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Overview

The progress of the second session of the Working Group to establish the modalities of a universal periodic review mechanism (UPR) mirrored the efficiency of the first session. In fact, at this stage of the reform process, the Working Group on the UPR is the only working group that is reasonably on course to complete its work before 31 June 2006. The constructive environment and swift pace of progress thus far should not, however, lead to the impression that the modalities of the UPR are going to be agreed upon without any complications. The reason for smooth progress thus far is because the Working Group has chosen to first agree upon the softer issues of the basis of review, principles and objectives, and some very broad concepts for a general framework. The more critical questions, including many elements of the process and modalities, the role of experts and NGOs, and outcomes and enforcement – questions which will ultimately decide the strength and legitimacy of the UPR - are yet to be decided.

There were, however, preliminary moves made toward defining the operation of the UPR, and the objectives of regional groups could be identified from these preliminary expressions. It is clear, for instance, that the European Union and certain GRULAC countries envisage the future UPR as a mechanism with a clearly defined role for independent experts, and with sufficient space for NGO information and other contributions. The African Group, on the other hand, is clear that the process should be almost entirely a peer review. Its proposal that NGOs may contribute at the national level to the State's self-assessment report is insufficient as this would, in practice, amount to zero input in those States where NGO input is most required. It should be re-iterated that neither side has yet influenced the final structure of the UPR in this regard. The weight of

numbers in the Council would however indicate that the African Group's position on less, rather than more, NGO and expert influence, is likely to gather majority support.

These issues are not yet decided by the Working Group, and may be contested more closely at the next session in April 2007. Decisions that were made at the second session could be characterised as consolidating and tightening of basic elements of convergence already reached at the second session, and were generally uncontroversial. These are discussed in detail below.

Background

The UPR was established under General Assembly *Resolution 60/251*, which created the Human Rights Council (the 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”.¹

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* established an interessional open-ended intergovernmental working group to develop the modalities of the UPR mechanism. The Working Group has at its disposal ten days (or 20 three-hour meetings) for the development of the UPR. Ambassador Loulichki, the Permanent Representative of Morocco, was appointed as the Facilitator to lead the discussions of the Working Group. The Working Group first met on 20 - 24 November 2006 for four three-hour meetings² and then met again for six meetings on 12 - 16 February 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 over the critical areas of 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 Council, based on preliminary conclusions outlining the various points of convergence and areas that required further discussion.³ This was followed by an interactive dialogue of the Council, which allowed States to further elaborate on positions expressed in the Working Group.⁴ These conclusions, as well as the conclusions of the first meetings of the working group, set the starting point for the next meetings of the Working Group.

¹ , Para 5(e), General Assembly *Resolution 60/251*.

² For a detailed review of the first meetings of the Working Group, see the Council Monitor report on the first session available at www.ishr.ch/hrm/council/wg/wg_reports/wg_upr_nov_2006.pdf.

³ 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

⁴ For a summary of these discussions, see ISHR Daily Update, 4 December 2006, at www.ishr.ch/hrm/council/dailyupdates/session_003/4_December_06.pdf.

The Facilitator's non-paper and programme of work

Prior to the session, the Facilitator distributed a new non-paper for the second meeting of the Working Group.⁵ The non-paper was divided by the same headings listed above for the programme of work of the first session. Under each topic, the Facilitator identified the points of convergence reached at the previous session, the areas that require further discussion, and also put forward his own compromise proposals on areas where there were disagreements.⁶ The non-paper was a comprehensive, detailed text, and was greeted with widespread support.⁷

The Facilitator also distributed a programme of work in advance of the session. The first meeting was dedicated to general comments by States and other observers, and the following meetings were dedicated to the specific headings of the non-paper. The final session was then dedicated to assessing the three illustrated options of the Facilitator on the future process and modalities of the UPR.⁸ These were drafted according to various proposals made by states in the previous meetings.

During the meetings the Facilitator was clear that he wished for states to stick to the subject heading for each session, and to concentrate primarily on the points requiring further consideration unless they had a particular objection to the language of the points of convergence. This resulted in well-structured and generally quick-moving discussions throughout. In relative terms, the atmosphere of the session was generally cooperative and reasonable progress was made. Given that the Working Group has now used half of its allocated time (10 of 20 sessions), the impression would be that it is on schedule in its work.

Basis of review

The elements of the basis of review were introduced at the first day by the Facilitator. The areas identified as points of convergence from the last session were: the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, human rights instruments to which a state is party, and voluntary pledges and commitments undertaken by states parties when seeking election to the Council. In response to the general dissatisfaction with the idea of including international customary law at the last session, the Facilitator added 'obligations arising from international humanitarian law instruments' as a compromise proposal. The further suggestion of including 'commitments in United Nations conferences and summits' also still needed to be resolved.

There was little or no challenge to the areas of convergence highlighted by the Facilitator. A consensus appears to have been reached on the use of the UN Charter and the *Universal Declaration of Human Rights* as the foundation for the basis of review. Only Liechtenstein elaborated on the value of the Charter's inclusion, which they felt would enable the UPR to address the whole set of internationally agreed human rights and fundamental freedoms, regardless of how many human rights treaties the State under review is a party to. Likewise, there was little objection to human rights instruments to which a State is party. The point was raised by the International Service for Human Rights (ISHR) that in order to avoid duplicating the work of treaty bodies, the UPR should assess the status of ratification and reporting performance to treaty bodies and the follow-up by States to treaty body recommendations. Concerning pledges and commitments, only Guatemala critiqued that not all states will stand for election, so this would create unequal treatment as some States would not have pledges to be judged on.

