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WORKING GROUP TO DEVELOP THE MODALITIES OF THE UNIVERSAL PERIODIC REVIEW (UPR) GENEVA (20-24 NOVEMBER 2006).

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Background

The Universal Periodic Review (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 fulfillment 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 1 year. The Council’s decision 1/103 (30 June 2006) 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. The Working Group met between 20-24 November for four three-hour sessions.

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

Structure of the Working Group's meetings

The first day of meetings included two three-hour sessions. The first three hours were dedicated to presentations on existing review mechanisms including: the World Trade Organization (WTO), International Monetary Fund (IMF) and the Inter American Commission of Human Rights (IACHR). The presentations were then followed by interactive dialogue. The second half of the day was allotted for the discussion of three topics including: terms of reference; objectives and principles of review; and periodicity and order of review. Only the first, terms of reference, was completed at the end of the day.

The next meeting of the working group focused on two main themes; periodicity and order, and process and modalities. At the end of the session there was extra time available to address these topics in more focus and substance which was guided by the facilitator's questions.

The fourth meeting of the working group addressed the topics of outcome and follow-up to the review. Again, there was time at the end of the meeting for the facilitator to instigate deeper dialogue on these topics.

Existing review mechanisms

The first session consisted of a series of presentations by international organizations, with the goal of providing the working group with an overview of established review mechanisms. The World Trade Organization (WTO), the International Monetary Fund (IMF) and the Inter-American Commission of Human Rights (IACHR) all gave presentations to the Council. After the presentations members of the working group asked the panel questions. During this period the United Kingdom asked what obligations states have to cooperate with the review process and if the representative from the WTO could elaborate on the nature of the review. Bangladesh enquired how the IMF develops the periodicity of members and how members are put on the two year cycle of review. Additionally, Argentina enquired into the role NGOs have played with the IACHR.

In response to the UK's question, Mr Clemens Boonekamp from the WTO stated that the fundamental objective of the WTO is to check the trading policy of members and help them gather the benefits from trade. This is achieved by examining the policy of the member and how it is implemented and formulated. Mr Boonekamp explained that the WTO secretariat draws up a report based on facts which is discussed at a multilateral level.

Replying to Bangladesh's question, Mr Geogrey Barnard of the IMF informed the Working Group that a country can be placed on a two-year cycle depending on its size and resources. He stated that a small country that does not have the necessary resources could be put on the two year cycle, but a country such as the USA will always be placed on the one-year cycle of periodicity.

Santiago Canton of the IACHR told the Working Group that NGOs provide life and strength to the Inter-American system. The Commission has its door open to NGOs and they attend meetings and present cases. He specifically referred to a case in Argentina in 1992 where NGOs were the key player in exposing and developing an initiative for the IACHR.

Terms of reference

Resolution 60/251 states that the UPR will be based on "the fulfillment 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"². One of the challenges facing the Working Group for the UPR is establishing a system

² Para 5 (e).

of equal treatment while accounting for the fact that States have varying degrees of obligations or commitments stemming from human rights treaties and other instruments ratified. The point often raised is that the application of varying standards would contradict the principle and objective of equal treatment. Various options were provided at the initial stage, including the *United Nations Charter*, the *Universal Declaration of Human Rights*, international humanitarian law, customary international law and *jus cogens*³, the *Vienna Declaration and Program for Action*, obligations stemming from treaties signed by States and State commitments undertaken when acceding to the Council.

During the Working Group session there was broad consensus on using the *Universal Declaration of Human Rights*⁴ (UDHR) and the *UN Charter*⁵ as terms of reference for the UPR. There was sizeable support for the inclusion of treaty obligations⁶ and commitments⁷ made when acceding to the Human Rights Council (Council). Some members mentioned the application of domestic or national law⁸ as a foundation for the UPR. Other states suggested the use of customary international law⁹ and international humanitarian law (IHL),¹⁰ Opposition to this broader approach was reflected in statements that the UPR was not a legal process, and that, at least according to Malaysia, ‘there would be arguments on what constitute these laws given the different religious background and different legal system we come from.’

Russia reminded the Working Group that it was focusing too much on a legalistic approach and must remember the practical implementation side in the review process. Finland reiterated this point by stating that the UPR should not become a mechanism which investigates human rights violations but instead should serve as a follow-up tool which focuses on implementation.

