

# COUNCIL MONITOR

International Service for Human Rights



Human Rights Monitor Series

## HUMAN RIGHTS COUNCIL WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES DISCUSSIONS ON THE EXPERT BODY

### Background

The Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) was the main subsidiary body of the former Commission on Human Rights (the Commission). General Assembly *Resolution 60/251*, which created the Human Rights Council (the Council), provides that the Council shall "maintain a system of ... expert advice".<sup>1</sup> The use of the term 'system of expert advice' and the absence of any reference to the continuation of the 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 the Human Rights Council (the Council) adopted *Decision 2006/104*, which mandated the establishment of 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".<sup>2</sup>

The Working Group on the review of mandates and mechanisms met for the first time from 13 to 24 November 2006<sup>3</sup> and its work was divided into three segments: the review of special procedures; the complaint procedure; and the expert advice body. Ambassador Mousa Burayzat, the Permanent Representative of Jordan, acted as the facilitator for the discussions on the system of expert advice (the Facilitator) and also held informal consultations with States in the lead-up to the Working Group's meetings.<sup>4</sup>

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<sup>1</sup> Para 6.

<sup>2</sup> Para 1, Human Rights Council *Decision 2006/104*. For further information and a discussion of the key issues see M. Abraham, *A New Chapter for Human Rights*, (ISHR and FES, Geneva 2006), available at [www.ishr.ch/handbook](http://www.ishr.ch/handbook), pp. 33-50. Additional background information and documents are also available at: <http://www.ishr.ch/hrm/council/subcom/subcom.htm>

<sup>3</sup> The Working Group on the review of mandates and mechanisms met in parallel with the Working Group on the Universal Periodic Review (UPR), with some sessions during the two-week period being devoted to review of mandates and mechanisms and other sessions being devoted to the UPR.

<sup>4</sup> Please see ISHR's *Council Monitor Daily Update* for 3 October 2006 for a summary of the progress report on the informal consultations submitted by the facilitator to the 2<sup>nd</sup> session of the Council. Please also see ISHR's reports on the informal consultations, available at [www.ishr.ch/hrm/council](http://www.ishr.ch/hrm/council).

The Working Group's discussions on expert advice took place in the morning and afternoon sessions of Tuesday, 21 November 2006. The discussion resumed at the final afternoon session of Friday, 24 November 2006, when the Facilitator presented his preliminary oral conclusions to the Working Group in a session chaired by the President of the Council.

Prior to the first meeting on expert advice, Ambassador Mousa Burayzat had circulated a non-paper setting out a framework for discussions on the expert advisory body of the Human Rights Council based on the discussions he had held with States during the informal consultations.<sup>5</sup> The non-paper was not a descriptive and comprehensive document but was drafted in the form of a multiple-choice questionnaire. It simply listed 14 main headings for discussion, with various options under each heading that States could choose from. The 14 issues were:

1. Name
2. Structure
3. Size
4. Term of Membership
5. Candidacy of Experts
6. Election/Selection
7. Eligibility of the Experts
8. Composition
9. Status
10. Mandate
11. Relationship with the Council
12. Relationship and role with other human rights mechanisms
13. Functions / Scope
14. Methods of work

The Working Group first discussed issues 1-7 and then proceeded to 7-14, with each State presenting their preferred options and any additional comments. NGOs could participate in the Working Group's meeting but there was very limited NGO participation and only one NGO, the World Lutheran Foundation, made an oral statement at the meeting.

## **Structure of the future Expert Advisory Body of the Human Rights Council**

The Facilitator's list looked at four issues relating to the structure of the future expert advisory body of the Council – its name, structure, size and status. Beginning with the name, he provided four options: a) expert body; b) expert advisory system; c) advisory commission on human rights; and d) Human Rights Commission.

Algeria, on behalf of the African Group, proposed an alternative name of 'Human Rights Consultative Expert Body'. Egypt supported this proposal but expressed that the possibility of retaining the name of the former Sub-Commission should remain an option. Many States, led by Brazil, approved of 'Expert Advisory System'.<sup>6</sup> A further popular proposal, made by Colombia and supported by Zambia, Venezuela, Canada and Indonesia, was 'Expert Advisory Body'. Bangladesh expressed the view that the name proposed by the Sub-

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<sup>5</sup> The Facilitator's non-paper as well as a discussion paper written by the OHCHR are available on the OHCHR Council extranet (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm).

