

United Nations Human Rights Council

Between Institution-Building Phase and Review of Status

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I. Introduction

The replacement of the United Nations Commission on Human Rights (CHR) that had fallen from grace, by a smaller Human Rights Council (HRC) in 2006, sixty years after its creation, marks without doubt one of the most significant reforms of the United Nations Human Rights System. The question, whether the creation of the HRC is to be seen as a success or if, on the contrary, it must be regarded as a backward step has been the subject of animated discussion during the first years of its existence. Concluding its fourth year in June 2010, the HRC has not only completed its institution-building phase by taking up all of its functions and mechanisms but faces a general revision of its status and functions during its fifth year of existence as determined by its founding resolution.¹

In this context the present article aims at summarizing the development of the HRC within its first four years and the associated debate concerning the success of this reform. Furthermore it tries to identify problems and opportunities for improvement in the light of the upcoming general review. In terms of avoiding an excessive scope, the present analysis focuses on the core functions of the newly established HRC, namely the Universal Periodic Review (UPR), the Special Procedures, the Advisory Council (AC) and the Complaint Procedure, since the development of these functions is the crucial point in assessing its further development.

II. Establishment of the Human Rights Council

The, at times, heatedly debated creation of the HRC was particularly influenced by the classical conflict of developing an effective international human rights system on the one hand and the preservation of national sovereignty on the other.

¹ A/RES/60/251 of 15 March 2006, op. paras 1 and 16.

1. The Criticism on the Commission on Human Rights

Created back in 1946 by ECOSOC² the CHR was the core human rights body of the United Nations for more than sixty years. Focusing initially on standard-setting³ during the first 20 years of its existence, step by step the implementation of these standards became the second focal point of the work of the CHR. Therefore a mechanism for the investigation of human rights violations⁴ and a complaint procedure were established⁵ and from the 1980s onwards a system of monitoring mechanisms was developed under the auspices of the CHR.⁶ Furthermore, against the background of a growing international concern for human rights issues, the CHR emerged as the UN's most important political organ and discussion forum in the field of human rights.⁷

However, the CHR increasingly became the target of criticism in the post Cold War era, in which the political vacuum left by the disappearance of the traditional East-West divide had been filled with new con-

² E/RES/5 (I) of 16 February 1946.

³ In this regard one has to name the Universal Declaration of Human Rights (A/RES/217 (III) of 10 December 1948) and the human rights treaties adopted since the 1960s; for an overview of these treaties see <www2.ohchr.org/english/law/index.htm>.

⁴ The so-called 1235-Procedure, named after the resolution by which it was created, E/RES/1235 (XLII) of 6 June 1967.

⁵ In the so-called 1503 procedure, named after its founding resolution E/RES/1503 (XLVIII) of 27 May 1970, communications concerning human rights violations could be submitted by the victims themselves or by others, representing them. Thereby the procedure was not designed to prosecute the human rights violations of individuals but to bring to the CHR's attention "gross and reliably attested violations of human rights and fundamental freedoms". The complaint procedure was applicable to every state, regardless whether they had adopted resolution 1503 or ratified any of the international human rights treaties. The 1503 procedure was confidential and the CHR considered the situations brought up in closed sessions. The authors of the communications were only informed whether their complaint was adopted but not about the process.

⁶ The so-called system of special procedures. It is distinguished by country-specific and thematic mandates. See <www2.ohchr.org/english/bodies/chr/special/index.htm>.

⁷ For a comprehensive illustration of the CHR's history and evolution see P. Alston, "The Commission on Human Rights", in: P. Alston, *The United Nations and Human Rights: A Critical Appraisal*, 1992, 126 et seq.

frontations such as those between regional groups, between the North and the South or the West against “the Rest”.⁸ Gradually expanded from 18 to 53 members,⁹ the members were elected by ECOSOC, for three year terms, on the following basis: 15 from African States; 12 from Asian States; five from Eastern European States; 11 from Latin American and Caribbean States; 10 from Western European and other States. In line with its increased importance as a political forum and the constantly growing membership of the United Nations in the course of the process of decolonization, it became clear, with regard to the limited meeting time of one annual session of six weeks, that the institutional frame of a functional commission would no longer suffice. Furthermore in the context of an increasing number of condemning resolutions and an expanding agenda the CHR became more and more politicized. Most notably this was illustrated by the increasing number of so called “no-action motions”¹⁰ tabled from the mid-nineties on and a further shift of the opinion and decision making to the different political groups.¹¹

Moreover, as a result of its excessive politicization, the CHR was increasingly accused of applying double standards while reviewing the human rights records of members and non-members and therefore being unprofessional and biased.¹² This was mainly the result of the circumstance that many states with bad human rights records sought membership of the CHR to protect themselves from being reviewed

⁸ See J. Gutter, “Special Procedures and the Human Rights Council”, *Human Rights Law Review* 7 (2007), 103 et seq.

⁹ E/RES/1990/48 of 25 May 1990.

¹⁰ No-action motions are procedural motions provided by article 2 of Rule 65 of the Rules of Procedure of the functional commissions of ECOSOC. If accepted, member states can by this be prevented from discussing a resolution at all. In the CHR no-action motions were primarily used to avoid the condemnation of the human rights situation in a specific country (e.g. China, see Doc. E/CN.4/2000/SR.55, paras 83 et seq.) and led to endless discussions over procedural matters.

¹¹ For example, the Non-Aligned Movement, the League of Arab States and the Organisation of the Islamic Conference (OIC) on the one side, facing the group of the Western States on the other.

¹² See, e.g., *Commission on Human Rights Opens Sixty-First Session*, 14 March 2005, <www.unis.unvienna.org/unis/pressrels/2005/hrcn1107.html?email=yes>.

but, nevertheless, to denounce others.¹³ The election of many of those states was enabled by the so-called presenting of “clean slates”, a practice by which regional groups¹⁴ determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region.¹⁵ Triggered by the reaction of the United States to its failed candidacy to the CHR in 2001 the discussion on the need for reform of the CHR was again ignited in the following years by the election of the Libyan representative as chairperson of the CHR in 2003 and the election of Sudan to the CHR in 2004. In the same year the United States placed the topic of reforming the CHR on the agenda of ECOSOC, claiming that only “real democracies” should be awarded membership of the CHR.¹⁶

2. The Founding Resolution A/RES/60/251

The establishment of the HRC, in the first place, is due to the extraordinary dedication of Secretary-General Kofi Annan, who integrated the topic of reforming the CHR into the general UN debate on reform in the run-up to the UN World Summit of 2005. He charged the High-Level Panel on Threats, Challenges and Change with assessing this issue. In its 2004 report the Panel then criticized the shortcomings of the CHR, developed ideas for reform and proposed the creation of a HRC as a principal organ of the United Nations.¹⁷ In March 2005 Kofi An-

¹³ Only members were able to request a vote and to vote, so that membership enabled the states to challenge resolutions condemning their own human rights situation and to gain support to do so on the basis of regional and political solidarity or by exchanging votes.

¹⁴ For the members of the groups see the draft statistical report of the twelfth session of the HRC, page 3, available on the HRC extranet, <<http://portal.ohchr.org>>.

¹⁵ Definition by Amnesty International (AI), see “*UN: Governments Must Act Promptly and Effectively on Important Human Rights Commitments in 2005 World Summit Document*”, <www.amnesty.org/en/library/info/IOR41/062/2005>.

¹⁶ See on this in detail P. Alston, “Reconceiving the UN Human Rights Regime”, *Melbourne Journal of International Law* 1 (2006), 189 et seq.

¹⁷ Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004, paras 282-291. The idea of a HRC goes back to a study of W.

nan published his follow-up report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which he associated himself with the criticism of the Panel and called for a replacement of the CHR by a smaller standing HRC, to be created either as a new principal organ or alternatively as a subsidiary organ of the General Assembly.¹⁸ This discretion considering the creation of the HRC is perhaps related to the questionable feasibility of such a reform project since it would require an amendment of Article 7 para. 1 of the United Nations Charter.¹⁹ In the following month Kofi Annan then concretized his proposals in a speech before the CHR²⁰ and in an explanatory note to the president of the General Assembly.²¹ In the speech before the CHR Kofi Annan also introduced a “Universal Peer Review”. Despite fears that the replacement of the CHR by the HRC would do away with some of the biggest accomplishments within the UN human rights system, the idea of the creation of a HRC prevailed at the World Summit in 2005. The outcome document of the summit, however, dedicates only four paragraphs to the HRC, outlining a mandate for the new institution and requesting the president of the General Assembly to conduct negotiations in this regard.²² These negotiations subsequently proved to be extremely difficult, since opinions differed concerning the question of how the new Council should look and what features of the CHR should be preserved. However, on 15 March 2006 the General Assembly succeeded in adopting the founding resolution of the HRC that was supported by a great majority of the member states

Kälin, “Towards a UN Human Rights Council” of 2004, commissioned by M. Calmy-Rey. The three core elements of this concept were the creation of the HRC as a principal organ of the UN, a drastic reduction of the membership and the implementation of human rights criteria for membership in the HRC, <www.humanrights.ch/home/upload/pdf/050107_kaelin_hr_council.pdf>.

¹⁸ Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Doc. A/59/2005 of 21 March 2005, paras 181-183.

¹⁹ See Article 7 of the UN Charter.

²⁰ K. Annan, *Major Proposals to Reform UN Human Rights Machinery* of 7 April 2005, <www.un.org/News/Press/docs/2005/sgsm9808.doc.htm>.

²¹ Explanatory note of 14 April 2005, published as Annex to the report of the Secretary-General, see note 18.

²² World Summit 2005 outcome document, A/RES/60/1 of 15 September 2005, para. 160.

but failed to reach consensus.²³ The United States, followed by its closest allies, had turned its back on the reform project that it itself had instigated, since it became clear that not all of its positions were going to be accepted by the majority of the General Assembly.²⁴

a. Mandate

According to resolution A/RES/60/251 of 15 March 2006 the HRC replaces the CHR²⁵ while assuming all of its mandates, mechanisms, functions and responsibilities.²⁶ The HRC is also provided with a comprehensive mandate, according to which it “shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”²⁷ Besides that the HRC “should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.”²⁸ Furthermore it shall undertake a Universal Periodic Review (UPR), make recommendations with regard to the promotion and protection of human rights and submit an annual report to the General Assembly.²⁹

²³ A/RES/60/251 of 15 March 2006, adopted with 170 votes to 4 (United States, Israel, Marshall Islands and Palau) and three abstentions (Belarus, Venezuela and Iran).

²⁴ Even though the various positions of the United States were never brought together in one single document, they emerge clearly from two statements, Ambassador John Bolton, US Permanent Representative to the United Nations, *Explanation of Vote by Ambassador John R. Bolton, US Permanent Representative to the United Nations, on the Human Rights Council Draft Resolution, in the General Assembly* (Press Release, 15 March 2006), <http://www.usunnewyork.usmission.gov/06_051.htm>. Furthermore the statement under <http://www.usunnewyork.usmission.gov/06_002.htm>.

²⁵ A/RES/60/251, see note 23, op. para. 1.

²⁶ Ibid., op. para. 6. See in this respect also Doc. E/CN.4/2006/1 of 27 March 2006.

²⁷ A/RES/60/251, see note 23., op. para. 2.

²⁸ Ibid., op. para. 3.

²⁹ Ibid., op. para. 5 (e), (i) and (j).

b. Institutional Status

Instead of establishing a new principal organ, resolution A/RES/60/251 creates the HRC as a subsidiary organ of the General Assembly, based on Article 22 of the UN Charter.³⁰ However, as a compromise it was agreed, that the institutional status of the HRC shall be reviewed within five years, thus leaving the door open for upgrading the HRC in the future.³¹

c. Meeting Time

By extending the limited meeting time of only one annual session of six weeks in the CHR to no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, the founding resolution of the HRC seeks to solve one of the most fundamental problems of the CHR.³² Furthermore the HRC can convene special sessions at the request of a member of the Council with the support of one third of the membership of the Council.³³

d. Membership

Reducing the overall membership from 53 seats to 47, to make the HRC more maneuverable, the resolution tries to establish a compromise in respect of one of the most controversial questions in the course of the reform process.³⁴ The resolution merely states that “when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.”³⁵ From now on member states are elected “directly and individually by

³⁰ Ibid., op. para. 1.