Three NGOs addressed the Working Group in relation to terms of reference for the UPR.¹¹ Human Rights Watch reminded the Working Group of paragraph 9 of *GA Resolution 60/251*, which states that the UPR should uphold the highest standards; to do this HRW noted that the seven UN treaties reflect these highest standards. The International Service for Human Rights stated that the UPR should take into account treaty ratification to identify gaps in monitoring and that the UPR should give a priority to rights that are not under review from treaties already signed by States.

Objectives and principles of review

Resolution 60/251 states that the objectives of the UPR include: the review of each States obligations and commitments; universality and equal treatment of all States; interactive dialogue based on cooperation with the full involvement of the country concerned and with consideration to its capacity-building needs; and complementing and not duplicating the work of the treaty bodies¹².

During the Working Group session there was agreement that the objectives of the UPR should be: first, to improve the human rights situation on the ground; second, fulfillment of human rights obligations and commitments; third, enhancement of capacity building and technical assistance; fourth, sharing of best

³ *Jus Cogens* applies to all States and are fundamental norms of international law.

⁴ Algeria, Switzerland, Finland, Venezuela, Brazil, Malaysia, Pakistan, Chile, Bangladesh, Uruguay, Argentina, Iran, Japan, Mexico, Singapore, Cuba, Tunisia, USA, Ecuador, Belgium, Egypt, Indonesia, Sri Lanka, Romania, Australia, Italy, China, Human Rights Watch, International Service for Human Rights and Amnesty International.

⁵ Algeria, Switzerland, Finland, Brazil, Malaysia, Pakistan, Chile, Bangladesh, Argentina, Chile, Costa Rica, Ecuador, Peru, Uruguay, Iran, Japan, Mexico, Cuba, Tunisia, Egypt, Indonesia, Sri Lanka, Romania, Australia, International Service for Human Rights and Amnesty International.

⁶ Algeria, Finland, Brazil, Pakistan, Chile, Bangladesh, Iran, Japan, Mexico, USA, Ecuador, Indonesia, Romania, Australia, Human Rights Watch, International Service for Human Rights.

⁷ Algeria, Finland, Malaysia, Chile, Bangladesh, Japan, Mexico, Singapore, USA, Ecuador, Indonesia, Sri Lanka, Romania, Australia.

⁸ Algeria, Malaysia, Chile, Bangladesh, Iran, Japan, Belgium, Indonesia, ISHR.

⁹ Chile, Ecuador, Human Rights Watch.

¹⁰ Argentina, Ecuador, Belgium.

¹¹ Human Rights Watch, International Service for Human Rights and Amnesty International.

¹² Para 5 (e)

practices, support and protection of human rights; and fifth, allowing the Council to respond to urgent human rights situations.¹³

The Working Group agreed that the UPR should be based on objective information with a process of interactive dialogue which promotes universality, interdependence, indivisibility of all human rights. Most states agreed that the UPR should not place additional obligations on states and that the UPR should complement existing human rights mechanisms, thus presenting an added value. There was additional convergence among the working group that the UPR should ensure equal treatment and be non-selective in its approach.

There were differing views on whether the UPR should take into account country specificities and levels of development. Bangladesh, with the support of Malaysia, proposed that a country's level of development and individual problems should be taken into account under the examination of the UP. This applied also to the periodicity of review, which should likewise be differentiated on the basis of differing capacity for implementation and follow-up of UPR recommendations.

Human Rights Watch (HRW) stated that the objective of the UPR is to improve each state's fulfillment of its human rights obligations. HRW said that independent experts should be involved in all aspects of the review including the preparatory stage and the interactive dialogue. The participation of NGOs in the review process was also addressed by HRW.

Periodicity and order of review

Resolution 60/251 requires that Council members be reviewed by the UPR during their term of membership.¹⁴ The review of all 191 member States to the UN at periodic intervals will create stress and pressure on the Council's workload. To ensure that the Council isn't overburdened by the UPR process the Working Group needs to develop methods which will balance a substantive review while avoiding backlogs.

During the Working Group session many states supported a review cycle frequency of either three¹⁵ or five¹⁶ years. However, Pakistan, Bangladesh and Indonesia were of the view that the periodicity of a state should depend on the level of development, thus developed countries would be reviewed every three years while developing countries are reviewed every five to seven years. The issue of equal geographic representation during the review cycle was also addressed by States.¹⁷ Additionally, there were differing views concerning whether the UPR should be conducted inter-sessionally or during the normal meeting times of the Council.

Amnesty International was of the view that the Working Group would be rewriting General Assembly *Resolution 60/251* if States are not reviewed every three years. If the Council decides to depart from the letter of the resolution concerning periodicity Amnesty International was concerned that this might move into other areas as well. Amnesty added that the review is more than an interactive dialogue and that states should keep in mind the difference between the dialogue and review.

