

August 2008



Quaker United Nations Office

*Human Rights
& Refugees
Publications*



Digging Foundations or Trenches?

UN Human Rights Council:
Year 2

by Rachel Brett

English Français Español

August 2008

Quaker United Nations Office



Human Rights & Refugees Publications


Digging Foundations or Trenches?

UN Human Rights Council:
Year 2

by Rachel Brett

The Quaker United Nations Office

The Quaker United Nations Offices located in Geneva and New York represents Friends World Committee for Consultation (Quakers), an international non-governmental organisation with General Consultative Status at the UN. QUNO works to promote the peace and justice concerns of Friends (Quakers) from around the world at the United Nations and other global institutions. It is supported by the American Friends Service Committee, Britain Yearly Meeting, the worldwide community of Friends, other groups and individuals.

 All QUNO work is published under a Creative Commons licence. It can be copied, distributed and altered for non-commercial purposes, provided that the original author is given credit and any altered work is published under a licence identical to this one. More information and full details of the licence are available at <http://creativecommons.org>.

Cover photo:

© Big Stock Photo: Marilyn Barbone

Hard copies of this paper are available from QUNO on request.

Copies of all QUNO publications can be downloaded from our website:

www.quno.org

Quaker United Nations Office
Avenue du Mervelet, 13
1209 Geneva
Switzerland

Tel: +41 22 748 48 00

Fax: +41 22 748 48 19

Email quno@quno.ch

Contents

<i>Introduction</i>	3
<i>Special Procedures</i>	4
<i>Thematic mandates</i>	4
<i>Country mandates</i>	6
<i>Interactive dialogues</i>	7
<i>Mandate-holders appointments</i>	7
<i>Human Rights Council Advisory Committee</i>	8
<i>Other bodies</i>	8
<i>Standard Setting</i>	9
<i>Special Sessions</i>	9
<i>Universal Periodic Review, Peer Review or Public Relations?</i>	10
<i>Universality</i>	10
<i>Troikas</i>	10
<i>Prevarication</i>	11
<i>Review</i>	11
<i>Recommendations</i>	12
<i>Other substantive issues</i>	14
<i>Panels and annual thematic debates</i>	15
<i>National Human Rights Institutions</i>	15
<i>Future</i>	16

Introduction

The UN Human Rights Council's second year¹ (June 2007-June 2008), covering its 6th, 7th and 8th sessions,² was expected to complete the 'institution-building' phase and move into a regular, substantive mode of work. The unfinished business included instituting the Universal Periodic Review (UPR), electing the members of the Advisory Committee (though its first meeting would not take place until Year 3 of the Council), finishing the 'review, rationalisation and improvement' of the Special Procedures mandates (not all completed in Year 2), and putting into practice the new appointment process for the Special Procedure mandate-holders. Much was achieved under the Presidency of Ambassador Doru Costea of Romania despite last minute hitches, including some further debates on and reinterpretations of the Institution Building Package.³ External factors also influenced the Council's work, such as the crackdown on peaceful protest in Myanmar and the decision of Louise Arbour not to seek another term as High Commissioner for Human Rights.⁴ This may, in fact, be the transitional year for the Human Rights Council to a more normal and substantive programme of work. Whether it is a transition that marks the digging of sound foundations for the future work of the Council, or the prolongation of trench warfare, remains to be seen.

1 For earlier analysis of the UN Human Rights Council see Rachel Brett: *Righting Historic Wrongs* (QUNO, Geneva, July 2006) and Rachel Brett: *Neither Mountain nor Molehill* (QUNO, Geneva, August 2007), downloadable from www.quno.org. For more detailed reporting and specific analysis see the reports prepared by the International Service for Human Rights www.ishr.ch

2 For ease of reference the Human Rights Council sessions will be designed as HRC6, HRC7, etc.

3 The Human Rights Council resolutions 5/1 and 5/2 are generically known as the Institution Building (or IB) Package

4 For an assessment of her work as High Commissioner see the joint NGO oral statement of 2 June 2008

Special Procedures

Thematic mandates

Almost all thematic Special Procedure mandates were reviewed and renewed during this period. To what extent any of them were improved is less clear⁵ and no rationalisation occurred. The exceptions were the Special Rapporteur on Toxic Waste and the Working Group on People of African Descent which are still to be considered. The call for consistency of approach across the Special Procedures seemed to be somewhat inconsistent, depending on the political or personal agenda in relation to the mandate, the mandate-holder or the main sponsor, but all mandates now include a standard reference to the Code of Conduct for Special Procedures Mandate-Holders.⁶

All thematic mandates were renewed for three years, including the Independent Expert on Minority Issues (7/6)⁷, which had been established in 2005 for only two years because of the sensitivity of the subject, and the Special Representative of the Secretary-General (SRSG) on human rights and business (8/7) which the current (and continuing) mandate-holder had proposed should be extended for only two years. This aspect of the review process introduced a measure of consistency across mandates by 'levelling up'.