³¹ Ibid.

³² Ibid., para. 10.

³³ Ibid. This was already possible in the CHR at the request of the majority of the members according to resolution E/RES/1990/48 of 25 May 1990, op. para. 3, but it was used very rarely and the CHR only held five special sessions between 1992 and 2000.

³⁴ A/RES/60/251, see note 23, op. para. 7. A more drastic reduction of the membership did not find majority support in the General Assembly, see Alston, see note 16, 199.

³⁵ A/RES/60/251, see note 23, op. para. 8.

secret ballot by the majority of the members of the General Assembly” for a three year term, so that every candidate has to win over 97 of the currently 192 members of the General Assembly.³⁶ The election system thereby aims at regularly attracting a larger number of candidates than seats to be filled at the HRC to avoid the presenting of “clean slates”.³⁷ Besides, the members of the Council shall not be eligible for immediate re-election after two consecutive terms, thereby excluding permanent membership,³⁸ and furthermore the Resolution provides for a suspension of membership rights by a two-thirds majority in the General Assembly, if a member of the HRC commits gross and systematic violations of human rights.³⁹

Besides the new approach in the selection of members another development in the field of membership must be considered. The geographic distribution of seats reveals a reduction of the influence of the Western States and an increase of the influence of the Asian States.⁴⁰ Therefore, the states of the southern hemisphere now hold a two-third majority in the HRC.

e. Universal Periodic Review

The most important element of the establishment of the new HRC is the implementation of the so-called Universal Periodic Review (UPR). The founding resolution instructs the HRC to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the coun-

³⁶ Ibid., op. para. 7. Every year one third of the seats will become available due to ending terms and will be filled with new members.

³⁷ See note 15.

³⁸ A/RES/60/251, see note 23, op. para. 7.

³⁹ Ibid., op. para. 8.

⁴⁰ Group of African States CHR 15 (28 per cent), HRC 13 (28 per cent); Group of Asian States CHR 12 (23 per cent), HRC 13 (28 per cent); Group of Latin American and Caribbean States CHR 11 (21 per cent), HRC 8 (17 per cent); Eastern European States CHR 5 (9 per cent), HRC 6 (13 per cent); Group of Western European and other States CHR 10 (19 per cent), HRC 7 (15 per cent), A/RES/60/251, see note 23, op. para. 7.

try concerned and with consideration given to its capacity-building needs.”⁴¹ The mechanism, which was ultimately named “periodic” instead of “peer” review, is however based on the idea that member states review themselves instead of being examined by independent experts. Therefore the UPR differs fundamentally from the review by treaty bodies, whose work the UPR shall complement and not duplicate,⁴² forming an unique mechanism within the UN Human Rights System.⁴³ The mechanism based on ECOSOC resolution 1235 (XLII) bore some resemblance indeed, but was rather selective compared to the UPR.⁴⁴ Only states that were accused of violating human rights by UN Rapporteurs were addressed by the condemning resolution of the CHR and the General Assembly. This was perceived by many developing countries as being unfair, since the exigencies of many of those states were not adequately taken into consideration. Against this backdrop, the establishment of the UPR aims at solving the often criticized politicization of the CHR by simply reviewing all UN member states within four years, thereby avoiding the politically sensitive question of whose human rights record is being reviewed. Furthermore this means that all HRC members are reviewed, so that membership can no longer be used as a shield against scrutiny.⁴⁵

⁴¹ A/RES/60/251, see note 23, op. para. 5 (e).

⁴² Ibid.

⁴³ However, the idea of monitoring the implementation of human rights standards by regularly examining state reports had already been realized on the initiative of the CHR by ECOSOC resolution E/RES/624 B (XXII) of 1 August 1956. According to this resolution states were obliged to submit reports on progress made in implementing the standards of the Universal Declaration of Human Rights and the right to self-determination. See further Doc. E/2844-E/CN.4/731 and E/RES/1074 C (XXXIX) of 28 July 1965 on the reform of the procedure. With the entry into force of the international human rights treaties that provided for reporting procedures, the reporting procedure of 1956 became more and more superfluous and was eventually abolished by A/RES/35/209 of 17 December 1980.

⁴⁴ See note 4. See further on this C. Tomuschat, *Human Rights, Between Idealism and Realism*, 2008, 140 et seq.

⁴⁵ See on this note 13 and A/RES/60/251, see note 23, op. para. 9.

f. Special Procedures

The system of Special Procedures,⁴⁶ which in many eyes constitutes one of the most important achievements of the abolished CHR,⁴⁷ was already under heavy pressure in the years prior to the establishment of the HRC.⁴⁸ In this context, besides several reform efforts,⁴⁹ an increasing number of attempts to restrict or even completely abolish the entire system of special procedures were to be observed.⁵⁰ In light of the fundamental opposition to country-specific mandates by a number of member states⁵¹ the thematic and country-specific mandates became the main target of criticism. Unsurprisingly during discussions on the establishment of the HRC a complete abolishment of the system of special procedures was called for to enable the new organ to start anew.⁵² In the end supporters and opponents of the special procedures reached a compromise which preserved the entire system of special procedures but provided for a review and, if necessary, a rationalization of all mandates and functions within one year after the holding of the first session of the HRC.⁵³ Thus, the question of which mandates should be extended or abolished was somewhat adjourned.

⁴⁶ See on this note 6.

⁴⁷ See on the achievements of the Special Procedures, Gutter, see note 8.

⁴⁸ See on this M. Lempinen, *Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights*, Institute for Human Rights, Åbo Akademi University, 2001, 248 et seq.

⁴⁹ See, e.g., the Office of the High Commissioner for Human Rights (OHCHR) *Seminar on Enhancing and Strengthening Special Procedures* (12 to 13 October 2005) and the report by the Secretary-General *Strengthening of the United Nations*, Doc. A/57/387 of 9 September 2002.

⁵⁰ See on this M. Abraham, *A new Chapter for Human Rights*, International Service for Human Rights/Friedrich Ebert Stiftung, 2006, 40.

⁵¹ Especially by the *Like Minded Group*. See further on this Gutter, see note 8, 95.

⁵² See N. Schrijver, "The UN Human Rights Council: A New 'Society of the Committed' or Just Old Wine in New Bottles?", *Leiden Journal of International Law* 20 (2007), 809 et seq. (817).

⁵³ A/RES/60/251, see note 23, op. para. 6.

g. Expert Advice and Complaint Procedure

In para. 6 of the Resolution it is stated that the HRC, just like the CHR, shall maintain expert advice and a complaint procedure, without further describing it.⁵⁴

III. The First Year of the Human Rights Council

Following the first elections in May 2006, the HRC assembled for its inaugural session on 19 June 2006 in Geneva, electing Ambassador Luis Alfonso de Alba of Mexico as its first President.⁵⁵ Additionally, it was decided that the first “year” of the council would end on 18 June 2007.⁵⁶ As was to be expected during its first year, the HRC engaged in institution-building issues that were left open by its founding resolution. However, this proved to be an extremely difficult venture and it was not until the very last minutes of the first year of the HRC that it adopted a package on institution-building.⁵⁷ Despite initial fears, the HRC, nevertheless, managed to tackle a number of important human rights situations⁵⁸ and standard-setting tasks⁵⁹ during its five regular and four special sessions of the first year. Similarly to its predecessor,

⁵⁴ Ibid.

⁵⁵ Elected by acclamation, see report of the first HRC session, part III, para. 8, published in Doc. A/61/53.

⁵⁶ It was discussed whether the “year” should end 365 days after the beginning of the first session (i.e. 19 June 2006 to 18 June 2007) or at the end of June or even the end of 2006. Ultimately the UN Legal Counsel ruled, that 18 June was the final day.

⁵⁷ Resolutions A/HRC/RES/5/1 – *United Nations Human Rights Council: Institution-Building* and A/HRC/5/2 – *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council* of 18 June 2007 are referred to as the institution-building package.

⁵⁸ Amongst others concerning Belarus, Burundi, Cambodia, Cuba, Congo, Haiti, Democratic People’s Republic of Korea, Kirgizstan, Liberia, Burma, Nepal, Somalia, Sri Lanka and Zimbabwe.

⁵⁹ It adopted the International Convention for the Protection of All Persons from Enforced Disappearance, Doc. A/HRC/1/1 of 29 June 2006; Declaration on the Rights of Indigenous Peoples, Doc. A/HRC/1/2 of 29 June 2006. See in respect of the latter one the contribution of K. Göcke in this Volume.

the HRC thereby paid special attention to the situation in the occupied Palestinian territory,⁶⁰ which provoked stark criticism among a number of western commentators.⁶¹

1. Election of Members

The General Assembly elected the first 47 members of the new HRC⁶² on 9 May 2006 out of 74 candidates.⁶³ While succeeding in keeping away some candidates with bad human rights records like Sudan, the Democratic People's Republic of Korea (North Korea), Belarus, Zimbabwe, Uzbekistan, Syria and Nepal,⁶⁴ next to others, still managed to collect a sufficient number of votes to gain a seat in the HRC.⁶⁵ All permanent members of the UN Security Council were elected with the exception of the United States which, in line with its rejection of the founding resolution of the HRC, had decided not to run for election. However, in the end the new HRC and its predecessor looked very

⁶⁰ First special session on the Human Rights Situation in the Occupied Palestinian Territory, second special session on the Grave Situation of Human Rights in Lebanon caused by Israeli military operations and third special session on the Israeli Military Incursions in Occupied Palestinian Territory.

⁶¹ See R. Brett, *Neither Mountain nor Molehill*, Quaker United Nations Office, 2007, 4.

⁶² The initial members were: Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, Cameroon, Canada, China, Cuba, Czech Republic, Djibouti, Ecuador, Finland, France, Gabon, Germany, Ghana, Guatemala, India, Indonesia, Japan, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, South Korea, Romania, Russian Federation (Russia), Saudi Arabia, Senegal, South Africa, Sri Lanka, Switzerland, Tunisia, Ukraine, United Kingdom, Uruguay and Zambia.

⁶³ See for a list of candidates and their voluntary pledges <<http://www.un.org/ga/60/elect/hrc>>.

⁶⁴ These former CHR members decided not to present a candidacy for the HRC, see P. Lauren, "To Preserve and Build on its Achievements and to Redress its Shortcomings", *HRQ* 29 (2007), 307 et seq. (337).

⁶⁵ China, Cuba, Pakistan, Russian Federation and Saudi Arabia gained a seat in the HRC despite being considered as "unsuitable" for membership in the HRC by Human Rights Watch, see the comprehensive Human Rights Watch assessment of all 74 initial candidates <www.hrw.org/legacy/un/elections/index.htm>.

much alike in terms of membership, so that it was even more important to successfully establish new mechanisms and functions to solve the problems of the CHR.

2. The Institution-Building Package

The discussions on the institution-building process were to be carried out by three open-ended, inter-sessional working groups⁶⁶ – one on review of mechanisms and mandates,⁶⁷ one on the development of the modalities of the UPR⁶⁸ and one on the formulation of recommendations on the HRC's future agenda, program of work, methods of work and rules of procedure.⁶⁹ The working group on review of mechanisms and mandates was charged with reviewing the special procedures, the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission)⁷⁰ and the so-called 1503 procedure. The extremely difficult and contentious institution-building process culminated in the dramatic developments that eventually led to the adoption of an institution-building package⁷¹ in the last session of the first year of the HRC on 18 June 2007.⁷² It determines the agenda, program of work,⁷³ working methods,⁷⁴ rules of procedure,⁷⁵ complaint proce-

⁶⁶ Members of the HRC, other states and observers, NGOs and national human rights institutions (NHRIs) with the requisite accreditation could participate in the working groups' sessions.

⁶⁷ Doc. A/HRC/DEC/1/104. The working group was authorized to meet for twenty days.

⁶⁸ Doc. A/HRC/DEC/1/103. The working group was authorized to meet for ten days.

⁶⁹ Doc. A/HRC/3/4. The working group was authorized to meet for ten days.