⁵ The Facilitator's 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

⁶ 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

⁷ Japan, Germany on behalf of the EU, India, Colombia, Brazil, Bangladesh, Malaysia, Russian Federation, Argentina, Uruguay, United States of America (USA), Turkey, United Kingdom (UK), Australia, Romania, Tunisia, Mexico.

⁸ The three illustrated options of the facilitator were attached as annexes to the non-paper, and could loosely be allocated in preference to the African group (Option 1) and the EU (Option 2), with Option 3 representing a variation of Option 2.

However, the points that required further consideration, namely the inclusion of international humanitarian law (IHL) obligations and commitments made at UN summits and conferences, seemed to meet a strong cross-section of resistance.⁹ While some seemed unopposed to its inclusion,¹⁰ Australia stated that the UPR mechanism in neither mandated nor equipped to address IHL. Norway added that *Resolution 60/251* refers to States' human rights obligations and commitments, and not IHL. Iran, Indonesia and Switzerland sought further clarification on the meaning of 'obligations arising under IHL instruments' in this context.

There was an even more general disregard for the notion of including conference and summit commitments. Most States disagreed on the inclusion of commitments in UN conference and summits.¹¹ Australia stated that the nature, level and support for these commitments varies widely, was not binding on states and was often aspirational in nature.¹² Furthermore, holding States to such commitments might hinder discussion of important issues at future conferences. Whilst Germany, Slovenia and Norway supported the inclusion of voluntary pledges and statements, they clarified that should not extend to outcome documents at conferences etc.

There were certain conferences, however, that were deemed relevant to States obligations under the UPR, including most significantly the 1993 World Conference on Human Rights and the *Vienna Declaration and Program of Action*. The inclusion of the Vienna Declaration as a basis of review was supported by many States.¹³ Other summits that proposed to be included that 2005 UN World Summit¹⁴ and the Durban Conference on Racism.¹⁵ Mexico proposed that these commitments should at least be considered while drafting the final recommendations.

The discussion on the basis of review was also open to introducing new elements beyond those identified by the Facilitator. These included:

- A re-inclusion of customary international law (supported by Chile and Human Rights Watch);
- Domestic law (Bangladesh);
- The UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, or Linguistic Minorities* adopted in 1992 (Slovenia);
- The Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly *Resolution 260 A (III)* of 9 December 1948 (proposed by FIDH);
- The broad parameters of *Resolution 60/251* (proposed by Pakistan on behalf of the OIC).

Principles and objectives

The language used by the Facilitator to detail the principles and objectives of the UPR was drawn primarily from the text of General Assembly *Resolution 60/251*. He referred to universal coverage and equal treatment, non-duplication, a cooperative mechanism based on objective and reliable information that would promote universality, interdependence, indivisibility and the interrelatedness of all human rights and so forth.¹⁶ The reference that the UPR should 'not be burdensome to the reporting State or to the agenda of the

⁹ Australia, India, Norway, Guatemala, Ecuador, USA, China.

¹⁰ Colombia, Argentina, Malaysia, Brazil, Pakistan on behalf of the OIC, Algeria (on behalf of the African Group), Mexico, Chile.

¹¹ India, Australia, Malaysia, Germany, Brazil, Liechtenstein, Algeria (on behalf of the African Group), Ecuador, Norway, Russian Federation, Islamic Republic of Iran, Guatemala, USA, China, Switzerland, Indonesia, Human Rights Watch.

¹² Supported by Malaysia and Pakistan on behalf of the OIC.

¹³ Germany, Argentina, Russian Federation, Mexico, Colombia, Chile, Algeria (on behalf of the African Group), and ISHR.

¹⁴ Argentina.

¹⁵ Supported by Russian Federation, Mexico and Algeria, (on behalf of the African Group).

¹⁶ The Facilitator identified the elements of convergence that the UPR should: be a cooperative mechanism based on objective and reliable information and on interactive dialogue; promote universality, interdependence, indivisibility and the interrelatedness of all human rights; not be burdensome to the reporting State or to the agenda of the Council; complement and not duplicate other human rights mechanisms, thus representing an added value; ensure universal coverage and equal treatment of all States; be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner; fully involve the country under review; be an intergovernmental process, member-driven and action-oriented.

Council’ was generally supported by States¹⁷ but some States requested clarification on what this meant. Norway was concerned that the statement concerning burden was too strong and should be categorised under ‘modalities’. The Republic of Korea instead proposed that it should not be “overly-burdensome”. Japan who argued that States could abuse this clause to weaken the mechanism. New Zealand recommended rephrasing this objective in a more positive manner to state that UPR should be “efficient” and “should not duplicate reporting”.

But in relative terms this was a minor point. Of much bigger concern were the two elements on principles provided by the Facilitator for further consideration: the ‘adequate participation of all relevant stakeholders, including NGOs and national human rights institutions (NHRIs)’, and the UPR taking into account the level of development and specificities of countries.