By contrast 'levelling down' occurred in relation to the title and appointment process

on Human Rights Defenders which was originally created as a Special Representative of the Secretary-General and thus also appointed by the Secretary-General. This mandate was renewed as a Special Rapporteur of the Human Rights Council and, therefore, appointed through the new Council process (7/8). In the parallel cases where the existing mandate-holder was continuing as having served only one term, the previous title was continued and, of course, the appointment question did not arise.⁸ The issue was discussed at the time of the review of the Representative of the Secretary-General on Human Rights of Internally Displaced Persons (6/32) at HRC6 but was taken for granted by HRC8 when the mandate of the SRSG on Human Rights and Business was reviewed.

While most mandates were renewed with little debate,⁹ those on torture (8/8) and on extrajudicial executions (8/3) focussed as much on the mandate-holders (Manfred Nowak and Philip Alston respectively) as on the mandates.¹⁰ This, and the earlier attention to the mandate-holder on Freedom of Religion or Belief (Asma Jahangir), seemed to be attempts to prevent these particular individuals continuing for the second of the three-year terms which are permitted. The bizarre result was a Presidential statement

5 The name and scope of the Independent Expert on effects of economic reform policies and foreign debt was changed to the 'Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (7/4; 34-13-0)

6 HRC Resolution 5/2

7 Resolutions are cited by session and number only; all resolutions were adopted without a vote unless the votes are indicated, in which case they are given in the order: for-against-abstentions.

8 The question of 'reappointment' of mandate-holders having served one term was raised subsequently but was taken for granted as being the established practice at the time of the renewals during HRC6.

9 Special Rapporteurs on Right to Food (6/2), on Indigenous Peoples (6/12), on Right to Adequate Housing (6/27), on Human Rights and Counter Terrorism (6/28), on Right to Health (6/29), on Sale of Children, Child Prostitution and Child Pornography (7/13), on Violence against Women (7/24), on Contemporary Forms of Racism (7/34), on Right to Education (8/4), on Independence of Judges and Lawyers (8/6), on Migrants (8/10), and on Trafficking (8/12); the Independent Experts on human rights and international solidarity (7/5; 34-13-0), and on extreme poverty (8/11); and the Working Groups on Arbitrary Detention (6/4), on Disappearances (7/12), and on Mercenaries (7/21; 32-11-12) which also covers private military companies and is to draft 'basic principles that encourage respect for human rights by those companies' and to look at the issue of the role of the State as the holder of the monopoly over the legitimate use of force.

10 Outspoken critics were Cuba, Egypt (on behalf of the African Group), India, the Russian Federation, Singapore and Sri Lanka

which presumes a second term unless information about ‘persistent non-compliance’ with the Code of Conduct is presented to the President by States and/or the Coordination Committee of the Special Procedures.¹¹ A result described by Amnesty International as a solution to a problem that did not exist.

The renewal of the mandate of the Special Rapporteur on Freedom of Religion or Belief was controversial not only because of the mandate-holder (Pakistan appeared to alter its position in relation to her after its domestic political changes) but also because of substance. On behalf of the Organisation of the Islamic Conference (OIC), Pakistan gave five reasons why they could not support the resolution, one of which was that there should be ‘respect for national laws and religious norms about the right to change one’s religion’. In other words, they wished to remove or restrict the reference to the freedom to change one’s religion or belief – ironic in the year celebrating the 60th anniversary of the Universal Declaration on Human Rights whose Article 18 specifically provides for this. However, even they could not bring themselves to vote against the renewal of the mandate and so abstained in the vote (6/37; 29-0-18). In addition to the OIC Council members,¹² the abstentions were from China, South Africa¹³ and Sri Lanka.¹⁴ The resolution not only renews the mandate but issues a strong condemnation of all forms of religious intolerance, and urges States to tackle intolerance and discrimination through a number of political, legal and social channels, with broad suggestions such as ensuring that

the education system promotes tolerance and respect for religious and cultural diversity.

The other contentious thematic mandate was the Special Rapporteur on Freedom of Expression. This was linked to the question of religion since the controversy revolved around the limits to freedom of expression in relation to religion (ie, the ‘cartoons’ issue). The mandate was amended¹⁵ by vote (27-13-3) to include reporting ‘abuse of the right to freedom of expression that constitutes an act of racial or religious discrimination, taking into account Articles 19(3) and 20 of the International Covenant on Civil and Political Rights, and General Comment No. 15 of the Committee on the Elimination of Racial Discrimination, which stipulates that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression.’ This amendment led to many of the original co-sponsors withdrawing their co-sponsorship: the resolution as amended was adopted by vote (7/36; 32-0-15). The resolution on Combating Defamation of Religion (7/19; 21-10-14) covers some of the same ground.¹⁶

Two new special procedure mandates were created: a Special Rapporteur on Contemporary Forms of Slavery (6/14) replacing the Sub-Commission¹⁷ Working Group on that subject, and an Independent Expert on the human rights obligations related to access to safe drinking water and sanitation (7/22). The latter is the first new Council Special Procedure mandate for which no form of predecessor existed.

