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Quaker United Nations Office

*Human Rights  
& Refugees*



Neither Mountain nor Molehill

UN Human Rights Council:  
One Year On

By Rachel Brett

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Rachel Brett

## The Quaker United Nations Office

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*“[A]lthough some of us consider human rights as “God-given rights”, they are not, unfortunately, often given on a silver platter, hence the difficulties we have gone through over the past year.”<sup>1</sup>*

## Introduction

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The new UN Human Rights Council completed its first year on 18 June 2007. UN General Assembly Resolution 60/251 (15 March 2006), which established the Council, had given it a number of ‘institution-building’ assignments to be completed within the year and it was touch and go whether it would manage. However, just before midnight on 18 June, the Council President tabled a package text for adoption.

In fact, one of the initial problems was whether the ‘year’ was from the beginning of the Council’s first session until 365 days later (ie 19 June 2006 to 18 June 2007) or whether the ‘year’ ran until the end of June or until 31 December. The UN Legal Counsel ruled that 18 June was the relevant date. This led South Africa to propose a future ‘alignment’ of the Council’s year with the calendar year. The President requested the UN Office of Legal Affairs to prepare a study of the implications and method of achieving this result, to be considered by the Council Bureau prior to them making proposals to the Council.

The President’s text was a true compromise in the sense that no-one likes the whole package. It also leaves a number of issues to be resolved, and many of the items included require further development in order to implement them, but the skeleton of the Council’s institutional framework is set out in the document<sup>2</sup> and the accompanying Code of Conduct for Special Procedure Mandate-Holders.<sup>3</sup> This report seeks to assess some of the trends and activities of the Council in the course of its first year, key points of the agreed institution-building package and to identify issues requiring further attention or about which only how they are implemented will clarify whether or not they represent progress over the Council’s predecessor, the Commission on Human Rights.

However, on 19 June Canada contested whether in fact the President’s text had been adopted on 18 June, since they wished to call a vote on it. The new President<sup>4</sup> of the Council ruled that it had, and when Canada challenged his ruling, put this to the vote, where it was endorsed by 46 of the 47 Council members, with no abstentions and only Canada voting against.

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<sup>1</sup> Statement by Kwabena Baah-Duddu, Ambassador of Ghana, Human Rights Council, 19 June 2007

<sup>2</sup> Human Rights Council Resolution 5/1, Annex

<sup>3</sup> Human Rights Council Resolution 5/2

<sup>4</sup> Ambassador Doru Romulus Costea of Romania

## Overview of the Year

Beforehand, many were concerned that the Council would spend the entire year on the development of its own internal structure, leaving substantive human rights issues without a focus in the UN system. Although most of the Council's time and energy were devoted to 'institution building', nevertheless, four Special Sessions were held on particular country-specific human rights situations, resolutions were also adopted on Afghanistan<sup>5</sup> and Nepal<sup>6</sup>. The reports of the High Commissioner for Human Rights and of the Special Procedures were heard and discussed (though later than they should have been since

these had been prepared for the Commission on Human Rights session scheduled for March-April 2006), and the duration and quality of the inter-active dialogues were greater than they had been in the Commission on Human Rights – more government delegations were present and participated, and Non-Governmental Organisations (NGOs) were also able to participate. Some standard-setting exercises were completed and others begun.<sup>7</sup> No aspect of any of these was problem-free, but the greatest fears of human rights advocates and promoters were not realised.

## Country Situations and Universal Periodic Review (UPR)

Criticism has already been levelled at the Council for the 'exclusive' (originally) or 'excessive' focus on the activities of the Government of Israel - three<sup>8</sup> out of its four Special Sessions with the fourth being on the situation in Darfur. This focus had also been one of the criticisms of the Commission. Canada's wish to call a vote on the whole institutional package was primarily because the Council's agenda includes a separate item on "Human rights situation in Palestine and other occupied Arab territories", while all other human rights situations will be covered by generic agenda items, but it was unrealistic to expect otherwise.

**Special sessions:** Whatever the imbalance in attention, each of the Special Sessions could be justified in relation to the actual situations covered. The question is

whether other situations (for example, Sri Lanka) should not also have been covered, as well as whether Darfur should have been considered sooner than it was.<sup>9</sup> The outcomes of the Special Sessions have been mixed in both form and reality. A criticism of the Commission was the passing of resolutions, often in condemnatory language, which had no 'action points' attached to them, and/or simply called on Governments to take or to desist from certain actions. The Council was instructed by the General Assembly to be 'action oriented', implying a move away from lengthy resolutions towards shorter decisions. Over the year its performance in this regard appeared to have improved with more emphasis being given to establishing mechanisms/systems for monitoring and engagement with, for example, the Government of Sudan about the Darfur

5 Human Rights Council Decision 2/113

6 Human rights Council Decision 2/114

7 Convention on Disappearances and Declaration on the Rights of Indigenous Peoples were adopted, and a Working Group mandated to draft an Optional Protocol (complaints procedure) for the International Covenant on Economic, Social and Cultural Rights: see Rachel Brett: *Righting Historic Wrongs* (Quaker UN Office, Geneva, July 2006)

8 In order, the Special Sessions were on: the human rights situation in the Occupied Palestinian Territory; the situation of human rights in Lebanon caused by the Israeli military operations; the human rights violations resulting from Israeli military incursions in the Occupied Palestinian Territory including in Northern Gaza and Beit Hanoun.

