effectively carry out their work and they often faced difficulties in securing the cooperation of governments.

During the entire year of discussion in the Working Group, country-specific special procedures mandates were attacked, with many States calling for their elimination.²³ Several States had also argued for strict criteria for the establishment of new country mandates.²⁴ The issue of country mandates remained one of the most controversial until the very end of the negotiations on the institution-building text. The day before the adoption of the package, the President of the Council included most of the country mandates in his text and proposed that they be renewed and reviewed just as the thematic mandates. However, the list did not include the mandates on Belarus and Cuba. These two mandates were excluded on the vague basis that they did not have a pending mandate of the Council or the General Assembly to be

accomplished; and secondly because 'the nature of the mandate was not for advisory services and technical assistance'. These criteria in part reflected the strong opposition of many States to country mandates established without the consent of the concerned State. Even more so, the criteria were crafted to achieve the political objective of terminating the two mandates that had received most fierce opposition, in particular from the countries concerned and their powerful allies.

Some States had argued that the aim of the review process was to substantially reduce the number of special procedures mandates.²⁵ However, the institution-building package renewed the mandate of all of the thematic special procedures until they are 'considered by the Council according to the programme of work'.²⁶ The Council for the second time extended the mandates of mandate holders that had not already served the six-year term limit.²⁷ Exceptionally, mandate holders that had already served for six years could also continue to hold their mandate until the review of the mandate and appointment of a new mandate holder.

Some guiding principles for the review of individual mandates are set out in the institution-building text. They include that the Council must be guided by the need to improve the enjoyment of human rights in any decision to streamline, merge or discontinue mandates.²⁸ It should also give equal attention to all human rights by ensuring a balanced coverage of all human rights among the thematic mandates.

The review of individual mandates began at the 6th session of the Council in September 2007. However, the beginning of the process was marred by heated discussions on the modalities for the review process, with several States expressing serious concern about the lack of clear guidelines for the process.²⁹ In particular, Pakistan pushed for streamlining of the review process and argued in favour of very short and purely procedural resolutions to renew special procedures mandates. It also suggested that more time should be given to determining the process and modalities of the review. This was a somewhat surprising change of position. In the Working Group discussions in 2006 and early 2007, NGOs had advocated strongly for clear criteria for the review, in order to preserve the coherence of the entire system of special

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Council Resolution 5/1, para. 58 (c) and (d).

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The Facilitator's non-paper suggested that increased focus by the special procedures should be given to the right to education, poverty, protection against discrimination, torture and racism, the right to food, the right to vote, freedom of assembly and association. States and NGOs had also made the following suggestions: cultural rights, effective access to justice, contemporary forms of slavery, non-discrimination, right to a fair trial, right to take part in government, humane treatment in detention, privacy, impact of economic sanctions on human rights, peaceful assembly and association, environmental rights. For more information, please see ISHR's report on the discussions in the Working Group on review of mechanisms, during its 3rd session, available at www.ishr.ch. The special procedures themselves have also identified a number of protection gaps in a draft paper prepared for the 14th annual meeting of the special procedures, available on the OHCHR extranet (special procedures Extranet), available at <http://portal.ohchr.org/portal/page/portal/SPExtranet/AnnualMeeting/14Meeting>.

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Council Resolution 6/14.

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Algeria (on behalf of the African Group), Belarus, China, Cuba, DPRK, Iran, Russian Federation.

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China, Algeria, Cuba, Sri Lanka, Philippines, DPRK.

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Algeria (on behalf of the African Group).

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Council Resolution 5/1, para. 61.

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The Council first extended the mandates for one year pending the review at its 1st session, see *Decision 1/104*.

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Council Resolution 5/1, para. 57.

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For a detailed summary of these discussions, please ISHR's *Daily Updates* of 10, 17, 26 September 2007.

procedures – a demand that had been rejected by many States, including Pakistan. Rather than genuine concern for the system of special procedures, this change seemed to be a tactic for delaying the review of mandates, prolonging the period of uncertainty, and preventing mandate holders in general from taking up their work in an efficient and forward-looking manner. Pakistan's position was seemingly also closely linked to concerns about the renewal of the mandate of the Special Rapporteur on freedom of religion.³⁰ Many States reacted negatively to the proposals to further develop the modalities of the review and seemed to consider that such proposals could reopen the institution-building text that had been adopted.³¹

Following these discussions, the second President of the Council, Ambassador Doru Romulus Costea of Romania, further elaborated the modalities for the review in two non-papers.³² These papers did not, however, bring new clarity or detailed guidance to the review process and it is still unclear how the process will develop as the review of individual mandates continues.

During the resumed 6th session of the Council in December 2007, some States called for common, standardised words to be included in all resolutions dealing with the renewal of mandates. In particular, they called for an inclusion of a reference to the code of conduct for special procedures.³³ Others were opposed to the inclusion of such language, suggesting it could reopen the agreement reached on the institution-building package.³⁴ It was informally agreed that all resolutions renewing a special procedures mandate would contain a reference in the preamble to the code of conduct.

While it is still early in the process of review of individual mandates, some general and preliminary conclusions can be drawn. The institution-building text provides that the review could include an interactive dialogue with the mandate holder. Many States argued that the presence of the mandate holder was not required for the Council to undertake the review. It was therefore somewhat surprising when one of these States reproached one mandate holder that she had not been present for the conclusion of the interactive dialogue and questioned her commitment to the mandate.³⁵ This seems to confirm the need for the Council to strictly

respect its programme of work, in particular in relation to the interactive dialogues with the special procedures, including in the context of the review of their mandates.

Regulating the work of special procedures and a code of conduct

In the previous discussions in the Working Group on possible ways to regulate the work of the special procedures, States were divided on who should assume responsibility for such regulation. Some States argued that the special procedures should regulate their own work, including through the *Manual of the United Nations Human Rights Special Procedures* (the Manual).³⁶ These States believed that there was no need for a code of conduct. Others called on the Council to regulate the work of the special procedures through the adoption of a code of conduct. In a rather controversial decision led by Algeria, on behalf of the African Group, the Council decided at its resumed 2nd session by majority vote to mandate the Working Group on review of mandates to draft such a code of conduct.³⁷ These States also argued that the Manual had no legal value and that it should be revised and endorsed by the Council.