¹³ H.E. Mr Mohammed Loulichki, Permanent Representative of Morocco, Facilitator for the Intergovernmental Working Group to develop the modalities of the universal periodic review mechanism (UPR), Concluding Remarks, Friday 24 November 2006, Palace National Geneva Switzerland.

¹⁴ Para 9.

¹⁵ Supporters of a three year cycle include: Columbia, Norway, Venezuela, Uruguay and Argentina. Supporters of a three to four year cycle include: Finland, Romania, and Switzerland.

¹⁶ Supporters of a five year cycle include: Korea, Bhutan, USA, China, and India. Supporters of a five to six year cycle include: Malaysia, Japan, Pakistan, Singapore, and Thailand.

¹⁷ States that noted equal geographical representation in the UPR included: Venezuela, Pakistan and Iran.

Process and modalities of review

There are two main models for the UPR, a short and long process which could be concluded within the sessions of the Council or in inter-sessional meetings. The review could consist of a preparatory stage where information is gathered from various sources, including State reports, various UN agencies, NHRI and NGOs. From this information a list of issues could be developed and would be the basis of an interactive dialogue. This would involve either the participation of independent experts and States or exclusively States.

Broadly, there was convergence on the broad process of review during the Working Group sessions. This would consist of a report or summary submitted to the Council, which would then be evaluated and discussed. More specifically, states still widely differed on what information this report would cover; where the information would come from; who would evaluate it and write up a list of issues; where it would be evaluated and who could participate in the interactive dialogue. States also maintained differing opinions on whether the final review phase should be a peer review process¹⁸ or whether it should involve other actors such as independent experts¹⁹ and NGOs.

There were a variety of suggestions made on how the meeting could take place. Some members suggested forming sub-committees²⁰, while other states saw the report being examined in the plenary in front of all the Council members as a means to better ensure equality of treatment.²¹ Norway suggested a process where independent experts or panels would prepare lists of issues and the establishment of working groups or sub-committees for the interactive dialogue. On the other hand, Singapore supported a process of peer review and stated that NGOs and NHRIs could provide information and supplementary reports in the preparation stage but should not be able to participate in the interactive dialogue.

No agreement was reached on where the information for the review would come from, but proposed sources included: UN treaty body reports, special procedures, common country assessments by other UN agencies, national human rights institutions (NHRIs) and NGOs. It was suggested by Canada that this information might be presented in the form of a compilation by the OHCHR of a country dossier. Finland, on behalf of the EU, went beyond this suggestion by proposing the establishment of a database by the OHCHR, and a more proactive role for the OHCHR of identifying key human rights challenges that a country is facing. It also stated that it would be useful to hear OHCHR's own opinion on how it feels it might assist the UPR.

Both Amnesty International and Human Rights Watch also addressed the process and modalities of the UPR. According to Human Rights Watch, the preparatory stage would include the appointment of experts by the Council, who would then serve as a rapporteur for a State. These experts would come from a roster prepared by OHCHR. Information would be compiled by OHCHR, including sources such as treaty bodies, special procedures, the Security Council and NGOs. The expert would compile a State dossier with a list of issues and provide this to the Council. During the interactive dialogue the state would reply to the list of issues in sub-committees comprised of three members of each regional group.

Outcome of the review

Resolution 60/251 states that the UPR should provide “recommendations with regard to the promotion and protection of human rights”²². Outcomes of the UPR could take the form of a detailed document consisting of the findings of experts or the Council, and/or conclusions and recommendations.²³ Additionally the Council could recommend measures for capacity building and technical assistance to help the State

¹⁸ Bhutan, Malaysia, Cuba,]

¹⁹ Finland, Argentina, Chile, Costa Rica, Ecuador, Peru, Uruguay, Norway, Netherlands and Switzerland supported the use of independent experts.

²⁰ Canada and Korea proposed of four sub-committees meeting inter-sessionally.

²¹ Japan and Iran.

²² Para 5 (i)

²³ M. Abraham, *A New Chapter For Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council*, (ISHR and FES, Geneva, June 2006), available at www.ishr.ch/handbook.

implement its human rights obligations. If deemed necessary, the Council could appoint rapporteurs to monitor situations, request the establishment of OHCHR offices to monitor the human rights situation in the country under review; and recommend action by the Security Council or the General Assembly.

