

UPR MONITOR

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UNIVERSAL PERIODIC REVIEW ANALYTICAL OVERVIEW OF THE UPR APRIL- JUNE 2008

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Overview

The first two sessions of the new universal periodic review (UPR) of the Human Rights Council (the Council) took place from 7 to 18 April and from 5 to 19 May 2008 with the review of 16 United Nations (UN) member States at each session.¹ The first States to be reviewed under the UPR, in order of review, were:

- Bahrain
- Ecuador
- Tunisia
- Morocco
- Indonesia
- Finland
- United Kingdom
- India
- Brazil
- Philippines
- Algeria
- Poland
- Netherlands
- South Africa
- Czech Republic
- Argentina

The second session comprised of the review of the following States:

- Gabon
- Ghana
- Switzerland
- Pakistan
- France
- Tonga

¹ All information related to the UPR is available on OHCHR's UPR page at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx>. Most statements made at the UPR Working Group can be found at <http://portal.ohchr.org/portal/page/portal/UPR/1session/>. Fill in the form at www.ohchr.org/english/bodies/hrcouncil/form.htm to receive username and password. Audiovisual archives of the meetings of the Working Group 'webcast' are available at www.un.org/webcast/unhrc/index.asp.

- Peru
- Guatemala
- Benin
- Republic of Korea
- Zambia
- Japan
- Ukraine
- Sri Lanka
- Romania
- Mali

The practices developed at this first session were so varied that it was difficult to provide a clear critical appraisal of the process. By the second session, certain practices became more established and it is now possible to offer a more sure assessment of the UPR process. The following report provides an analysis of the first two sessions of the UPR and the adoption of all UPR reports at the 8th session of the Human Rights Council in June 2008.

A comprehensive analysis, however, does not necessarily translate into a conclusive one, as many of the variable practices of the UPR thus far show. On the one hand a State that would never find its human rights record being discussed at the Council is now at times facing certain difficult questions before its peers, but on the other hand ‘friendly States’ have the ability to collectively present an image that does not reflect the human rights situation on the ground. In some cases genuinely robust questions are being asked, and are being answered. In other cases they are not. In some cases useful recommendations have been formulated, in other cases recommendations are so vague that they cannot be realistically measured. There has been a clear move away from the Council’s practice of issuing statements by regional or other groups of States, in favour of individual interventions by States. However, many States have applied different standards of scrutiny to States that they have a regional or organisational association with. This has been the practice even of those States who vowed that the UPR would do away with the ‘politicisation’ often associated with the former Commission on Human Rights, and would ensure the equal treatment of all States. These early inconsistencies have led a few NGOs to roundly criticise or dismiss the UPR at early stage, although many remain willing to engage in the hope that the UPR can build on some of the positive outcomes already witnessed.

Background to the sessions

The weeks and days before the first session of the UPR were marked by an air of nervousness among States, knowing that a sizeable degree of the Council’s credibility rested on the UPR’s success. Much of this arose from the uncertainty of how the process would function. At the same time, many issues related to the working methods of the UPR Working Group had still not been resolved. Despite ongoing bilateral and group meetings with the President of the Council in the weeks before, this confusion lasted right up to the last day before the UPR was scheduled to begin,² into the first meeting on Monday 7 April³ and throughout the first week of the review.⁴ These outstanding issues included: whether reports submitted by NGOs and other stakeholders should be published on the website of the Office of the High Commissioner for Human Rights (OHCHR); whether questions submitted to the State under review via the troika⁵ may also be published on the website at the request of the State under review; how time would be allocated to States under review to present their report and the answer questions, and how the interactive dialogue would be conducted; outstanding issues related to the format of the report of the Working Group; and whether the UPR Working

² See ISHR’s *Council Alert*, 4 April 2008, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_alert_4_april_2008.pdf

³ For a summary of the President’s opening statement and positions put forward relating to outstanding modalities, see http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_bahrain_final.pdf

⁴ See the adoption of the reports of Bahrain, Ecuador, Morocco and Tunisia, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008

⁵ For an explanation of the role and purpose of the troika, see Council *Resolution 5/1*, para. 18 (d), at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/1. For a full summary of the selection of troikas, see www.ishr.ch/hrm/council/councilalert/council_update_7session.pdf

Group meetings should be webcast.⁶ Egypt (on behalf of the African Group), Palestine (on behalf of the Arab Group) and Pakistan (on behalf of the Organisation of the Islamic Conference) presented a non-paper on these issues to the President four days before the first meeting of the Working Group. The late submission of this paper led many States to question the ‘transparency’ of its sponsors and their intentions.⁷

The President informed all States at the organisational meeting three days before the session that no decisions could be made on these issues before the first meeting of the UPR Working Group on Bahrain on the following working day, and that time could not be allocated to discussing these issues during the morning session as it was dedicated strictly to the review of Bahrain. On the first morning of the UPR the President circulated his final statement on modalities and practices⁸ and declared that no decisions would be taken on issues related to the format of the reports of the Working Group until the adoption of the report on Bahrain two days later. This meant that the five reviews that took place before then would not establish a precedent for the Working Group’s working methods. ‘Webcasting’ of the session proceeded on the basis of that agreement.

Outstanding issues relating to the report of the Working Group overshadowed the process in the first week and created an uneasy beginning to the UPR. These issues are addressed in the relevant sections below.

Working methods

Presentation by the State under review

The President’s final statement on modalities established that States would have a maximum of 60 minutes for their **presentation** of the national report and responses to written questions received through the troikas, to reply to questions from the floor during the dialogue, and to offer concluding comments. While the President had initially proposed that the State would be given 30 minutes to introduce its report and respond to written questions, and did not detail how much time would be allocated to the interactive dialogue, he noted the strong support for the proposal made in the non-paper of the African Group and others described above,⁹ and this was finally agreed. The President also clarified at the organisational meeting that the State under review could choose to take questions individually, in clusters of its choosing, or at the end of the interactive dialogue.

