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The HRC Universal Periodic Review: A preliminary assessment

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1 Introduction

The Universal Periodic Review (UPR), established by General Assembly resolution 60/251 of 15 March 2006, is a new mechanism with the Human Rights Council (HRC). The UPR shall assess the human rights situation in each country being member of the United Nations on a periodic basis of 4 years. Within the UN system, such an approach is unique: to systematically and periodically scrutinize a state member on the fulfilment of its obligations and even voluntary commitments.

By nature and by its structure, the UPR is state driven. All governmental stakeholders repeatedly underlined *openness, tolerance, cooperation* and a *consensual approach* among the state actors as dominant factors in order to conduct UPR. Frequently, it was also expressed by governments that UPR in its best sense means sharing best practices. Therefore, the scope of and the expectations towards such an instrument have to necessarily consider this understanding. Nevertheless, the following expectations should not be minimised: that UPR will substantially contribute to

- revealing the truth on human rights violations;
- doing justice to victims of human rights violations by addressing the violations;
- indicating ways of rehabilitation for such victims by strengthening the national law and justice system via recommendations;
- preventing and acting at least on gross human rights violations;
- improving generally the situation on the ground by drawing and focussing the international attention on human rights.

The following text intends to encourage the discussion on the UPR. As the UPR process has completed its two first rounds and, therefore, is still in an early stage, the conclusions are rather preliminary and do not pretend to be comprehensive either. The observations and conclusions made are based on the attendance by the author of the first two rounds of interactive dialogue with concerned states in April and May 2008, the attendance of the sessions on Item 6 during HRC's June meeting 2008 and the evaluation of the written documents of several states.

2 Formal aspects in brief

The UPR will evaluate every country member of United Nations (currently 192 in total), what means, 48 states each year in three two-week sessions (normally in February, May and December). Preference in terms of time scheduling shall be given to (ex-) members of the HRC. In order to conduct the UPR, the HRC established a special Working Group for UPR consistent of all 47 member states and the HRC president of the year as chairperson.

The criteria of review includes the UN Charter, the Universal Declaration of Human Rights, the UN Treaties on Human Rights including conclusions and recommendations by the Committees as far as the country concerned is party to one or more of the treaties, voluntary pledges and commitments including those undertaken when presenting candidature for election to the HRC, and the international humanitarian law as far as it is reasonably applicable (e.g. in war situations or armed conflicts).

By lots and in addition to an alphabetical selection, each country concerned will get appointed a so called Troika (i.e. three countries chosen from HRC members of the regional groups Asia, Africa, Latin America and the Caribbean region, East Europe, Western states and others). The state concerned has the right to request that one of the Troika members should stem from the same regional group. The state concerned can also reject one of the Troika members. The members chosen for the Troika have the right to deny being member of a specific Troika.

The Troika serves as facilitator of written questions by governments via the HRC Secretariat to the concerned state. All written questions should be transmitted not later than 10 days in advance of the hearing. The Troika also acts as a kind of supervisor of the minutes on the interactive dialogue and the recommendations made to be coordinated with the state concerned. The Troika formally requests the Working Group to adopt the report to be forwarded to the next regular session of HRC following the interactive dialogue.

The UPR is divided into the following procedural steps:

1. Documentation

a) Written report by the concerned government (20 pages). In April 2008, South Africa did not, and presented its state report only at the moment of the interactive dialogue. By HRC Resolution 5/1 of June 18 2007 (paragraph 15a) the state concerned should have consultations with civil society stakeholders prior to finalising the state report.

b) Written document (*Compilation*) of Conclusions and Recommendations by the UN Treaty Bodies compiled to maximally 10 pages by the Office of the High Commissioner for Human Rights (OHCHR).

c) Written submissions (*Summary*) by other relevant stakeholders (e.g. Non-Governmental Organisations (NGOs), National Human Rights Institutions (NHRIs) to be sent to the OHCHR and then summarised into a document of maximally 10 pages. Details on the format and deadlines are available via the Websites provided at the end of this text.

2. Interactive dialogue

The interactive dialogue is conducted in the mode of a public hearing of 3 hours all in all. The state concerned can use up to one hour out of the three. The interactive dialogue is accessible for the public via Webcasting or personal assistance being accredited to the HRC. The right to speak is limited to states or special observers as Palestine and the Holy See. The interactive dialogue is based upon the written documents (see above) and the oral presentation of the state concerned. Finland did a good performance within approx. 20 minutes, while Argentina lasted 40 minutes alone for the introduction part and made any effort impossible for a substantial question-reply-debate simply by time restraints.

