

# COUNCIL MONITOR

International Service for Human Rights



Human Rights Monitor Series

## HUMAN RIGHTS COUNCIL WORKING GROUP ON THE REVIEW OF MECHANISMS AND MANDATES DISCUSSIONS ON THE FUTURE SYSTEM OF EXPERT ADVICE, 10-25 APRIL 2007

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### Overview

The Working Group on the future system of expert advice held its third round of discussions from 10 to 25 April. There were a total of five three-hour meetings. Most of the key issues regarding the system have not been agreed upon. Although some States showed flexibility on some of the issues, others were not willing to move away from the Sub-Commission on Human Rights' structure and function.

One of the major developments of the session was the move of the EU's to no longer advocate for a strict roster model for the future system of expert advice. Instead, it supported the hybrid model which was proposed by India at the previous session of the Working Group.<sup>1</sup> Germany (on behalf of the EU) reminded delegations that this was a significant concession aimed at achieving a consensus. The African Group, the OIC, Cuba, China and others<sup>2</sup> nonetheless remained committed to maintaining a system of expert advice with a formal, standing structure and a set meeting time similar to that of the former Sub-Commission.

Another key issue remained the role of States and the Council in the selection of experts. The EU, Australia, the USA and Canada remained in favour of some sort of appointment procedure by the President of the

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<sup>1</sup> This would allow for a fixed meeting time of ten days, but also allow experts to meet with the Council on an *ad-hoc* basis to present their studies.

<sup>2</sup> Iran, Bangladesh, Colombia and Argentina.

Council. However, they indicated that they could accept the election of experts if there is adequate input of relevant stakeholders in a pre-screening process. On the other hand, the African Group, the OIC and others<sup>3</sup> were of the view that the selection process should be the sole prerogative of States, and that there was no room for the involvement of stakeholders in the pre-screening procedure, as they claim the process to be purely intergovernmental in nature. Furthermore, some States were not willing to accept any sort of pre-screening on the grounds that it would lead to politicization if States were involved.

There was still no consensus as to what the name of the expert group would be, as it was difficult for the Working Group to find a name that did not have a connotation of a standing body or a roster. The size of the expert system remained a contentious issue. There were many delegations that felt strongly about maintaining a number similar to that of the Sub-Commission (between 23 and 26), while others felt that it should be significantly smaller (between 10 and 16).

There was an emerging consensus that the expert group should not be able to initiate its own studies without prior approval of the Council. This did not preclude the ability of the experts to propose studies, but these could not be undertaken without the Council's consent.

It seems to have been established that the expert system will not be able to examine country specific situations, in accordance with the limitations imposed upon the Sub Commission by a decision of the Commission on Human Rights in 2000. Although some delegations, such as Belgium and Canada, did not want to rule out this possibility on the basis that thematic issues cannot be discussed in isolation of examples of human rights violations occurring in any part of the world, the majority of delegations remained opposed to any such function.

The Working Group also had difficulty deciding the length of a set annual meeting time. Many delegations, including those who were in favour of a hybrid model and those in favour of a standing body, were able to accept an annual meeting time of ten days. However, other delegations were not willing to decrease the meeting time of the expert system to ten days,<sup>4</sup> and felt that it may even need to be increased, or at least divided among sessions of the Council.

There was some debate regarding the status of the former Sub-Commission's working groups (Indigenous Populations, Minorities, Contemporary Forms of Slavery). While some delegations thought that they had completed their work, and hence had been abolished, others were of the view that these working groups still had work pending and were still active until 18 June. This issue was not resolved during the Working Group.

The modalities for NGO interaction with the expert system were also evaluated, and could be subject to change. Some delegations were of the view that only NGOs with ECOSOC accreditation should be able to interact with the expert system. Although several NGOs opposed this, no States took a strong position regarding preserving current practice.

On 25 April, the Facilitator called an extraordinary session that was not in the original program of work. In this session, he presented another concept paper. This put delegations in a difficult position, and they were only able to offer preliminary comments as there was no time for coordination with regional groups, or referral to respective capitals. Furthermore, this paper contained several inconsistencies that led most delegations to request that the Facilitator's 19 April draft be used as a basis of negotiation.

## Background

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<sup>3</sup> China, Iran, and Colombia.

<sup>4</sup> The former Sub-Commission would meet for fifteen working days annually.

General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council), provided that the Council should ‘maintain a system of ... expert advice’, as had been provided by the former Sub-Commission on the promotion and protection of Human Rights to the former UN Commission on Human Rights.<sup>5</sup> The use of the term ‘system of expert advice’ and the absence of any reference to the continuation of the former Sub-Commission meant that the Council is not required, under the terms of the resolution, to retain the Sub-Commission and can set up a new system of expert advice.