11 Presidential Statement, ‘Terms in office of Special Procedure mandate-holders’ A/HRC/PRST/8/2 of 18 June 2008

12 Only the 47 members of the Council are entitled to vote on resolutions

13 For reasons known only to itself

14 Sri Lanka opposed many EU positions because it objected to the EU’s criticism of the human rights situation in Sri Lanka. This equal and opposite reaction to any EU action became even more pronounced after Sri Lanka failed to be re-elected to the Council - the only Council member standing for re-election who failed - in the wake of an NGO campaign opposing its bid for re-election because of its poor human rights record. On the other hand, Sri Lanka vociferously supported Italy when the latter’s treatment of the Roma was criticised by the High Commissioner for Human Rights.

15 Amendment tabled by Pakistan (on behalf of the OIC), Egypt (on behalf of the Group of African States) and Palestine (on behalf of the Group of Arab States)

16 See joint oral statement/question to the Special Rapporteur on Freedom of Religion or Belief by FWCC (Quakers), International Service for Human Rights and Amnesty International (13 September 2007) for a more nuanced and grounded human rights approach to the issues.

17 The subsidiary body of the former Commission on Human Rights

Country mandates

The mandates on Cambodia and the Occupied Palestinian Territories (OTs) have not yet been reviewed. The latter is, of course, contentious since it is stated to be ‘until the end of the occupation’ hence some have argued that it does not need to be reviewed. However, even if renewal is not required, this does not preclude reviewing (and possibly improving) it.

With this one exception, country mandates are all for one year. By contrast with the review of the thematic mandates, few of the country mandates were without controversy. The most entertaining was the renewal of the mandate of the Independent Expert on Burundi (6/5) where Egypt (purportedly on behalf of the African Group of which it is coordinator and of which Burundi is presumably a member) first sought to impose the ‘African Group’ position that opposes all country mandates (except of course on the OTs which they had tried to argue was not a ‘country’ mandate at all). Faced with the demand from the Government of Burundi that they wanted the mandate continued, Egypt then publicly articulated - and reiterated - a position that the African Group did not support the renewal of the mandate (the review of which was introduced by a Burundian Government Minister) but would not oppose it. The resolution was tabled by Burundi and co-sponsored by Angola, Burkina Faso, Côte d’Ivoire, Ghana, Mauritius, Rwanda, Uganda, United Republic of Tanzania and Zambia. Subsequently, the African Group position appears to have been modified to supporting renewal of country mandates which are wanted by the country concerned. In addition to Burundi, the mandates of the Independent Experts on Haiti (PRST/6/1)¹⁸, Liberia (6/31) and Somalia (7/35) were renewed, as well as the Special Rapporteurs on the Democratic People’s Republic of Korea (7/15; 22-7-18) and Myanmar (7/32).

The Sudan situation was complicated not only because of the hostility of the Government, but also because of the creation of the Group of Experts on Darfur (comprising a number of the thematic Special Procedures).¹⁹ The ‘compromise’ was to lay down the Group of Experts (despite the fact that they confirmed progress on only four of the 46 short and medium-term measures listed) but to continue the Special Rapporteur and to give her the task of ensuring ‘effective follow up and to foster implementation of the Group of Experts short and medium term recommendations’ (6/34). A separate resolution urged the Government of Sudan ‘to continue and to intensify its efforts to implement the recommendations identified by the Group of Experts in accordance with the specified time frames and indicators’ (7/16).

The mandate of the independent expert on the Democratic Republic of Congo (DRC) was not renewed (7/20) but a range of thematic Special Procedures were, instead, asked to report to the HRC9. Having such a report may be useful, but the precedent of the Darfur Expert Group is not altogether encouraging (and the DRC arrangement is less formalised than was that for Darfur). The expertise – particularly the combined expertise – of thematic Special Procedures when focused on one country is considerable but is not by itself a substitute for a country mandate because by their nature thematic mandates cover all countries, thus they cannot continue to concentrate and follow up on one specific country situation. The possible exception has been the work of the Special Rapporteur on the Independence of Judges and Lawyers who successfully helped to address the 2004 crisis in the Supreme Court in Ecuador, paying repeated visits to the country, but this was in respect of a specific, immediate crisis in relation to one issue, albeit with broader ramifications, rather than a general, broader, ongoing situation such as in the DRC.

¹⁸ Presidential Statement rather than a resolution

¹⁹ For background on the Darfur Expert Group see *Neither Mountain nor Molehill*

Interactive dialogues

The interactive dialogues with Special Procedures in the Plenary of the Council continued, including NGO participation in both thematic and country ones. Unfortunately, the good practice of setting and sticking to the timetable for these was not maintained throughout, leading to occasions when the mandate-holder could not be present, which defeats the object of the exercise.

Mandate-holders appointments

All involved in the new process for appointing Special Procedure mandate-holders had a steep learning curve. Not only was the process starting from scratch, but also there were a considerable number of vacancies to fill. The public list has attracted many good quality candidates, although more are still needed and a notable absence was anyone from the Eastern European region with expertise in indigenous peoples, leading to an anomaly in the appointment of the five members of the new Expert Mechanism which therefore contains two Asians and no Eastern European. This underlines the continuing importance of having the broadest range of qualified and interested candidates on the list.