The ‘most effective contribution’ of all stakeholders in the work of the Council is provided by paragraph 11 of *Resolution 60/251*, thus making it difficult for any States to propose that NGOs and others be excluded entirely from the UPR process. Nonetheless, a range of opinions were voiced concerning the scope of NGO contribution and the period(s) of the process where it may be permitted. Germany (on behalf of the EU) advocated the inclusion of all stakeholders, including UN agencies and programmes, at all levels of the process.¹⁸ Uruguay interpreted this as the best means of ensuring objectivity and transparency.¹⁹ Human Rights Watch added that often in a country with a poor human rights record, it was difficult for national NGOs to develop and operate effectively and therefore the input of international and not just national NGOs was important.²⁰ In accordance with *Resolution 60/251*, the UK requested that the language of the non-paper be amended so that ‘adequate’ participation be replaced with ‘effective’ participation, and that the purpose of NGO contributions be made explicit. Amnesty International also drew the Working Group’s attention to the language of *Resolution 60/251*, noting that the only area of the resolution which mentions a ‘country’ rather than ‘State’ is that dealing with participation in the UPR.

The counterargument was led by Algeria (on behalf of the African Group), who suggested that NGO participation should be restricted to the preparation stages, contributing at the national level, through a broad consultation organised by the State.²¹ The focus on national level NGO participation was justified on the grounds that it would facilitate the empowerment of NGOs from the Global South who do not have the capacity to contribute on the international stage. It was added that ECOSOC accredited international NGOs could observe at the international level, but could not contribute directly.²² ISHR pointed out that Algeria has previously criticised a perceived lack of geographical representation in NGO participation at the international level, and yet was now proposing that national NGOs should only be able to contribute at the national level during the UPR. This raised the question as to when Algeria thought it most appropriate for national NGOs to contribute at the international level.

Limitations were further suggested by Algeria and India on the basis that this NGO participation would detract from the intergovernmental nature of the process.²³ Mexico responded that the *Resolution 60/251* does not specify that the UPR is an inter-governmental process and this should not be assumed in the debate. The International Service for Human Rights and Human Rights Watch supported Mexico’s sentiment, noting that it had been decided to title the UPR a universal ‘periodic’ review, rather than a universal ‘peer’ review, and that delegates should therefore refrain from using the term peer review. Nonetheless, States such as the USA and others persist in referring to a peer review mechanism and base their position on this understanding of the UPR.

¹⁷ Pakistan and Australia.

¹⁸ Liechtenstein added that observer States should not be forgotten when considering stakeholders.

¹⁹ The United Kingdom, Norway, and Poland.

²⁰ Supported by Amnesty International.

²¹ The UK was quick to point out that this presupposes a convergence on the idea of the need for national reporting, which was not the case in the Working Group (see below).

²² Supported by Bangladesh, Indonesia.

²³ Reference to the UPR as a peer review process is also maintained by the USA.

The other outstanding question concerned whether a country's level of development and other specificities. Algeria (on behalf of the African Group) advocated for such considerations, claiming that it would not be a pretext for double standards but instead would show sensitivity to the specific challenges addressed by countries, and ensure that the UPR would be capable of providing appropriate remedies. Germany, on behalf of the EU, and many others²⁴ countered that 'equal treatment' meant treating each country equally during the process of review, although it was of the opinion that specificities should be considered at the end in the type of recommendations the State is required to implement.

In other areas, Bangladesh and the Islamic Republic of Iran (Iran) sought to remove reference to the UPR 'not diminishing the capacity of the Council to respond to urgent human rights situations' as this was deemed redundant. Pakistan and China supported its removal, arguing the Council already had enough mechanisms for dealing with urgent human rights situations. Belgium stressed that the UPR will not be held frequently enough to respond to urgent situations²⁵ and any attempt to suggest that the UPR might act as a means to respond to urgent human rights situations should be avoided.

Periodicity and order of review

Although the Facilitator's non-paper dealt with periodicity and order of review under the same heading, it transpired that the 'points requiring further discussion' pertained to the overarching question of periodicity. The previous session of the Working Group had provided recommendations varying from three to six years and beyond, and the Facilitator therefore proposed a median figure of four or five years. Under this periodicity, the process would be divided in the following manner:

Periodicity/year	Number of countries/year	3-hour meeting	
		Hours	Meetings
4	48	144 hours	48 meetings
5	38.4 = 39	117 hours	39 meetings

The obvious difficulty with this proposal, as continually highlighted by Amnesty International, is that the mathematics of General Assembly *Resolution 60/251* requires that the periodicity be three years. This is because it is laid down that States be reviewed during their term of membership to the Council. As the duration of membership is three years, a member State would have to be reviewed in this time. As the Resolution requires equal treatment of all States, this should apply equally to non-members, thus curtailing a two-track process.²⁶ Despite these stark facts, and a re-iteration of Amnesty's argument by other NGOs²⁷, the Facilitator and almost all members of the Working Group (except for Norway and Canada)²⁸ have chosen to ignore the contradiction. Instead, there was general acceptance in narrowing the preference to four or five years, although there was on convergence one over the other at the session.

Germany (on behalf of the EU) relaxed its request for a three year periodicity by conceding that a four year model could still provide a 'light and flexible mechanism'. Brazil also stated that its original proposal of three years may not provide a country with sufficient time to implement the recommendations of the UPR, and said that it could accept four years. Colombia suggested that States should be able to provide a mid-term

²⁴ Uruguay, United Kingdom, Belgium, Japan, Lichtenstein, Switzerland, Chile, Poland, New Zealand

²⁵ Reiterated by Australia.

²⁶ As suggested by Canada.

²⁷ ISHR requested clarification from the Facilitator and from members states as to how the review of member states within their term of membership and a four or five year periodicity can be reconciled with the requirement for 'equal treatment' under *Resolution 60/251*.

