

**The 2011 UNITED NATIONS HUMAN RIGHTS COUNCIL
REFORM PROCESS: THE STATUS QUO PREVAILS**

Friedrich Ebert Stiftung Conference on the Human Rights Council
Review
Geneva, Switzerland
October 6-7, 2011

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I). Introduction

After much discussion and consideration the 2011 review of the UN Human Rights Council concluded with the adoption in June by the UN General Assembly of the proposed reform package. It is now possible to examine what decisions were taken, and draw some preliminary conclusions both regarding their import and potential impact, and the possibilities of further evolution and strengthening of the HRC. In this review there was considerable focus on the Universal Periodic Review (UPR) mechanism. This paper summarizes reform recommendations made during the review process, and compares them to what was actually decided. It also includes data on the UPR recommendations through the first 9 sessions.

II). Proposed Reform Issues

The HRC has many challenges ahead if it is to gain traction and full credibility as a key leading international vehicle for human rights protection and promotion. In many respects it represents a positive step, but the jury is still out on its overall impact. Some critics suggest that the HRC experiment is a failure and should be drastically reformed or abolished. They are, however, in a minority. Most observers see the HRC, and the UPR, as providing some value added to the promotion of human rights, although significant differences exist regarding the extent of this positive impact. Given that the HRC is likely to continue, the challenge has mainly been one of achieving consensus on how to improve it.

Over the past two years, as the 2011 date for the five-year HRC review identified in its original mandate approached, there were a number of specific initiatives designed to stimulate thinking about the HRC's performance and possible reform. Deliberations took place at Wilton Park in the UK, in Algiers, Montreux, Mexico City, Bangkok, Seoul and Paris. Many ideas on how to reform the recommendations process were raised during this review process by various member states and NGOs interested in strengthening the process. In addition, some individual states separately issued views on the topic reflecting a view against significant reform. They appeared to be content with system and believe that it serves their purposes without significant reform. They thus, typically, did not energetically push for substantive reform.

This section of the paper summarizes a number of the most salient issues to be raised in these fora.

A) Non-UPR Issues:

Most suggestions on reforming the HRC separate from the UPR fell into four major categories; those relating to i) situations of concern i.e. urgent instances of human rights violations; ii) the Special Procedures function; iii) the administration of the HRC; and iv) broader issues of membership of the HRC.

Situations of Concern: Proposals in this area emphasized the need for a more robust approach, including diversification of the tools it uses to respond to situations of concern. A principal idea centered on the utility of independent triggers which could automatically result in HRC consideration of particular situations, rather than having this be solely discretionary. Another suggestion was that the general debate on situations that need the attention of the Council should be divided into five regional segments, in line with the de facto regional structure used in the UN. Relatedly, to provide additional depth and expertise to the HRC's functioning, it was suggested that the Council should create five working groups of independent experts on situations, one for each of the regions represented at the Council.

Special Procedures: Suggestions included an outcome document summarizing the extent of cooperation by states with special procedures, including their comments, to be adopted by the Council once a year. Particular attention would be paid to the status of cooperation of member states of the Council and candidates for election to the body. In addition, some suggested that the Council should adopt a monitoring system to ensure that standing invitations are effectively implemented. States that fail to implement their standing invitations would be removed from the list of countries that have standing invitations.

HRC Administration: Many proposals called for increased funding, for the HRC. The need for a position of legal advisor to president of the Council was raised. More generally, the idea of the president having a small staff to assist in the administration of the HRC received much attention.

Membership on HRC: The very sensitive issue of the country selection process for membership on the HRC was raised. Most proponents suggested that it should be strengthened to lessen the influence of human rights violator states in the organization; in this view to the extent possible HRC members with collectively stronger human rights records should play a preponderant role in the HRC. One such success in 2008 was the defeat of Belarus' candidacy; in 2010 Iran withdrew its candidacy under heavy international pressure. Still, the percentage of countries on the Council rated "Free" by Freedom House has declined from 52% to 43% since 2006. Other suggestions were raised, for example, requiring HRC candidate states to be parties to both ICCPR and ICESCR, extend a standing invitation to Special Rapporteurs, comply with timely submissions of periodic reports to treaty bodies, not have been recently condemned for serious or systematic human rights abuses.¹

In addition, suggestions were made that countries could be required to have achieved some objective minimum threshold of observance of human rights in order to be eligible for membership on the Council. This could perhaps involve some weighted scale of country-specific human rights assessment methodologies such as the Bertelsmann Transformation Index, The Economist democracy index and/or the Polity IV Index. Similarly, Alston has suggested the creation of a "Human Rights Accountability Index".² Another idea was that countries which have better human rights records could have greater influence in choosing which countries could be eligible to serve on the HRC. These proposals were controversial due to some countries' rigid adherence to the principle of state sovereignty, but proponents suggested they could perhaps be ushered in by stages or via some other transitional mechanism.

