

# COUNCIL MONITOR

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Human Rights Monitor Series

## **HUMAN RIGHTS COUNCIL WORKING GROUP TO DEVELOP THE MODALITIES OF THE UNIVERSAL PERIODIC REVIEW, 3<sup>RD</sup> SESSION, 11 AND 24 APRIL 2007.**

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### Overview

The two previous sessions of the Working Group to develop the modalities of the Universal Periodic Review (UPR) were the most constructive sessions of the institution-building Working Groups established by the Human Rights Council (the Council), at least in terms of the working atmosphere.<sup>1</sup> The reason for smooth progress was not because the UPR mechanism is without controversy, but because the discussions of the Working Group were centred around first agreeing on the softer issues surrounding the basis of review, principles and objectives, and some very broad concepts for a general framework. The more thorny and critical questions of whether the process would include working groups outside of the plenary, the role of experts and NGOs, and outcome and follow-up were therefore left until the final session. The work of this final session, which comprised of only four meetings over two working days, was dedicated to discussing these points and did not follow the text of the Facilitator's non-paper on a line-by-line basis, as in previous sessions. However, at the conclusion of the final session of the Working Group it was difficult to identify any clear areas where progress had been made. And it was in this state that a visible shell of a future universal

<sup>1</sup> The other working groups are the Working Group on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and a complaint procedure (which has been divided among three facilitators to address special procedures, the system of expert advice and the complaint procedure) and the Working Group on the agenda, annual programme of work, methods of work and rules of procedure. The latter working group does not need to finalise its work by 31 June 2007.

periodic review mechanism, with blurry edges, was presented to the President of the Human Rights Council on 27 April 2007.

## Background

The UPR was established under General Assembly *Resolution 60/251*, which created the Human Rights Council (Council). The resolution affirms that the Council will “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 country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies”.<sup>2</sup>

*Resolution 60/251* does not set the parameters and modalities of the UPR, but instead instructs the Council to develop the modalities for the UPR within the timeframe of one year from the end of its first session. The Council’s *Decision 1/103* of 30 June 2006 established an inter-sessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism. The President of the Council appointed Ambassador Mohammed Loulichki of Morocco as the Facilitator of Working Group, who had at his disposal ten days (or 20 three-hour meetings) for the development of the UPR. The Working Group first met on 20-24 November 2006 for four three-hour meetings<sup>3</sup> and then reconvened for six meetings on 12-16 February 2007. Its final meetings took place on 11 and 25 April 2007.

The discussions of the first session of the Working Group from 20-24 November 2006 had proceeded on the basis of a programme of work circulated by the Facilitator. This was divided into: terms of reference/basis of review; objectives and principles of the review; periodicity and order of review; the process and modalities of the review; and outcome and follow-up. General points of convergence were reached on many elements; but, most tellingly, there were also areas of outstanding disagreement, and these were often the critical areas over the process and modalities that would shape the future effectiveness of the UPR.

On 4 December 2006, the Facilitator presented a summary of the outcomes of the Working Group to the third session of the Human Rights Council based on preliminary conclusions.<sup>4</sup> This was followed by an interactive dialogue, which allowed States to further elaborate on positions expressed in the Working Group.<sup>5</sup>

The second session followed the same pattern, with the Facilitator providing a much more concise non-paper that identified all points of convergence, the areas that require further negotiation, and final ‘compromise proposals’ of the Facilitator under each subject heading.<sup>6</sup> The most notable advancement on the previous session was the inclusion of an annex to the non-paper that outlined three potential modalities for the functioning of the UPR. These varied from a plenary-focused UPR to the creation of a working group or multiple working groups that assess the human rights records of countries under review, to be then forwarded to the Council. The second session also saw further convergences on the basis for review (dissatisfaction with reference to conferences and summits), periodicity (narrowing down to 4 years), and the outcome (to be adopted by the plenary of the Council). The Facilitator noted at the conclusion, however, that the question of

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<sup>2</sup> General Assembly *Resolution 60/251*, Para 5(e),

<sup>3</sup> For a detailed review of the first meetings of the Working Group, see ISHR, [http://www.ishr.ch/hrm/council/upr/WG\\_UPR.pdf](http://www.ishr.ch/hrm/council/upr/WG_UPR.pdf).

