

US and the Universal Periodic Review
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On March 15, 2006, the UN General Assembly passed a resolution [60/251] to replace the Commission on Human Rights with the Human Rights Council (the “HRC”). The resolution also established a process, known as the Universal Periodic Review (the “UPR”), by which the human rights obligations and commitments of all 192 UN member states would be reviewed every four years.¹ Since the first UPR session in April 2008, sixteen countries have been up for review at three two-week sessions per year. By 2011, every UN member state will have been reviewed and the US will be reviewed for the first time during the Working Group’s ninth session, scheduled for November 2, 2010 through December 3, 2010.

1. The UPR Mechanism

Each UPR is conducted by the UN HRC’s UPR Working Group (“Working Group”), comprised of the forty-seven state members of the HRC. UN member states that do not sit on the HRC can also choose to take part in the dialogue that accompanies each member state review. The UPR process examines the degree to which countries abide by their obligations under the United Nations Charter, the Universal Declaration of Human Rights, treaties ratified by the state being reviewed, voluntary commitments, national programs and applicable international humanitarian law. Human rights compliance is reflected in submissions compiled by the High Commissioner for Human Rights (the “HCHR Compilation”), comprising a national report submitted by the state under review, submissions of other UN bodies, as well as submissions by NGOs and other stakeholders. However, while NGOs can submit reviews to be included in the HCHR Compilation and attend the UPR sessions, they cannot participate in any UPR discussions. Further, private human rights experts are not formally involved

¹ See U.N. Doc. A/RES/60/251, pp. 2-3 (“Decides that the Council shall . . . (e) 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; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session”).

in the UPR process (although states can choose to include them in their own delegations).

Following each member state review, the HRC produces an “outcome report” (the “UPR Outcome Report”) that provides a summary of the discussion. Within forty-eight hours of each review, the UPR Outcome Report, containing recommendations from countries and the reviewed state’s preliminary comments, is adopted by the Working Group. The UPR Outcome Report must then be adopted in a plenary session of the HRC where the reviewed state and others, including HRC member and observer states, NGOs and stakeholders, may comment.

Upon completion of the UPR, compliance with the recommendations is a state issue, but when member states are up for a second review four years later, the state must provide information as to how they have implemented the recommendations of the first review. In cases of persistent non-cooperation, the HRC will decide on measures to address the non-compliance.

2. The UPR in Context

As a state-driven process, the UPR process represents a break from the nature of the primary human rights mechanisms employed by the HRC’s UN Charter-based predecessors -- the Sub-Commission on the Promotion and Protection of Human Rights (the “Sub-Commission”) and the Commission on Human Rights.

The UPR also differs significantly from the review process employed by UN treaty bodies -- committees formed to monitor the implementation of core international human rights treaties.

a. UPR Compared to Prior Charter-based Review Mechanisms

The Sub-Commission, first convened in 1947, was the main subsidiary body of the Commission on Human Rights until its final meeting in August 2006. The Sub-Commission was composed of twenty-six human rights experts and their alternates, if any, elected upon nomination of member state governments for a term of four years. The Sub-Commission met four weeks annually in August and carried out foundational work for a

large number of human rights standards that were ultimately adopted by the Commission. Much of the Sub-Commission's work originated as initiatives focusing on new and emerging areas of human rights law. The Sub-Commission also allowed NGOs to participate in its sessions, and regularly relied on allegations from any person or group, including victims claiming knowledge of human rights violations. Based on its expert review of specific human rights violations and emerging areas of human rights law, the Sub-Commission adopted resolutions and decisions for the Commission's consideration. This expert-driven review differed considerably from the UPR mechanism. As noted above, there is no role for independent human rights experts in UPR reviews, except as stakeholders in helping prepare government reports.

The UPR mechanism is also distinct from the formal review mechanisms employed by the Commission on Human Rights. From its formation in 1946 until its last meeting in 2006, the Commission was the UN's principal body tasked with the promotion and protection of human rights.

