

# An NGO Assessment of the New Mechanisms of the UN Human Rights Council

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## Abstract

The inauguration of the universal periodic review (UPR) and the Advisory Committee in 2008 as the two new mechanisms of the UN Human Rights Council marked a significant step towards the finalisation of the Council's institution-building process.<sup>1</sup> The following article provides a critical assessment of the first two sessions of the UPR Working Group and the first session of the Advisory Committee. It also looks at the treatment of the reports of these two bodies by the Human Rights Council in June and September 2008, respectively. Particular attention is given to the contribution of non-governmental organisations (NGOs) and 'other stakeholders' throughout the process.

## 1. The UPR

### A. Introduction

The UPR constitutes the one entirely new mechanism of the UN Human Rights Council that distinguishes it from its predecessor, the UN Commission on

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1 The other elements of the institution-building process comprised of the 'review, rationalization and improvement' of the system of UN special procedures, which concluded at the 9th session of the Human Rights Council in 2007, and the review of the confidential '1503' complaints procedure (so-called as it derived its mandate from ECOSOC Resolution 1503(XLVIII) of 27 May 1970), which remains effectively the same.

Human Rights.<sup>2</sup> The proposal by the then UN Secretary General Kofi Annan in March 2005 to create a mechanism that would evaluate the fulfilment of all the human rights obligations of all States by their peers was intended to 'give concrete expression to the principle that human rights are universal and indivisible'. By so doing it was hoped that the UPR would contribute to overcoming the Commission's alleged 'hallmarks of politicization and selectivity',<sup>3</sup> despite the response by the former UN High Commissioner for Human Rights that such criticisms have been equivalent to 'fish criticizing one another for being wet'.<sup>4</sup> Annan did not tackle this more fundamental question of how the UPR itself would be any less 'politicised', as it retained this same inherent characteristic of any intergovernmental body. This expectation without explanation therefore places the UPR under considerable pressure, as its ability as an intergovernmental process to review UN Member States in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner' will have a significant bearing on the future of the Human Rights Council itself when it is reviewed in 2011.<sup>5</sup>

From an NGO perspective, however, what matters most is whether the UPR can deliver on its primary objective of 'improving the situation of human rights on the ground'.<sup>6</sup> The following assessment follows two tracks. Although it is early in the process, the first is to assess whether the UPR can still meet its primary objective on the basis of identifiable patterns and trends in the first two sessions. The second track is to assess how NGOs have contributed to date and how they may continue to play an active role if it is viewed that the UPR does indeed provide an additional means to improve the situation of human rights on the ground.

### *B. Background and Modalities of the UPR*

Following the adoption of the institutional framework of the new Human Rights Council in March 2006 through General Assembly Resolution 60/251,

- 2 All information related to the UPR is available on the UPR page of the Office of the High Commissioner for Human Rights (OHCHR) at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx> [last accessed 1 December 2008] and on the UPR extranet at: <http://portal.ohchr.org/portal/page/portal/UPR/1session/>. Audiovisual archives of the meetings of the Working Group 'webcast' are available at: <http://www.un.org/webcast/unhrc/index.asp> [last accessed 1 December 2008]. See also: <http://www.upr-info.org> and the International Service for Human Rights (ISHR) publication UPR Monitor, available at: <http://www.ishr.ch> [last accessed 1 December 2008].
- 3 In Larger Freedom, Towards Development, Security and Human Rights for All, Report of the Secretary-General, Addendum on the Human Rights Council, 23 May 2005, A/59/2005/Add.1 at para. 6.
- 4 Statement of the High Commissioner for Human Rights, Sergio Vieira De Mello, to the closing meeting of the 59th Session of the Commission on Human Rights, 25 April 2003.
- 5 GA Res. 60/251, 15 March 2006, A/RES/60/251 at para. 16, provides that 'the Council shall review its work and functioning five years after its establishment and report to the General Assembly'.
- 6 Council Resolution 5/1, 18 June 2007, A/HRC/RES/5/1 at para. 4(a).

the first task of the newly formed Council in June 2006 was to 'review, rationalise and improve' the mechanisms that it had assumed from the Commission on Human Rights<sup>7</sup> and to establish the modalities of the UPR. To this end, Ambassador Mohammed Loulichki of Morocco was appointed as facilitator of the intergovernmental working group to develop the modalities of the UPR<sup>8</sup> on the basis of the skeletal principles and objectives prescribed in Geneva Assembly Resolution 60/251.<sup>9</sup>

Ably managed by Ambassador Loulichki, the drafting of the modalities of the UPR took place over three sessions in 2006–7 and transpired to be the least contentious component of the institution-building phase. Differences of view centred on the potential role of independent experts and NGOs, the sources of information on which the review would be based, and the composition of the Working Group(s) that would facilitate the final review.<sup>10</sup> The facilitator's final non-paper of 27 April 2007 was then transmitted to the President of the Council,<sup>11</sup> and aside from some technical additions surrounding the role of 'troika members' to facilitate the review and collate questions,<sup>12</sup> its core content was essentially reproduced in the final 'institution-building text', Council Resolution 5/1.<sup>13</sup> It could be argued that the ease with which consensus was achieved in finalising the modalities of the UPR was due to the recognition that it was imperative that this mechanism succeed if the Council were to recoup any of the former Commission's lost credibility.

It is also worth noting the concerted contributions of NGOs in the drafting process, as many were hopeful that the UPR could offer new possibilities in raising national human rights issues at the international level. This NGO involvement was far more pronounced, for example, than in the discussions on the review of the former Sub-Commission or the '1503' complaints procedure. However, looking at the expectations of civil society prior to the drafting

7 Namely, the system of special procedures, the former Sub-Commission on the Promotion and Protection of Human Rights and the confidential '1503' complaints procedure.

8 Council Decision 1/103, 29 June 2006, A/HRC/1/L.12.

9 *Supra* n. 5 at para. 5(e).

10 For critical summaries, see ISHR's 'Overview reports of the Working Group sessions' and 'Daily Highlights of the final session of the Working Group', available at: <http://www.ishr.ch/index.php?option=com.content&task=view&id=248&Itemid=444> [last accessed 1 December 2008].

11 Non-paper on the universal periodic review mechanism, 27 April 2007, A/HRC/5/14.

12 *Supra* n. 6 at paras 18–21. The original proposal considered that such rapporteurs would comprise of independent experts. The original mention of a 'troika' of Council Member States came from Liechtenstein.