<sup>4</sup> The Facilitator’s ‘Preliminary Conclusions’ can be found on the OHCHR extranet (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm)

<sup>5</sup> For a summary of these discussions, see ISHR Daily Update, 4 December 2006, at [http://www.ishr.ch/hrm/council/updates/4\\_December\\_06.pdf](http://www.ishr.ch/hrm/council/updates/4_December_06.pdf)

<sup>6</sup> For a detailed review of the second session of the Working Group, see ISHR, [http://www.ishr.ch/hrm/council/wg/wg\\_reports/wg\\_upr\\_feb\\_07.pdf](http://www.ishr.ch/hrm/council/wg/wg_reports/wg_upr_feb_07.pdf)

a plenary review or the use of working groups, the means of decision making in the process, the role of experts, the level of involvement of the concerned States, and the implementation of the outcome of the UPR needed to be agreed upon at the final session.

The Facilitator then presented his conclusions to the Human Rights Council on 15 March 2006<sup>7</sup>, where he again identified remaining gaps and concluded by urging States not to concentrate on concluding all possibilities for the UPR, but rather to concentrate on developing the general architecture so that the UPR can evolve according to lessons learned. Further brief informal consultations outside the meetings of the Council also aided in clarifying States' positions on more specific points.<sup>8</sup>

## The Facilitator's non-paper and programme of work

The discussions of the third session of the Working Group were preceded by the circulation of a revised working paper during the session of the Human Rights Council on 20 March 2007. The paper sought to introduce a new compromise text by the Facilitator on the basis of further recommendations by States. This was not amended following the informal consultations outside the Council and formed the basis of discussion at the third session of the Working Group. It should be noted, however, that the Facilitator chose to direct the discussions away from the text of the non-paper, as was the practice in the previous sessions, and simply to concentrate on general unresolved issues.

In any case, the Facilitator's final non-paper was different in many respects. This included that the basis of review was amended so that international humanitarian law may form the basis 'as and when applicable'<sup>9</sup>, as well as commitments undertaken in 'relevant' UN conferences and summits. It was added to the 'principles' section that the UPR would not be 'overly' burdensome for States and that NGO participation would be ensured 'in accordance with General Assembly *Resolution 60/251* and Economic and Social Council *Resolution 1996/31*', in place of 'being determined by the Council at a later stage'. It was clarified that the enhancement of technical assistance would require the consultation and consent of the State concerned and that States 'shall be', rather than 'should be' reviewed during their term of membership to the Council. Other new elements included 'General guidelines' for the drafting of State reports and, whether the UPR was conducted in working group or plenary, that 'a rapporteur(s) will be selected, respecting geographical representation, from among the members of the Council or of the working groups to prepare the review outcome by the plenary'. It was also proposed by the Facilitator that the outcome 'should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders' and, in cases of co-operation, the Facilitator finally included that after exhausting all efforts to ensure co-operation, the Council would 'address the issue' as appropriate.

Despite the circulation of the non-paper, the Facilitator decided to depart from his normal practice of following the text and instead highlighted the four core issues that remained to be resolved. These he defined clearly as:

- Whether the UPR should be conducted in plenary or working group(s);

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<sup>7</sup> The Facilitator's latest non-paper can be found on the OHCHR extranet (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm). The summary of the Facilitator's interactive dialogue with the Council can be read at [http://www.ishr.ch/hrm/council/dailyupdates/session\\_004/15\\_march\\_2007.pdf](http://www.ishr.ch/hrm/council/dailyupdates/session_004/15_march_2007.pdf)

<sup>8</sup> These included the scope of international humanitarian law as a basis of review and the question of specificities according to a States' level of development. For a summary of the informal consultations at the 4<sup>th</sup> session of the Council, see [http://www.ishr.ch/hrm/council/dailyupdates/session\\_004/19\\_march\\_2007.pdf](http://www.ishr.ch/hrm/council/dailyupdates/session_004/19_march_2007.pdf)

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- The role of experts in the UPR;
- The level of participation of NGOs and other stakeholders; and
- The involvement of the concerned State in the making and taking of decisions.

The Facilitator impressed upon those present that he sought to go beyond general statements and wished for delegates to ‘win over others’. At the same time, he warned against the temptation to resist compromise and urged States not to refer to other developments, as a good outcome document from this final session would be positive for the other Working Groups and for the Human Rights Council as a whole. The Facilitator also moved the discussion along by responding in between statements, a practice he rarely observed during the previous sessions.