The general understanding was that the Consultative Group²⁰ would put forward a list of candidates for each vacancy with justifications, and the President would make a selection taking into account not only each mandate individually but also the overall balance across the mandates including geographical distribution, gender and different legal traditions. By 'nominating' one candidate in some instances, the Consultative Group built up an expectation on the part of that candidate and supporters (including in some cases the relevant Government or Regional

Group) that this was an assured position. It was, therefore, not surprising that when this proved not to be the case, there was a negative reaction. However, as indicated, this was due to the failure of the Consultative Group to perform the task it was mandated to do. Despite the protestations, both slates of candidates presented by the President during this period were accepted by the Council.

The new process was intended to achieve a number of different things. First, to broaden, both numerically and geographically, the pool of qualified candidates from whom the selection would be made by creating the public list to which anyone (including the individuals themselves) could nominate candidates, and by setting criteria in terms of independence and expertise. Secondly, to create greater support from the States given that, through the Consultative Group and through approval of the President's slate, they would have a greater role in the process than previously. So far, the experience suggests that it has achieved a broadening of the base,²¹ and a significant influx of new people as mandate-holders, almost all of whom appear to be well-qualified and independent of government. Once the new mandate-holders begin to undertake their functions, it will be easier to verify this, and also whether the increased State involvement in the process translates into greater support.

An encouraging sign is that the number of States issuing Standing Invitations to the Special Procedures continues to increase, and has been reinforced through the UPR process as Latvia has taken this up regularly with States under review. By August 2008, 62 States from all five regional groups had done so (Australia, Republic of Korea and Zambia being the most recent).

20 The Ambassadors of Algeria, Chile, Pakistan, the Russian Federation and Switzerland 'acting in their personal capacity'

21 There are now mandate-holders from 42 different countries from all regions, although in every region there is some duplication of nationality (Argentina, Chile, Kenya, Mexico, Nigeria, Pakistan, Spain, the Russian Federation and USA). However, gender balance is still lacking: 36 men to 17 women, with all 5 members of the Working Group on Disappearances being men.

Human Rights Council Advisory Committee

By contrast with the new procedure for filling Special Procedure mandates, the elections to the Advisory Committee were unreconstructed, and it showed. There were clean slates for three regional groups (Africa, Asia and Latin America/Caribbean) and so no

ballot was held for these. Of the 18 members of this new body, 14 are men and 7 were on the Sub-Commission (its predecessor) with a total of 100 years service between them as members or alternates.²²

Other bodies

An Expert Mechanism on the Rights of Indigenous Peoples (6/36) was created (replacing the Sub-Commission Working Group on Indigenous Populations) consisting of five independent experts (selected in the same way as Special Procedure mandate-holders and on the same three-year, two-term basis) giving due regard to experts of indigenous origin, to provide thematic expertise to the Council mainly through studies and research-based advice and to report annually. Both the Special Rapporteur and a member of the Permanent Forum on Indigenous Peoples are invited to attend and contribute to the 5-day annual meeting of the Mechanism.

A Forum on Minority Issues (6/15), replacing the Sub-Commission Working Group on Minorities, was established mandated to meet annually for two days, with its work to be guided by the Independent Expert on Minority Issues. It is to provide a platform for

promoting dialogue and cooperation, thematic expertise to the Independent Expert, and to identify and analyse best practices, challenges, opportunities and initiatives in implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The chair, an expert in minority issues serving in his/her personal capacity, is to be appointed by the Human Rights Council President on the basis of nominations from States, with regional group rotation.

The Social Forum, originally created by the Sub-Commission, is to continue (6/13) as a body of the Council, meeting for 3 days annually, and focussing on the eradication of poverty in the context of human rights, best practices in the fight against poverty, and the social dimension of globalization. The chairperson-rapporteur is to be appointed by the Human Rights Council President from nominations by regional groups.

²² Calculated on the basis that the Sub-Commission ceased to exist in 2007. Two more of the members had just completed two terms as Special Procedure mandate holders.

Standard Setting

The draft Optional Protocol establishing a complaints mechanism for the International Covenant on Economic, Social and Cultural Rights was adopted (8/2) but not without difficulty. There had been mixed support in the Working Group negotiating it and the result was presented as a carefully balanced compromise. However, this was challenged by Pakistan (supported by others) because Article I of the Covenant, the right to self-determination, was not included as one of the provisions subject to the Protocol. In the end, the draft was amended to include it. This was presented as a principled rather than a practical victory: self-determination is covered by the parallel Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), but attempts to invoke it have not been successful. However, Article I of the ICCPR has been used in individual cases

to interpret other articles of the Covenant, such as the rights of public participation and of minorities.²³ Furthermore, the broader scope of this draft Protocol may open up additional possibilities in relation to Article I. Complaints ('communications') may be made by or on behalf of²⁴ individuals or groups of individuals claiming to be victims of violations of any of the economic, social or cultural rights in the Covenant, but the Committee may decline to consider those not revealing a clear disadvantage to the author. There is a provision for friendly settlements. In addition, there is an optional reciprocal inter-state complaints provision and an optional inquiry procedure on the basis of reliable information indicating grave or systematic violations. The draft Protocol will be forwarded to the General Assembly for adoption. It will be interesting to see who actually becomes a party to it.