States under review were generally represented by high level delegates, usually at ministerial level,¹⁰ and large delegations,¹¹ which seemed to signify that they took the process seriously. The **allocation of one hour**

⁶ For a review of the content of the non-paper and the arguments put forward for and against its content, see ISHR’s *Council Alert*, 4 April 2008, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_alert_4_april_2008.pdf

⁷ For example, in the organizational meeting of 4 April the United Kingdom was of the view that an informal agreement had been reached on various issues through bi-lateral and group meetings, and that the re-opening of these issues in the non-paper raised questions about the transparency of its signatories.

⁸ A/HRC/8/L.1, 8/PRST/1, available on the Extranet of the UPR.

⁹ ‘The State under review will be given a maximum of 60 minutes in the WG to be used for: a) initial presentation of the national report/responses to written questions; b) replies to the questions raised from the floor during the interactive dialogue, if desired; and: c) concluding comments at the end of the review’.

¹⁰ India – Solicitor General, Netherlands – Secretary of State, Bahrain – Minister for Foreign Affairs, Ecuador – Minister of Justice, Tunisia – Minister of Justice, Morocco – Minister of Justice, Indonesia – Deputy Minister of Multilateral Affairs, Finland – Secretary of State, United Kingdom – Minister of State, Brazil – Executive Secretary of the special secretariat for human rights of the Presidency, Philippines – Executive Secretary of the Presidential Human Rights Committee, Algeria – Minister of Foreign Affairs, Poland – Under-secretary of State, Netherlands – State Secretary for Justice, Czech Republic – Government Agent before the European Court of Human Rights. The delegation of South Africa, led by its Permanent Representative to the United Nations, was the exception.

¹¹ Bahrain’s and Poland’s delegations each consisted of 27 delegates.

for the State under review worked reasonably well for the first and second sessions, although there were variations in practice and there remains the possibility of misuse in the future. For instance, in the first sessions the Netherlands chose not to focus on information already provided in the State report, and instead succinctly addressed questions submitted via the troika, thus ensuring that 45 minutes was left to engage in answering questions from the floor. Others, such as Argentina in the first session and Ghana, Peru, Sri Lanka and Romania in the second, used up to 40 minutes to present their report, with the result that they were not able to address points raised in the interactive dialogue. It was particularly surprising that Romania would follow such a course of action, given that its Ambassador, as President of the Council, had originally proposed that States' presentations be limited to 30 minutes. On average, however, other States did observe this recommendations and took up to half of the time available for their initial presentation.

One of the clearer critical questions arising from the first session of the UPR related to the questionable value of submitting written questions to the troika for each country under review, and by extension the **value of the troika per se**.¹² Less than half the States under review allocated time to address questions submitted to them via the troika, with only the Netherlands referring to the authors of specific questions submitted by the troika. It was clear that a far higher proportion of questions and/or recommendations presented orally during the interactive dialogue were likely to receive a response, or were at least recorded in the summary report of the Working Group. The high number of questions that were left unanswered through the troika process were not addressed in any manner.¹³ This also created an impression that some States were not engaged in the UPR, whereas they may have decided to submit their questions through the troikas for the first session. This practice was continued through the second session, with Japan and the Republic of Korea making specific reference to questions received and answering these questions in their presentations, but with the majority not making any clear reference to written questions. It is highly likely, therefore, that States are less likely to submit questions to troika members in the future and will instead reserve their questions for the interactive dialogue.

Finally, it was only by the second session that a State under review - Benin - requested **technical assistance** to help it improve the situation of human rights on the ground. Considering the protracted discussions that took place during the drafting of the UPR on the need to provide technical assistance, reference to this option has been limited to date. However, it should also be noted that Benin is the only 'least developed country', as categorised by the UN¹⁴, to have been reviewed under the UPR so far.

Patterns and trends in the interactive dialogue

It was agreed from the first modalities non-paper of the President of 27 March 2008 that member and observer States would be given 3 and 2 minutes respectively to provide comments, questions and recommendations to the State under review. The State could address these questions individually, in clusters of its choosing, or at the end. The prevailing practice was to **answer questions in clusters**, although in the case of India and Brazil in the first session and Guatemala in the second, for example, the clusters were so large that specific questions and/or recommendations were left unanswered, intentionally or otherwise. Gabon, in the second session, was the first country to take all of the questions at the end rather than by clusters, and also avoided addressing many points. The approach of Ecuador of responding after each grouping of seven or eight interventions appeared to be a more workable practice.¹⁵

¹² For an explanation of the role and purpose of the troika, see Council *Resolution 5/1*, para. 18 (d), at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/1. For a full summary of the selection of troikas, see www.ishr.ch/hrm/council/councilalert/council_update_7session.pdf

¹³ These questions are now available on the OHCHR extranet at <http://portal.ohchr.org/portal/page/portal/UPR/1session/>. Fill in the form at www.ohchr.org/english/bodies/hrcouncil/form.htm to receive username and password.

¹⁴ The list of the Least Developing Countries is available at <http://www.un.org/special-rep/ohrls/ldc/list.htm>

¹⁵ Review of Ecuador available at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_ecuador_final.pdf

The first **list of speakers** for Bahrain consisted of 36 States. After the smooth completion of the first interactive dialogue the President announced that the figure of 36-38 interventions would be optimum for the interactive dialogue. However, during the review of Tunisia, 61 States requested to speak. Due to the resulting impossibility of all States to intervene, it was decided thereafter that the cut-off point would be 45 interventions. The number of speakers varied from as high as 61 for Tunisia to as low as 21 for Finland and the Czech Republic in the first session. However, the practice of limiting speakers was discarded by the President without clear explanation in the review of Pakistan at the 2nd session, where 70 States were permitted. While almost all States respected an imposed time limit of two rather than three minutes, the review of Pakistan still ran considerably overtime. This anomaly raised serious questions about whether more powerful States could wield undue influence over the Chairperson. During the interactive dialogue on Sri Lanka, the Chairperson also allowed 56 States to speak, while the remaining long list of States were requested to submit their comments in writing. Elsewhere throughout the second session the unwritten limit of 45 interventions was upheld.