¹See, for example, P. Alston, "Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the new UN Human Rights Council", 15 *Journal of Transnational Law and Policy*, 2005, 49-96.

² *Ibid.*

B). UPR Issues

*“Only if there is a move from peer review to peer engagement will the success of the UPR mechanism become sustained”.*³

It is worth initially noting some of the salient positive attributes that these reviews have assigned to the UPR. It is indeed universal and innovative in nature. It creates domestic momentum for human rights strengthening. It provides legitimization and entry points for NGO stakeholder engagement with governments. It is a forum for the exchange of best practices. Countries have taken it seriously, in that no state has refused to be reviewed. The process and tenor of proceedings have been relatively non-political in nature. It assists in the promotion of ratification of human rights instruments and the creation of national human rights institutions based on the Paris principles. It creates further precedent for self and mutual assessment. The UPR is also seen as providing a forum and impetus for expanded human rights dialogue between the State under Review (SuR) and recommending states, and the SuR and international institutions.

Notwithstanding the above comments, many ideas surfaced on how to strengthen the mechanism. Of the proposals identified below, the three most frequently cited were a) increased international support for the UPR; b) UPR recommendations to be made more specific and action-oriented; and c) more coherent consolidation and thematic organization of UPR recommendations.

Recommendation Specificity. Accountability could be heightened by making recommendations more specific. It should be clear which recommendations a country has accepted and which it has not.

- Recommendations should be made more realistic, pragmatic and first and foremost implementable.
- Recommendations should be actionable and verifiable.
- Recommendations should include specific benchmarks.

Organize Recommendations. Considerable attention was paid to how to organize and rationalize what is currently a hodge-podge of recommendations to SuRs to make them more coherent and manageable as a whole. These relate to a perceived unnecessary and at times unmanageable proliferation of recommendations, and potential contradiction in their content taken as a whole. Several suggestions related to clustering them thematically and to merging identical recommendations.

- Prioritize recommendations in order of urgency/importance. It might be possible to have states sign up for different recommendations, perhaps as primary sponsors and co-sponsors. A criticism of this is that it would diminish the state-to-state nature of the process and diffuse recommending state identification with specific recommendations.

³ Office of the High Commissioner for Human Rights, *Retreat of Algiers on the review of the work and functioning of the Human Rights Council*, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/Seminaire_Alger.pdf.

More Engagement of NGOs. The HRC should emphasize its acceptance of the important role that NGOs have to play in terms of observing, providing information and input and feedback to the HRC's proceedings. NGOs often complain that they are not given sufficient advance notice of meetings and HRC sessions.

- NGOs could have a heightened formal role in the process.
- A number of recommendations were directed to strengthening national NGO involvement not only in the preparation of the SuR report, but also when submitting information to the Troika, attending UPR working group, general comments before adoption of working group report, participating in implementation and follow-up of accepted recommendations.

Role of the Troika. The role of the Troika, or the secretariat of three countries which organizes the specific country reviews, could be strengthened. This is a sensitive issue because this would invariably involve subjective judgments about how to organize and streamline the recommendations, and who should do this.

- The Troika was presented in a number of proposals as having a key role to play in streamlining, merging, prioritizing or otherwise clustering recommendations, in consultations with recommending states, clustered as urgent/non-urgent.
- Also, some felt that the Troika could forward recommending state questions to the SuR in advance of the interactive dialogue in order to make the most efficient use of time available.
- Other proposals focused on expanding substantive Troika country expertise; for example by facilitating access to knowledgeable and independent sources.

Allocation of Time. Much concern was expressed about time management. A number of various solutions were presented.

- The time for interactive dialogue could be expanded. Recommendations in this regard range from 3-4 hours to unlimited time.
- The review cycle could be extended to 5 years (allowing for 13 states to be examined per session instead of 16).
- The UPR could hold 4 sessions per year instead of three (12 states per session) by reducing ordinary HRC sessions from 10 to 8 weeks.
- Have 2 countries examined simultaneously in concurrent sessions, the results of which are then harmonized, a criticism of this is that it would reduce the universality of the mechanism.
- Limit interventions to less than 2 minutes.
- Add an hour to each review.
- Speech time could be reduced to allow more time for questions and responses.