Special Sessions

For the first time, a Special Session (the 7th one) was held on a thematic issue – the Global Food Crisis. A more 'traditional' Special Session was held on Myanmar (October 2007) in the face of the crackdown on peaceful protests by monks and others, leading to the adoption without a vote of a strong resolution (S-5/1). Despite the stated objections to the resolution by the Government of Myanmar, following this the Special Rapporteur on Myanmar was permitted to visit the country for the first time in several years, though not to undertake a follow-up mission.

One of the complaints against the Human Rights Council has been of too great

an emphasis on human rights violations committed by Israel, including through a succession of Special Sessions. However, the resolution on the Right of the Palestinian people to self-determination (7/17) was adopted without a vote, and includes the reaffirmation of 'the inalienable, permanent and unqualified right of the Palestinian people to self-determination, including their right to live in freedom, justice and dignity and to establish a sovereign, independent, democratic and viable contiguous State'. The resolution on Israeli Settlements (7/18; 46-1-0) was opposed only by Canada who nevertheless stated their opposition to the settlements.

23 ICCPR Articles 25 and 27

24 With their consent unless acting without such consent can be justified

Universal Periodic Review, Peer Review or Public Relations?²⁵

UPR was generally considered to be the main innovation of the Human Rights Council.²⁶ It was, therefore, crucial to get it into operation without undue delay, and in itself will be a major factor in any assessment of the Human Rights Council, as well as potentially having a significant effect on how other aspects of the Council function. It is to be hoped that it might also have a beneficial effect on the promotion and protection of human rights in each country reviewed.

Universality

The concept behind UPR was that all countries would have their human rights record reviewed on an equal footing, and although the original terminology of ‘peer review’ was changed to ‘periodic review’, the emphasis has been on the review being conducted by States (rather than independent experts). But the goal of equality requires not only a level playing field but also that the players participate in an equal fashion. Having the review conducted by States has intrinsic problems. Some are not used to commenting on others’ human rights performance and may find it difficult to do so. Others have particular interests to pursue or to avoid, for example, DPRK made plenary statements on only two countries, Japan and the Republic of Korea (to both of whom it had also made recommendations in the Working Group). In commenting during the Plenary (the only time NGOs are permitted to make oral statements on UPR), Amnesty International expressed surprise that given the prominence of counter-terrorism issues in the UK in

the UPR Working Group, so little attention had been given in the recommendations to the question of the reliance on ‘diplomatic assurances’ to facilitate return of individuals to countries where they faced a grave risk of human rights violations.²⁷ However, this is hardly an issue likely to be raised by the countries from whom the UK was seeking diplomatic assurances.

An anomaly that has arisen is that two entities are raising questions and making comments and recommendations in the UPR Working Group as though they are States, but are not themselves subject to review: the Holy See²⁸ and Palestine. Irrespective of the substance of their participation, this calls into question the ‘universal’ and ‘peer’ nature of the process. Either they should be treated as ‘other stakeholders’ and not be able to take the floor in the Working Group, or they should be treated as States and also subject to the UPR. After all, the Holy See reports to the Treaty Bodies on those human rights treaties to which it is a party.

Troikas²⁹

The process for selecting which States would be reviewed when, and selecting the ‘Troika’ for each one was the closest the Council has yet come to playing bingo since both parts of the process were done by the drawing of ‘tiles’. It required more than one attempt by the secretariat to find a reasonably workable procedure (the mathematics were complex even without the politics). In the end, despite the complicated arrangements for the

25 This section has particularly benefited from the insights of Allehone Mulugeta Abebe

26 For background on UPR see *Neither Mountain nor Molehill*, pp5-7

27 Amnesty International, Oral statement on the outcome on the UK under the UPR, 10 June 2008

28 Recommendations have included protection of children in the womb, freedom of religion and belief and abolition of the death penalty

29 Three ‘Rapporteurs’ from different regional groups to facilitate the review including the preparation of the report of the Working Group. These ‘Rapporteurs’ are not part of the Special Procedures.

State to be reviewed and the Troika members to decline and the possibility of requesting (but not refusing) that one Troika member be from the same region as the 'review' State, the only rejection came from Pakistan who was drawn as a Troika member for India (India did not reject Pakistan).³⁰ This may reflect the fact that the negotiations had led to the Troika having a minimalist and mostly technical (not substantive) role. Nevertheless, all but one (Ghana) of the African States requested a member of their own group be included in the Troika, but only a third of Asian states and one Latin American (Ecuador) did so, while the Western European and Other Group stated explicitly that they would not do so, nor would they reject any Troika member drawn or decline any assignment as a Troika member.³¹ Following this publicly stated position, to general amusement the UK (the spokesperson for the Group) drew Egypt, the Russia Federation and Bangladesh for its Troika.