13 The one element that the facilitator left to the President of the Council was to determine the periodicity of review. The final proposal of four years was decided on the basis that the first cycle of the UPR should also be completed in order to be assessed as part of the larger review of the Council in 2011. Council Resolution 5/1, *supra* n. 6 at footnote 'a', provides that 'the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned'. Other unresolved areas that required the President's endorsement or rewording were the applicability of international humanitarian law as a basis of the review (para. 2) and the manner in which State's position on recommendations was reflected in the final outcome report (para. 32).

phase regarding possible avenues for participation before, during and after the UPR process, it would be fair to conclude that the end result was met with muted fanfare by those closely following the process.<sup>14</sup>

Part I of the ‘institution-building text’ sets out the role and function of the UPR according to the basis of the review, the principles and objectives of the UPR, the periodicity and order of the review, the process and modalities of the review (including the documents on which the review would be based), the outcome of the review (including the format, content and means of adoption of the outcome) and follow-up to the review. Each session of the UPR Working Group reviews the human rights situation in 16 States, with three such reviews taking place per year, covering 48 States. Under Resolution 5/1, the review is based on the UN Charter and Universal Declaration of Human Rights, as well as the UN human rights treaties to which the State is a party, providing for a review across the spectrum of all human rights, irrespective of treaty ratification. It also covers and serves to strengthen the monitoring of States’ ‘voluntary pledges and commitments’, which can include the pledges undertaken by those seeking membership of the Council.<sup>15</sup>

The review is based on three sources of information: the national report (20 pages), a compilation report of UN information (10 pages)<sup>16</sup> and a summary of ‘credible and reliable information provided by other relevant

14 See ISHR/Friedrich Ebert Stiftung, *A New Chapter for Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council* (2006). See also the Human Rights Watch proposal that a session rapporteur or a panel of experts would prepare a background note and questions for the State under review on the basis of existing UN recommendations and submissions by NGOs, to which the State under review would first respond before the review, available at: <http://www.hrw.org/en/news/2006/06/27/universal-periodic-review-mechanism> [last accessed 1 December 2008]; ‘An effective Universal Periodic Review mechanism: Amnesty International’s Proposal’, AI Index: IOR 40/033/2006, September 2006, at 12 (‘All concerned parties in the country under review, including independent national human rights institutions, and civil society must be able to contribute effectively to the dialogue and review’); and International Commission of Jurists, ICJ Position Paper on the Mechanism of the Universal Periodic Review of the United Nations Human Rights Council, May 2007 (‘experts might contribute to establishing a list of issues, summarising information compiled by the Office of the High Commissioner for Human Rights, acting among country rapporteurs... as well as feeding into effective follow-up to recommendations adopted by the Council’), VI International Human Rights Colloquium, Sao Paulo, Brazil, Strengthening Human Rights in the South, Sao Paulo, Brazil, 11–17 November 2006, which included human rights activists and academics from 28 southern countries, called for ‘a follow-up mechanism and the elaboration of a plan of action to implement recommendations’. A collection of NGO position papers are available on the OHCHR extranet, available at: <http://portal.ohchr.org/portal/page/portal/HRCExtranet/WG-UPR/NGOOtherContributions> [last accessed 1 December 2008].

15 *Supra* n. 5 at para. 8. International humanitarian law was added as a further basis of the review, which was pushed through by Egypt, against the wishes of Switzerland and the advice of the International Committee of the Red Cross, on the grounds that the Council has neither the mandate nor competency to consider the application of international humanitarian law. To date, little reference has been made to such obligations in the UPR Working Group.

16 *Supra* n. 6 at para. 15(b) stating ‘information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents’.

stakeholders' (including, NGOs, national human rights institutions and other interested parties, such as regional human rights bodies) (10 pages), the last two documents being prepared by the OHCHR. The General Guidelines on information provide that States should describe in the national report the 'broad consultation process followed for the preparation of information provided'.<sup>17</sup> Following from the drafting of the modalities of the UPR, during which NGOs strongly emphasised that the UPR should be seen as a national process with the 'full involvement of the country (and not simply State) concerned', the General Guidelines thus provide that preparation should include a broad process of national consultation with NGOs and other stakeholders.

While the other relevant stakeholders' submissions are summarised by the Office of the High Commissioner for Human Rights (OHCHR), they are also published on the OHCHR website in order to ensure full transparency by allowing all parties to assess the sources and the quality of the summary. Early on, concern was raised about what the OHCHR would consider as 'credible and reliable' information, and whether this would lead to an inclination to rely on information provided by international NGOs at the expense of lower profile national NGOs. However, to date, most national NGOs and coalitions have appeared to be satisfied with the form of these summaries. The official status of the summary as a UN document also distinguishes it from the status of NGO submissions to treaty bodies, for example.

An ongoing anomaly, however, is the fact that the deadline for NGO submissions is five to seven months before the review, compared to six weeks for the national report. This is due to the fact that the OHCHR is required to summarise multiple submissions (up to 37, for example, in the case of India).<sup>18</sup> This creates obvious difficulties in submitting up-to-date information and in being able to comment on the State's own submission, as happens with the treaty bodies. NGOs have urged the OHCHR not to institutionalise this practice. However, unfortunately, the deadlines for submitting information for the first five sessions have lengthened.<sup>19</sup>

### Modalities of the review

Each review is conducted by the UPR Working Group, which comprises the 47 Member States of the Human Rights Council, although observer States may also take the floor. The review lasts three hours and begins with

17 Human Rights Council Decision 6/102, General Guidelines for the Preparation of Information under the Universal Periodic Review, 27 September 2007, at para. A.

18 Contributions for the summary of stakeholder's information, India, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRIndiaStakeholderInfoS1.aspx> [last accessed 1 December 2008].

19 The deadline for the 3rd and 4th sessions was five months prior to the review. It is six months prior to the review for the 5th session and seven months for the 6th session, see: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NewDeadlines.aspx> [last accessed 1 December 2008].

a presentation by the State under review, followed by comments, questions and recommendations from States. It should be noted that NGOs play no active role in the review itself.<sup>20</sup> The State under review may respond to questions if it so chooses at any stage. The dialogue is recorded in the outcome report, accompanied by specific recommendations identified from the dialogue. The OHCHR has two days to compile the report following the review, which is approved by the ‘troika’ and the State under review.<sup>21</sup> In this interim period, the State may identify which recommendations it can accept or which it summarily rejects, and this is reflected in the summary of recommendations in the Working Group’s report. Likewise, it may indicate that it reserves its on any or all recommendations. The report is then presented back to the UPR Working Group for adoption ad referendum two days after the review, allowing for an additional two weeks to receive editorial corrections.

The final stage of the process is the adoption of reports by the Human Rights Council at its next scheduled plenary session,<sup>22</sup> where one hour is allocated for the consideration and adoption of each report. The first 20 minutes is provided for the State under review to present its acceptance or rejection on recommendations on which it has reserved its position, and the reasons for its decision, which is duly recorded in an amendment to the original draft. Written submissions by States are also appended as an annex to the final outcome. The floor is then opened to Member and Observer States to make comments on the outcome of the review and, for the first time, to NGOs to make ‘general comments’. This constitutes the sum total of official NGO engagement in the UPR process at the UN level. These collective contributions are summarised in the report of the Council session and included in the final report, which is then formally adopted by the Council.