²⁸ Norway remained fixed on a three-year periodicity for the reasons described above. Canada, whilst accounting for the requirement of States to be reviewed during their term of membership, proposed instead a two-track process for member and non-member States.

report of significant progress in the implementation of UPR recommendations if it was felt that four years was too large a gap between reviews.²⁹ Other states who spoke in favour of a four year cycle included Argentina, Chile, Ecuador, the Maldives Mexico, New Zealand and Switzerland.

India, the Russian Federation, the USA and China stated that a five-year cycle would be preferable on account of the lesser burden that it would place on the work of the Council. Malaysia argued for five years as more reasonable in allowing States adequate time to implement recommendations.³⁰ Cuba and China added that this was particularly relevant to developing countries.

The other element for further consideration provided by the Facilitator's non-paper was the question of whether different periodicities might be applied to developed and developing countries (as distinct from the issue discussed above on differences being applied in the conduct of the review). The suggestion was supported primarily by Algeria (on behalf of the African Group) and Bangladesh on the understanding that developing countries would need more time to prepare and to implement previous recommendations.

There was strong opposition to this suggestion. While Argentina was sympathetic to the question of specificities and levels of development, it felt that it was a question that should be considered at the outcome, and not under periodicity.³¹ Norway argued that it was not reasonable to give developing states less attention, but more, particularly as the UPR was designed to be a cooperative mechanism (as continually emphasised by Algeria, Bangladesh and others). The UK re-iterated this point and added that the concerns raised by Algeria and others strengthened their argument for a light mechanism, so that no States are overburdened. They also pointed out that recommendations would be agreed upon by the Council, and did not expect that the concerned State and members of the Council would agree on unrealistic recommendations that could not be implemented within the cycle.³²

The options for the initial order of review presented by the Facilitator consisted of drawing lots, and alphabetical list and volunteering. Germany (on behalf of the EU) stated that they favoured the drawing of lots on a geographic basis. Brazil was open to both the drawing of lots and an alphabetical list, and suggested that the Council could use a combination of both criteria.³³ The Brazilian delegation also suggested a system where one-third of the states reviewed annually would be Council members and two-thirds would be non-members. China, on the other hand, thought that an alphabetical list would provide for better predictability.³⁴ While the Netherlands suggested that volunteering would set a good example to others, and volunteered itself for the first round, Switzerland was more of the view that volunteering would upset the need for certainty in the order of review.

Process and modalities

The Working Group's discussion on the process and modalities was divided into two sessions. The first session (Tuesday afternoon, 13 January 2007) dealt with the definition of some terms in the Facilitator's non-paper, such as a 'standardised questionnaire' and a 'self-assessment report'. The final session of the Working Group (Thursday morning, 15 January 2007) was then given over to discussing the Facilitator's three models³⁵ that could be adopted as the basic framework for the UPR.

²⁹ The Republic of Korea also suggested the use a mid-term report, although it supported a five-year cycle.

³⁰ This position was supported by Algeria (on behalf of the African Group), Iran, Indonesia and Thailand.

³¹ Germany (on behalf of the EU), India, the Republic of Korea and the Russian Federation also saw no link between periodicity and level of development, but felt it could be considered later in the UPR process.

³² Germany also added that only 'realistic recommendations' would be tabled.

³³ Columbia was also open to both the drawing of lots and an alphabetical order.

³⁴ Iran also supported using an alphabetical order.

³⁵ The three models proposed by the Facilitator were attached to the working paper as an annex, and can be read on the OHCHR extranet. These models should be read in conjunction with the following overview to avoid confusion.

Discussion of the non-paper

A few areas of convergence were identified by the Facilitator based on previous discussions on the process and modalities for the UPR. These included that an interactive dialogue should take place between the country under review and the Council; that the final outcome should be adopted by the Council; and that the UPR should not be ‘overly long’ but ‘should be realistic and not absorb a disproportionate amount of time, human and financial resources’. The substantive areas requiring further consideration, deriving from proposals at the last session of the Working Group, included the use of self-assessment reports in the process or review based on standardised individual questionnaires, the compilation by OHCHR of existing information, and the consideration of additional information provided by other relevant stakeholders. Elements that required further discussion were whether there should be a prior review by regional group or a group of friends of the country under review; whether the UPR should be conducted in the Council plenary meeting and/or in working groups (dealt with in more detail separately below); and whether it was possible to include experts or a Rapporteur from a State from the relevant regional groups in the review.

A large number of delegations spoke in favour of self-assessment reports by the State as the basis for the review.³⁶ However, Argentina argued against the notion of self-evaluation, asserting that the interactive dialogue should constitute the core of the review. A number of States were also concerned that a self-assessment report would be time-consuming,³⁷ with Australia insisting that it ought to be optional for States if they felt they had more information to add³⁸ so as to avoid duplication of treaty-body type reporting obligations.

Most delegations thought it would be useful for the OHCHR compile a dossier of existing information on the country.³⁹ Algeria (on behalf of the African Group), qualified its acceptance on the understanding that the OHCHR should have no role in analysing this information. China and Cuba both stated that this information should exclude information from country rapporteurs on account of their contested status before the Working Group on the review of mandates and the Council. Cuba also requested that all information would be accompanied by comments from States. India, on the other hand, directly opposed this kind of a role for OHCHR, suggesting that the States could refer to OHCHR when necessary during the interactive dialogue.

