

COUNCIL MONITOR

International Service for Human Rights



Human Rights Monitor Series

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Role of independent experts	1
Country rapporteurs	2
The consent of the concerned State.....	3
International Humanitarian Law as an element of the basis of review	4
Other issues.....	4

The Working Group finalised its deliberations on the modalities for the Universal Periodic Review (UPR) mechanism, the new mechanism to be established by the Human Rights Council under General Assembly *Resolution 60/251*. The Facilitator of the Working Group, Ambassador Mohammed Loulichki of Morocco, presented his revised non-paper.¹ He indicated that while there were many issues that needed to be discussed, there were three principal areas which he wished to form the basis of discussion: the role of experts; the role of country rapporteurs; and decision-making in the outcome of review. For the final hour, the Facilitator moved to opening the floor so that States could express any other outstanding issues.

Role of independent experts

The morning session once again addressed the question of the role of experts, and many States simply reiterated or expanded upon positions outlined in the previous session. There was a near equally proportionate divide amongst States that spoke in favour and against the use of independent experts, with variations among States as to the level of involvement of independent experts. Amongst the core arguments in favour were the need to condense the volume of material in order to better manage the workload of all States, and the need to avoid as much as possible creating a ‘politicised circus’ (UK). Arguments against tended to focus on the ‘State-driven’ focus of the UPR.

¹ The revised non-paper is available at the OHCHR extranet, which can be accessed at www.ohchr.org/english/bodies/hrcouncil/form.htm (fill out the form on the page to receive the user name and password). For the highlights of the discussions of the first meeting on the UPR, see http://www.ishr.ch/hrm/council/wg/wg_reports/highlights/WGUPR_Highlights_11_April_07.pdf

- Argentina (on behalf of Brazil, Chile, Japan, the Netherlands, New Zealand, the Republic of Korea, UK, Switzerland, Norway and Uruguay) described independent experts as facilitators that would contribute to avoiding politicisation, reducing preparatory burden and providing predictability and consistency in the process.
- Germany (on behalf of the EU) emphasised that the UPR is an intergovernmental State-driven process, and that the primary task of experts was in the condensing of information and identifying key issues in order of relevance. The UK further added that this would allow for more adequate preparation by governments at home in anticipating who to send to Geneva for the UPR, and stressed that this was not the creation of 191 country rapporteurs but was simply a ‘technical, practical and necessary function’.
- The International Service for Human Rights stressed that independent experts could not investigate, monitor and give their own views to the Council in the form of special rapporteurs, but would provide an advisory technical function. They should be independent of States but not independent of the Council.
- Liechtenstein cautioned that any mechanism without expert facilitators would create a system that benefited only large delegations. Mexico pointed to the principle of equal treatment and the meaning of a ‘universal’ mechanism in this regard.
- France introduced a new proposal of an ‘advisory expert mechanism’, which would assist in all stages of the process from synthesising information for the Working Group to drafting conclusions and recommendations to providing technical assistance in implementing these recommendations. Selection of experts would be through pre-screening of a roster of candidates by OHCHR against set criteria, which would then be selected by the Council (24 or 48 experts). This new proposal was circulated in writing.² This was attacked by Algeria and Thailand, among others, as being burdensome and removing State involvement.
- The USA argued that the processing of information was a job for the Secretariat, and there was no need for additional experts (plus Cuba, India). The Russian Federation saw that the preparation of summaries by OHCHR could form a compromise, but pointed to the fact that two-thirds of its staff are from one regional group. The International Service for Human Rights indicated that this work required more than purely secretarial functions, and would put the Secretariat under fire for operating beyond their mandate.
- Cuba perceived that the sources of information provided constituted sufficient ‘expertise’.
- Pakistan argued that experts were not part of General Assembly *Resolution 60/251*, and bringing in experts would lead to subjectivity and politicisation of what is a ‘peer review’ process (plus Bangladesh). The Facilitator responded that *Resolution 60/251* merely provided indicators in this regard. Belgium and Norway clarified that the UPR is termed a ‘periodic’ and not ‘peer’ review.

Country rapporteurs

In response to a question put forward by Japan, the Facilitator explained that the role of the country rapporteur would be to summarise the discussion of the Working Group, which would then be adopted by the Working Group, to be forwarded to the plenary for final adoption. It was envisaged by the Facilitator that these rapporteurs would be State representatives. Discussion was centred on whether any such need existed.

- Germany (on behalf of the EU) fully opposed the use of rapporteurs as it believed that independent experts should also fulfil the role of preparing the outcome document of the Working Group. Germany

² The French proposal for an expert advisory group is available at the OHCHR extranet, which can be accessed at www.ohchr.org/english/bodies/hrcouncil/form.htm (fill out the form on the page to receive the user name and password).

also noted that rapporteurs may be members of the same regional group and this would pose difficulties. If accepted, at the very least rapporteurs should be decided through lots (Canada).