### Conduct of the UPR in plenary or working group(s)

The question of whether the UPR should be conducted in plenary or in a working group or groups occupied a great deal of the Working Group’s time at the second session, with no agreed outcome. Nor was there any discernable movement towards agreement on the opening day of the third session.

The Ambassador of Argentina opened the discussion with the type of candid and direct language not often heard in the Working Group. First objecting to the terminology of the Facilitator that all elements of the process are interrelated and of equal importance (Argentina saw the question of experts, discussed below, as ‘fundamentally’ important), the Ambassador insisted that States must first agree on the objective of the UPR. He proffered that this should be a ‘deeply action-oriented’ exercise aimed at seeking to improve States’ protection and promotion of human rights. Argentina could not ‘in any way’ accept a UPR that took place in the plenary. In other words, at the very least the interaction should take place in working groups, and only then should their conclusions and recommendations be forwarded to the plenary for adoption. And unless this objective was first accepted by the Working Group, consultations ‘wouldn’t go anywhere’.

This position was most vocally supported by Mexico, who added that three hours in the plenary was too short a time to assess States’ performance. They further maintained their position that four working groups were required if the question of dealing with the logistics of periodicity and follow-up was to be adequately met. Portugal also saw it as ‘obvious’ that it was not possible to discuss a country, draft a decision and adopt it in this time, and followed that any decisions would be ‘pre-cooked and politicised’. The delegation of the United Kingdom also retained their preference for four working groups, but conceded that they could agree to two, provided they are open to observers. Norway, also advocating for full NGO participation in the working groups, followed that such a structure would allow for stronger input from the concerned State, and would create a less confrontational environment.

Australia advocated that smaller working groups are more capable of reaching quick decisions and would aid in avoiding that the UPR overshadow resources and time needed to address other issues in the Council. The idea of time allocated was also raised by Germany, on behalf of the European Union, who stressed that the review should place within the working groups, who would then transfer their conclusions and recommendations to the Council. The plenary of the Council dedicated to the adoption of these decisions should not use any of the ten weeks allocated for ordinary meetings of the Council each year.

Mexico also requested that the Facilitator put time aside to consider the implications of securing conference services and other such practical matters for the convening of the UPR.

On the other side of the divide were the Organization of Islamic Conference, Cuba and the majority of Asian States that took the floor. Little by way of advanced reasoning was provided by these States, who generally reiterated their positions that the plenary of the Council was adequately placed to conduct the proceedings without the need for additional layers so that it would be ‘manageable, predictable, and straightforward’<sup>10</sup> and would not accrue any additional expense.<sup>11</sup> India did highlight once again, however, that the UPR should be conducted outside the minimum ten weeks provided by General Assembly *Resolution 60/251* for the normal work of the Council. Iran expressed the solitary view that the UPR should be conducted in plenary during its first year, after which its effectiveness could be gauged and a transferral to a working group model could be proposed by the Council if necessary.

At the end of the second meeting on 11 April, the Facilitator asked the Working Group if he could propose a compromise that he felt might meet with the agreement of States for inclusion in a revised working paper: that the plenary of the Council transform itself into a UPR working group (that is, of 47 members of the Council) to conduct country examinations. Particular procedures attributed to the Working Group would apply. Both Algeria (on behalf of the African Group) and Switzerland expressed an initial interest in this proposal, although just as quickly both Germany (on behalf of the EU) and Mexico opposed this suggestion on the grounds that it essentially constituted a plenary review with a different title. Cuba and Egypt nonetheless requested that it be included in the final non-paper as a possible option.

### The role of independent experts

The question of the role of independent experts was discussed in detail at the first and second days of the Working Group. The question remained as fraught as in the previous session, and there remained a near equal divide amongst States that spoke in favour of the use of independent experts and those who spoke against, with variations in the former camp over the level of involvement that experts might assume.

The most concise and well-formulated consideration of the issue came from Argentina at the opening of the meeting on 24 April 2007. Speaking also on behalf of Brazil, Chile, Japan, New Zealand, Norway, the Republic of Korea, Switzerland, the UK and Uruguay, the Ambassador of Argentina noted that in accordance with *General Assembly Resolution 60/251*, the UPR process is intergovernmental and State-driven. Within this process, the ‘constructive involvement of human rights experts acting as professional and independent facilitators’ would be key to fulfilling the guiding principles of the UPR. This included: ensuring universality of coverage and equal treatment of all States; reducing the risk of over politicisation;<sup>12</sup> ‘refining credible information into a manageable and accessible format’ to provide for more focused dialogue; reducing the preparatory burden on States; ‘providing predictability for the State under review’; and to ‘provide consistency and continuity in the UPR process through the accumulation of procedural knowledge and expertise’.