Prevarication

An interesting feature of the slow progress towards the first round of the UPR was the apparently extraordinary fear of what might be revealed by those who had earlier been amongst the strongest proponents of a process whose stated intention was to do away with politicisation and double standards because everyone would be reviewed and on an equal basis. Was there a dawning realisation that if everyone's human rights record was going to be reviewed this also meant that no one was immune from scrutiny? This seems to explain the (unsuccessful) demands that the proceedings should not be webcast, the efforts to marginalise NGOs and NGO material, to minimise the role of the Troika and to insist that the process should be based on a State report. It is ironic that while reporting

to the human rights Treaty Bodies has been criticised by States as being too burdensome, when faced with the possibility of not having to report but using the information already in the system (from the Treaty Bodies and Special Procedures, in addition, of course, to the likely input of NGOs), Algeria (on behalf of the African Group) demanded that there must be a State 'report', not merely 'information' provided by the State. Nevertheless, the three documents which are produced – one by the State under review, and two by the OHCHR (compilation of UN information, and compilation of information from other 'stakeholders' including NGOs, NHRIs, and regional human rights bodies) - do not have a hierarchy, thus distinguishing them from the State report and NGO shadow reports to Treaty Bodies.

The consideration of the UPR Working Group reports in the Plenary was also dogged by attempts to limit the scope of NGO oral statements (the only time in the whole process that NGOs get to speak), with some being repeatedly interrupted. At the end of Year 2, problems were still being created about the UPR, in particular there appeared to be further efforts to hide the already limited participation of NGOs in the process by not having summaries of their comments in the Plenary, as well as those of States and other stakeholders, included in the Council's sessional report.³²

Review

Most States being considered under the UPR sent high level delegations from capital, the exception being South Africa. Most also drew on their experience of Treaty Body reporting in ensuring that the delegation had members knowledgeable about and able to respond to many of the issues raised, and

31 UPR 1: 4 African States out of 4; 1 Asian State out of 4; 1 GRULAC State out of 3; none from the other 2 groups. UPR2: 4 African States out of 5, 2 Asian States out of 5; none from the other 3 groups.

32 Originally the secretariat had included these summaries in an Annex to the Report; attempts were made to eliminate the substance of these and only list the speakers; after negotiations, it was agreed that summaries should be included in the Report itself.

followed the sensible practice of responding after a number of questions or comments had been made, rather than waiting until everyone had finished before responding.

The approaches varied with many being open to critical as well as to supportive and appreciative comments, and acknowledging some at least of their problems and challenges. For example, several European States were open about racist and xenophobic attitudes in their countries. This openness was, of course, assisted by the fact that amongst the background documents submitted to the OHCHR were reports from the various Council of Europe human rights bodies meaning that more authoritative and critical reports were available in relation to these States than for most others.³³ By contrast, some States made considerable efforts to line up ‘friendly’ governments and NGOs to make statements – a process which seeks to exclude possibly critical voices in itself suggests that there must be something to hide.

One of the significant lessons learned from reporting to the Human Rights Treaty Bodies has been the importance of holding broad national consultations in advance of the preparation of the report, not only with civil society and other ‘stakeholders’ but between different government ministries, and in the case of federal states between the different levels of government. This was carried over into the UPR, although the short time between the selection and the appearance of States for the first session of the UPR Working Group meant that even with the best will consultations could not be as broad and all-encompassing as they should have been.

Recommendations

Before the end of the Council’s second year, 32 States were considered under the UPR despite the delays. Once started, other

problems arose: demands that neither the UPR Working Group (the whole Human Rights Council sitting as a Working Group) nor the Council itself adopt any recommendations for the State under review merely adopting the report of the Working Group with the recommendations being identified as coming from the specific State(s) who had made them. In addition, only recommendations accepted by the State would be listed as ‘Recommendations’ at the end of the Working Group Report, those not accepted would be noted by referring to the paragraph in the body of the Report, thus making it harder to identify them. The height of absurdity was reached by Egypt objecting to the inclusion of a recommendation (on non-discrimination on the grounds of sexual orientation, not surprisingly) which the State concerned (Ecuador) had accepted – at this point, the balance of opinion in the Council was clear that one State could not veto another State’s right to accept a recommendation in relation to its own human rights situation.

The original expectation had been that most questions would be submitted in writing in advance through the Troika. However, with the single exception of the Russia Federation in relation to the Ukraine, only a small number of exclusively Western States used this process at all. Most States preferred to ask their questions orally, which meant that they were heard by the public in the room and via the webcast. In addition, since the written questions are not made readily available, it is often not clear (unless the State under review says so) whether they are responding to written questions or simply ignoring all or some of them. Encouraging the greater use of written questions (for example by distributing and/or displaying them in the room so that it is clear whether or not the State under review has responded to them) would leave more time for supplementary questions and/

³³ There could be real benefits if the African and Inter-American regional human rights mechanisms were also to submit information for the UPR, for example the various regional Special Rapporteurs relating to prisoners, human rights defenders, and so on.

or for making recommendations. At present the stringent time limits (2 or 3 minutes) mean that any oral questions or recommendations have to be few in number and without much nuance. As the process continued it became clear that some States were routinely taking up the same issues (eg ratification of the new Convention on the Rights of Persons with Disabilities, creation of independent NHRIs, issuing Standing Invitations to Special Procedures, discrimination against women, abolition of the death penalty). These are all good points and this approach has the merit that it can be adopted in relation to (almost) all countries, but means that the more specific issues may be overlooked.