At its first session, which took place from 19 to 30 June, the Human Rights Council (the Council) adopted *Decision 2006/104*, which established an inter-sessional open-ended Working Group to “formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaint procedure”. At this stage the President divided the Working Group into three streams: one to deal with the review of mandates, one to deal with the complaints procedure, and one to deal with the future system of expert advice. These three streams went on to function as separate working groups. Ambassador Mousa Burayzat of Jordan was appointed as the Facilitator of the Working Group on the future system of expert advice.

The Working Group on expert advice held its first meeting from 13 to 24 November 2006.<sup>6</sup> The Facilitator presented a draft non-paper in the form of a multiple-choice questionnaire consisting of fourteen issues.<sup>7</sup> The outcome of the session was a division among States that were in favour of a system similar to that of the Sub-Commission, and those who proposed a new roster model. The roster model would be an *ad hoc system* where specific experts would be drawn from a pool of experts and tasked to conduct specific studies at the request of the Council.<sup>8</sup> These could be individuals or groups of experts. However, many delegations remained in favour of an expert advisory system similar to that of the Sub-Commission, where each study would have to be reviewed and adopted collectively by the entire group of experts.

With regards to election and selection, there was a clear division among States who were in favour of candidates being elected exclusively by the Council,<sup>9</sup> and those who preferred that there should be a role for High Commissioner in the selection process.<sup>10</sup>

At this stage, many delegations felt that it should not have a standard setting function, and should not have the ability to deal with country situations.<sup>11</sup> However, some States were of the view that its function and scope should not be limited to thematic issues.<sup>12</sup>

There was consensus that experts would serve a maximum of two three-year terms. However, this was not relevant to those in favour of the roster model, as appointments from the roster would occur on a case-by-case basis.

Following the completion of the session, the Facilitator agreed to prepare a working paper to be presented at the third session of the Council; eliminating options that had received no support and regrouping the

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<sup>5</sup> The full-text of the non-paper is available at the OHCHR extranet, which can be accessed at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm) (fill out the form on the page to receive the user name and password).

<sup>6</sup> For a detailed review of the working group view the International Service for Human Rights (ISHR) summary which is available on the ISHR website at [http://www.ishr.ch/hrm/council/wg/wg\\_reports/wg\\_review\\_expertadvice.pdf](http://www.ishr.ch/hrm/council/wg/wg_reports/wg_review_expertadvice.pdf)

<sup>7</sup> Name; structure; size; term of membership; candidacy of experts; election/selection; composition; status; mandate; relationship with the Council; relationship and role with other human rights mechanisms; functions/scope; methods of work.

<sup>8</sup> Finland (on behalf of the EU), Canada, Japan Switzerland, Australia and the United Kingdom were in favour of a roster.

<sup>9</sup> Algeria (on behalf of the African Group), Bangladesh, Iran, Zambia, Ecuador, India, Venezuela, and the Republic of Korea.

<sup>10</sup> Finland (on behalf of the EU)

<sup>11</sup> Algeria (on behalf of the African Group), China, Egypt, Guatemala, Colombia, Thailand, Nigeria, and Venezuela.

<sup>12</sup> Finland, Canada, Japan, and the Republic of Korea.

remaining options under four categories: consensus, emerging convergences, bridgeable divergences and new ideas.

The report that the Facilitator presented at the Council created visible tensions. Despite the fact that several delegations could support most of what was contained in the document,<sup>13</sup> many delegations disagreed with the preliminary conclusions of the Facilitator.<sup>14</sup> Some of the main areas where delegations felt that consensus had not been reached, despite the Facilitator's paper claiming that they had, were the name of the entity, the question of appointment, and the formation of working groups under the expert body. Most importantly, the Facilitator did not include any reference to the roster model whatsoever, which was not acceptable to those who were advocating for this type of system.

In the Working Group's 2<sup>nd</sup> session from 8 to 16 February,<sup>15</sup> the main issues remained whether the Council would opt for a standing body or a roster model. Although the proponents continued to argue in favour of their respective systems, India presented a hybrid proposal, where the expert advisory system would comprise of a 'standing pool of experts' of ten to sixteen members. The Council would have flexibility in appointing experts individually, in groups, or collectively for specific studies. India also felt that this group would need an annual two-week meeting in order for the experts to be able to exchange experiences and interact with NGOs. Germany (on behalf of the EU) expressed interest in this position as a possible basis for compromise, and indicated that it would give it further consideration. However, many States remained committed to maintaining a system of expert advice similar for that of the Sub-Commission.

During this session, the majority of delegations pressed for consensus in order for the expert system not to have the authority to initiate its own studies. Most delegations agreed that it would be better if it had the ability to propose studies to the Council, and could then carry them out with the Council's consent.

During the fourth session of the Council, on 15 March, the Facilitator presented a revised non-paper. He explained that his previous concept paper was found lacking in certain areas by delegations on both sides, and that States were not ready for a compromise text. However, he did feel that consensus was emerging around a 'two-stage selection process' that was outlined in the paper.