In November 2006, upon the adoption of the decision to draft a code of conduct, Algeria (on behalf of the African Group) announced its intention to draft a code of conduct for consideration by the Working Group. The draft was circulated in mid March 2007 but was only discussed in the April session of the Working Group. The discussion focused on the procedural issue of which document should form the basis for further discussion, the African draft or the Facilitator's non-paper.³⁸ As a result of this deadlock, the African Group decided to submit its draft as a resolution for consideration at the Council's 5th session, and thus forced the Council to continue its deliberations on a code of conduct on the basis of the African Group text. The Algerian Ambassador convened informal consultations with several stakeholders. Regrettably no open-ended and public meetings were held. Until the end it was uncertain whether the African Group would push the draft resolution on the code of conduct to a vote. However, it was finally adopted by consensus together with the institution-building text.³⁹

30 Please see ISHR's overview report on the first part of the 6th session (10-28 September 2007), available at www.ishr.ch

31 The President had made it clear that if consensus was not reached on his institution-building package, he would withdraw the entire text.

32 The non-paper on review, rationalisation and improvement of special procedures mandates of 27 September 2007 is available on the OHCHR extranet. The President has also elaborated a rolling check-list for the review, rationalisation and improvement of mandates as follow up to the non-paper. The text is dated 12 December 2007 and is also available on the OHCHR extranet.

33 Pakistan (on behalf of the OIC), Egypt (on behalf of the African Group), Russian Federation, China.

34 Canada, Australia.

35 See comments made by Egypt in the context of the review of the mandate of the Special Rapporteur on the human rights situation in the Sudan, ISHR's *Daily Updates* of 13 and 14 December 2007.

36 The Manual can be found on the OHCHR extranet, special procedures extranet.

37 Council *Decision 2/1*. The decision was adopted by 30 in favour, 15 against, and two abstentions. For an overview of the debate, please see ISHR's *Daily Update* of 27 November 2006.

38 For an overview of the discussions, please see ISHR's report on the Working Group on review of mechanisms and mandates, 3rd session, 10-27 April 2007.

39 Council *Resolution 5/2*.

The final text of the code of conduct is far better than earlier drafts and the most detrimental suggestions to the effective functioning of the special procedures were left out or at least watered down,⁴⁰ such as exhaustion of domestic remedies for communications to the special procedures, strict criteria for sending urgent appeals, and the creation of an ethics committee of five government representatives to ensure compliance with the code of conduct.

The implementation of the code of conduct by the special procedures will be important. Of particular significance are the efforts by the Coordination Committee of Special Procedures to address instances where individual mandate holders may have failed in fulfilling the high standards of professionalism that are required of them.⁴¹ The way in which the code of conduct is used by the Council will show whether the stated intention of the code to enhance 'the effectiveness of the system of special procedures' is indeed also its result.

System of expert advice: the new Advisory Committee

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

Ambassador Mousa Burayzat of Jordan was appointed as the Facilitator of the Working Group on the future system of expert advice. The Working Group on expert advice had previously met from 13 to 24 November 2006 and from 5 to 16 February 2007.⁴² The Working Group held its third and final round of discussions from 10 to 25 April 2007. The key issues were its mandate, functions, composition, and working methods and the future of the Sub-Commission's working groups. Little progress was made during the session and most of the key issues regarding the system had not been agreed upon at the end of the meeting.

The Facilitator had previously received criticism for the format of the non-papers he had prepared as well as for the way he was leading the discussions in the Working Group.⁴³ When, on 25 April 2007, the Facilitator called an extraordinary session and presented another concept paper delegations found themselves in a difficult position, unable to offer but very preliminary comments. This paper also contained several inconsistencies that led most delegations to request that the Facilitator's earlier draft be used as a basis for negotiation.

Size, structure and composition

From the early meetings of the Working Group, States had been divided between those that were in favour of a system similar to that of the Sub-Commission, and those who proposed a new *ad hoc* system where specific individual experts would be drawn from a pool of experts and tasked to conduct specific studies at the request of the Council. However, the majority of delegations remained in favour of an expert advisory system similar to that of the Sub-Commission, where each study would have to be reviewed and adopted collectively by the entire group of experts.

During the April session, the EU abandoned its position in support of a strict roster model for the future system of expert advice. It was ready to support the hybrid model, which had been proposed by India at the previous session of the Working Group, to move towards consensus. However, the African Group, the Organization of the Islamic Conference (OIC), Cuba, China, and others⁴⁴ remained committed to maintaining a system of expert advice with a formal, standing structure and a set meeting time similar to that of the former Sub-Commission.

The will of the majority prevailed in the end. The new Human Rights Council Advisory Committee was set up as a formal subsidiary body of the Council that will function as a 'think-tank' and 'work at its direction'.⁴⁵ It will meet for up to two sessions for a maximum of ten days a year.⁴⁶

Selection and terms of membership

Another key issue remained the role of States and the Council in the selection of experts.

⁴⁰ For a detailed analysis of the code of conduct, please see Meghna Abraham, *Building the New Human Rights Council, Outcome and analysis of the institution-building year*, Friedrich Ebert Stiftung, Occasional papers, No. 33/ August 2007, pp. 29-32.

⁴¹ The Coordination Committee has already drafted a paper on internal advisory procedure to review practices and working methods (*Interim*), 14 September 2007.

⁴² For an overview of earlier discussions, please see ISHR's reports on the Working Group, available at www.ishr.ch.

⁴³ ISHR, *Human Rights Monitor 2006*, pp.18-19.

⁴⁴ Iran, Bangladesh, Colombia, Argentina.

⁴⁵ Council Resolution 5/1, para. 65.

⁴⁶ Council Resolution 5/1, para. 79.

The EU, Australia, the United States of America (US), and Canada remained in favour of some sort of appointment procedure by the President of the Council. However, they indicated that they could accept the election of experts if there is adequate input of relevant stakeholders in a pre-screening process. On the other hand, the African Group, the OIC and others were of the view that the selection process should be the sole prerogative of States, and that there was no room for the involvement of other stakeholders in the pre-screening procedure.

The size of the expert system also remained a contentious issue. There were many delegations that felt strongly about maintaining a number similar to that of the Sub-Commission (between 23 and 26), while others felt that it should be significantly smaller (between ten and 16).