9 Although the situation in Darfur had been the subject of debate and a Decision (2/115) at the Council's resumed 2<sup>nd</sup> session (November 2006) but this weak text (adopted by 25 votes in favour, 11 against with 10 abstentions) was in part what precipitated the request for a Special Session – in itself a reaction worth considering: see "Darfur crisis unites Human Rights Council" in *Geneva Reporter*, Vol. 26, No. 1 (Quaker UN Office, Geneva) November 2006-January 2007.

situation.<sup>10</sup> At the same time, in each of its regular sessions it has also addressed follow up to its decisions, and thus continued to monitor to what extent these have been implemented. This has the benefit of maintaining a focus on issues and situations, on keeping attention on Governments who are not cooperating with the Council and its mechanisms, of enabling continued reporting on and discussion of situations under consideration, as well as whether there is a need for additional or alternative steps.

**Country consideration:** Otherwise the Council has not yet significantly improved on its predecessor in addressing specific country situations. It failed to get the Universal Periodic Review (UPR) up and running (in fairness it may have been unreasonable to have expected it to do so during this first year), and thus the only countries considered were through the Special Sessions, through the reports of and inter-active dialogues with the existing country Special Procedures (Belarus, Burundi, Cambodia, Cuba, DPRK, DRC, Haiti, Liberia, Myanmar, Occupied Palestinian Territories, Somalia and Sudan), through the thematic procedures who had undertaken country visits, through the report and updates of the High Commissioner for Human Rights, and to some extent through being raised in general debate of ‘other issues’ – most notably in relation to Zimbabwe, which objected to being subjected to a covert mini-Special Session at the 4<sup>th</sup> session of the Human Rights Council (March 2007).

As part of the final Institution-Building package, the mandates on Belarus and Cuba were abolished, but all the other country mandates maintained. Although there were objections to these two being discontinued, in her report Christine Chanet had proposed laying down the mandate on Cuba (which she

has been performing since 2003), pointing out that this did not mean the end of the Council’s scrutiny of Cuba’s human rights situation but that this would happen under the UPR on the same basis as other States, thus undermining resistance based on claims of ‘double standards’.<sup>11</sup> This is an important distinction as, irrespective of the merits of the Cuba mandate, in particular given the political agenda behind it, to ‘reward’ non-cooperation with the Special Procedures by terminating the mandate would be counterproductive in seeking to enhance cooperation. Although the Special Rapporteur on Belarus did not make such a recommendation, a similar logic could be applied to Belarus – it will come up under UPR.<sup>12</sup> The human rights situation in Belarus is certainly worthy of very serious attention, and a crucial test of the UPR will be whether these States (as well as others) cooperate with it, and whether it is more effective in improving these situations than the Special Procedures mandates have been. If not, the Council will need to give further consideration to what to do about them.

**UPR:** The Commission’s most systemic problems about politicisation, double standards and selectivity were in fact the perceived benefits of Commission membership for States who feared scrutiny of their poor human rights records.<sup>13</sup> It is imperative that the UPR addresses this issue by indeed considering the members of the Council during their membership<sup>14</sup> so that scrutiny becomes a cost of membership rather than a way of avoiding it: no excuses for delays should be accepted. Another potential benefit of UPR is that it is a mechanism of universal scope, covering all UN Member States over a four-year time period, thus the situation in countries can be considered without another State having

10 See “African split creates consensus” in *Geneva Reporter*, Vol. 26, No. 2 (Quaker UN Office, Geneva) February – April 2007

11 Christine Chanet, Représentante personnelle de la Haut-Commissaire des N-U aux droits de l’homme, 12 Juin 2007

12 The criteria for continuing the other country mandates was that there was a pending mandate of the Council or of the General Assembly to be accomplished or the nature of the mandate is for advisory services and technical assistance (Resolution 5/1, Annex).

13 Since only members of the Commission could call a vote or vote, membership enabled States to challenge resolutions addressing their own human rights violations as well as to garner support from others on the basis of regional, political, or other solidarity, and by trading votes across resolutions.

14 Since the initial members who only served a one-year term have not been reviewed because of the delay in getting the process started, they should be the first of the non-members to be reviewed.

to take action to put it on the table, which immediately raised issues (sometimes justified) of politicisation and selectivity.

The Reviews themselves are now scheduled to start in 2008. Some confusion (or obfuscation) arose as to whether this was 'peer review' or 'periodic review': the significant difference being that the former implies (in this context) an inter-governmental process, while the latter does not but only regularity. In the course of negotiations in the General Assembly, the term 'periodic' was adopted, but many Governments persisted that it should still be 'review by peers' and wished to minimise or exclude any NGO or expert input or participation. The result is review by a working group of the whole Council although the text itself says, "Each member State will decide on the composition of its delegation". This clearly enables States to bring in independent experts if they wish.