⁷⁰ Sub-Commission on the Promotion and Protection of Human Rights, formerly named "Sub-Commission on Prevention of Discrimination and Protection of Minorities" (renamed in 1999), <<http://www2.ohchr.org/english/bodies/subcom/index.htm>>. See further Abraham, see note 50, 52 et seq.

⁷¹ See note 57.

⁷² For a comprehensive description of the institution-building process see M. Abraham, "*Building the new Human Rights Council*", Dialogue on Globalization 33 (2007), 9 et seq.

⁷³ Doc. A/HRC/RES/5/1 of 18 June 2007, Annex V.

dure⁷⁶ and establishes a comprehensive framework for the UPR,⁷⁷ the special procedures⁷⁸ and an Advisory Committee (AC).⁷⁹

a. Universal Periodic Review

According to resolution A/HRC/RES/5/1 the review is conducted by one working group, chaired by the President of the Council and composed of the 47 member states of the HRC.⁸⁰ A group of three Rapporteurs, selected by the drawing of lots among members of the HRC from different regional groups (“troika”), is formed to facilitate each review, including the preparation of the report of the working group.⁸¹ A country concerned may request that one of the Rapporteurs be from its own regional group and may also request the substitution of a Rapporteur on only one occasion.⁸²

The review is based on information prepared by the state concerned, which can take the form of a national report, on the basis of general guidelines, and any other information considered relevant by the state concerned. Additionally a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the state concerned, and other relevant official UN documents are taken into account.⁸³ States are “encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders.”⁸⁴ The centerpiece of the mechanism is an interactive dialogue between the state under review and the UPR working group in which observer states can participate.⁸⁵

⁷⁴ Ibid., paras 100-128.

⁷⁵ Ibid., VII.

⁷⁶ Ibid., paras 85-109.

⁷⁷ Ibid., paras 1-38.

⁷⁸ Ibid., paras 39-64.

⁷⁹ Ibid., paras 65-84.

⁸⁰ Ibid., para. 18 (a).

⁸¹ Ibid., para. 18 (d).

⁸² Ibid., para. 19. It is not announced which member was rejected. Further, the selected members can refuse to participate in the troika.

⁸³ Ibid., para. 15.

⁸⁴ Ibid., para. 15 (a).

⁸⁵ Ibid., para. 18 (b).

Other stakeholders, such as NGOs, are only entitled to attend but not to participate at this stage of the UPR.⁸⁶ Within the interactive dialogue three hours are designated to every state under review.⁸⁷ Further, it is determined that the first cycle of the UPR shall be completed within four years, therefore reviewing 48 states per year.⁸⁸ However, here it is pointed out that the UPR is an evolving process and that its modalities and periodicity may be reviewed after its first year.⁸⁹

The outcome of the UPR will take the form of a report of the working group, which summarizes the proceedings of the review process, conclusions and recommendations, and the voluntary commitments of the state concerned.⁹⁰ It then will be presented to the plenary of the HRC where, before the adoption, the state under review is given the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue.⁹¹ The consideration of the reports of the working group is the only phase during the entire process of the UPR, where other stakeholders like NGOs are allowed to take the floor, by making general comments.⁹² This indicates the very limited role granted to them in the UPR. Concerning the implementation of the results of the UPR, the resolution states that the outcome "... should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders."⁹³ The wording of this paragraph demonstrates clearly the cooperative and rather "soft" approach of the UPR, even though the HRC can address cases of persistent non-cooperation with the mechanism after exhausting all efforts to encourage a state to cooperate with the UPR.⁹⁴

b. Special Procedures

"Special procedures" is the general name given to the mechanisms established by the CHR and assumed by the HRC to address either spe-

⁸⁶ Ibid., para. 18 (c).

⁸⁷ Ibid., para. 22.

⁸⁸ Ibid., para. 14.

⁸⁹ Ibid., para. 14, footnote a.

⁹⁰ Ibid., para. 26.

⁹¹ Ibid., para. 29.

⁹² Ibid., para. 31.

⁹³ Ibid., para. 33.

⁹⁴ Ibid., para. 38.

cific country situations or thematic issues in all parts of the world. According to resolution A/RES/60/251 the HRC shall “assume, review and, where necessary, improve and rationalize all mandates of the CHR ‘in order to maintain a system of special procedures, ...’”.⁹⁵ Unsurprisingly the special procedures, which had already been under severe strain before the creation of the HRC,⁹⁶ were heatedly debated also during the institution-building period. The country-specific mandates were particularly contentious and at one point the fight became one to preserve the existing strength of the special procedures and the institution of country specific mandates, rather than to improve the system.⁹⁷ In this context, the most important achievement of resolution A/HRC/RES/5/1 is that it upholds the system of special procedures as a whole. However, by establishing a new selection procedure⁹⁸ and code of conduct for mandate-holders⁹⁹ as well as by limiting thematic mandates to three years and country-specific mandates to one year only,¹⁰⁰ the resolution contains a number of reforms that bear the risk of weakening the system as a whole. Besides that, the trend towards terminating country-specific mandates that was to be observed in the CHR between 1998 and 2006 (decrease from 26 to 13 mandates), continued in the HRC by the non-renewal of the mandates regarding Cuba and Belarus.¹⁰¹

⁹⁵ A/RES/60/251, see note 23, op. para. 6.

⁹⁶ See Lempinen, note 48.

⁹⁷ See Abraham, note 72, 25.

⁹⁸ Doc. A/HRC/RES/5/1, see note 73, paras 39 – 53.

⁹⁹ Doc. A/HRC/5/2 of 18 June 2007.

¹⁰⁰ A/HRC/RES/5/1, see note 73, para. 60. Apparently the mandate concerning the occupied Palestinian territories (Doc. E/CN.4/1993/2 A of 19 February 1993) is exempted from this rule since it is supposed to operate “until the end of the occupation”.

¹⁰¹ The mandates of the Personal Representative of the High Commissioner for Human Rights on the Situation of Human Rights in Cuba (Doc. E/CN.4/RES/2002/18 of 19 April 2002) and of the Special Rapporteur on Belarus (Doc. E/CN.4/RES/2004/14 of 15 April 2004) were abolished with no further HRC action, see special procedures information bulletin, 5th issue, April – June 2007, page 10.

The new selection procedure is based on a public list of eligible candidates,¹⁰² prepared, maintained and periodically updated by the OHCHR.¹⁰³ Governments, regional groups operating within the United Nations human rights system, international organizations or their offices, NGOs and other human rights bodies and individuals are entitled to nominate candidates as special procedures mandate holders.¹⁰⁴ The selection from the list will be carried out by a consultative group, consisting of one member of each regional group, serving in his/her personal capacity.¹⁰⁵ The consultative group proposes to the HRC President, at least one month before the selection of mandate holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the required criteria.¹⁰⁶ On the basis of these recommendations and following broad consultations, the President of the Council will identify an appropriate candidate for each vacancy and will present to the member states and observers a list of candidates and the appointment will be completed upon the subsequent approval of the Council.¹⁰⁷ Thereby member states are now more integrated into the selection process, while the responsibility of the President is maintained.¹⁰⁸ The code of conduct is based on a draft proposal tabled by the African regional group and aims at guaranteeing that mandate holders remain impartial and independent. The code of conduct bears the risk of being used to limit the independence and constrain the work of, in particular, mandate holders of country-specific mandates. The review and rationalization of mandates, as determined by resolution A/RES/60/251 was not carried out during the first year of the HRC.

¹⁰² Doc. A/HRC/RES/5/1, see note 73, para. 39 lists as general criteria for candidates: expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity.

¹⁰³ *Ibid.*, para. 43.

¹⁰⁴ *Ibid.*, para. 42.

¹⁰⁵ *Ibid.*, para. 49.

¹⁰⁶ *Ibid.*, para. 47.

¹⁰⁷ *Ibid.*, paras 52 and 53.

¹⁰⁸ At the CHR the Chairperson appointed mandate-holders after consultations with his bureau. This was criticized by a number of member states of the CHR which then refused to be reviewed by mandate-holders with the argument that they had no influence on their selection.

c. Advisory Committee

The resolution creates a HRC Advisory Committee (AC), which replaces the former Sub-Commission¹⁰⁹ of the CHR, thereby meeting the requirements of A/RES/60/251, which provides for a consultative organ.¹¹⁰ The AC consists of 18 experts serving in their personal capacity. Members are nominated exclusively by HRC member states¹¹¹ which “should consult their national human rights institutions and civil society organizations and, in this regard, include the names of those supporting their candidates.”¹¹² In contrast to special procedures mandate holders, the members of the AC are elected in secret ballot, with a geographical distribution of seats among the regional groups.¹¹³ The distribution of seats in the AC, just like in the HRC, now displays the overall UN membership which constitutes a decreased influence of Western States compared to the former Sub-Commission.¹¹⁴ According to resolution A/HRC/RES/5/1 the AC is supposed to function as a “think tank” for the HRC¹¹⁵ and is to provide expertise only to the Council “in the manner and form requested by the Council.”¹¹⁶ The AC should be implementation-oriented and the scope of its advice should be limited to thematic issues, namely promotion and protection of all human rights. Although being entitled to make “further research proposals within the scope of the work set out by the Council” the AC has no power to adopt resolutions or decisions, so that it is left with little space

¹⁰⁹ A/RES/60/251, see note 23, op. para. 6. Here it is only determined that the HRC shall be provided with expert advice, thereby leaving it open in what way this was to be realized.

¹¹⁰ *Ibid.*, op. para. 6.

¹¹¹ Doc. A/HRC/RES/5/1, see note 73, para. 70.

¹¹² *Ibid.*, para. 66.

¹¹³ *Ibid.*, paras 70, 73.

¹¹⁴ Distribution of seats of the HRC Advisory Committee (AC) and the CHR Sub-Commission: African States: AC: 5 (27.7 per cent)/ Sub-Commission: 7 (26.9 per cent); Asian States: AC: 5 (27.7 per cent)/ Sub-Commission: 5 (26.9 per cent); Eastern European States: AC: 2 (11.1 per cent)/ Sub-Commission: 3 (11.54 per cent); Latin American and Caribbean States: AC: 3 (16.6 per cent)/ Sub-Commission: 5 (26.9 per cent); Western European and Other States: AC: 3 (16.6 per cent)/ Sub-Commission: 6 (23.08 per cent).

¹¹⁵ Doc. A/HRC/RES/5/1, see note 73, para. 65.

¹¹⁶ *Ibid.*, para. 75.

to be proactive.¹¹⁷ This is a trend that could already be observed throughout the last years of the CHR.¹¹⁸ The AC shall convene up to two sessions for a maximum of ten working days per year.¹¹⁹ Additional sessions may be scheduled on an *ad hoc* basis with prior approval of the Council.¹²⁰ Member states and observers, including states that are not members of the Council, specialized agencies, other intergovernmental organizations and national human rights institutions (NHRIs),¹²¹ as well as NGOs shall be entitled to participate in the work of the Advisory Committee based on certain arrangements.¹²²

d. Complaint Procedure

A complaint procedure is being established according to para. 85 to address consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances. Given the little interest member states showed, it was decided, that the HRC should continue the CHR's 1503 procedure,¹²³ with some small changes. The "new" 1503 procedure has the same scope as it had before.¹²⁴ The outcome of the complaint procedure is set out in para. 109.

IV. The Second Year of the Human Rights Council

At the election of member states for the second year of the HRC 14 new members were elected out of only 16 candidates. Therefore only in the Eastern European and Western European regional groups were

¹¹⁷ Ibid., para. 77.

¹¹⁸ See Abraham, see note 72, 17 et seq.

¹¹⁹ Doc. A/HRC/RES/5/1, see note 73, para. 79.

¹²⁰ Ibid., paras 79 and 81.

¹²¹ See on national human rights institutions the so-called Paris Principles, A/RES/48/134 of 4 March 1993.

¹²² Doc. A/HRC/RES/5/1, see note 73, op. para. 83.

¹²³ See note 5.

