

THE UNIVERSAL PERIODIC REVIEW: A NEW HOPE FOR INTERNATIONAL HUMAN RIGHTS LAW OR A REFORMULATION OF ERRORS OF THE PAST?

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ABSTRACT

The following article looks into the newly created Universal Periodic Review, a mechanism for the evaluation of the human rights situation of all United Nations State members, briefly explaining the origin of the Universal Periodic Review, as well as the objectives it pursues, the principles that guide the process and the different stages of carrying out the review itself. The article also refers to the experiences of three countries that were reviewed under during, namely, Brazil, South Africa and Poland, in order to illustrate how the Universal Periodic Review operates in practice, thereby attempting to give the reader a basic understanding of why this new mechanism was created, how it is structured, its innovations and intention to correct both problems and flaws of the past and the transition of the review from paper to practice.

Key words: United Nations Human Rights Council; United Nations Commission on Human Rights; Universal Periodic Review (UPR).

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*EL EXAMEN PERIÓDICO UNIVERSAL, ¿UNA
ESPERANZA PARA EL DERECHO INTERNACIONAL DE
LOS DERECHOS HUMANOS O UNA REFORMULACIÓN
DE ERRORES DEL PASADO?*

RESUMEN

El presente artículo aborda el nuevo mecanismo de evaluación de la situación de derechos humanos en los Estados miembros de las Naciones Unidas, el Examen Periódico Universal. Se hace una breve explicación de su origen histórico, así como una descripción de los objetivos que persigue, los principios que guían su implementación, y las diferentes etapas de desarrollo del proceso de evaluación. También se hace referencia a las experiencias de tres países (Brasil, Sudáfrica y Polonia) para la ilustrar la puesta en práctica del mecanismo, intentando así darle al lector un entendimiento básico del porqué se creó este mecanismo, cómo está estructurado, sus innovaciones e intenciones de subsanar dificultades y problemas del pasado, y la transición del examen del papel a la puesta en práctica.

Palabras clave: *Consejo de Derechos Humanos de las Naciones Unidas; Comisión de Derechos Humanos de las Naciones Unidas; Examen Periódico Universal (EPU).*

Summary: I. Introduction.- II. From the United Nations Commission on Human Rights to the United Nations Human Rights Council.- III. The Universal Periodic Review.- A. Principles and Objectives.- B. Basis of Review and Guidelines.- C. The Review.- D. Outcome of the Review.- E. Follow-up.- IV. First Session Experiences.- A. Brazil.- B. South Africa.- C. Poland.- D. Lessons Learned and Issues of Main Concern.- V. Concluding Remarks.- Bibliography.

I. INTRODUCTION

The United Nations Commission on Human Rights was a highly criticized human rights organ that with time, gradually lost credibility and legitimacy, by becoming what many considered a highly politicized forum. Increased pressure for United Nations member States reached a breaking point, and in the year 2006 the Commission was replaced by a new General Assembly organ named the Human Rights Council. Under the mandate given by the General Assembly to the Human Rights Council, a new mechanism for the evaluation of the human rights situation in UN member States was to be created. This new mechanism, the Universal Periodic Review, is the outcome of an ongoing debate within the UN, and accordingly is it has evolved; structured in an innovative way, evaluating every four years all UN member States, seen as an opportunity for cooperation among different countries, and giving way to the participation of different relevant stakeholders such as NGOs and civil society. These are a few of the new particular characteristics of this mechanism, which make it seem as a ground-breaking process within the Universal System for the Protection and Promotion of Human Rights.

II. FROM THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL

The Commission on Human Rights (hereinafter, the Commission) was established during the first ECOSOC meeting that took place on December 10 of 1946, thereby becoming the first and exclusive political body within the UN System dedicated solely to human rights. Hierarchically subordinated to ECOSOC, the Commission consisted of diplomatic representatives of 53 member states elected by ECOSOC for a three year term. Initially, the main objective of the Commission was to promote human rights, through the drafting of conventions and declarations, unable to take action over petitions, as ECOSOC had clearly stated out that the Commission had “*no power*