As was to be anticipated with a new process, some aspects evolved even during the course of the first two Working Group sessions. Starting with the UK, a number of States, rather than responding at the time about which recommendations they would accept and which not, reserved their position on all recommendations, and responded in writing prior to the adoption of the report in the plenary. Another rapid evolution occurred because the Working Group reports in fact listed as recommendations only those in which the State specifically used that word. For example, this meant that the UK's proposal to Finland (UPR1) that it reduce the length of its alternative service to the average length of the military service was not reflected in the Working Group report as a recommendation. In the plenary, therefore, FWCC (Quakers) and Amnesty International proposed to Finland that it should, in fact, treat this as a recommendation and implement it.³⁴ By contrast, on the same issue, in the case of the Republic of Korea (UPR2), the UPR clearly reinforced a Concluding Observation and individual cases of the Human Rights Committee by recommending the State 'to

recognize the right of conscientious objection [to military service] by law, to decriminalize refusal of active military service and to remove any current prohibition from employment in Government or public organizations, in line with the recommendation of the Human Rights Committee' (Slovenia), while the UK recommended 'that active steps be taken to introduce alternatives to military service for conscientious objectors'.³⁵

Specificity was not the only problem arising in relation to recommendations. Sri Lanka recommended that the UK abolish the monarchy³⁶ (a recommendation it did not make to any of the other monarchies being reviewed), and Egypt that the Netherlands consider reintroducing the death penalty. Both of these recommendations were rejected. The UK also rejected recommendations about the current length of pre-charge detention and proposals to extend it further despite the Algerian Ambassador citing Sir Nigel Rodley's comments on this issue when Algeria last reported to the Human Rights Committee.³⁷ An interesting situation arose in relation to the recommendation that Ghana abolish the death penalty since, as the delegation pointed out, it is an entrenched provision of the Constitution they inherited from the military government. If their expressed willingness to consider doing this in the future bears fruit, it will be an example of the value and potential of UPR. Likewise, a notable acceptance was Japan's agreement to take measures to eliminate discrimination based on sexual orientation and gender identity.

In fact, most recommendations were accepted by most States, although as already noted the desire of some States to hide the unaccepted recommendations by not having them listed as such in the report of the Working Group, but simply referring to

34 Joint statement by Friends World Committee for Consultation (Quakers) and Amnesty International, Universal Period Review: Finland, 9 June 2008

35 A/HRC/WG.6/2/1.6 of 9 May 2008, para. 64

36 'To consider holding a referendum on the desirability or otherwise of a written constitution, preferably republican ...'

37 Statement of Idriss Jazairy, Ambassador, Permanent Representative of Algeria, UPR Adoption of UK Report, 10 June 2008

recommendations appearing in paragraphs in the Report as not being accepted, suggests attempts to mask issues of concern. In addition, some of the responses to recommendations at the time of the plenary discussion were vague, inadequate or misleading. It will be important to monitor to what extent governments actually implement the recommendations that they accepted, as well as any voluntary commitments they made (for example Brazil committed to produce an annual report on the human rights situation in Brazil for domestic monitoring purposes). At the same time, some recommendations are easier to

check than others, for example ratifying a treaty, inviting a specific Special Procedure to visit, issuing a Standing Invitation, and adopting or repealing a specific law. Those requiring qualitative changes in programmes, policies and attitudes are inevitably much harder to evaluate. Furthermore, as *Connectas Direitos Humanos* (a Brazilian NGO) pointed out in relation to Brazil, the issue is not only how the Government is going to implement the 15 UPR recommendations but also the almost 300 recommendations made by Treaty Bodies and Special Procedures.³⁸

Other substantive issues

Considerable debate took place about whether the first resolution on the *Rights of the Child* which the Council would adopt should break with the Commission tradition of an ‘omnibus resolution’ and instead focus on only one or two specific issues. The compromise result (7/29) was in favour of an initial broad, baseline resolution with a specific provision that future resolutions would be focussed but with an omnibus one every fourth year. There is also provision for an annual full day discussion on a child rights issue in the Council plenary. An innovation in this resolution was a new section (OP31) on ‘Children of persons alleged to have or recognized as having infringed the penal law’, which calls on all States to give attention to the impact of parental detention and imprisonment on children, and, in particular, to give priority to non-custodial measures when sentencing or deciding on pre-trial measures for a child’s sole or primary carer; and to identify and promote good practices in relation to the needs and physical, emotional, social and psychological

development of babies and children affected by parental detention and imprisonment.³⁹ In addition, the resolution has a paragraph about the draft UN Guidelines⁴⁰ for the Appropriate Use and Conditions of Alternative Care for Children. This was followed up at the HRC8 with a panel discussion on the draft Guidelines, which it is hoped will be forwarded to the General Assembly for adoption, possibly at HRC9.