¹²⁴ Doc. A/HRC/RES/5/1, see note 73, paras 85 et seq. Interestingly the wording was changed from "any country" to "any part" of the world. Apparently this was changed to ensure that the procedure was also applicable to states' action e.g. in occupied territories.

more candidates running for membership than seats were available.¹²⁵ Moreover Bosnia and Herzegovina submitted its candidacy only one week before the elections due to great pressure by human rights organizations and states that tried to prevent Belarus from winning a seat in the HRC because of its bad human rights record.¹²⁶ However, Bosnia and Herzegovina failed to gain the required 97 votes in the General Assembly so that it needed a second round to finally beat Belarus. During the second year (June 2007 to June 2008) the HRC held its sixth, seventh and eighth regular and its fifth, sixth and seventh special sessions under the newly elected president Doru Costea of Romania.¹²⁷ The HRC was initially occupied with institution-building tasks that were left open¹²⁸ and established further sub-organs, which, in particular, replaced the Sub-Commission on Human Rights working-groups.¹²⁹ Besides that, progress was made in the field of standard-setting¹³⁰ and a variety of human rights situations were discussed.¹³¹

1. Special Procedures

In view of the revision of all mandates and the newly established selection procedure, the system of special procedures was of particular interest during the second year of the HRC. Once again the country-specific

¹²⁵ See HRC elections 2007 <www.un.org/ga/61/elect/hrc>.

¹²⁶ See on this *UN Human Rights Council Elections Small Victory for Global Human Rights*, press release, <<http://www.freedomhouse.org/template.cfm?page=70&release=507>>.

¹²⁷ Special Sessions on “the human rights situation in Myanmar”, on “human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory” and “on the negative impact of the world food crisis on the realization of the right to food”.

¹²⁸ See on this Doc. A/HRC/DEC/6/102 of 27 September 2007.

¹²⁹ It was established an Expert Mechanism on the Rights of Indigenous Peoples (Doc. A/HRC/6/36 of 14 December 2007) and a Forum on Minority Issues (Doc. A/HRC/6/15 of 28 September 2007). Furthermore the Social Forum of the CHR was continued (Doc. A/HRC/6/13 of 28 September 2007).

¹³⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Doc. A/HRC/8/2 of 18 June 2008.

¹³¹ In particular the situation in Darfur, Myanmar, North Korea, Congo, the occupied Palestinian territories, Sri Lanka and Iran.

mandates were extremely contentious, even so they were all preserved. Drawing up a completely new selection mechanism by which a large number of vacancies had to be filled, the establishment was a challenge for everyone involved but member states eventually succeeded in setting up the procedure and a public list of candidates.¹³² All thematic mandates except the one of the Working Group on People of African Descent and the Special Rapporteur on Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes were reviewed during the second year. While most mandates were extended without discussion, some of them and some of the mandate-holders, such as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹³³ the Special Rapporteur on the Freedom of Religion and Belief¹³⁴ and the one on the Promotion and Protection of the Right to Freedom of Opinion and Expression¹³⁵ proved to be very contentious. However, all these mandates were extended in the end,¹³⁶ although with regard to the mandates on torture and on extrajudicial executions a rather awkward presidential statement was necessary to settle the dispute.¹³⁷

The restriction of thematic mandates to three years as stipulated by the institution-building package, led to an upgrading of those mandates

¹³² The public list is available at the HRC extranet, <<http://portal.ohchr.org>>.

¹³³ Alston (Australia) and Nowak (Austria) both criticized especially by Cuba, Egypt (on behalf of the African regional group), India, Russian Federation, Singapore and Sri Lanka.

¹³⁴ Mandate and mandate-holder Asma Jahangir (Pakistan) especially criticized by Pakistan (on behalf of the Organization of Islamic States).

¹³⁵ Ambeyi Ligabo (Kenya), criticized especially by Pakistan (on behalf of the Organization of Islamic States), Egypt (on behalf of the African regional group) and the occupied Palestinian territories (on behalf of the League of Arab States). Discussions related to the conflict over the Mohammed cartoons.

¹³⁶ Mandate on torture, Doc. A/HRC/8/8 of 18 June 2008; mandate on extrajudicial executions, Doc. A/HRC/8/3 of 18 June 2008; mandate on freedom of religion and belief, Doc. A/HRC/7/36 of 28 March 2008; mandate on freedom of opinion and expression, Doc. A/HRC/7/36 of 28 March 2008.

¹³⁷ See *Terms in office of Special Procedure mandate-holders*, Doc. A/HRC/PRST/8/2 of 18 June 2008.

which were initially established for a term of two years only.¹³⁸ However, at the same time a certain downgrading of mandates appeared in the replacement of Special Representatives of the Secretary-General by Special Rapporteurs of the HRC.¹³⁹ Furthermore, all mandates now contain a standard reference to the code of conduct for mandate holders¹⁴⁰ and two new thematic mandates were established – the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences¹⁴¹ and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation.¹⁴²

The country-specific mandates, as could be expected, were far more contentious than the thematic mandates. Thereby, the extension of the mandates concerning Sudan and the Congo were particularly controversial. Due to the hostile attitude of the Sudanese government and the criticism of the Expert Group on the Darfur-Crisis,¹⁴³ a compromise had to be established. The mandate of the Expert Group was terminated, while the mandate of the Special Rapporteur on the Situation of Human Rights in the Sudan was extended, thereby assigning the task of implementing the recommendations of the Expert Group to him.¹⁴⁴ The mandate of the independent expert for the Congo, in contrast, was not renewed. Although the duties of this expert were transferred to a num-

¹³⁸ This was the case for the Independent Expert on Minority Issues (Doc. A/HRC/7/6 of 27 March 2008) and the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (Doc. A/HRC/7/8 of 18 June 2008).

¹³⁹ See, e.g., the mandate of the Special Representative of the Secretary-General for Human Rights Defenders (Doc. A/HRC/7/8 of 27 March 2008). Downgrading evolves from the fact, that mandate-holders are no longer appointed by the Secretary-General.

¹⁴⁰ See note 99.

¹⁴¹ Doc. A/HRC/6/14 of 28 September 2007. It replaces the working group of the Sub-Commission on this matter.

¹⁴² Doc. A/HRC/7/22 of 28 March 2008. This forms the first special procedure mandate established by the HRC that had no predecessor in the CHR.

¹⁴³ Doc. A/HRC/S-4/101 of 13 December 2006. Members of the expert group were not able to obtain visas for the Sudan. See also on this Doc. A/HRC/4/8 of 30 March 2007.

¹⁴⁴ Doc. A/HRC/6/34 of 14 December 2007. See also on this Doc. A/HRC/7/16 of 27 March 2008.

ber of thematic mandates which were instructed to report regularly to the HRC, this did not constitute a sufficient substitution for an independent expert.¹⁴⁵ Furthermore, the renewal of the mandate on Burundi was of interest, since it was extended due to its approval by Burundi, despite the opposition of the African regional group.¹⁴⁶ Furthermore, the mandates of the independent experts on Haiti,¹⁴⁷ Liberia¹⁴⁸ and Somalia,¹⁴⁹ as well as the ones of the Special Rapporteurs on North Korea¹⁵⁰ and Myanmar¹⁵¹ were renewed. The mandates in respect of Cambodia and on the Palestinian territories occupied since 1967 were not reviewed during the second year.

2. Advisory Committee

The members of the new Advisory Committee were elected on 26 March 2008 at the seventh regular session of the HRC. Unlike the selection procedure for special procedure mandate holders the procedure for Advisory Committee members was not renewed. As a result there were “clean slates” presented by the African, Asian, Latin-American and Caribbean Group, so that here no real selection took place.¹⁵² The first session was not to take place before the third year of the HRC.

¹⁴⁵ R. Brett, “Digging Foundations or Trenches?”, *Human Rights & Refugees Publications*, Quaker United Nations Office, 2008, 5.

¹⁴⁶ Doc. A/HRC/6/5 of 28 September 2007. Initially Egypt had announced, supposedly on behalf of the entire African group, to refuse all county-specific mandates.

¹⁴⁷ Doc. A/HRC/PRST/6/1 of 28 September 2007.

¹⁴⁸ Doc. A/HRC/6/31 of 14 December 2007.

¹⁴⁹ Doc. A/HRC/7/35 of 28 March 2008.

¹⁵⁰ Doc. A/HRC/7/15 of 27 March 2008, adopted with 22 votes in favor, 7 against and 18 abstaining.

¹⁵¹ Doc. A/HRC/7/32 of 28 March 2008.

¹⁵² Seven of the elected candidates had already been members of the Sub-Commission and three of them were from a permanent member of the Security Council (Russian Federation, France and China).

3. Universal Periodic Review

Constituting the most important new mechanism of the HRC and functioning as an indicator for its success or failure,¹⁵³ it was of utmost importance to get the Universal Periodic Review off the ground during the second year. In April 2008 the HRC succeeded in finally holding the inaugural session of the Universal Periodic Review.¹⁵⁴ However, the first session was preceded by protracted and difficult discussions concerning the institutional framework of the Review, where some states proposed not to broadcast sessions live via the internet and on the contrary to make the state report the main source of information.¹⁵⁵ This would have marginalized the information provided by NGOs but was not accepted in the end. As was to be expected for a new mechanism, some procedures emerged during the first session.¹⁵⁶ The selection of troika members, which took place at an organizational meeting on 28 March 2008, proved to be quite difficult, since troika members are selected by the drawing of lots, considering the geographic distribution prescribed.¹⁵⁷ About 40 per cent of the states under review demanded the drawing of one troika member from their own regional group¹⁵⁸

¹⁵³ Abraham, see note 72, 35.

¹⁵⁴ Universal Periodic Review 1: 7 to 18 April 2008/ Universal Periodic Review 2: 5 to 19 May 2008.

¹⁵⁵ Algeria, speaking on behalf of the African regional group, demanded a state report, rather than just “information of the state under review”. See on this Brett, see note 145, 11.

¹⁵⁶ See the presidential statement Doc. A/HRC/8/PRST/1 of 9 April 2008, published in the report of the eighth session of the HRC, Doc. A/HRC/8/52 of 1 September 2008.

¹⁵⁷ Doc. A/HRC/7/78, Annex VII of 14 July 2008. The exact procedure is described in the opening statement of the President of this session, Doc. A/HRC/OM/L.1 of 28 February 2008.

¹⁵⁸ Universal Periodic Review 1: 4 African States of 4; 1 Asian State of 4; 1 Latin-American and Caribbean State of 3; none of the other two regional groups. Universal Periodic Review 2: 4 African States of 5, 2 Asian States of 5; none of the other three regional groups. The Western European and other States group declared in advance, that they would not use this right, nor would they reject any Rapporteur drawn or decline any assignment as a troika member.

and one selected Rapporteur refused to participate.¹⁵⁹ At this meeting the role of the troikas in discharging their duties, namely the compilation of the primarily submitted questions and the preparation of the final report, was further defined, leaving them with no space for own initiatives.¹⁶⁰ Troika members are neither authorized to incorporate their own views, nor to participate in any way in the assessment of the human rights situation of the state under review.¹⁶¹ However, this role of the troikas might be a reason for the relatively harmonic selection procedure. In the course of the second year of the HRC 32 states were reviewed under the Universal Periodic Review. The interactive dialogues of the first session showed that most states presented their questions and comments orally instead of submitting them in writing, as previously.¹⁶² This could be linked to the fact that it was often unclear whether states under review would address the written questions at all or just ignore them. Contributions in the interactive dialogue varied from overly positive statements, which left the impression, that some states under review had lined up their allies to exclude negative comments.¹⁶³ Besides that, many states confined themselves to always issuing the same recommendations.¹⁶⁴ Most of these contributions form, without doubt, very important issues, that concern, very conveniently, almost every state, but they take away the very limited time from more specific human rights issues. A positive development, in contrast, is that

¹⁵⁹ Pakistan refused participation in the Universal Periodic Review of India. (India, for its part, had not rejected the troika member from Pakistan). No troika member drawn was rejected.

¹⁶⁰ See further on this the presidential statement, see note 156.

¹⁶¹ See opening statement of the President, see note 157.

¹⁶² With the exception of the Russian Federation in the Universal Periodic Review of the Ukraine only a few Western States used this opportunity. See <<http://portal.ohchr.org/>>.