Speaker's List. Relatedly, much attention was focused on rationalizing the process for signing up for UPR recommendations. A consensus was that that the speaker's list management does not function well. Based as it is on a first-come first-serve policy, the current process for presenting recommendations can bias the number of recommendations made and who makes them, and risks delegitimizing the entire UPR. Ideas suggested include:

- Instituting a lottery to determine the speaking order of recommending states,
- Registering 2 or 3 days ahead and then drawing lots for first speaker then alphabetical from there (with appropriate geographic distribution).
- Giving priority to members of the HRC.
- More radically, the question of whether recommendations even need to be made orally could also be considered.

Strengthen Relationship Between UPR and Treaty Bodies. There was considerable discussion, and differences of opinion, as to whether there should be a linkage between UPR recommendations and other human rights mechanisms i.e. treaty bodies and special procedures. Many were in favor of some greater linkage, while others suggested that the UPR should be stand-alone in nature.

- Create linkage with Special Procedures for recommendation follow-up; integrate/coordinate more with Treaty Bodies/Special procedures.
- Overlap or duplication of requests between UPR, Special Procedures and Treaty Bodies should be avoided.

More emphasis on SuR recommendation follow-up. The UNGA Resolution that created the Council omitted details about the steps the Council should take after the periodic reviews; this ambiguity needs to be resolved. Most specifically, the question remained open as to whether, at the time of the second review four years after the first one SuRs must present a report on their implementation of recommendations they had accepted in the first round.

- A frequently aired view was that consultations should be continuing, not one-off in nature.
- Emphasis was also placed on mandating or otherwise ensuring that that non-governmental national stakeholders be involved (note this has also been the subject of many UPR recommendations).

Length between reviews. Some believed that the four-year period between reviews was either too long or too short and should be altered.

- A variety of views were expressed presenting various arguments for between 2-5 years.
- Institute a one or two year moratorium between the 1st and 2nd cycles in order to assess compliance with the first round of recommendations.

UPR Timing. Many proposals emphasized the utility of mid-term reviews, in which SuRs would issue a self-assessment.

- Require mandatory 2-year mid-term reports.
- Some states emphasized the desired voluntary, rather than mandatory nature of such an exercise should it occur.

Second UPR cycle. Different views were expressed regarding the appropriate focus of the next review cycle.

- Many suggested that both the general picture of human rights in the country as well as follow-up from the first round of reviews should be the focus of the next cycle.
- Others argued that the second cycle should focus merely on implementing previously adopted recommendations.

Involve Regional Intergovernmental Organizations in follow-up. Concerns were expressed that the UPR remains too much in a “Geneva bubble” with insufficient focus at the national and regional level.

- Include regional organizations in providing technical assistance. Regional organizations could provide support for this concept on both the rhetorical and practical levels. The EU, OAS and AU, for example, all have policies in place regarding adherence to defined minimum norms of democracy and human rights.
- The UN and its affiliated agencies could also heighten their level of support for the democracy promotion role of regional organizations.

Institutional mechanism for tracking compliance. This proposal suggested that a central, clearing house role in tracking compliance should be established within the OHCHR or the HRC.

III). What actually happened

On June 17, 2011 the Human Rights Council (HRC) completed the review of its work and functioning by adopting decision A/HRC/17/L.29 on the Follow up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review. Resolution 16/21 adopted on 25 March 2011, contained the new modalities for the functioning of the HRC but left some issues pending in relation to the UPR.

Key reform elements in the final review package include:

Special Procedures. National Human Rights Institutions can nominate candidates for special procedures mandate holders. The HRC should streamline requests to special procedures to ensure meaningful discussion of their reports. Additional emphasis is to be placed on following-up Special Procedures’ recommendations. The need for adequate funding for special procedures is emphasized.

HRC Administration. The Council cycle is to be for the calendar year. An Office of HRC President is to be established, but must be funded within the existing budget. The use of information technology to enhance participation and dialogue is encouraged.

There were more decisions taken regarding the UPR. These include:

Responses to Recommendations: States should clearly communicate to the Council, in a written format preferably prior to the Council plenary, its positions on all received recommendations (para. 16, resolution A/HRC/RES/16/21).

Role of NGOs: States are encouraged to conduct broad consultations with all relevant stakeholders on the follow-up (para. 17, resolution A/HRC/RES/16/21).

Other relevant stakeholders are encouraged to include in their contributions information on the follow-up to the preceding review (para. 8, resolution A/HRC/RES/16/21).

Number of Sessions per Cycle: There will be 14 sessions per cycle (para. 3, resolution A/HRC/RES/16/21).

Number of States per Session: Only 14 States will be reviewed per session (part I, decision A/HRC/17/L.29).

Duration of the Review: Each review will last 3.5 hours. The State under Review (SuR) will be given 70 minutes and other States 140 minutes (part III, decision A/HRC/17/L.29).

