

Clinging to the Imperfect The Results of the *Review* Process of the UN Humans Rights Council¹

Introduction

When the UN Human Rights Council was brought into being in 2006 the General Assembly decided, in Resolution 60/251, to review its work and functioning after five years. Operative Paragraph (OP) 1 of this Resolution declares: »the General Assembly shall review the status of the Council within five years«. OP 16 explains that the Human Rights Council will review its work and functioning five years after its founding and pass on the results to the General Assembly. Underlying the assessment is the mandate of the Council: »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« (OP 2).

In October 2009, the first preparations began. Non-state actors could participate in all sessions but such participation was reduced to a minimum. From the outset, a large majority of states had no interest in using the review as an opportunity to fundamentally call into question the negotiated structure of the Council (Resolutions 5/1 and 5/2 on the so-called Institution Building Package). To the extent that institutional structures needed changing the consensus principle would apply.

Resolution 60/251 gave rise to three objectives: the review of the status of the Human Rights Council in the UN system, the evaluation of its work and functioning and the assessment of the newly created country review procedure, the Universal Periodic Review (UPR). The review of status – the institutional level the Human Rights Council should be granted and to what extent it should be established as an independent organ of the United Nations – was incumbent on the General Assembly in New York. It became clear relatively quickly that a change of status was not envisaged. The two other reviews were carried out by the Council itself or by a working group formed for that purpose in Geneva.

¹ Abridged version of the German original. Published in the September issue of *Vereinte Nationen* (German review dealing with United Nations affairs).

A Process Full of Expectations

With regard to mandate and functioning the Council primarily lacked a commitment to addressing country situations. It was already difficult during the period of the Human Rights Commission to get the Human Rights Council officially and publicly to address the situation in a country or to issue a country mandate. Majorities from member states of the non-aligned movement (NAM), the Organisation of Islamic Cooperation (OIC) and the Russian Federation long prevented debate and the passing of resolutions on member countries. This has changed in the meantime due to reform-oriented states in Africa (see below for more details). Conversely, in the course of the »war on terror« Western states blocked critical evaluations with regard to Iraq, Afghanistan or secret prisons.

Thus emerged a proposal to institutionalise a trigger in order to guarantee that the human rights situation in a country or sensitive issues such as gender identity would be addressed officially, independently of particular political configurations. The favoured options were that the High Commissioner for Human Rights, the UN Secretary General, the UN Special Envoy for the Prevention of Genocide or a group of at least five special procedure mandate holders, either individually or collectively, could move the inclusion of a precarious human rights situation on the agenda.

With regard to membership and the requirement to meet the highest human rights standards there were proposals on the table to review voluntary pledges when putting forward a candidacy in an institutionalised, public procedure. Members of the Council should also have ratified at least half of the key human rights covenants without reservation, have issued a standing invitation to special procedure mandate holders and have cooperated with them demonstrably. Countries with which the UN Security Council is dealing or which are accused of serious human rights violations should be excluded from being put forward as candidates.

With regard to the Universal Periodic Review procedure many proposals were aimed primarily at improving national circumstances. The proposal to allow NGOs to participate in the three-hour hearing (»interactive dialogue«) in the Council, however, met with little support. Non-state actors, too, feared that countries with a critical human rights record would refuse to submit to inspection if the process was no longer confined to their state peers. Instead, the focus lay on the comprehensive integration of NGOs and national human rights institutions (NHRIs) in the informal domain. The *troika*, the group of mediators consisting of three Council members, should, for example, on the eve of the hearing, arrange an informal meeting with national NGOs and NHRIs in order to be informed about the latest developments in the country and to hear critical evaluations of the country report, as is usual in the

case of the UN Treaty organs. Complementing this, the NHRIs should play a role, for example, as monitors in the implementation of the recommendations. In addition, the integration of national parliaments in the UPR procedure was also recommended. Finally, governments should be called upon to present an interim report after two years. In order to cope better with the occasional rush to get on the list of speakers at a hearing it was proposed to extend the hearing from three to four hours and to examine only 12 or 13 states instead of 16 at one session.

The subsidiary bodies of the Council – Advisory Committee, Social Forum, Minorities Forum and Expert Mechanism on the Rights of Indigenous Peoples – remained somewhat underexposed in the discussions. Fault was found with the shackling of subsidiary organs and it was therefore demanded that in particular the Advisory Committee be provided with a right of initiative. Similarly, members of the Committee should be able to present reports to the plenary Council and enter into an interactive dialogue, similar to the special procedure mandate holders.