¹⁶³ Sri Lanka, e.g., advised the United Kingdom to abolish its monarchy, a proposal that was not made to any other monarchy. See Universal Periodic Review Report United Kingdom, Doc. A/HRC/8/25, para. 17. Algeria criticized the length of pre-charge detention in the United Kingdom, citing the British member of the Human Rights Committee in the review of Algeria on this matter (see above paras 17 and 41).

¹⁶⁴ Primarily Ratification of the new Convention on the Rights of Persons with Disabilities; establishment of independent NHRIs; standing invitations to the special procedures; discrimination against women; abolition of the death penalty.

concluding observations or individual cases of the treaty bodies are regularly taken up in the Universal Periodic Review.¹⁶⁵

Regarding the outcome of the UPR several things needed to be clarified during the first session. Concerning the final report of the Working Group¹⁶⁶ it was decided, that recommendations can only be accepted by the state under review and that those accepted shall be “identified” as such, whereas the “other” recommendations are only to be “noted”.¹⁶⁷ Thereby only recommendations that enjoy the support of the state under review are published in the second section of the report named “Conclusions and/or Recommendations”. The recommendations that were not accepted are only cited by the paragraph under which they are to be found in the first part of the report named “Summary of the Proceedings of the Review Process”, thus making it harder to find them and letting them somewhat disappear.¹⁶⁸ Moreover, it is noted which state has introduced which recommendations.¹⁶⁹ Furthermore, the first Universal Periodic Review sessions showed that recommendations are only indicated as such in the report if they are specifically called “recommendations”¹⁷⁰ and that no other state than the addressee can reject them.¹⁷¹

Overall, most recommendations were accepted, but many states followed the example of the United Kingdom and delayed their decision

¹⁶⁵ Slovenia and the United Kingdom, e.g., brought up the issue of the right to conscientious objection in the Universal Periodic Review of South Korea, Universal Periodic Review report South Korea, Doc. A/HRC/8/40, para. 64 (recommendations no. 17 and 24). See on this Human Rights Committee, Doc. CCPR/C/KOR/CO/3 of 28 November 2006, para. 17.

¹⁶⁶ See in this respect para. 91 of Doc. A/HRC/RES/5/1, see note 73.

¹⁶⁷ Presidential statement, see note 156, para. 3.

¹⁶⁸ See, e.g., the Universal Periodic Review report on Algeria, Doc. A/HRC/8/29 of 23 May 2008, paras 69 and 70.

¹⁶⁹ In particular, the states of the African regional group argued that otherwise recommendations of single states could be attributed to the working group as a whole. See on this A. Abebe, “African States and the UPR”, *Human Rights Law Review* 9 (2009), 16 et seq.

¹⁷⁰ In the Universal Periodic Review concerning Finland, the British proposal to cut the alternative military service to the length of the military service was not indicated as recommendation, Doc. A/HRC/8/24 of 23 May 2008.

¹⁷¹ Egypt, to no avail, tried to reject a recommendation concerning discrimination based on sexual orientation in the Universal Periodic Review of Ecuador, Doc. A/HRC/8/20 of 13 May 2008, para. 60.

regarding the adoption of the recommendations until the consideration of the report by the plenary of the HRC.¹⁷² It was decided that there will be 20 minutes for the state under review,¹⁷³ 20 minutes for states and observer states¹⁷⁴ and 20 minutes for other stakeholders, altogether one hour.¹⁷⁵

V. The Third Year of the Human Rights Council

In May 2008 15 new members were elected to the HRC, this time out of 19 candidates. Once again, too few candidates applied for membership, thus in two groups there were as many candidates as seats to be filled.¹⁷⁶ The HRC held its ninth, tenth and eleventh regular session and its eighth to eleventh special session in the course of its third year.¹⁷⁷ With the inaugural session of the AC in August of 2008 all HRC functions were now operating, so that the institution-building phase of the HRC was completed.

¹⁷² States can deliver their decision concerning the adoption of recommendations either during the Universal Periodic Review, between the Universal Periodic Review and the next HRC session or at the session of the HRC, see presidential statement, Doc. A/HRC/8/PRST/1, see note 156, para. 11.

¹⁷³ Within this time the state under review can present its views on recommendations and/or conclusions, on voluntary pledges and commitments, reply to questions not sufficiently addressed, present its views on the outcome and make final comments.

¹⁷⁴ Three minutes of speaking time for members, two minutes for observers.

¹⁷⁵ Two minutes per speaker. See on this *Universal Periodic Review Segment in Human Rights Council Plenary Sessions – Technical Modalities*, <<http://portal.ohchr.org>>.

¹⁷⁶ See <www.un.org/ga/62/elections/hrc_elections.shtml#candidates>.

¹⁷⁷ Special sessions were held on “the situation of the human rights in the east of the Democratic Republic of Congo (DRC)”, “the violations of human rights in the occupied Palestinian territory”, “the Impact of the global economic and financial crisis on the universal realization of human rights” and “the human rights situation in Sri Lanka”.

1. Special Procedures

By the end of the second year two thematic and two country-specific mandates were still to be examined in the context of the review and rationalization of all special procedures mandates.¹⁷⁸ Seven mandates were extended and four new mandate-holders were elected overall. Concerning the thematic mandates, the Special Rapporteur on Toxic Waste and the Working Group on People of African Descent were extended for three years.¹⁷⁹ Further it was decided to establish a new mandate of an Independent Expert in the Field of Cultural Rights.¹⁸⁰

The country-specific mandates remained a contentious issue during the third year. However, it was possible to extend a number of mandates without any further debate and member states succeeded in concluding the process of reviewing, rationalizing and improving mandates with the extension of the mandate concerning Cambodia.¹⁸¹ However, instead of a Special Representative of the Secretary-General it was appointed a Special Rapporteur. Another development was the extension of mandates for less than one year. At first the mandate concerning Sudan was extended for only nine months and then the mandate concerning Somalia was renewed for just six months without a vote.¹⁸² Although the termination of the country-specific mandate concerning Sudan was avoided by a small majority at the eleventh session,¹⁸³ this development could lead to a further down-grading of country-specific mandates, which had been already restricted to one year only, and questions the fragile compromise reached in the institution-building pack-

¹⁷⁸ The mandate on the situation of human rights in the Palestinian territories occupied since 1967 is supposed to run “until the end of the Israeli occupation”. Apparently it was therefore not reviewed.

¹⁷⁹ Doc. A/HRC/9/1 of 24 September 2008 and Doc. A/HRC/9/14 of 24 September 2008.

¹⁸⁰ Doc. A/HRC/10/23 of 26 March 2009.

¹⁸¹ Doc. A/HRC/9/15 of 24 September 2008.

¹⁸² Doc. A/HRC/9/17 of 24 September 2008 and Doc. A/HRC/10/32 of 27 March 2009. Supported by China as well as Sudan and Somalia themselves. Disapproved by France, concerning Sudan and Germany, concerning Somalia, both announcing on behalf of the EU that this short extension does not set a precedent.

¹⁸³ Instead of a Special Rapporteur it was implemented an independent expert, Doc. A/HRC/11/10 of 18 June 2009, approved by 20 votes to 18, with 9 abstentions.

age anew. The mandates concerning Haiti,¹⁸⁴ Myanmar¹⁸⁵ and the Democratic People's Republic of Korea¹⁸⁶ were extended for one year. However, in terminating the mandate of the Independent Expert on Human Rights in Liberia¹⁸⁷ the HRC has now already abolished four country-specific mandates since its establishment. Furthermore the mandate concerning Burundi was only extended "until the establishment of an independent national human rights commission."¹⁸⁸

2. Advisory Committee

After electing its members already at the seventh session of the HRC in March 2008,¹⁸⁹ the committee convened its inaugural session from 4 to 15 August 2008, where Miguel Alfonso Martínez of Cuba was elected to the Chair.¹⁹⁰ The second session thereafter was held from 26 to 30 January.¹⁹¹ Already the first sessions showed that the Advisory Committee exists in a field of tension created by its mandate. On the one hand, it is a body consisting of independent experts serving in their personal capacity, but on the other hand, it is tightly bound to the HRC. At the first session of the committee this continually led to lengthy discussions among members concerning the competencies of the Advisory Committee.¹⁹² Moreover, it became obvious that its close ties to the

¹⁸⁴ Doc. A/HRC/PRST/9/1 of 24 September 2009.

¹⁸⁵ Doc. A/HRC/10/27 of 27 March 2009.

¹⁸⁶ Doc. A/HRC/10/16 of 26 March 2009, approved by 26 votes to 6, with 15 abstentions.

¹⁸⁷ Doc. A/HRC/9/16 of 24 September 2008. The mandate was established at the 62nd annual session of the CHR, Doc. E/CN.4/2003/82 of 25 April 2003.

¹⁸⁸ Doc. A/HRC/9/19 of 24 September 2009.

¹⁸⁹ Doc. A/HRC/7/78 of 14 July 2008, paras 113 to 116.

¹⁹⁰ The bureau of the chairman, as in the Sub-Commission, consists of three vice-chairmen Chin-Sung Chung (South Korea), Vladimir Kartashkin (Russian Federation), Mona Zulficar (Egypt) and one Rapporteur Emmanuel Decaux (France).

¹⁹¹ At the first session members had agreed to hold two sessions of one week instead of one 14 day session.

¹⁹² A number of members (e.g. Miguel Martínez, Vladimir Kartashkin, supported by Egypt and India), e.g. tried to make the rules of procedure subject to prior authorization by the HRC, which was vehemently rejected by

HRC make the committee dependant on the HRC taking notice of its work in a timely manner. This was demonstrated by the decision of the HRC to adjourn the consideration of the first report of the committee from its ninth to its tenth session, whereby the work of the committee was constrained. Besides that, the limited participation of NGOs was a negative result of the first two sessions. Despite optimal pre-conditions for a participation of NGOs¹⁹³ and a great degree of openness of the committee for initiatives from this direction¹⁹⁴ there were very few requests to speak and only a few sideline events. Furthermore, the very limited meeting time caused considerable difficulties. Several issues could not be sufficiently prepared, so that there was either no discussion at all or a debate of inferior quality on the matter.¹⁹⁵ Despite these difficulties the Advisory Committee succeeded in producing some considerable results. Progress was made in the field of human rights education¹⁹⁶ and concerning the right to food.¹⁹⁷ Furthermore, on the basis of a merely rhetorical order of the HRC regarding “gender mainstreaming”¹⁹⁸ the committee took the initiative by requesting permission to

others, perceiving the rules of procedure as an internal issue. Further, the question of how to continue the work of the Sub-Commission aroused discussions on the competencies of the AC, too. See on this, Doc. A/HRC/DEC/10/117 of 27 March 2009, adopted by 29 votes to 3, with 15 abstentions.

¹⁹³ NGOs are entitled to take the floor up to 15 minutes, hand out written information, hold sideline events and participate in the meetings of the working groups charged with elaborating the drafts, Doc. A/HRC/RES/5/1, see note 73, para. 83.

¹⁹⁴ Concerning, e.g., a Convention on the Rights of Indigent Peasants, Doc. A/HRC/AC/2008/1/8 of 3 November 2008 or the Right to Self-determination, Doc. A/HRC/AC/2008/1/12 of 3 November 2008.

¹⁹⁵ See in this respect the results of the second session, AC report Doc. A/HRC/AC/2/2 of 24 February 2009, pages 8-10.

¹⁹⁶ By order of the HRC, Doc. A/HRC/6/10 of 28 September 2007, a draft statement in this regard was elaborated, which was presented at the thirteenth session of the HRC in March 2010, Doc. S/HRC/10/28 of 27 March 2009.

¹⁹⁷ On the order of the HRC, Doc. A/HRC/7/14 of 27 March 2008, recommendations regarding further measures to realize the right to food were elaborated. Submitting further orders in this respect, these were adopted by the HRC, Doc. A/HRC/10/12 of 26 March 2009.

