



Dialogue on
Globalization

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Meghna Abraham

**Building the New Human
Rights Council**

Outcome and analysis
of the institution-building year

Dialogue on Globalization

Dialogue on Globalization contributes to the international debate on globalization – through conferences, workshops and publications – as part of the international work of the Friedrich-Ebert-Stiftung (FES). *Dialogue on Globalization* is based on the premise that globalization can be shaped into a direction that promotes peace, democracy and social justice. *Dialogue on Globalization* addresses “movers and shakers” both in developing countries and in the industrialized parts of the world, i.e. politicians, trade unionists, government officials, businesspeople, and journalists as well as representatives from NGOs, international organizations, and academia.

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1. Preface

The transition from the Commission on Human Rights (the Commission) to the Human Rights Council (the Council) dominated the work of the UN human rights system all over the last year. Since the Commission had been dissolved, states and NGOs alike were striving to give shape to the newly created body which, by the resolution that created it, existed only in very vague terms and left room for new institutional structures, as well as for the definition of mechanisms of work.

Very soon it became clear that not all Member States would work towards a Council which would have stronger teeth than the former Commission. The classical dispute between a strong and effective international human rights system with far reaching competencies on the one side and the preservation of national sovereignty on the other was apparent during all of the negotiations and consultations leading up to the final adoption of an “institution-building” package. This adoption took place at the very last minute of the timeframe given by the General Assembly resolution which created the Council and had given it one year to complete this process.

Whether the package that was reached in the end was a good deal or a bad deal continues to be disputed among Member States and NGOs. As Meghna Abraham, a Geneva based lawyer and consultant on international human rights law, presents in this paper, an evaluation of the package also depends on the “yardstick” used for its measurement. When assessing whether the package is a success or a failure, should the political background be taken into account, or should the package just be judged alone by its technical content?

The Geneva Office of the Friedrich-Ebert-Stiftung has accompanied the process of transition from Commission to Council. An earlier publication which was issued in 2006 in collaboration with the International Service for Human Rights (ISHR) had explored the issues raised in the transitory phase, trying to give activists and experts a useful tool to understand the process and get involved in it in a constructive manner. As this “Handbook on issues of transition from the Commission on Human Rights to the Human Rights Council” was well received, we have asked its main author to take a look at the recent developments in the institution-building process. In this “Occasional Paper”, she describes the outcome of this process and analyzes and evaluates in a critical way the work of the Council. She examines which questions had been answered in what ways during the last year and gives insight into the issues that had not been addressed and that came up during this last period of intense work at the Council.

The present description and analysis, which covers the state of debate until mid August 2007 in and on the Council, is again intended to give information to delegations and NGOs in order to support them in continuing their work of shaping a Human Rights Council that will be the central institution promoting and protecting human rights worldwide.

Felix Kirchmeier
Geneva Office
Friedrich-Ebert-Stiftung

2. Executive summary

The Commission on Human Rights (the Commission) had served as the main political body which addressed human rights issues in the United Nations (UN) system. Despite its many achievements, the Commission came under severe criticism in its last few years of functioning because of its membership and selective monitoring of countries. As a result, the Human Rights Council (the Council) was created by the General Assembly in March 2006 to replace the Commission. The Council assumed all the former mechanisms, mandates, functions and responsibilities of the Commission. The General Assembly however tasked it with reviewing these mechanisms to improve and rationalise them, where necessary. The Council was also required to undertake a periodic review of the fulfilment of human rights obligations of all UN member States, under a new Universal Periodic Review (UPR) mechanism. However, the General Assembly left it up to the Council to develop the actual mechanism. All these tasks had to be completed within the Council's first year of functioning.

The Council decided to carry out the discussions on the institution-building process through three working groups. After a few months of discussions, it became obvious that, rather than striving to improve on what had been created under the Commission, the fight had become centred on how to preserve the protections offered by those mechanisms. The final institution-building package that was adopted on 18 June 2007 was based on a compromise text suggested by the President of the Council, Ambassador De Alba. The President's text did not provide much in the way of a reform or a strengthening of the system but managed to keep out the most negative proposals.

The balance sheet of the institution-building package is as follows:

- The agenda has been improved to give it more flexibility. The degree to which it also offers predictability to NGOs and allows for more focused discussions and prioritisation will depend on the programme of work, which is yet to be developed.
- The arrangements for NGO participation have been maintained and those for NHRI participation have been consolidated.
- The 1503 procedure has largely been maintained as the new complaint procedure but with some limited improvements. The most notable innovation is that the complainant will now be provided information on the progression of the complaint and its final outcome.
- The 'Human Rights Council Advisory Committee', a new body with reduced membership and meeting time has been set up to replace the Sub-Commission. The scope of functioning of the system of expert advice has been greatly constrained and the role of the experts has been reduced to purely an 'advisory' one. The experts no longer have the ability to undertake independent initiatives and this is a significant loss. On the positive side, the development of criteria for nominations and a slightly better nomination system offers the prospect that the quality of expertise will be improved.

- The system of special procedures has been preserved but no steps were taken by the Council to make this mechanism more effective. The Council postponed the review of individual mandates and this will now be undertaken based on the programme of work that will be developed for the second year. It is not clear what the outcomes of this staggered review process will be. The special procedures also now have a code of conduct, which was the best of the worst options, but has the potential to be intrusive to their work and to be misused by States. There is a new system of appointment, which could add greater transparency and bring in better candidates but also has the scope to give more power to the regional groups in the selection process.
- The institution of country mandates has been preserved but there is an atmosphere of strong hostility to country mandates, which may make it difficult, though not impossible, for new country mandates to be created. Two country mandates, on Cuba and Belarus, were terminated and it is likely that at least a few of the others will not survive the review process.
- The UPR will be conducted by the entire Council, sitting as a working group, through a three-hour long interactive dialogue with the concerned State. The review will be based on a national report or national information, and documents prepared by OHCHR compiling information from treaty bodies, special procedures, and other UN documents and from other stakeholders including NGOs. Observer States can participate and ask questions. There is no provision for formal involvement of experts in the process but States can choose to include them in their own delegations. NGOs can attend the review but can not participate in the discussions. The possible outcomes of the procedure are quite weak but their adoption is not subject to the consent of the concerned State. The UPR is not, at least on paper, the strongest of mechanisms that could have been set up. Neither is it the weakest. It may evolve into an effective mechanism but it remains too early to make firm predictions without seeing its operation in practice.

Overall, it is difficult to evaluate the outcomes of the institution-building process because the conclusions vary based on the yardstick used. Viewed in the context of the realities of the political process and battles over the past year, the outcome is a success because it managed to preserve most of the institutions that came under attack. Problems however begin to emerge if we look further back to the expectations behind the creation of the Council and the promises of ‘reform’ of the system. The key determinant of whether the Human Rights Council represents an improvement over the Commission is the UPR. If the UPR functions well this may outweigh the losses in other areas but if it does not, there can be little doubt that the institutional design of the Council does not represent a marked improvement over that of its predecessor.

The process is still not over and many of the operational details of the institution-building package still need to be finalised. The institution-building package is also very broad in the way it is drafted and opportunities exist for States and NGOs to reshape it to make the mechanisms more effective in practice. The Council still has the tools to carry out its functions as it retains the capacity, by and large, to do all that the Commission could. How it uses these tools towards ensuring the protection of human rights hinges, as always, on the political will of its members. What the Council does with these tools in the next few months and years will be the true yardstick of the success or failure of the reform process.

3. Background¹

The Commission was responsible for the creation of almost all the major human rights instruments that are in force today.

NGOs censured the Commission for failing to take action on a number of countries where there was clear evidence of gross human rights violations. Many States, however, condemned the Commission for punishing the few countries it had taken action on.

The Human Rights Council (the Council) was created by the General Assembly in March 2006² to replace the former Commission on Human Rights (the Commission). The Commission had served as the main political body which addressed human rights issues in United Nations (UN) system for the last sixty years.³

The Commission was responsible for the creation of almost all the major human rights instruments that are in force today. It had the mandate of monitoring human rights violations and did so largely through the adoption of resolutions on countries. It also created the ‘special procedures’; mechanisms that monitor and publicly report on the situation of human rights in specific countries or particular human rights issues. The Commission served as an important forum for non-governmental organisations (NGOs) to publicly assert concerns about particular countries and lobby States to take action on these situations.

The Commission was severely criticised in the last few years of its functioning and calls were made for its reform. The major criticisms revolved around the membership of the Commission and its monitoring of countries. Most NGOs censured the Commission for failing to take action on a number of countries where there was clear evidence of gross human rights violations.⁴ Many States, however, condemned the Commission for punishing the few countries it had taken action on. In the view of these States, the Commission’s actions were motivated by political considerations and it applied double standards by targeting developing countries but shielding the most powerful. The other attack, led notably by the United States of America, was aimed at the membership of the Commission. This came to a head in 2003 when the Ambassador of Libya was ‘elected’ as the Chairperson of the Commission and Sudan was re-elected to the Commission in 2004, despite its actions in Darfur.⁵

The challenges to the credibility of the Commission were affirmed in a report of the UN Secretary-General’s High-level Panel on Threats, Challenges and Change,⁶ and by the Secretary-General himself in his report, *In Larger Freedom: development, security and human rights for all*.⁷ The Secretary-General recommended

1 I would like to thank Michael Anthony, Inmaculada Barcia, Claire Callejon, Mathew Coakley, Lucinda O’Hanlon, Susan Mathews, Gareth Sweeney, and Thomas Sebastian for their comments and suggestions on earlier versions of this paper or on some sections. These comments were made in their personal capacity. I would also like to thank Felix Kirchmeier and Türkan Karakurt, from FES, for their comments and Felix for editing the paper. All errors and omissions remain mine.

2 General Assembly resolution 60/251. The body was established and met for the first time in June 2006. See also H. Upton, ‘The Human Rights Council: First Impressions and Future Challenges’, [2007] 7 Human Rights Law Review 29.

3 For more information on the Commission, see P. Alston, ‘The Commission on Human Rights’, in P. Alston, *The United Nations and Human Rights*, (Clarendon Press, 1995), pp. 126–209.

4 Amnesty International, Meeting the Challenge: Transforming the Commission on Human Rights into a Human Rights Council, (Amnesty International, April 2005), pp. 6–7. See also see M. Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments*, (Institute for Human Rights, Åbo Akademi University, 2005).

5 For a detailed discussion see P. Alston, ‘Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council’, (2006) 7 Melbourne Journal of International Law 185, see in particular pp. 188–198.

6 *A More Secure World: Our Shared Responsibility*, A/59/565, (2 December 2004), p. 74.

7 A/59/2005, (21 March 2005), p. 45.

the replacement of the Commission by a smaller, standing body, a Human Rights Council, to be elected by the General Assembly by a two-thirds majority vote.⁸ He also suggested that the Human Rights Council should be mandated to undertake a periodic ‘peer review’ of the fulfilment by all States of all their human rights obligations.⁹ The High-level Panel and the Secretary-General’s report however failed to carry out a comprehensive assessment of the factors that had led to the ‘declining credibility’ of the Commission. They also did not analyse what features of the Commission should be retained and those that needed to be changed. In the chapters that follow, we will see how this lacuna came to haunt the whole reform process.

A decision was taken at the World Summit in September 2005, to create a new Human Rights Council. The resolution establishing the Human Rights Council was adopted by the General Assembly on 15 March 2006 by a majority vote, after five months of protracted negotiations.¹⁰ The Human Rights Council that was finally created by the General Assembly did not resemble either the High-level Panel’s recommendation of a Council that was made up of all member States of the UN, or the smaller standing body that the Secretary-General had proposed.¹¹ It had a marginally smaller membership than the Commission, with 47 instead of the Commission’s 53 members. The reduction of the number of members was accompanied by a change in the distribution of seats amongst the five regional groups to provide for equitable geographical representation. This re-distribution and particularly the reduction of seats allocated to Western Europe and Others Group (WEOG) and Group of Latin and Caribbean States (GRULAC) (who now have 15 rather than 21 seats) meant that these countries “have lost the power to win a vote ...unless their proposals attract the support for at least three African and Asian States”.¹²

The General Assembly was unable to set up strict membership criteria and the resolution merely asks States to “take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments”.¹³ The resolution does however provide for each member of the Council to be elected directly and individually by the majority of members of the General Assembly. It also enables rotation of membership by specifying that States shall not be eligible for immediate re-election after two consecutive terms.¹⁴ The General Assembly, by a two-thirds majority, may suspend the rights of membership of a member of the Council that commits gross and systematic violations of human rights.¹⁵ These provisions go some way towards addressing the concerns

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⁸ Ibid.

⁹ See www.ohchr.org/english/bodies/chr/docs/61chr/sgchr.doc.

¹⁰ See M. Abraham, *A New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council*, (International Service for Human Rights and the Friedrich Ebert Stiftung, 2006), pp. 11–12. The handbook is available in an electronic form at <http://www.fes-geneva.org/publications/OtherPublications/Handbook.pdf> and at www.ishr.ch.

¹¹ See N. Ghanea, ‘From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways’, (2006) 55 *International and Comparative Law Quarterly* 695, pp. 699 – 704.

¹² Y. Terlingen, ‘The Human Rights Council: A New Era in UN Human Rights Work’, (2006) 21 *Ethics and International Affairs* 167, p. 171. For an analysis of the voting patterns of the Commission, see ISHR, *The All-In-One Guide to Voting or Voting Results*, prepared for each session of the Commission, available at www.ishr.ch (look under Archived Reports).

¹³ Para 7, General Assembly resolution 60/251.

¹⁴ Para 8, General Assembly resolution 60/251.

¹⁵ But see M. Bossuyt, ‘The Human Rights Council: A Doubtful Reform?’, VVN seminar on “The UN Human Rights Council: Challenges and Opportunities”, (June 2006), available at <http://www.vvn.be/docu/HRC-Bossuyt.pdf>. He notes, “it is not very likely to expect that the General Assembly will frequently be able to take such initiatives even in case of gross and systematic human rights violations”.

that were voiced around the selection and conduct of members of the former Commission but did not go as far as some would have preferred.¹⁶

In contrast to the Commission, which met once a year, the Council is empowered to meet for a minimum of three sessions a year, which should be totally not less than ten weeks in duration. Though the proposals for the Council to be a standing body were not taken up, a provision was made for it to convene special sessions, when needed, at the request of a member and with the support of one third of the membership. It now reports directly to the General Assembly, instead of first reporting to ECOSOC and this has speeded up the process.¹⁷ The Council has similar functions to the Commission and is responsible for addressing violations of human rights, including gross and systematic violations. It is also expected to contribute to the prevention of human rights violations and respond promptly to human rights emergencies.