The burden of work assumed by Council members in participating in these reviews (6 weeks in addition to the regular 10 weeks of plenary sessions of the Council), may lead to some States not feeling able to become Council members, and/or of not fully participating in the UPR. It will be important to check that the intended non-selectivity is not undermined in practice because some Council members do not participate in all Reviews either opting out of the process altogether, or only participating where they have positive or negative reasons for doing so, thus demonstrating selectivity themselves as well as leaving the field open for those States who are better-resourced, more committed to human rights, and/or have a specific agenda to pursue. At the same time, States have only themselves to blame since they insisted on a working group of the whole Council to do this, rather than having chambers of the Council or independent experts, both of which had been proposed.

Although the review takes place in the Working Group, the outcome, including recommendations, is adopted by the Council plenary (after time for comments from the State concerned, other States and other stakeholders). However, the whole process is public even though NGOs and National Human Rights Institutions (NHRIs) can only speak during the plenary, not in the Working Group, unless presumably invited to do so by the State under review.

Amongst the key points set out in the President's text are that UPR should ensure equal treatment and coverage of all States, cover all human rights, complement and not duplicate other human rights mechanisms, and that the objectives of the review are to improve the human rights situation on the ground and the fulfilment of the State's human rights obligations and commitments.

A bizarre aspect has been the insistence of some States that the basis for review should be a report<sup>15</sup> from the State.<sup>16</sup> Why is this 'bizarre'? Because States have been complaining about the 'burden of reporting' to the human rights Treaty Bodies, and demanding that they should not have to produce so many reports or so often. Is this then amnesia, schizophrenia or bad faith? It will be important to keep this in mind when monitoring and evaluating that the UPR does not compromise the Treaty Body system – it is not only a question of it not affecting the substance of their work, but also that States do not use the requirement to produce UPR reports as an excuse for failure to report, or late reporting, to the Treaty Bodies.

On the other hand, it is positive that one lesson learned through the experience of the Treaty Bodies has been included: "States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders".<sup>17</sup> Much benefit in reporting processes can be achieved

15 Idriss Jazairy, Ambassador of Algeria, in the name of the African Group, "We are not talking about 'information' supplied by States but about a national report to be drawn up on the basis of a standard uniform questionnaire." (Human Rights Council, 5<sup>th</sup> session, 15 June 2007)

16 The 20-page (maximum) country report/information is to be supplemented by 10-page summaries prepared by the OHCHR of information treaty bodies and Special Procedures and from other relevant stakeholders.

17 Human Rights Council Resolution 5/1, Annex

if they act as a catalyst for domestic analysis and debate about human rights<sup>18</sup> – with, of course, the obvious possibility for States putting their own house in order before appearing at the international level. This logic should be followed through so that public reporting back domestically and further consultation with all relevant stakeholders about implementation of the results of the UPR is also a regular part of the process. This, therefore, should be one of the routine recommendations of the review, complementing the Council's own follow-up procedure.

How the UPR will be conducted in the Working Group is far from clear. Three 'Rapporteurs'<sup>19</sup> are to facilitate the review, including the preparation of the report of the Working Group. They "could collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue, while guaranteeing fairness and transparency".<sup>20</sup> The Rapporteurs are to be selected by drawing lots among the members of the Council and from different regional groups. It is unclear whether all members of the Council will serve as Rapporteurs or whether some will serve more often than others? The precise role of 'facilitation' is also unclear. As with composition of delegations in the Working Group, it appears that although the State will be selected, the individual to act as Rapporteur is the choice of the State. The State under review can opt to have a Rapporteur from their own region, and is also permitted to challenge (request a substitution for) one Rapporteur (presumably the country rather than the individual). Equally, a Rapporteur can request to be excused from a specific review. The procedures for how this selection process will work in detail will need to be carefully thought through: for example, logically the State under review has to specify in advance of drawing lots that it wishes one to be from its own region, but to exercise its

objection/challenge if it so wishes only after all three have been drawn by lot. If this happens, is another name drawn from the same region, or from all States in the 3 regions from which a Rapporteur has not already been selected? It will be interesting to see how this process develops, whether it becomes the norm or the exception to request a same region Rapporteur and/or to challenge others (and on what basis) and for Rapporteurs to request to be relieved (and on what basis).

The UPR is the major new aspect of the Council. It remains to be seen whether it will be a real contribution in practice – either to improving the 'situation on the ground', or to 'depoliticising' the work of the Council, and whether it will indeed not 'duplicate' (or undermine) the work of the existing human rights procedures. It also needs to be recognised that the OHCHR has been given a major task in preparing and servicing this aspect of the Council's work, which could also divert time and resources away from the Office's other work. Other possible problems include superficiality (due to the short period for consideration of each country – only three hours per country), the limited documentation on which it will be based, and the possible lack of independent expertise built into the system. Scepticism, based on experience, suggests that the process will either evolve rapidly, become stagnant or implode under its own bureaucratic weight. A footnote in the President's text points out, "UPR is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned."<sup>21</sup> In the meanwhile, it is imperative if it and the Council are to have any credibility that the procedure is put into operation as soon as possible so that further time and Council members do not elapse without review.