*to take any action in regard to any complaints concerning human rights*¹. Subsequently, the Commission's mandate was broadened, through ECOSOC Resolution 1235 (XLII) OF 1967, allowing for the public discussion of human rights issues, through the appointment of special rapporteurs who would carry out a thorough study of the human rights situation of a specific country and submit a report to the Commission, which would ultimately decide on the actions to be taken. Due to the fact that the Commission would only appoint a special rapporteur on cases in which countries had a clear pattern of gross human rights violations, States were heavily opposed to being subject to such examination, making of this an increasingly politicized mechanism. In an attempt to avoid political pressures, the Commission established thematic rapporteurs who would report on issues regarding their particular mandate. In 1970 ECOSOC adopted Resolution 1503 (XLVIII) which allowed the Commission to review individual communications.

Despite the efforts made to modify the Commission's work and mandate, it continued to be a highly criticized organ, and with time it lost legitimacy and credibility. This was the result, of what was considered by many as the use of selectivity criteria and double standards, as well as the lack of compliance by member States with both the recommendations given by mandate holders as well as with treaty obligations. The composition of the Commission was also an issue of debate, because many of its members had critical situations of human rights violations. This condemnation reached its peak point in 2004 with the election of Sudan as one of its 53 members.

Responding to this problematic context, the 15th of March of 2006², the United Nations General Assembly created the Human Rights Council (hereinafter, the Council) to replace the Commission of Human Rights. This new Council was given a higher status. It is no longer an organ of ECOSOC, but rather, directly related to the General Assembly as its subsidiary organ.

1 ECOSOC Res. 75(V) 1947.

2 GA Res. 60/251.

The Council consists of 47 members, elected by the majority of the members of the General Assembly, by secret ballot, based on equitable geographical distribution, without the possibility of reelection after two consecutive terms. In order to correct errors of the past, an additional requirement was established, namely that for a country to be elected as a member of the Council, it should uphold the highest standards in the promotion and protection of human rights. In accordance with this new requirement, there is also the possibility for suspension to any member that commits gross and systematic human rights violations.

The General Assembly decided that the Council would “assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission” this includes the special procedures that were established by the former Commission to address specific country situations or thematic issues. This is a transitional arrangement and the Council shall determine which of the Commission’s mandates, responsibilities and functions will remain unaltered, which will be changed and which will disappear.

In the same resolution where the General Assembly created the Council, it was established that the Council would:

“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”.

This new mechanism, the Universal Periodic Review (UPR), is the main topic which will be studied and analyzed throughout this article.

III. UNIVERSAL PERIODIC REVIEW

The UPR was established as a mechanism that would allow the Council to look into the human rights situation of all countries. Each state will be reviewed in the fulfillment of their human rights obligations and commitments independently of their treaties obligations³.

A. PRINCIPLES AND OBJECTIVES

The Council outlined a number of principles the UPR should follow, the first being the promotion of the universality, interdependence, indivisibility and interrelatedness of all human rights. It also considered the UPR to be a cooperative mechanism based on objective and reliable information and on interactive dialogue, and as an intergovernmental process. The UPR is United Nations Member-driven and action-oriented, allowing the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions, and conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner⁴.

The objectives pursued by the UPR are: the improvement of the human rights situation on the ground; the fulfillment of the State's human rights obligations and commitments, and assessment of positive developments and challenges faced by the State; the enhancement of the State's capacity and of technical assistance; the sharing of best practice among States and other stakeholders; support for cooperation in the promotion and protection of human rights; and the encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights⁵.

3 Eric Tistounet, *Facts and Figures in The First 365 Days of the United Nations Human Rights Council*, 56-67 (Human Rights Council, Geneva, June 2007).

4 HRC Res. 5/1 , Annex, Section IB.1.

5 HRC Res. 5/1, Annex, Section IB.2.

B. BASIS OF REVIEW AND GUIDELINES

After much debate on what the basis of the review would be, and whether it would include international humanitarian law, a commonly shared compromise was established. It was decided that the basis of review would be: The Charter of the United Nations, the Universal Declaration of Human Rights, Human rights instruments to which a State is party, voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council. Although international humanitarian law was not clearly stated out as a basis of review, the Council recognized its complimentary nature to international human rights law, and in that sense it determined that international humanitarian law would be taken into account.