Considerable time was also given to the question of contributions from ‘other stakeholders’, although opinions varied on whether such input should be permitted at all stages of the process, and to what degree.⁴⁰ The USA and Mexico argued that stakeholder contributions were significant enough that the wording in the non-paper should be changed from ‘HRC could take into consideration...’ to the ‘HRC should take into consideration...’.⁴¹ It should be noted that the USA did not, however, favour ‘other stakeholder’ input at the proposed working group stage of the UPR, but only at the information and plenary stage. New Zealand stated that they could not support a UPR that excluded any relevant information. However, Bangladesh felt that a multiplicity of contributions might overburden the process. China expressed the view that NGO and other information from stakeholders may not conform to the meaning of objective and reliable information under General Assembly *Resolution 60/251*. The Russian Federation suggested that although information from stakeholders could be used the interactive dialogue, it should not be included in the dossier of information compiled by OHCHR. The International Coordinating Committee of National Human Rights Institutions explained that NHRI’s have an important role to play in the UPR, which should be recognised, particularly in the capacity building process.

³⁶ India, Philippines, Malaysia, Algeria (on behalf of the African Group), Cuba, China, Mexico, Lichtenstein, and Azerbaijan.

³⁷ Germany (on behalf of the EU), Australia, the USA, Norway, and Canada.

³⁸ Supported by Belgium and the International Federation for Human Rights.

³⁹ Philippines, Australia, Germany on behalf of the EU, Algeria (on behalf of the African Group), the USA, Columbia, Chile.

China expressed flexibility on the issue.

⁴⁰ Those who raised the issue of NGO participation included the Philippines, Algeria (on behalf of the African Group), Australia, Germany (on behalf of the EU), the USA, Russian Federation, Switzerland, Republic of Korea, Canada, Chile, and the Maldives.

⁴¹ Supported also by Norway.

Discussion of models for the UPR

The final session of the Working Group was a focused discussion on the future model of how the UPR would be undertaken. The three models under discussion were drawn up by the Facilitator on the basis of previous proposals, and were distributed beforehand as an attachment to the non-paper. These were illustrated for the Working Group using a projector, making the Facilitator's explanation easier to follow.

The core distinction between the three models, or in effect Option 1 versus Options 2 and 3, is whether or not the process would employ a system of working groups as a second stage between the compilation of country information and UPR arriving before the plenary of the Council. The three models can in fact be divided into two distinct models, where options 2 and 3 are in fact a slight variation of the same concept. The one identifiable shared characteristic of the three models was the sources for information, which would consist of a compilation of available material by the OHCHR, a self-assessment report based on a standardised questionnaire, and additional information to be provided by relevant stakeholders.

Model Option 1

Option 1 suggests beginning with the collection of material from three sources: a compilation of existing material from OHCHR (treaty bodies, special procedures, other UN information), a self-assessment report from the country concerned based on a standardised questionnaire, and additional information from other stakeholders. This information would then be submitted directly to the plenary session of the Council for consideration, and would be considered during a three-hour session per country. The number of countries to be reviewed each year would depend on whether agreement is reached on a four-year or five-year periodicity. A four-year cycle would require five weeks of plenary at 48 countries per year; a five-year cycle would average out at 39 countries per year and four weeks of plenary.

The Facilitator then posed two questions relating to Option 1. The first was on how all the information from various sources would be brought together for the plenary to be examined. The Facilitator took note of the suggestions by some delegations that experts could be used at this stage to summarise the information. The second question was whether the four or five weeks that would be required under this model to undertake the UPR would fall within the 'normal' sessions of the Council, or whether additional time would have to be set aside.

Many States expressed their broad support for Option 1⁴², with varying views on periodicity, organisation of information and the participation of other stakeholders in the process. The general principle of support for Option 1 centred around its 'simplicity', a phrase re-iterated many times. The question of simplicity was also linked to accessibility by Bangladesh, who stated that it would be difficult for small delegations to attend intersessional working groups, particularly multiple working groups as proposed by Options 2 and 3. Cuba added to this that a plenary session would ensure greater universality in allowing every State to assess the human rights records of others, as opposed to a limited number in a working group.

The States supporting Option 1 proposed different alternatives for the type of information that would be transmitted to the plenary. Algeria (on behalf of the African Group) proposed a self-assessment report conducted at the national level with all input from all stakeholders (but suggested restricting their input only to the national level process).⁴³ It suggested a five-year periodicity so that the State concerned will have more time to prepare subsequent reviews and implement recommendations. This was challenged by Germany (on behalf of the EU), which stated that the UPR should not have to rely on self-assessment reports to conduct the UPR, as the track record of the overdue reports before treaty bodies illustrates that this could delay the process. Algeria countered that the report should not be seen as "an actual" report, but as a

⁴² Those who spoke in favour of Option 1 included China, Cuba, Senegal, Chile, Indonesia, Algeria (on behalf of the African Group), Bangladesh, Guatemala, Iran. Those who favoured a five-year periodicity included Guatemala, Columbia, Chile preferred the four-year periodicity. Bangladesh, Indonesia, Algeria (on behalf of the African Group), Cuba, Iran, Malaysia.

⁴³ Supported by Iran.

document on the State's achievement in implementing international human rights instruments. There would therefore be no concern over any possible delay.

Algeria, on the other hand, remained flexible on the content of the questionnaire. Cuba stressed that questionnaire will only create a 'straight jacket' for countries. Bangladesh supported the US position of not requiring a secondary questionnaire after the first review.