The Ambassador of Argentina proceeded to stress that experts or facilitators would not overtake the process, but would provide ‘useful professional assistance’. He identified five areas where this was possible: the analytical summary of information provided; the identification and preparation of a limited and focused list of issues; during the dialogue with the State, ‘for example as a silent rapporteur’; in the preparation of a first draft of recommendations and conclusions; and in the follow-up to the UPR process/recommendations.

France also introduced a new proposal that went beyond the statement of Argentina in providing a structure for an ‘advisory expert mechanism’. According to the delegate of France, this mechanism would assist in all stages of the process from synthesising information for the working group to drafting conclusions and

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<sup>10</sup> Indonesia.

<sup>11</sup> China.

<sup>12</sup> The delegate of the UK referred to this as avoiding as much as possible creating a ‘politicised circus’.

recommendations to providing technical assistance in implementing these recommendations. Selection of the mechanism would be through pre-screening of a roster of candidates by OHCHR against set criteria, which would then be selected by the Council. It may consist of either 24 or 48 experts. This new proposal was circulated in writing<sup>13</sup> and was attacked on the floor by Algeria and Thailand, among others, as being burdensome and as aiming to remove State involvement almost entirely.

Other opinions expressed in favour of independent experts tended to elaborate on the same points detailed by Argentina on the basis of guiding principles, with the modalities to be considered at a later stage. Germany (on behalf of the EU) expressed flexibility on the term that may be used, but placed emphasis on the question of experts being a ‘technical’ issue. It placed the most important role of experts on the need to condense what will be an abundance of information. The UK reiterated its own particular categorisation of the need for a form of ‘clerk’ to derive what particular issues the UPR should focus on from an inevitably huge array of information, and consequently would aid in allowing the concerned State to decide who it would send to Geneva for the session in order to be capable of best answering the questions posed.

Those who opposed the input of independent experts at any level based their core arguments on the fact that the UPR was an intergovernmental, State-driven process. 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.<sup>14</sup> Pakistan added that it did not feel that missions in Geneva would be incapable of digesting the necessary information for the review of countries, and thought that the introduction of experts was therefore superfluous. This instigated an immediate counterargument from Liechtenstein, which cautioned that the absence of expert facilitators would create a system that benefited only large delegations, to the detriment of smaller States.<sup>15</sup> Mexico pointed to the principle of equal treatment and the meaning of a ‘universal’ mechanism in this regard.

The Facilitator responded to Pakistan’s argument that *Resolution 60/251* did not provide for independent experts by highlighting that the Resolution merely provided indicators to the modalities of the UPR, and was not exhaustive in this regard. Other countries, in particular Belgium and Norway, were quick to counter the language employed by Pakistan in clarifying that the drafting negotiations on General Assembly *Resolution 60/251* in New York originally referred to a ‘universal *peer review*’, but this was dropped in favour of a ‘universal *periodic review*’ for the very reason that it was not limited to the input of States only.

A second stream of opposition was led by the USA, who argued that the processing of information could be undertaken by the Secretariat, and there was no need for additional experts. This was supported by India and Cuba, with the latter adding that the input of information from all stakeholders constituted ‘sufficient expertise’. Russia saw that the preparation of summaries by OHCHR could form a compromise, but pointed to the fact that two-thirds of the staff of OHCHR are from one regional group. The International Service for Human Rights (ISHR) indicated that the work of condensing information submitted by other stakeholders went beyond the clearly defined mandate of the Secretariat, and would expose OHCHR to criticism of exceeding its role. ISHR argued instead that independent experts could make technical decisions beyond a secretarial function, but at the same time it was important to understand that they did not fulfil the equivalent role of country special rapporteurs, as they could not investigate, monitor, and give their own views to the Council.

Algeria (on behalf of the African Group) nonetheless persisted that the use of independent experts would sideline the role of States in what was intended to be a State-driven process. It further reasoned that concerned States would be more bound to procedure if States only are involved in the review, in the preparation of the

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<sup>13</sup> 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](http://www.ohchr.org/english/bodies/hrcouncil/form.htm) (fill out the form on the page to receive the user name and password).