On 20 March, 2007, the Facilitator held an informal consultation. At the request of Cuba, it was decided that the discussion would focus on outstanding issues. Germany (on behalf of the EU) reiterated the advantages of the roster system, which included the ability of the roster model to provide specialist advice when needed. The delegation also requested that the mandate of the expert mechanism be expanded to include 'promotion and protection' of human rights rather than simply 'promotion'.

The Russian Federation asked for an explanation as to what the difference between the EU model of a roster of experts and the existing system of special procedures.<sup>16</sup> Germany countered by stating it saw the difference as to the relationship of the system of expert advice to the Council. While special procedures exist independently of the Council and can initiate their own studies, experts under the system of expert advice would only undertake research according to what was asked of them by the Council.

India further elaborated on its compromise proposal, stating that there was no need for a collective adoption of individual studies, as was the practice of the former Sub-Commission. The EU and others<sup>17</sup> expressed interest in considering the Indian proposal as a means towards compromise.

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<sup>13</sup> Brazil, Mexico, Algeria, Malaysia felt that the report was useful at the very least.

<sup>14</sup> Finland on behalf of the EU, the United Kingdom, Norway, Switzerland, and the United States of America,

<sup>15</sup> For a detailed review of the working group view the International Service for Human Rights (ISHR) summary which is available on the ISHR website at [http://www.ishr.ch/hrm/council/wg/wg\\_reports/wg\\_review\\_expertadvice\\_02.pdf](http://www.ishr.ch/hrm/council/wg/wg_reports/wg_review_expertadvice_02.pdf)

<sup>16</sup> Similar points were raised by China, Pakistan (on behalf of the OIC), and Egypt.

<sup>17</sup> Switzerland, Sweden, USA.

The Facilitator thanked those present for their contributions and stated that he would aim to incorporate new suggestions or requests into a new concept paper he would present at the next meeting of the Working Group.

## Initial reactions to the Facilitator's first non-paper

The Facilitator presented his first non-paper of the session to the Working Group on 12 April 2007.<sup>18</sup> The Facilitator reverted back to producing a 'concept paper', and stressed the need to push the process forward. The Facilitator requested that members of the Working Group provide specific drafting proposals rather than general comments.

Although delegations thanked the Facilitator for the concept paper, many had problems with the document. Among other issues, the selection process, the size and nature of the body, its mandate, scope, and its designated meeting time were not acceptable to many. Germany (on behalf of the EU) thought that the Facilitator had agreed to use the hybrid model as a basis for consensus, and was disappointed that the Facilitator had only made minor adjustments to his previous proposal.

The paper was divided into four sections and had a similar structure to the concept paper presented at the previous session of the Working Group. The first section described the selection process of the experts and the basic structure of the mechanism.

The paper outlined the **selection criteria** as 'impartial, independent, highly qualified experts who hold no official status whatsoever.' Although most delegations went along with the first three criteria, Argentina and others<sup>19</sup> opposed the provision that experts could hold no official status. These delegations argued that many of the best available experts in developing countries are concentrated in the State section. Egypt felt that the objective criteria in and of itself should serve to preserve high quality expertise, and Russia gave the example that many of its best experts on torture work within the State health system. Canada had asked that this provision be included during a previous session of the Working Group, but reiterated that it was essential that experts not exercise government functions during terms of office. Canada proposed a change of wording that would read 'experts would serve in their personal capacity, and not exercising government functions or acting as government officials.' The USA and others agreed that better language could be found.<sup>20</sup> The Russian Federation stated that it could accept that 'no official status whatsoever' be replaced by 'shall act in their personal capacity.'

The Facilitator continued to include reference to the election of experts through a two-stage process, although this had still not been agreed upon. There would be some role for stakeholders to play in a 'pre-election selection process' for the nomination of candidates, but it remained unclear. These candidates would then be screened by the Bureau of the Council and the High Commissioner for Human Rights, and a pool of expert-candidates of 20 to 30 persons who would be put forward for election by the Council. The Council would then select an 'expert body' comprising of seventeen members. The Facilitator offered no explanation as to how he came up with this number, and it had not been suggested by any of the delegations.

Australia, Canada and the United Kingdom still preferred that the candidates be appointed by the President of the Council in consultation with the High Commissioner for Human Rights, stakeholders and the regional

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<sup>18</sup> The full-text of the non-paper is available at the OHCHR extranet, which can be accessed at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm) (fill out the form on the page to receive the user name and password).

<sup>19</sup> Algeria, Bangladesh, Colombia, Egypt, Morocco, Russia.

<sup>20</sup> United Kingdom, Mexico, Switzerland.

groups. On the other hand, Algeria (on behalf of the African Group) and others<sup>21</sup> felt that the entire selection process (nomination, pre-screening and election) should be in the hands of States. The Algerian delegation explained that nominations would be put forward by UN member States, and a committee comprised of five members of the Council representing the regional groups would then oversee the nomination process to ensure that these candidates meet the criteria. If these candidates were deemed to be qualified, they would then be put forward to be elected by the Council.