The Council decided that the 18 members of the Advisory Committee would be elected by the Council.⁴⁷ Regrettably, only States can nominate candidates from their own region. However, they are encouraged to hold national consultations with civil society when selecting candidates for nomination.⁴⁸ Similar to the special procedures mandate holders, the experts must fulfil certain technical and objective criteria that were adopted by the Council at its 6th session.⁴⁹

The criteria for membership and the term limitation to two terms of three years could improve the membership of the Advisory Committee compared to the Sub-Commission. However, the limitations in the appointment process could have an adverse effect on the quality of the pool of qualified candidates from which the members will be elected. The first elections will only take place in March 2008 and it has therefore yet to be seen what the effect of these measures will be.

Mandate and functions

In early discussions it had been a contentious issue whether the expert advisory body should be able to take up both thematic and country-specific issues, and whether it should be able to initiate its own studies or only work at the request of the Council. During the April session of the Working Group, consensus emerged that the expert advisory body should not be able to

initiate its own studies without prior approval of the Council. This did not preclude the ability of the experts to propose studies, but these could not be undertaken without the Council's consent. It also emerged that the expert system would not be able to examine country-specific situations, in accordance with the limitations imposed upon the Sub-Commission by a decision of the Commission in 2000.⁵⁰ Although some delegations did not want to rule out this possibility on the basis that thematic issues could not be discussed in isolation of examples of human rights violations occurring in any part of the world, the majority of delegations remained opposed to any such function.

These agreements are reflected in the final institution-building text. The Advisory Committee can only provide expertise to the Council 'in the manner and form requested by the Council'⁵¹ and only on thematic issues.⁵² It may not adopt resolutions or decisions but can propose further research proposals within the scope of its work.⁵³ It can only establish subsidiary bodies with the approval of the Council.

Its mandate is consequently significantly more restricted than that of the former Sub-Commission. These restrictions are closely linked with the attacks on the role of independent human rights expertise in any aspect of the Council's work.

Working groups

The Working Group also discussed the status of the former Sub-Commission's working groups, although only very briefly and without coming close to any form of conclusion.⁵⁴ While some delegations thought that the working groups had completed their work,⁵⁵ and hence were abolished, others were of the view that they still had work pending and were still active until 18 June 2007.⁵⁶ This issue was not resolved during the Working Group. Some concrete proposals had been made regarding the future of some of the Sub-Commission's working groups. However, most delegations were of the view that the Working Group was not the appropriate forum for these to be debated.

The institution-building text provided that the Council would decide at its 6th session on the

47 Council *Resolution 5/1*, para. 70. There will be five members from Africa, five members from Asia, two members from Eastern Europe, three members from Latin American and the Caribbean States, and three members from Western Europe and other States.

48 Council *Resolution 5/1*, para. 66.

49 Council *Decision 6/102*.

50 Commission *Decision 2000/109*, see annex, paras 51-52.

51 Council *Resolution 5/1*, para. 75.

52 Council *Resolution 5/1*, para. 76.

53 Council *Resolution 5/1*, para. 77.

54 Working Groups on indigenous populations, minorities, contemporary forms of slavery, and the Social Forum.

55 India, Canada, UK, US.

56 Cuba.

most appropriate mechanisms for continuing the work of the working groups. Consequently, it was left up to States most interested in these bodies to take initiatives for the continuation of their work. At the initiative of Brazil and Bolivia, the Council decided to establish a new mechanism to provide the Council with thematic expertise on the human rights of indigenous peoples in the manner and form requested by it.⁵⁷ The new mechanism will 'identify and recommend to the Council effective means to implement, develop and mainstream international standards that promote and protect the human rights and fundamental freedom of indigenous peoples'. It may also suggest proposals to the Council for its consideration and approval.

While the former Working Group on indigenous populations of the Sub-Commission provided advice on the human rights of indigenous peoples, there was never an indigenous person as member of the Sub-Commission. It is therefore a significant achievement that the new mechanism will have at least three indigenous representatives out of its six members. They will be selected in the same manner as the mandate holders of the special procedures. The expert mechanism will meet once a year for five days and will be open to the participation of all NGOs and indigenous peoples regardless of accreditation status with the Economic and Social Council (ECOSOC), in accordance with the rules and practices of the former Commission. This is particularly important, as the former Working Group on indigenous populations was one of the most accessible forums for indigenous peoples and their organisations within the UN system.

Austria proposed a new forum on minority issues to replace the Working Group on minorities. The Council decided that the forum will 'provide a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities, which shall provide thematic contributions and expertise to the work of the independent expert on minority issues. The forum shall identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, with the aim of contributing to dialogue and the promotion

of inclusive and stable societies at national level'.⁵⁸ The forum will be open to NGOs, national human rights institutions (NHRIs), and experts on minority issues through an open accreditation process. It was extremely important that the Council should decide to maintain the previous open space for NGOs and human rights defenders on minority issues. The forum will hold an annual meeting of two days and will be convened and guided in its work by the Independent Expert on minority issues.

The Council also decided at the initiative of Cuba to continue the work of the Social Forum.⁵⁹ The Social Forum will continue to be an open space for 'interactive dialogue between the United Nations human rights machinery and various stakeholders, including grass-roots organisations'. It will meet for three days annually and hold its first meeting during 2008. It will be open to the participation of NGOs with ECOSOC status as well as other NGOs based on the rules and practices of the Commission. It will focus on the eradication of poverty in the context of human rights and the social dimensions of the globalisation process.

Complaint procedure

The Commission on Human Rights' confidential complaint procedure was the 1503 procedure, under which it could receive communications from victims or others acting on behalf of the victims regarding situations that 'reveal a consistent pattern of gross and reliably attested violations of human rights'⁶⁰ in any part of the world.

The Commission would not address the violation of an individual's human rights under this procedure. Instead, the procedure was intended to bring situations of massive human rights violations to its attention. The 1503 procedure was strictly confidential and complainants were only informed if their communication was taken up for consideration but would not receive any further information about the proceedings or the outcome.

General Assembly *Resolution 60/251* provided that the Council should maintain a complaint procedure. As a result, the Council was

⁵⁷ HRC/6/L.42.

⁵⁸ Council Resolution 6/15.

⁵⁹ Council Resolution 6/13.