The General Assembly obligated it to maintain a system of special procedures, expert advice and a complaint procedure but empowered the Council to review and “where necessary, improve and rationalize” these mechanisms.

The Council assumed all the former mechanisms, mandates, functions and responsibilities of the Commission. The General Assembly obligated it to maintain a system of special procedures, expert advice and a complaint procedure but empowered the Council to review and “where necessary, improve and rationalize” these mechanisms.¹⁸ The use of the words ‘system of’ special procedures and expert advice also gave the Council the flexibility to modify the current special procedures and to devise a new system of expert advice, if it wished to replace the Sub-Commission. Similarly, it could develop a new complaint procedure to replace the former 1503 procedure. The Council was required to complete this review within one year after holding its first session. The most significant innovation relating to the new Council was the creation of a new Universal Periodic Review (UPR) mechanism, under which the Council is required to undertake a periodic review of the fulfilment of human rights obligations of all UN member States.¹⁹ The resolution only set out broad guidelines for the UPR but left it to the Council to develop the modalities and necessary time allocation within one year. The General Assembly therefore set out the key institution-building tasks that the Council was required to complete within its first year of functioning. In addition to these tasks the Council also had to further develop its rules of procedure and methods of work and attend to substantive human rights issues.

The most significant innovation relating to the new Council was the creation of a new Universal Periodic Review (UPR) mechanism, under which the Council is required to undertake a periodic review of the fulfilment of human rights obligations of all UN member States.

This paper describes and analyses the outcome of the institution-building process. In the next chapter, it briefly discusses the process itself and the events leading up to the adoption of the institution-building package. Chapters 4 to 8 focus on the decisions taken in relation to each of the mechanisms of the Council and to its agenda and rules of procedures. The paper describes the framework that has been adopted and the issues and options the Council chose to focus on in relation to each of these mechanisms and procedures. It also tries to identify the practical changes to these mechanisms and procedures and to assess, from an NGO perspective, the main gains and losses that may result from these outcomes. The paper ends with a conclusion which evaluates these outcomes.

16 See Ambassador John Bolton, ‘Explanation of vote on the Human Rights Council Draft Resolution’, available at: www.state.gov/p/io/rls/rm/63143.htm.

17 See L. Rahmani-Ocora, ‘Giving the Emperor Real Clothes: The UN Human Rights Council’, (2006) 12 *Global Governance* 15, see p. 18.

18 Para 6, General Assembly resolution 60/251.

19 Para 5 (e), *Ibid.*

4. The institution-building process

4.1. The working groups

The Council decided to carry out the discussions on the institution-building process through three open-ended²⁰ inter-sessional working groups. There were the working group on review of mechanisms and mandates,²¹ the working group to develop the modalities of the UPR²² and a working group to formulate recommendations for the Council's future agenda, programme of work, methods of work and rules of procedure²³. The working group on review of mechanisms and mandates was tasked with reviewing the special procedures, the Sub-Commission, and the 1503 procedure.

The scope, nature and progress of the discussions varied greatly based on the importance that States placed on the issue and the skill of the facilitator in directing the discussions. At the end of February, the picture was not looking too optimistic from the view point of those who wanted the process to be used to strengthen existing mechanisms. Though positive and/or innovative proposals had been put forward by some States and NGOs,²⁴ the battle had increasingly become one to preserve the protections offered by the existing mechanisms.

The impact of the change in the regional distribution of membership of the Council was also clearly demonstrated at the resumed second session. Algeria (on behalf of the African Group) tabled a resolution asking the Working Group to review the Manual of special procedures and to draft a code of conduct. The resolution,²⁵ which was put to vote was supported by all members of the Council belonging to the African Group, almost all Asian States, and surprisingly also by Brazil and Ecuador. As the framework for the institution-building process had been adopted by consensus at the beginning of the year, the tabling of the resolution was a deliberate attempt to re-open the issues that had been agreed upon. It also was a successful demonstration of the shift in the balance of power and votes within the Council.

By the end of April 2007, when the working groups had completed their final session, many of the key concerns still had to be resolved. It is at this stage that Ambassador De Alba took control of the process himself as the Chairperson of the three working groups. After holding a number of consultations, Ambassador De Alba put forward a President's text in early June to assist negotiations.²⁶ The

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20 Members of the Council, other States and observers, NGOs and national human rights institutions (NHRIs) with the requisite accreditation could participate in the working groups' sessions.

21 Council decision 1/104. The working group was authorised to meet for 20 days.

22 Council decision 1/103. The working group was authorised to meet for 10 days.

23 Council resolution 3/4. The working group was authorised to meet for 10 days.

24 Only a small number of NGOs were able to participate in the sessions of the working groups.

25 Council resolution 2/1.

26 The President released three versions of the President's text from the 4th to 18th June 2007. These are available at the OHCHR extranet at <http://portal.ohchr.org/>. This paper refers to and quotes extensively from the final version of the text adopted on 18 June 2007 which is included in A/HRC/5/L.2. This document is also available on the extranet.

President's text built on the facilitators work and the text or ideas that they had identified as areas of consensus or in some cases their proposals to reach consensus. He also included his own proposals to solve pending issues, based on the consultations he had held.

4.2. The end game

The President's text only set out the broad framework for each of the mechanisms. The appeal of the text lay in the fact that the most negative proposals had been kept out.

The President's text only set out the broad framework for each of the mechanisms so that this could be adopted by the deadline set by the General Assembly. Many of the important operational details such as the guidelines for submission of information and schedule for the UPR, criteria for the selection of special procedure mandate holders and members of the Human Rights Council Advisory Committee, schedule for review of the special procedures, arrangements for the Sub-Commission's working groups and the social forum were left to be resolved by the Council at the sixth session in September 2007. It was only on the 17th June 2007, a day before the package was due to be adopted, that the President finally dealt with the issue of country mandates, and proposed an agenda (till this stage he had merely included the text from the facilitator's last non-paper). He suggested that all the existing country mandates, barring the two on Cuba and Belarus, would be extended and reviewed along with the thematic special procedures. China's proposal for a two thirds majority for all country-specific resolutions was not reflected in the text. Though the consensus provisions that were included did not provide much in the way of a reform or a strengthening of the system, the appeal of the text lay in the fact that the most negative proposals had been kept out.

There was no doubt that if the Council failed to agree, its failure would be a highly publicised one.

The President, it seemed, may have been using the two main weapons he had. The first was the desire for consensus, which was asserted by many States in part as a strategy to offset the changed membership of the Council. The implicit threat underlying this strategy was that an institution-building package that was adopted without consensus would lack legitimacy (especially if the European Union chose not to support the package). The second was the fear that if a package was not adopted before the deadline set by the General Assembly, all the members of the Council would have egg on their faces. The Council had been under unprecedented media scrutiny since its creation, perhaps in part because of John Bolton's strong critique of it at the eve of its creation at the General Assembly. There was no doubt that if the Council failed to agree, its failure would be a highly publicised one. Ambassador De Alba, looked as though he was targeting this fear, when he made it clear that any attempt to amend any part of his document would lead to its withdrawal.

The President took a risky gamble in dealing with the issue of country mandates a day before the final text was due to be adopted. China had set up a strong stance against country mandates and insisted on a two thirds majority rule for the creation of any new mandate. There was a strong chance that the Chinese would not react too well to what they would perceive as a loss of face. The gamble almost did not pay off. The Council met on 18 June 2007 only to break up into smaller consultations as there was no agreement on the final text. The two sticking points were the Chinese, who were insisting on the inclusion of their proposal of two thirds majority requirement and the Canadians, who objected to the inclusion of

a separate agenda item on Palestine and the occupied Arab territories. Negotiations continued the whole day with NGOs and other observers watching the clock. The Council's membership was due to change at midnight on the 19th of June 2007. The situation degenerated to the verge of farcical when a group of Mariachi's,²⁷ who had been booked for what was hoped would be the celebration of the adoption of the institution-building package, came out to play upbeat music. In marked contrast, reports were filtering in that the President had threatened to withdraw his text and the entire process was falling apart.

Some say just before the stroke of midnight, others say a minute past,²⁸ the President announced that agreement had been reached on the institution-building package, which would be formally adopted the next morning. However, next morning the drama continued when Canada raised a point of order to the effect that it had not agreed to the institution-building package. It pointed out that Ambassador De Alba had promised that the Council could take action on the proposed text, including the code of conduct on the 19th of June. Canada explained that it could not support the package because of the inclusion of the agenda item on Palestine and the occupied Arab territories and the termination of the mandates on Cuba and Belarus. The newly appointed President of the Council, Ambassador Costea did not give Canada the opportunity to vote on the institution building package itself. He instead asked the Council to vote on his ruling that the package had been agreed by consensus. Some regard this as a clever procedural manoeuvre and others describe as an "aggressive Orwellian move".²⁹ The Council voted 46 to 1 in favour of the new President's interpretation of events. If the attempt was aimed at ensuring that future references to the adoption and the record would refer to its being adopted by consensus, it seems to have been successful. However, as consensus is not a legal requirement and as Canada has clearly recorded that it had not joined the consensus, it would perhaps be more accurate to say that the package was adopted by consensus minus one.

The rabbit was pulled out of the hat at the last minute and the package was perhaps the best political outcome that could be expected considering the membership of the Council and the positions that had been adopted by various States throughout the year. What the package represents in terms of a human rights outcome or in value added or lost in terms of mechanisms for the protection of human rights, however, remains a different measure and story. It is this assessment that I hope to focus on in the chapters that follow.

The newly appointed President of the Council, Ambassador Costea did not give Canada the opportunity to vote on the institution building package itself. He instead asked the Council to vote on his ruling that the package had been agreed by consensus.

27 A troupe of Mexican musicians.

28 UN Watch, 'Geneva's Midnight Secret: Reform's Missed Deadline', available at http://www.unwatch.org/site/c.bdKKISNqEmG/b.1317481/k.96E7/View_From_Geneva/apps/nl/newsletter2.asp#e3999055.

29 UN Watch, 'Consensus Declared – Whether Canada Consented Or Not', available at <http://www.unwatch.org/site/apps/nl/content2.asp?c=bdKKISNqEmG&b=1317481&ct=3978271>.

5. Agenda and rules of procedure

5.1. Agenda

The Commission had a fixed agenda with twenty one agenda items, which was adopted in 1998³⁰ after detailed political negotiations. This agenda did not change from year to year and therefore participants, particularly NGOs, benefited from the predictability of knowing approximately when a particular agenda item would come up during the annual session and which thematic item they could present their particular concerns under. The main disadvantage of this approach was the lack of prioritisation of discussions, duplication of concerns and issues across agenda items, and that its rigid structure did not provide for genuine dialogue or focused action.³¹

In the discussions over the last year in the working group, a number of States expressed their preference for a structured agenda, with pre-identified thematic issues, on the lines of the Commission's agenda.³² Others suggested having a generic agenda, which would not identify specific thematic issues in advance but would instead allow States to suggest for each year, the issues they wished to see addressed.³³ These States thought that predictability could be ensured through the annual programme of work, which would identify which session the different issues would be discussed at.

It is a structured agenda, with ten agenda items, and includes the thematic and one country-specific agenda items that proponents of a structured agenda had argued most strongly for.

The institution-building package that was finally adopted by the Council provides for a compromise between these two proposals. It is a structured agenda, with ten agenda items, and includes the thematic and one country-specific agenda items that proponents of a structured agenda had argued most strongly for.³⁴ It also includes agenda items focused on different human rights mechanisms and bodies that are created by the Council or which it interacts with.³⁵ The new agenda, as it currently stands, represents an improvement on the Commission's agenda by providing for a mixture of predictable standing agenda items and broader and more flexible agenda items. The sub-agenda item on the 'interrelation of human rights and human rights thematic issues' and the fact that civil and political and economic, social and cultural rights are dealt with under the same agenda item offers the prospect of a more comprehensive discussion on cross-

30 Commission on Human Rights resolution 1998/84.

31 For a further discussion of the Commission's agenda and main choices and questions in the institution-building process in this regard, see M. Abraham, *A New Chapter For Human Rights*, n. 10 above, pp. 20–23.

32 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, and Zimbabwe.

33 Germany (on behalf of the EU), Canada, Guatemala, Portugal, the Netherlands, Switzerland, the UK, and the USA among others.

34 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development; human rights situation in Palestine and other occupied Arab territories; follow-up and implementation of the Vienna Declaration and Programme of Action; and racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action.

35 These include the annual report of and updates by the High Commissioner for Human Rights, other reports from her office and the Secretary-General, reports of the Advisory Committee and complaint procedure, and an agenda item on the UPR.

cutting issues and violations. The agenda items on human rights situation that require the Council's attention and technical assistance and capacity building offer opportunities for States and NGOs to raise concerns about the situation in particular countries. The inclusion of the former agenda item is a very positive outcome in the face of the strong opposition of some States, during the working group, to this item and discussion and action on country situations outside the UPR and complaint procedure.

A few NGOs have publicly criticised the singling out of the human rights situation in Palestine and other occupied Arab territories as an agenda item.³⁶ This agenda item was also the reason why Canada was unwilling to join the consensus on the institution-building package. There can be no doubt that the situation in Palestine and in the other occupied Arab territories should be addressed by the Council. It is regrettable however that it was not included within a general item on occupation, as suggested by some countries, as this would have enabled the Council to widen its focus. Another significant omission is the failure to include an agenda item on 'follow up of decisions of the Human Rights Council', a positive innovation that had been introduced last year by the Council and proposed during the Working Group's sessions. The Council will of course have the flexibility to add other agenda items for each session so could choose to continue this practice.