The first negative trend in the interactive dialogue became apparent at the very outset of the review of Bahrain. Palestine (on behalf of the Arab Group) and twelve 'friendly States'¹⁶ commended Bahrain for its comprehensive report and for its 'range of achievements' and 'wealth of experience in human rights'.¹⁷ However, none of them put forward critical comments, questions or recommendations. The practice reached a dangerous low in the review of Tunisia, when the **list of speakers was so dominated by 'friendly States'** that it appeared an orchestrated exercise in filibustering.¹⁸ The lack of critical comments and recommendations resulted in a report of the Working Group that was less likely to reflect the reality of the situation of human rights on the ground, diminishing the possibility that the first objective of the UPR to 'improve of the human rights situation on the ground' could be realised.¹⁹

Fortunately, this practice abated in the second session, due more so to the fact that fewer States under review held strong affiliations to particular groups, with the notable exception of Pakistan. However, a more visible trend in the second session was the fact that **smaller States were far less inclined to engage in interactive dialogues with States from different regions** than their own. African States, with the exception of Morocco, Algeria, Egypt, and to a certain degree Tunisia, were only likely to take part in the interactive dialogue with other African States. For example, in the review of Gabon, 13 of the 36 States that provided comments were from the African Group, whereas in the review of Peru only Algeria provided comments, and they were joined solely by Tunisia in the review of Guatemala.²⁰ Of the GRULAC States, only Brazil, Mexico and Cuba tended to continually engage cross-regionally. The same could be credited to Indonesia, the Philippines, Malaysia and Azerbaijan from the Asian Group. Contributions from EU States tended to be more evenly spread across the regions, although the level of engagement from States varied enormously, with Slovenia, as Presidency of the EU, tending to comment on most States in an individual capacity. However, the selectivity employed by States in deciding when to engage in the interactive dialogue has raised legitimate questions about the 'universality and non-selectivity' of the review process so far. It may also have illustrated, even accounting for the capacity of small permanent missions in Geneva, that States in one region are not particularly interested in what is happening in another when it comes to human rights.

Concerning the procedure adopted by member and observer States of the UPR Working Group, States developed a **general practice** during the first session of first noting positive developments in the country

¹⁶ Palestine, India, Pakistan, Qatar, Tunisia, United Arab Emirates, Saudi Arabia, Turkey, Malaysia, Algeria, Libya, Cuba.

¹⁷ Palestine.

¹⁸ For example, the first fifteen countries to speak in the interactive dialogue were Kuwait, Palestine, Pakistan, Philippines, Chad, Saudi Arabia, Russian Federation, Slovenia, China, India, Madagascar, Ghana, Mauritania, Bangladesh, Angola. Review of Tunisia available at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_tunisia_final.pdf

¹⁹ Council Resolution 5/1, para. 4(a), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/1

²⁰ Algeria, Democratic Republic of the Congo, Tunisia, Senegal, Republic of the Congo, Morocco, Nigeria, Guinea, Ethiopia, Chad, Cameroon, Mauritania

under review, then (if they chose to progress beyond compliments) to issues of concern, leading then to questions and to possible recommendations. However, it became clear at the outset that if a State wished for a recommendation to be registered as such in the report of the Working Group, it had to use the word 'recommend' in its statement. Overall, the **percentage of positive comments** far outweighed criticisms. In the case of Brazil for example positive comments were approximately ten times more numerous than critical observations. In the case of Sri Lanka in the second session, which was anticipated as the first test case of how the UPR would address a particularly serious human rights situation, positive comments actually outweighed critical interventions, although these were generally phrased as commending Sri Lanka in the face of the 'challenges' it has to meet.²¹ **Questions and recommendations** were also of such **variable quality** that it is difficult to give an overall assessment. However, it is worth noting that while States were selective about who they directed their questions to, genuinely robust questions and recommendations were raised in almost all meetings.²² Nonetheless, recommendations were often made that were so broad, vague and weak that it will be very difficult for States and other stakeholders to measure their implementation.²³ This practice did not notably improve from the first to second session of the UPR, but now that the reports of the first two sessions can be cumulatively assessed, States and NGOs can clearly see how improvements might be made. Whether they are made will be a critical issue for the third session of the UPR in December 2008.

The Working Group addressed the widest **range of thematic issues** over the course of the first two UPR sessions. As could be expected, member and observer States focused on issues of interest for themselves. However, the issue of discrimination on the basis of sexual orientation drew significant attention on account of the position of Egypt that sexual orientation did not fall under the 'basis of review'²⁴ of the UPR unless it was included in a particular State's 'voluntary pledges and commitments', including those taken by the State upon seeking membership to the Council.²⁵ As the State in question, Ecuador, had taken up the issue in its voluntary pledges, the procedural issue was passed over. The issue resurfaced in the review of Tonga during the second session. Following recommendations from the Netherlands, the Czech Republic and Canada that Tonga should decriminalise sexual activity between consenting same sex adults, Bangladesh recommended that Tonga continue to criminalise such activity 'if this is in accordance with the country's values' as the purpose of the UPR is 'not to impose the values of one country on another'.²⁶ This constituted the first instance where a State was faced with two directly opposing sets of recommendations. In the final report, Tonga responded by stating that it is 'a Christian society that believes in tolerance and respect across

²¹ For the review of Sri Lanka, see http://www.ishr.ch/hrm/council/upr/upr_2nd_session_2008/upr_002_sri%20lanka_final.pdf

²² See for example the United Kingdom and Peru in the case of Brazil (at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_brazil_final.pdf). Senegal in the case of Tunisia, the Democratic Republic of the Congo in the case of South Africa (at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_south_africa_final.pdf). Algeria in the case of the Netherlands (at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_netherlands_final.pdf), Russia and Cuba in the case of Poland (at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_poland_final.pdf), Belgium in the case of Algeria (at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_algeria_final.pdf)

²³ Some examples include the following recommendations to Tunisia: 'Recommends that Tunisia pursue its programmes and consolidated approach in the promotion and protection of all human rights including in the field of education, health and the promotion of the status of women (Syrian Arab Republic) as well as the empowerment of women (Cuba)'. Several vague recommendations were made to Morocco, such as 'to continue its achievements in the field of Human Rights (Saudi Arabia)', 'while recognizing the efforts of Morocco to promote a culture of human rights and human rights education and training, to carry on with its efforts to disseminate and consolidate the human rights culture in the country (Syrian Arab Republic)', 'to continue, as it has done, to ensure respect for the human rights of all migrants (Mexico)'. The following recommendation was also made to India: 'Consider new ways of addressing growing economic and social inequities arising out of rapid economic growth and share experiences/results of best practices in addressing poverty (Algeria).'