⁶⁰ ECOSOC Resolution 1503, para. 1.

free to comprehensively review the former 1503 procedure and establish a truly new mechanism.

Ambassador Blaise Godet of Switzerland was appointed as the Facilitator of the Working Group on the new complaint procedure. The Working Group previously held meetings from 13 to 24 November 2006 and from 5 to 16 February 2007.⁶¹

From the outset it became clear that the 1503 procedure would form the core basis for the new complaint procedure. The majority of States supported maintaining the features and scope of the 1503 procedure with very few changes. During the second session of the Working Group, States had reached converging views on the structure and composition of the two working groups (the Working Group on communications and the Working Group on situations), the method of selection of members of the second working group, the need to keep complainants informed of the status of their communication, and the need to reduce the time for dealing with the complaints.

The discussions in the last session of the Working Group therefore focused on some of the key unresolved issues, including the criteria for admissibility of complaints, composition of the first working group, decisions by the second working group, the timeframe for the consideration of complaints, the frequency of meetings of the working groups, and the possible measures that the Council could adopt in response to complaints.

Scope and admissibility criteria

While admissibility had not been identified as one of the main topics for discussion at the April session of the Working Group, many States felt that it merited more discussion.

Some States attempted to raise doubt about the clarity of the international legal definition of 'effective domestic remedies'.⁶² It provides that a victim is not required to exhaust domestic remedies that appear to be ineffective or unreasonably prolonged. These States argued that the terms 'ineffective' and 'unreasonably prolonged' were vague and not clearly defined. Fortunately, the well-established understanding

of exhaustion of domestic remedies was retained in the final text. There were also diverging views on what 'exhaustion of *all* domestic remedies' meant. Some States had argued that NHRIs should be included in this formula, since they could have quasi-judicial powers and therefore could constitute an effective remedy. A compromise was found to include these concerns in the institution-building text. It provides that NHRIs that comply with the *Paris Principles* and have quasi-judicial competencies may serve as domestic remedies.⁶³ This could place an additional burden on victims.

Stages of review and composition of working groups

It was agreed early on during the Working Group discussions that the complaint procedure would have two stages dealt with by two different working groups. It was also agreed that the first working group, which would assess the admissibility of the complaint, would be made up of independent experts. However, agreement was not reached on who would select the experts and whether they should be drawn from the new Advisory Committee. The latter question was closely related to the nature of the future Advisory Committee, and at that stage of the discussions that had still not been resolved. Consequently, an agreement could not be reached in the Working Group in April.

The institution-building text provides that the Advisory Committee will appoint the five members of the Working Group on communications from among its members. This Working Group will screen communications and assess their admissibility. The Working Group on situations will be made up of five representatives of member States, one from each of the regional groups, serving in their personal capacity. This Working Group will report on consistent patterns of gross and reliably attested human rights violations and make recommendations to the Council on the action to be taken in response.⁶⁴

There had been disagreement in the Working Group as to whether the Working Group on situations could decide only by consensus or by a simple or qualified majority to discontinue consideration of a complaint. A majority of States were in favour of such decisions being

⁶¹ For an overview of these discussions, please see ISHR's reports on the Working Group session, available at www.ishr.ch.

⁶² Algeria (on behalf of the African Group), Colombia.

⁶³ Council Resolution 5/1, para. 88.

⁶⁴ Council Resolution 5/1, para. 98.

taken by consensus, although they were willing to accept a simple majority if consensus could not be reached.⁶⁵ This view is reflected in the final text.⁶⁶

There were also diverging views on whether the Working Group on situations should have the power to decide that the Council should consider a situation in a public meeting. The majority of States were opposed to granting this power to the Working Group on situations.⁶⁷ Accordingly, the institution-building text provides that only the Council can decide to consider the situation under its public procedure.⁶⁸

Timeframe and outcomes of the procedure

While agreement was reached early on regarding the need to reduce the timeframe for the consideration of complaints, it was not clear how this would be achieved.

Under the 1503 procedure, both Working Groups met once a year. During the Working Group discussions, States were divided between maintaining the frequency of meetings as it was⁶⁹ and establishing two meetings for both Working Groups, which would improve the overall timeframe of the procedure.⁷⁰ The Council decided that since the complaint procedure is to be 'victims-oriented' and 'timely', both Working Groups would meet at least twice a year.⁷¹ The Council will then consider the cases at least once a year.⁷²

On the basis of the same considerations and the efficiency of the procedure, the Council also decided that the period of time between the receipt of the complaint and its consideration by the Council should 'not, in principle, exceed 24 months'.⁷³ This is a significant improvement compared to the 1503 procedure, where the process could take up to four years. However, it is still far more than what is reasonable for the Council to deal with gross and systematic human rights violations.

The debate on the measures to be taken by the Council focused on whether the measures should be provided for in an indicative or exhaustive list. Those in favour of an exhaustive list of measures argued that the confidential nature of the procedure necessitated that the measures were clearly defined.⁷⁴ India explained that should

the Council want to take measures not provided for under the confidential procedure, it could transfer the situation for consideration under a public procedure. The institution-building text contains an exhaustive list of measures, including public consideration of the case.⁷⁵

The most significant improvement to the procedure is that complainants will be kept informed of the status of their communication at every stage of the process, from the consideration by each of the Working Groups to the consideration by the Council.⁷⁶ Furthermore, the complainant can request that his or her identity not be communicated to the State concerned.

Addressing the pending complaints

The new complaint procedure can only start functioning once the members of the Advisory Committee have been elected. The huge number of cases received by the UN regarding gross and systematic human rights violations have not been considered for more than 18 months and are reported to amount to 10,000 cases. At its 6th session the Council decided to extend exceptionally the mandate of the former Working Group on communications until the Advisory Committee is established and can elect the new members.⁷⁷ The Working Group on situations has also been constituted and is made up of the permanent representatives of Angola, Jordan, Bosnia and Herzegovina, Nicaragua, and Italy.

UNIVERSAL PERIODIC REVIEW

The new universal periodic review mechanism was first envisioned in General Assembly *Resolution 60/251*. It provided that the Council would 'undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments'.⁷⁸ However, it did not set out any of the concrete modalities for the UPR and mandated the Council to do so within one year from its establishment. Consequently, at its 1st session the Council set up a Working Group to develop the UPR.⁷⁹

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Algeria (on behalf of the African Group), Azerbaijan, Bangladesh, China, Guatemala, India, Indonesia, Iran, Japan, Pakistan (on behalf of the OIC), Portugal (on behalf of the EU), Russian Federation, Senegal.