<sup>14</sup> This was supported by Bangladesh.

<sup>15</sup> The UK followed that it could manage such a workload, but it realised that smaller delegations could not.

report, and so forth. The objective, according to the Ambassador of Algeria, was to promote human rights, and the exclusion of experts was the most effective means to do so. As both Algeria and South Africa have maintained, sole input from other stakeholders should take place at the national level only in consultation with the State in the preparation of the State report.

## Role of NGOs and other observers

Whilst all States who took the floor made a clear point of reciting their strong support for and admiration of non-government organisations (NGOs) and their past and present contributions to the international human rights system, many nonetheless proceeded to deliver blanket opposition to the idea of NGO participation at any level of the process. This issue perhaps illustrated the clearest divide on visions for the functioning of the UPR. Positions remained steadfastly unchanged from the previous session of the Working Group. However, Argentina, ISHR and Amnesty International pointed to the fact that the revised language of the Facilitator's non-paper, which read that 'the Council *could* take into consideration additional credible and reliable information by other relevant stakeholders' should be amended so read '*...should* take into account'. China requested that the sentence be amended to read '*...other qualified* stakeholders'.

Algeria, on behalf of the African Group, maintained its position that NGOs should only be engaged at the national level in consultation with the State in the preparation of a national report.<sup>16</sup> South Africa was quite emotive in its plea that the UPR be an entirely State-driven process which included the concerned State from beginning to end, and was based only on a national report as the basis of review, in the preparation of which national NGOs may be consulted. Elsewhere, they played no role. Argentina responded that in many political systems NGOs were subjected to severe restrictions and had no legitimate space through which they could make a meaningful contribution except by coming directly to the international system.

Argentina, supported by the EU, the USA, Norway and others, maintained instead that NGOs should be able to effectively participate at every level of the procedure. Mexico paid particular attention to the need for NGOs to be allowed to directly participate in the dialogue with the State under review. New Zealand interpreted NGO participation as a means to promote transparency in the UPR. Amnesty International, Human Rights Watch and ISHR advocated the same position of full participation on the basis this would be consistent with General Assembly *Resolution 60/251*, with Amnesty International reiterating its earlier point that the reference to the 'full involvement of the *country* concerned', and not the State (as is used elsewhere in *Resolution 60/251*) means that the drafters clearly had more in mind than the State in the process of the UPR. It would also increase the credibility of the exercise.

A number of States, however, made clear their view that while participation might be granted, it should be limited. Russia and Cuba accepted that NGOs should be able to provide information to the review, but did not express support for participation beyond this. India proposed that NGO participation might be equivalent to that of the treaty body reviews, where they submit 'shadow reports' and observe, but not directly contribute to, the plenary session.

## Role of country rapporteurs

Discussion at the final afternoon of the Working Group was dedicated primarily to the question of the role of country rapporteurs and the level of involvement of the concerned State in the decision-making process.

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<sup>16</sup> Supported by Bangladesh and Iran.

A rapporteur for the UPR process is intended to prepare the review outcome for presentation to the Council. According to the Facilitator's non-paper, the rapporteur(s) 'will be selected, respecting geographical representation, from among the members of the Council.' In response to a request for further clarification from 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.

Only Germany (on behalf of the EU) and the UK expressed outright opposition to the idea of country rapporteurs. Germany believed that independent experts should also fulfil the role of preparing the outcome document of the working group, and noted that rapporteurs from the same regional group could pose difficulties. It stressed that the UPR should avoid regional influence as much as possible. The UK was more vocal in its scepticism, and likened the drafting of conclusions by member States as akin to creating a perpetual Item 9 of the former Commission on Human Rights<sup>17</sup> and by extension a 'politicised circus'. According to the UK, there was a distinct need to be careful not to create a scenario where individuals were representing the political views of their own states and of their regional groups. For this reason an individual expert might provide a first draft at the direction of the working group, which may be amended and then adopted by the working group, and finally forwarded to the plenary of the Council.

Canada also showed some reticence to the idea of country rapporteurs, but conceded that if they were to be employed they should be decided through lots. This was supported by Germany as a minimum, with the exclusion of members from the same regional group.