²⁴ The 'basis of review' of the UPR is (a) the Charter of the United Nations; (b) the Universal Declaration of Human Rights; (c) human rights instruments to which a State is party; (d) voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council; and applicable international humanitarian law. Council Resolution 5/1, para. 1(d), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/1

²⁵ For a summary of this debate, see the adoption of the report of Ecuador at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_ecuador_final.pdf

²⁶ See the review of Tonga at http://www.ishr.ch/hrm/council/upr/upr_2nd_session_2008/upr_002_tonga_final.pdf

difference', and that this respect for difference 'allows the widest margin of appreciation' to lawmakers and other stakeholders to engage in 'robust discussion' on issues related to equality, thus obfuscating from both recommendations.²⁷ The question of sexual orientation, as the issue at the forefront of allegations of the imposition of the values of certain countries on others, will continually resurface at future sessions of the UPR.

Several issues, including that of sexual orientation, served to illustrate the positive and negative aspects of States speaking in an individual capacity. A **move away from regional or other group statements** and positions was a very positive development of the UPR in allowing States not to be constrained by a lowest common denominator approach. However, in certain cases these individual statements led to repetition. For instance several EU States lined up to ask Poland to criminalise discrimination on the basis of sexual orientation. While this appeared to improve in the second session, there is still a need to strengthen coordinated planning among States so that duplication of questions could be avoided in the future.

The interactive dialogue also witnessed the practice by certain States of asking the same **standard thematic questions** to all States. In its questions sent to the troika, the United Kingdom included a standard question on the role of civil society in the preparation of the national report. During the dialogue, Slovenia raised the gender perspective of the UPR, France queried the ratification of the *International Convention for the Protection of All Persons from Enforced Disappearance* through both sessions, Luxembourg intensified its practice in the second session of focusing its questions on alleviating poverty, and Australia enquired whether the State under review had a national human rights institution. While the intention may have been to avoid selectivity, and the practice was in certain cases positive, the latter example also illustrated a perfunctory approach to the process, as it was clear in many cases that Australia had not first checked whether the State under review did already have a national institution. Moreover, the question had in some cases already been answered by the State under review.²⁸

The review of **Sri Lanka** was anticipated as the litmus test of the **UPR's ability to respond to particularly grievous human rights situations**. The State's presentation, as expected, concentrated on its cooperation with the Council and the international system, and focused its areas of concern on the activities of non-State actors. As mentioned, there was an equal balance of positive and critical comments. Critical recommendations came from EU and other Western countries, while Sri Lanka's regional neighbours commended Sri Lanka for its efforts in the face of severe challenges and for its institutional human rights framework.²⁹ Notably, India shied away from sensitive issues and simply inquired into the status of minority language education in schools, returning the favour shown to it by Sri Lanka as part of India's own review on 10 June 2008.³⁰ Recommendations from Pakistan and Belarus were directed towards the international community, and not the State under review, to assist it in its fight against terrorism. An assessment by any casual observer with a passing knowledge of the situation in Sri Lanka would reveal a glaring bias in the way that Sri Lanka was approached.

Nonetheless, on account of the individual allocation of recommendations, Sri Lanka was provided with over 70 recommendations of varying quality. It is also worth noting that Sri Lanka rejected 26 of these recommendations, a high proportion, and gave further consideration to ten recommendations in an addendum report to the Council on 16 June 2008.³¹ Sri Lanka accepted recommendations that tended to be related to 'further encouraging efforts' and 'continuing to strengthen' existing activities, whereas substantive

²⁷ A/HRC/8/48, para. 65.

²⁸ See for example the case of Brazil, after Brazil had detailed its various institutions responsible for human rights protection and promotion, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_brazil_final.pdf

²⁹ India, Maldives, Pakistan, Bhutan, Nepal.

³⁰ Sri Lanka stated that their neighbouring country's handling of such a multifaceted society 'served as a model to them and it reminded the Council that many delegations received India's efforts as examples of best practices'.

³¹ A/HRC/8/46/Add.2.

recommendations such as the acceptance of independent international monitoring and the need to avoid unduly constraining the activities of civil society, including through registering human rights defenders, were rejected without explanation.³² This highlighted the **sovereign right that the UPR affords States in deciding which recommendations it can accept**, in stark contrast to the recommendations of the treaty bodies, for example. And while the compilation on the human rights situation in Sri Lanka now exists, as well as a long list of recommendations aimed generally at improving the human rights situation, the percentage of those recommendations accepted by Sri Lanka is low. This illustrated that the UPR may not be most useful in such serious cases, further highlighting the importance of maintaining the country mandates of the Council.

The case of **Tonga**, as the **first ‘micro-State’** to be reviewed under the UPR and a State that is not usually involved in or referred to by the Council, served as a useful counterpoint to the example of Sri Lanka. Even prior to the review, the Government of Tonga submitted a report that was publicly endorsed by civil society in the country.³³ The delegation’s presentation was candid, and many of the questions and recommendations provided to it were well-prepared and absent of the bias that flavoured recommendations to Sri Lanka (although a high percentage did still fall into the category of recommending that Tonga seek technical assistance). While Tonga did shy away from accepting certain important recommendations, including an amendment to women’s inheritance rights and observers’ access to prisons³⁴, it also accepted strong recommendations, including ratifying the ICCPR and ICESCR and ‘developing the practical steps to enhance freedom of speech and freedom of the press’. In the case of Tonga and other such States that are not embroiled in the politics of the Council, but who may genuinely seek assistance in improving their human rights situation, it seemed like the UPR process could yield useful dividends. However, for this to become a precedent the UPR Working Group would need to maintain a keen level of interest in smaller States, and not treat Tonga as a novel case.