Having established the principles, objectives and basis of review of the UPR, the process itself must be addressed in order to have a better idea of how it is carried out and to evaluate the success or failure in the outcome.

As the General Assembly stated out in the resolution that created the Council and the UPR, this mechanism should not interfere with other human rights mechanisms or treaty bodies nor should it duplicate them. This meant that the Council had to establish clear differences between the UPR and the mechanisms of evaluation of other UN treaty bodies.

This was accomplished by establishing that the documents on which the review would be based, were not going to be exclusively the ones submitted by the State, but it would also take into account a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents; as well, it would include reliable information provided by other relevant stakeholders, which would also be summarized by the Office of the High Commissioner for Human

Rights⁶. The participation of relevant stakeholders is undoubtedly an innovation, especially due to the fact that throughout the debate on the framework of the UPR, within the Council, there were very opposite points of view regarding this particular aspect⁷. Likewise, in the information prepared by the State which can take the form of a national report (written or oral), the Council encouraged the States to prepare the information through a broad nationwide consultation process with all relevant stakeholders. Here once again the NGOs and civil society play an important role.

Due to the fact that Council has to review a large number of states each year⁸, and in order to guarantee fair treatment, certain requirements were established, such as : the State's written report shall not exceed 20 pages, the compilation prepared by the Office of the High Commissioner for Human Rights will include the information contained in the reports of treaty bodies, special procedures, and other relevant official United Nations documents; and the summary of the information of relevant stake holders shall not exceed 10 pages.

The Council also outlined a series of general guidelines for the states to prepare the information for the UPR. The guidelines include the following: (i) description of the methodology and the broad consultation process followed in preparing the information provided under the universal periodic review; (ii) background of the country under review and framework (normative and institutional framework) for the promotion and protection of human rights⁹; (iii) promotion and protection of human rights on the ground¹⁰;

6 HRC Res. 5/1, Annex, Section ID.1.

7 Mohammed Loulichki, *The Universal Periodic Review or the Promise of a New Mechanism for the Protection of Human Rights in The First 365 Days of the United Nations Human Rights Council*, 81 (Human Rights Council, Geneva, June 2007).

8 The UPR will examine 192 UN member States, every four year, which means the Council will review 48 countries per year.

9 This includes: constitution, legislation, policy measures, national jurisprudence, human rights infrastructure including national human rights institutions and scope of international obligations identified in the "Basis of review" in Resolution 5/1, Annex, Section IA.

10 This includes: implementation of international human rights obligations identi-

(iv) identification of achievements, best practices, challenges and constraints; (v) key national priorities, initiatives and commitments that the State concerned intends to undertake in order to overcome those challenges and constraints and to improve human rights situations on the ground; (vi) expectations of the State concerned in terms of capacity-building and requests, if any, for technical assistance; and (vii) follow-up of the previous review¹¹.

These guidelines clearly differentiate the UPR from treaty body periodic reports, because if carried out accordingly, the outcome is an evaluative report that does an in-depth analysis of the country's human rights situations, both the good and the bad, giving way to compromises for the future and cooperation assistance from other countries. This differs from periodic reports to treaty bodies that generally only include legislation, policy measures, national jurisprudence, human rights infrastructure and the implementation of international human rights obligations of that given treaty.

C. THE REVIEW

The review is carried out under the leadership of a working group, which consists of the 47 member States of the Council and chaired by the President of the Council. The State under review chooses the composition of its delegation. Relevant stakeholders may attend the review in the Working Group, however, they may not actively intervene or participate in the discussions, playing the role of spectators. In order to facilitate the review, a group of three rapporteurs, known as the Troika, is selected by drawing lots of members of the Council and from different Regional Groups¹². Each State under review will have a different Troika¹³.

fied in the "Basis of review", national legislation and voluntary commitments, national human rights institutions activities, public awareness of human rights, and cooperation with human rights mechanisms.

11 A/HRC/DEC/6/102.

12 The country concerned may request that one of the rapporteurs be from its own Regional Group and may also request the substitution of a rapporteur, but only once.