There was a great deal of support during the Working Group for the outcome document of the UPR to be a summary of the interactive dialogue. This summary would also include recommendations and measures which focus on capacity building and technical assistance in order to help the state meet its commitments. There were differing views, however, on whether such summaries would be written by sub-committees consisting of independent experts or by the Council itself. In either case, the outcome document would be adopted by the plenary. Pakistan followed from this point by proposing that the outcome document should be adopted by consensus in the plenary. The UK noted in response that the Council would fall short of its objectives if States were in charge of providing advice and recommendations, since they are not experts in human rights. Additionally, the UK agreed that the outcome should be adopted in the plenary, but had reservations to adoption by consensus due to the fact that the reviewed state could in effect veto the report.

Brazil suggested that after the report had been submitted it could be published by the OHCHR and all the reports for the three year cycle could be combined into a global report.²⁴ Additionally, Finland noted that recommendations should be addressed to the OHCHR and other UN agencies on ways to help the reviewed country meet its obligations. Finland also suggested the creation of a database on the OHCHR website which could be accessed by all stakeholders.

Human Rights Watch noted that the outcome of each session should comprise of a set of recommendations and conclusions. The recommendations would take into account capacity building and technical assistance. They would also inform the UN thematic and country rapporteurs, OHCHR missions or offices within that country and other UN agencies on how they may contribute to improved human rights protection. Human Rights Watch further stated that the Council should have the power to convene an earlier future review of a country if necessary, provide recommendations to the Security Council to consider the situation if it has an impact on international peace and security, and recommend to the General Assembly the suspension of a Council member for gross violations of human rights.²⁵

Follow up of the review

During the Working Group sessions there was broad consensus that the follow-up to the UPR should take place during the next review cycle of the state concerned.²⁶ There were clear differences of opinion, however, concerning whether follow-up may be aligned to the appointment of special rapporteurs, the establishment of fact-finding missions and the adoption of country specific resolutions, establishing field presences and financing technical assistance and capacity building.²⁷ Concerning technical assistance and capacity building, Nigeria supported the establishment of *ad hoc* fund. Others instead stressed that appropriate mechanisms already exist and could be used more appropriately.

Brazil suggested that in extreme cases the UPR could recommend that a “pool” of thematic special procedures could visit a country to assess the human rights situation, but only on the approval of the Human Rights Council. In the same light, Finland noted that fact finding missions or special rapporteurs could be used to assist the state in addressing their human rights commitments. Conversely, Russia found this difficult to envision and thought that it would lead to confrontation and politicization in the Council.

²⁴ This concept can be linked to Brazil’s aborted draft resolution at the Commission on Human Rights in 2005, which called for the creation of a global human rights report to be compiled by the OHCHR. The resolution was founded on a suggestion of the Secretary General’s High Level Panel on reform, which preceded the Secretary General’s own reform report ‘In Larger Freedom’. The Brazilian resolution was withdrawn as it failed to receive sufficient support at the drafting stage.

²⁵ Human Rights Watch statement, Thursday 23 November 2006.

²⁶ Brazil, Norway, Switzerland, Cuba, Philippines, Russian Federation, Sri Lanka, Bhutan, Canada, Mexico,

²⁷ H.E. Mr Mohammed Loulichki, Permanent Representative of Morocco, Facilitator for the Intergovernmental Working Group to develop the modalities of the universal periodic review mechanism (UPR), Concluding Remarks, Friday 24 November 2006, Palace National des Nations, Geneva Switzerland

Conclusion and future meetings of the Working Group

At the end of the inter-sessional meeting of the Working Group for the UPR the facilitator noted that the dialogue had been interactive in nature and included many stakeholders. He continued to state that the session had moved beyond general statements to concentrate on on complex issues of a conceptual and practical nature. The dialogue allowed the facilitator to find many points of convergence and to pinpoint areas that required further discussion and clarification.

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 of the facilitator outlining the various points of convergence and areas that required further discussion.²⁸ This was followed by an interactive dialogue of the Council, which allowed states to further elaborate on positions expressed in the Working Group.²⁹

The Working Group is scheduled to reconvene for six meetings from 12-16 February 2007. It can be expected that the discussions will resume from the conclusion of the last session and the informal dialogue of the Council. This should be centred around the content of the facilitator's latest non-paper³⁰, which is structured according to points of convergence, areas that require further negotiation, and a final 'compromise proposal' of the facilitator under each subject heading. It can also be expected that there will be greater urgency to the work of the Working Group, given the expectation of General Assembly Resolution 60/251 that the UPR is operational by the end of June 2007.

²⁸ 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

²⁹ 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

³⁰ 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

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