### *C. The First and Second Sessions of the UPR Working Group, April and May 2008*

The first UPR session was expected to take place in late 2007, but due to objections that certain modalities were not finalised<sup>23</sup> and requests that developing

20 NGOs are entitled to observe the review in the room, and may conduct parallel events at the time of the review in the Working Group, but they are only entitled to take the floor later during the consideration and adoption of reports in the Council plenary.

21 For an explanation of the role of the troika, see Council Resolution 5/1, supra n. 6 at paras 18(d) and 21.

22 The reports of the first two sessions of the UPR in April and May 2008 were adopted at the June session of the Council. In future, the reports of the UPR December session will be adopted at the March Council session, and it is yet to be decided when the February and May sessions will be adopted, although the likely outcome would be to adopt the February session of the UPR at the June session of the Council, and the May session of the UPR at the September session of the Council in order to give States adequate time to finalise their position on recommendations.

23 Such modalities included whether reports submitted by NGOs and other stakeholders should be published on the OHCHR website, whether questions submitted to the State under review via the troika may also be published on the website, how time would be allocated to States



countries needed more time to prepare, it was postponed until 7–18 April and 5–19 May 2008. Thirty-two UN Member States<sup>24</sup> were drawn from lots on 21 September 2007 to be reviewed in the first two sessions.<sup>25</sup> The final UPR session of 2008 will then take place from 1 to 12 December 2008, and future reviews will take place in February, May and December of each year.

(i) Presentations by States under review

States under review were generally represented by large high-level delegations,<sup>26</sup> usually at the ministerial level, which signified that the process was being taken seriously. However, the sending of Ministers or Deputies of Foreign Affairs rather than, for example, a Minister of Justice, by Bahrain, Indonesia, Algeria and others suggested an unfortunate tendency to view the UPR as a foreign affairs exercise rather than a national process for the examination and improvement of human rights protection and promotion.

The President of the Council's final statement on modalities established that the State under review would have a maximum of 60 minutes to present its national report, respond to written questions received through the troika, reply to questions from the floor during the dialogue, and offer concluding comments.<sup>27</sup> This allocation worked reasonably well although there remains the possibility of misuse of time in the future. Argentina in the first session and Ghana, Peru, Sri Lanka and Romania in the second, used up to 40 minutes

under review to present their report and answer questions, how the interactive dialogue would be conducted, the final format of the UPR report, and whether live webcasting should be permitted.

- 24 The selection process, which accounts for geographical representation, the percentage of Council member and observer States and the status of development of States, was inordinately complex and required the creation of an algorithmic software programme that many delegations found very difficult to comprehend. For a summary explanation, as well as State and NGO responses, see 'Main steps to be taken regarding the establishment of the UPR work programme (for the first year): draft Note from the Secretariat - version 11, 12 September 2008' on the OHCHR extranet. For a summary of the simulation process, see ISHR, Daily Updates, 12 and 19 September 2008, available at: [http://www.ishr.ch/index.php?option=com\\_content&task=view&id=115&Itemid=176](http://www.ishr.ch/index.php?option=com_content&task=view&id=115&Itemid=176) [last accessed 1 December 2008].
- 25 States under review at the first session were, in order: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, Philippines, Algeria, Poland, the Netherlands, South Africa, the Czech Republic and Argentina. States under review at the second session were, in order: Gabon, Ghana, Peru, Guatemala, Benin, Republic of Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania and Mali. See the OHCHR extranet at: <http://portal.ohchr.org/portal/page/portal/HRCExtranet/6thSession/OralStatements/210907/Tab16> [last accessed 1 December 2008] and ISHR, Daily Update, 21 September 2007, available at: <http://www.ishr.ch/hrm/council/dailyupdates/session.006/21.september.2007.pdf> [last accessed 1 December 2008].
- 26 For example, India—Solicitor General, the Netherlands—Secretary of State for Justice, Ecuador—Minister of Justice, Tunisia—Minister of Justice, Morocco—Minister of Justice, Finland—Secretary of State, and the United Kingdom—Minister of State.
- 27 'Modalities and practices for the universal periodic review process', 9 April 2008, 8/PRST/1 at para. 7. This was a more flexible approach than the initial allocation by the President of 30 minutes for the presentation and 30 minutes for responses to questions.

to present their reports, with the result that they were not able to address all of the points raised in the interactive dialogue.<sup>28</sup>

One of the clearer critical questions arising from the first session of the UPR related to the questionable value of submitting written questions to the troika for each country under review, and by extension the value of the troika *per se*.<sup>29</sup> Less than half the States under review allocated time to address questions submitted to them via the troika, with only the Netherlands, the United Kingdom, Japan and the Republic of Korea responding directly to the States that submitted questions in writing. The clearest evidence that this approach was ineffective can be seen in the case of Ireland, which switched from submitting written questions in the first session without taking the floor, to taking the floor in the second session.<sup>30</sup> It would therefore appear that what had originally been conceptualised as a system of independent rapporteurs<sup>31</sup> has been diluted to an exercise whereby the troika simply rubberstamps the draft outcome reports once the UPR Working Group has completed the review.<sup>32</sup>

#### (ii) The list of speakers and alignments of ‘friendly’ States

From the first review of Bahrain, a negative trend was established of ‘friendly States’<sup>33</sup> filling the speakers’ list to compliment the State under review. The later review of Tunisia was so dominated by its allies that it appeared an exercise in filibustering,<sup>34</sup> challenging the principle of transparency and objectivity and diminishing the possibility that the first objective of the UPR to ‘improve of the human rights situation on the ground’ could at all be achieved.<sup>35</sup> This negative practice is likely to resurface in future reviews.

28 It was particularly surprising that Romania would follow such a course of action, given that its Ambassador, as the then President of the Council, had originally proposed that States’ presentations be limited to 30 minutes.

29 The ‘troika’ consists of three Member States from different regional groups of the Human Rights Council that are drawn by lots for each individual State under review in the UPR. Its tasks are to ‘facilitate each review, including the preparation of the report of the working group’ (supra n. 5 at para. 18(d)) and ‘to collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue, while guaranteeing fairness and transparency’ (at para. 21). For a summary of the first drawing of lots on 25 February 2008 for the 1st and 2nd sessions of the UPR and an explanation of the process, see <http://www.ishr.ch/hrm/council/councilalert/councilupdate.7session.pdf> [last accessed 1 December 2008].

30 See the compilation by UPR-info.org of state interventions related to human rights defenders, available at: <http://www.upr-info.org/IMG/pdf/IA.HumanRightsDefenders.S1-2.pdf> [last accessed 1 December 2008].