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Council *Resolution 5/1*, para. 99.

67

Algeria (on behalf of the African Group), Bangladesh, China, Cuba, Egypt, India, Indonesia, Iran, Japan, Morocco, Pakistan (on behalf of the OIC), Russian Federation.

68

Council *Resolution 5/1*, para. 109.

69

Algeria (on behalf of the African Group).

70

Germany (on behalf of the EU), Canada, India, Italy, Mexico.

71

Council *Resolution 5/1*, para. 100.

72

Council *Resolution 5/1*, para. 103.

73

Council *Resolution 5/1*, para. 105.

74

Algeria, India.

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Council *Resolution 5/1*, para. 109.

76

Council *Resolution 5/1*, para. 106.

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The members are Ms Halima Embarek Warzazi (Africa), Mr Shiqiu Chen (Asia), Mr Vladimir Kartashkin (Eastern Europe) Mr Miguel Alfonso Martínez (Latin America), Ms Françoise Jane Hampson (Western Europe and Other States).

78

General Assembly *Resolution 60/251*, para. 5 (e).

79

Council *Decision 1/103*.

Ambassador Mohammed Loulichki of Morocco was appointed as the Facilitator.

The Working Group met from 20 to 24 November 2006 and from 12 to 16 February 2007.⁸⁰ It convened its last session from 11 to 24 April 2007. During these discussions a convergence of views had been attained on many of the softer issues, such as the basis of review, principles and objectives governing the review, as well as some very broad parameters for the framework of the UPR.

The April session of Working Group focused on discussion of the modalities for the review, the roles of experts and NGOs, the outcome of the process, and follow-up. However, the session only produced very limited progress on these issues and the concrete functioning of the new UPR mechanism remained unclear.

How the UPR will work in practice is yet to be seen since the first session of the Working Group on the UPR will take place in April 2008. Even now knowing the modalities of the review process, many questions remain unanswered. It will only become clearer over the course of 2008 whether the UPR will be a real contribution to the UN human rights machinery and whether it will deliver on the expectations of human rights defenders around the world for greater human rights protection and promotion.

Periodicity and order of review

Despite the implicit requirement in General Assembly *Resolution 60/251* that States should be reviewed every three years (since members of the Council must be reviewed during their term of membership which is three years, and since all States must be treated equally), the majority of States argued in favour of a longer periodicity of review.⁸¹ Some States also argued in favour of a different periodicity for developing and developed countries.⁸²

The Council decided in its institution-building text that all States should be reviewed within four years for the first cycle.⁸³

The order of review is to be established by a drawing of lots while respecting a series of principles, including equal treatment and

universality, equitable geographical distribution, and review of members of the Council during their term of membership.⁸⁴ Establishing a formula that would take account of all of these considerations proved a very big challenge for the Council's secretariat. But at the 6th session, after several demonstrations, a model was presented that was acceptable to States, and the drawing of lots could take place.⁸⁵

The institution-building text provides that the Council may review the modalities and periodicity of the review after the completion of the first cycle. This would coincide with the review of the Council and its work and functioning that was envisaged at its creation.⁸⁶

Basis of the review

The Working Group had also discussed the various human rights obligations and commitments that would form the basis of the review. Among the outstanding issues was the inclusion of international humanitarian law (IHL) as a basis of review. The Facilitator had made a compromise proposal in his non-paper but many States were outright opposed to the inclusion of IHL.⁸⁷ Bi-lateral negotiations took place between Switzerland and Egypt in trying to find an acceptable compromise proposal, but in the end this was not possible during the Working Group discussions. A compromise was found in the institution-building text which states that 'given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law'.⁸⁸

In previous discussions agreement had been reached on including the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, human rights instruments to which the State is a party, and voluntary pledges and commitments in the basis of review.

Process and modalities of the review

There was broad support in early sessions of the Working Group for the UPR to be based on

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For an overview of the discussions at these sessions, please see ISHR's reports on each session available at www.ishr.ch.

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Germany (on behalf of the EU) changed its position at the second session of the Working Group in favour of a four-year cycle. This was also supported by Argentina, Chile, Ecuador, Maldives, Mexico, New Zealand, and Switzerland. India, Malaysia, Algeria (on behalf of the African Group), Iran, Indonesia, Thailand, Russian Federation, US. China supported a five-year cycle.

82

Algeria (on behalf of the African Group), Bangladesh.

83

Council *Resolution 5/1*, para. 14.

84

Council *Resolution 5/1*, paras 6-11.

85

The schedule of reviews is available at <http://www2.ohchr.org/english/bodies/hrcouncil/upr/uprlist.pdf>. For an overview of the demonstrations and discussions of the model for selection, please see ISHR's *Daily Updates* of 12 and 19 September 2007.

86

General Assembly *Resolution 60/251*, para. 16.

87

Norway, Canada, US.

88

Resolution 5/1, para. 2

a self-assessment report by the concerned State and information compiled by OHCHR based on reports from treaty bodies, special procedures, and other relevant UN documents.⁸⁹ Not surprisingly, this is reflected in the institution-building text, which also encourages the State to prepare its report through a broad consultation process. The State report may be 20 pages long, while the OHCHR compilation may not exceed ten pages.

Views diverged on whether the Council should also consider information from other stakeholders, such as NGOs and NHRIs. Some States had argued that these stakeholders should only be able to contribute information at the national level.⁹⁰ The institution-building package provides that additional 'reliable and credible' information from these sources should also be considered.⁹¹ OHCHR will also compile this information in a document.

The Council has adopted guidelines for the State report.⁹² These have been used by OHCHR to also develop guidelines for information from NGOs or other stakeholders.⁹³

There had been much discussion in the Working Group on whether the UPR should be conducted in the plenary of the Council or in one or more working groups. Many States had preferred the review to be undertaken by the Council itself.⁹⁴ Other States supported the establishment of up to four working groups to conduct the reviews.⁹⁵ The Philippines proposed a hybrid model of the proposals presented by the Facilitator, and this was the model adopted in the end.⁹⁶ It suggested that a single working group should conduct the reviews and present a report to the Council for its consideration in plenary.⁹⁷ Mexico had objected to this proposal, arguing that this was essentially a plenary review with a different title. This argument still seems convincing and the Council will have to prove that it can work in a manner that is not dictated by politics in fulfilling this aspect of its mandate.