The second section addressed the mandate, or scope, of the expert advice mechanism. The Facilitator did not manage to accommodate the requests of delegations on both sides of the divide. Germany (on behalf of the EU) and others had asked at the previous meeting that the **mandate include protection of human rights as well as promotion**.<sup>22</sup> Instead, the text became even more restrictive, and read ‘its mandate should be strictly the promotion of human rights.’ Many delegations argued that ‘protection’ needed to be included in the mandate of expert advisory mechanism.<sup>23</sup> Argentina felt that this was an artificial divide, and that stating that the expert advice mechanism’s mandate would be ‘strictly’ promotion creates an official dichotomy. The delegation explained that it thought that the previous formulation was too restrictive, and that the Facilitator has now further restricted the mandate of the expert advice mechanism. The Argentine delegation and several others<sup>24</sup> raised the point that the expert advice mechanism will play a role in protection, as some of its members are involved in the Working Group on Communications for the complaints procedure.

Concerning the issue of the **scope of the mandate** of the future system of expert advice, the non-paper’s claim that this would be ‘primarily’ but not exclusively **thematic issues** left significant room for argument. Many delegations asked that it be explicitly stated that the expert system have no ability to address specific **country situations**.<sup>25</sup> Algeria stated that ensuring that country situations were outside the scope of the expert advice mechanism was its main concern. Cuba was of the view that the text should remove any hint that the Council is not going to return to allowing the expert advice mechanism to produce country specific resolutions and decisions. The Russian Federation proposed that the Facilitator remove ‘primarily’ from the concept paper so that there would be no ambiguity.

Canada was of the view that it did not want to restrict the Council’s ability to look at certain country-specific situations. The delegation explained that thematic issues have to be addressed in the context of the real world, which meant that it may need to examine certain situations. However, Canada did state that the expert mechanism should not be allowed to adopt any resolutions or decisions, which it felt was an outcome that members of the Working Group were trying to avoid.

The third section of the non-paper dealt with the **methods of work of the experts**. It stated that the ‘Expert Advisory Body’ could meet for a maximum of ‘10 days every calendar year’, but left the possibility of experts seeking more meeting time ‘in case of urgent circumstances an on exceptional basis’. The paper also stated that the experts must not create working groups other than those that still have pending or unfinished work. This was a significant issue, as there was no consensus among members of the Council as to whether or not the Sub-Commission’s working groups had held their last session or if they still had work pending.

Algeria (on behalf of the African Group) stated that the expert advisory mechanism should have an **annual meeting time** of ten to twelve days. The German delegation felt that ten days was enough for experts to exchange ideas.<sup>26</sup> On the other hand, Cuba and China were not in favour of reducing the experts’ meeting

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<sup>21</sup> China and Cuba.

<sup>22</sup> At the last meeting, the Facilitator’s non-paper outlined the mandate of the expert mechanism to be ‘mainly the promotion of human rights.’

<sup>23</sup> Russian Federation, Argentina, United Kingdom, Germany (on behalf of the EU), Mexico, Canada, Guatemala, Switzerland, USA, Colombia

<sup>24</sup> Russian Federation, Guatemala, Colombia and Mexico.

<sup>25</sup> Cuba, Russian Federation, Pakistan, Algeria, China, Switzerland and Morocco.

<sup>26</sup> Supported by USA, Canada, Japan, and Bangladesh.

time. Germany (on behalf of the EU) argued that this section should include a provision stating that the experts should have some degree of flexibility, in order to preserve the hybrid model.

There was significant confusion about the status of the former **Sub-Commission's working groups**. India and other delegations were of the view that they had completed their work, and hence did not need to be mentioned.<sup>27</sup> However, Cuba was of the view that these groups were extended until 18 June 2006. Mexico and Algeria stated that it was perhaps necessary to seek advice on the status of these working groups, and that it might be necessary to decide on the issue at the fifth session of the Council.

### The Facilitator's second non-paper<sup>28</sup>

The Facilitator presented a second non-paper to the Working Group on 19 April 2007. Some delegations had asked him to present a compilation of the views expressed, with bracketed text for the most difficult issues. However, the Facilitator presented another 'concept paper' with no brackets, as he felt it could better serve for a basis of consensus. He stated that he hoped that this would be the last, or nearly the last stage in the process.

The paper was organized in a similar fashion to the previous non-paper. It was divided into three parts:

- 1) Selection process
  - a. Nomination of candidates
  - b. Pre-screening
  - c. Election
- 2) Function
- 3) Methods of Work
  - Status of working groups

The first section outlined a slightly modified selection process that was not fully implemented. It stated that 'All stakeholders, mainly, states' could submit candidates to the Secretariat of the HRC. However it was unclear how this could be implemented. In terms of pre-screening, the Facilitator took up the Algerian proposal to have a committee made up of five members representing each of the regional groups. Stakeholders would be able to submit information to the committee regarding candidates, but they would not be able to make final rulings on candidates.