31 ISHR/Friedrich Ebert Stiftung, supra n. 14 and Human Rights Watch, supra n. 14.

32 Supra n. 6 at para. 18(d).

33 Palestine, India, Pakistan, Qatar, Tunisia, the United Arab Emirates, Saudi Arabia, Turkey, Malaysia, Algeria, Libya and Cuba.

34 The first 15 countries to speak in the interactive dialogue were Kuwait, Palestine, Pakistan, Philippines, Chad, Saudi Arabia, the Russian Federation, Slovenia, China, India, Madagascar, Ghana, Mauritania, Bangladesh and Angola, 22 May 2008, A/HRC/8/21 at paras 12–26.

35 Supra n. 6 at para. 4(a).



Another visible trend that emerged by the second session of the UPR was that smaller States were less inclined to engage in interactive dialogues with States from regions other than their own. African States, with the exception of Morocco, Algeria, Egypt, and to a certain degree Tunisia, were only likely to take part in the interactive dialogue with other African States.<sup>36</sup> The same could relatively be said of the Group of Latin American and Caribbean States (GRULAC) and the Asian Group,<sup>37</sup> while engagement by the EU States tended to be more evenly spread across the regions. This raises questions about the 'universality and non-selectivity' of the review process so far, suggesting that States in one region may not be particularly interested in what is happening in another when it comes to human rights.

Under the UPR principle of cooperation, States have no obligation to respond to questions, and this was evident in the general selectivity of responses, with rare exceptions.<sup>38</sup> The prevailing practice of States under review was to answer questions in clusters. However, many States, including India, Brazil and Guatemala, allowed the clusters to be so large that the majority of issues were left unaddressed, intentionally or otherwise. Gabon, in the second session, was the first country to take all of the questions at the end rather than by clusters, and also avoided addressing many points. In comparative terms, such *a la carte* responsiveness would generally not be considered acceptable by the treaty bodies, before which States are technically under no obligation to respond to questions put to them during examination. Yet a failure to respond to a treaty body's questions may result in more pointed concluding observations. In the case of the UPR the recommendations have already been made, and so there is little incentive for States under review to break their silence as it has no real bearing on the outcome.

### (iii) Character of State interventions

State interventions generally contained positive and/or critical comments, questions and recommendations, with States expressly using the word 'recommend' to ensure that it was recorded as such in the final outcome report. Over the course of the first two sessions, the percentage of positive comments by States far outweighed criticisms.<sup>39</sup> A poor example of how the UPR was used to address particularly serious human rights situations is the case of

36 For example, in the review of Gabon, 13 of the 36 States that provided comments were from the African Group, whereas in the review of Peru, Algeria was the only African State to provide comments.

37 Of the GRULAC States, only Brazil, Mexico and Cuba tended to continually engage cross-regionally. Of the Asian Group, consistent cross-regional engagement was evident from Indonesia, the Philippines, Malaysia and Azerbaijan.

38 Only the Netherlands endeavoured to answer every question put to them.

39 In the case of Brazil, for example, positive comments were approximately 10 times more numerous than critical observations.

Sri Lanka, where positive comments actually outweighed critical interventions.<sup>40</sup> The quality of questions and recommendations were also variable. While tough questions were posed in almost all meetings,<sup>41</sup> recommendations were often so broad that monitoring their implementation will be difficult.<sup>42</sup> However, now that the reports of the first two sessions can be cumulatively assessed, it is easy to see how States might make their recommendations more specific and measurable in future.

The UPR addressed the widest range of thematic issues during the first two sessions, with an equitable balance given to economic, social and cultural rights and civil and political rights. However, the issue of discrimination on the basis of sexual orientation and gender identity drew significant attention, partly on account of very impressive lobbying by NGOs active in this area.<sup>43</sup> When the issue first arose in relation to Ecuador, it was argued by Egypt that sexual orientation did not fall within the terms of the review unless it was included in a particular State's 'voluntary pledges and commitments'.<sup>44</sup> Incidentally, Ecuador had no objection to the recommendation, leading to the farcical situation of Egypt telling Ecuador that it could not accept a recommendation that it was happy to accept unless it had previously accepted it as a voluntary commitment. In the case of Tonga, this resulted in the first instance where a State was faced with two directly conflicting recommendations.<sup>45</sup> The question of sexual orientation will continue to feature at future sessions of the UPR, with allegations of the imposition of 'cultural values' perhaps serving to obscure examination of other serious human rights issues. The UPR may also give rise to attempts by States to unilaterally reject certain

40 Report of the Working Group on the Universal Periodic Review: Sri Lanka, 5 June 2008, A/HRC/8/46. See: <http://www.ishr.ch/hrm/council/upr/upr.2nd.session.2008/upr.002.sri%20lanka.final.pdf> for a summary of positive and critical statements, [last accessed 1 December 2008].

41 See, for example, by the United Kingdom and Peru in the case of Brazil; Senegal in the case of Tunisia; the Democratic Republic of the Congo in the case of South Africa; Algeria in the case of the Netherlands; Russia and Cuba in the case of Poland; and Belgium in the case of Algeria.

42 Some examples include the recommendation that Tunisia 'pursue its programmes and consolidated approach in the promotion and protection of all human rights including in the field of education, health and the promotion of the status of women (Syrian Arab Republic) as well as the empowerment of women (Cuba)', and that India 'consider new ways of addressing growing economic and social inequities arising out of rapid economic growth and share experiences/results of best practices in addressing poverty (Algeria)'.

43 For a relevant summary, see Alejandra Sardá, Second session of the UPR: sexual rights and women's issues (Mulabi-Espacio Latinoamericano de Sexualidades y Derechos).

44 For a summary of this debate, see ISHR, Monitor, Universal Periodic Review, 1st session Ecuador - Adoption of the report at 7–9, available at: <http://www.ishr.ch/hrm/council/upr/upr.1st.session.2008/upr.001.ecuador.final.pdf> [last accessed 1 December 2008].