The Russian Federation (Russia) addressed the Facilitator's question regarding how to order information received by the plenary by asserting that the absence of a preliminary review of information meant that the plenary would receive inaccurate or outdated information. Russia recommended therefore that, instead of instituting an expert or working group as an intermediary, the OHCHR's compilation of information should be removed from the equation.

Algeria proposed a process of preliminary review by a 'group of friends' or by a regional grouping to ensure that the plenary was not overburdened. It also stressed that the plenary was an inter-governmental mechanism, and therefore while all stakeholders could be involved in the process, only member states should be allowed to speak. Of those that supported Option 1, only Senegal signalled support for inputs from an independent expert. Senegal and Guatemala stated that all stakeholders should be involved at all stages of the review.⁴⁴

According to Algeria (on behalf of the African Group), the outcome of Option 1 should constitute a summary of discussions and recommendations. India stated that all outcomes should have the consent of the concerned State and the Council could then adopt these outcomes. India further proposed setting up a fund for financial assistance for States in order to implement the recommendations. Russia proposed designating a rapporteur to prepare the draft of conclusions and recommendations.

Concerning the allocation of time, India was the only State in favour of Option 1 to propose that additional weeks be set aside for the UPR. Canada was opposed to this option because of the 'burdensome' nature of the model, and questioned whether 'we could obtain conference facilities for an additional five weeks of full Council sessions per year'.

Model Options 2 and 3

The clear distinction between Option 1 and Options 2 and 3 was the creation of working groups between the information stage and the plenary stage. According to the Facilitator, the Option 2 would provide for four Working Groups, which would comprise of 12 Council member-states in three of the working groups, with the remaining 11 member-states comprising the fourth. Option 3 varied by providing for only two working groups, comprising of 23 and 24 members respectively. It was not decided whether these members would be independent experts or would be government delegates, with the Facilitator proposing that it would be up to the state to choose if they would prefer an independent expert or a government official to be their representative. The Facilitator asked the members of the Working Group to reflect on the issue of experts, with respect to whether they should be government experts or independent, as well as how they feel about a hybrid model.

The Facilitator explained that the country under review would present itself before the working group, instead of the plenary. The Working Group would draft a report with conclusions and recommendations that would be presented in the plenary. The report would take into account all the elements of the information that had been presented, and include the comments of the State being reviewed. It was suggested that, subject to general consensus, the Council could then adopt the working group's conclusions without delay.

The working group model was shown to be less taxing in terms of workload over a four or five year periodicity, both in terms of the work before the respective working groups and the subsequent work that would come before the Council. If the Council adopted a four-year cycle, then 48 states would need to be

⁴⁴ Senegal.

reviewed per year. In this case, the working groups would need four weeks of meetings. This would mean one week per working group under Option 2 and two weeks per working group under Option 3. The Facilitator speculated that if the Council adopted a five-year cycle, reviewing 39 countries per year, then each working group would still need a week (Option 2) or two weeks (Option 3) of meetings each, as the amount of information to be addressed would be cumulatively greater. The USA was quick, however, to point out that the Facilitator's breakdown of time allocation was fractionally incorrect.⁴⁵

Germany (on behalf of the EU), was the first to support Option 2, on the general grounds that a dossier of 12 countries per year per working group was more 'manageable' than any other system. Others who spoke in favour of option 2 included Sweden, Argentina, Czech Republic, Brazil, the United Kingdom, Norway, New Zealand, Liechtenstein, Canada, Republic of Korea, Belgium and Mexico. The language of a 'manageable workload', against the 'burden' of Option 1, was re-iterated by Canada among others.

Germany underscored that as the working group would be undertaking the substantive part of the UPR, it should be representatives of States.⁴⁶ It suggested however that it could be useful to have the working groups headed by an independent expert, where the expert would be in charge of focusing available information so that the information compiled by the OHCHR could be more manageable for the working group.⁴⁷ This independent expert could then table a list of possible recommendations for the working group to discuss. A discussion about possible recommendations in a smaller group would help to avoid a politicised debate in the plenary.⁴⁸ Although the U.K., Brazil and Norway saw value in having individual experts in the working group, they felt that it was more important for the expert to trigger the discussion for the Working Groups. Sweden further recommended that the expert facilitating the discussion would also draft the final conclusions and recommendations of the working group, again on the grounds that this would serve to avoid politicization.⁴⁹ Canada, recommended that "the review would be conducted *both* in working groups and in plenary", in so far as a 'report', rather than shortened conclusions, would be submitted to the Council for discussion.

There was little opposition to the sources amongst those States that supported Options 2 and 3, although Argentina, Germany (on behalf of the EU) and Norway questioned the need for compulsory self-assessment reports, raising the concern that overdue reports might create a backlog in the system. Additional suggestions to those provided by the Facilitator included the suggestion by the Czech Republic that the State under review answer an additional specific questionnaire formulated after the working group plenary, based on the general recommendations of the Working Group. The Republic of Korea suggested that the responses to the second questionnaire should be submitted to the Working Group rather than directly to the Council so the comments could be incorporated into the final draft recommendations of the working group. The USA opposed such suggestions on the grounds that they created an unnecessary layer of additional paperwork.

Hybrid models

Two notable hybrid options were proposed. The USA maintained its insistence that the process was a 'peer review' mechanism and stated that it would prefer to have one working group as any more than one would be impractical and would create an unnecessary secretarial burden. The USA proposed a working group consisting of all UN member states, whose contributions would be channeled to a core group of ten States. Mirroring the language of Algeria, the USA stressed that this should be restricted to States only as part of the 'peer review' process, and therefore other stakeholders would not be able to contribute beyond the information stage.