18 This is not only about consulting with NGOs or civil society but also amongst different Government departments or ministries, and between different levels of governmental authorities where relevant, so that reporting is not a 'bureaucratic' paper exercise by, for example, the Foreign Ministry.

19 These are not part of the Council's Special Procedures.

20 Human Rights Council Resolution 5/1, Annex

21 Human Rights Council Resolution 5/1, Annex

## Special Procedures

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The Special Rapporteurs, Representatives, Independent Experts and Working Groups which made up the country and thematic Special Procedures of the Commission on Human Rights were generally considered to be one of its major achievements.<sup>22</sup> However, a significant problem faced by the Commission in its later years was States' rejection of the legitimacy of and refusal to cooperate with these Special Procedures (thematic as well as country specific) which they themselves had created through the Commission. No institution can survive unscathed if its members do not accept the processes which they have established. Of course it is embarrassing for a Government to have its accidental or deliberate shortcomings pointed out in public and there is a natural tendency in such circumstances to 'shoot the messenger'. But to attack the entire system and/or the individual mandate holders, both of which derive from an agreed inter-governmental process of the body itself, is not legitimate and undermines the credibility of the whole institution and not only the specific part.

This is not to suggest that the Reports of Special Procedures should be accepted without question. On the contrary, questions of fact and law and their interpretation are a subject for debate. Indeed one of the greatest achievements of the Commission was the engagement in discussion of ideas and concepts in the development, interpretation and understanding of human rights. The thematic Special Procedures have been vital catalysts in this process. To take just two examples, the understanding of violence against women and of the right to health have changed and developed under the influence of the work of the respective mandates. The role of the Commission as a forum for the exchange of ideas in which the global human

rights community could engage (governmental, non-governmental and expert) tended to be underestimated and overshadowed by its 'results' (or the lack of them) measured in terms of resolutions adopted.

**Role of Special Procedures in the Council's work:** Procedurally, the Council's engagement with its Special Procedures built on the inter-active dialogues which the Commission had started. The Council improved these by assigning a set time for each one (rather than them being slotted in according to the actual progress of the agenda and thus being unpredictable for both the Special Procedures and the other participants)<sup>23</sup>, with a full hour assigned for each, and NGOs (at least to some extent) as well as governments being able to participate. Importantly, these dialogues were at a time when negotiations on resolutions were not taking place. This enabled all interested delegations to participate in them. Indeed the level of participation - the number of delegations in the room, the fact that in many cases the ambassador was present as well as the number asking questions or making comments - was unprecedented compared with the Commission. These good practices need to be maintained, but there is still scope for further improvement. Divorcing these dialogues from immediate decisions in relation to substance or process on the mandates may also be beneficial in enabling a more open discussion of issues.

Substantively, during the course of the year, positions on the Special Procedures shifted dramatically. For much of the time, there appeared to be a concerted attempt to undermine them, to challenge individual mandate-holders, and to eliminate or marginalise any role for independent experts in general (as

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22 The global petition for a strong system of independent Special Procedures by Amnesty International and others produced nearly 14,000 endorsements from individuals from 147 countries.

23 On occasions in the Commission, the scheduled inter-active dialogue did not take place either because the Chair decided there was no time for it, or because of delays in the consideration of the agenda item, the mandate-holder's travel arrangements meant that they were not present at the time when the specific item was under consideration.

opposed to Government representatives) and Special Procedures specifically. This reached its zenith in the first proposed mission to Darfur. The original proposal was that this should be composed of the five members of the Council Bureau and the five regional coordinators, that is ten Ambassadors. Ironically, not only would this have been, by definition, a political (rather than independent expert) group but it would in practice have comprised ten men, of whom the African representatives would have been Algeria and Morocco, and the Asians Jordan and Saudi Arabia. This was modified in the negotiations, but the delegation established was a mixture of ambassadors and others,<sup>24</sup> but their processes and report were then challenged in the Council.<sup>25</sup> As a result, the follow-up mechanism consists entirely of independent experts who are already Special Procedures of the Council.<sup>26</sup> Both the Government of Sudan and the Council have engaged more constructively with this group. Significant factors in this changed attitude have been that the group and its composition were established by consensus (Sudan also agreeing), which thus engaged the support and credibility of the whole Council, its regional groups and their coordinators, and, in particular, the coordinator of the African Group (Algerian Ambassador) and the EU presidency (German Ambassador) since these two were the principal negotiators. It will be important to assess to what extent the Darfur group's engagement with the Sudanese Government, and their identification of specific recommendations<sup>27</sup> to be implemented within set timeframes, lead to the necessary actions being taken, including those to be implemented immediately, and in the light of this experience to incorporate

lessons into the Council's future country-specific activities and processes.