India however was first to support the modalities of the country rapporteur, whilst also noting the cautions of potential politicisation in appointing individual rapporteurs. On this basis, and on the grounds that 'differences of opinion in the working group can be anticipated', the delegate proposed a 'more balanced' formula of a group of rapporteurs preparing the outcome document, respecting equitable geographic distribution. The initial document would include recommendations arising from the discussion of the working group. India then noted that some of these recommendations would be acceptable to the country concerned, and others not. In order to ensure a consensus outcome, India therefore proposed that the report of the group of rapporteurs would reflect all the recommendations of the working group both acceptable and unacceptable to the concerned State, from which the acceptable recommendations would be drawn to be presented to the Council for adoption. The Facilitator requested whether India envisaged one group of rapporteurs to address all of the countries concerned. The delegate replied that it could envisage four or five such groups. Portugal raised concern about whether follow-up would apply only to those recommendations endorsed by the concerned State or to all recommendations.<sup>18</sup> Germany (on behalf of the EU) later expressed interest, although not necessarily support, in the formulation of this Indian proposal.

Liechtenstein succeeded India by declaring that it had always championed a group of rapporteurs, although it preferred the notion of a 'troika' who would have additional expertise in the concerned State and would also be involved in drawing up a list of issues derived from the sources of information in order to guide the discussions of the working group.<sup>19</sup> It followed that the review must be held in public, and the concerned State's views be documented and accessible. One manner in which this could be done was in hosting the entire working group session on a webcast. Lithuania was not opposed to a member of the troika being from the same regional group as the concerned State and favoured the drawing of lots as the best means of appointment. Nor did they exclude the possibility of the troika asking for expert assistance.

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<sup>17</sup> Agenda Item 9 of the former Commission on Human Rights addressed the situation of human rights in any country. Its use to 'name and shame' particular countries in light of their human rights record led to allegations of selectivity and politicisation, and its existence created the basis for allegations by certain factions that the Commission was an uncooperative institution.

<sup>18</sup> Pakistan later argued that only recommendations adopted by consensus could be followed up.

<sup>19</sup> Russia also supported the use of a troika.

Canada on the other hand proposed that a rapporteur could prepare the outcome document alongside an independent expert. The rapporteur would be randomly chosen, but would not be from the same regional group (Canada did not disclose the process of appointment of the independent expert at this point) and would prepare the document in close consultation with the concerned State following the session of the working group. This should include a list of issues, responses, summary, conclusions and recommendations. Mexico also expressed preference for a 'troika' system, as well the use of independent experts in preparing the final document. It emphasised however, that a 'proper' final document was crucial if the UPR was to have any real value.

Algeria proposed a system of two Rapporteurs, one appointed by the President and one by the State concerned. The Ambassador surmised that the use of independent experts was being presented as a panacea against politicisation, whereas independent experts very often carried their own views and prejudices, as was witnessed by the behaviour of many special rapporteurs at the second session of the Human Rights Council. According to Algeria, the outcome document should be a summary report of discussions, in contradiction with Mexico's statement. The USA also claimed that it was not necessary to adopt recommendations in every case, and that a summary of the discussions of the working group may suffice. Iran added in its support of Algeria's statement that rapporteurs should be from the same regional group as the concerned State. The UK referred to this as a 'worst case scenario'.

Cuba expressed interest with ideas expressed by Algeria and India, and thought they deserved further consideration, whilst bearing in mind at all times that the review should be 'strictly governmental'. It did raise its objection however, to the use of the word 'rapporteur', which is claimed on behalf of itself and other unnamed States stirred certain negative connotations and suggested 'marked intentions'.

### Involvement 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 at the second session of the Working Group, with the same near consensus on the fact that a concerned State may not have any equivalent power of veto over the outcome of the UPR, but that consensus should be the desired outcome.

The reaching of consensus still held a different meaning to certain groups, however. Cuba, Algeria, Pakistan and others argued that the UPR could not be a co-operative mechanism without the final document being adopted by consensus.<sup>20</sup> Others maintained that while consensus is always desirable and should be the objective, 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. Therefore, a vote would be taken if necessary.<sup>21</sup> 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

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<sup>20</sup> South Africa, Venezuela, Iran.

<sup>21</sup> USA, EU, UK, Japan, Brazil, Portugal, Mexico, Turkey.

being able to reflect areas of disagreement.’ It was therefore envisaged that there would no basis for *not* adopting the document forwarded to the Council 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 were no reasons for a non-consensual outcome.