13 HRC Res. 5/1, Annex, Section ID.2.

The review consists of three stages, based on an interactive and participative dialogue, facilitated by the troika, and whereby those participating in the review have the opportunity to address different issues. The first part of the review is the State's presentation of the national report, and during this stage the State also addresses questions and issues that have been previously submitted in writing to the Working Group by other States. The second stage is the interactive dialogue, in which States intervene to ask questions and make recommendations as well as offer technical assistance to the State under review. Finally, the State under review will state its concluding remarks, in which observations on other States recommendations may be addressed, although the State may choose to make these observations in writing, subsequently, in the time between the working group session and the *plenary* of the Human Rights Council¹⁴.

The duration of the review will be three hours for each country in the working group, additional time of up to one hour will be allocated for the consideration of the outcome by the plenary of the Council, and there will be a half hour period for the adoption of the report of each country under review in the working group.

D. OUTCOME OF THE REVIEW

The outcome of the review will be presented in the form of a report which will summarize the proceedings of the review process, as well as conclusions, recommendations, and voluntary commitments of the State concerned. Given that the UPR has been conceived as a cooperative mechanism, in developing and carrying out the UPR process, States should share best practices, provide technical assistance among each other and enhance cooperation for the promotion and protection of human rights. All these elements should be reflected in the report prepared and given by the troika. In this report the recommendations and conclusions will refer exclusively to what was discussed and addressed in the interactive dialogue and if the State under review expressed its opinion on the

14 Id.

recommendations, the report will clearly state out which of these were accepted and which were rejected.

The report is adopted by a resolution of the Human Rights Council, during a plenary session. During this plenary session, the State can respond questions and issues that were not sufficiently addressed during the interactive dialogue, as well as discuss the recommendations proposed during the interactive dialogue. Recommendations that enjoy the support of the State under review will be identified as such, and other recommendations and the comments of the State will be noted and included in the outcome report adopted by the Council. Unlike the working group session, during the plenary session relevant stakeholders may participate and make general comments.

E. FOLLOW-UP

As established by the Council, the UPR will evaluate the human rights situation of a country with a periodicity of four years in between reviews. Each State that has undergone the review process has the duty to implement the recommendations outlined in the final outcome report. With the consent of the State concerned, the international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance. The implementation and fulfillment of those recommendations will be the basis on which the subsequent review will be carried out. If a State does not cooperate with the UPR mechanism, the Council will address cases of persistent non-cooperation with the mechanism, as appropriate.

IV. FIRST SESSION EXPERIENCES

The first session of the UPR Working Group of the Human Rights Council was held in Geneva from April 7 to 18, 2008. During this first session, the human rights situation of 16 States was evaluated through the UPR mechanism. The first group of States included: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the

United Kingdom, India, Brazil, the Philippines, Algeria, Poland, the Netherlands, South Africa, the Czech Republic and Argentina. Many lessons were learned after this first session and the Council adjusted certain requirements for the development of future sessions. This article will look into the UPR of three States included in this 1st session: South Africa, Brazil and Poland.

A. BRAZIL¹⁵

Brazil's Troika members for the UPR were: Saudi Arabia, Gabon and Switzerland. After the first session was completed, Brazil's UPR was considered one of the most successful and fruitful. On the one hand, the working group acknowledged the broad participation of the civil society and all relevant stakeholders on the consultation process for preparing the information for the national report, and on the other hand, Brazil's report presented both a sociological and historical analysis of the context of many of the problems it faces in the promotion and protection of human rights, as well as an outline of the cultural aspects of the difficulties and flaws that the country faces. Brazil acknowledged its responsibility over cases of arbitrary executions, abuse of power, excessive use of force, torture, etc. It also emphasized on the persistence of discrimination. Brazil assessed all fifteen of the recommendations brought forward during the interactive dialogue, and accepted all of them. It also voluntarily assumed the commitment to create tools to enable internal monitoring of human rights situations, and it will prepare annual reports in accordance with this commitment.