Once candidates passed by the pre-screening, they would be put forward for election by the Council. The Facilitator reduced the number of experts to fifteen, but did not provide an explanation as to why he had changed the number.

Under the heading of function, the Facilitator included 'protection' in the mandate of the expert group, but removed any doubt as to whether or not the experts could deal with country situations by stating that it 'shall not deal with any country situation.'

With regards to methods of work, the Facilitator's concept paper maintained that the expert group would meet for ten working days per calendar year. Regarding the status of the Working Groups, it read that the Council would rule on their status in the fifth session.

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<sup>27</sup> Supported by the UK, Canada, and USA.

<sup>28</sup> The full-text of the non-paper is available at the OHCHR extranet, which can be accessed at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm) (fill out the form on the page to receive the user name and password).

## Selection process

The debate on the selection process centred around several key issues. These included who would be involved in the nomination process, whether experts would be elected by the Council or appointed, eligibility criteria, and the number of experts. The key cross-cutting issue was the role of States and stakeholders in the selection process.

### Nomination

The most contentious issue relating to nomination was the respective role of stakeholders and States in the process. Cuba was the strongest proponent that nomination should be the prerogative of member States of the United Nations, and that it was ‘not a matter for stakeholders.’<sup>29</sup> The delegation argued that not only there was no precedent for stakeholders to be able to put forward candidates, and that it would not bring good results.

Argentina was more flexible, and agreed with the Facilitator’s text that it should be ‘primarily States’ who nominate experts.<sup>30</sup> The delegation did not preclude the possibility of other stakeholders to put forward candidates on the grounds that some States might not put forward qualified candidates working in their countries. Belgium elaborated on this point, explaining that there is sometimes a tense relation between civil society and governments, and that this would make it difficult for some experts to perform their work and succeed in obtaining a nomination.

Germany (on behalf of the EU) stated that the involvement of stakeholders will help to ‘inject new blood’ into the system,<sup>31</sup> and preferred that there were no limitations when it comes to the nomination of candidates.<sup>32</sup>

### Pre-screening

The pre-screening procedure outlined by the Facilitator was yet another contentious issue. The proposal was initially put forward by Algeria during the 12 April meeting. Germany (on behalf of the EU) identified this as Algeria’s proposal and stated that it was an interesting basis upon which it could find agreement if the pre-screening committee were to include other stakeholders. However, Algeria (on behalf of the African Group) seemed to have disassociated itself from this proposal, with the delegation explaining that it still had doubts about the pre-screening procedure outlined in the text.

Cuba felt that any pre-screening procedure would lead to politicization if a candidate were to be blocked by the committee.<sup>33</sup> This point was also raised by the United Kingdom, who felt that some members of the pre-screening committee might engage in approving one candidate in exchange for other members approving one of their candidates, which might also reduce the quality of the experts. The United Kingdom argued that if the pre-screening committee were to ensure the best possible candidates it should include individuals and institutions with relevant expertise. These included former members of the Sub-Commission, representatives of civil society, the UN High Commissioner for Human Rights and representatives from special procedures.<sup>34</sup>

The Russian Federation was of the view that States or institutions putting nominations forward should be responsible for ensuring the qualifications of their candidates. Cuba stated that the pre-screening should be

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<sup>29</sup> Algeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Colombia, China, Bangladesh, Morocco, Saudi Arabia, Tunisia and Iran also felt that nominations should be solely in the hands of States.

<sup>30</sup> Japan, the Russian Federation and India also went along with this proposal.

<sup>31</sup> Supported by Canada, the Republic of Korea and the USA.

<sup>32</sup> Supported by Switzerland, USA the United Kingdom.

<sup>33</sup> South Africa also stated that it would be unacceptable to have one of their candidates rejected by the pre-screening committee.

<sup>34</sup> Supported by Belgium.

done at the national level in consultation with civil society. Furthermore, the delegation proposed that the names of candidates could then be widely disseminated to other stakeholders, including NGOs, who can then take part in active lobbying at the international level.

The Facilitator interjected himself into the debate, and commented on the role of civil society. He offered that the Working Group work off the assumption that in some societies NGOs exert a great deal of influence over State policies, and that no NGOs are entirely independent from the State. He felt that it should be the prerogative of States to decide whether they want to give priority to State representatives or members of NGOs for the submission of candidates. Whilst Amnesty International stated that it has a policy of not supporting or opposing appointments of individuals in any capacity, and would not comment on the question of election versus selection, it took exception to the comments that no NGOs are independent.