⁴⁵ The delegate of the USA noted that if the four-year cycle were adopted, then it would be necessary for each of the Working Groups to meet for six days rather than five. In the context of two Working Groups, it would be necessary for them to meet for twelve days rather than ten.

⁴⁶ Argentina and the United Kingdom,

⁴⁷ The use of an independent expert to compile information was supported by Canada.

⁴⁸ Sweden and Norway.

⁴⁹ The Czech Republic also felt that the role for expert recommendations was important.

The Philippines also expressed its preference for an ‘offspring’ of Options 1 and 3 through a single open-ended working group to conduct the review session and draft the outcome for consideration by the plenary. This was to be considered more suitable during the initial year when the Council would be testing the system.

Outcome of the review

The issue of outcome of the review had already reached wide convergence at the first session of the working group. Most States reiterated that the format of outcome of the UPR should include both a summary of the proceedings and recommendations and conclusions, with India and Russia expressing their reservations on the necessity of a ‘statement’ by the Council to this effect. Germany (on behalf of the EU) expounded that the recommendations should be action-oriented and “tailor made” to account for different specificities. It envisaged that this might include training of the judiciary, human rights education, recommendations for States to enter into discussions with OHCHR, and the enhancement of cooperation with other UN mechanisms.

The Facilitator interpreted from the previous session that the ‘content’ of the outcome should be transparent and objective, could provide best practices with an emphasis on cooperation in the promotion and protection of human rights, provide for technical assistance and capacity building and include voluntary pledges and commitments made by States.⁵⁰ Many States were quick to emphasise, however, that technical assistance could only be at the request or with the consent of the concerned State.⁵¹ Cuba and others argued that there were enough capacity building mechanisms already in place, and the problem lay in the lack of space for the State’s involvement. Algeria (on behalf of the African Group) suggested the establishment of an additional fund to aid States in implementing recommendations.

The Facilitator listed as areas requiring further discussion whether the outcome should include an assessment of the implementation of treaty body and special procedure recommendations and conclusions, as well as their follow-up; the appointment of a special procedure mandate, dispatching of fact-finding missions, investigative teams or commissions of inquiry; and the establishment of OHCHR field offices or other forms of field presence. Almost all these proposed elements met with strong objections. Most States objected to assessment of the implementation of the recommendations of treaty bodies or special⁵², as well as the appointment of special procedure mandates, dispatch of fact-finding missions, investigation teams or commissions of inquiry as possible outcomes of the UPR.⁵³ The USA expressly opposed the idea of setting up OHCHR field offices or other forms of field presence as an outcome.⁵⁴

The method of adoption of the outcome was relatively uncontroversial and has reached a general level of convergence. There was broad agreement with the Facilitator’s identified points that the outcome should be adopted by the plenary of the Council, that the reviewed country should be fully involved in the process, that the State concerned ‘should be offered the possibility to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue, and that the outcome should be widely disseminated. The major point of note, raised by Pakistan (on behalf of the Organization of Islamic Conference) was the idea that the outcome document must be adopted by consensus. India and Indonesia stated that the consent of the concerned country would be required to ensure that the UPR remains a cooperative mechanism. There was general agreement, however, on the Facilitator’s one point for further discussion; that ‘decision-making for UPR outcomes should be the same as for other decisions of the Council’. Germany (on behalf of the EU) mentioned that it would be preferable to reach consensus at the outcome, a requirement for consensus would constitute an effective veto for the UPR. Argentina took a much less conciliatory view that States under

⁵⁰ Voluntary pledges were expressly supported by India.

⁵¹ Cuba on behalf of the NAM, Algeria on behalf of the African Group, China, India, Islamic Republic of Iran., Canada, Pakistan

⁵² Pakistan (on behalf of the OIC), China, Indonesia, Iran, Malaysia, and the Russian Federation.

⁵³ Algeria (on behalf of the African Group), Pakistan (on behalf of the OIC), Bangladesh, Cuba, Indonesia, Iran, Malaysia, Norway, and the Russian Federation.

⁵⁴ Supported by Norway, Guatemala, Islamic Republic of Iran, Bangladesh, Canada, Pakistan

review should be fully ‘informed’ but not involved in the outcome, and there should be no negotiation with the concerned State.

Other discussion centered on semantics. Russia and Bangladesh, for example, questioned the Facilitator’s meaning of the word “widely disseminated” and proposed that the outcome should be published the same way as other UN documents.

Follow-up to the review

The debate surrounding the question of follow-up was constructive and well-organised, as many States shared the view that concrete follow-up measures were central to guaranteeing a truly effective UPR that could yield visible results in practice.

There was once again general acceptance of the areas identified by the Facilitator as representing areas of convergence. These constituted: implementation of the outcome by all relevant stakeholders, in particular the State concerned; that the subsequent review should focus, *inter alia*, on the implementation of the preceding outcome; that the Council should have a standing item on its agenda devoted to UPR; that the State reviewed should have the main responsibility in implementing and following up UPR outcomes; and that the international community should discharge its responsibility in implementing the recommendations and conclusions regarding capacity-building and technical assistance.