<sup>6</sup> This was supported by Finland, on behalf of the European Union (EU), China, Iran and Switzerland, Australia and Guatemala

Commission of ‘Human Rights Consultative Committee’ was acceptable. Other States<sup>7</sup> indicated that they were flexible about the name of the body in order to facilitate reaching consensus.

In relation to structure, the Facilitator’s list suggested three options: a) a single, well-defined formal structure; b) a plural, less formal or informal structure; and c) a roster of experts. There was a clear divide over whether the structure should be single, well-defined and formal, or formed of a roster of experts. Overall, the majority of States favoured a formal structure. However, Finland, on behalf of the European Union (EU), Japan, Switzerland, Canada, the United Kingdom (UK) and Australia called for a more informal approach by employing a roster of experts. Finland (on behalf of the EU) introduced the idea that experts should be able to highlight areas of interest, and stressed the importance of limiting the number of studies and enforcing clear sunset clauses<sup>8</sup> to ensure finalisation. They further suggested that the Office of the High Commissioner for Human Rights (OHCHR) should be responsible for monitoring and updating the pool of experts for the roster and that the Council might also use this pool of experts in their work. In this context, Canada drew attention to financial considerations and suggested that there should be greater use of video conferencing and e-mail communication in order to reduce the number of expensive meetings in Geneva.

There were also varied opinions surrounding the future size the expert body. The Facilitator’s list suggested four options: a) small (eight to ten members); b) medium (ten to 12); c) large (16); and d) ‘maintain the same size as the Commission (26)’. Algeria (on behalf of the African Group) suggested that many States preferred to see the expert body maintain the same size as the present Sub-Commission. Iran, Bangladesh and Thailand supported keeping the same size and added that equal geographic distribution must be guaranteed. Bangladesh proposed two additional seats for Asia and for the Eastern European Group (28 members) on the grounds that this would provide for more equitable geographic representation. In contrast, the USA and Australia supported a much-reduced size (five to ten members). Four States supported 16 members<sup>9</sup> and Finland (on behalf of the EU), Brazil, Canada, the Republic of Korea and Japan favored ten to 12 members.

The future status of the expert body created equally divergent opinions. The Facilitator’s list had proposed three options: a) a standing body; b) *ad hoc*; and c) in-between. Whilst Algeria (on behalf of the African Group), expressed a strong preference for a standing body with fixed meeting times, Finland (on behalf of the EU) and a number of others<sup>10</sup> preferred the ‘ad-hoc’ option, where experts would be appointed on an individual basis to study a specific issue. The Russian Federation (Russia), India, the United States of America (the USA) and Venezuela added that, irrespective of the status of the future body, it was necessary that it report directly to the Council.

India and Mexico abstained from stating any detailed preferences on the size of the structure as they felt it was necessary to have a clear idea of the function of the expert advisory body before structural decisions could be made. India requested that this be returned to at a later stage.

## Composition

The Facilitator provided four elements on his list that relate to the general composition of the expert body – term of membership; candidacy of experts; election/selection and eligibility of the experts; and geographic representation. Perhaps the most significant progress was the reaching of a consensus on terms of membership, with all States present agreeing that members would serve terms ‘of three years each and two terms only’, as opposed to the other tabled option of ‘unlimited time’. Bangladesh saw this as allowing ‘new

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<sup>7</sup> Chile, Argentina, the Russian Federation and Thailand.

<sup>8</sup> Sunset clauses allow for changes if need be.

<sup>9</sup> Ecuador, Zambia, Guatemala, Colombia

<sup>10</sup> Japan, Switzerland, Canada, Thailand and Nigeria.

faces, new expertise and new vigour' as well as providing a reasonable period of continuity. Brazil added that following the two terms of membership, the retired member should not be selected for any other mandate, so as 'to promote a constant renewal of the human rights system'. The only variation to this near consensus derived from Finland (on behalf of the EU) who asserted that terms of membership were inapplicable, as they proposed the appointments of experts from a roster on a case-by-case basis, with the Council limiting the number of studies undertaken annually.

Nonetheless, there was division over whether the candidacy of experts should be provided by States [option (a)] or should be a pool of experts provided by the OHCHR, UN Secretary-General or General Assembly [option (b)]. Chile suggested that States, the OHCHR and members of civil society could propose candidacy. Whilst the majority of States welcomed this combined approach, Egypt warned that this may lead to politicisation. Canada further suggested OHCHR should be primarily responsible for screening the candidates put forward by States, the OHCHR and NGOs.