Regarding the special procedures their independence was emphatically defended by reformers. At the meeting in Algiers and in the position paper by the Russian Federation the proposal was developed to tighten up the code of conduct for special procedures. Mandate holders' obligation to cooperate with governments should be even stronger and their authorised access to the media should be restricted. Others took up the proposal and wanted to establish a working group on the special procedures in order to mediate disputes in the case of complaints by governments. Primarily non-state actors took the opposite view and demanded that the code of conduct be tightened with regard to governments and that they should be obliged to cooperate with special procedures. It was recommended that missing or unsatisfactory answers by governments, in particular to urgent appeals on the part of special procedures, be reported and debated in the plenum under Item 5. Also, refusals to allow mandate holders to enter a country should be the subject of a public debate.

Review: Procedures and Results

The Human Rights Council adopted the report on the Review process by Resolution 16/21 with a no request for a vote. In June 2011 the Council adopted the last agreements concerning the UPR procedure by Decision 17/119. Report and Decision are included in the annex to the Institution-Building Package.

In parallel to Geneva the UN General Assembly had been busy with the status review since March 2010. Here, too, there were broad consultations lasting months. Despite opposition from NAM, OIC and the Russian Federation demands for the

highest standards in respect of Council membership and the election procedure were discussed, although without much success. In contrast to Geneva the concluding Resolution A/65/L.78 of June 2011 was put to a vote. Israel, Canada, the USA and Palau voted no, 154 states voted in favour, including the European Union. The reason for the no-vote was that there were no mandatory measures to guarantee the highest standards with regard to membership and Item 7 on Israel was kept on the agenda.

What are the results now in comparison to institution-building in 2007? Has anything changed fundamentally? Judged in normative terms and on the basis of the corresponding expectations of rights holders and victims the documents do not contain any fundamental novelties. The status quo was protected with fine tuning of individual aspects instead of fundamental reform. The UPR procedure underwent the biggest changes. According to Resolution 16/21 and Decision 17/119 the next cycle was extended to 4.5 years (previously 4 years) with 14 rounds of meetings (previously 12). Only 14 (no longer 16) states are examined in each UPR round. Hearings have been extended from 3 to up to 3.5 hours. The recommendations to states to be examined are to be summarised thematically. States are to submit an interim report on a voluntary basis. The time available at a hearing is to be subdivided in such a way that all states that wish to speak may do so. Further changes concern time periods in relation to hearings and report formats.

The participation of NHRIs with »A status« was expanded in accordance with the Paris principles. Firstly, they have their own section in the summary of the reports of NGOs. Secondly, they will be granted the right to speak at the Council session on adoption of the UPR report direct after the state to be examined. Otherwise, the demands for comprehensive inclusion of NGOs and their documents were not taken into account.

Otherwise, NHRIs were granted the right to nominate their own candidates for special procedures mandates and – analogous to the UPR procedure – to be able to issue a statement in the interactive dialogue on a country situation directly after the government concerned. In order to upgrade the Advisory Committee in future the Committee's first session is to be held directly before the traditional March session of the Council. Other changes concern an annual podium discussion with all relevant UN bodies for the purpose of implementing human rights standards within the UN system, the temporal and textual streamlining of resolutions, greater use of information technology such as video-conferencing, improved access for disabled people to Council sessions and the establishment of a bureau for the presidency: previously, this task has been performed by a department of the High Commission.

Changes worth mentioning arising from the review of the UN General Assembly primarily concern time management. The Council's meeting cycle shall in future begin with the calendar year and no longer in June. The Council's annual report to the General Assembly covers the period 1 October to 30 September. It was also stipulated that the next review process should take place in the next 10–15 years.

Outlook

In a nutshell, by means of this outcome once again governments have protected themselves rather than human rights and the victims of human rights violations. Is it the case that in this way the Council has written out the prescription for its own demise, as NGOs put it in a statement? Recent developments in the Council away from the review process sound more promising. Bloc formation in accordance with regional groups of states or informal interest-led groups such as the Non-aligned Movement has disintegrated. OIC member states vote against their guidelines even on religious issues. Cooperation between states from different regional groups, on the other hand, is increasing markedly. In other words, it has been possible to overcome previous blockades, for example against country mandates, by means of new majorities. This is confirmed by the recent country resolutions on Iran and Belarus (June 2011).

As a supplement to this the Council diversified its instruments for analysing and evaluating country situations. Supplementing the standard Resolution with country mandates »urgent debates« take place alongside special sessions, or the High Commission is instructed to prepare a report. It is presented at the next Council session and debated. There are podium discussions on all topics. One escalation level below a country mandate are decisions to deploy ad hoc fact-finding missions appointed by the Council president and put together by the High Commission, as recently for the Ivory Coast, Libya and Syria.

The Council has already begun to further exploit the institutional framework. It was not possible to bring it about that serious and systematic human rights violations are taken up by the Council, independent of particular political configurations, but below this threshold anything now seems possible. Dynamic actors such as the USA and courageous Council presidents have recognised and seized these opportunities. The emancipation in particular of African states with regard to regional and interest groups, as well as the radical change in North Africa enable us to forecast that this informal review will overcome the official policy of clinging to the imperfect with lasting effect.