The extent to which the new agenda will represent an improvement on the Commission's agenda will largely depend on how the programme of work for the year and each session will be developed. For nationally based NGOs, it will be important that the Council clearly indicate how issues will be divided across sessions and the agenda for each session in time for them to plan their participation. At present, there is no annual programme of work for 2007–2008 and Ambassador Costea, the President of the Council, has announced that he would discuss this and the calendar for the year with delegations so that this can be adopted at the beginning of the sixth session.³⁷

The extent to which the new agenda will represent an improvement on the Commission's agenda will largely depend on how the programme of work for the year and each session will be developed.

5.2. Working methods and rules of procedure

The Council was presented with an opportunity to reform the aspects of the working methods and institutional culture of the former Commission. Over the course of last year, however, it appeared that very few States wanted to truly reflect on this issue or to suggest innovative procedures and mechanisms for the Council. States chose to concentrate on a very narrow range of issues in their discussions on working methods and rules of procedure. These primarily focused on the need for meetings to convey information about prospective resolutions, some other institutional arrangements, and guidelines and rules for special sessions of the Council.³⁸ The Council also adopted its rules of procedure.

States chose to concentrate on a very narrow range of issues in their discussions on working methods and rules of procedure.

³⁶ See Amnesty International, Conclusion of the United Nations Human Rights Council's institution-building: Has the spirit of General Assembly resolution 60/251 been honoured? (Amnesty International, 20 June 2007), available at <http://web.amnesty.org/library/Index/ENGIOR410152007>. See also Human Rights Watch, 'UN: Rights Council Ends First Year with Much to Do', (19 June 2007), <http://hrw.org/english/docs/2007/06/18/global16208.htm> and UN Watch, 'Castro and Lukashenko to Celebrate Human Rights Council Reform Package', (17 June 2007), available at http://www.unwatch.org/site/c.bdKKISNqEmG/b.1317481/k.96E7/View_From_Geneva/apps/nl/newsletter2.asp.

³⁷ To be held from 10–28 September 2007.

³⁸ The most significant of which is that a special session should be held between two to five days after the request for a special session is received. Sponsors of draft resolutions are also encouraged to present them as possible and to hold open-ended consultations on such drafts.

The most controversial proposal was that any resolution should be only adopted if it has the support of two-thirds of the membership. The Council would have been effectively crippled from taking action.

The most controversial proposal on rules of procedure was China's proposal that any resolution on the situation of human rights within countries should be tabled only with the support of one third of the members of the Council and adopted only if it has the support of two-thirds of the membership. If this proposal had been accepted, the Council would have been effectively crippled from taking action on situations in countries. The final text merely provides a guideline, under the methods of work section, that proposers of a country resolution have the responsibility to secure the broadest possible supports for their initiatives (preferably 15 members) before action is taken.

The main innovation in relation to the working methods and rules of procedure is the introduction of the possibility of the Council using other work formats and outcomes other than resolutions and decisions. The section on working culture calls on States to notify proposals and submit draft resolutions early and to exercise restraint to avoid proliferation of resolutions.

5.3. Participation of NGOs and NHRIs

Rule 7 of the rules of procedure repeats the content of paragraph 11 of General Assembly resolution 60/251 in relation to the participation of observers, specialised agencies, NGOs and NHRIs.³⁹ In relation to the participation of NHRIs, it clarifies that their participation shall be based on arrangements and practices agreed upon by the Commission including resolution 2005/74, which permitted NHRIs to make statements under all agenda items. The institution-building package therefore preserves the rights of participation of NGOs and NHRIs.

Ambassador De Alba was able to develop the practice of NGOs participating in the Council's interactive dialogues with special procedures and ensure their full participation in the institution-building process and the special sessions.

Over the last year, Ambassador De Alba was able to develop the practice of NGOs participating in the Council's interactive dialogues with special procedures and ensure their full participation in the institution-building process and the special sessions.⁴⁰ He was careful not to lay down strict guidelines on NGO participation, as this may have opened the issue up for debate in the Council. He instead relied on NGOs themselves to manage the time available and suggested broad principles rather than strict quotas to manage the number of times an NGO spoke and the choice of speakers. This approach was successful for the most part because most NGOs were willing to cooperate and because of the efforts of the NGO Liaison Officer. It was however possible for NGOs to do this in the context of the institution-building process as relatively few NGOs were present for the sessions. A few States suggested in the discussions at the working group that NGO participation in the interactive dialogues should be seen as an exception and that there was no guarantee that this would be continued in future sessions.⁴¹ The working group

39 "The participation of and consultation with observers ... including national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities".

40 See also P. Scannella and P. Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled', [2007] 7 Human Rights Law Review 41, see pp. 65-67.

41 Algeria (on behalf of the African Group).

did not however enter into an in-depth discussion on NGO participation or make any further decisions in this regard. Two other innovations that were useful for the work of NGOs were the introduction of the extranet,⁴² under which documents and statements are posted online, and webcasting of the sessions of the Council.⁴³

As the Council moves towards more substantive discussions on human rights issues, many more NGOs are likely to participate in its sessions. The issue of speaking rights is likely to come up then and may require skilful resolution.

42 Available at <http://portal.ohchr.org> (fill up the form at <http://www.ohchr.org/english/bodies/hrcouncil/form.htm> to obtain the user name and password).

43 The webcasts, including archived video footage are available at <http://www.un.org/webcast/unhrc/index.asp>.

6. The system of expert advice: expertise without initiative

The Sub-Commission acted as a ‘think-tank’ and was responsible for carrying out studies and preparing papers on human rights issues. It carried out the foundational work for a large number of human rights standards that were adopted by the Commission.

The Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) was the main subsidiary body of the Commission on Human Rights (the Commission). The Sub-Commission was made up of 26 independent human rights experts, who were elected by the Commission. The Sub-Commission acted as a ‘think-tank’ and was responsible for carrying out studies and preparing papers on human rights issues. It carried out the foundational work for a large number of human rights standards that were adopted by the Commission.⁴⁴ Much of this work originated as initiatives of the Sub-Commission itself and was not based on a request by the Commission.⁴⁵ It also highlighted new and emerging areas of human rights concerns, gaps in the protection of human rights, and provided guidance of the interpretation and implementation of human rights standards.⁴⁶ The Sub-Commission initiated the practice of allowing NGOs without ECOSOC accreditation to participate in many of its working groups’ sessions. It therefore had a far wider interaction with NGOs than other institutions in the UN system.

In the last few years, the Commission increasingly began to curtail the powers of the Sub-Commission and marginalise the importance of its work. The Sub-Commission’s greatest weakness lay in its membership as implemented by the Commission. Many members of the Sub-Commission occupied other roles that generated conflicts of interest and hampered their ability to carry out their work. Some also lacked the necessary expertise to do so.

6.1. Structure and membership

The institution-building package provides for the creation of a new body for the provision of expert advice to the Council, the ‘Human Rights Council Advisory Committee’.

The institution-building package that was adopted by the Council provides for the creation of a new body for the provision of expert advice to the Council, the ‘Human Rights Council Advisory Committee’. There was a prolonged debate over the year in the working group on review of mechanisms and mandates about whether the Council should have a formally structured body that meets annually,⁴⁷ an ad hoc roster of experts that it could draw up on as necessary,⁴⁸ or a hybrid between the two models.⁴⁹ The Council finally chose to create a body with a formal

44 The International Convention for the Protection of All Persons from Enforced Disappearance and the UN Declaration on Human Rights Defenders are two examples of such standard-setting work.

45 F. Hampson, ‘An Overview of the Reform of the UN Human Rights Machinery’, [2007] 7 Human Rights Law Review 7, see p. 21.

46 See M. Abraham, *A New Chapter for Human Rights*, n. 10 above, pp. 52 – 60 for a brief description of the Sub-Commission and a discussion of the main issues for the review process. See also A. Eide, ‘The Sub-Commission on Prevention of Discrimination and Protection of Minorities’, in P. Alston, *The United Nations and Human Rights*, (Clarendon Press, 1995), p. 211 and www.ohchr.org/english/bodies/subcom/index.htm

47 Finland and Germany (on behalf of the EU), Australia, Canada, Japan, Switzerland, the UK, and the USA. See also ISHR’s *Council Monitor* reports on the discussions at the working group, available at www.ishr.ch.

48 Algeria (on behalf of the African Group), Argentina, Pakistan (on behalf of the OIC), Bangladesh, Colombia, Cuba, Egypt, Iran, Thailand.

49 India proposed creating a pool of experts that the Council could use as needed, which would also meet for two-weeks annually.

structure that would meet annually. The Human Rights Council Advisory Committee (the Advisory Committee) has a reduced membership (18 experts) in comparison to the former Sub-Commission. The geographic distribution of membership has also changed with a reduction in the number of members across all the regions but particularly from Western Europe and Africa.

Election continues to be the method of selection of experts but the institution-building package has introduced a potentially better nomination procedure and limits on terms. Unfortunately, proposals that all stakeholders should be able to nominate candidates were rejected and only member States can propose or endorse candidates. They are also limited to nominating or endorsing candidates only from their own region. A window of opportunity for NGO and NHRI input is provided by requiring States to consult with their NHRIs and civil society organisations in this regard and to include the names of those supporting the candidates. As with the special procedures, the package provides for the development of technical and objective requirements for the submission of candidatures, which include recognised competences and experience in the field of human rights, high moral standing and independence and impartiality. These will be approved by the Council at its sixth session.⁵⁰

The provisions in relation to disqualification on the ground of conflict of interest and the principle of non-accumulation of human rights functions also apply to candidates for the Advisory Committee. Members will serve a three year term and be eligible for re-election once. These are positive innovations that could address the deficiencies that plagued the membership of the Sub-Commission. Much will depend on the technical and objective requirements that are developed and the degree to which they are implemented and adhered to in the election process.

6.2. Sessions, powers and functions

The powers and functions of the Advisory Committee have been noticeably circumscribed in comparison to those of the Sub-Commission. The package makes it clear that the function of the Advisory Committee is to provide expertise to the Council in the manner and form requested by it, only upon its request, and in compliance with its resolutions and guidance. The Council may request the Advisory Committee to undertake these tasks collectively, through a smaller team or individually. This allows in part for the roster approach that many States were calling for. The Advisory Committee can make suggestions to the Council for improving its procedural efficiency and for further investigation proposals but only within the scope of the work set out by the Council. These shall be subject to the Council's consideration and approval.

As the expert body is virtually stripped of the power to initiate studies, this raises serious questions about how effective it will be in drawing the Council's attention to key gaps in the system in respect of standard-setting or emerging areas. The special procedures could fill part of the gap and expand the role that they also

A window of opportunity for NGO and NHRI input is provided by requiring States to consult with their NHRIs and civil society organisations and to include the names of those supporting the candidates.

The powers and functions of the Advisory Committee have been noticeably circumscribed in comparison to those of the Sub-Commission.

⁵⁰ Ambassador Alicia Gallegos of Nicaragua has been appointed to act as the facilitator on the identification of technical and objective requirements for submission of candidatures for the Advisory Committee.

The loss of initiative in the system of expert advice is a significant one and reveals a deep reluctance on the part of the Council to empower its own experts.

play in this regard. However, a lacuna will remain in terms of a collective body of experts identifying key developments and areas of future work. The loss of initiative in the system of expert advice is a significant one and reveals a deep reluctance on the part of the Council to empower its own experts. The fact that this trend had been increasingly manifested in the last few years of the Commission and starkly so in the year of institution-building does not make it any less disappointing.

The Advisory Committee is supposed to be implementation-oriented and the scope of its advice is restricted to thematic issues pertaining to the mandate of the Council. It is barred from establishing subsidiary bodies without the authorisation of the Council. It is prohibited from adopting resolutions and decisions, thereby doing away with another of the Sub-Commission's tools that nationally based actors were able to use. While the focus on implementation is a useful one, the package confirms the shift from advice and action on country situations that was forced through in 2000. The Advisory Committee also has no role within the UPR mechanism because of the strong objection from some States on any relationship between these mechanisms. The package also does not address the relationship between the Advisory Committee and the special procedures, the treaty bodies or the wider UN system. The package also fails to identify how the transition between the two bodies will be managed and what will be done with the numerous pending studies and other work of the Sub-Commission.

As the collegiate and collective nature of the Sub-Commission's discussions were highlighted as an asset by the Sub-Commission itself and by some NGOs, it is positive that this feature has been retained.

The Advisory Committee is authorised to meet for a shorter period of time than the Sub-Commission. It can convene up to two sessions for a maximum of 10 working days per but can schedule additional sessions with the prior approval of the Council. Members are also encouraged to communicate inter-sessionally. As the collegiate and collective nature of the Sub-Commission's discussions were highlighted as an asset by the Sub-Commission itself and by some NGOs,⁵¹ it is positive that this feature has been retained. To maximise the time that is available and to focus discussions, the Advisory Committee will need to organise its time well and develop a clear agenda for its sessions well in advance to enable NGOs to plan their participation. It may also wish to, with the help of the Secretariat, use video and teleconferencing facilities and other electronic modes of communication to maximise contact and discussion in between sessions.

6.3. The working groups, social forum and participation of NGOs

The issue of the most "appropriate arrangements to continue the work of the Working Groups on Indigenous Populations, Contemporary Forms of Slavery, Minorities, and the Social Forum" has been postponed for a decision by the Council at its sixth session. The President's text finally used the formulation 'to continue the work' of these bodies because of pressure from a number of States. There is however no clarity on the form that these arrangements will take. A few States suggested in the working group that some of this work could be incorporated into

⁵¹ International Commission of Jurists, *A Future Expert Body for the Human Rights Council*, (International Commission of Jurists, September 2006), available at http://www.icj.org/IMG/Expert_body_final.pdf. See also Sub-Commission decision 2006/112.

the special procedures system, perhaps by the creation of new special procedures.⁵² As the working group on indigenous populations and minorities are the most accessible forums for minority groups and indigenous peoples within the UN human rights system, it is essential that any future arrangements provide for this access.

The Advisory Committee is urged to establish interaction with States, NHRIs, NGOs and other civil society entities in accordance with the modalities of the Council. NGOs, NHRIs and other observers are entitled to participate in the work for the Advisory Committee based on arrangements including ECOSOC resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.

NGOs, NHRIs and other observers are entitled to participate in the work for the Advisory Committee.