These developments in relation to Darfur lent greater legitimacy to the continued pressure on Israel to cooperate with the Council by permitting entry to the missions<sup>28</sup> established by earlier Special Sessions. At the same time, it is worth recalling that when a group of the Special Procedures thematic mandates undertook a visit to Lebanon and Israel to look at the effects of the conflict, their joint report<sup>29</sup> was trashed by some Governments on two grounds – the supposed content of the Report (which were not born out on a reading of the actual final Report) and that they should not have visited Israel – an untenable position in that the thematic Special Procedures can seek to visit any country. This was also an unfortunate objection on substance since it excluded consideration of the evidence in the report of the differential impact on Jewish and Arab Israelis - an issue to which the Government of Israel should be required to respond.

More generally, the observations<sup>30</sup> of John Dugard, Special Rapporteur on the OPTs, are worth considering alongside the Darfur group experience. In his view it makes little sense for an existing country specific mandate to be asked to undertake a fact-finding mission since (1) they will consider and report on the situation to the extent possible in any case as part of their mandate but cannot be a one-person fact-finding mission; and (2) where the relationship with the Government concerned is already problematic, as is often the case with such mandates, to demand that they undertake or lead a fact-finding mission into

24 Professor and Nobel Peace Laureate Jody Williams (Head), Professor Bertrand Ramcharan (former Acting High Commissioner for Human Rights), the Honourable Mart Nutt (member of the Council of Europe Parliamentary Assembly), Ambassador Makarim Wibisono (Indonesia), Ambassador Patrice Tonda (Gabon), as well as the Special Rapporteur on the Sudan, Sima Samar.

25 See "African split creates consensus" in *Geneva Reporter*, Vol. 26, No. 2 (Quaker UN Office, Geneva) February – April 2007

26 Special Rapporteurs on Sudan (presiding), on summary executions, on torture and on violence against women and the Secretary-General's Representatives on internally displaced persons, on human rights defenders and on children and armed conflict (General Assembly mandate).

27 Report on the situation of human rights in Darfur prepared by the group of experts mandated by Human Rights Council resolution 4/8 (A/HRC/5/6, 8 June 2007)

28 by John Dugard, Special Rapporteur on the OPTs, and on Beit Hanoun led by Desmond Tutu - Human Rights Council Resolutions S-1/1 and S-3/1.

29 Report of the Special Rapporteurs on extrajudicial, summary or arbitrary executions, on the right to health, and on adequate housing, and of the Representative of the SG on human rights of internally displaced persons - Mission to Lebanon and Israel (7-14 September 2006) (A/HRC/2/7)

30 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (A/HRC/5/11 of 8 June 2007)

a particular incident may be unproductive as the Government is unlikely to cooperate and permit access. Another problem is that where the relevant resolution passes judgment about the ‘facts’ before the mission is undertaken, it is even less likely that the Government (any government) will be inclined to permit access, and it may also undermine the integrity of any conclusions or indeed the ability of an independent, expert mission to undertake the assignment with integrity.<sup>31</sup>

The wish to react to serious incidents may be natural, whether or not politically motivated. However, the recent experience suggests that such reactions should be differentiated from cases where fact-finding is actually required and might be achieved by establishing a mission; there is a need to draw a Government’s attention to its own responsibilities, in particular in terms of investigation, accountability, reparations and non-repetition; and situations where the international community might take action to, for example, provide assistance to victims, or identify possible war crimes suspects.

As these developments illustrate, there is not such a clear cut distinction between ‘thematic’ and ‘country’ special procedures mandates as is often presented. Thematic procedures undertake country visits, and the Darfur group includes both the Special Rapporteur on the Sudan and a number of thematic mandates.

General Assembly resolution 60/251 required the Council to have “a system of special procedures”, but without further specification. During the Council’s negotiations, four separate elements emerged: the method for selection of mandate-holders; a Code of Conduct for mandate holders; the retention, review or abolition of country mandates, and the review, rationalisation and improvement of thematic mandates.

***Selection and appointment of mandate holders:*** In the past, the Chair

of the Commission, in consultation with the Bureau, selected and appointed the Special Procedures mandate holders. Some States wished for an election process by the Council, and many felt that it should not be the sole responsibility/prerogative of the President. Different issues were behind the various proposals. Appointment by the Chair had in general served the system better than might have been expected. This was not least because the Chair had to take personal responsibility and everyone could see the results (for better or worse) of the decisions taken. So even when faced with a candidate nominated by his or her own government, some chairs demonstrated a degree of independence. On the other hand, this process enabled Governments who wished to challenge the system of Special Procedures to distance themselves, claiming that they had not endorsed the selection of mandate-holders. A more substantive problem was that as the number of mandates has grown, the need for more mandate holders also increased, and identifying enough good candidates from different regions required a more open, transparent and proactive approach.

After much discussion, the outcome was that the OHCHR is to set up a roster of eligible individuals – nominated by anyone (including the individuals themselves) – meeting certain “technical and objective criteria” to ensure that they are “highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights”<sup>32</sup> as well as having independence, impartiality, personal integrity and objectivity, and experience in the field of the specific mandate for which they are being considered. Setting up this roster is urgent since many of the existing mandate holders have already been extended (exceptionally) beyond the maximum 6-year period they should have served. Once the roster and the criteria for inclusion on it have been established, it needs to be publicised as widely as possible

31 It is worth noting that the Government of Israel has permitted John Dugard access to the OPTs in his capacity as Special Rapporteur while refusing him and the mission led by Desmond Tutu access under the resolutions adopted at the Special Sessions.