During the 1st and 2nd sessions of the Working Group there was an almost equal divide between States in favour of the involvement of independent experts in the review process⁹⁸ and those opposed to it.⁹⁹ As in the other working group discussions, the role of independent experts was highly contested and controversial.

The institution-building text provides that each member State will decide on who will represent it in the Working Group on the UPR.¹⁰⁰ This was introduced as a compromise proposal to allow those delegations in favour of involving independent experts to appoint such persons to the Working Group. It will be interesting to see if any countries will in fact appoint independent experts.

The review will be undertaken with the assistance of a group of three rapporteurs (troika) who will facilitate each review. The rapporteurs will be selected by the drawing of lots among the members of the Council, while ensuring geographical representation. The State under review may request that one rapporteur be from its own regional group. It may also request once that one rapporteur be replaced. The rapporteurs may also excuse themselves from one review process.¹⁰¹ These 'safeguards' were introduced to alleviate the concerns of many States about which other States would be closely involved in their review. The process for selecting the rapporteurs and their specific role was hotly debated after the adoption of the institution-building text.¹⁰² But no solution has yet been found to these complex and highly sensitive issues and consultations continue. Many States have expressed concern about the delay in this process but it seems that most are more concerned about the rapporteurs that may facilitate their review, or the countries they may have to facilitate the review of as rapporteur.

Role of NGOs and NHRIs

All States that took the floor during the April session voiced strong support for the contributions of NGOs to the international human rights system. However, many States went on to oppose NGO participation in any part of the UPR process and maintained their inflexibility on the issue. As mentioned above, several States had argued that NGOs should only contribute at the national level through consultations with the State in preparation of the national report. Many others supported NGO involvement at all stages of the process.¹⁰³

The role granted to NGOs and NHRIs in the institution-building package is more than the bare

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ISHR *Human Rights Monitor* 2006, p. 24.

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Algeria (on behalf of the African Group), Bangladesh, China, Indonesia, Iran, South Africa.

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Council *Resolution 5/1*, para. 15 (c).

92

Council *Decision 6/102*.

93

The technical guidelines are available at <http://www2.ohchr.org/english/bodies/hrcouncil/upr/TechnicalGuide.htm>.

94

Algeria (on behalf of the African Group), Bangladesh, Chile, China, Cuba, Guatemala, India, Indonesia, Iran, Senegal.

95

Germany (on behalf of the EU), Argentina, Australia, Belgium, Brazil, Canada, Czech Republic, Liechtenstein, Maldives, Mexico, New Zealand, Norway, Republic of Korea, Sweden, Switzerland, UK.

96

Council *Resolution 5/1*, para. 18 (a).

97

ISHR's report on the February session of the Working Group to develop the modalities of the UPR.

98

Argentina, Brazil, Chile, Japan, New Zealand, Norway, Republic of Korea, Switzerland, UK, Uruguay.

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Algeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Bangladesh, US.

100

Council *Resolution 5/1*, para. 18 (a).

101

For a discussion of some of the difficulties in selecting the rapporteurs, please see see Rachel Brett, *Neither Mountain nor Molehills: UN Human Rights Council: One Year On*. Quaker United Nations Office (Geneva, August 2007) p. 7.

102

See ISHR's *Council Alert* for the resumed 6th session.

103

Argentina, Portugal (on behalf of the EU), US, Norway, Mexico, Amnesty International, Human Rights Watch.

minimum that was proposed by some States but far from real participation in the process. NGOs and NHRIs will be able to observe the review in the Working Group but will not be allowed to speak. It has also been suggested that the State under review could allow NGOs to make comments or ask questions during the discussions in the Working Group.¹⁰⁴ During the consideration of the outcome by the Council plenary, NGOs will be allowed to make general comments before the adoption of the outcome.¹⁰⁵

A voluntary fund was established at the 6th session of the Council to facilitate the participation of representatives from developing countries in the UPR,¹⁰⁶ but no similar initiative exists for NGOs. The text of the resolution does not explicitly exclude that NGOs could benefit from this fund and it would be interesting to explore that possibility. Alternatively a separate fund could be established to assist NGOs in attending the UPR Working Group and sessions of the Council.

Outcomes and follow-up

There was already a significant convergence of views regarding the outcome of the UPR process at the first session of the Working Group. States had reached agreement that the outcome should include a summary of the proceedings and recommendations and conclusions.

There was agreement from an early point that the Council plenary would adopt the outcome of the review process and that the country concerned should be fully involved in the process. However, some States suggested that the outcome should be adopted by consensus, or even with the consent of the concerned country. Others were opposed to granting what they called an effective veto power to the country under review, a power which, in the UN system, is reserved only for the five permanent members of the Security Council.

The full involvement of the concerned country in the outcome is reflected in the institution-building text.¹⁰⁷ The country can present replies to issues that were not adequately covered in the interactive dialogue and can express its views on the outcome.¹⁰⁸ The question of the State's consent to the outcome was resolved through a

compromise proposal originally presented by India. It provides that the recommendations that enjoy the support of the State will be identified as such and that other recommendations with any comments of the State will be noted.¹⁰⁹ This preserves an important space for the Council to also address issues that the country under review may not agree with. However, the treatment in practice of the two types of recommendations, in particular in relation to their implementation, will be the real test of the effectiveness of the mechanism and of the country's cooperation with it.

The views in the Working Group also converged on the need for the outcome to be implemented primarily by the State under review. However, there was disagreement on the role of other stakeholders in this regard. The institution-building text recognises this agreement and states that the outcome should be implemented by other stakeholders, as appropriate.¹¹⁰ It also provides that the international community will assist in the implementation of recommendations regarding capacity building, with the consent of the State.¹¹¹ To that end, the Council set up a Voluntary Fund for Financial and Technical Assistance at its 6th session.¹¹² Finally, the Council can decide on any specific follow-up measures that it may consider necessary.