Finally, in accordance with the requirement that the UPR not duplicate but complement the work of **treaty bodies**, the interactive dialogue proved to be quite useful in drawing attention to the recommendations of treaty bodies and of special procedures of the Council, and recommending their implementation. An initial count of references to treaty body recommendations at the second session of the UPR, for instance, runs to over 220. On a procedural level, many States have also used their presentation to commit to submitting overdue reports to various treaty bodies within a fixed period of time. Others have declared their intention to ratify outstanding treaties, while Pakistan, whether by coincidence or otherwise, ratified the *International Covenant on Economic, Social and Cultural Rights* and signed the *International Covenant on Civil and Political Rights* on 17 April 2008, less than three weeks before it was to be reviewed under the UPR. In this instance it could be stated that the UPR has succeeded thus far in not duplicating, but complementing the work of treaty bodies, both in encouraging States to meet their procedural obligations and as a form of interim follow-up to outstanding substantive issues raised by the treaty body. This has been facilitated, in turn, by NGOs linking ongoing human rights concerns to unimplemented treaty body recommendations in their submissions.

Conversely, it remains to be seen **how the recommendations of the UPR will be taken up by the treaty bodies** in their examination of States.³⁵ As of July 2008 Algeria, Finland, France (twice), India, Indonesia and the United Kingdom (twice) have appeared before treaty bodies after being reviewed by the UPR, while Benin was examined by the Committee on Economic, Social and Cultural Rights the day before it was reviewed by the UPR.³⁶ In the case of Finland before the Committee on the Elimination of Discrimination

³² Para. 26(b) (Sweden); para. 32(d) (Ireland).

³³ A/HRC/WG.6/2/TON/1, available at www.ohchr.org/EN/HRBodies/UPR/PAGES/TOSession2.aspx.

³⁴ A/HRC/8/48, paras. 28(c), 39(b).

³⁵ Indonesia and Algeria are due to appear before the Committee against Torture in May 2008. See <http://www2.ohchr.org/english/bodies/cat/cats40.htm>

³⁶ CESCR – France and India; CAT – Algeria and Indonesia; HRC – United Kingdom and France; CEDAW – Finland and United Kingdom.

against Women (CEDAW), considerable reference was made to the UPR review, including references to the implementation of previous recommendations by CEDAW.³⁷ In the case of Indonesia before the Committee against Torture, some cross referencing of the outcomes of the UPR report was made during the examination,³⁸ and in the case of France, Human Rights Committee member Ms Wedgwood declared that she had found the report of France to be useful in preparing for its examination before the Committee. Elsewhere, however, references were non-existent. The recent Inter Committee Meeting (ICM) of the treaty bodies, which took place from 23-25 June 2008, was characterised by a predominant pessimism and fear that the UPR would undermine the entire treaty body system, despite the fact that early UPR practice would clearly indicate otherwise.³⁹ Among the substantive complaints raised by treaty body members was the political selectivity in which treaty body recommendations were referenced, whether States had refused to accept their recommendations to which they were already obligated under the treaties, the generality of UPR recommendations, and allegations that human rights issues were being bargained away behind the scenes in the drafting of the final UPR reports. It was clear from the outcome of the ICM that treaty bodies require more information on the UPR's performance (a practice that the Human Rights Committee is conducting internally). In this respect, NGOs can, among other initiatives, contribute by referencing UPR recommendations in its NGO submissions to the treaty bodies.

Direct references to the information submitted by other stakeholders were more sporadic, although the lack of reference to NGO submissions does not mean that points were not duly taken up by States. In certain cases, it is clear in fact that the vast majority of issues raised in the submissions of NGOs were also raised by States in the interactive dialogue.⁴⁰

Format and content of the final report

During the last days of the March session of the Council, the President formally proposed modalities and practices for the UPR⁴¹, including on the report of the Working Group to the Council. However, it merely recalled that the report should follow the format of the outcome as set out in Council *Resolution 5/1*, which 'will be a report consisting of a summary of the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned.'

The above-mentioned non-paper by the African Group, OIC, and the Arab Group on modalities also recalled that the outcome would consist of a summary of the proceedings, conclusions and recommendations *agreed and not agreed* (emphasis added), and voluntary commitments by the State under review. The non-paper further suggested that the State under review could withhold its position on certain recommendations and make its position and any comments known at a later stage, to be included in the final report of the Working Group. The paper also indicated that only the recommendations supported by the State under review be subject to follow-up.

Consultations and negotiations in the build up to the session led the above-mentioned groups to revise their non-paper. The revised non-paper of 3 April 2008 is largely identical to the compromise reached in a Presidential statement dated 9 April 2008.⁴² The non-paper established that the report will be a factual summary of the proceedings in the Working Group reflecting the recommendations made. The State under

³⁷ For a review of Finland's examination before CEDAW, see http://www.ishr.ch/hrm/tmb/treaty/cedaw/reports/cedaw_41/cedaw_41_finland.pdf

³⁸ See http://www.ishr.ch/hrm/tmb/treaty/cedaw/reports/cedaw_41/cedaw_41_lithuania.pdf

³⁹ For a critical analysis of the Inter Committee Meeting, see http://www.ishr.ch/hrm/tmb/icm_mc_june_2008.pdf; All documents are available at <http://www2.ohchr.org/english/bodies/icm-mc/documents.htm>

⁴⁰ This can be seen by cross referencing the summary reports and the OHCHR summary of information of 'other stakeholders' in the reviews of the Philippines and the Netherlands, for example.

⁴¹ Proposal of the President, dated 27 March 2008, 'the review process: modalities and practices', available on the OHCHR extranet.

⁴² A/HRC/8/L.1, 8/PRST/1.

review is then expected to examine all the recommendations. The recommendations that enjoy the support of the State under review are to be listed, and other recommendations should be 'noted'.⁴³ The State under review can inform the Working Group of its position regarding outstanding recommendations 'whenever it is in a position to do so' until and including during the plenary session of the Council when the report of the Working Group is to be considered. However, right up to the adoption of the first report of the Working Group - on Bahrain - there was still no agreement on the issue.