32 Human Rights Council Resolution 5/1, Annex

in order to ensure that the broadest range of qualified individuals are included (from all regions) so that not only can each mandate be filled by an appropriate candidate but that the overall profile of the special procedures is balanced in terms of gender, different countries, regions, cultures and legal systems. In particular, it should be advertised through academic, professional, governmental, and non-governmental networks.

Selection from the roster will be made by a Consultative Group – one member appointed by each of the 5 regional groups of States but serving in their personal capacity (in fact they are not required to be a government person). This Group will prepare and present to the President a list (with justifications) of suitable candidates for each vacancy. The President then selects one candidate for each vacancy and presents the list of these to the Council for approval. In this way, there is more governmental buy-in to the process, while retaining the individual responsibility of the President not only in making the final selection for each mandate but also to ensure that there is a reasonable balance across the mandates.

Whether this process will produce better results than the previous system remains to be seen, but the key issues will be the quality of the candidates on the Roster, the quality and overall balance of the Special Procedures mandate holders as a group and whether Governments feel more committed to and supportive of the mandate holders because of their greater involvement in the process.

**Code of conduct:** Part of the attempt to ‘shoot the messenger’ was evidenced by the African Group’s tabling of a draft Code of Conduct for Special Procedures mandate holders. There are, of course, professional and ethical standards that the mandate holders should maintain, and unfortunately some individuals have at times failed to do

so. Indeed, what is interesting is that many of the proposed provisions of this draft appear to have been based on a single incident, by one mandate-holder, on one occasion, in one country. This in itself demonstrates the high standards maintained by most of them. Although considerable changes were made before the Code was adopted as part of the President’s Institution-Building package, the process of drafting was flawed and left a number of provisions far from ideal. Given the Council’s increased recognition during the year of the importance of the Special Procedures, the Code should only be used as a reminder to current and future mandate holders of the nature of the role they are undertaking and not to undermine or hamstring them.

**Review, rationalisation and improvement of mandates:** No review of mandates took place before the end of the Council’s first year but some principles are set out in the President’s text. Some of the wish for ‘review and rationalisation’ seemed to be based only on the notion that there are too many mandates, and therefore this should be a process of discontinuing some. In fact the real issues are whether the *ad hoc* creation of mandates on which the current system is based should continue, whether the existing mandates should be continued as they are, expanded, altered, combined, otherwise adjusted or discontinued – as well as whether to create any new mandates. For example, this could be a good opportunity to replace the previous Sub-Commission Working Group on Contemporary Forms of Slavery with a Council Special Rapporteur covering this area, but also bringing in the mandate on trafficking in persons, and some aspects of the mandate on sale of children. This illustrates the need not to look at the Special Procedures in isolation from the consideration of the issues previously covered by Sub-Commission groups.

## Independent Expertise and Human Rights Council Advisory Committee

It is not only the Special Procedures and the new Advisory Committee who are to provide independent expertise to the Council and its members. As previously noted, there are additional possibilities since some provisions are not prescriptive, for example, for the UPR Working Group delegations, the UPR Rapporteurs and the Consultative Group involved in the selection of the Special Procedures mandate holders. Given the nature of the functions to be performed, States should think seriously about the benefits of having independent experts handling some of these functions: this might also assist by reducing some of the demands of time on government delegations.

For the first time, two principles will apply across the board for all independent expert positions on the Council: the non-accumulation of (UN) human rights functions as well as term limits of no more than six years. The latter had applied to Special Procedures of the Commission but not to its Sub-Commission members; the former requirement is entirely new. This should ensure that the same people, however good, do not become a permanent part of the UN human rights system to the exclusion of many other equally well qualified candidates.

**Advisory Committee:** The Human rights Council Advisory Committee replaces the Commission's Sub-Commission on the Promotion and Protection of Human Rights, and is designed to fill the UN General Assembly resolution's mandate for the Council to have expert advice as well as a system of Special Procedures. It will comprise 18 independent expert members (down from 26 for the Sub-Commission). Only States (not limited to members of the Council) can propose candidates, but they "should consult their national human rights institutions and civil society organisations and ... include the names of those

supporting their candidates"<sup>33</sup>.

Unlike the Special Procedures, members of the Advisory Committee will be elected by the Council, in secret ballot, with specific numbers of places assigned to the UN regional groups: five each from Africa and Asia; three each from Latin America and the Caribbean, and Western European and Other Group, and two from Eastern Europe. Since requirements of recognised competence and experience in the field of human rights, high moral standing, independence and impartiality are stated, it would be appropriate to apply the same 'technical and objective criteria' for these candidates as for Special Procedures, as well as the same exclusion of those in decision-making positions in Government or where a conflict of interest with their role could arise applies as for Special Procedures – in particular, since the Advisory Committee retains a role in the Complaint Procedure.