Up to now, most of the states attended the interactive dialogue with a larger delegation of experts coming from the capitals. The exercise of Finland, India, Brazil and others has been convincing by actively involving the delegation into the replies of the concerned government. All reviewed states are free in whether addressing the questions, issues and recommendations or not.

3. Adoption of the report and recommendations

At the very beginning of the UPR process, the adoption of reports by the Working Group provoked various controversies, both on the substance and on the question of standard format to be used for future reports. After four days of controversial discussion, the HRC President proposed a compromise in relation to the standard format: if the state under review so wishes, recommendations which are not agreed would only be included in the narrative part of the report. A separate paragraph after the list of agreed recommendations would cross-refer to the recommendations not agreed. Alternatively, the State can ask for a list of all recommendations made to be included in the report, and decide at a

later stage whether to accept or reject these. In addition to that, a formula was agreed saying "*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 WG as a whole.*" In both cases, all recommendations, whether accepted or not, 'should be duly noted in the outcome document' at the regular plenary session of the HRC. After this clarification, most of the reports have been smoothly adopted and the procedure for adoption normally lasted no more than 15 minutes.

The Working Group's report will be considered, discussed and adopted during the following regular session of the HRC under Item 6, again within the format of an interactive dialogue. The state concerned will reflect on questions, issues and recommendations made during the Working Group's session and according to its own interest, followed by remarks of member and observer states and UN institutions. At this stage of UPR, also civil society stakeholders have the right to take the floor. This interactive dialogues lasts one hour maximally all in all. The HRC decided to divide the one hour into three segments of 20 minutes: a) for the state concerned, b) for the member and observer states and the UN institutions, and c) for other stakeholder (e.g. NHRI, NGO). Speaking time for member states is maximally 3 minutes, for others 2 minutes. If there are more requests for the floor as time is available, only the first 8-10 stakeholders of segment b) or c) can take the floor.

During the first adoption process in June 2008 (8th session of HRC), it happened that in relation to countries like Czech Republic, Finland or Argentina, no governmental stakeholder took the floor. While the adoption process of the reports e.g. on Pakistan or Sri Lanka raised the interest of more than 20 states each.

The last step of the UPR process consists in the follow-up by the reviewed state, i.e. the implementation of the conclusions and recommendations contained within the outcome documents. It is expected that the follow-up process also includes the active participation of civil society actors.

3 Observations and conclusions

As at the beginning was said: By nature and by its structure, the UPR is state driven and a con-

sensual approach prevails. This generally marks scope and dynamic of the UPR process.

1. Positive aspects

A positive outcome of UPR – by the procedure as such – is the documentation available. Particularly the compilation of the concluding observations and recommendations by the UN Treaty Bodies as well as the summary of the submissions by Non-Governmental Organisations (NGOs) / National Human Rights Institutions (NHRIs) / and other relevant stakeholders (each compiled by the OHCHR) allow an objective overview on human rights situation of the country concerned. All these information have been already available, but now they are presented in a succinct manner, as official documents, within a formalised procedure, and dealt within the main body of the UN system on human rights.

In addition, comparing the written documents, the outcome of the Working Group, the final report together with the list of recommendations, it altogether allows to identify the gaps and to have a close approximation to where the state concerned stands in its human rights policy, as well as what might be the priority / priorities to be addressed by other stakeholders.

A second positive outcome relates to the obligation of the country under review to undergo a consultation process with stakeholders of the national civil society prior to concluding the state report to be submitted to the HRC (HRC Resolution 5/1 paragraph 15a). Particularly NHRIs from countries of the Southern Hemisphere noted a higher esteem towards their institutional existence and a better understanding of their independence as being a helpful part of conflict management and, insofar, of good governance. Morocco's authorities reported their own learning exercise by this consultation. Switzerland published its draft version of the state report on the Website for further comments up to the very last moment and, thus, inviting its citizens as a whole for comments. Similarly, the exchange of views between governments and NGOs contributed in emerging with a national action plan by many countries under review in order to address identified gaps; while the instrument of a national action plan has also its ambiguity (see below).

Within the context of consultation, encouraging information was given by civil society stakeholders also on the process e.g. in Indonesia, Brazil, the Philippines. Obviously, some govern-

ments did not meet those standards, e.g. South Africa. But even in South Africa, the NHRI was able by this UPR obligation and procedure to generate a genuine platform on human rights and to strengthen the coordination between the national stakeholders.