Disagreements focussed on how the recommendations should be reflected in the report. Egypt, Pakistan, Nigeria and Algeria argued that the recommendations in the report should only reflect the views of the individual State and should not be attributable to the Working Group as a whole. These States, with the support of the Russian Federation and China, argued that each recommendation should therefore be followed by the name of the State that had formulated it.⁴⁴ Others argued that this was not necessary. Mexico suggested that all States that had made recommendations could be listed in an introductory paragraph to the list of recommendations. Cuba and the Russian Federation argued that only recommendations accepted by the State under review and which enjoyed 'broad support' should be included in the report's section on conclusions and recommendations. Slovenia (on behalf of the EU) insisted that some of these proposals seemed to run counter Council *Resolution 5/1* in that it would not provide for a full listing of recommendations, and argued that this basic text should continue to guide the UPR process. This view was echoed by other States during discussions of the subsequent reports, including for example Canada and Switzerland on the report on Tunisia.

The discussion on the format of the report continued when the Working Group considered the report on Tunisia. While Tunisia had accepted all of the recommendations in the report, many States complained that their recommendations were not in fact adequately reflected in the draft. An agreement could only be reached on a standard format after the suspension of the session by the President to allow for consultations. This standard provided that, if the State under review so wished, recommendations that it could not accept or had not yet agreed upon would be reflected only in the summary of the meeting and not in the list of recommendations. A separate paragraph after the list of agreed recommendations would then cross-reference the recommendations not yet agreed upon.⁴⁵ Alternatively, the State could 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 any of these. In both cases, all recommendations, whether accepted or not, 'should be duly noted in the outcome document' that is adopted by the Council.

The report on Indonesia also caused controversy in terms of its format, with States divided over whether the report could refer to conclusions and recommendations reached during the interactive dialogue or only to recommendations.⁴⁶ The report did not mention the name of the State that had made the recommendation. Nigeria, the Russian Federation and China expressed dissatisfaction with this and argued that the authors of recommendations should be clearly stated. After another suspension, the President announced that an agreement had been reached on including a new standard phrase in all reports. The paragraph reads: '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.' The report on Indonesia was then adopted without the attribution of States to the recommendations as a 'last exception' to the basic template.

⁴³ *Resolution 5/1*, para. 32: 'Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.'

⁴⁴ Supported by the Russian Federation, China.

⁴⁵ The report on Morocco was used as an example of this, where a paragraph was included reading "Other recommendations noted in the report in paragraph 72 and paragraph 65 will be examined by Morocco, who will provide responses, if any in due time. Both will be noted in the outcome report to be adopted by the Council".

⁴⁶ Pakistan, Nigeria, Russian Federation, China argued that there was no room for conclusions in the report as States had only made recommendations.

The **quality of the summary** of the interactive dialogue in the draft UPR was quite accurate, and even more so by the second session. It is difficult to gauge how often States needed to use the two-week window to request amendments to various reports, as this communication took place confidentially between States, the State under review and troika members. Some NGOs did assume a watchdog function of notifying States that their own statements had not been adequately reflected in the summary of the interactive dialogue.

During the first UPR session, States already adopted different **approaches to the recommendations**. While some States agreed to all recommendations made,⁴⁷ others could only agree to some recommendations while leaving others to be ‘considered’.⁴⁸ Others States, still, decided to only review the recommendations, reserving their decision for later.⁴⁹ Only Algeria rejected out of hand some of the recommendations. The content of the summary of recommendations was much more seriously challenged, however, in the second session by Pakistan. Prior to the adoption of the report itself, Pakistan sought to include a paragraph that read: “Pakistan further *notes* that other recommendations in paragraphs 23(b) and (f), 30(b) and (d), 43(c), and 62(b) and (e)⁵⁰ in section II above neither fall under the framework of **universally recognised human rights** nor conform to its current laws, pledges and commitments, hence, cannot be accepted.”

Pakistan argued that these recommendations did not fit within the parameters of universal human rights principles, and were not compatible with its own legal system. Slovenia (on behalf of the EU) argued that Pakistan’s proposed wording had no basis in the institution building package and was not in spirit of the exercise, while Switzerland, Mexico and others pointed out that it did not correspond to any reporting model that had been accepted, and that the country under review was not in a position to make a value judgment on the applicability of recommendations under international law, or introducing new criteria for the acceptance of recommendations.⁵¹ Egypt argued that any recommendations falling outside the parameters of the institution building package should not be called ‘recommendations’, and agreed with Pakistan that such issues were not covered by human rights law.

The Chairperson had no option but to announce that the report would have to be considered the following day. Following further discussions, the reworded paragraph finally read: “Pakistan *considers* that recommendations contained in paragraphs 23(b) and (f), 27(b), 30(b) and (d), 43(c), and 62(b) and (e) in chapter II above are neither universally recognised human rights nor conform to its existing laws, pledges and commitments, and cannot accept them.” The report was then adopted by consensus.

This issue has not been resolved and may in future raise the possibility of States under review commenting on recommendations as they choose to interpret international law. At the time of writing, it has at least been limited to the States’ *individual* interpretations, rather than a statement of fact (as was the attempt of Pakistan’s first draft), yet this remains a potentially damaging new development in relation to the basis of recommendations.

The **attribution of individual recommendations to States** allows for the inclusion of recommendations that would not be able to enjoy the support of the Working Group as a whole, or would be weakened if they had to be subject to negotiations. A good example of an issue that has been included in the reports, despite some

⁴⁷ Ecuador, Finland, Argentina, Tunisia.

⁴⁸ Algeria, Bahrain, Morocco, Indonesia.

⁴⁹ United Kingdom, India, Philippines, Poland, Netherlands, South Africa, Czech Republic.

⁵⁰ 23(b) regards repealing provisions criminalising non-marital consensual sex and failing to recognise marital rape – recommendation made by Canada; 23 (f) decriminalising defamation (Canada); 30(b) reviewing the death penalty, with a view towards introducing a moratorium and abolishing it (United Kingdom); 30(d) repealing the *Hadood* and *Zina* Ordinances (United Kingdom); 43(c) declaring a moratorium on executions and moving towards abolition (Switzerland); 62(b) decriminalising adultery and non-marital consensual sex (Czech Republic); 62 (e) prohibiting provisions of the *Qisas* and *Diyat* law in cases of honour killings (Czech Republic).