45 Following recommendations from the Netherlands, the Czech Republic and Canada that Tonga should decriminalise sexual activity between consenting same sex adults, Bangladesh recommended that Tonga continue to criminalise such activity 'if this is in accordance with the country's values' as the purpose of the UPR is 'not to impose the values of one country on another'. For Tonga's very diplomatic response, see Report of the Working Group on the Universal Periodic Review - Tonga, 5 June 2008, A/HRC/8/48 at para. 65.

recommendations on the basis that they do not concern ‘universally recognised human rights principles’, as was claimed by Pakistan.<sup>46</sup>

The interactive dialogue also witnessed the practice by certain States of asking the same standard thematic questions to all States. In its questions sent to the troika, the United Kingdom included a standard question on the role of civil society in the preparation of the national report. During the dialogue, Slovenia always provided a general question on gender integration in preparation for the UPR and a tailored question related to other gender issues.<sup>47</sup> While the intention of using standard questions may have been to avoid selectivity, and the practice was often positive, it is important that States do not ask such standard questions in a perfunctory manner, as this runs the risk of turning the UPR into a stale and generic exercise.<sup>48</sup>

(iv) Complementarity of existing international human rights mechanisms

In accordance with the requirement that the UPR complement the work of treaty bodies and other human rights mechanisms,<sup>49</sup> the interactive dialogue drew more attention to the recommendations of treaty bodies and special procedures of the Council than anticipated. On a procedural level, many States have also used their presentation to commit to submitting overdue reports to various treaty bodies within a fixed period of time, while others have declared their intention to ratify outstanding treaties or have done so in anticipation of their UPR review.<sup>50</sup> In this instance, it could be stated that the UPR has complemented the work of treaty bodies both in encouraging States to meet their procedural obligations and as a form of interim follow-up to

46 See Report of the Working Group on the Universal Periodic Review - Pakistan, 4 June 2008, A/HRC/8/42 at para. 108, referring to recommendations in paras 23(b) on repealing provisions criminalising non-marital consensual sex and failing to recognise marital rape—recommendation made by Canada; 23(f) on decriminalising defamation (Canada); 30(b) on reviewing the death penalty with a view towards introducing a moratorium and abolishing it (United Kingdom); 30(d) on repealing the Haddod and Zina Ordinances (United Kingdom); 43(c) on declaring a moratorium on executions and moving towards abolition (Switzerland); 62(b) on decriminalising adultery and non-marital consensual sex (the Czech Republic); and 62(e) on prohibiting provisions of the Qisas and Diyat law in cases of honour killings (the Czech Republic).

47 Other examples include France’s standard recommendation to ratify the International Convention for the Protection of All Persons from Enforced Disappearance 2006 through both sessions and Luxembourg focusing on the alleviation of poverty.

48 For example, when Australia asked its standard question on whether Brazil had a national human rights institution after Brazil had already detailed its various institutions responsible for human rights protection and promotion, available at: [www.ishr.ch/hrm/council/upr/upr.1st.session.2008/upr.001.brazilfinal.pdf](http://www.ishr.ch/hrm/council/upr/upr.1st.session.2008/upr.001.brazilfinal.pdf) [last accessed 1 December 2008].

49 GA Res. 60/251, supra n. 5 at para. 5(e) and Human Rights Council Resolution 5/1, supra n. 6 at para. 3(f).

50 Pakistan, whether by coincidence or otherwise, ratified the International Covenant on Economic, Social and Cultural Rights and signed the International Covenant on Civil and Political Rights on 17 April 2008, less than three weeks before it was to be reviewed under the UPR.

outstanding substantive issues raised by treaty bodies. This has been facilitated, in turn, by NGOs linking ongoing human rights concerns to unimplemented treaty body recommendations in their submissions.

Conversely, it remains to be fully seen how the recommendations of the UPR will be taken up by the treaty bodies in their examination of States. As of December 2008, 12 States have appeared before the core treaty bodies after being reviewed by the UPR, with the United Kingdom appearing before three separate treaty bodies.<sup>51</sup> In the case of Finland before the Committee on the Elimination of Discrimination against Women and Indonesia before the Committee against Torture, the outcomes of the respective UPR reports were referred to during the examination.<sup>52</sup> In a limited number of cases, treaty body country rapporteurs have declared that they had found UPR reports useful in preparing for the examinations of States.<sup>53</sup> In most cases, however, there was little indication that this was the case, which highlights the scope for vast improvement in maximising complementarity.

In June and December 2008, the Inter-committee Meetings (ICM) of the treaty bodies revealed an underlying pessimism that the UPR would undermine the treaty body system and erode its autonomy, despite early indications to the contrary.<sup>54</sup> Substantive complaints raised by treaty body members included: political selectivity with which treaty body recommendations were referenced; whether States had refused to accept their recommendations to which they were already obligated under the treaties; the generality of UPR recommendations; and the absence of follow-up procedures. It was clear from the outcome of the ICM that treaty bodies require more information on the UPR's performance. The Human Rights Committee, for example, is currently conducting an internal assessment of the UPR, and a positive shift in the

51 Committee on Economic, Social and Cultural Rights (CESCR)—France, India and the Philippines; Committee Against Torture (CAT)—Algeria and Indonesia; Committee on Elimination of Racial Discrimination (CERD)—Peru, Ecuador and Switzerland; Human Rights Committee (HRC)—the United Kingdom, France and Japan; Committee on the Elimination of Discrimination against Women (CEDAW)—Finland, the United Kingdom, Ecuador and Bahrain; and Committee on the Rights of the Child (CRC)—the United Kingdom. Benin was reviewed by CESCR two days before its UPR review. Serbia came before the CRC in May 2008, CAT in November 2008 and the UPR in December 2009.

52 For a review of Finland's examination before CEDAW, see ISHR, Treaty Body Monitor, Committee on the Elimination of Discrimination against Women - Finland, available at: <http://www.ishr.ch/hrm/tmb/treaty/cedaw/reports/cedaw.41/cedaw.41.finland.pdf> [last accessed 1 December 2008]. For an examination of Indonesia's examination before CAT, see: <http://www.ishr.ch/index.php?option=com.comment&task=view&id=84&Itemid=141> [last accessed 1 December 2008].

53 This was stated by HRC member Ms Wedgwood in explaining the value of the UPR report in her preparation as country rapporteur for the examination of France. See ISHR, Summary of the HRC's dialogue on working methods, 14 July 2008, available at: <http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=8&Itemid=141> [last accessed 1 December 2008].

54 Report of the seventh Inter-committee Meeting of human rights treaty bodies, 13 August 2008, A/63/280 at Annex, paras 22–3. Discussion at the 8th Inter-committee Meeting of human rights treaty bodies, Geneva, 2 December 2008, from the author's notes.

mindsets of its members towards realising the potential of a more cyclical process between the UPR and treaty bodies has become apparent. NGOs can also contribute to this cyclical process by beginning to reference UPR recommendations in their submissions to treaty bodies, and vice versa.

Although references in the UPR Working Group to the recommendations of UN special procedures were less frequent, partly because less exist, they were also well-represented. While it is more difficult for thematic special rapporteurs to follow-up on recommendations deriving from past country visits, it will be interesting to see how thematic rapporteurs may apply UPR recommendations for specific countries in planning upcoming visits to those countries. Direct reference to the information submitted by 'other relevant stakeholders' was far more sporadic, although the lack of reference to NGO submissions does not mean that points were not duly taken up by States. In certain cases, it is clear in fact that the vast majority of issues raised in the submissions of NGOs were also raised by States in the interactive dialogue, although it is more difficult to qualitatively assess this across the board. Such a study would be very useful in measuring the impact of NGO information.