A third positive aspect relates to the performance of the majority of countries under review within the interactive dialogue and the final discussion of the Working Group's report. Many countries underwent the effort to explain in public why recommendations have been adopted, others not and to present some arguments. The way in which Switzerland's government revealed and explained its policy on human rights e.g. to migrants was a good practice, although the policy in terms of substance continues to be disputed. The HRC Extranet provides further responses of such governments.

Yet, such exercise is challenging and seldom enough within governments of democratically ruled countries as it admits to raising doubts about the wisdom of the official ruling. This exercise is even more convincing done by states as Gabon, Ghana, Zambia or – with certain cut-backs – Morocco or Bahrain. By its histories and – authoritarian – understanding of running the state, they are not experienced (or unwilling) to argue about their governance and, furthermore, asking for international assistance. Even a country like Guatemala, in fact not known for its good human rights record, left the impression that the UPR procedure and its implication towards the international reputation made it open for seeking the close cooperation with OHCHR.

A fourth Pro within the procedure relates to the fact that since the UPR was established, it was hard to imagine to have a powerful country like United Kingdom under scrutiny for entire 3 hours (or others from the Western Group, USA, Russian Federation or China). Such an exercise is barely imaginable within the regular agenda of the HRC. And sometimes it is enlightening to see a government like UK or France acting not very different to other countries when it comes to defend itself from critics; by either not taking the critics into account, merely relating to the musts of the institutional and legal structure, or to flee into euphemisms.

Within this context, there is the argument that, scrutinising countries with a generally better human rights record in the same manner as countries with a bad human rights record might dilute the standards. There is some truth in it at

the level of formal aspects. Nevertheless, everybody underlined that there are no countries with a perfect record, and, turned into the perspective of victims, it is highly needed that the challenges for countries with nominally better records are revealed as well.

A fifth positive aspect was also the openness of various states listening to the concerns of NGOs and NHRIs, and to echo them by formulating questions and recommendations to the country under review. Among those which have been approached and positively responded, it is worth to mention most of the Western countries but also Brazil, Mexico, Guatemala, Republic of Korea. It might be worth for the next UPR rounds, to extend the scope of lobbying towards the conclusions and recommendations made within the African Peer Review, the Inter-American Commission and the Inter-American Court on Human Rights as well as the European Council and the European Human Rights Commissioner.

A sixth positive aspect has been the increased attention of media particularly of countries of the Southern Hemisphere, though finally reduced to the question whether UPR is 'good' or 'bad'. Avoiding such black-and-white schemata, some of the NGOs succeeded to launch their assessment to the national audience.

2. Ambiguous aspects

The state-orientated procedure, seeking consent and cooperation, will not substantially differ in the future sessions. This, unfortunately, strengthens the general attitude of states to attest each other *good governance, cooperation, openness, a constructive approach, involving civil society in participation* and other terms important to be mentioned within the human rights mechanisms. This attitude is awful when states like Tunisia are applauded while knowing its poor human rights record and the government's current human rights policy. However, the same attitude shows positive impacts too, when states like Bahrain, Morocco, Gabon, Brazil, Argentina, Poland felt encouraged within this friendly environment – but within their genuine limits – to self-critically assess the country's situation and to establish or to improve independent procedures on scrutinising human rights in the country. As far as they transfer this attitude into real politics, it would be worth to applaud.

The interactive dialogue (the hearing of three hours within the Working Group) has been downgraded in terms of preventing a political

debate on critical issues. Such discussions have been shifted to the regular plenary meetings of HRC where they may be raised within the General Debate on Item 6 – or not. Recommendations which are not agreed upon by the state concerned, will be included only in the narrative part of the report within a separate paragraph cross-referring to the contribution of the state which made this recommendation. In addition, there is no obligation of the concerned state to deal with such recommendations beyond voluntary comments. On the other hand, the low political ranking opened the scope of the hearing for introducing sensitive issues in the specific country's context – and thus, becoming part of the record of the Working Group – which in regular sessions of the HRC are unlikely to be raised or discussed, e.g. sexual orientation, women's rights in an Islamic context, or Dalits in terms of discrimination.

However, the new way to address critical issues, remains ambiguous. Obviously, governments like Egypt also took the opportunity e.g. to recommend to consider the death penalty (in relation to the Netherlands), to maintain the discrimination of Lesbian, Gay, Bi- and Transsexual People, to deal with abortion within the criminal law and in terms of extra-judicial killings, to continue with women's lower rights in relation to family or inheritance laws, and, generally, to tentatively roll back established human rights standards.