Order of Review: The order of review will be exactly the same. As there will be only 14 States reviewed per session, the two last States of session 1, Czech Republic and Argentina, will be moved to the beginning of session 2, the last four of session 2, France, Tonga, Romania and Mali, will be moved to the beginning of session 3, etc. (part I, decision A/HRC/17/L.29).

List of Speakers: The list of speakers will open on the Monday of the week preceding the beginning of the Working Group session. For each review, States will be arranged in English alphabetical order and the beginning of the list will be drawn by lot. States will be able to swap place (part IV, decision A/HRC/17/L.29). All States will be given the floor. If needed be, time per speakers will be reduced to two minutes each or the 140 minutes will be divided by the number of speakers.

General Guidelines: The General Guidelines Decision 6/102 for the drafting of the three reports that form the basis of the review were slightly modified to give greater emphasis on the need for States to report on the implementation of recommendations (part II, decision A/HRC/17/L.29).

Role of National Human Rights Institutions: National Human Rights Institutions (NHRIs) with A status will have a dedicated section in the summary of other stakeholders' information (para. 9, resolution A/HRC/RES/16/21).

NHRIs will be given the floor directly after the SuR during the adoption at the HRC plenary session (para. 13, resolution A/HRC/RES/16/21).

Length of the Next Cycles: The second and subsequent cycles will last 4.5 years (para. 3, resolution A/HRC/RES/16/21).

Mid-term Reports: States are encouraged to provide the Council, on a voluntary basis, with a midterm update on follow-up to accepted recommendations (para. 18, resolution A/HRC/RES/16/21).

Focus of the next cycles: The second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the SuR (para. 6, resolution A/HRC/RES/16/21).

IV). Conclusion

There is, as the saying goes, much about which to be modest when assessing the impact of the review. Perhaps the best that can be said is that it did not end up weakening the HRC. But many of the important reform ideas brought up in the process leading up to the adoption of the final report were not addressed. And many of those that were resulted only in minor fixes or adjustments. For example, no reforms emerged regarding Situations of Concern. And potentially important UPR reforms, such as strengthening the role of the Troika, or mandating mid-term reports, also failed to achieve the needed consensus to be included.

The UPR's support may be broad, but it is not necessarily deep among member states. Many may feel that they have to "go along" with it, but they are either sceptical of its impact or, on the other hand, may fear it and little interest in seeing it further develop. The job of reforming the HRC is thus one of working from the inside, and strengthening both specific functions such as the UPR and more generally shoring up its supporting constituency within the U.N. Given the consensus-based nature of the UN HRC decision-making process, it is not surprising that it is evolutionary rather than revolutionary in nature. To develop and successfully implement a strategy for enhancing the UPR with increased ability to effectively promote and protect human rights globally is a sensitive and delicate task, which must be done very carefully. It must take into account the multi-polar context in which the various regional groupings holds veto power.

V). Brief Overview of UPR First Cycle Functioning. Given the focus on the UPR, it is instructive to undertake some analysis to determine the mechanism has been functioning. The following are a few elements of the UPR functioning through the first nine sessions (although all 12 sessions of the first cycle are now complete, data is available for the first 9 sessions).

Through the first 9 sessions there were a total of 14,435 recommendations. This results in an average of 1600 per session, and approximately 100 per State under Review (SuR). The number of recommendations increased from most of the sessions to the next.

10,211 (71%) of the recommendations were accepted. 63% were accepted through the first four sessions. The rise in both the number of recommendations and the percentage of acceptances

suggests greater familiarity and willingness to use the procedure. It does not, however, provide information on the effectiveness or utility of the recommendations.

Significant variation in acceptance rates depended on the type of issue. Not surprisingly, the more sensitive and politically charged issues resulted in lower acceptance rates. For example, only 20% of death penalty, 30% of sexual rights, 50% of Special Procedures recommendations were accepted.

There was a great diversity of recommendation issues; over 50 separate types can be identified. Of these, the top three included: recommendations to adhere to international instruments regarding human rights (these figured in 19% of the recommendations); Women's Rights (17%); and Rights of the Child (15%).

In terms of regional distribution, the West European and Others Group (WEOG) far outpaced the other regions, with fully 41% of recommendations made. Asia, Africa, East Europe and Eurasia, and GRULAC (Latin America) each made between 13% and 16% of the total recommendations made. This may be due in part to the larger size and staffing advantages enjoyed by many of the WEOG member states, It could also, however, be taken to represent WEOG's focus on the UPR.