The Facilitator complicated the debate when he presented his new concept paper on 25 April. It contained a provision that allowed States to bypass the pre-screening committee and present their candidates directly to the Council. Furthermore, it read that States could still present candidates for election by the Council even if they did not pass the pre-screening procedure if they enjoy ‘demonstrable support at the national level’. This was not accepted as a compromise, as many delegations felt that it rendered the procedure effectively useless. Those countries that supported a pre-screening felt that it was unacceptable for it to be optional, while countries that were not in favour of this procedure felt that there was no use for it to be included.

### **Election vs. selection**

During this round of meeting, there were no strong arguments put forward against the provision on elections. Germany (on behalf of the EU) and others reiterated their preference to experts being appointed by the President of the Council in consultation with the Office for the High Commissioner for Human Rights and regional groups.<sup>35</sup> However, these delegations did not dwell on this point as in previous sessions, but simply stated their preference for elections. However, there was substantive debate relating to the criteria, and what kind of entity the Council would be electing.

### **Criteria and eligibility of experts**

The debate regarding the criteria for election related to nomination, pre-screening and election. For the most part, the criteria were acceptable to members of the Working Group. The Facilitator amended the provision from his previous non-paper which read that ‘experts shall not be representing any official viewpoint while discharging their functions’, which accommodated those States that were concerned about the independence of State officials who would be appointed as experts.

#### *Size*

Throughout the Working Group, most States did not alter their positions on their desired size for the expert advice mechanism. However, the numbers proposed in the Facilitator’s concept paper changed in every proposed concept paper. In four concept papers, he proposed sizes of seventeen, fifteen, thirteen to twenty-one, and finally thirteen to twenty three experts.

Algeria (on behalf of the African Group) reiterated that it preferred a number similar to that of the former Sub-Commission. It proposed a body of twenty-five experts, and explained its geographic composition that would allow it to meet the requirements of the Facilitator’s concept paper.<sup>36</sup> China stated that it did not believe that anything less than twenty-three experts would ensure ‘respect for geographic representation in a manner comparable to the Council...representation of main legal, cultural and civilisational traditions and

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<sup>35</sup> USA, Canada, and Australia.

<sup>36</sup> 6 members from the African Group, 6 from Asia, 4 from West, 5 from Grulac, 3 from Eastern Europe. One seat would be rotated among regional groups.

perspectives’ as outlined in the Facilitator’s concept paper.<sup>37</sup> The International Organization of Indigenous Peoples suggested that two or three seats should be reserved for indigenous experts. This would ensure cultural and civilizational representation. The representative stated that these experts should be nominated by the UN Indigenous Peoples Caucus.

Germany (on behalf of the EU) felt that it was too difficult to reflect the proportion of the Council, and that the only criteria should be geographic representation, which would guarantee all of the other requirements. The USA disagreed with Algeria, and was of the view that the expert group needed to be a more streamlined body that is able to carry out the Council’s requests. The delegation wanted to ensure that the Working Group was not replicating the Sub-Commission.

Japan was willing to accept the proposed number of fifteen as a compromise.<sup>38</sup> India proposed a geographic composition for a body of fifteen: three seats should go to the African Group, three to Asia, three to the Group of Latin American and Caribbean Countries (GRULAC), three for the Western Countries, and three for rotation amongst the regional groups.

## Function

Function refers to the scope and mandate of the Council. Overall, there was an emerging consensus amongst the Working Group in this regard. The Facilitator hoped that this section could be adopted in principle. Most delegations commented that the language needed to be tightened, but could go along with the Facilitator’s proposal as a basis for further negotiation. However, there was still no consensus on the ability of the expert advisory system to address country situations.

## Scope – country situations

The concept paper read that the expert group ‘shall not deal with any country situation’. Germany (on behalf of the EU) sought the deletion of this reference, as it did not want to preclude the ability of looking into country situations. Belgium felt that this provision was too broad, and that thematic human rights issues do not exist in a vacuum. Canada echoed this view, and stated that what the Council was trying to avoid was allowing the expert body to adopt its own resolutions and decisions. The Canadian delegation felt that it would be enough if the Working Group ruled that the expert system would not have the ability to adopt resolutions and decisions, but left the door open for them to look into specific situations when necessary.

However, the majority of delegations who spoke were pleased that the Facilitator clarified this reference as to leave no ambiguity. The Russian Federation stated that there should be a ‘moratorium’ on country situations, which was supported by several other delegations.<sup>39</sup> Egypt reminded delegations that the former Commission had ruled in 2000 not to allow the Sub-Commission to look into country situations. The Facilitator also stated that country situations were ‘not in the game’, as he felt including them was not a basis for consensus.

## Mandate

The Facilitator heeded the request of many delegations to include protection in addition to promotion of human rights in the group’s mandate. Germany welcomed this inclusion, and stated that it was of the view that protection fell within the group’s mandate. Argentina proposed that the text read the ‘promotion and protection of all human rights’ in order to guarantee that both civil and political rights and economic, social and cultural rights receive equal treatment.