B. SOUTH AFRICA¹⁶

South Africa's Troika members for the UPR were: Zambia, Guatemala and Qatar. South Africa submitted a written national report for the UPR, but due to the fact that it exceeded the limit of pages allowed it was not accepted by the Council as basis of

15 A/HRC/8/27.

16 A/HRC/8/32.

review. Accordingly South Africa's Review relied on the oral presentation made by the State in the working group session. Within the interactive dialogue held in the working group session, 22 recommendations were brought forward and included in the report of the working group. South Africa decided it would respond to these recommendations in the outcome report adopted by the Human Rights Council at its eighth session. South Africa's voluntary commitments were outlined in an annex to the country's oral presentation. During the interactive dialogue many delegations praised South Africa for both the quality of their presentation and their national report, as well as acknowledging the achievements of the country regarding human rights issues. HIV/AIDS-related difficulties as well as discrimination against women were two of the issues mainly discussed, and many of the recommendations were related to these two specific issues.

C. POLAND¹⁷

Poland's Troika members for the UPR were: Brazil, Japan and Angola. Poland's UPR is brought to the attention to illustrate how European Union member countries were particularly harsh on fellow member countries, particularly those that recently have become part of the EU. After the interactive dialogue, 29 recommendations were brought up. Poland decided, just as South Africa did, to respond to these recommendations on the plenary session of the Council where the final outcome would be adopted. This was a common decision among European Union member countries under the UPR. Many of the recommendations were very specific and concrete, unlike recommendations given to other countries under review which were of a more broad and general nature. Likewise, other recommendations were direct references to the recommendation of the Council of Europe organ bodies.

17 A/HRC/8/30.

D. LESSONS LEARNED AND ISSUES OF MAIN CONCERN

The first session was a learning experience for both the States under review, as well as for the Council itself. From practical aspects and simple rules of form for the presentation of the reports, the UPR went through some adjustments and some issues were defined along the way.

One of the main discussions that were an issue of debate was the nature of the recommendations given in the different sessions of the working group. After much discussion a decision was adopted, where it was stated that each recommendation would clearly identify the country that was making it, this way the recommendation was a country's particular opinion and not the opinion working group as a whole. To avoid any confusion, the following paragraph was included in every working group report: *“All conclusions and/or recommendations contained in this report reflect the position of the submitting State(s) and /or the State under review thereon. They should not be construed as endorsed by the Working Group as a whole”*.

Other issues commonly addressed during this first session include: enforced disappearance, arbitrary executions, torture, strengthening of the justice system and fight against impunity, respect to human rights within counteractive measures against terrorism (abuses and violations of human rights while implementing measures to fight terrorism and terrorist groups), gender issues, child rights, sexual and racial discrimination, migrants, and freedom of speech and of opinion. After the conclusion of this first session, it also became evident that each country had to emphasize on certain issues of specific concern, and that in a 20 page report or a 60 minute intervention, it was impossible to address all of the human rights issues.

The lessons learned from this first session served as input for the subsequent sessions. The Council through its Secretariat made adjustments to the rules of procedure for carrying out the session, the rules of form concerning written reports and consolidated the UPR process according to its development in practice.

CONCLUDING REMARKS

The UN General Assembly assumed the challenge of replacing the Commission and establishing the Council, as it has been correctly expressed by former Council President Luis Alfonso de Alba: *“The creation of the Human Rights Council has been a difficult and risky attempt to deal in an improved way with human rights issues within the United Nations”*. Only time will tell how effective the Council has been in correcting errors of the past, remedying Commission flaws, and de-politicizing the human rights discourse within the UN. The UPR is certainly an innovative attempt to achieve the goals that have been established, however, its success and effectiveness will only be possible if the States consciously participate in the process following the given guidelines, working groups follow the procedure objectively, and different stakeholders participate in carrying out the review process. The first experience has proven to be partially successful. The States reviewed were willing to make some commitments and both technical assistance and cooperation was offered by some countries. Nevertheless, historical political discussions were unavoidable during the session and this influenced the number and nature of the recommendations made to each particular State under review. The UPR should not be fully judged by this first stage, nor should it be dismissed due to its political nature. Every mechanism that takes place within the UN forum will have a political content and this is both the asset and drawback of the UN. After a four year period, it will be possible to draw a better picture of the UPR, when the first States that have undergone the review go through the UPR process once again and provide an account on their follow up of the recommendations. Only then will it be possible to judge the success or failure of the mechanism. Hopefully, all participants on the UPR process give it a chance, and play an active role in both its development and success.

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