The Commission first devised a system for the consideration of complaints submitted by individuals and NGOs. Two mechanisms, one public and one confidential, emerged whereby individuals and other stakeholders could submit complaints of gross human rights violations for Commission review. Later, the Commission recognized that review of only (alleged) gross human rights violations left a significant gap in its mandate to protect and promote human rights. As a result, the Commission created the "special procedure" mechanism. This mechanism enabled the Commission to address a general area of human rights concern (thematic mandate) or a country-specific violation (country mandate) by selecting an individual expert, known as a "special rapporteur," or a working group to study the issue and report back on its findings and recommendations.²

The Commission's special procedure mechanism enjoyed many successes, and continues to be employed by the HRC, but unlike the UPR, which mandates the review of every UN member state, Commission member states were able to pick and choose the country-specific violations and

² For an example of the Commission on Human Rights appointing a special rapporteur and a working group to study a particular human rights issue, see U.N. Doc. E/CN.4/RES/2002/31 (appointing Special Rapporteur on the right to health) and U.N. Doc. E/CN.4/RES/1991/42 (establishing Working Group on arbitrary detention), respectively.

thematic issues upon which to focus. Accordingly, the Commission's reviews were viewed by many as unduly selective and often targeting Commission members' political adversaries.

b. UPR Compared to Treaty Body Mechanisms

UPR also differs significantly from UN treaty bodies in regard to the participation of the main agency. Each UPR Working Group report ends with this disclaimer: "All conclusions and/or recommendations contained in the present 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."³

This diffidence contrasts strikingly with what occurs, for example, in the Human Rights Committee, the UN treaty-based body charged with monitoring the implementation of the International Covenant on Civil and Political Rights by its state parties. The Human Rights Committee's standard approach is to provide "concluding observations" on States parties' reports. In Volume I of the Committee's report on its 94th – 96th sessions, 73 pages are devoted to observations on 13 countries.⁴

This is not to say that the HRC is incapable of pronouncing on particular countries, but not under the rubric of UPR. The HRC continues to work closely with many of the special procedures established by the former Commission. For example, the HRC issued a report in 2009 on the mission to Egypt of Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁵ More broadly, the HRC in 2007 discussed Sudan and Myanmar under a heading of "human rights situations that require the Council's attention."⁶

3. Looking Ahead

At its UPR, the United States need not anticipate open discussion of its human rights problems except at the stage where governments exchange views. As described above, only at the earlier stage when the High

³ See, e.g., U.N. Doc. A/HRC/11/18 (Bangladesh); U.N. Doc. A/HRC/11/21 (Cameroon).

⁴ U.N. Doc. A/64/40 (Vol. I) (2009), pp. 20-93.

⁵ U.N. Doc. A/HRC/13/37/Add.2 (Oct. 16, 2009).

⁶ U.N. Doc. A/HRC/6/SR.28 (Dec. 11, 2007).

Commissioner for Human Rights is compiling information may NGOs make submissions.

Nonetheless, with respect to both the U.S. review and the mechanism generally, many remain concerned that the state-driven nature of the UPR mechanism will lead to inconsistent and ineffectual reviews. Reviews can be productive, however, where reviewed states are open to candid discussion. The U.S. UPR provides an opportunity for the U.S. to lead by example. A willingness to engage in frank, direct dialogue on the human rights challenges that currently face our country would set a positive example for other member states and might invigorate the UPR mechanism generally.⁷

In the coming weeks, a group of NGOs called the United States Human Rights Network (“USHRN”) will be participating in town halls to solicit ideas and recommendations for a report it plans to submit for consideration during the U.S. UPR. For more information on the town halls nearest you, visit www.ushrnetwork.org and see also www.state.gov/g/drl/upr.

In addition, the United Nations Law Committee of the International Law Association, American Branch welcomes the fact that the Department of State, on behalf of the American people, is soliciting input from the public regarding information to be potentially used in submissions to the UN for the U.S. UPR. This outreach should include NGOs and other stakeholders who may be able to contribute to the national report or submit additional views for inclusion in the U.S. HCHR Compilation.

⁷ After several years of deciding not to stand for election to the HRC, the U.S. was elected to the HRC last year and is currently a member. U.S. membership has given the HRC a boost and a model U.S. UPR could indeed invigorate the UPR process. But the U.S. relationship with the UN human rights apparatus was again recently called into question by human rights groups when the Obama administration submitted a budget to Congress that did not include funding for the Office of the High Commissioner for Human Rights. See Crossette, Barbara, *No US Funds for the Human Rights Commissioner*, Feb. 17, 2010, UN-USA WORLD BULLETIN, http://www.unausa.org/worldbulletin/021710/crossette?sms_ss=email&sms_ss=email. This budget dispute, unless resolved soon, may cloud the U.S. UPR in late 2010.