¹⁹⁸ Doc. A/HRC/6/30 of 14 December 2007.

elaborate guidelines in this regard for its work and the entire UN system.¹⁹⁹

All in all, the first sessions of the Advisory Committee showed that it is quite capable of achieving considerable results that enrich the work of the HRC. However, in light of the severely restricted competencies compared to the former Sub-Commission and the close ties to the HRC, as well as the limited meeting time and the scant interest of NGOs it appears to be questionable if the Advisory Committee will be an equal substitution to its predecessor.

3. Universal Periodic Review

The third year of the HRC saw the third, fourth and fifth Universal Periodic Review session.²⁰⁰ The fourth session was of particular interest since permanent Security Council members China and the Russian Federation came under review.²⁰¹ The selection of troika members confirmed the subordinate role accorded to them and thus constituted a mere formality.²⁰² Once again, this could be the reason for the comparatively smooth selection process in which five states from the African group and the Russian Federation decided not to request one Rapporteur from their own regional group.²⁰³ Altogether about 50 per cent of all states reviewed made use of this opportunity and only two selected

¹⁹⁹ The HRC adjourned the consideration of this issue to a later session, Doc. A/HRC/PRST/10/1 of 27 March 2009.

²⁰⁰ Universal Periodic Review 3: 1 to 15 December 2008; Universal Periodic Review 4: 2 to 13 February 2009; Universal Periodic Review 5: 4 to 15 May 2009.

²⁰¹ Universal Periodic Review 4: 856 comments in total (about 200 more than the previous sessions) from 128 different states.

²⁰² Selection at the first meeting of the ninth session of the HRC, 8 to 26 September 2008.

²⁰³ Universal Periodic Review 3: 4 African States of 4; 4 Asian States of 4; 1 Eastern-European State of 2; none of the other two regional groups. Universal Periodic Review 4: 1 African State of 5; 5 Asian States of 5; 1 Eastern-European State of 2; none of the other two regional groups. Universal Periodic Review 5: 4 African States of 5; 3 Asian States of 3; 1 Eastern-European State of 2; 1 Latin-American State of 3; none of the other two regional groups.

Rapporteurs were rejected.²⁰⁴ The newly established mechanism succeeded in reviewing all 48 states scheduled with no delay, however, some negative developments observed continued. Once again an excessive number of comments in the interactive dialogue were just used for hymns of praise²⁰⁵ or invective and libel²⁰⁶ instead of addressing serious human rights concerns. This is particularly problematic in view of the limited time frame of the review, which allows only three hours for each review. In many cases 20 to 30 states – in reviews attracting much attention, like the one of China or Cuba, up to 40 states – are prevented from taking the floor.²⁰⁷ Once again only a handful of western states handed in their questions and comments in writing prior to the review and many questions and recommendations were answered very vaguely or were completely ignored. A positive development that continued was that issues and individual cases being reviewed by the treaty bodies were taken up in the review.²⁰⁸ This was equally recognized by the Chairpersons of the treaty bodies, calling the Universal Periodic Review the “political sounding box” of treaty body recommendations²⁰⁹ even though they had initially been skeptical.²¹⁰ Furthermore, the review was used as a forum for developing and donor states²¹¹ and several states submitted overdue reports to the treaty bodies.²¹²

²⁰⁴ Only Turkmenistan and Tuvalu rejected a Rapporteur at the third Universal Periodic Review session.

²⁰⁵ In the review of China critical comments were openly regretted by other states (Algeria, Sri Lanka, Pakistan and Myanmar regarding Australia’s comment concerning the issue of Tibet), see Doc. A/HRC/11/25 of 3 March 2009, paras 33, 39, 88 and 94.

²⁰⁶ Israel, e.g., was called a “Zionist regime” by Iran in its review, whereupon the president of the HRC intervened, <<http://portal.ohchr.org>>.

²⁰⁷ Undelivered comments are published under <<http://portal.ohchr.org>>.

²⁰⁸ In the review of China, e.g., the issue of China’s rehabilitation program “reeducation through labour” was taken up (Doc. A/HRC/11/25 of 3 March 2009, para. 82) that had been criticized by the Committee against Torture (CAT) before, see Doc. CAT/C/CHN/CO/4 of 12 December 2008, para. 12.

²⁰⁹ See the report of the twenty first treaty body Chairperson meeting, Doc. A/64/276 of 10 August 2009, para. 4.

²¹⁰ Seventh Inter-Committee meeting of human rights treaty bodies, Doc. A/63/280 of 13 August 2008, Annex, paras 22-23.

²¹¹ Tuvalu emphasized its lack of personnel and financial capacities to improve its human rights situation, whereupon several states called on the interna-

During the second year of the Universal Periodic Review it was of particular interest, how states like China and the Russian Federation would encounter the newly established mechanism. Both states presented rather meaningless reports that gave rise to doubts if there had been any consultation process at the national level with relevant stakeholders at all.²¹³ The interactive dialogue then indicated the limits of a cooperative mechanism like the Universal Periodic Review. Reviewing states as powerful and influential as China and the Russian Federation many other states refrain from a critical examination of the human rights situation with a view to national interests. This leads to a particularly large number of laudatory comments and even Western states hold back criticism, as demonstrated in the review of China regarding the situation of Tibet.²¹⁴ Although responding to a number of questions,²¹⁵ China and the Russian Federation categorically rejected from the outset all contributions regarding more sensitive issues like the Tibetan or Georgian conflict. Comparing the Universal Periodic Review of China with its examination by a treaty body organ, e.g., the Committee against Torture (CAT) in November 2008, despite the narrower the-

tional community to provide Tuvalu with the required funds. See, e.g., the comments of Brazil and Morocco, Universal Periodic Review report Tuvalu, Doc. A/HRC/10/84 of 9 January 2009, paras 48 and 52.

²¹² For example, Jordan submitted its CCPR and CAT report in March 2009 after 12 and 13 years, following an accepted recommendation in its UPR in February 2009.

²¹³ China's national report states that oral and written dialogue with about 20 NGOs was held but looking at the websites of these listed NGOs it appeared questionable if they had the necessary independence towards government positions, see Doc. A/HRC/WG.6/4/CHN/1 of 10 November 2008, Annex 2. The report of the Russian Federation only speaks of the "consultation of Representatives of civil society organizations" with no further information submitted, Doc. A/HRC/WG.6/4/RUS/1 of 10 November 2008, para. 2. Contradictory to this, several NGO positions in the documentation of other stakeholders differ considerably from those in the state report, Doc. A/HRC/WG.6/4/RUS/3 of 1 December 2008.

²¹⁴ Only Australia, Switzerland, the United Kingdom and the Czech Republic directly addressed the situation of Tibet. Others, like Germany, the Netherlands and Austria restricted themselves to only emphasizing the "important role of minority rights", see report of the Universal Periodic Review working group on China, see note 213.

²¹⁵ After all, the Russian Federation engaged itself to a certain extent on the topic of the journalist murders.

matic framework it can be observed that many sensitive issues were addressed more clearly.²¹⁶ However, it is to be noted that China refused serious scrutiny by both the independent experts of CAT and their peers in the Universal Periodic Review.

Concerning the results of the interactive dialogue it was to be observed again that many of the recommendations were accepted but that states, however, focused mainly on the numerous positive and less important ones. As before, many states availed themselves of the opportunity to delay their decision regarding the adoption of the recommendations until the consideration of the report by the HRC plenary several months later. Concerning the structure of the reports of the UPR Working Group it is a failing that rejected recommendations are not adequately listed.²¹⁷ Further, on several occasions reports were not made available in all official languages. Attempts were made to solve this problem.²¹⁸

The debate of the Universal Periodic Review outcome of the fourth session took place at the eleventh regular session of the HRC. This stage of the mechanism has shown that many states seriously provide written answers to the recommendations and distribute them prior to the discussion. As long as translations of these answers are available in time this is a useful procedure and should be followed by all states under review. Unfortunately the problem of an excessive number of purely laudatory comments that was already visible at the first stage of the Universal Periodic Review continues and is even exacerbated by the narrow timeframe of only one hour of discussion for each review outcome. In the discussion of the Universal Periodic Review report on China, Cuba and the Russian Federation for example, there were no critical comments at all²¹⁹ and in respect of China and Cuba hardly any

²¹⁶ Doc. CAT/C/CHN/CO/4 of 12 December 2008. Here China had to at least take a stand on the events in Tibet in March 2008.

²¹⁷ See note 168. See the reports of the working group on Burkina Faso, Colombia, Turkmenistan, Tuvalu, United Arab Emirates (UAE), Azerbaijan, Cameroon, China, Cuba, Djibouti, Jordan, Malaysia, Saudi Arabia, Chad, Congo, Monaco and Viet Nam. See further on the structure of the reports *President's statement on follow-up to President's statement 8/1*, Doc. A/HRC/PRST/9/1 of 24 September 2008.

²¹⁸ Doc. A/HRC/DEC/11/117 of 18 June 2009.

²¹⁹ See <<http://portal.ohchr.org>>.

critical statements by other stakeholders.²²⁰ In the end, however, it will be crucial for the Universal Periodic Review as to how the submitted recommendations will be implemented. First and foremost, it has to be determined how this is supposed to be monitored.

VI. The Fourth Year of the Human Rights Council – Current Developments

The election of members for the fourth year in May 2009 was of major interest since the United States had decided to present their first candidacy which eventually was successful. Thereby, the United States gave up their boycott of the HRC under the new Obama administration and aimed at a greater commitment.²²¹ However, states like Saudi Arabia, China, the Russian Federation or Cuba were re-elected. Once again only 20 candidates applied for 18 seats.²²² As of 1 April 2010 the HRC has so far concluded its twelfth and thirteenth regular session and its twelfth and thirteenth special session under the newly elected President Alex Van Meeuwen of Belgium.²²³ Having completed its institution-building phase and taken up all of its main functions for more than one year, it was to be hoped that some early conclusion could be drawn concerning this newly established human rights institution.

²²⁰ See on China and Cuba <<http://portal.ohchr.org/portal/page/portal/HRCExtranet/11thSession/OralStatements/110609>>;<http://portal.ohchr.org/portal/page/portal/HRCExtranet/11thSession/OralStatements/100609/Tab2>>.

²²¹ In 2008 the United States had even given up their observer status in the HRC, see press release of 6 June 2008 *US Scales Back Participation in UN Human Rights Commission*, <www.voanews.com/english/archive/2008-06/2008-06-06-voa50.cfm>.

²²² See <http://www.un.org/ga/63/elections/hrc_elections.shtml#candidates>.

²²³ Special sessions held on the human rights situation in the occupied Palestinian territories and East Jerusalem and on the recovery process in Haiti.

1. Special Procedures

After the worrying outcome of the contentious discussion of the country-specific mandates on Sudan and Somalia²²⁴ it was questionable, whether this would constitute a precedent for future debates on mandates. Supporters of the special procedures feared that the fourth year of the HRC would witness a further loss of country-specific mandates. So far four mandates established by the CHR have already been terminated since the establishment of the HRC.²²⁵ Nevertheless, the renewal of the mandate on Sudan for a whole year at the end of year three²²⁶ gave rise to cautious optimism. This optimism then was confirmed by the extension of the mandates on Somalia,²²⁷ Cambodia,²²⁸ Myanmar²²⁹ and North Korea²³⁰ for an entire year without a vote, except for the latter. Against this backdrop, it can be said that the erosion of the country-specific mandates was so far stopped. However, those states campaigning for the abolition of country-specific mandates are not likely to give up on this goal. Therefore further attacks on mandates, mandate holders and the system as a whole are to be expected, particularly during the upcoming review of HRC functions. However, the discussions on the renewal of the mandate concerning Sudan showed that supporters of the system of special procedures have the strength to combine forces to successfully prevent mandates from being terminated and that particularly the African regional group is not that homogeneous in its

²²⁴ The mandate on Sudan was renewed for only nine months, the mandate on Somalia for only six months thereby questioning the consensus of the institution-building package, see note 182.

²²⁵ The mandates on Cuba and Belarus in 2007, see note 101, and the mandates on Congo, see note 145 and Liberia in 2008, see note 187. The mandate on Burundi was only renewed “until the establishment of an independent national human rights commission”, see note 188.

²²⁶ An independent expert was implemented, see note 183.