Similarly, some times there was a lack of precise wording when even countries as Switzerland identified '*guidelines*' for its national human rights policy while formally spoken, there is the obligation to fulfil. This may be based on lingual negligence, but there is the real risk too, that, by the time, via the UPR routine, obligations are watered down to guidelines; considering too the tendency by certain states to weaken the obligations for the governments and to rise the barriers for the people in having access to their rights. Within this context, it will be of paramount importance to strengthen and maintain the link with the UN Treaties Bodies in order to impede such development; e.g. referring more frequently to the compilation of their conclusions and recommendations.

As mentioned before, the consultation process with civil society stakeholders as well as the Working Group's outcome made several governments to emerge with a national action plan on human rights. On one hand, such plans are a valuable instrument to manifest the govern-

ment's political will in order to address problems. As national action plans establish goals and criteria they, thus, allow the monitoring of the governments activities in terms of implementation. On the other hand, the 'national action plan' got the sense of smell being diverted into rhetoric and a template for substituting efficient action.

This suspicion prevails in relation to countries as the Philippines or Sri Lanka which denied to undergo an independent monitoring either by international mechanisms, or by denying to establish independent national mechanisms, or by refraining from independent capacity building. The same ambiguity exists with all the announcements to train national bodies, particularly security people. The follow-up process and the involvement of civil society stakeholders into the implementation will show, how far further announcements of this nature can be taken as credible or will remain a balloon.

While it has been worth to spend time and energy in lobbying the states by civil society stakeholders, the use of side events and other means of drawing public attention during the interactive dialogue of the Working Group has been managed in a rather restrictive way up to now. It is therefore fruitful, to start with public attention and lobbying just during the regular session of HRC previous to the according UPR Working Group; particularly, when a critical approach is chosen. In addition, during these sessions, states are less reluctant to engage in discussions with NGOs through side events.

3. Negative aspects

A negative aspect is the low outcome in terms of a genuine and immediate improvement for the situation on the ground. These limits have been critically assessed by several NGOs and NHRIs; as e.g. the national NGO coalition from Indonesia while expressing their *utter disappointment* and their regret that the UPR may take a new meaning as *Universal Periodic Rhetoric*.

Secondly, many of the positive aspects on UPR are based upon the willingness of a government – to simply acknowledge its reality at home – and is not a compelling outcome of the procedure. Compared to the formal criteria of review (see above), any outcome in relation to the state under review is possible. Particularly, there is no procedural duty to a certain mandatory activity either by the HRC Working Group nor by the concerned government even when gross human

rights violations are at stake; like extra-judicial killings. There is no secret that only a minority among the member states of United Nations is currently prepared to show such willingness and to particularly undergo a following independent scrutiny for giving evidence to its announcements.

Thirdly, until now, the interactive dialogue of the Working Group was disproportionately based on the state report (literally state-driven). The compilation and the summary were widely neglected. In correspondence, most of the states' delegations preferred not to respond to critical questions, while opting to maintain an air of optimism, or fleeing into euphemism.

In a similar way, sensitive issues are frequently not attended or appropriately responded by the governments. Though countries of the Western Group generally showed certain openness to critical issues, most of them also tried not to go to the substance: secret detention centres, discrimination of Roma people or other minorities, the legal and real handling of migrants, xenophobia in general. Generally underrepresented have been issues like Human Rights defenders, indigenous peoples and minorities.

Within the same context, a next negative aspect relates to the mere formal understanding of UPR by crucial states like India and South Africa. India responded to concerns and questions by side-stepping uncomfortable issues categorising them as '*internal*'. South Africa did not pay any attention to the requirements for written documents or time limits. Listening to the oral statements by the South African government delegation during the Working Group, there are obviously two different worlds: about 5 Mio. people infected by HIV/AIDS, but officially no crisis on health rights, about 40% unemployed people, but officially no crisis on ESC-Rights, etc. The self-critical approach chosen by Finland has been a real exception and deserves a true applause.

A further problem in terms of negative outcome, has been the tendency to exempt the country under review from a critical assessment by referring to difficult objective conditions: combating terrorism (extending the incommunicado arrest in UK), having a different understanding of terms (like minorities in France), being subject to natural disasters or extreme poverty, being a developing country, burdened with foreign debts. Obviously, it is worth and necessary to take such factors into consideration, but not as a matter of analysis and assessment of the human rights re-

cord while being useful when the most appropriate support to overcome such situation will be discussed.

There is no pro-active performance in defending the human rights standards when they come under attack by the mentioned roll back on the part of countries like Pakistan or Egypt. During the hearing e.g. on the Netherlands, most of the recommendations stemmed from Algeria and Egypt while few ones have been expressed by Western countries – a lost opportunity to underscore the democratic and liberal society as a precondition for benefiting human rights on the ground.