52 The UK suggested that the working group on contemporary forms of slavery could be converted to a special procedure focused on the same issue. R. Brett, *Neither Mountain nor Molehill UN Human Rights Council: One Year on*, (Quaker United Nations Office, August 2007), p. 13.

7

The 'new' complaint procedure

The Commission would not address violations of an individual's human rights under this procedure. The procedure was intended, instead, to bring situations of massive human rights violations to its attention.

The Commission on Human Rights' (the Commission) main complaint procedure was the 1503 procedure,⁵³ under which it could receive communications (complaints) from victims or others acting on behalf of the victims regarding situations which "reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms"⁵⁴ in any country in the world. The Commission would not address violations of an individual's human rights under this procedure. The procedure was intended, instead, to bring situations of massive human rights violations to its attention.⁵⁵ The 1503 procedure was confidential and the Commission considered 'situations' in countries that come up under the procedure in a closed meeting. Complainants were informed if their cases had been taken up for processing under the 1503 procedure but were not given any further information on the proceedings themselves or the outcomes.⁵⁶

The Council discussed the new complaint procedure in the working group on review of mechanisms and mandates. It became evident very early in the process that States were unwilling to even explore the possibility of creating a new complaint procedure and instead preferred to use the 1503 procedure as the basis for discussions. In doing so, the Council lost a significant opportunity to re-develop the complaint procedures taking into account the different types of international and regional complaint procedures that have been set up in the last forty years.

7.1. Scope of the complaint procedure and admissibility

The institution-building package reiterates that the new complaint procedure will have the same scope as the 1503 procedure and will "address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms". Unlike the 1503 procedure which focused on such violations in any country in the world, the new complaint procedure states that it will do so in "any part of the world and under any circumstances". This wording may have been used to accommodate views that the complaint procedure should also focus on situations of occupation and extra-territorial action on the part of a State. As one of the main strengths of the 1503 procedure was that it was one of the few forums available to submit complaints regarding governments that have not ratified many human rights treaties or agreed to treaty bodies receiving communications, it is important that this feature has been preserved.

53 Named after the resolution by which it was created: Economic and Social Council (ECOSOC) resolution 1503 (XLVIII) of 27 May 1970.

54 Para 1.

55 A.F. Bayefsky, *How to Complain about Human Rights Treaty Violations: Choosing a Forum*, available at: www.bayefsky.com/complain/44_forum.php.

56 M. Abraham, *A New Chapter for Human Rights*, n. 10, p. 62. See pp. 62 – 71 for a brief description of the 1503 procedure and a discussion of the main issues for the review process. See also M.F. Ize-Charrin, '1503: A Serious Procedure', in G. Alfredsson, J. Grimheden et. al. (eds.), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001), p. 297.

Like the 1503 procedure, the ‘new’ complaint procedure allows any person, or group of persons or NGOs acting in good faith and in accordance with principles of human rights to submit complaints. The admissibility criteria of the 1503 procedure are maintained,⁵⁷ including the requirement that the complainant should have exhausted domestic remedies. The text however goes on to include NHRIs which have quasi-judicial competence and comply with the Paris Principles, amongst the scope of domestic remedies. This may therefore increase the burden on the complainant in some situations and could lead to disputes about when a particular NHRI satisfies these criteria.

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The 1503 procedure excluded complaints when the State against whom the complaint had been made was being examined under any public procedure of the Commission.⁵⁸ This requirement has not been included in the new mechanism. Also, the 1503 procedure excluded complaints if their subject matter fell within the mandate of any of the Commission’s special procedures; or it was possible for the complainant to submit the complaint under an individual complaints mechanism set up by a treaty, which the State in question had ratified.⁵⁹ These requirements have been relaxed by providing that only complaints that are *already being dealt with* by a special procedure, a treaty body or other UN or similar regional complaint procedure in the field of human rights shall be inadmissible.

7.2. Mechanism for review of complaints and outcomes

Complaints will continue to be reviewed through a two-stage process, with a similar composition and system of selection of the bodies carrying out the review, before they are considered by the Council.⁶⁰ The package aims at strengthening the screening process for complaints by calling for all decisions of the working group on communications to be based on rigorous application of the admissibility criteria and duly justified. It also aims at greater transparency by requiring the chairperson of the working group to provide all members with a list of all communications that he/she has rejected during the initial screening of complaints and the grounds of all decisions. Both working groups can keep a case under review, dismiss it or pass it on to the next body in the chain.

Even a superficial glance at the regional breakdown of the countries that were examined under the 1503 procedure is enough to establish that the choice of countries that were taken up and the outcomes varied greatly based on the region and the political power of the country concerned.⁶¹ Strangely, this issue was not

57 The criteria that are maintained are that the complaint should provide a factual description of the alleged violations, including the rights which are alleged to be violated; should not have manifestly political motivations and its object should not be inconsistent with the Charter, the Universal Declaration of Human Rights and other applicable human rights instruments; it should not use abusive language; or rely exclusively on reports disseminated by the mass media.

58 M.F. Ize-Charrin, ‘1503: A Serious Procedure’, in G. Alfredsson, J. Grimheden et. al. (eds.), *International Human Rights Monitoring Mechanisms*, (Martinus Nijhoff Publishers, 2001), p. 297.

59 Ibid.

60 The working group on communications will now consist of five members, one from each region, appointed from and by the Advisory Committee for a term of three years, renewable once. Admissible communications that reveal a consistent pattern of gross and reliably attested violations of human rights shall be transmitted to the working group on situations. This working group will be composed of five members of the Council, one from and appointed by each regional group, for a term of one year renewable once.

61 See Annex 5. 1, *A New Chapter for Human Rights*, n. 10 above, available at <http://www.ishr.ch/handbook/Annexes/CommProcs/1503outcms.pdf>. See also the list of countries examined under the procedure provided on the OHCHR website at <http://www.ohchr.org/english/bodies/chr/stat1.htm>.

Both working groups are required to provide a justification for their decisions, something that may help ensure more consistency and build a body of principles for decisions.

discussed at the working group. An improvement that has been introduced is that both working groups are required to provide a justification for their decisions, something that may help ensure more consistency and build a body of principles for decisions. However, this requirement alone may not be sufficient to make the body more 'objective' and 'impartial' unless the reasons provided are subject to scrutiny.

The package aims at making the procedure 'more timely' by increasing the frequency of meetings of both working groups and by providing that the Council should consider the situations brought to its attention at least once a year but also can do so "as frequently as needed". The concerned State is expected to cooperate with the complaint procedure and provide 'substantive replies' within three months unless it requests an extension of this deadline. The package also provides that the period of time between the transmission of the complaint to the concerned State and the consideration by the Council shall not "in principle" exceed 24 months. Though the attempt to reduce the time spent in processing complaints is useful, it is still not clear why the two-stage review process should take as long as 24 months and why even such a period can only be agreed to in principle.

The Council can decide to consider the reports referred by the working group on situations in public. The working group on situations can itself also recommend to the Council that it consider a situation in public, "in particular in case of manifest and unequivocal lack of cooperation". The Council is required to consider such recommendations on a priority basis at its next session. The outcomes of the procedure remain the same as that under the 1503 procedure, with some minor tweaks.⁶²

The package does not make any provision for interim measures of protection or remedies to the individual.

The package does not make any provision for interim measures of protection or remedies to the individual. These measures would have helped make the complaint procedure more 'victim-oriented' and attractive to complainants. At the moment, the procedure is likely to remain part of an incremental technique for "placing gradually increasing pressure on offending governments".⁶³ It may be most useful to complainants that are in a position to follow up on these issues at the Council and/or are campaigning for such outcomes.

One key weakness of the 1503 procedure that has been addressed under the new complaint procedure is the lack of information provided to the complainant. The complainant will now be provided information on the progression of the complaint at the two screening stages and the final outcome. The package also provides for an important innovation that the identity of the complainant can be kept confidential at his/her request from the concerned State. Regrettably, the complainant is still not provided with an opportunity to respond to the information provided by the State.

⁶² The Council can: 1) discontinue reviewing the matter when further consideration or action is not warranted; 2) keep the situation under review and request further information from the State within a reasonable period of time; 3) keep the situation under review and appoint an independent and "highly qualified" expert to monitor the situation and report back to the Council; 4) discontinue reviewing the matter under the confidential complaint procedure in order to consider it publicly; and 5) recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

⁶³ T. van Boven, *People Matter: Views on International Human Rights Policy*, (Meulenhoff, 1982), p. 65.

There is also no clarity at the moment on what will be done with the communications that are pending from the 1503 procedure. Until the Advisory Committee is set up and establishes the new working group on communications, there is a gap at this level. The President is supposed to suggest a solution in this regard and but has not so far indicated the options that he is considering.

7.3. A lost opportunity

Proposals for the complaint procedure to act as an early warning system for the Council by drawing its attention to emerging situations of gross violations were not taken up.⁶⁴ Neither were proposals for sharing information on patterns of cases with the special procedures or the UPR. Remarkably, some States were even opposed to better data management systems, which will allow the special procedures and treaty bodies to be aware of communications that are taken up under the complaint procedure to avoid overlap. It seemed that the confidentiality of the procedure was sacrosanct at all costs.

It would be fair to say that though there have been some improvements, the Council lost the opportunity to truly review the complaint procedure.

Proposals for the complaint procedure to act as an early warning system for the Council by drawing its attention to emerging situations of gross violations were not taken up.

⁶⁴ For further details on the discussion on this issue and the positions adopted by various States, see See also ISHR's Council Monitor reports on the discussions at the working group, available at www.ishr.ch. (missing in the formatted document)

8 Special procedures: preserving the system

The special procedures are widely considered the principal achievement of the Commission and along with the treaty bodies, are at the very core of the UN human rights system.

The Commission set up various procedures and mechanisms that examine, monitor, and publicly report on human rights situations in specific countries⁶⁵ or on specific human rights and issues⁶⁶. These procedures are all together referred to as the ‘special procedures’ and were assumed by the Council, along with the other mechanisms of the Commission. The special procedures are widely considered the principal achievement of the Commission and along with the treaty bodies, are at the very core of the UN human rights system.⁶⁷ The General Assembly directed the Council to review and “where necessary, improve and rationalize” these mechanisms in order to maintain a ‘system of’ special procedures.⁶⁸ This review process became one of the two key issues that States and NGOs considered to be of primary importance.

In contrast to the UPR, which was a blank slate, the special procedures had been in existence for more than 25 years. The idea of a review of special procedures did not develop in a vacuum. There had been for many years a clash between two conflicting agendas in relation to the special procedures. The first, what I termed a ‘negative reform agenda’⁶⁹ has been characterised by an increasing number of attacks⁷⁰ on the special procedures to limit their independence or working methods. Other actors in the system including the special procedures themselves, UN bodies, States, OHCHR, and NGOs have been engaged in identifying the major challenges and limitations faced by special procedures and steps that need to be taken to strengthen the system in order to push a ‘positive reform agenda’.⁷¹ Miko Lempinen argues that these conflicting interests that have lead to “an almost endless review”.⁷²

The discussions in the institution-building year were therefore not unique in the history of the Commission and the Council. This round of discussions however saw the negative agenda gain more prominence. This was in large part due to the fact that many of the negative proposals were put forward on behalf of entire

65 Referred to as country mandates.

66 Referred to as thematic mandates.

67 For a brief description of the special procedures and their work and the main issues involved in the review process see M. Abraham, *A New Chapter for Human Rights*, n. 10 above, pp. 33 – 50. See also the information provided on the OHCHR website at <http://www.ohchr.org/english/bodies/chr/special/index.htm>. See also J. Gutter, ‘Special Procedures and the Human Rights Council: Achievements and Challenges Ahead’, [2007] 7 Human Rights Law Review 93.

68 Para 6, General Assembly resolution 60/251.

69 M. Abraham, *A New Chapter for Human Rights*, n. 10 above, p. 41.

70 See ISHR, *Overview of the 61st Session of the Commission on Human Rights and Overview of the 60th session of the Commission on Human Rights* available at www.ishr.ch/hrm (see under archived reports).

71 Seminar on Enhancing and Strengthening Special Procedures, OHCHR, 12-13 October 2005), available at: http://portal.ohchr.org/portal/page?_pageid=1674,1&_dad=portal&_schema=PORTAL. Measures to enhance the special procedures have also been raised in the Secretary-General’s report on *Strengthening of the United Nations: an Agenda for Future Change*, A/57/387, (9 September 2002), p. 13.

72 Since the World Conference on Human Rights, 1993, various attempts have been made to review the special procedures and to enhance their functioning. For further details see: M. Lempinen, *Challenges Facing the System of Special Procedure of the United Nations Commission on Human Rights*, (Institute for Human Rights, Åbo Akademi University, 2001), pp. 248-259.

regional or other groupings. It was also a reflection of the change in distribution of seats in the Council. A number of States did put forward proposals to address the structural and other weaknesses that impair the work of special procedures; in particular, the lack of cooperation and follow up by States. The fight, however, became one to preserve the existing strengths of the special procedures and the institution of country mandates, rather than to improve the system.

A very wide range of issues were discussed at the working group touching on all aspects of the work of special procedures. The issues considered included the process for selection and appointment of mandate holders; review, rationalisation and harmonisation of mandates; proposals to regulate the work of special procedures; working methods; cooperation by and with governments; relationship with the Council; relationship with other human rights mechanisms and actors; and support from OHCHR and funding.⁷³ It became evident after the second session, in February 2007, that it would not be possible to reach any final decisions on these issues because of the breadth of the discussions and the differences in view points.

The final institution-building package only deals with the selection and appointment of mandate holders and sets out a broad framework for the review of special procedures, the time-frame and schedule for which is still to be decided by the Council. The country mandates dealing with Cuba and Belarus were terminated. A code of conduct for special procedures was also adopted along with the package. As this limited package meant that the major threats against the special procedures had been staved off at least for the moment, for most involved in the political negotiations, its content was a relief rather than a disappointment.

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8.1. Appointment process

A number of States wanted the Council to directly elect special procedure mandate holders, in order to ‘increase their credibility’.⁷⁴ Under the Commission, the Chairperson appointed the mandate holders in consultation with the bureau and the regional groups. While many States acknowledged that the former system of appointment had its shortcomings, particularly in relation to transparency, they were opposed to elections as they thought this would politicise the system.⁷⁵ The final institution-building package provides for a system of appointment by the President but with far greater political controls and subject to approval by the Council.