²²⁷ Doc. A/HRC/12/26 of 2 October 2009.

²²⁸ Doc. A/HRC/12/25 of 2 October 2009.

²²⁹ Doc. A/HRC/13/L.15 of 19 March 2010.

²³⁰ Doc. A/HRC/13/L.13 of 19 March 2010, adopted with 28 votes in favor, 5 against and 13 abstentions.

position as it sometimes seems.²³¹ Furthermore, the mandate of the Special Rapporteur on the Right to Food was renewed for three years.²³²

2. Advisory Committee

After its inaugural year the Committee held its third and fourth session in August 2009 and January 2010. At the third session in August 2009 Ms Halima Embarek Warzazi of Morocco was elected as new chairperson. First and foremost, the Committee agreed on its rules of procedure that had been controversially discussed during the first two sessions.²³³ This set of rules of procedure, that was adopted rule by rule after discussions had continued for four meetings, provides a lot of flexibility for the Committee members in carrying out their work.²³⁴ In the course of its second year the Committee once again managed to produce some considerable results. After animated discussion of the issue at both sessions thereby attracting a great number of contributions by NGOs, the Committee submitted a draft declaration on human rights education and training to the HRC for consideration.²³⁵ Furthermore, in particular at the fourth session constructive discussions were held on the right to food. However, the quality of discussions varied considerably between the different topics and once again NGO participation was unsatisfactory.²³⁶ Only a very small number of side-events were held.²³⁷

²³¹ See the related statements and voting at the eleventh HRC session <<http://portal.ohchr.org>>. See further on this A. Abebe, "Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council", *Human Rights Law Review* 9 (2009), 1 et seq.

²³² Doc. A/HRC/13/L.17 of 19 March 2010.

²³³ Doc. A/HRC/AC/3/2, Annex III of 9 October 2009. See on the debate on the rules of procedure, see note 192.

²³⁴ For example, the AC agreed not to restrict long time studies to three years, as proposed by the drafting group, see Doc. A/HRC/AC/3/2, Annex III of 9 October 2009, rule 16.

²³⁵ Doc. A/HRC/AC/4/L.2 of 27 January 2010.

²³⁶ With the exception of the topic on a Draft Declaration on Human Rights Education and the Right to Food hardly any NGO statements were made during the third and fourth AC session.

²³⁷ The third and fourth AC session saw only a single informal meeting, <<http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/ses>

3. Universal Periodic Review

The Universal Periodic Review has so far held its sixth and seventh session in the fourth year of the HRC,²³⁸ having now reviewed 112 states.²³⁹ The drawing of troika members proved once again to be of minor importance since troika members are left with no real facilitating role.²⁴⁰ There was a slight increase of states demanding a troika member to be drawn from their own regional group.²⁴¹ All in all, about 50 per cent of the states under review made use of this possibility during the first two years of the procedure (63 of 128 states, 49.22 per cent). After the reviews of Cuba, China, Saudi Arabia and the Russian Federation at the fourth session, it seemed as if the procedure could not cope with the large number of participating states, leaving an unacceptable number of them with no speaking time at all.²⁴² Compared to all previous and following sessions, however, this seems to be an exemption rather than the rule.²⁴³ Nevertheless, the seventh session showed that there are regu-

sion3/ood.htm> and <<http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/session4/ood.htm>>.

²³⁸ In December 2009 and February 2010. The eighth session had been held 3-14 May 2010.

²³⁹ 58 per cent of the UN membership reviewed – by late 2011 the UPR will have reviewed all UN member states.

²⁴⁰ See note 160. Troikas for the sixth to eighth session were selected at the twelfth regular session on 14 September 2009.

²⁴¹ Universal Periodic Review 6: 3 African States of 5, 4 Asian States of 5, 2 Latin American and Caribbean States of 3, 1 Eastern European State of 1, none of the Western European and other States; Universal Periodic Review 7: 2 African States of 4, 4 Asian States of 4, 1 Latin American and Caribbean State of 3, 1 Eastern European State of 2, none of the Western European and other States; Universal Periodic Review 8: 3 African States of 4, 2 Asian States of 3, 2 Latin American and Caribbean States of 3, 1 Eastern European State of 2, none of the Western European and other States.

²⁴² 224 states were not able to deliver their statements at the fourth UPR session.

²⁴³ States under review with number of undelivered statements: Universal Periodic Review 1: Algeria (8); Universal Periodic Review 2: Ghana (5), Sri Lanka (6); Universal Periodic Review 3: United Arab Emirates (5); Universal Periodic Review 4: Azerbaijan (2), Bangladesh (22), Canada (21), China (38), Cuba (38), Djibouti (17), Germany (8), Jordan (21), Malaysia (21), Mexico (7), Nigeria (20), Russian Federation (17), Saudi Arabia (24), Senegal (6); Universal Periodic Review 5: none; Universal Periodic Review 6:

larly a number of politically sensitive reviews, like the one on Iran or Egypt, that cause insufficiencies regarding the participation of states. Furthermore, these reviews revealed a problem concerning the allocation of speaking time through the lists of speakers which are normally opened for inscription the morning of the day before the review. The large demand for speaking time led to a very competitive atmosphere and some obscure maneuvers to obtain one of the first 60 slots of the lists which are allocated on a “first come, first serve” basis.²⁴⁴ The bureau of the HRC President had already discussed this issue on several occasions finding “that the way the list is currently formed has led to inconveniences for delegations due to the need to queue early, repeatedly, and for long hours” and that “it has sometimes resulted into competition among delegations to be among the first 60 speakers on the list” but it had not reached an agreement on how to solve this problem.²⁴⁵ Basic ideas for a solution so far include the opening of speakers’ lists one week before the UPR and the President drawing a number corresponding to the position of a random speaker on the list. Speakers will then continue from that number downwards. This gives a fairer chance to all delegations whether or not they are at the top of the list.²⁴⁶ This problem of a competitive allocation of speaking time concerns other stakeholders such as NGOs as well and has occurred before.²⁴⁷

Bhutan (8), Cambodia (1), Costa Rica (1), North Korea (19); Universal Periodic Review 7: Angola (16), Egypt (34), El Salvador (3), Iran (27), Italy (13), Kazakhstan (13), Nicaragua (15), Qatar (22). Overall result: Universal Periodic Review 1: 8; Universal Periodic Review 2: 11; Universal Periodic Review 3: 5; Universal Periodic Review 4: 224; Universal Periodic Review 5: none; Universal Periodic Review 6: 29; Universal Periodic Review 7: 143.

²⁴⁴ In the afternoon of 15 February 2010 a number of states suddenly opened a hand written list of speakers for the UPR of Egypt, which should have been opened the next morning. The list is available at <http://www.upr-info.org/IMG/pdf/Egypt_Pre-List_of_speakers.pdf>. In the UPR of Iran delegates stayed overnight to cue up for the list of speakers.

²⁴⁵ See minutes of the HRC bureau meetings (BMM) of 7 October 2009, <<http://portal.ohchr.org>>.

²⁴⁶ See the non-paper presented at the BMM of 18 November 2009, <<http://portal.ohchr.org>>.

²⁴⁷ See the point of order raised by Germany and the following comments at the eleventh session on 10 June 2009 concerning the pre-registration of NGOs that had managed to enter the premises before 8:00 am to cue up for the UPR list of speakers <<http://portal.ohchr.org>>.

The plenary stage of the UPR showed that not all states seriously answer as to what recommendations they have accepted in writing and distribute this information prior to the discussion of their UPR outcome.²⁴⁸ Besides that, these answers are often issued only in one or two of the official UN languages, thereby excluding delegations from the debate to a certain extent. Furthermore, the lack of translations of UPR documents also again proved to be a general problem. At the beginning of the seventh session the national reports of Gambia and Fiji, for example, were only published in English – 28 translations were missing overall.

On the contrary, there were also a number of continuing positive aspects during the fourth year. The Universal Periodic Review still attracts substantial attention among UN member states and all states reviewed have participated through high-level delegations, so far. Furthermore, several states under review signed or ratified one of the international human rights instruments,²⁴⁹ extended standing invitations to the special procedures,²⁵⁰ submitted overdue reports to the treaty bodies²⁵¹ or further developed or strengthened their NHRIs following UPR recommendations.²⁵² Additionally, the structure of the UPR Working Group reports was improved, since rejected recommendations

²⁴⁸ 12 states did not circulate their responses prior to the discussion of the outcome of the seventh UPR session.

²⁴⁹ The Bahamas and Pakistan, e.g., ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture at the time of their UPR in May and December 2008. Furthermore, Cuba (International Convention for the Protection of All Persons from Enforced Disappearance), Zambia, Ecuador, Azerbaijan (Optional Protocol to the Convention on the Rights of Persons with Disabilities) have ratified human rights treaties in connection with their UPR so far.

²⁵⁰ Overall nine standing invitations have been extended directly before or after the Universal Periodic Review by Albania, Portugal, Bolivia, El Salvador, Kazakhstan, North Korea, Zambia, Chile, Monaco.

²⁵¹ Bolivia, e.g., made a voluntary pledge to submit all pending reports in its Universal Periodic Review in February 2010, Doc. A/HRC/WG.6/7/L.6 of 12 February 2010, para. 102.

²⁵² For example, Chile and Belize received technical support from the OHCHR in 2009 to establish an NHRI (see Doc. A/HRC/13/44 of 15 January 2010, para. 12) following Universal Periodic Review recommendations in this regard.

are now fully listed.²⁵³ Unfortunately, on the other hand, a growing number of states dismiss numerous recommendations out of hand as “already implemented” or “in the process of implementation.”²⁵⁴ Interestingly, at the seventh Universal Periodic Review session the rejection of recommendations was questioned for the first time by a number of states in the discussion of the report of the Working Group on Iran, which rejected 45 recommendations for being “inconsistent with the Institution-Building text and/or not internationally recognized human rights, or not in conformity with its existing laws, pledges and commitments.”²⁵⁵

²⁵³ See on this note 217. Overall development of reports listing rejected recommendations only by paragraph: Universal Periodic Review 1: 1 (Algeria); Universal Periodic Review 2: 3 (Pakistan, Sri Lanka, Zambia); Universal Periodic Review 3: 5 (Burkina Faso, Columbia, Turkmenistan, Tuvalu, United Arab Emirates); Universal Periodic Review 4: 8 (Azerbaijan, Cameroon, China, Cuba, Djibouti, Jordan, Malaysia, Saudi Arabia); Universal Periodic Review 5: 4 (Chad, Congo, Monaco, Viet Nam); Universal Periodic Review 6: none; Universal Periodic Review 7: none. Overall development of reports fully listing rejected recommendations: Universal Periodic Review 1: none; Universal Periodic Review 2: none; Universal Periodic Review 3: 1 (Bahamas); Universal Periodic Review 4: none; Universal Periodic Review 5: 3 (Afghanistan, Comoros, Yemen); Universal Periodic Review 6: 7 (Brunei, Norway, Costa Rica, Democratic Republic of the Congo, Dominica, Dominican Republic, Equatorial Guinea); Universal Periodic Review 7: 6 (Egypt, San Marino, Iran, Iraq, Qatar, Madagascar).

²⁵⁴ See, e.g., Universal Periodic Review Working Group report on Egypt, Doc. A/HRC/WG.6/7/L.16 of 19 February 2010, para. 96. Overall development of reports dismissing recommendations as “already implemented or in the process of implementation”: Universal Periodic Review 1: none; Universal Periodic Review 2: none; Universal Periodic Review 3: none; Universal Periodic Review 4: 1 (China); Universal Periodic Review 5: 2 (Yemen, Viet Nam); Universal Periodic Review 6: 4 (Democratic Republic of the Congo, Portugal, Cote d’Ivoire, Albania); Universal Periodic Review 7: 7 (Bolivia, Egypt, Gambia, Iran, Kazakhstan, Nicaragua, Qatar).

²⁵⁵ See Doc. A/HRC/WG.6/7/L.11 of 17 February 2010, para. 92. Questions raised by the United Kingdom, France, the United States, Austria, Australia and Canada, <<http://portal.ohchr.org>>.