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<sup>37</sup> Supported by Egypt, Iran, Cuba, Colombia, Pakistan (on behalf of the OIC), Saudi Arabia, and Tunisia.

<sup>38</sup> Supported by Russia, India

<sup>39</sup> Cuba, Bangladesh, Algeria, China, Pakistan, Egypt, and Saudi Arabia.

## Right of initiative

At this stage, there was an established consensus towards limiting any capacity for the expert group to initiate its own studies without prior approval of the Council. It was clear that the Working Group felt that as a subsidiary body to the Council, the expert system should not be able to undertake studies without prior approval from the Council. This did not preclude the possibility for the expert group to propose its own studies to the Council, but they could not be undertaken without prior consent from the parent body, as was the practice in the Sub-Commission.

Cuba not comfortable with the wording provided by the Facilitator that the expert group would ‘conduct its work in close consultation with the Council’, stating that it would be difficult to implement in practice. The delegation preferred that it the expert group ‘take into account decisions adopted by the Council.’ India felt that the Working Group needed to ensure that experts did not ignore the priorities of the Council.

## Interaction with NGOs

The main issue regarding NGO interaction regarded whether or not NGOs with no ECOSOC accreditation would be able to work with the expert group. India stated that although it supported links with NGOs, the modalities needed to be set by the Council.<sup>40</sup> China was of the view that the modalities should be the same as those of the Council, and therefore must be in accordance with ECOSOC Resolution 1996/31.<sup>41</sup>

Amnesty International argued that NGO interaction should be based on past practice. It explained that many NGOs that participated in the Sub-Commission did not have consultative status, and that the Working Group should not lose sight of the best practice within the Sub-Commission.

## Methods of work

At the end of the session, there were several outstanding issues regarding the methods of work of the expert group. Key issues included the annual meeting time of experts, and what degree of flexibility they would have in conducting their research. This section was of great importance to the India and the EU’s model if it were to allow some flexibility for experts to meet with the Council outside of the collective group to present their studies.

## Annual meeting time

Several delegations felt that the Facilitator’s proposed meeting time of ten days was too short. The delegation of China did not understand the rationale for cutting down the experts’ meeting time from the fifteen days of the former Sub-Commission’s meeting time. Algeria added that the Council has increased its meeting time by four weeks, yet the Working Group is discussing reducing the meeting time for its subsidiary body. The Algerian delegation also suggested that experts should meet more than once a year, given that there are three formal Council sessions.<sup>42</sup> Canada was of the view that ten days was ample time for experts to exchange views.<sup>43</sup> The Facilitator added that they will only meet for ‘brainstorming’, not to write their studies, and that this should be achievable within ten days.

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<sup>40</sup> Supported by Pakistan (on behalf of the OIC).

<sup>41</sup> Established the consultative relationship between the United Nations and non-governmental organizations. Available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>

<sup>42</sup> Supported by Bangladesh,

<sup>43</sup> Supported by Japan, India, the UK, Germany (on behalf of the EU), Russia,

## Flexibility

Germany (on behalf of the EU) continued to argue that having a hybrid expert body that could also meet on an *ad-hoc* basis throughout the year would better serve the Council. The delegation asked for the text to be amended to include a provision allowing for the inclusion of an element of flexibility. In this way, the expert group would be a ‘quasi-standing body’, which would be available to the Council throughout the year. Furthermore, the Council would be able to task specific experts with specific studies, which could then be presented to the Council at the next available session.<sup>44</sup> Germany reminded delegations that it had changed its position considerably, and that it felt that a hybrid system would help to draw out the best elements of a standing body and a roster model. Germany added that this would in fact mean that the meeting time with the Council would increase considerably, and that it would be much more responsive than the Sub-Commission. The USA felt that the hybrid model was an interesting idea, although it was concerned about the financial implications.

Cuba felt that the hybrid model was not a basis for consensus on the grounds that the expert advisory system should be a collegial body. If the Council could directly point to one or two of the members of the group to undertake a study, then it would lose its collegial nature. The Cuban delegation argued that it should be the prerogative of the experts to task studies to individuals, not of the Council. China added that it was seeking collective advice based on collective work. China argued that it can seek individual advice from Special Procedures, and that there is no use in setting up an advisory body if they work individually.

The Facilitator gave some clarification to his text, and added that it is ‘a foregone conclusion’ that the studies will be collectively approved. He also stated that he would not get into the specifics of the working methods of the expert group, including drawing up a program of work, as this would be done by the Council at a later date. This left the door open for the Council to discuss the details of the hybrid model in the future.

## Working groups

The status of the Sub-Commission’s working groups remained an item of discussion throughout the session. India and other delegations felt that the working groups (Indigenous Populations, Minorities, Social Forum and Contemporary Forms of Slavery) had held their final session, and hence do not have any pending work. The Facilitator’s non-paper included a provision stating that the status of the Working Groups will be ruled upon during the fifth session of the Council. China felt that this was not an appropriate time to decide upon their status given the heavy workload of the Council during the fifth session, and suggested that it be done earlier.