Certain reservations were however put forward concerning the scope of these elements. Japan, India and the USA, while supporting a fixed agenda item on the UPR, recommended that it should be dealt with at only one of the Council’s sessions each year. Germany (on behalf of the EU) and the USA also requested that the phrase used by the Facilitator relating to the international community’s “discharging its responsibility” be replaced with the term “assist”.⁵⁵ The rationale would appear to be that it places less direct responsibility on States to provide funding for technical assistance. Although not expressly voicing their opposition to the involvement of various stakeholders in the follow-up process, both Algeria (on behalf of the Africa Group) and the Philippines, sought to emphasise the primary responsibility of the reviewed State to implement UPR recommendations. Cuba, on the other hand, was vocal in its opposition and insisted on the deletion of any reference to ‘other stakeholders’.

The elements identified by the Facilitator as requiring further consideration tended, however, to create a much wider divergence on the finer details of follow-up. Indeed, many States objected to *all* the points he had listed as duplicative and burdensome.⁵⁶ These were namely that: the State concerned would report directly on implementation to the Council; other actors ‘such as treaty bodies and special procedures’ should play a role in implementation; a rapporteur should be nominated to ensure follow-up; the consolidation of UPR reports into a global report at the end of the cycle; and the measures to be taken in case of non-compliance by a State with the UPR outcome (or non-cooperation with the UPR mechanism in general).

Germany (on behalf of the EU) first requested that reference to States reporting on implementation should be changed from ‘should’ to ‘could’, so that any obligation to address implementation would be avoided. This position was supported by Pakistan (on behalf of the OIC), India and the USA. The question of UPR follow-up being taken up by treaty bodies, special procedures and others received surprisingly little attention, with only the USA voicing its opposition to the idea. This should not, however, be read to mean that there is a general support for this proposal, but rather that the issue has not yet been adequately addressed.

⁵⁵ With this EU proposal the line of the non-paper would now read, “the international community should assist in implementing recommendations and conclusions regarding capacity-building and technical assistance”.

⁵⁶ Bangladesh, the Islamic Republic of Iran, India, the Philippines and Cuba.

The idea of a consolidated global report was put forward in the recommendations of the High Level Panel on Threats, Challenges and Change⁵⁷ in 2004, and has been supported by Brazil since 2005. Support was also voiced in the Working Group from Argentina and Liechtenstein, with the latter declaring that it would be beneficial to the work of NGOs, civil society and NHRIs. The majority of States who spoke on the subject, however, were opposed to a global report⁵⁸, with Russia arguing that such a document would be out of date by the time of its publication and its values in terms of resources spent therefore questionable.

The appointment of a rapporteur for follow-up also proved unpopular in certain quarters. To Malaysia, it signified a departure from a State-centric approach; to Russia and Algeria (on behalf of the African Group), the nomination of a rapporteur and the debate surrounding the nomination would reintroduce the type of politicisation that the UPR sought to move beyond.

The language of avoiding politicisation and confrontation was heard again in the discussion on measures to deal with non-compliance with UPR recommendations.⁵⁹ Germany (on behalf of the EU) however saw such measures as critical to the effectiveness and legitimacy of the UPR mechanism. Germany suggested that President of the Council could deliver a statement addressing the need for a specific state to comply with the UPR's recommendations as an example of such measures.⁶⁰ Liechtenstein added briefly that in cases of complete non-compliance by states, reviews could take place without the presence of the concerned states, as is the case with some meetings of the treaty bodies. China finally stated that if the Council were to assume such a role, country specificities would have to be taken into account before any decisions were made.

Conclusions and next steps

The Facilitator concluded the session by stating that he felt the Working Group had made very significant progress, and believed that he could now identify elements of convergence that could be turned into consensus. He noted as distinctive elements that require further discussion: the question of 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 other stakeholders; and the implementation of the outcome of the UPR. He concluded his remarks by noting, however, that 'nothing is agreed until everything is agreed.'

The Facilitator will now prepare a working paper summarising the progress of the Working Group on the UPR, to be presented to the fourth session of the Human Rights Council from 12 - 30 March 2007. The discussions during the Council session will also inform the Facilitator's draft of the non-paper he will prepare for the next and final session of the Working Group. The detailed schedule for the next session of the Working Group is yet to be announced but it will meet between 16 – 27 April 2007. The UPR must be complete by 30 June 2007, in accordance with the timeframe provided by General Assembly *Resolution 60/251*. As some States would like to complete the process before the new membership of the Council takes effect (19 June 2007), it is likely that the Council will attempt to adopt its final decisions on the UPR during the fifth session of the Council (from 11 – 18 June 2007).

⁵⁷ See the Report of the High Level Panel on Threats, Challenges and Change, (A/59/565) para. 288 at <http://www.un.org/secureworld/report.pdf>

⁵⁸ Malaysia, Pakistan (on behalf of the OIC), the Republic of Korea, Algeria (on behalf of the Africa Group), Japan and the Russian Federation.

⁵⁹ This view was expressed by Malaysia, the USA, the Russian Federation and Algeria in behalf of the Africa Group.

⁶⁰ Supported by Switzerland. The idea of non-compliance measures was generally supported, without illustration, by the Republic of Korea and Japan.

COUNCIL MONITOR STAFF

Meghna Abraham, Program Manager, Information Program
Gareth Sweeney, Human Rights Officer, Information Program
Eléonore Dziurzynski, Communications Officer, Information Program

AUTHOR

Gareth Sweeney, Human Rights Officer, Information Program

CONTRIBUTORS

Rami Chalabi, Intern
Hannah Klein, Intern
Brigit Morris, Intern
Jumi Rahayu, Intern
Betty Yolanda, Intern

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