⁷³ Please see ISHR, ‘Human Rights Council, Working Group on Review of Mechanisms and Mandates, 13 – 24 November 2006’, *Council Monitor*, in particular pp. 2 – 4 for a quick summary, available at www.ishr.ch/hrm (see under working groups). See also the *Council Monitor* reports on the second and third sessions of the working group to assess the progress of discussions on these issues.

⁷⁴ Algeria, on behalf of the African Group, Saudi Arabia, on behalf of the Asian Group, Pakistan, on behalf of the Organization of Islamic Conference (OIC), Azerbaijan, Bangladesh, China, Colombia, Cuba, Democratic People’s Republic of Korea, Egypt, Indonesia, Iran, Malaysia, Morocco, the Philippines, Singapore, South Africa and Tunisia.

⁷⁵ Argentina, Chile, Mexico, Republic of Korea, Slovenia and Switzerland. Germany and Finland on behalf of the European Union, Australia, Canada, Israel, Japan, Norway Poland, Portugal, the United Kingdom, and the United States of America stated that the best way to ensure independence and expertise would be for the High Commissioner for Human Rights to appoint mandate holders.

States, regional groups, international organisations, NGOs, other human rights bodies or individuals can nominate candidates as special procedures mandate holders. OHCHR will prepare and maintain a ‘Public list’ of eligible candidates, which shall include “personal data, areas of expertise and professional experience”. The candidates will have to comply with technical and objective requirements, which will be approved by the Council at its sixth session. The President of the Council, Ambassador Costea, is facilitating discussions to develop these requirements.⁷⁶

Individuals who hold decision-making positions in government or in any other organisation or entity, “which could give rise to a conflict of interest” will be excluded.

Individuals who hold decision-making positions in government or in any other organisation or entity, “which could give rise to a conflict of interest with the responsibilities inherent to the mandate” will be excluded from consideration. The exclusion of individuals who hold decision-making positions in government is a welcome development. However, there is a concern that the provision, in the way that it is drafted, could also serve to exclude many NGO candidates. As special procedures do not monitor the conduct of NGOs but do monitor States, more clarity is also needed to identify the situations in which a conflict of interest would exist because of an individual holding a decision-making position in an NGO. In response to concerns from States that some mandate holders were holding multiple positions in the UN human rights system, the package sets up a principle of non-accumulation of human rights functions.

A Consultative Group, which will be composed of five persons appointed by each regional group, will be established to short-list candidates.

A Consultative Group, which will be composed of five persons⁷⁷ appointed by each regional group, will be established to short-list candidates. Some States and NGOs queried whether the individual who is appointed need be from a member State of the Council or even if it should be a government representative. The ideal outcome would be if some regional groups nominated experts or civil society representatives to form part of the Consultative Group but such an outcome may be difficult to achieve. The Group will be assisted by OHCHR and will propose a list of candidates to the President “who possess the highest qualifications for the mandates in question and meet the general criteria and particular requirements”. It is supposed to take into account the views of stakeholders, including special procedures mandates holders while determining the expertise, experience, skills and other relevant requirements for each mandate. The Consultative Group is allowed to consider candidates with equal or more suitable qualifications outside the public list “under exceptional circumstances and if a particular post justifies it”. All the Consultative Group’s recommendations to the President should be public and “substantiated”.

The President will identify an appropriate candidate for each vacancy on the basis of the recommendations of the Consultative Group and following broad consultations, especially with the regional group coordinators. The appointment will be completed upon the approval of the Council. The package provides that if necessary, the President will conduct further consultations to ensure the endorsement of the proposed candidates. This seems to suggest that if the initial candidate

⁷⁶ The package identifies expertise; experience in the field of the mandate; independence; impartiality; personal integrity; and objectivity as general criteria. Gender balance; equitable geographic representation; and appropriate representation of different legal systems are also listed as additional criteria that should also be considered.

⁷⁷ The individual who is appointed is then expected to serve in a personal capacity.

is considered unsuitable, the Council would have to wait for the President to suggest alternate candidates and could not itself select or elect another candidate.

The development of technical and mandate specific criteria and the requirement that recommendations of the Consultative Group be public and substantiated are significant improvements on the past system. It is hoped that this will lead to the identification of a wider and more qualified pool of candidates and for more transparency in the appointment system. However, the double process of screening by a Consultative Group and consultation with regional group coordinators may require candidates to have a broad base of support that caters to the lowest common denominator.

The double process of screening by a Consultative Group and consultation with regional group coordinators may require candidates to have a broad base of support that caters to the lowest common denominator.

8.2. Review of mandates

Despite an entire year of discussions, the working group did not develop any criteria for the review of special procedure mandates.⁷⁸ This did not stop some States from insisting that the working group immediately begin reviewing individual mandates.⁷⁹ Strangely, when they were given the opportunity to review mandates individually during the second and third sessions of the Working Group, no State was willing or perhaps prepared to carry out this exercise. Many States argued that the system of country mandates should be ended, that country situations should only be addressed through the Universal Periodic Review (UPR) mechanism or special sessions and for much stricter criteria for the creation of country mandates.⁸⁰ Belarus, Cuba and the Democratic People's Republic of Korea (DPRK) also pressed for the country-mandates set up to monitor the human rights situations in their countries to be terminated as part of the individual review of mandates.⁸¹ The thematic special procedure mandates came under less attack but some suggestions were made for terminating, merging or 'clustering' mandates to address duplication and overlaps. There were very few concrete suggestions though in this regard.⁸²

Despite an entire year of discussions, the working group did not develop any criteria for the review of special procedure mandates.

In informal consultations during the fourth session of the Council, Cuba suggested that it was willing to consider postponing the review of thematic mandates till after the fifth session. It suggested that mandates could be reviewed when conducting negotiations on resolutions to continue the mandate. The institution-building package builds on this proposal and states that the "review, rationalization and improvement of each mandate would take place in the context of the negotiations of the relevant resolutions". An assessment can also take place during the interactive dialogues with special procedures, in a separate segment. The

78 See in this regard, H. Hannum, 'Reforming the Special Procedures and Mechanisms of the Commission on Human Rights', [2007] 7 Human Rights Law Review 73, see pp. 79–82.

79 China, Colombia, Cuba, Egypt, India, Iran, Philippines, Russian Federation and Saudi Arabia.

80 Algeria (on behalf of the African Group), Bangladesh, Belarus, China, Cuba, the Democratic People's Republic of Korea, India, Iran, Malaysia, and the Indian Movement Tupac Amaru (an NGO).

81 See ISHR, 'A Stock-taking of the Human Rights Council's Institution-Building Process', (2006) 64 Human Rights Monitor 13, p. 15.

82 Cuba recommended replacing the working group on enforced disappearances, the working group on arbitrary detention, and the working group on mercenaries with individual rapporteurs focused on these issues but also stated that they were open to discussing this further. The Russian Federation also suggested terminating or merging the mandate of the independent expert on the effects of economic reform policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights.

package does not provide criteria for such an assessment but states that it should focus on “the relevance, scope and content of the mandate”. The package is clear that any decision to streamline, merge or eventually discontinue mandates “should always be guided by the need for improvement of the enjoyment and protection of human rights”.⁸³

Mandates will be renewed until the date on which they will be considered by the Council according to the programme of work.

In relation to country mandates, decisions to create, review or discontinue country mandates are expected to take into account “the principle of cooperation and genuine dialogue aimed at the strengthening the capacity of Member States to comply with their human rights obligations”. The package includes, in an annex, a list of mandates. It provides that these mandates will be renewed until the date on which they will be considered by the Council according to the programme of work.⁸⁴

The President’s text did not address the issue of country mandates till the day before the package was due for adoption by the Council. He included the country mandates in the list of mandates that will be renewed and reviewed, “where applicable” by the Council but, without any explanation, Cuba and Belarus were dropped from the list. The phrase “where applicable” was included to accommodate the views of States which did not want the mandate on the Occupied Palestinian territories to be reviewed and wanted it be clear that this mandate will continue to last till the end of the occupation. The criteria for country mandates are detailed in a footnote in the package: there is a pending mandate of the Council or the General Assembly to be accomplished or the nature of the mandate is for advisory services and technical assistance. The reference to a mandate to be accomplished is confusing but appears to be referring to whether the mandate has pending reporting responsibilities to the Council or the General Assembly. The mandates on DPRK, Democratic Republic of Congo (DRC), Burundi, Palestinian territories occupied since 1967, Sudan and Myanmar report to the General Assembly and would appear to satisfy this criterion. The mandates on Haiti, Liberia, Somalia satisfy the criterion that the mandate is for advisory services and technical assistance. Burundi and Sudan satisfy both criteria. DRC satisfies all three as it also has to report to the next session of the Council. That conveniently leaves out only Cuba and Belarus. It seems clear that the decision on which mandates would be terminated were not based on an application of criteria that were decided in advance but a reflection of the political negotiations. Cuba and Belarus had fought most strongly for their mandates to be ended and though some other States were opposed to this, if the issue had gone to vote, they would not have had sufficient votes to challenge this decision.⁸⁵ DPRK, which had also called for the termination of its mandate, did not succeed because it did not appear to have the same degree of political support.

83 It also identifies a set of broad guidelines including that mandates should offer a clear prospect of an increased level of human rights protection and coherence within the system; equal attention should be given to all rights; unnecessary duplication should be avoided; thematic gaps will be identified and addressed including by means other than the creation of special procedure mandates; any consideration of merging mandates should have regard to the content and predominant functions of each mandate and the mandate holders’ workloads; efforts should be made to identify which structure (expert, rapporteur or working group) is the most effective in terms of increasing human rights protection; and new mandates should be as clear and specific as possible to avoid ambiguity.

84 On an “exceptional basis”, current mandate holders who have served more than six years may have their terms of office renewed till the review of their mandate and the selection process for the new mandate holders are completed.

85 See Ambassador Nicholas Thorne, Ambassador and Permanent Representative of Great Britain and Northern Ireland to the United Nations, ‘Speech on the Human Rights Council’, (London, 5 July 2007), available at www.fco.gov.uk/Files/kfile/HRC%20London%20Speech%20NT_.htm.

The termination of the mandates on Belarus and Cuba was perceived as the price of continuing the remaining country mandates. Even at this cost, the preservation of the tool of country mandates represents an important victory for the institution-building process. However, concerns persist about what will happen to many of the country mandates when they are reviewed by the Council and the difficulties of establishing new country mandates in the future given the strong resistance of several States to this tool.

The preservation of the tool of country mandates represents an important victory for the institution-building process.

There is also no clarity about what will happen during the review of thematic mandates. It appears from the discussions at the working group that there is no obvious threat to the thematic mandates and that the negotiations on most of the mandates may proceed as it did in the past. The suggestion to convert some of the working groups to special rapporteurs (individual experts) may be taken up. The possibility of some mandates being targeted or tampered with also remains but the level of risk and to which mandates will only become evident after the reviews commence. States may also choose to invest their energies in appointing a weaker mandate holder rather than changing the mandate. This may be an easier task, but again will depend on the extent to which the members of the Consultative Group are willing to act independently of their regional groupings.

8.3. Code of conduct and the manual of special procedures

Algeria (on behalf of the African Group) tabled a resolution at the resumed second session of the Council which directed the working group to review the manual of special procedures⁸⁶ and to draft a code of conduct. The resolution,⁸⁷ which was put to vote, was supported by all members of the Council belonging to the African Group, almost all Asian States, and also by Brazil and Ecuador.⁸⁸ Though a number of States opposed the code on the grounds that it was not necessary⁸⁹ and would restrict the independence of special procedures, they were in the minority amongst members of the Council.⁹⁰

The working group was not able to reach any agreement on this issue as it was divided about the need for a code of conduct, the content of the code, and the document to use as the basis of negotiations.⁹¹ The African Group draft code of

86 The Manual was originally adopted in 1999, at the 6th Annual Meeting of Special Procedures. It aims to provide guidance to the special procedure mandate-holders and covers a range of issues related to their work and was revised by the coordination committee of the special procedures in 2006. The draft revised Manual has been circulated and been made publicly available for comments from governments, civil society organisations, independent experts and all other stake holders. See *Manual of the United Nations Special Procedures*, available in English, French and Spanish at www.ohchr.org/english/bodies/chr/special/manual.htm.

87 Council resolution 2/1.

88 Algeria, Azerbaijan, Bahrain, Bangladesh, Brazil, Cameroon, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, India, Indonesia, Japan, Jordan, Malaysia, Mali, Mauritius, Morocco, Nigeria, Pakistan, the Philippines, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia, and Zambia voted in favour of the resolution. Argentina and Uruguay abstained.

89 They argued that the manual of the special procedures and the General Assembly's *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* (the Regulations) made a code of conduct redundant.

90 Canada, Czech Republic, Finland, France, Germany, Guatemala, Mexico, Netherlands, Peru, Poland, Republic of Korea, Romania, Switzerland, Ukraine and United Kingdom.

91 For details of the discussions and the positions adopted by various States see the *Council Monitor* reports on the second and third sessions of the working group, available at www.ishr.ch/hrm (under Working Groups).

conduct circulated by Algeria was finally used as the basis of negotiations. The Algerian Ambassador therefore held consultations on the draft and circulated a number of revised versions of the text based on the comments he received. The final revised version,⁹² which was acceptable to, though not supported by, all States, was adopted along with the President's text as part of the final institution-building package.

The purpose of the code of conduct is identified as enhancing “the effectiveness of the system of special procedures by defining the standards of ethical behaviour and professional conduct that special procedures... shall observe whilst discharging their duties”.⁹³ The provisions of the code complement the General Assembly's *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* (the Regulations). The code also provides that the provisions of the draft manual of special procedures should be in consonance with those of the code.

The code identifies general principles of conduct for mandate holders, building on those identified in the Regulations. These include an emphasis on the need for mandate holders to act in an independent capacity, exercise their functions according to their mandate, and to be free of any extraneous influence, incitement, pressure, threat or interference, whether from stakeholders or others.⁹⁴ They can not seek or accept instructions, honours, gifts or remuneration for any government, organisation, or pressure group and should not use their office for private gain.⁹⁵

Mandate holders are expected to carry out their mandate “while fully respecting the national legislation and regulations of the country wherein they are exercising their mission”.