#### ***D. Consideration and Adoption of Reports by the Human Rights Council and General Debate on the UPR (Item 6)***

The outcome reports for the 32 States under review from the first and second sessions of the UPR were considered and adopted by the Human Rights Council at its 8th session in June 2008, with each report allocated one hour for consideration. This final stage provided NGOs and other stakeholders with their first opportunity to actively participate in the UPR process. The Council's agenda also contains a standing item for a general debate on the UPR (Item 6), with the June session providing the first opportunity for States and civil society to comment on the process as a whole. This general debate also took place at the Council's 9th session in September, where it was hoped that a number of States would set a precedent by updating the Council on its implementation of UPR recommendations. Instead, discussion again focused on attempts by a number of States to limit the involvement of NGOs in the consideration of reports.<sup>55</sup>

During the UPR drafting phase, a clear distinction was made between the role of States and 'other relevant stakeholders' during the consideration and adoption of reports by the Council.<sup>56</sup> Whereas Member and Observer States are limited to expressing their views on the 'outcome of the review',

55 Parts of the following section were originally published in 'Fair Comment and Free Speech: NGO participation during the UN's Universal Periodic Review', (2008) 38 *CIVICUS Civil Society Watch Monthly Bulletin*, available at: <http://www.civicus.org/csw.files/ANALYSIS.UNHCR.No38.htm> [last accessed 26 March 2009].

56 *Supra* n. 6 at paras 28–31.

other relevant stakeholders are entitled to ‘make general comments before the adoption of the outcome by the plenary’.<sup>57</sup> This broader language was inserted so that NGOs would be able to provide some substantive input to the discussion at the Council phase. The contributions are (or should be) then recorded in the final compilation of UPR outcome documents.<sup>58</sup>

From the very first opportunity for NGO participation, in the review of Bahrain, it was clear that there were differences of understanding of the meaning of ‘general comments’. Frontline International used its two minutes to provide critical comments on the situation of human rights in Bahrain.<sup>59</sup> Pakistan then raised a point of order to demand that NGOs ‘should not re-open discussions mentioned in the Working Group’. The then President of the Council, Ambassador Costea of Romania, ruled that NGOs should ‘stick to the provision of Resolution 5/1 as well as all relevant documents’, which he claimed were ‘perfectly clear’. In effect, this only created more confusion. Successive NGOs that addressed the situation of human rights in Bahrain, Morocco, Algeria and Pakistan were interrupted by banging and waving,<sup>60</sup> even when their statements were linked to the outcome report of the UPR Working Group. A disappointingly small number of States protested that this constituted an ‘excessively narrow’ interpretation of Council Resolution 5/1,<sup>61</sup> although this had no effect on Egypt, which insisted that all NGO comments be removed from the official record of the session.

NGOs that were allowed to speak were generally more critical than Member and Observer States. Many used the speaking time to propose means by which States could implement UPR recommendations, or challenged States’ positions on particular issues or recommendations that the State had rejected.<sup>62</sup> Some of the more critical interventions related to Pakistan’s rejections on the basis of its own interpretation of ‘universally recognised human rights principles’.<sup>63</sup> In the case of Algeria, among others, NGOs were able to highlight that the recommendations rejected were in fact the most important

57 Ibid. at para. 31. It should be noted that the opportunity to speak under Item 6 at the Council is limited to ECOSOC-accredited NGOs and national human rights institutions that are accredited by the International Coordinating Committee of National Human Rights Institutions, unlike the submission of information to the UPR, which is open for all relevant stakeholders.

58 Draft Report of the Human Rights Council at its Eighth Session, 5 August 2008, A/HRC/8/L.10/Rev.1.

59 Ibid. at para. 195.

60 It is worth noting that complaints by States were limited to NGO interventions directed at African or OIC States. Algeria and Pakistan were notably silent when NGOs criticised the human rights situation in France or the Republic of Korea, for example, even without clear links to the recommendations of the UPR report.

61 Canada, Mexico and Switzerland.

62 See, for example, the Centre on Human Rights and Evictions (COHRE) in relation to Switzerland and economic, social and cultural rights, and the National Human Rights Commission of Korea in relation to the National Security Act.

63 *Supra* n. 46.



ones in the report.<sup>64</sup> In relation to Argentina, NGOs stressed that the recommendations of the UPR had not addressed many of the most serious issues in the country. On a more positive note, a high percentage of States under review did respond to issues posed by NGOs in their concluding remarks.<sup>65</sup>

The same difficulties arose in the general debate (Item 6) on the UPR, when Egypt attempted to interrupt NGOs as soon as reference was made to specific country situations. Nonetheless, NGOs relayed their views on recent developments, including the lack of inclusion of NGOs in national consultations; the practice of certain groups of States lining up to praise their allies; a lack of clarity about NGO participation in the adoption of the outcome reports; a lack of response by the State under review to some of the recommendations made; and attempts by some States to call into question universal human rights law and principles.<sup>66</sup>

The general debate at the 9th session of the Council in September 2008 presented a different challenge, as there was no interim UPR session and no UPR reports before the Council for adoption. Nonetheless, four to five months had passed since the reviews of the first 32 States, and the expectation was that these States could show their commitment by updating the Council on efforts to implement recommendations. Furthermore, NGOs could provide their assessment of progress and comment on situations relevant to such implementation. Again, however, a vocal number of States resisted attempts to discuss follow-up,<sup>67</sup> following from previous attempts to consider the removal of Item 6 as a standing item from the agenda.<sup>68</sup> While Cuba and

64 See ISHR, Daily Updates from 9–13 June 2008, available at: <http://www.ishr.ch/index.php?option=com.content&task=view&id=115&Itemid=176> [last accessed 1 December 2008].

65 See, for example, Bahrain in relation to women's participation in public life; Brazil in relation to human rights defenders and collaboration; Poland on renditions; Peru on the advancement of women; and Switzerland on economic, social and cultural rights. Ecuador and Argentina, as States under review, also underlined the importance of NGO participation at this stage of the UPR process.

66 Joint statement by the Asian Legal Resource Centre, Ba'hai International Community, the Cairo Institute for Human Rights Studies, the Centre for Housing Rights and Evictions (COHRE), Conectas, Forum-Asia, Franciscans International, Human Rights Watch, the International Service for Human Rights (ISHR), Pax Romana and Rights and Democracy, 13 June 2008.