Recommendations were directed mostly to Asia (31%) and Africa (27%). GRULAC, WEOG and EEG received 16%, 14%, and 12% respectively.

In order to better understand the nature of the recommendations, they have been coded by Action Level. This 1-5 scaled categorization provides a characterization by level of action, as expressed by verbs contained in the recommendation. In general Category 1 requires the least cost and effort to the State under Review, while Category 5 represents the greatest potential cost, as specific and tangible actions are being requested.⁴ It is possible to hypothesize, based on rational choice theory, that the percentage of recommendations accepted will tend to decline as the perceived cost to the state of accepting these recommendations increases.⁵ So states should find Category 1 recommendations easiest to accept; those from Category 5 hardest to embrace.

Category 1 - Recommendations directed at non-SuR states, or calling upon the SuR to request financial or other assistance from, or share information with, non-SuR states.

Examples: *Seek contributions from the international community in the Government's efforts to promote rights (Ghana to Botswana, Session 3).*

Share its experiences and best practices with other countries in establishing national legislation and mechanisms and pursuing international cooperation to curb human trafficking (Philippines to United Arab Emirates, Session 3).

⁴ The term "cost" is employed broadly here; it can mean utilization of financial, personnel, physical, or political capital.

⁵ This hypothesis is confirmed in that while Category 2 recommendations had an acceptance rate of 93%, Category 5 recommendations had only a 52% rate of acceptance. It is interesting to note, however, that Category 3 (consider change) recommendations had a lower acceptance rate than Category 4 (general action).

Category 2 – Recommendations emphasizing continuity in actions and/or policies (other verbs in this category include continue, persevere, maintain).

Examples: *Continue its efforts to develop the work of its national institution for human rights, as an effective human rights watchdog (Egypt to Bangladesh, Session 4).*

Continue the efforts to combat trafficking in persons with a special emphasis on women and children (Canada to Japan, Session 2).

Category 3 – Recommendations to consider change (consider, reflect upon, review, envision)

Examples: *Consider subsequent measures towards the complete abolition of the death penalty (Switzerland to Cuba, Session 1).*

Consider becoming party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Azerbaijan to Mauritius, Session 4).

Category 4 – Recommendations of action that contains a general element (take measures or steps towards, encourage, promote, intensify, accelerate, engage with, respect, enhance)

Examples: *Further improve the professionalism of the police force (Netherlands to Barbados, Session 3).*

Take the necessary steps to reduce discriminatory practices and violence against women (France to Mali, Session 2).

Category 5 – Recommendations of specific action (undertake, adopt, ratify, establish, implement, recognize –in international legal sense).

Examples: *Abolish the death penalty (Chile to Burkina Faso, Session 3). Take necessary steps to establish a national human rights institution (New Zealand to Netherlands, Session 1).*

The distribution of action categories resulted in the following:

1 (Minimal) – 3%

2 (Continuing) – 17%

3 (Considering) – 10%

4 (General action) – 40%

5 (Specific) – 30%

It is perhaps positive that 70% of the recommendations asked for actions. Unfortunately the high number of general action recommendations also means that governments will have considerable leeway to interpret compliance with the accepted recommendations as their reviews in the second cycle approach.

Fully 55% of the #5 recommendations were made by WEOG states. GRULAC and EEG made 18% and 14% respectively while Asia and Africa made only 7% and 6%. By contrast, Asia made 34% of the category 2 recommendations and Africa made 24%. WEOG made just 16%, GRULAC 15% and EEG 10%. Similarly, in terms of region-specific category 5 recommendations, 36% of the WEOG-WEOG recommendations were Category 5 while just 9% of the Asia-Asia recommendations were in this category.

These data clearly demonstrates a difference in approach to utilization of the UPR based on regional differentiation. WEOG, and to a lesser extent GRULAC and EEG, seek to make robust use of the mechanism with a relative emphasis on specific and actionable recommendations. Asia and Africa tend to take a “softer” approach, relying more on positive statements and more gentle recommendations. Some initial data, however, suggest that the more democratically-inclined states in Africa and Asia take a somewhat more muscular approach.

Finally, while the Sessions 1-4 category 5 acceptance rate was 44%, it rose for Sessions 5-9 to 55%. Why did this happen? This is potentially good news in that it suggests that states were more familiar and engaged in the process, and increasingly prepared to implement the more specific action recommendations. These data demonstrate the need for greater research on this and related topics, so the fundamental question of whether the HRC and UPR do promote human rights can be addressed.

For the UPR to survive and gain enhanced credibility it is important that the proportion of specific action recommendations be increased. Another mark of success would be lessened differentiation in recommendation patterns between regions, and especially in those made by like-minded states across the regions which respect democratic values.