AGENDA, PROGRAMME OF WORK, RULES OF PROCEDURE

At its 3rd session, the Council turned its attention to the last aspect of its institution-building tasks: its agenda, programme of work, methods of work and rules of procedure. It established a Working Group to formulate recommendations on these issues.¹¹³ The President appointed Ambassador Carlos Ramiro Martinez Alvarado of Guatemala to lead the discussions on the agenda and programme of work, and Ambassador Enrique A. Manalo of the Philippines as Facilitator on working methods and rules of procedure.

The Working Group met for the first time from 15 to 19 January 2007.¹¹⁴ It held its second and final session from 13 to 23 April 2007.¹¹⁵

104 Meghna Abraham, *Building the New Human Rights Council, Outcome and analysis of the institution-building year*, Friedrich Ebert Stiftung, Occasional Papers, No. 33/ August 2007, p. 40.

105 Council Resolution 5/1, para. 31.

106 Council Resolution 6/17.

107 Council Resolution 5/1, para. 28.

108 Council Resolution 5/1, paras. 29 and 30.

109 Council Resolution 5/1, para. 32.

110 Council Resolution 5/1, para. 33.

111 Council Resolution 5/1, para. 36.

112 Council Resolution 6/17.

113 President's statement contained in Resolution 3/4.

114 For an overview of the discussions, please see www.ishr.ch.

115 For an overview of the discussions at this session, please see www.ishr.ch.

Agenda and programme of work

From the outset, the discussions on the agenda had been divided and they remained so until the very end. The debate focused on whether the Council should have a structured agenda detailing specific themes and rights¹¹⁶ or a more flexible and generic agenda with broad topics.¹¹⁷

One of the most contentious issues was whether the agenda should include an item on 'human rights situations requiring the Council's attention'. This debate also saw divisions over whether the human rights situation in Palestine and the occupied Arab territories should be subject to a separate agenda item¹¹⁸ or included under a broader item addressing human rights situations. There were also divided positions on whether 'cross-cutting human rights issues' should be addressed and whether the agenda should include a catch-all item such as 'other issues'. The States of the African Group, the OIC and of the Non-Aligned Movement (NAM) opposed separate items on country situations, cross-cutting issues, and other issues. Not surprisingly, these same States favoured an item devoted to the situation in Palestine and the other occupied Arab territories on the basis that this did not constitute a country situation, but rather came under the thematic heading of occupation.

While progress was not made on these issues during the Working Group, consensus emerged on less contentious issues. The Working Group agreed that there should be separate items on the UPR and on follow-up. Despite the fact that these proposals received broad support in the Working Group, the separate item on follow-up was regrettably not retained in the final text. Instead, the agenda appears to link the question of follow-up with follow-up to the *Vienna Declaration and Programme of Action* although the formulation of the agenda item would leave it open to interpretation.¹¹⁹ There had been much discussion during the Working Group on the need for an item on follow-up to the outcome of important world conferences on human rights. Many States had given particular emphasis to the *Durban Declaration and Programme of Action*. This was closely linked to their view that a special focus should be brought to the issue of racism. In the end, this view prevailed and a separate item is dedicated to racism and follow-up and

implementation of the outcome of the Durban World Conference.

Despite the heavy opposition to an agenda item dealing with country situations, this was secured on the final version. During the last minutes of the Working Group session, China forcefully proposed that country resolutions should be co-sponsored by a third of the members of the Council and adopted by a two-thirds majority. This proposal is further discussed below.

While country work remains contentious within the Council it was important to firmly establish the space on the Council's agenda and programme of work for addressing human rights situations. Not surprisingly, a separate agenda item was dedicated to the human rights situation in Palestine and other occupied Arab territories. This issue almost undid the agreement on the institution-building package. In the Council, Canada was among the strongest voices of opposition. Its position delayed the adoption of the package until the last minutes of the day on 18 June 2007 and forced the Council to find a graceless procedural solution that would allow it to adopt the outcome of its yearlong work.¹²⁰ On 19 June, the new President of the Council ruled that the package had been adopted on the previous day. Canada challenged this interpretation, and in a vote of 46 in favour and one against the Council endorsed the ruling.

The Council's agenda is lighter and more flexible than that of its predecessor, the Commission. It should, hopefully, allow it to undertake human rights work with less artificial divisions between categories of rights and in a more comprehensive manner. The Council can also address the 'interrelation of human rights and human rights thematic issues'.¹²¹ This compromise language reflects an attempt to retain the idea of an item on 'cross-cutting human rights issues'.

On the programme of work, progress was closely linked with reaching agreement on the Council's future agenda. However, during the April session, the Working Group reached convergence on the length of each of the three annual sessions (one four-week session and two three-week sessions) although there were different views on when the annual cycle would begin. This issue has not yet been resolved.

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This was supported by Cuba on behalf of the Non-Aligned Movement (NAM), Algeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Bangladesh, China, Honduras, India, Indonesia, Iran, Malaysia, Morocco, Saudi Arabia (on behalf of the Asian Group), South Africa, Sri Lanka, Tunisia, Venezuela, Zimbabwe.

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Supported by Germany (on behalf of the EU), Canada, Guatemala, Portugal, Netherlands, Switzerland, UK, US, Japan, Mexico, Australia.

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The Commission's agenda had a separate item on this situation (Item 8).

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'Follow-up and implementation of the Vienna Declaration and Programme of Action'.

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See ISHR's *Daily Updates* of 18 and 19 June and report on the conclusion of the 5th session and the organisational meeting (18-20 June 2007).

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Framework for the programme of work, contained in Council Resolution 5/1.

The Council has yet to develop a detailed programme of work for its yearly cycle. This will be an important tool for all those wishing to work with and participate in the Council, in particular for NGOs that are based outside of Geneva. So far the Council has only managed to develop a programme of work a few weeks before the start of each session and not a yearly programme. This is still much needed for greater predictability in the work of the Council.

Working methods and rules of procedure

In early meetings of the Working Group, many States argued that progress on the working methods and rules of procedure was dependent on agreement on the Council's agenda. However, progress was at least achieved in reaching a broad agreement on the need for the President to convene organisational meetings prior to Council sessions, and for at least one public and open informal consultation on draft resolutions. The institution-building text provides for these meetings as well as for information meetings on resolutions to be convened by the President. These are welcome developments and, in some cases, codifications of the Commission's previous practices. It is hoped that they will lead to greater transparency in the planning and implementation of the Council's work.