67 Egypt (on behalf of the African Group) stated that 'the African Group did not oppose having a general debate on the UPR with the understanding that it will not be used, in violation of the institution-building text, as a follow-up to the UPR cycles the Council conducted thus far. The institution-building text clearly states that such a follow up will be conducted four years after revision', available at: [http://portal.ohchr.org/portal/page/portal/HRCExtranet/9thSession/OralStatements/170908/Tab2LL/Tab2/Egypt\(African%20Group\)-170908.pdf](http://portal.ohchr.org/portal/page/portal/HRCExtranet/9thSession/OralStatements/170908/Tab2LL/Tab2/Egypt(African%20Group)-170908.pdf) [last accessed 1 December 2008].

68 At the organisational meeting for the 9th session of the Council, 28 August 2008, Egypt (in its national capacity) 'sought further details on why such a general debate was necessary; whether it would be intended to address the substance or the procedure of the UPR; what the intended outcomes might be; and whether such a debate would constitute a "review" of the UPR process'. See ISHR, Council Alert, 28 August 2008, at 5, available at: <http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=68&Itemid=> [last accessed 1 December 2008].

China did not oppose the practice of States voluntarily reporting on their follow-up, as long as this did not develop into a standard practice or an obligation, Nigeria and India suggested that any form of updating would restart ‘another review cycle’.<sup>69</sup> It is likely that a number of States will use the general debate under Item 6 to update the Council on implementation in March 2009 and at subsequent sessions, as the September 2008 session may have been too early to offer substantive updates, and so the debate on follow-up will certainly resurface.

### *E. Conclusions*

There still remain many aspects of the UPR that need to be measured and to be improved. It remains to be seen how many States will constructively engage in national consultations in preparation for the UPR and whether the UPR Working Group is able to respond critically to States that do not do so, or that do so poorly.<sup>70</sup> It is not yet clear to what degree States are reliant upon and willing to use NGO submissions and to what ends, as practice has been variable across reviews and States are disinclined to directly reference NGOs as sources.

Nor is it clear to what degree States are selectively drawing upon treaty body recommendations, and whether treaty bodies will develop a harmonised approach to using UPR reports and recommendations and to feeding references in the UPR process back into their own examinations of States.

At the stage of adopting reports at the Council, States have yet to commit to submitting in writing the reasons for their rejection of certain recommendations. There also remain issues around the manner in which Council discussions are reflected in the final report, in particular in relation to sensitivity over critical NGO statements.<sup>71</sup>

In broader terms, it is not yet possible to measure whether the UPR may become a vehicle for certain States to attempt to claim that there is no longer any need for the Human Rights Council to address specific country situations,

69 See ISHR, Daily Update, 18 September 2008, available at: <http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=89&Itemid=> [last accessed 1 December 2008] and a joint NGO response to these developments at: <http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=87&Itemid=> [last accessed 1 December 2008].

70 For example, see India’s claim that ‘a broad consultation process was also held with the stakeholders’, leading to ‘a liberal exchange of views, suggestions and information regarding protection and implementation of human rights took place, which helped in evolving the contours of the national report’, National Report submitted by India, 6 March 2008, A/HRC/WG.6/1/IND/1 at para. 7. In reality, the State contacted a very small number of NGOs and asked that they meet in Delhi the following day to discuss a draft report that no NGO had seen. According to local NGOs, the outcome of the 45 minute meeting had no bearing on the final draft submitted to the UPR.

71 For a critical summary of the debates around the format of the final report, see ISHR, Analytical Overview of the UPR, April–June 2008, at 9, available at: <http://www.ishr.ch> [last accessed 1 December 2008].

despite some initial attempts by the Democratic Peoples' Republic of Korea, the Philippines and China among others.<sup>72</sup>

Finally, it is too early to assess States' commitment to implementing recommendations and their subsequent reporting back to the Council on follow-up. This is most critical as it will answer the question whether the UPR is capable of fulfilling its primary objective of 'improving the situation on the ground'. If this is not evident, then faith in the idea of a UPR may begin to wane. The effect that this could then have on the Council going the same way as its predecessor is a prospect which, in and of itself, may pressure States to better honour their obligations and commitments under the UPR.

## 2. The Human Rights Council Advisory Committee

The Human Rights Council Advisory Committee (the Advisory Committee) was formally established by the Human Rights Council on 18 June 2008 to serve as its 'think-tank'.<sup>73</sup> At its first session, the Advisory Committee actively solicited input from NGOs and responded directly to their concerns. However, the Council's rather dismissive treatment of the work of the Advisory Committee in September 2008, through the postponement of all decisions on Advisory Committee recommendations, has slightly dampened the expectations that this new mechanism might have initially created.

### A. Background

In establishing the Human Rights Council, the General Assembly mandated that it 'maintain a system of . . . expert advice'.<sup>74</sup> It is notable that the General Assembly made no reference to the expert body of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission). This, in effect, meant that the Council was not required, under the terms of this resolution, to retain this body.

At its first session in June 2006, the Council established an intergovernmental working group to review the mandates and mechanisms of the Commission, therein including the system of expert advice.<sup>75</sup> The Working Group was facilitated by Ambassador Mousa Burayzat of Jordan and began its work in November 2006.<sup>76</sup> States had disparate views on all aspects of the

72 See the debate around the extension of the mandate of the Special Rapporteur on the DPRK in ISHR, Daily Update, 27 March 2008, at 11–12, available at: <http://www.ishr.ch/hrm/council/dailyupdates/session.007/27.march.2008.pdf> [last accessed 1 December 2008].

73 *Supra* n. 6 at para. 65.

74 *Supra* n. 5 at para. 6.

75 Human Rights Council Dec. 1/104, 30 June 2006, A/HRC/DEC/1/104 at 1.

76 The Working Group met in November 2006, February 2007 and April 2007. For overviews of the discussions at each session, see <http://www.ishr.ch> [last accessed 1 December 2008].

prospective expert body, from its name to its composition to its mandate. There were few NGOs present at the sessions of the Working Group. One possible explanation for this is that the majority of the NGOs which were active in the Sub-Commission were based in the South. These NGOs may have lacked the capacity to travel to Geneva to attend the Working Group sessions. At the same time, the Working Group on the UPR was garnering the attention and resources of those NGOs that did participate in the institution-building phase.

The mandate and membership of the Advisory Committee have been significantly curtailed compared to its predecessor.<sup>77</sup> Now, virtually all aspects of the work of the Advisory Committee require the prior authorisation of, if not an explicit request from, its parent body. The Advisory Committee is meant to provide expertise to the Council in ‘the manner and form requested by the Council’ and ‘only upon the [Council’s] request, in compliance with its resolutions and under its guidance.’<sup>78</sup> In other words, the Advisory Committee may not initiate its own studies; it can merely present research proposals to the Council for its consideration and approval. Moreover, the Advisory Committee is not entitled to adopt any resolutions or decisions.<sup>79</sup>

The elections to the Advisory Committee were held in March 2006. Council Resolution 5/1 outlines the process for the nomination and election of the 18 members of the Advisory Committee, and Council Decision 6/102 lists the technical and objective requirements for candidates. Regrettably, the lists of candidates proposed by the African Group, the Asian Group and the GRULAC were ‘clean slates’ and there was no choice of candidates. Thus, effectively, three-quarters of the membership was elected by acclamation.<sup>80</sup> Moreover, despite the explicit provision in Resolution 5/1 that the Council give ‘due consideration’ to gender balance, there is a striking paucity of women on the Advisory Committee.<sup>81</sup> Also of note is the large number of former Sub-Commission members who have been elected on to this new body.<sup>82</sup>

77 For more detail, see Callejon, ‘Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence’, (2008) 8 *Human Rights Law Review* 323.