The Facilitator provided three options on the election/selection of candidates: a) by the Council exclusively; b) some role for the High Commissioner and UN Secretary-General; and c) to be elected by the General Assembly. Algeria (on behalf of the African Group), Bangladesh, Iran, Zambia, Ecuador, India, Venezuela and the Republic of Korea stated that experts should be nominated and elected by the Council. Finland (on behalf of the EU), Australia, Canada, the Republic of Korea and Switzerland stated that the participation of the High Commissioner would better ensure objective and informed decisions. Japan added that such involvement would help to ensure fair representation of the regional groups.

The Facilitator's list provided an element on defining criteria for the eligibility of the experts, under the headings a) independent, b) highly qualified and c) specialised. There was little preliminary support for the need for specialisation.<sup>11</sup> Finland (on behalf of the EU) was of the opinion that all experts should be independent and highly qualified, but proposed that 'some of the experts should have specialised expertise (this depends on the task which the expert in question is mandated to carry out). Algeria (on behalf of the African Group) recommended that experts should be independent, have considerable experience in human rights, and be 'known for their commitment to the promotion and respect of all human rights'. Pakistan excluded the need for specialisation.

Algeria (on behalf of the African Group) and a large number of other delegations agreed that there should be equitable geographic representation.<sup>12</sup> The USA believed that the broadest possible geographical representation should be sought but that it should not be a priority. Delegations also added that due consideration should be given to legal and cultural perspectives.<sup>13</sup> Algeria and Canada added that there should also be a consideration of gender balance.

## Role and Function

There was notable division over the form of mandate, which was broadly categorised in the Facilitator's list as either: a) broad and general; or b) narrow and somewhat focused. A majority of delegations called for the mandate to be 'narrow and somewhat focused'<sup>14</sup> yet another eight States expressed a preference for the option that the mandate should be more 'broad and general'<sup>15</sup> on the basis that the principle function of the expert body should be the promotion and development of human rights, and the primary tasks should be the

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<sup>11</sup> Brazil, Nigeria, Thailand and Zambia expressed that all three should be considered.

<sup>12</sup> Thailand, Nigeria, China, Mexico, Algeria (on behalf of the African Group), Bangladesh, Chile, Egypt, Ecuador, Iran, Canada, Colombia and Pakistan.

<sup>13</sup> Ecuador, Iran, Egypt, Zambia, Venezuela, Guatemala and Japan.

<sup>14</sup> Thailand, Nigeria, China, Brazil, Iran, Japan, Zambia, USA, Republic of Korea, Indonesia, Colombia and Azerbaijan.

<sup>15</sup> Pakistan, Ecuador, Mexico, Bangladesh, Chile, Argentina, Venezuela and Guatemala.

elaboration of studies at the request of the Council.<sup>16</sup> Finland (on behalf of the EU) again stressed that, according to the roster system it proposed, the mandate would be determined by the Council on an *ad hoc* basis for each study/expert advice produced. There was little substantive discussion beyond this broad categorisation, and Argentina stressed that there should be a move toward discussing the substantive content of the mandate at the next meeting.

The Facilitator offered one heading on the expert body's relationship with the Council, and a separate heading on its relationship with 'other human rights mechanisms'. There was wide agreement that the Council should oversee the work of the expert body.<sup>17</sup> Yet some States, including China, Brazil and Guatemala, stated that the advisory body should be a directly subsidiary body of the Council. Canada added that the mandate should ensure that the expert body can make recommendations to the Council for studies.

Finland (on behalf of the EU) stated that there should be informal interaction with other human rights mechanisms in order to avoid duplication of work. Egypt, Chile and Nigeria reiterated the desire for the relationship to be 'interdependent'. Zambia, Colombia, Mexico and Ecuador expressed that the expert body should be available upon request of the other human rights mechanisms. Algeria, both on behalf of the African Group and in a separate individual statement, Colombia, Pakistan and Thailand insisted that the future UPR should not be dealt with by the future expert body and that this should be reserved only for the work of the Council. Bangladesh expressed that it was reluctant to consider the expert body's relations with the UPR at this stage, as the form of the UPR had not yet taken shape. This general view was echoed by Japan, the Republic of Korea and Venezuela.

Several delegations declared that the functions and scope of the expert body should not be restricted and that it should have the capacity to take on thematic and country-specific issues.<sup>18</sup> In contrast, Algeria (on behalf of the African Group) and a large number of other States<sup>19</sup> stated that the expert body should only deal with thematic issues. China referred to it quite bluntly as 'not taking up country situations [and] having no legislative function'. Bangladesh, Iran, the Republic of Korea and Mexico also called for norm-setting to be included within the scope of the expert body.