⁵¹ Canada, Netherlands, Italy.

heated discussion, is recommendations on sexual orientation.⁵² While there are concerns about the lack of collective ownership by the Working Group of the UPR, the value of having these recommendations seems to surpass the likely alternative of a consensus text that would ultimately contain very few strong recommendations.

Consideration and adoption of reports by the Human Rights Council

The second week of the 8th session of the Council was dedicated first to the adoption of the reports of 32 States under review from the first and second sessions of the UPR,⁵³ with each report being allocated one hour for consideration by the Council. The Council agenda also allocated two hours for a general debate on the UPR, providing the first opportunity for States and civil society to comment on the process so far (Item 6).

It had not been decided in advance of the 8th session **how time would be allocated** to States under review, member and observer States to comment on the outcome, and - for the first time in the process - NGOs and NHRIs to provide general comments. At the organisational meeting of the Council on 19 May, it was clear, however, that Pakistan (on behalf of the OIC) and Bangladesh sought to limit NGO engagement to the maximum extent possible. Following lengthy consultations, it was finally decided the day before the consideration that the State under review, member and observer States, and other stakeholders would each be allocated 20 minutes. While this appeared to be a fair allocation, the lateness of the decision hindered the participation of national NGOs in the debate on the UPR outcomes. Also, in presenting this proposal to the Council, the President stated that NGOs should not use this time to 're-open discussions of the Working Group' - a statement that would later create enormous difficulties for NGOs and the President alike, as explained below.

The report on Bahrain was the first to be considered. The Bahrain delegation used its speaking time to comment vaguely on plans undertaken to implement UPR recommendations.⁵⁴ This was followed by eight out of nine States who had time to speak, all members of the OIC, entirely complimenting Bahrain on its efforts.⁵⁵ However, it should be noted that it was not always easy for States or NGOs to comment on the State under review's response to recommendations, as the **final edited UPR reports**, containing the States final position on various outstanding recommendations, **were not always available** before the consideration of the report. It should be expected that this anomaly will be addressed by the new President of the Council prior to the next consideration of UPR reports by the Council in March 2009.

When NGOs spoke in relation to Bahrain, a difference in understanding of the guidelines for participation became apparent. Frontline International, as the second NGO speaker, declared that human rights defenders were harassed, detained, and subjected to excessive force in the country. Pakistan then recalled the previous words of the President that NGOs 'should not re-open discussions discussed in the Working Group'. The President then asked that NGOs 'stick to the provision of *Resolution 5/1* as well as all relevant documents',

⁵² For the debate on the inclusion of these issues, see ISHR's report on Ecuador, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_ecuador_final.pdf.

⁵³ The States reviewed during the first session of the UPR were: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, United Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, Czech Republic, Argentina. The second session covered: Gabon, Ghana, Peru, Guatemala, Benin, South Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania, Mali. The summaries of the consideration of all reports are available under ISHR's *Daily Updates* at www.ishr.ch.

⁵⁴ Available on the Extranet, at <http://portal.ohchr.org/>

⁵⁵ Slovenia was the exception, which regretted that Bahrain had not accepted its recommendation on women migrant workers.

which he claimed were ‘perfectly clear’. However, as these documents state that NGOs may make ‘**general comments**’, the President’s directions were anything but clear.⁵⁶

The failure of the President to clearly rule on the issue meant that the impasse continued throughout the week. Any NGO that addressed the situation of human rights in a country under review was interrupted⁵⁷, even when the statement was linked to the outcome report of the Working Group, with the request (usually from Egypt) that the President uphold his own ruling and that the comments of the NGOs in question be removed from the final report of the session. This was followed by States such as Canada, Mexico and Switzerland challenging this ‘excessively narrow’ interpretation of Council *Resolution 5/1* and the President’s own statement on modalities.⁵⁸

It is worth noting that complaints by States were limited to NGO interventions directed at African or OIC States.⁵⁹ Egypt, Algeria and Pakistan were notably silent when NGOs criticised the human rights situation in France or the Republic of Korea, for example, even without clear links to the recommendations of the UPR report. It is also worth noting that many States who often claim to be advocates of the work of human rights defenders, including those who continually raised the issue during the UPR itself, were generally silent throughout the procedural controversy (with the exception of those States mentioned above).

Concerning the **general process of the consideration of reports**, there were varying practices by States under review on how they used their allotted speaking time. The vast majority of States explained which outstanding recommendations of the UPR they had finally accepted and rejected, with Switzerland and the United Kingdom focusing on recommendations they could not accept and providing detailed reasons why.⁶⁰ The majority of States detailed efforts they were undertaking to implement recommendations and voluntary commitments. This was useful, as it created an immediate follow-up mechanism through the consideration of reports by the Council. The practice of Ecuador of listing initiatives in relation to each UPR recommendation proved to be a particularly good example.⁶¹ A number of States chose to once again respond to sensitive issues that had been raised by member States during the interactive dialogue of the UPR Working Group, including for example Indonesia on the Ahmadiyah minority, India on caste-based discrimination, and France on the wearing of religious symbols.⁶² A final and less useful practice was that of simply reiterating elements of statements made during the UPR Working Group and reaffirming the State’s commitment to the UPR process.⁶³

As mentioned, the contribution of member and observer States was surprisingly muted. When States did speak, they tended to be complimentary to the State under review.⁶⁴ Notable exceptions included criticism by Denmark, Sweden, Japan, and Canada of the non-acceptance by Sri Lanka of 26 recommendations, while condemning the prevailing culture of impunity in the country. Algeria, on the other hand, deplored the ‘politicisation of human rights’ that occurred when States addressed the situation in Sri Lanka, yet sternly listed several of its recommendations to the United Kingdom that it had not accepted. Canada used the

⁵⁶ Council *Resolution 5/1*, para. 32 states that NGOs may ‘make *general comments* before the adoption of the outcome by the plenary’.

⁵⁷ NGOs increasingly linked their references to human rights to recommendations in the UPR report, which lessened the opportunity Egypt and others to interrupt the proceedings with ‘points of order’,

⁵⁸ President’s statement on modalities and practices for the Universal Periodic Review Process, 8/PRST/1, available on the Extranet at <http://portal.ohchr.org/>

⁵⁹ Interruptions took place during the adoption of the reports regarding Bahrain, Morocco, Algeria, Pakistan.