78 *Supra* n. 6 at para. 75.

79 At its first session, therefore, the Advisory Committee adopted ‘recommendations’. The implications of this semantic detail are yet unclear.

80 The full list of members is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/membership.htm> [last accessed 1 December 2008]. Members are allocated regionally as follows: Africa - five; Asia - five; Eastern Europe - three; Latin America and the Caribbean - three; and West Europe and others - three: *supra* n. 6 at para. 73. Members are elected for three years: *ibid.* at para. 74.

81 There are only four women on the Advisory Committee, representing less than one-quarter of the membership.

82 Mr José Antonio Bengoa Cabello, Mr Shiqiu Chen, Ms Chung Chinsung, Mr Emmanuel Decaux, Mr Vladimir Kartashkin, Mr Miguel Alfonso Martínez and Ms Halima Embarek Warzazi. One observer has calculated that the seven Advisory Committee experts who were on the Sub-Commission have a total of 100 years of service between them as members or alternates. See Brett, *Digging Foundations or Trenches? UN Human Rights Council: Year 2* (Geneva: Quaker United Nations Office, 2008) at 8.

### *B. First Session of the Advisory Committee*

The first session of the Advisory Committee was held from 4 to 15 August 2008 in Geneva. The Advisory Committee settled procedural matters such as the election of officers relatively expeditiously and began some substantive discussions on human rights education and training, the right to food, human rights of women and missing persons.<sup>83</sup>

The openness shown by this new body to the participation of NGOs is remarkable, and it is regrettable that so few NGOs were present at the first session. The conditions for participation in the discussions of the Advisory Committee are favourable for NGOs. For instance, NGOs can make oral statements of up to 15 minutes, submit written information and attend weekly meetings with the bureau. They can also organise parallel events on issues being dealt with by the Advisory Committee.

Given that the members of the Advisory Committee are not necessarily experts on the issues put before the body, the input of specialised NGOs is particularly valuable. In an effort to facilitate discussions on substantive matters, a new method of work was introduced at the first session, namely the preparation of background documents and brief oral introductions by the Secretariat. Despite this, the comments on most of the substantive topics remained general and, inevitably, the quality of debate in the plenary was relatively low. The experts themselves recognised the vital importance of NGOs input for advancing the work of the Advisory Committee.

The handful of NGOs that did participate in the first session of the Advisory Committee saw their interests directly reflected in the work of the experts. A case in point is Via Campesina's proposal for a convention on peasant's rights, which the Advisory Committee will explore further upon approval by the Council. The Advisory Committee also adopted a recommendation, albeit controversially, on self-determination.<sup>84</sup> Although this outcome merely indicated the Advisory Committee's interest in exploring this subject, this is significant given that self-determination was an issue that was repeatedly raised by NGOs at the session, but which the Council had not mandated the Advisory Committee to discuss.

The first session of the Advisory Committee demonstrated that there is much scope for NGO interaction with this new body. Over the next few meetings, both the agenda and the methods of work should begin to settle, thus facilitating NGO participation. However, the extent to which the Advisory Committee can contribute to the promotion and protection of human rights ultimately remains in the hands of the Member States of the Council.

83 For a full account of the discussions that took place, see ISHR, Analytical Overview of the First Session of the Advisory Committee, available at: <http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=7&Itemid=> [last accessed 1 December 2008].

84 *Ibid.*

Their handling of the first oral report of the Advisory Committee, to which we now turn, was unfortunate to say the least.

### *C. First Oral Report to the Human Rights Council*

In September 2008, the Chairperson of the Advisory Committee reported orally to the Council on its first session under Item 5 of the Council agenda, on human rights bodies and mechanisms.<sup>85</sup> While drawing attention to the progress made, he carefully stressed that the Advisory Committee had acted ‘with full respect’ of its mandate. Aside from repeating their reprimands that the Advisory Committee work in conformity with the relevant resolutions of the General Assembly and the Council, the Council also decided to defer by half a year the consideration of all recommendations made to it by the Advisory Committee. The argument advanced by States was that no recommendations should be considered until the annual report is submitted to the Council in March 2009.

The Council’s decision to only accept recommendations from the Advisory Committee once per year has exposed a contradiction inherent in its Resolution 5/1. On the one hand, the members of the Advisory Committee are encouraged to ‘communicate between sessions’. On the other hand, any additional sessions must have the prior approval of the Council. At the September session, the Advisory Committee had requested the Council to authorise some of its members to meet in January 2009 to finalise the preparatory work of the body’s drafting group on the right to food. The Council will now, absurdly, consider this decision in March 2009. This paradox can seriously hamper the work of the Advisory Committee.

On a different note, the use of this agenda item by NGOs was interesting. Several NGOs encouraged the Council to task the Advisory Committee to work on linguistic rights, an issue which has hereto been largely overlooked in the work of the Council.<sup>86</sup> It remains to be seen whether a trend will develop, whereby NGOs (and States) will use Item 5 of the Council’s agenda to draw attention to general issues of concern.

### *D. Concluding Remarks*

At its inaugural session, the Advisory Committee took its first tentative steps towards establishing itself as an independent expert body. While much

85 For a full account of this meeting, see ISHR, Daily Update, 17 September 2008, available at: [http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=88&Itemid=\[last accessed 1 December 2008\]](http://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=88&Itemid=[last accessed 1 December 2008]).

86 European Bureau for Lesser Used Languages, International Pen and Universal Esperanto Association.



introspection and improvement is still needed, it has already demonstrated some positive trends, not least its openness to the participation of NGOs. However, it must be remembered that the Advisory Committee must balance two potentially conflicting priorities, namely real substantive contribution and acceptability to the Council. The response of the Council in March 2009 to its first set of recommendations will be central to ascertaining the Advisory Committee's niche within the UN human rights system.<sup>87</sup> This, in turn, will give NGOs an early indication of the value of engaging with this new body.

87 The next session of the Advisory Committee is in January 2009. The Committee shall convene up to two sessions a year for a maximum of 10 working days: *supra* n. 6 at para. 79. The Human Rights Council will consider the first annual report of the Advisory Committee in March 2009.