The code confirms that mandate holders are entitled to privileges and immunities under relevant international instruments and that their responsibilities are international.⁹⁶ Without prejudice to these privileges and immunities, mandate holders are expected to carry out their mandate “while fully respecting the national legislation and regulations of the country wherein they are exercising their mission”.⁹⁷ The coordination committee suggested a qualification to this requirement “to the extent that these laws and regulations are consistent with human rights and the effective performance of the mandate holder's official functions”.⁹⁸ Unfortunately, this suggestion was not taken up but after pressure from States, a clause was added that mandate holders should adhere to regulation 1 (e) of the Regulations, if any issue arises in this regard. Regulation 1 (e) would require the mandate holder to report any clash between their immunities and privileges and the national laws and regulations to the Secretary-General “who alone may decide whether such privileges and immunities exist and whether they shall be waived”. This does not exempt the mandate holder from the requirement of complying with national laws and regulations but may offer them some protection in cases where an attempt is made to misuse this provision.

92 A/HRC/5/L.3/Rev. 1, (18 June 2007).

93 Art. 1.

94 Art. 3 (a).

95 Art. 3 (f), (i) and (j).

96 Art. 4 (1) and (2).

97 Art. 4 (3).

98 See the note circulated by the coordination committee in response to the discussions on the code of conduct with an annex that includes possible elements of a code of conduct, (13 April 2007), p. 4, available at www.ohchr.org/english/bodies/chr/special/docs/note_code_of_conduct.pdf.

Mandate holders are required to exercise their functions “in strict observance of their mandate” and to ensure that their recommendations do not exceed their mandate or the mandate of the Council.⁹⁹ They are also required to take into account “in a comprehensive and timely manner” information provided by the State concerned.¹⁰⁰ In their information gathering activities, mandate holders shall “rely on objective and dependable facts based on evidentiary standards *that are appropriate to the non-judicial character of the reports and conclusions*”¹⁰¹ (emphasis added) they draw.¹⁰² On a positive note, an additional clause was put in allowing mandate holders to preserve the confidentiality of their sources of testimonies if needed to prevent harm to the individuals involved.¹⁰³

Mandate holders are required to exercise their functions “in strict observance of their mandate” and to ensure that their recommendations do not exceed their mandate or the mandate of the Council.

The early versions of the code of conduct attempted to impose a requirement that persons who send communications to the special procedures must exhaust domestic remedies and a further requirement that urgent appeals¹⁰⁴ can only be issued following an assessment into “the existence of gross human rights violations”.¹⁰⁵ In the final version, the requirement for exhaustion of domestic remedies was removed.¹⁰⁶ The criteria for the issuance of urgent appeals was also relaxed to provide that mandate holders may resort to urgent appeals when the “alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of an extremely grave nature to victims that cannot be addressed in a timely manner by the procedure under article 9 of the present code”.¹⁰⁷

Regrettably, the final version of the code requires all communications from special procedures to governments to be sent through diplomatic channels unless there is an agreement to the contrary between the government and the OHCHR.¹⁰⁸ One of the main strengths of the urgent appeal procedure was the ability of special procedure to directly contact those best placed within the government to take immediate action to stop the ongoing human rights violation. The requirement that all appeals will have to be sent through the mission in Geneva or New York, when no mission exists in Geneva, could create delays in the transmission of appeals and to its winding a slow path through the State machinery. The code also requires special procedures to ensure that concerned governments are the first recipients of their conclusions and recommendations and for the Council to be the first recipient of conclusions and recommendations addressed to it.¹⁰⁹

Regrettably, the final version of the code requires all communications from special procedures to governments to be sent through diplomatic channels.

The worst provision in the early drafts was the suggestion to create an Ethics Committee to oversee compliance with the code. Such an ethics committee would

99 Art. 7.

100 Art. 6 (b).

101 Art. 8 (c).

102 Earlier versions of the draft called on mandate holders to base their activities on “adequate evidentiary standards” or to “verify the veracity of the facts”; which could have created ambiguity as to the standards to be applied and placed a high standard of proof on special procedures. This provision was modified based on comments by States and the coordination committee.

103 Art. 8 (b).

104 Urgent appeals are used to draw the attention of the government to information about a violation that is allegedly ongoing or about to happen.

105 African Group Proposal, (13. 03. 07), available on the OHCHR extranet at <http://portal.ohchr.org/>.

106 Art. 9.

107 Art. 10.

108 Art. 14.

109 Art. 13 (c).

have most likely been composed of members from each regional group and could have led to an extremely politicised system of oversight. Thanks to the resistance of many States, this provision was dropped and the code now merely provides that the mandate-holders are accountable to the Council in the fulfilment of their mission. There are concerns however that the idea of the ethics committee could be resurrected. It has to be acknowledged that there are instances where some special procedure mandate holders may exceed the scope of their mandate or behave in a manner which is inappropriate to their position. If the code has the effect of strengthening self-regulation by mandate holders or by the coordination committee, this would be best outcome. The danger of course is that they will not get the opportunity to do that or the provisions will be misused as a pretext to target all or other mandate holders.

The code therefore stays a one way street dealing only with the responsibilities of special procedures but not of states.

The coordination committee had suggested that the issue of cooperation by States with the special procedures should also be addressed in the code. This suggestion was rejected and the code therefore stays a one way street dealing only with the responsibilities of special procedures but not of States. The only reference to cooperation by States is found in the preamble to the code, which urges all States to cooperate with, and assist, the special procedures including by providing all information in a timely manner and responding to communications without undue delay.

The code that was adopted was the best of the worst options put forward and again, is being judged by most involved, more by the disasters that were averted than the merits of its final text. As with other issues, the impact of the code on the activities of the special procedures will only be apparent with time.

8.4. Putting it in context: disaster averted?

Most of the special procedures and the system itself have survived the review process. The biggest achievement of the institution-building package in this regard was that it maintained much of the status quo.

Most of the special procedures and the system itself have survived the review process. The biggest achievement of the institution-building package in this regard was that it maintained much of the status quo. The biggest failure was that not even one of the positive proposals put forward to address the structural and other weakness that affect the work of special procedures was taken up. This is most evident in the failure to address the issue of lack of cooperation by States with the special procedures. Other important issues that fell by the way side included measures to ensure follow-up by States and the Council; steps to make the special procedures a coherent rather than ad hoc system; relationship between the special procedures and other mechanisms of the Council, in particular the UPR and complaint procedure; and ensuring equal support from OHCHR to all mandate holders.

It is difficult to assess how far the final package has defeated disaster or has it merely been averted? The negative proposals and stances taken by States have not disappeared though it is hoped that the degree of negativity may have been a negotiating position rather than a policy. The comments that have been made by

some States to the draft Manual of special procedures unfortunately indicate that not all the restrictive proposals have disappeared.¹¹⁰ They seem to have just shifted to another forum.

The Council moves forward with the special procedures in an atmosphere of strong hostility to country mandates which will make it difficult, though not impossible, for new country mandates to be created. It also now includes a code of conduct, which has the potential of misuse and to be intrusive to the work of special procedures. It has a new system of appointment, which could add greater transparency and bring in better candidates but also has the scope to give more power to regional groups in the selection process. The review of thematic mandates may for the most part be conducted as business as usual but this can only be confirmed once the reviews commence. On the more positive side, the process has resulted in far more coordination and coherence amongst the special procedures themselves. The impact of these changes can only be determined with time and as always, there is scope for negative or positive action to be taken by members of the Council in this regard.

The special procedures have survived this round of engagement between the conflicting interests in the Council. Unfortunately as in the past, this has been at the cost of any concrete measures aimed at strengthening the system.

The Council moves forward with the special procedures in an atmosphere of strong hostility to country mandates.

110 See comments made by Cuba in OHCHR, *Note by Secretariat: Summary of Comments to the Draft Manual of the United Nations Human Rights Special Procedures (as received at 20 May 2007)*, available at http://www.ohchr.org/english/bodies/chr/special/docs/compilation_draft_manual_en.pdf. See also the Chinese proposal and comments, available at http://www.ohchr.org/english/bodies/chr/special/docs/china_comments30may2007_en.pdf.

9 Universal periodic review: the promise of the reform

The Universal Periodic Review is a new mechanism under which the Council is required to review the fulfilment of the human rights obligations and commitments by all UN member States.

The Universal Periodic Review (UPR) is a new mechanism created under General Assembly Resolution 60/251, under which the Council is required to review the fulfilment of the human rights obligations and commitments by all UN member States. The resolution provides that the Council shall “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies”.¹¹¹ By reviewing the performance of *all* States, the Council will attempt to nullify the main criticism levelled against the Commission; its selectivity and double standards in reviewing and responding to the human rights situation within countries. The idea of the UPR originated in a proposal by the Secretary-General, who suggested that the proposed Human Rights Council should undertake a ‘peer review’ of all States. In the course of the negotiations in the General Assembly, the wording was changed from ‘peer’ to ‘periodic’ review. Some States and NGOs saw the change in wording as significant in allowing for the participation of other entities besides States as ‘peers’ in the review process. The year of discussions in the working group on the UPR has however amply demonstrated that many other States have not caught on to this nuance and persist in categorising the process as an inter-governmental process that leaves little room for the participation of NGOs or experts.¹¹²

The idea of States submitting reports is not a new one and the UPR had a forgotten predecessor, a system of self-reporting by States to the Commission, which was abandoned in 1977 because it was considered a failure.¹¹³ The working group did not discuss this system or the reasons that it failed but Philip Alston examined this ‘historical parallel’ and pointed to the lessons to be learned from this “futile and ultimately abandoned periodic review procedure which the Commission maintained for a quarter of a century”.¹¹⁴ One of the key issues that he identified was that there should be a major role for OHCHR and for designated experts. “The basis of the Council’s examination of a country must be a focussed set of recommendations, based on a thorough and expert study of the situation. It is the responsibility accorded to expert inputs that will primarily distinguish the Council’s more objective and systematic approach from the haphazard and unscientific country-focused discussions held by the Commission”.¹¹⁵ He made it clear that he

111 Para 5 (e).

112 Algeria (on behalf of the African Group), Bangladesh, China, Indonesia and the USA.

113 F. D. Gaer, ‘A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System’, [2007] 7 Human Rights Law Review 109, pp. 116 and 117. See also P. Alston, ‘Reconceiving the UN Human Rights Regime’, n. 5 above, pp. 207–214.

114 P. Alston, ‘Reconceiving the UN Human Rights Regime’, n. 5 above, p. 213.

115 *Ibid.* p. 214.

was not recommending a system where the outcome will be determined by experts as the decision-making process, in his view, should remain a “quintessentially political one”. He also stated that “unless the Council makes specific, well-formulated and feasible recommendations based on its review of each country’s performance, the process will lack credibility and will soon fall into disrepute and then into desuetude”.¹¹⁶

As the UPR was the most tangible innovation of the reform process that created the Council, it carries the burden of delivering on the promise of the reform. The fact that the institution-building process very quickly became an attack on the best features of the mechanisms that were carried over from the Commission has only served to exacerbate the expectations from the UPR. In a normal process, the UPR could have been judged on its merits alone. In the context of all the drama surrounding the creation of the Council and its resource intensive institution-building process, it has for better or for worse, become the marker for the failure or success of the Council.

As the UPR was the most tangible innovation of the reform process that created the Council, it carries the burden of delivering on the promise of the reform.

9.1. The final model and vision of the UPR

A number of models were put forward for the UPR in the lead up to and in the actual discussions at the UPR. However, early in the process, most States recognised the practical and resource difficulties that would accompany some of the most detailed models of the UPR that had been suggested and debate revolved around two options: either a UPR conducted by smaller working group or a UPR conducted by the Council in plenary. The worst option on the table was a UPR carried out in plenary by the Council, facilitated by a group of friends or a member of the regional group. Under this model, NGOs would only have been able to provide input for the preparation of the national report, and the adoption of any recommendations or outcome document would be subject to the consent of the State concerned.

The package now provides a compromise that the UPR will be conducted by the entire Council, sitting as a working group, rather than in a plenary session through an interactive dialogue with the concerned State. The review will be based on three documents; a national report or national information, a compilation by OHCHR of the information contained in the reports of treaty bodies, special procedures and other UN documents, and a summary prepared by OHCHR of information received from other stakeholders, including NGOs. The interactive dialogue will be facilitated by three UPR rapporteurs¹¹⁷ who are chosen by lot from each regional group. The working group, with the help of the three UPR rapporteurs, will prepare a report which will be forwarded for adoption as an outcome to a plenary session of the Council. The report will identify recommendations that enjoy the support of the State under review but also include those that do not, identifying them clearly as such. The main benefit of the Council sitting as a working group is that the process will occur outside the main sessions of the Council allowing for more focused attention to the review and will not eat up the time allocated to

The UPR will be conducted by the entire Council, sitting as a working group through an interactive dialogue with the concerned state.

¹¹⁶ Ibid., p. 214.

¹¹⁷ The persons who are selected to facilitate the UPR are referred to in this paper as ‘UPR rapporteurs’ to distinguish them from the special procedures.

the main sessions. It will also allow for a clear distinction to be drawn between the review process and the adoption of the outcome and for a gap of time to elapse between the two.

NHRIs and NGOs can attend the review but can not ask questions. Proposals for experts to be involved in the process were rejected.

Observer States can participate in the review process and in the interactive dialogue with the concerned State. Other “relevant stakeholders” such as NHRIs and NGOs can attend the review but can not ask questions. Though some States endorsed the idea of NGOs asking questions, many others were opposed to this as they saw it solely as intergovernmental process. Proposals for experts to be involved in the process even in the limited capacity of what some described as ‘clerks’ or ‘facilitators’ were rejected. The option for the special procedures or the new expert body to participate in or contribute directly to the review was strongly opposed. Though some States were clear that expert involvement was crucial to the credibility and seriousness of the UPR, the notion of a ‘peer review’ triumphed again. The only concession that the facilitator was able to include was that any State, which wished to, could include experts in its own delegation

Great emphasis is placed on the cooperative nature of the mechanism and that it should be constructive, non-confrontational and non-politicised.