- The UK stressed that it was important to avoid a scenario where individuals were representing the politics of their own States, and advocated for someone outside political dynamic to produce the first draft.
- On the basis that ‘differences of opinion in the Working Group can be anticipated’, India proposed a group of rapporteurs chosen from each regional group to ensure balance. This group would draft a final report in consultation with the concerned State, which would detail all recommendations of the Working Group including those that the State could not endorse. There could be between four and five of these groups. Portugal directly queried how follow-up would be handled if there were two sets of recommendations for States.
- Liechtenstein proposed a similar ‘troika’ system to the Indian model. Mexico supported this method, although maintained that there should be at least three working groups. The Russian Federation opposed the ‘troika’ method on the grounds that it would lead to an inevitable imbalance in regional groupings.
- Algeria proposed a system of two rapporteurs, one appointed by the President and one by the State concerned. The outcome document should be a summary report of discussions (Russian Federation). Iran added in its support that rapporteurs should be from the same regional group as the concerned State. The UK referred to this as a ‘worst case scenario’.
- Canada proposed that country rapporteurs could prepare the outcome alongside independent experts and that this should include a list of issues, responses, summary, conclusions and recommendations. Mexico also pressed for the inclusion of experts in the summary.
- Cuba argued for a ‘strictly governmental process’ and sought that the word rapporteur be replaced by Facilitator, alleging that the term rapporteur held too many negative connotations for many developing countries.

The consent of the concerned State

General Assembly *Resolution 60/251* establishing the Council provides that the process of the UPR should include the full involvement of the concerned State. The discussion concerning the need for the consent of the concerned State showed very little departure from the positions expressed by States in the past.

- Some States argued that the UPR could not be a co-operative mechanism without the final document being adopted by consensus (Cuba, Algeria, Iran, Pakistan, South Africa, Venezuela). Others maintained that while consensus is always desirable, the outcome document should nonetheless be adopted in the same manner as other decisions of the Council, in accordance with the General Assembly Rules of Procedure. (USA, EU, UK, Japan, Brazil, Portugal, Mexico, Turkey).
- Germany (on behalf of the EU) termed the requirement of consensus as an effective ‘veto right’ in expressing opposition to the need for consensus. The UK questioned the legal precedent for such an initiative, given that the right of veto is reserved only for the Security Council. By way of attempting to reach consensus, the EU proposed that recommendations are relevant and feasible for the concerned State.
- The draft Indian proposal (as mentioned above) provided that the plenary would adopt the report of a group of rapporteurs, which would contain recommendations that are both agreeable and not agreeable to the State. This would be recognised as such in the report as a means of ‘preserving consensus recommendations while being able to reflect areas of disagreement.’
- The USA said that it was too much to assume that there should be recommendations and conclusions in every case, and that this should not be a requirement of the outcome.
- Pakistan re-iterated its preference for a summary of proceedings and recommendations to be adopted by consensus.

- South Africa spoke most strongly that the UPR could not have any other outcome than by consensus. It aligned this to the view that all material from the UPR should derive from the national level and should be aimed at international assistance. On this basis, there was no reason for a non-consensus outcome.

International Humanitarian Law as an element of the basis of review

Among one of the outstanding issues throughout the process of the Working Group was the inclusion of international humanitarian law (IHL) as a basis of review, and/or the manner it was phrased in the Facilitator's non-paper.³ Switzerland had proposed an alternate definition at the informal consultations that "In situations where IHL is applicable, human rights law shall be applied in light of relevant IHL".⁴ Bi-lateral negotiations had been ongoing between Switzerland and Egypt in trying to find a compromise proposal, but it was finally reported to the Facilitator that this had not been possible. On this basis, Switzerland requested that the Facilitator accept their wording for consideration. Egypt requested instead that the 'clarity, precision and flexibility' of the Facilitator's present wording is preferable.

- Norway, Canada and the USA expressed clear objections to the inclusion of IHL, with Norway detailing that *Resolution 60/251* relates only to human rights, and that the Council has neither the competence nor expertise to address IHL. In any case, human rights law still applies in situations of armed conflict and this still applies under the basis of review of the UPR.
- India maintained its reservations about inclusion, but conceded that if it was maintained, the wording of the non-paper should be amended to read 'in accordance with the obligations of the States'.

Other issues

The Facilitator opened the floor for delegations to raise other issues before the close of the Working Group. This led to general restatements by particular States, including a generic recycling of every position by Algeria on behalf of the Working Group. Interesting points were nonetheless raised by certain parties:

- Argentina, the International Service for Human Rights and Amnesty International drew attention to the fact that additional information submitted by other stakeholders 'could' be taken into consideration as documents. All sought equal treatment of the sources of review and requested that this be changed to 'should'.
- Argentina, the International Service for Human Rights and the EU also urged that other stakeholders should not just attend the Working Group, but should be allowed to actively participate in the process.
- Amnesty International elaborated on the experience of the treaty bodies and the non-receipt of State reports. It emphasised that the UPR should therefore be able to proceed without the need for the submission of State reports. It also used the example of the treaty to illustrate the importance of NGO submissions, which acted as a mirror to State reports, and without which there is a lapse in quality of the process.
- China requested that the wording should be changed so that only the information of 'qualified' relevant stakeholders would be considered.

³ At present this reads that IHL forms a basis of review 'as and when applicable'.

⁴ For a review of these informal consultations, see http://www.ishr.ch/hrm/council/dailyupdates/session_004/19_march_2007.pdf

- Algeria, Bangladesh, Venezuela and Cuba objected to the inclusion of language that "the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism". Bangladesh did not foresee such non-cooperation and thought it redundant, whereas Algeria and Cuba found the language to be out of place in trying to build a cooperative mechanism.

The Facilitator is due to amend his non-paper on the basis of these final discussions. He presents his conclusions of the Working Group to the President, alongside the Facilitators of all of the Working Groups, on Friday 27 April.

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