Regarding proposals for methods of work, Finland (on behalf of the EU), Bangladesh, Japan, Venezuela and Zambia preferred that experts work individually. Five States supported using working groups<sup>20</sup> and seven States favoured a combination of both working groups and individual experts.<sup>21</sup> Chile and Guatemala favoured the use of outside experts for short terms.

As a final general comment, Finland (on behalf of the EU) suggested that the OHCHR could prepare a manual on the working methods on expert advice.

## Future of the Working Groups of the Sub-Commission

There was a brief discussion on the future of the existing Working Groups of the Sub-Commission.<sup>22</sup> Algeria (on behalf of the African Group) stated that they should be allowed to finalise their work following the

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<sup>16</sup> Bangladesh.

<sup>17</sup> Thailand, Nigeria, Algeria, Pakistan, Bangladesh, Chile, Iran, Japan, Indonesia and Colombia.

<sup>18</sup> Finland, Canada, Japan and the Republic of Korea.

<sup>19</sup> Egypt, Algeria, Guatemala, Colombia, Thailand, Nigeria, Egypt and Venezuela.

<sup>20</sup> Nigeria, Chile, Egypt, Japan, Pakistan

<sup>21</sup> Bangladesh, Iran, Republic of Korea, China, Mexico, Colombia, Guatemala

<sup>22</sup> The Sub-Commission had eight working groups in 2006. The four working groups that met prior to the Sub-Commission's annual session were the working groups on minorities; contemporary forms of slavery; indigenous populations; and the Social Forum

decision adopted in the first Council session and that the system of working groups should be maintained. Switzerland praised the nature of dialogue found in these Working Groups and suggested that even after the finalisation of work by the Working Groups on Minorities and Indigenous Peoples in June 2007, forums should be held to discuss these issues with a focus on implementation. Referring to the history of working groups in the Sub-Commission, the USA stated outright that the working groups had outlived their usefulness.

## Conclusions and Next Steps

Following the completion of statements by all present States on the 14 key issues, the Facilitator called for ideas on how to proceed. Algeria (on behalf of the African Group) requested a tabulated presentation of State positions in order to facilitate further negotiations. Many States supported this suggestion and the Russia made a call for even more forward movement with the creation of a text that could be used to move towards a draft resolution. India remained opposed to any formal document at this stage, and the EU (on behalf of Finland) endorsed India's stance by proposing a revised options paper.

At the close of the session the Facilitator agreed to prepare a document eliminating options that had received no support<sup>23</sup>, and would regroup the remaining options into categories entitled:

1. Consensus (this would include issues that had reached consensus or were very close to consensus);
2. Emerging convergences;
3. Bridgeable divergences;
4. New Ideas.

Finally, in response to an assertion made by the Philippines, the Facilitator stated that, with a view to his time constraints, he would attempt to produce a paper that elaborated upon the definitions of terms, such as 'specialised' and 'ad hoc', in order to ensure greater clarity in future work.

The final afternoon session of the Working Groups on Friday 24 November was given over to a presentation by the four Facilitators [UPR, review of mandates, complaints procedure and expert advice] of their preliminary conclusions. The Facilitator on expert advice used the categorisations agreed upon in the final session of the Working Group to present his preliminary conclusions. He noted that grey areas still existed between these categorisations and that a lot of work remained to be done. In conclusion, he identified that the four main issues of 'size, character, functions and the selection process' need to be dealt with most immediately, and that he looked forward to further discussions on these issues.

At the conclusion of the first round of discussions on expert advice, little has yet been decided. The only point to have reached a clear consensus is that the future membership shall be limited to terms of three years and a maximum of two consecutive terms. Nonetheless, this is a significant decision, as one of the strong criticisms of the former Sub-Commission was that members served for multiple terms.

Elsewhere, however, the early indication is that the Working Group will move towards a future expert body closely resembling the Sub-Commission. Algeria (on behalf of the African Group) has illustrated the clearest desire for this outcome, including retaining the formal structure, size, scope and working methods of the Sub-Commission.

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(which was a two-day meeting of a working group which served as a forum on economic, social and cultural rights) The three working groups that met during the Sub-Commission's annual session were the working groups on transnational corporations; administration of justice; and the Working Group to develop detailed principles and guidelines concerning the promotion and protection of human rights when combating terrorism. The Working Group on Communications met after the Sub-Commission's annual session.

<sup>23</sup> This came out of a suggestion first made by Chile and supported by many States that a revised paper could be produced in which issues that had been supported by no or very few States were not included.

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## **ABOUT THE PUBLICATION**

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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