The most contentious issues discussed, among the wide range of issues addressed by the Working Group, were the adoption of innovative working methods, which included, as proposed by Canada, interactive dialogues with special procedures on specific issues, panel debates, seminars, and roundtables; the format and modalities of informal meetings and consultations; the working methods of special sessions; and the adaptation of the General Assembly's rules of procedure to the work of the Council.¹²²

It is regrettable that the proposals for the use of new and innovative working methods were not more firmly established in the institution-building text. It merely provides that the Council can decide to use such work formats on a case-by-case basis. While the lack of institutionalisation of such working methods represents a lost opportunity, the use of panel discussions during

the first 18 months of the Council has been a step forward that may over time become more institutionalised.¹²³

Despite some discussion on the rules that would govern the participation of NGOs and NHRIs in the work of the Council, no new formal rules were established. The institution-building text merely repeats the guidelines that were already set out in General Assembly *Resolution 60/251*.¹²⁴ The result is that the rules and practices from the Commission remain in place. Late in the negotiations it was suggested that the rules and practices applicable specifically to NHRIs should be clarified. In 2005 the Commission had decided that NHRIs could speak under all agenda items but the decision had never been implemented.¹²⁵ It was therefore particularly significant that the institution-building package referred to this decision in clarifying the scope of their participation.

During the last minutes of the Working Group session, China made a controversial proposal for country resolutions to be co-sponsored by a third of the members of the Council and adopted by a two-thirds majority. The proposal divided delegations. Those States that supported it had, not surprisingly, earlier opposed the Council addressing country situations through other means than the UPR. The proposal also nearly unravelled the entire institution-building package, as China insisted on it until the last minutes of the day on 18 June 2007. In the end a compromise was found. It merely provides that States proposing a country resolution should seek to secure the broadest possible support for the resolution (preferably 15 members) before it is voted upon.¹²⁶ In a statement following the adoption of the institution-building text, China explained that the proposal was intended to safeguard the credibility of the Council and expressed its hope that the criteria would be strictly followed.

CONCLUSION

Expectations for what could be achieved in terms of change to and reform of the main human rights protection and promotion system were constrained by the knowledge of the limitations

¹²² General Assembly *Resolution 60/251* provided that the Council 'shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council'.

¹²³ In particular the panel on integrating a gender perspective into the work of the Council was a success. For an overview of the discussion, please see ISHR's *Daily Updates* of 20 and 21 September 2007.

¹²⁴ See its para. 11.

¹²⁵ Commission *Resolution 2005/74*. Until then national human rights institutions (NHRIs) had only been able to speak under one agenda item that dealt specifically with such institutions.

¹²⁶ Council *Resolution 5/1*, para. 117 (d).

inherent in the UN inter-governmental system. Nevertheless, there was anticipation that the institution-building process could improve the human rights system. This was after all the purpose of establishing the new Council. Many human rights defenders and activists were hopeful that the process could not only strengthen the Council's individual procedures and mechanisms but also bring greater coherence and integration to the Council's architecture as a whole.

The conclusion of the Council's first year and its main institution-building work is in itself an achievement, and a relief. Human rights defenders and activists have patiently awaited the end of this process to confront the Council with the many substantive tasks in the promotion and protection of human rights that require its attention.

The improvements to the individual procedures and mechanisms of the Council are minor and their value seems to be outweighed by the regression in other areas, and by the time and energy spent on achieving them.

While the review of the special procedures did maintain the great majority of the mandates, there continues to be strong opposition to country mandates. The mandate holders often face criticism for their work and the continued review of individual mandates will leave the system and the individual mandates in uncertainty for months to come. While this review process may very well jeopardise the future of some mandates, it has so far preserved the existing mandates. It is clear that the strength of the special procedures largely depends on the qualities of the mandate holders. It will therefore be particularly important to see how the appointment process will work and whether it will ensure the continued high quality of the system. The Council's oversight of the code of conduct's implementation could also pose a risk to the independence of the special procedures in carrying out their work.

The Advisory Committee has a much more limited mandate than that of its predecessor. The most notable improvement is the imposition of term limits on the members and the slightly improved nomination process. The establishment of the new advisory mechanism on indigenous peoples on the other hand is a significant achievement. The fact that representatives of indigenous

peoples themselves will now be able to advise the Council on issues related to their rights testifies to the developments that have occurred in the international system over the past two decades in relation to these issues.

The improvement to the complaint procedure is limited to the fact that information will now be provided to the complainant at each stage of the complaint's consideration. Hopefully, the guidelines for the length of the procedure will be implemented in the spirit of the interests of the victims.

Much hope has been placed in the new UPR mechanism. The assessment of the Council's success or failure is often considered linked to the UPR's successful implementation. That certainly leaves the Council a little more time to prove its merits and accomplishments in fulfilling its mandate. While this new mechanism has understandably attracted a lot of interest, including from human rights defenders, its limitations may prevent the process from delivering on these expectations. The UPR does not include a formal role for experts in the process, and the involvement of NGOs is very restricted. Furthermore, its outcomes are also very constrained and the level of influence of the State under review on the outcome may determine the credibility of the process.

The Council's agenda is lighter and more flexible than that of its predecessor. It should, hopefully, allow it to fulfil its mandate with less artificial divisions between categories of rights and in a more comprehensive manner. However, the lack of a detailed annual programme of work presents a barrier to the effective involvement of stakeholders in the Council's work, and in particular to human rights defenders and NGOs far removed from Geneva.

The Council failed to ensure that all its mechanisms would form a single system that would work cohesively and effectively. It did not in its review of each piece of the institution-building process place that piece in relationship to other pieces to produce a single, composite picture. While the United Nations as a whole is committed to system-wide coherence as 'One UN', many States did not want an integrated human rights machinery and argued that the individual parts should not interact with each other.

This represents perhaps one of the biggest lost opportunities of the institution-building process.

The assessment of whether the Council is an improvement on its predecessor will have to await the implementation of the institution-building package and the full functioning of its mechanisms and procedures. It is only with time that we will be able to assess whether the mechanisms have been strengthened and whether the elements of the system can work effectively together as a whole. The assessment will of course also depend on the extent to which the Council will respond to the expectations and hopes of human rights defenders who have long awaited the Council's attention.