Although not being genuine to the UPR, the frequently pronounced ‘openness’ and ‘transparency’ of the process quickly ended at the states’ limits of understanding of such terms. Egypt has been at the forefront to stop any contribution particularly by NGOs – during the HRC regular session under Item 6, General Debate, in June 2008 – which intended to identify the shortcomings of the UPR process by illustrating country specific examples. In a near future, NGOs will be in a position to counter such interruptions by choosing a more sophisticated language. Nevertheless, it has become obvious, that the understanding of ‘state-driven’ is close to censorship and turning UPR into ‘rhetoric’ or into a farce.

4 Preliminary assessment

As has been mentioned at the beginning: the UPR process is unique within the UN system, while by its nature and structure it is state driven. The scope of and the expectations towards UPR have to consider these circumstances.

The dynamic, rhythm and language used during the first two rounds of UPR indicate a mode of acting which is rather known from standard setting and institution building (consensual approach) then from former country evaluation and resolutions. In the most critical assessment, UPR would be identified as an additional exercise of self and mutual exoneration, highlighting constitutional provisions and progressive legislative measures as a screen to hide serious gaps in implementation and systemic failures to tackle human rights violations. In a less critical but more inclusive approach, UPR is one more avenue to an universal scrutiny and to address human rights violations as well as good practices in fulfilling the governments’ obligations. Independent from the chosen approach, within its

own logic, the outcome of UPR will show impacts rather in a mid- or long term perspective.

As has been analysed, there is a highly valuable documentation available in all official languages. UPR has been a catalyst for the national performance particularly of civil society stakeholders, both NHRIs and NGOs, but as well as for several governments changing their general approach to policy making on human rights. The true test remains with the follow-up and implementation on the ground, i.e. to bring human rights to each home. The attention of the media will also play an important role on this task.

The shortcomings of UPR reveal that, by its substance, this procedure is not able to substitute other mechanisms on the evaluation of country situations. As a kind of side effect it became obvious, that the need for country resolutions on gross and systematic human rights violations is not obsolete and would be rather a must (via Item 4 of the HRC agenda). Nevertheless, the current mode of the HRC tends to the opposite. There is the risk that the state-driven and i.e. consensual approach will become a template for all other assessments, including even Special Procedures and the High Commissioner’s reports.

Many of the positive aspects on UPR relate to the willingness of a government to simply acknowledge its reality at home. There is no secret that only a minority among the member states of United Nations is currently prepared to do so. This means, to make UPR a working instrument for the people on the ground – and in this sense generating a success story – it depends also of the contributions by ‘other relevant stakeholders’ within all steps of the procedure as well as in the follow-up to UPR; though there is currently no possibility to modify the formal modality of NGO participation.

Beyond the demands towards the governments’ performance, UPR is a big challenge for civil society stakeholders in discussing, how to make it more useful. This requires at least a certain coordination on national as well as on international level in order to attempt setting common priorities. As explained before, there is a need to systematically address (‘mainstream’) the situation of human rights defenders, indigenous peoples, minorities, peoples with disabilities – beyond the already existing mainstreaming on Gender and children.

5. Further tasks

A big challenge will be the follow-up on UPR in relation to the participation of NGOs and NHRIs plus other stakeholders of civil society. This means

- to disseminate the report and outcomes of the UPR in each of the countries;
- to design and propose an action plan;
- to discuss a time frame for implementation;
- to request a yearly meeting for further consultation and assessment on the implementation;
- to keep reporting to the HRC e.g. under Item 4 on the implementation process;
- to make use of further complaint procedures, e.g. via the Special Procedures on the (none) implementation.

Civil society stakeholders in Western countries are requested to pay the same attention to its home countries though the quality and quantity of human rights violations may differ compared to other regions. But it was striking that NGO statements submitted e.g. on the Netherlands summed up to four, while the situation in many

countries from the Southern Hemisphere is regularly addressed with about 20 NGO submissions (though not to all as e.g. to Tonga).

Seeking best practices in its best and constructive sense means that somebody has to start with. During the first two rounds of UPR, there have been examples giving evidence to such an endeavour. In order to turn it into a systematic approach and at least informal standard to be followed by the states reviewed, the input of civil society stakeholders will be essential. The UPR procedure urgently needs the continuous and critical company of non-state actors for being successful.

For details on country reviews, see HRC Extranet (www.ohchr.org), ISHR (www.ishr.ch), UPR-Info (www.upr-info.org).

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