The scope of the Advisory Committee's activities is more limited than the Sub-Commission's. It is only advisory, only on thematic issues, "in the manner and form requested by the Council", cannot adopt resolutions or decisions, but it may propose for the Council's consideration "further research proposals within the scope of the work set out by the Council". It can meet for up to two sessions per year for a maximum of 10 working days. *Ad hoc* meetings and subsidiary bodies can only be established with the authorisation of the Council.

The election of members of the Advisory Committee has yet to be organised, and until then the Complaint Procedure (see below) cannot proceed. The Committee's first session is provisionally scheduled for August 2008. No decision was taken about the issues covered by the former Sub-Commission working groups

on Indigenous Populations, Contemporary Forms of Slavery, and Minorities, nor the Social Forum. Logically these should be considered along with the Review of Special Procedure Mandates, including whether some of the per-

ceived benefits of having working groups could be taken into account by, for example, providing Special Procedures in these areas with the scope to hold annual consultations.

## NGOs and National Human Rights Institutions

The formal involvement of NGOs in the Council's processes has been maintained in line with GA resolution 60/251 which referred to ECOSOC resolution 1996/31 and the *acquis* of the Commission. In some respects developments have occurred, for example, allowing NGO participation in the inter-active dialogue with thematic Special Procedures, and in practice many NGO contributions to the institution-building process have been accepted and recognised by a broad range of governments.

However, in other respects the Council's first year has been a difficult one for NGOs. The focus on institution-building has minimised substantive discussion of human rights issues – thematic and country-specific – which is the main concern of human rights NGOs. The lack of a clear and predictable agenda/programme of work has made advance planning – whether of travel for those outside Geneva, or of preparation of statements/questions, including joint ones – problematic. Fewer NGOs have participated this year than would have been expected to be at the Commission.<sup>34</sup>

Two significant considerations for the future substantive participation of NGOs will be how issues are divided amongst the Council's regular annual sessions – which may enable some NGOs to plan attendance at only one or two sessions rather than all three, depending on their priorities and resources – and the UPR. Although NGOs are not given a participatory role in the Working Group

of the Whole, UPR may prove to be a focus for NGOs from the country or the region under consideration at the Council as well as during the preparation and follow-up process in country. However, monitoring the physical and substantive presence of NGOs will be important for the future, as well as maintaining a careful eye that the Council's practices do not have a detrimental effect on their engagement.

National Human Rights Institutions (NHRIs) have slowly increased their engagement with the Council, building on the Commission practices. Their role is important not only in informing about the development of NHRIs in countries, but increasingly in commenting on substantive issues and will be essential in the preparation and follow-up to the UPR.

Although most focus on NGOs and the Council have tended to be on the participation in the Council sessions, in fact one of the major aspects of the interaction with the Commission was through 'side events', held, usually during the two hour lunch break, in the Palais des Nations (UN Building). These events usually included a panel of speakers on a topic – often including Special Procedures, international, regional and local NGOs/activists, and sometimes government representatives. Such events have been severely curtailed this year because not enough rooms were available. It is important that the value of these, for all participants, is not lost and planning for future sessions of the Council needs to take into account ensuring the availability of enough rooms.

34 A maximum of 183 NGOs registered for a single session and a total of 284 NGOs across all five regular sessions of the Council, compared with 307 at the 61st session of Commission.

## Complaint Procedure

Little has changed between the Council's complaint procedure and the '1503' complaint procedure of the Commission. The procedure remains confidential. There are to be two working groups to consider the communications: the first of five members of the Human Rights Council Advisory Committee, the second of five member States of the Council, both mandated to meet twice a year for five working days on each occasion. The

Council is to consider situations referred to it by the second group at least once a year, and more frequently if needed. If the second group recommends public consideration, this will be taken up at the next session of the Council. A marginal improvement in a not particularly effective process positive development is that the author of the complaint is to be kept informed of decisions by the working groups and the Council.

## Agenda, Programme and Methods of Work of the Council

The Council wrestled with the need to come to terms in planning its work with the differences between being a body meeting only once a year, and one meeting several times a year. The agenda is shorter<sup>35</sup> and, therefore, more general than the Commission's, but this does not mean that any issue which could have been considered by the Commission is excluded. It avoids the conceptually unsound distinction between civil and political and economic, social and cultural rights, and includes a general item on human rights situations requiring the Council's attention (unfortunately the question of technical assistance is separate rather integrated into this item which is where logically it fits). Given the pervasive and increasing discrimination on many grounds, it is unfortunate that the item on "Racism, racial discrimination, xenophobia and related forms of intolerance" was not phrased as "Racism, *all forms of* discrimination, xenophobia and related intolerance", in order to ensure both that all forms of discrimination are covered and that the conceptual underpinnings of discrimination need to be addressed irrespective of the particular form in which they are manifested.

While the Commission had an agenda through which it worked during its annual session, with the Council meeting at least three times a year in regular session, there

was a need to separate the agenda from the Programme of Work since not all items need to be addressed at each session. For example, the Council will only elect its officers, have a high-level segment and have regular substantive consideration of some issues and the annual reports of Special Procedures once a year. Deciding when each of these is to occur, and thus establishing an orderly, predictable, though not overly restrictive, pattern of work is both necessary and helpful for all parties – those preparing reports as well as those wishing to discuss them.