## Other issues

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 (which reads that IHL forms a basis of review ‘as and when applicable’). 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.’<sup>22</sup> Bi-lateral negotiations have 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.

Switzerland reiterated that the Facilitator’s proposal was not sufficiently precise and could be subject to different interpretations. It felt that the Council was not competent to apply IHL and there was no need for any such legal analysis if the Council were to abide by its recommendation. On this basis, Switzerland requested that the Facilitator accept their wording for consideration. Egypt, while acknowledging that discussions with Switzerland had been open, felt that the Swiss proposal may not have met with the ‘clarity, precision and flexibility’ that the Facilitator’s present wording provided. This flexibility was in keeping with a ‘reality’ that had prevailed in the Commission in being able to comment on IHL in the broader context of human rights. Regarding fear of misinterpretation, the Egyptian delegate claimed that it would still be in the hands of the international community, OHCHR, the International Committee of the Red Cross (ICRC), and others to guide their work. This failed to give due credit to the fact that the ICRC had already given its legal support to the Swiss proposal during the previous informal consultations convened by the Facilitator at the fourth session of the Council.

Norway, Canada, and the USA followed these presentations by expressing outright objections to the inclusion of IHL, with Norway insisting 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 from previous sessions 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’.

The final hour of the final session of the Working Group on the UPR concluded with the Facilitator opening the floor up for comments by States on other issues that they wished to be noted before the close. This led to a rehashing of previous positions by many States, with Algeria presenting an entire run-through of the UPR from beginning to end, which was perhaps most remarkable by the fact that it exhibited no notable changes or concessions from the opening day of the Working Group in November 2006.

Nonetheless, some useful contributions were made. Amnesty International drew attention to the experience of the treaty bodies and the non-receipt of State reports as a working example of why the UPR should not be forced to rely on the **submission of State reports**. It stayed with the treaty bodies as an example also of 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. They were joined by Argentina and ISHR in urging that the language of the

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<sup>22</sup> For a review of these informal consultations, see [http://www.ishr.ch/hrm/council/dailyupdates/session\\_004/19\\_march\\_2007.pdf](http://www.ishr.ch/hrm/council/dailyupdates/session_004/19_march_2007.pdf)

Facilitator's non-paper, which states that additional information submitted by other stakeholders 'could' be taken into consideration as documents, be changed so that to 'should' to ensure equal treatment of the sources of review. China, on the other hand, requested that it be clarified that only the information of 'qualified' relevant stakeholders would be considered, and wished for an amendment to that effect.

Finally, there was some discussion around the question of non-cooperation with the Council. Algeria, Bangladesh, Venezuela and Cuba objected to the inclusion of new proposed compromise language by the Facilitator that 'the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.' Bangladesh did not foresee such non-cooperation and thought the inclusion was therefore redundant, whereas Algeria and Cuba found the language to be out of place in trying to build a cooperative mechanism.

## Conclusions and next steps

The final day of the sessions of the various institution-building Working Groups took place on 27 April 2007 in the form of a 'wrap-up' session, which comprised of the respective Facilitators of the Working Groups presenting their conclusions to the President of the Council.

In his presentation, the Facilitator for the Working Group on the UPR, Ambassador Mohammed Loulichki identified the role of experts and country rapporteurs as two areas that required particular attention between now and the fifth session of the Council on 11 June. The Facilitator made particular note of the possibility of appointing both an independent expert and a representative of a member State as joint rapporteurs. Other pending issues included whether the periodicity would be four or five years, and whether international humanitarian law should be used as a basis for review. The Facilitator thanked all of the delegations that participated and reiterated that his objective had been to lay down the basic architecture of the UPR. The Facilitator stated that some of the details would need to be left to the mechanism itself to evolve once the reviews start.

At the end of the wrap up session, the President announced his intention to continue consultations on all outstanding issues on two parallel tracks. The first of these tracks is a series of informal, private, bilateral and multilateral meetings in which the President will consult with all delegations, regional groups, and observers to identify and resolve pending issues. Parallel to this, public and open consultations will be conducted at least once a week to inform stakeholders of the progress of negotiations and provide opportunities to raise substantive issues in a more open forum. The remaining three open consultations are scheduled for 10, 18, 24 and 25 May.

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