Russia and the UK suggested that some of the working groups, such as the Working Group on Contemporary Forms of Slavery, may be turned into special procedures mandates. The Indian Treaty Council suggested that the Working Group on Indigenous Peoples be turned into a separate expert advisory system which would focus on indigenous issues. Although there was some discussion about this, many delegations felt that the Working Group was not the forum for this to be discussed.

Another issue concerned whether the experts would have the right to set up their own working groups. Most of the delegations agreed that the establishment of working groups should be solely the prerogative of the Council. Algeria felt that not allowing the experts to set up their own working groups would be micro-managing the expert advisory mechanism, and might be too restrictive. However, it agreed that they should be able to propose the creation of a working group, but that it would need prior approval of the Council. Cuba stated that this was repeating what was already known, as the Sub-Commission never had the ability to set up its own working group without approval from ECOSOC and the Commission. Russia echoed this view, but stated that the working groups should also convene during the ten working days in which the experts meet.

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<sup>44</sup> Supported by India, the UK and Canada.

## The additional meeting: 25 April

The Working Group was meant to have completed its work on 19 April. However, on the morning of 25 April, the Facilitator requested the afternoon session meant for the complaints procedure be dedicated to expert advice. The Facilitator explained that he called this session in preparation for the presentation of the final non-paper to the President on 27 April 2007.

The Facilitator presented a new concept paper and asked the members of the Working Group for comments, observations and ideas. Due to the short notice, delegations could only give preliminary comments due to the lack of time for coordination with regional groups or with their respective capitals.

Members of the Working Group felt that the paper was confusing and inconsistent. The Facilitator acknowledged that there were drafting errors, and that he had produced the document rather quickly.

### Problematic areas in the new document

**Pre-screening process:** The concept paper contained a new provision on the pre-screening process which stated that States could bypass the pre-screening process and ‘submit their candidates directly to the Council.’

Furthermore, candidates who were presented to the pre-screening committee but failed to meet the criteria could still be presented to the Council for election if they ‘enjoy demonstrable support at the national level and from the respective regional group’. Many States objected to this provision.<sup>45</sup> Cuba, China and Pakistan stated that if this was the case, then there is no use in having any sort of pre-screening whatsoever. The USA referred to this as a ‘fatal inconsistency’, and that the Facilitator either include a mandatory pre-screening procedure or none at all.

**Mandate:** The mandate of the expert advice system read ‘Promotion and protection of human rights in all spheres including economic, social and cultural rights’. Many were curious as to why the Facilitator singled out this category of rights, rather than simply stating that the mandate is the ‘promotion and protection of all human rights’.<sup>46</sup>

**Flexibility of the body:** The concept paper included no provision allowing for the flexibility needed for the hybrid model. The Facilitator stated that the hybrid proposal was not practical and that there could be no consensus on the issue.

The meeting did nothing to progress the discussion, as States were only able to reiterate their positions. Because of the problems with the document, States preferred the 19 April concept paper as a basis for further negotiation.

### Conclusions and next steps

At the end of Working Group session, most of the key issues still needed to be clarified. The Facilitator closed the session by stating that he had learned from his experience, and thanked all of the delegations for their support and contributions guiding the discussion. Despite his best efforts, the Facilitator often seemed to be imposing his views in the drafting of the concept papers and by interjecting in the debate. The modalities

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<sup>45</sup> Argentina, Germany, Switzerland, the UK.

<sup>46</sup> Supported by South Africa, Switzerland, USA, Argentina, and India.

of the future system of expert advice need to be adopted by 18 June 2007. On 27 April, the Facilitator presented a new non-paper to the President of the Council. He stated that while the Working Group had not agreed upon the document, it was agreed that it would be used as a basis for further negotiation.

At the end of the Working Group sessions, the President of the Council announced his intention to continue consultations on all outstanding issues of the various Working Groups on two parallel tracks. The first of these tracks is a series of informal, private, bilateral and multilateral meetings in which the President will consult with all delegations, regional groups and observers to identify and resolve pending issues. Parallel to this, public and open consultations will be conducted at least once a week to inform stakeholders of the progress of negotiations and provide opportunities to raise substantive issues in a more open forum. The consultations are scheduled for 10, 18, 24 and 25 May.

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The Council Monitor forms part of the Human Rights Monitor Series produced by ISHR. It provides you with information about all the key developments at the Human Rights Council, including Daily Updates during the session of the Council, an Overview of the session, briefings and updates on the major issues of concern in the transition from the Commission on Human Rights to the Council and other key reports. It is currently an online publication that can be found at [www.ishr.ch/hrm/council](http://www.ishr.ch/hrm/council)

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