The package identified a series of principles for the UPR, based on the discussions at the working group. These principles will not be used in the actual review process but set out a vision of the UPR, which is reflected in the process and modalities that have been chosen. These principles will also no doubt be referred to in the event of any dispute on interpretation or future development of the mechanism. In addition to reiterating many of the principles enunciated in General Assembly Resolution 60/251,¹¹⁸ great emphasis is placed on the cooperative nature of the mechanism and that it should be constructive, non-confrontational and non-politicised. The UPR, without prejudice to the obligations contained in the elements provided for in the basis of the review, is supposed to take into account the level of development and specificities of countries. The process is also supposed to be inter-governmental in nature and UN member-driven, it should not be overly burdensome or long, be realistic and not absorb a disproportionate amount time, human and financial resources. These principles reflect the overall push by many States, repeatedly and vocally in the working group, for a ‘cooperative’ mechanism. The package does however recognise that the process should be action-oriented and not diminish the Council’s capacity to respond to urgent human rights situations.

The problem is that many states interpret ‘cooperation’ as a limitation on any criticism of the failure of a state to fulfil its human rights obligations.

The focus on a constructive and cooperative process is useful as it is obvious that a review process, which the State is willing to engage in, would have far better chances of success than one it is resisting. The problem is that many States interpret ‘cooperation’ as a limitation on any criticism of the failure of a State to fulfil its human rights obligations. These States prefer to view such a failure as a reflection of the practical challenges faced by the State and linked to its level of development and specificities. The UPR, in their view, should overcome these shortcomings by providing technical assistance and creating a fund to help the State implement recommendations but of course, only with its consent. The State can therefore not be criticised for its failures but should be supported in addressing these. The main problem with this approach is that it refuses to consider situations when criticism

¹¹⁸ Promote the universality, interdependence, indivisibility and interrelatedness of all human rights; be a cooperative mechanism based on objective and reliable information and on interactive dialogue; ensure universal coverage and equal treatment of all States; fully involve the country under review; and be conducted in an objective, transparent, non-selective manner.

is warranted either because the State in question refuses to allow a genuine scrutiny, fails to even attempt to implement recommendations. There is also no acknowledgement that the State's failure is not always linked to resources or challenges but can sometimes be linked a deliberate policy, based on discrimination or other considerations. This approach is reflected in particular in the lack of a clear focus in the assessment and outcomes of the UPR. The conceptualisation of the UPR as a cooperative mechanism thus unfortunately became a conflict between those who wanted to use this mechanism to strengthen the ability of the Council to conduct scrutiny of countries and those who want to reverse the practice of country specific criticism itself.¹¹⁹

The institution-building package thankfully however managed to evade two key propositions of the cooperation approach that were expounded in the working group. First, that any outcome or recommendations should be adopted only with the consent of the concerned State and second, that there was no need to refer to action that the Council should take if the State persisted in not cooperating. These are discussed further in the outcomes section below. It will be essential to the success of the UPR that States will be able to move from cooperation to criticism when required during the reviews and for members of the Council to be willing to let any outcome censure the State under review, fairly and when called for.

It will be essential to the success of the UPR that states will be able to move from cooperation to criticism when required during the reviews.

9.2. Scope of the review and information to be considered

One of the key issues to be decided was which human rights obligations and commitments would be used to undertake the UPR and whether these would vary with the State in question?¹²⁰ The institution-building package identifies the UN Charter, the UDHR, human rights instruments to which the State is a party, voluntary pledges and commitments made by the State including those undertaken when presenting their candidatures for election to the Council as the standards that will form the basis of the review. The human rights instruments to which a State is a party will naturally vary from State to State and other than the UDHR, the State will only be considered on the instruments it has signed up to. The UPR will also take applicable international humanitarian law into account, although there was considerable divergence of opinion on whether this should have been included, and when it was included what this would mean in practice given that the Council has neither the mandate nor competency to address the subject in isolation.

As the UPR will be focusing on treaty obligations ratified by the state in question, it will be important that it avoid a 'second substantive assessment of compliance with these obligations'¹²¹ in order to avoid duplicating and potentially weakening the work of the treaty bodies. The package provides that the OHCHR will prepare a compilation of the information contained in the reports of treaty bodies. This compilation, which will also include information from special procedures, other relevant official UN documents, and include any observations and comments by the State concerned to this information, should not exceed 10 pages. The focus on treaty body information may therefore vary based on the country concerned.

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119 F. D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', n. 117, p. 133 but see also pp. 128 – 132.

120 M. Abraham, *A New Chapter for Human Rights*, n. 10 above, p. 75.

121 Finland (on behalf of the EU). See also, F. D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System', n. 117 above, p. 125.

The UPR will ideally focus on the extent of follow-up or implementation of the recommendations of treaty bodies. There was resistance from some States to including such an assessment in the outcome document as this would allow for an authoritative determination of the extent of non-compliance. The focus of the review on the basis of treaty obligations and on follow up to special procedure's recommendations and communications will become clearer once the Council develops the guidelines for submission of the national report, in its sixth session.

The package encourages states to prepare the information through a broad consultation process at the national level with all relevant stakeholders.

The concerned State will also prepare information, which can take the form of a national report, or be presented orally or in writing. Any written presentation should however not exceed 20 pages to “guarantee equal treatment and not to overburden the mechanism”. The flexibility in terms of the State presenting a report or other forms of information was introduced to avoid adding another reporting burden on the State, and potentially jeopardising its reports to treaty bodies. It also aims to prevent delays in situations where the State does not or is late in producing a report. Borrowing a principle from the work of the treaty bodies, the package encourages States to prepare the information through a broad consultation process at the national level with all relevant stakeholders. For this to be effective however, the guidelines should require states to report on the extent of consultations and to list the civil society entities that were involved in the production of the report.

The Council will also take into consideration “credible and reliable information” provided by other relevant stakeholders to the UPR.

The Council will also take into consideration “credible and reliable information” provided by other relevant stakeholders to the UPR. Provision is therefore made for NGOs and NHRIs to submit information but all the information submitted will be summarised by the OHCHR and the summary can not exceed 10 pages. It is interesting to note that little time was given to defining what may constitute ‘credible and reliable’ information, although it is likely to become an issue in the future. The Council will develop guidelines for the information to be submitted by the State and the document prepared by the OHCHR are also expected to follow the structure of these general guidelines that will be adopted in the sixth session.

A few States expressed strong opposition to the proposition that OHCHR should in any way ‘analyse’ the information that it puts together. OHCHR may be put in a politically awkward situation if it did so in any event. Producing a 10 page compilation that presents the main issues and information concisely but in sufficient depth will be a considerable challenge for most countries. It will however be particularly difficult for countries that have ratified all seven human rights treaties, received visits from multiple special procedures, or that receive a large volume of NGO submissions. In the discussions at the working group on the review of special procedures, some States had suggested that the OHCHR create a public website with information on the extent of cooperation with special procedures, particularly on responses to communications and requests for visits and follow up to recommendations. This idea was shot down but there is no reason why NGOs could not choose to make this information available publicly in the run up to the UPR. NGOs could in the same way try and fill this gap in analysis by identifying a list of the main issues that should be focused on in the UPR and provide data about follow-up to treaty body and special procedure recommendations.

9.3. Order and process of the review

The first States to be reviewed will be chosen from lots from each regional group, after this an alphabetical order will be applied. Exceptions will be made for those who volunteer to be reviewed. Council members shall be reviewed during their terms of membership and the initial members of the Council, especially those who were elected for one or two-year terms, are to be reviewed first. States will be reviewed once every four years but this periodicity and other modalities will be reviewed at the end of the first four year (described as the first cycle of the UPR).

The Council, sitting as a working group, will therefore review 48 States every year during three sessions of the working group, of two weeks each. The President of the Council will chair the working group. The package provides for a group of three UPR rapporteurs to be formed by drawing lots among the members of the Council and from different regional groups. This 'troika' will facilitate each review, including the preparation of the report of the working group and will be supported in its work by OHCHR. The State is given the opportunity to request that one of the rapporteurs be from the same regional group and to request the substitution of a UPR rapporteur on one occasion.

It is not clear if different troikas will be formed for each review or if the same group may be used for multiple reviews. The troika can collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue. The initial formulation in the President's text provided that the rapporteurs would identify questions however some States were insistent that it was the right of members to ask questions¹²² and the UPR rapporteurs' role was therefore further downgraded to a mere collation of questions. The effectiveness of the interactive dialogue will hinge on the ability of the rapporteurs and the President of the Council to manage the time available and focus the discussions on the main issues of concern in the country. There is a risk that if, as some States argued, they will not accept any restrictions on their rights to ask questions, that the process could degenerate into two hours of bland political statements or unfocused questions on every human rights issue in the country. The State concerned would then have limited time for its replies or its replies would be scattered and the working group would have no opportunity to follow up on the State's responses. This is a familiar scenario from the dialogues that were held with special procedures in the Commission.

The effectiveness of the interactive dialogue will hinge on the ability of the rapporteurs and the President of the Council to manage the time available and focus the discussions on the main issues of concern in the country.

As all States have the flexibility to decide on the composition of their own delegations, it will be interesting to see if this flexibility also extends to nominating an expert from the delegation instead of a State representative to be the UPR rapporteur. It is hoped that at least some States will try to establish this practice as a precedent and that many will also make it a normal practice to have experts on their delegation. If the number of States with experts in their delegation or experts as UPR rapporteurs increases, the contrast will become more obvious for the States who do not bring or use experts and this may become a backdoor route for extending the involvement of experts.

The working group has three hours to review each State and half an hour for the adoption of the report. The Council can take up to another hour to consider and adopt the outcome in its plenary session.

¹²² Notably Pakistan (on behalf of the OIC).

NGOs and NHRIs will be able to observe the review but will not be able to ask questions or respond to the state's information.

NGOs and NHRIs, with the requisite accreditation, will be able to observe the review but will not be able to ask questions or respond to the State's information. It *may* be possible for the State under review to allow NGOs and NHRIs to do so and it is hoped that more progressive States will try and extend NGO and NHRI participation in this manner. The requirement of ECOSOC accreditation and the fact that NGOs are limited to observer status may discourage nationally based NGOs from taking part in the process. Under the model of the UPR that has been adopted, NGOs may need to focus their energies on briefing delegations that are willing to engage in a dialogue with them. They can also use the media to publicise issues linked to the national report, the government's responses and the final outcome. Some of these options may require a level of resources and networks that are not universally shared. While the package puts forward a positive proposal for the creation of a fund to enable the participation of developing countries, especially least developed countries, in the UPR, there is no equivalent initiative for NGOs. These issues would be partially solved if the UPR was telecast on the website of the OHCHR as is the practice for the normal sessions of the Council. Certain delegations have indicated their understanding that this will be done but this has not been formally recorded and there may be resource issues, which States will have to try and overcome.

9.4. Outcome and follow-up

The outcome of the UPR can consist of an assessment of the human rights situation in the reviewed country, including positive developments and challenges; sharing of best practices; emphasis on enhancing cooperation for the promotion and protection of human rights; provision of technical assistance and capacity-building in consultation with and with the consent of the country concerned; and/or voluntary commitments and pledges made by the country reviewed. Proposals for the outcome document to include an assessment of the implementation of treaty body and special procedures' recommendations and their follow up were rejected because of the opposition of some States.¹²³ Many States were also not in favour of the appointment of special procedure mandates, dispatch of fact-finding missions, investigation teams or commissions of inquiry, or setting up of field presences or an OHCHR mission as an outcome of the UPR.¹²⁴ The options for outcomes are therefore quite weak.

The most positive aspect of the package in relation to the outcome is that though it requires that the concerned State should be fully involved in the outcome, it is not subject to the state's consent.

The most positive aspect of the package in relation to the outcome is that though it requires that the concerned State should be fully involved in the outcome, it is not subject to the State's consent. India had put forward a proposal to bridge the positions of those that wanted the outcome to be adopted by consensus and those who saw this as an 'effective veto' by the State under review. The package incorporates the Indian proposal and creates a distinction between the recommendations that enjoy the support of the concerned State and those that don't. The latter category will be noted with the comments of the State but both will be included in the outcome report, which is put forward for adoption by the Council. The outcome will be presented in the format of a report consisting of a summary of the proceedings of the review process, recommendations and conclusions, and voluntary commitments (if any). It will be interesting to see how the two-levels of recommendations will be dealt with in any follow-up efforts and in subsequent reviews.

¹²³ Pakistan (on behalf of the OIC), China, Indonesia, Iran, Malaysia, and the Russian Federation.

¹²⁴ Algeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Bangladesh, Cuba, Indonesia, Iran, Malaysia, Norway, the Russian Federation and the USA.

The State under review will have the opportunity to present its replies to questions or issues that could not be sufficiently addressed during the interactive dialogue and to express its view on the outcome, before it is adopted. Other States can also express their views and stakeholders, including NGOs, can make general comments before the adoption.

The package affirms that the outcome of the UPR should be implemented “primarily” by the State concerned but also “as appropriate, by other relevant stakeholders”. Subsequent reviews are expected to focus on the implementation of the preceding outcome. The international community is tasked with assisting in the implementation of recommendations regarding capacity-building and technical assistance, in consultation with the concerned State. There was opposition from some States to proposals for concrete follow-up mechanisms such the appointment of a follow-up rapporteur¹²⁵ or a requirement that the concerned State report to the Council on the implementation of the outcome.¹²⁶ Despite this, the package leaves the possibility open for the Council to decide if and when any specific follow-up would be necessary while considering the UPR outcome. As the Council’s agenda includes an item on the UPR, it is also hoped that NGOs and interested States can take up the issue of follow up under this item. One of the most significant victories on the UPR is the provision that the Council can address, as appropriate, cases of persistent non-cooperation with the mechanism but only after exhausting all efforts to encourage a State to cooperate with the mechanism. There is likely to be disagreement amongst States about what constitutes ‘persistent non-cooperation’ and exhaustion of all efforts but it is significant that the Council has the capacity to take action in such situations. This provision may also end up being used against States that do not show up for the review or participate in the interactive dialogues.

The package leaves the possibility open for the Council to decide if and when any specific follow-up would be necessary while considering the UPR outcome.