A contentious issue was the proposal by China (supported by others) to require a qualified (as opposed to simple) majority for resolutions on specific countries. This was the issue which delayed adoption of the President's Text, and nearly derailed it completely, since the President had made it clear that no vote is permitted on a President's Text and therefore if it did not command consensus, he would withdraw the whole package. The final compromise on this point was that in the section on "Working culture" of the Council, it states "Proposers of a country resolution have the responsibility to secure the broadest possible support for their initiatives (preferably 15 members), before action is taken."<sup>36</sup>

35 Pakistan and Algeria regretted the lack of a separate agenda item on self-determination. See earlier comments in relation to the item on the Palestinian Territories.

36 Human Rights Council Resolution 5/1, Annex

## Conclusion

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So far, the real *differences* between the Council and its predecessor are its (frequent) meeting pattern, more inter-active and less formal speech-making methods of work, the increased presence of and interaction with the Special Procedures and High Commissioner for Human Rights and the degree of engagement between Governments and Special Procedures in these processes, and the Council's status as a subsidiary of the General Assembly rather than ECOSOC, which includes the fact that its decisions become effective immediately rather than having to await approval by ECOSOC some months later. Potentially, another big difference will be the UPR but this is not yet operational.

The innovative creation of a group of the existing Special Procedures in relation to Darfur mandated not to undertake another mission but to compile and work with the Government on the implementation of the numerous existing recommendations, through specific steps, timetable and indicators of performance, will be worth following closely both in relation to the Sudan, and as a possible model for other serious and continuing situations of human rights violations which have already received attention but without having a significant impact in changing the real problems, such as, for example, Colombia. By identifying both the steps to be taken and the specific indicators by which the effectiveness of action will be judged, the group of experts have also created a model that will be worth considering in relation to other reports and recommendations. Again, building in cooperation with the regional human rights bodies and procedures is also worth considering for the future in relation to countries where such regional bodies exist.

If States are to participate fully in all aspects of the Council's work, most need to increase the number of persons in their Geneva delegations, and preferably with persons having human rights expertise. The frequency of meetings now means that it

is no longer possible to rely on bringing in people from capitals to cover and/or provide expertise. Even with the Commission, some States were never members, or only served one term, throughout the decades of its existence. If the Council is to be credible, it will be important that States are neither precluded from membership because of the demands, nor that some members do not participate fully in all aspects of the Council's work, including in all UPR considerations. If the need for consultations and action at the Ambassadorial level continues as it has been during the first year, consideration should also be given to having an Ambassador for Human Rights in the same way that some already do for Trade or Disarmament.

There is *not much change* with regard to country resolutions and action, the membership of the Council, the confidential complaints procedure, the post-Sub-Commission expert advisory committee, and with the role of NGOs and Special Procedures (except in terms of the more inter-active process and greater frequency of participation linked to the greater frequency of sessions).

*Actually or potentially worse* are the amount of time and energy taken up by institutional-building and procedural discussions as opposed to the promotion and protection of human rights, that some results of these amount to little more than reinventing the wheel, the delays in considering the reports of Special Procedures, that some issues previously considered at the Commission have not come up and the question remains whether they will drop off the agenda, the smaller number of NGOs attending thus reducing the sense of a global human rights gathering, the lack of rooms for NGO side events during Council sessions, and the fact that the institution-building process is not complete and may, therefore, continue to draw time, energy and focus away from substantive human rights issues.

The Council has maintained a standard-setting role, with work beginning on the Optional Protocol to the Covenant on Economic, Social and Cultural Rights, as well as the adoption of the Convention on Disappearances and the Indigenous Declaration. However, the latter remains stalled at the General Assembly – which is neither good for the Declaration nor as a precedent for the Council at this formative stage.

No consideration of the first year of the Human Rights Council could be complete without a tribute to its first *President*, Mexican Ambassador Luis Alfonso de Alba. The Council could not have had a better President during its inaugural year. In addition to the legacy already identified above, he also created the role of the Council Presidency and an Office of the President. In so doing he identified the need to ensure the capacity for this role, given the amount of time which is and will continue to be needed to perform it, as well as the importance of maintaining the distinction between the person serving as president and their role as Ambassador of a specific country

– thus Mexico had a different Ambassador heading its Council delegation during his Presidency. At one stage in the course of the year, it seemed that he might have lost the confidence of the participants, as he sought to give form to the Council in ways that would make it different from the Commission, and tried out different approaches – leading at times to frustration, angst and confusion – but his persistence and diplomatic skills paid off. The challenges were not only from the States (members and non-members of the Council), and the NGOs but also from the UN, which had not planned for the impact of creating this new body, so that such mundane things as interpretation services and room availability at times appeared insuperable. This led to an exasperated proposal from the President that since meet we must if we were to complete the business in the required time-span, if necessary we would meet in the car park! The words ‘magi’ and ‘magician’ have the same root, and elements of both were displayed in leading this new body in its formation.

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