The first substantive resolution on *protection of human rights and fundamental freedoms while countering terrorism (7/7)* included many issues covered in the Special Rapporteur’s reports to the Council and the General Assembly. In particular it focussed on non-discrimination, non-use of profiling based on stereotypes, prohibition of torture, cruel, inhuman or degrading treatment or punishment, *non-refoulement*, and non-return to a situation where there is a danger of torture or where life or freedom are threatened, as well as ensuring that border controls and

38 *Connectas Direitos Humanos*, Oral Statement on outcome of UPR: Brazil, 10 June 2008

39 For background on this issue see the joint written statement by FWCC (Quakers) and International Catholic Child Bureau (A/HRC/7/NGO/31 of 22 February 2008)

40 The Guidelines were initiated by the Committee on the Rights of the Child but the Commission on Human Rights declined to establish a Working Group to produce them, so they have been prepared through a more informal process involving government experts, UNICEF, NGOs and the Committee.

pre-entry requirements respect international refugee and human rights obligations towards persons seeking international protection. The resolution also addressed the requirement to respect due process guarantees in counter-terrorism measures, including in relation to persons deprived of their liberty (regardless of the place of arrest or detention), and the need for human rights guarantees when listing individuals or entities under national counter-terrorism procedures.

The Russian Federation presented a further resolution (to their previous ones

from the Commission on Human Rights) on *Human rights and arbitrary deprivation of nationality (7/10)* which addresses the need for an effective remedy and issues of statelessness as well as arbitrary deprivation of nationality *per se*.

A new topic, *Human Rights and Climate Change*, was raised by the Maldives. The resolution (7/23) requests the OHCHR to prepare a detailed analytical study on the relationship between climate change and human rights.

Panels and annual thematic debates

The holding of panels and annual debates on particular topics has proliferated apace. While some of these were interesting and may contribute to greater understanding of the issues, and even have an effect on ongoing work of the Council, others were fairly boring or did more to illustrate than to illuminate the problems. During this year, the topics included gender integration, voluntary human rights goals, inter-cultural dialogue, violence

against women, maternal mortality, rights of persons with disabilities, and the draft UN Guidelines on alternative care for children. In future there are, as mentioned above, to be an annual full day meeting to discuss a specific child rights theme in addition to the one on gender, and a panel discussion at the 9th session on the realization of the right to food, and on missing persons.⁴¹

National Human Rights Institutions

Not only NGOs but also governments and National Human Rights Institutions (NHRIs) have discovered that the extensive commitment required to attend and participate in the multiplicity of Council meetings has required adaptations. Perhaps the most successful to date have been the NHRIs, who have established in Geneva a permanent representation of their International Coordinating Committee. This enables them to participate actively and in an

informed way in all relevant aspects of the Council's work; including under the UPR, for example by challenging Governments' assurances about the status of their NHRIs and, at least in the case of the National Human Rights Commission of Korea, making their own statement⁴² on the recommendations. NHRI engagement in the process is important as they provide an obvious and appropriate mechanism to monitor and support follow-up in country.

41 The latter with a view to tasking the Advisory Committee with preparing a study of best practices (7/28)

42 National Human Rights Commission of Korea: Statement Regarding the Consideration of the UPR-report on the Republic of Korea

Future

Year 3 of the Council will be interesting as it will include the first meetings of the Advisory Council, of the Indigenous Expert Mechanism and of the Minorities Forum. In addition, there will be a new (African) High Commissioner for Human Rights, Navanethem Pillay of South Africa, as well as an African President of the Council. Ambassador Martin Ihoeghian Uhomobhi of Nigeria was elected to this position, and, in his inaugural statement referred to QUNO's analysis of the Council's first year.⁴³ Each of these new office-holders will be interesting to observe in their own right as well as the relationship between them, and between each of them and the Council, in particular the African Group. How will this affect the ongoing debate about the relationship between the Council and OHCHR? With many new mandate-holders appointed through the new process, the Special Procedures and their inter-action with the Council will also be worth observing. And, of

course, further rounds of UPR may show what has been learned from the first experiences and how this aspect of the Council's work will develop. As always many external factors will also influence both the substance and the politics of the Council, for example how will the announcement by the USA that it would only engage with the Council on 'matters of deep national interest'⁴⁴ affect things, and will this change with a new US President? Finally, 10 December 2008 marks the 60th anniversary of the Universal Declaration of Human Rights: will this deliver not only fine speeches but a renewed commitment to the fundamental acceptance that *all* individuals are human beings and thus entitled to human rights. It could, for example, be the occasion to launch a common endeavour to promote and protect the human rights of the most vulnerable, excluded and despised – those in prison, detention or otherwise deprived of their liberty.

43 Rachel Brett: *Neither Mountain nor Molehill* (QUNO, Geneva, 2007)

44 Statement of 6 June 2008. The USA has not stood for election to the Human Rights Council with some suggesting that it feared that it might not get elected.

QUNO offices:

In Geneva:

13 Avenue du Mervelet
1209 Geneva
Switzerland

Tel: +41 22 748 4800
Fax: +41 22 748 4819
quno@quno.ch

In New York:

777 UN Plaza
New York, NY 10017
USA

Tel: +1 212 682 2745
Fax: +1 212 983 0034
qunony@afsc.org