9.5. An evolving mechanism

The UPR mechanism that has been created under the institution-building package is not, on paper, the strongest of mechanisms that could have been set up. Neither is it the weakest. The package notes that the UPR is an evolving process and that the Council may review the process after the conclusion of four years based on best practices and lessons learned. It is difficult to say how effective the UPR will be without seeing it in practice. Much will depend on the guidelines that are adopted in the next session, the extent to which the windows of opportunity for fuller expert and NGO participation are taken up, how focused the discussions in the review and the recommendations are, the participation of many rather than some States in the process, the publicity that surrounds the process, and the willingness of members of the Council to allow for criticism and strong follow-up, when necessary.

As a starting point, it will be the first time that most of the UN’s 192 member States will be scrutinised in such a setting. This step in itself may lead to opening up of dialogue and lobbying on issues and countries, which have so far remained below the political radar.

As a starting point, it will be the first time that most of the UN’s 192 member States will be scrutinised in such a setting.

The UPR may evolve to a strong mechanism or to a meaningless exercise. Either way, the stakes for the Council are high.

¹²⁵ Algeria (on behalf of the African Group), Malaysia, and Russian Federation.

¹²⁶ Germany (on behalf of the EU) suggesting making this optional rather than a legal requirement on States. Their suggestion was supported by India and the USA.

10. Conclusion

It is difficult to evaluate the outcomes of the institution-building process because the conclusions vary based on the yardstick used.

It is difficult to evaluate the outcomes of the institution-building process because the conclusions vary based on the yardstick used. Viewed in the context of the realities of the political process and battles over the past year, the outcome is a success because it managed to preserve most of the institutions that came under attack. Preserving most of the status quo is however somewhat more difficult to describe as a 'success', if the yardstick used is whether human rights protection has significantly *improved* in comparison to the Commission. The same applies if one judges the outcome in the light of the initial expectations about what the reform could achieve or whether it justifies the resources and time spent.

In this chapter, I try and explore the overall outcomes from these different yardsticks, highlighting the contributing factors to these outcomes and analysing some of the trends that emerged during the reform process.

10.1. The best 'political' outcome?

The outcome may have been the best *political* outcome that could be expected considering the membership of the Council and the positions that had been adopted by various states throughout the year.

It does not require much reflection to arrive at the conclusion that the outcome may have been the best *political* outcome that could be expected considering the membership of the Council and the positions that had been adopted by various States throughout the year. One only has to look at the political support behind the most negative proposals to conclude that the final outcome could have been far worse. Set against this background, the decisions reached on each of the components are therefore judged in the light of what could have been lost.

By the middle of the institution-building process, it was clear that the potential losses outweighed the potential gains by a significant margin. The attacks on the special procedures, the resistance to the Council's system of country mandates and resolutions and the support for a restrictive code of conduct typified the worst results that could have emerged. It is easy to see why those involved in the political negotiations or who followed the process would consider the loss of just two country mandates a victory. The alternative was losing many more and setting up a rule that would have greatly restricted the Council's ability to adopt a country resolution or create a mandate in the future. Similarly, the worst option was a UPR carried out in plenary by the Council, facilitated by a group of friends or a member of the regional group, with NGO input only at the level of preparation of the national report, and the adoption of any recommendations or outcome document only with the consent of the State concerned. When faced with this as a choice, the option of the UPR being conducted by one working group with no express expert involvement but a small window of opportunity in this regard was a far more palatable one.

The fact that the Council was able to arrive at a conclusion within the time stipulated and almost with full agreement is in itself a significant achievement. In the months that preceded the final adoption, it looked extremely unlikely that the Council would be able to resolve all the pending issues and/or that it could do so without the package being put to vote. It is fair to say that very few Presidents would have been able to get agreement on the package that was finally adopted. The President, as mentioned earlier, most ably utilised the need for consensus as a strategy to offset the most negative proposals and counter-balance the impact of the changed membership of the Council. By tabling his proposals about the most controversial areas of the package at the very last minute, he, in effect, forced the members of the Council to accept a package that they were not entirely happy with or risk adopting nothing. All the members of the Council were aware of the hazards of their not reaching a final agreement before the deadline set by the General Assembly. Besides the media scrutiny that would be waiting, this would have confirmed the perception in many quarters that the venture of the new Council itself had failed.

Therefore, if one judges the outcome only in the light of the events of the last year and the political realities that these signified, it is completely fair to say that arriving at a broad-based consensus to preserve most of the status quo and create a UPR with some possibilities was a significant achievement.

Problems begin to emerge if we look further back to the expectations behind the creation of the Council and the promises of 'reform' of the system. If the biggest achievement of the institution-building process is the fact that it retained the best features of the mechanisms of the Commission, why did States enter into this resource intensive reform process at all?¹²⁷

If the biggest achievement of the institution-building process is the fact that it retained the best features of the mechanisms of the Commission, why did States enter into this resource intensive reform process at all?

10.2. Historical comparison with the Commission

The second yardstick that can be used is an assessment of the gains and losses in the mechanisms for the protections created or maintained by the Council in comparison to those of the Commission.

The balance sheet in this regard will have to be judged mostly by the formal changes to the mechanisms and procedures but will have to also factor in at least partially, the potential impact of the political discussions on future initiatives.

- The 1503 procedure has largely been maintained as it was but with some limited improvements. The most notable innovation is that the complainant will now be provided information on the progression of the complaint and its final outcome.

¹²⁷ See F. Hampson, 'An Overview of the Reform of the UN Human Rights Machinery', n. 49 above, pp. 9–10 where she states "By allowing the whole Commission system, including the mechanisms that reported to the Commission, to be called into question, Western States made it possible for States who wished to reduce scrutiny of their human rights record to make proposals which would have that effect. There is no presumption in favour of the *status quo*. This means that, now, maintaining the *status ante quo* will be a real triumph whereas before the institution of the reform process, that was, notwithstanding the protests of certain States, taken as a given. It would be hard to think of a better example of shooting oneself in the foot".

- The system of expert advice has been greatly constrained and the role of the experts has been reduced to purely an 'advisory' one. The loss of the ability of a group of experts to take independent initiatives within the system is a significant one. On the positive side, the development of criteria and a slightly better nomination system offers the prospect that the quality of expertise will be improved.
- The agenda has been improved to give it more flexibility. The degree to which it also offers predictability to NGOs and allows for more focused discussions and prioritisation will depend on the programme of work, which is yet to be developed.
- The arrangements for NGO participation have been maintained and those for NHRI participation have been consolidated. There were also a number of important innovations with respect to NGO participation in the last year that are not formally recorded in the institution-building package. The continuation of these innovations will depend on how practical challenges arising from increases in the numbers of participating NGOs are addressed.
- The system of special procedures has been preserved but no steps were taken by the Council to make this mechanism more effective. The Council effectively postponed the review of mandates and it is not clear what the outcomes of this staggered review process will be. The special procedures also now have a code of conduct, which has the potential to be intrusive to their work and to be misused by States. It also gives the impression that it is the conduct of special procedures that requires regulation and not that of States. There is a new system of appointment, which could add greater transparency and bring in better candidates but also has the scope to give more power to the regional groups in the selection process.
- The institution of country mandates has been preserved but there is an atmosphere of strong hostility to country mandates, which may make it difficult, though not impossible, for new country mandates to be created. Two country mandates were terminated and it is likely that at least a few of the others will not survive the review process. While it is significant that the two thirds majority rule for adoption of country resolutions was not included in the package, the fact remains that many States would support such a requirement. It seems probable that this will discourage the tabling of new initiatives, except in relation to severe country situations on which they may be cross regional agreement and/or where the State concerned consents to the initiative.
- The UPR is not, at least on paper, the strongest of mechanisms that could have been set up. Neither is it the weakest. As currently designed, the UPR excludes the possibility of formalised involvement of independent experts in the process though States may choose to bring a flavour of this on their delegations. It limits the information that can be considered and the outcomes of the review process. There is no provision for NGOs to ask questions or for special procedures or the Advisory Committee to participate in the review process. It places a great emphasis on cooperation but stops short of requiring the consent of the State under review to all the recommendations that are adopted. The possibility to record recommendations that enjoy the consent of the State concerned and those that do not should make it easier for the inclusion of a wider and potentially, stronger range of recommendations and conclusions. The Council has the possibility to identify follow up measures. It may evolve into an effective mechanism but it remains too early to make firm predictions without seeing the mechanism in practice.

Taken as a whole, the key determinant of whether the Human Rights Council represents an improvement over the Commission is the UPR. If the UPR functions well this may outweigh the losses in other areas but if it does not, there can be little doubt that the institutional design of the Council does not represent a significant improvement over that of its predecessor.

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10.3. A vision of the new Council

There was no objective assessment on what aspects of the Commission's mechanisms and procedures were useful and should be retained, what needed change and where the gaps lay through the entire reform process. The year of 'institution-building' therefore began without an agreed blue print. It was entirely dependent on States but also other stakeholders to articulate their vision of the new Council and its institutions.

States with a negative agenda have been very successful over the year in articulating their vision of the Council. They have consistently affirmed the notion that the Council should only serve as a forum for cooperation and constructive dialogue. This principle was used to justify opposition to the creation of country mandates, which in the view of many of these States represented a 'naming and shaming culture that denied dialogue and cooperation'. It was also voiced in relation to the UPR, which was viewed as a forum for cooperation. It was argued that therefore the UPR should not include measures to criticise the State for its failure to fulfil its human rights obligations. Following on from this approach, there was no need for the agenda to have an item which would allow discussions on human rights situations that require the Council's attention. Similarly, there was no need for the Advisory Committee to focus on country situations and the complaint procedure had to remain strictly confidential to encourage cooperation.

States with a negative agenda have been very successful over the year in articulating their vision of the Council.

There is no doubt that far more space needs to be created in the Council for genuine cooperation and dialogue, with an open and less adversarial exchange between States. For this to be realised however, it was important that pre-requisites of the cooperative approach were clearly identified. At the very least, there was need to explore what would be required both from the State and the Council in order for this approach to work. The proponents of the cooperative approach however focused exclusively on the Council and what it should not do without ever articulating what conduct would be required from the State concerned or other States in this regard. They were also never forced to identify the limits of such an approach and what they thought should be the alternatives, if cooperation failed. While a few States tried to raise the counter-example of a situation where the State was refusing to cooperate, they were unsuccessful in opening up a meaningful debate on this issue. It would have been interesting if the proponents of the 'cooperative approach' could have clearly been vested with ownership for the measures adopted in line with this approach. They would have then had the responsibility to substantiate the success of such measures. Without this reflection, there is a danger that 'cooperation' will become the fig leaf that States hide behind rather than a genuine dialogue.

There is a danger that 'cooperation' will become the fig leaf that States hide behind rather than a genuine dialogue.

In contrast, the proponents for positive changes put forward a number of proposals but lacked the coordination and cohesiveness of those articulating the negative agenda. This is not surprising as the degree to which the OIC, the African Group and many Asian States were articulating mutually supportive positions was probably unprecedented in the history of the body. It was also natural that States had multiple and diverse proposals for positive reform. What was unfortunate was that they were unable to articulate a clear counter vision or approach for the Council, either individually or in common ideological groupings of any nature. Though some of the proposals that were put forward were truly innovative, it seemed that it was difficult for States and NGOs to think outside the box. While it looks clear that a positive vision would not have prevailed, it could have at least set a clear bar for discussions. The situation was not helped by the fact that through the first six months members belonging to the European Union, with the notable exception of the UK and Belgium, seemed content to let the Presidency speak for all of them. GRULAC¹²⁸ also appeared to be more split than it had in the past on key issues like the special procedures.

The end result is that seen as a whole, the discussions on institution-building remained quite limited in their scope. Though much can be said about this year, it can not accurately be described as a year where institutions were really built.

10.4. A final note on the details

The process is still not over and many of the operational details of the institution-building package still need to be finalised.

The process is still not over and many of the operational details of the institution-building package still need to be finalised. These include the guidelines for submission of information for and the schedule for the UPR, objective and technical requirements for the selection of mandate holders and members of the Advisory Committee, schedule for review of the special procedures, and arrangements for the Sub-Commission's working groups and the social forum. Many of these issues will be resolved by the Council at the sixth session in September 2007 and could strengthen or weaken the framework that has already been agreed. The institution-building package is also very broad in the way it is drafted and opportunities exist for States and NGOs to reshape it to make the mechanisms more effective in practice. The impact of all these changes can only be determined with time and it is essential to wait at least till a few UPR sessions are conducted and the review of special procedures begin to draw any final conclusions. The package will also be considered by the General Assembly and much can change based on its reactions.

The Council still has the tools to carry out its functions as it retains the capacity, by and large, to do all that the Commission could.

The Council still has the tools to carry out its functions as it retains the capacity, by and large, to do all that the Commission could. How it uses these tools towards ensuring the protection of human rights hinges, as always, on the political will of its members. What the Council does with these tools in the next few months and years will be the true yardstick of the success or failure of the reform process.

¹²⁸ Group of Latin American and Caribbean States.

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On the author:

Meghna Abraham works as a consultant in the area of human rights law and policy. She has held positions in non-governmental organisations and universities in India, the UK, and Switzerland.

She has closely followed the institution-building process of the new Human Rights Council. She is the author of *A New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council* (Friedrich-Ebert-Stiftung and International Service for Human Rights) which was published in June 2006.

Ms. Abraham holds a combined BA.LLB (Hons) degree from the National Law School of India University and BCL and MPhil degrees from the University of Oxford, which she attended on a Radhakrishnan-Chevening scholarship.

For further information on Dialogue on Globalization, please contact:

Friedrich-Ebert-Stiftung Berlin
Hiroshimastrasse 17
D-10785 Berlin
Tel.: ++49-30-26-935-914
Fax: ++49-30-26-935-959
Roswitha.Kiewitt@fes.de
www.fes.de
www.fes-globalization.org

Friedrich-Ebert-Stiftung
Geneva Office
Chemin du Point-du-Jour 6 bis
CH-1202, Geneva
Tel.: ++41-22-733-3450
Fax: ++41-22-733-3545
fes.geneva@econophone.ch
www.fes-globalization.org/geneva/

Friedrich-Ebert-Stiftung
New York Office
747 Third Avenue, 22b
New York, N.Y. 10017
Tel.: ++1-212-687-0208
Fax: ++1-212-687-0261
fesny@fesny.org
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