4. Review of Status

Resolution A/RES/60/251 provides for a review of the newly established HRC five years after its creation. This review is twofold – on the one hand General Assembly members are to review the institutional status of the HRC,²⁵⁶ on the other hand HRC member states are charged with reviewing all functions of the new human rights organ.²⁵⁷ Concerning the timeframe for the review, however, the related provisions differ, speaking of a review “within five years” regarding the status and “five years after” concerning the HRC functions.²⁵⁸ At its twelfth session the HRC already considered the issue of reviewing its functions and established an Open-Ended Intergovernmental Working Group (OEWG) with the mandate to review its work and functioning.²⁵⁹ This early consideration of the issue and the wording of Resolution A/RES/60/251 lead to contentious discussions concerning the question of when to start the review. Against this background the Resolution establishing the OEWG was only adopted by the European states on the understanding, that the OEWG would not commence its work prior to the fifteenth regular HRC session, that is, no earlier than the fall of 2010.²⁶⁰

The OEWG will be chaired by the President of the HRC who is requested “to undertake transparent and all-inclusive consultations prior to working group sessions on the modalities of the review, and to keep the Council informed thereof.”²⁶¹ The OEWG will hold two sessions of five days each “after its fourth session” that ends on 19 June 2010 and it is requested to report to the HRC on its progress at its seventeenth session in June 2011.²⁶² Moreover, the Secretary-General is re-

²⁵⁶ A/RES/60/251, see note 23, op. para. 1.

²⁵⁷ Ibid., op. para. 16.

²⁵⁸ Ibid., op. paras 1 and 16.

²⁵⁹ Draft introduced by the Russian Federation (Doc. A/HRC/12/L.28.), co-sponsored by 64 states from all regional groups. Adoption without a vote, Doc. A/HRC/RES/12/1 of 12 October 2009.

²⁶⁰ See the statement of France, available at HRC extranet: <<http://portal.ohchr.org>>. In the discussion of the draft a number of NGOs had expressed their concern that the OEWG would take up its work too early.

²⁶¹ Doc. A/HRC/RES/12/1 of 12 October 2009, para. 4.

²⁶² Ibid., paras 2 and 6.

quested to support the OEWG and to report on how to improve conferences and secretariat services for the HRC regular sessions by 15 September 2010.²⁶³ At the thirteenth HRC session some states have already expressed preliminary views on the review of the functions.²⁶⁴ The General Assembly corresponded with Alex Van Meeuwen, the HRC President in October 2010 in connection with its consideration of the HRC report. On 15 March 2010 General Assembly President Ali Abdussalam Treki then informed member states that he had appointed two facilitators to conduct consultations on the review of the status of the HRC.²⁶⁵ They will consult member states in an “open, inclusive and transparent process” and have to “take into account” the “experiences and views of the Human Rights Council” while consulting and working “closely with the Human Rights Council on the Review.” The facilitators are to begin their work “during the 64th session” of the General Assembly which was opened on 15 September 2009. The date for the conclusion of the work of the facilitators is left unclear. The information of the President though reiterates Resolution A/RES/60/251 stating that the General Assembly has to conduct the review “within five years, i.e. 15 March 2010”, on the other hand it determines that the review of the HRC status “is to be completed in the 65th session [of the General Assembly]” that concludes no earlier than mid September 2011. However, the latter date would solve the conflicting reporting dates of Resolution A/RES/60/251. HRC members would be enabled to complete their review and report back to the General Assembly before it completes the review of the HRC status.

²⁶³ Ibid., paras 5 and 7.

²⁶⁴ Including the proposal to preserve and further develop special procedures (Spain on behalf of the EU), to have less agenda items per session and to further diversify the format for discussion (Greece). See twelfth HRC Session, interactive dialogue with the High Commissioner for Human Rights, <<http://portal.ohchr.org>>.

²⁶⁵ See letter of the General Assembly President, at <<http://www.un.org/ga/president/64/letters/hrc150310.pdf>>. The facilitators are Ambassador Christian Wenaweser of Liechtenstein and Ambassador Mohammed Loulichki of Morocco.

VII. Conclusion

After almost four years of existence, the HRC has taken up all of its functions and thereby completed its institution-building phase. Therefore it is possible to draw some first conclusions and give an answer to the question, whether this reform has so far been a success and what has to be improved in light of the upcoming review. The HRC continued the work of the CHR in the field of standard setting and as a political forum for human rights fairly successfully. However, the performance of its main functions was rather ambivalent.

The system of special procedures is still under strong pressure as it was during the last years of the CHR caused by those forces that wish to abolish all country-specific mandates. In particular, the special procedures have been weakened by limiting the country-specific mandates to a term of one year and by the code of conduct that can be and has been used as a tool to further restrict the independence of mandate-holders. Even though the system of special procedures was largely preserved during the contentious institution-building phase and the latest renewals of country-specific mandates left a more positive impression after four mandates had previously been terminated, this debate is very likely to be reopened during discussions concerning the review of HRC functions. It would be no surprise if it turns out to be a challenge to preserve the system as a whole again. In contrast to that the special procedures have to be further developed taking into account their significant importance for the UN human rights system. Concerning the particularly contentious country-specific mandates the proposal to introduce an independent expert for every UN member state appears to be an interesting idea.²⁶⁶ This would be an impartial alternative to the abolition of all country-specific mandates and a way to provide the HRC with the necessary information to react more swiftly to human rights crises. Furthermore, this would form an optimal supplementation to the Universal Periodic Review that has to be further linked to the special procedures and the treaty body system, enhancing the first positive developments in this regard described above.

The institution-building package provides the new Advisory Committee with much weaker competences and authority than its predeces-

²⁶⁶ Proposal by Germany during the thirteenth HRC session on 7 March 2010, <<http://portal.ohchr.org>>.

sor and ties it up more closely to its parent organ. Other problems of the Advisory Committee are the limited meeting time that was reduced to only ten working days annually and the lacking interest of NGOs. Since civil society contributions are crucial for the work of the Advisory Committee, participation should be made more appealing to NGOs. This will be achieved if the work of the Advisory Committee proves to have a considerable influence on the work of the HRC. Therefore in the course of the review of HRC functions, increasing the meeting time of the Advisory Committee and giving it authority to adopt decisions and resolutions should be discussed. It is to be taken into account in this regard that the Advisory Committee proved to be capable of producing substantial results despite difficulties. However, it is to be noted that the HRC so far has been provided with a weaker expert advice than the CHR.

Concerning the complaint procedure the General Assembly did not avail itself of the opportunity to create a completely new procedure, built on the UN experiences in this regard since the establishment of the 1503 procedure, that could have functioned as something of an early warning system for emerging human rights situations in any part of the world. Considering the little interest among member states in further establishing this feature of the HRC during the institution-building phase it is rather questionable, if the upcoming HRC review will witness progress in this field. However, if the present author is proved wrong, the establishment of the possibility of injunctions and remedies constitutes an idea worth discussing, since hereby the procedure would be more suitable for victims.

Putting the Universal Periodic Review into operation, to a certain extent, is to be seen as a success itself, given the difficult political climate of the institutional-building phase. However, the marginal role of the troikas and NGOs, the insufficiencies concerning the allocation of speaking time and translations of Universal Periodic Review documents and the large number of purely political, and therefore unproductive, comments, which exacerbate the narrow timeframe, are to be noted as negative developments. Concerning the latter it must be stressed that according to the institution-building package “positive developments” are indeed to be assessed in the Universal Periodic Review as well – its main objective remains however “the improvement of the human rights situation on the ground.”²⁶⁷ This will only be possible if Universal Pe-

²⁶⁷ Doc. A/HRC/RES/5/1 of 18 June 2007, para. 4 (a) and (b).

riodic Review participants focus on bringing up and discussing what is going wrong instead of what is going well. Furthermore, too few state reports were preceded by a sufficient national human rights debate including independent civil society stakeholders and several NGOs participating in the review lacked the necessary independence from government positions. This manipulation of civil society contribution clearly undermines the Universal Periodic Review and needs to be prevented. It is to be noted that a substantial national human rights debate is one of the most important effects of the review since it has the most significant impact on the human rights situation on the ground.

In contrast, a number of positive effects on the UN human rights system have been identified that can be summarized as follows: the ratification of international human rights treaties, the reiteration of concluding observations of treaty bodies in the Universal Periodic Review process, the submission of overdue reports to the treaty bodies, the issuance of standing invitations to the special procedures and the establishment or strengthening of NHRIs by the state under review. Furthermore, the Universal Periodic Review mechanism proved to produce considerable results, provided that the state under review opened up for a comprehensive discussion of its human rights situation. The overall picture shows that this mechanism is indeed capable of making an important contribution to the UN human rights system and turning this reform project into a success. The unique basis of information of the UPR could even be expanded by incorporating human rights information on African and Inter-American regional human rights mechanisms, complementing the information already provided by the human rights organs of the Council of Europe. Moreover, the review by state representatives, compared to the review by independent experts, has the advantage that statements delivered also represent the position of the respective state concerning this matter. Pledges regarding human rights violations made to state representatives outweigh those expressed in front of independent experts. Unable to immediately shatter long-established dictatorships, of course, it will hereby at least be possible to draw a picture of which international human rights standards *de facto* enjoy the support of the international community and to what extent.

Nevertheless, states must tackle the identified problems while at the same time further developing the positive aspects of the Universal Periodic Review. Particular attention in this connection is to be paid to the implementation of Universal Periodic Review recommendations which will be of crucial importance. OHCHR and HRC are charged with the difficult task of developing a monitoring system that will require the

collection of an enormous amount of data on the ground in states that often lack the necessary capacities. A first step into this direction could be the creation of an OHCHR unit to assist in follow up Universal Periodic Review recommendations as proposed by the HRC at the thirteenth session on 4 March 2010.²⁶⁸ Open and productive discussions should be conducted during the review of HRC functions that take into account that the other components of the UN human rights system like the treaty bodies must be further developed as well, since this reform will only turn into a success, if the Universal Periodic Review complements rather than replaces these human rights organs. By establishing the HRC as a subsidiary organ of the General Assembly, increasing the meeting time and reducing membership to 47 states some of the problems of the CHR have been solved. The Universal Periodic Review now guarantees that all states come under review on a regular basis, so that membership can no longer be used as a shield against human rights scrutiny. The newly established election procedure, in contrast, is rather disappointing. Unable to attract a sufficient number of candidates running for membership, it fails to initiate the necessary competition to enable the intended selection among candidates. Correspondingly, not all states with bad human rights records were kept away from the HRC. Nor has the problem of an overly politicized atmosphere been solved, demonstrated by the conflict of supporters and opponents of country-specific mandates, the discussions surrounding special sessions on the middle-east crisis, several Universal Periodic Review sessions and the first no-action movement at the eleventh special session. But, concerning this problem, one has to ask, if it was, in any way to be expected, that a political organ like the HRC would be able to work purely objectively and entirely free from any politicization. It is important to keep in mind that it is not the institution itself but the acting protagonists – the governments – who are responsible for politicization. Thus it was the governments, rather than the HRC, who lost their credibility. In the same spirit Louise Arbour pointed out that “even an institution that is perfect on paper cannot succeed if the international community does not make the necessary change in the culture of defending human rights.”²⁶⁹ According to this, it appears that the roots for a failure of the HRC to meet the expectations in this regard rather lie in the fact that

²⁶⁸ See <<http://portal.ohchr.org>>.

²⁶⁹ Statement of 23 February 2006, <www2.ohchr.org/english/press/hrc/hrc-hc-english.pdf>.

several states still perceive human rights as a domestic affair, covered by state sovereignty, rather than an international concern. Thus, the inevitably emerging politicization should not be used as an argument against the HRC, but as an impetus for a bigger commitment of those states claiming to be “human rights champions”. The new engagement of the United States could be such an impetus. The HRC so far proved to be the international human rights body of universal relevance. Nevertheless the problems identified have to be solved and its main functions have to be substantially strengthened and further developed. If the international community successfully and unconditionally carries out this task and refrains from further weakening and restricting the main functions in the upcoming review of the HRC, the HRC will be in the position to tap its full potential in the future and to mark in fact a milestone in the development of the UN human rights system.