⁶⁰ See also Finland, Benin, Republic of Korea, Ukraine, Romania, Mali. Sri Lanka, on the other hand, summarily dismissed 26 recommendations by simply stating that many were linked to establishing an OHCHR field-office, on which their position was ‘very clear’. See http://www.ishr.ch/hrm/council/dailyupdates/session_008/13_june_2008.pdf

⁶¹ Philippines,

⁶² Others included Tunisia (torture), Netherlands (health services, human rights education), Ghana (death penalty), Pakistan (religious freedom, women’s rights), and Japan (death penalty).

⁶³ See for example Indonesia, Brazil, Czech Republic, Gabon, Guatemala, Pakistan, Zambia, Tonga.

⁶⁴ Council *Resolution 5/1*, para. 31.

intervention in relation to Pakistan to state that the UPR report did not ‘accurately reflect’ its suggestion that Pakistan take steps to end discrimination against minorities, as the paragraph omitted a list of specific groups in need of protection. Certain States also used this space to request that States under review report back to the Council on implementation before the next cycle of the UPR⁶⁵, while France volunteered to do so as a State under review.

One general practice of the UPR Working Group was also replicated, whereby regional or other groupings lined up to commend their allies. For example, in the case of Morocco, 9 out of 10 speakers were members of the OIC.⁶⁶ Often, however, no member or observer State wished to comment, as was the case when the reports of Finland, Poland, the Netherlands, the Czech Republic or Peru were considered.

NGOs that were not interrupted were generally more critical than member and observer States of the human rights situations in States under review, and provided specific examples of issues addressed during the UPR. Many NGOs also used the speaking time to propose means by which States could implement recommendations⁶⁷, and/or challenged the State’s position on particular issues or recommendations that the State had rejected.⁶⁸ Some of the more critical discussions related to Pakistan, where many NGOs⁶⁹ expressed concern over the State’s rejection of a number of recommendations, as listed above.⁷⁰ In the case of Algeria, among others, NGO interventions were useful in pointing out that the recommendations that the State had rejected were in fact the most relevant recommendations in the report. In relation to Argentina, NGOs stressed that the recommendations of the UPR had not addressed many of the most serious issues in the country. Concerning South Africa, NGOs highlighted the apparent lack of commitment of the South Africa to the UPR process.⁷¹ In rare instances, such as in the case of Tunisia, many national NGOs chose to commend the State on its efforts in relation to poverty reduction and women and children’s rights, while remaining resolutely silent on any critical issues raised in the OHCHR’s summary report of information submitted by other stakeholders.

It was more difficult to gauge the nature of interventions by **national human rights institutions (NHRIs)** as only those from India, Indonesia, Republic of Korea and France spoke. KOMNAS – HAM from Indonesia and the National Commission of the Republic of Korea interestingly drew attention to the limits of their own powers, and they and the National Consultative Commission of France all levelled criticism of their respective States’ performances. India and Sri Lanka, as States under review, pointed to the existence and functioning of national institutions in their countries as evidence of the State’s commitment to human rights, despite challenges in the same forum concerning their independence. The National Human Rights Commission of India used its statement to provide general comments on the UPR process and the status of NHRIs, and objected to being ‘clubbed together with NGOs’. Aside from the fact that the agenda item for such a statement was the general debate on the UPR and not the consideration of State reports, the idea of discussing a review of the categorisation of ‘other stakeholders’ at this stage illustrated the need for further work to be done to

⁶⁵ For example, the Netherlands recommended that India inform the Council before the next review in four years on any developments regarding the implementation of the recommendations made, including those not agreed to.

⁶⁶ The same patterns were evident in relation to Bahrain and Tunisia and OIC co-member States, and Gabon and Benin and African Group States.

⁶⁷ For example, Action Canada for Population and Development, speaking on behalf of partner organisations in Ecuador, welcomed Ecuador’s inclusion of sexual orientation in their voluntary commitments, and called for sexual orientation to be listed as grounds for discrimination in accordance with recommendation 7 of the UPR report.

⁶⁸ See for example the Centre on Human Rights and Evictions (COHRE) in relation to Switzerland and economic, social and cultural rights, and the National Human Rights Commission of Korea in relation to the *National Security Act*.

⁶⁹ International Federation of Human Rights Leagues, Human Rights Watch, International Commission of Jurists, Amnesty International, Asian Legal Resource Centre, Women’s Rights Action Watch.

⁷⁰ See above, p. 10, and A/HRC/8/42, para. 108, referring to recommendations in paras. 23(b) and (f), 27(b), 20(b) and (d), 43 (c), 62(b) and (e).

⁷¹ Amnesty International.

clarify for NHRIs their role in the UPR process. A failure to address the situation of human rights also did nothing to alleviate accusations of a lack of independence.

On a more positive note, a high percentage of States under review were happy to respond to issues posed by NGOs in their interventions,⁷² thus making use of the opportunity for engagement, despite the best efforts of Egypt to restrict NGO involvement. In particular, Ecuador and Argentina, as States under review, underlined the importance of NGO participation at this stage of the UPR process.

Overall, relatively few stakeholders spoke.⁷³ This may have been attributable to the short time between the last session of the UPR and the Council, and the lack of clarity surrounding modalities for participation leading up to the session. Many NGOs may also have considered that a two-minute allocation of speaking time was not the best use of limited resources, and others may have wished to see how practice evolved following the first round.

NGOs also used the opportunity of the **general debate on the UPR** to relay their views of the first sessions of the UPR and recent developments. Again, NGOs were more constructively critical of the process than States, with a general sense that judgement was still reserved on the UPR. The issues raised included: a lack of inclusion of NGOs in national consultations; the practice of certain groups of States lining up to praise their allies, a lack of clarity about NGO participation in the adoption of the outcome, a lack of response by the State under review to some of the recommendations made, and attempts by some States to call into question universal human rights law and principles. Once again Egypt attempted to interrupt NGOs under the general debate on the UPR⁷⁴ when reference was made to country situations, even when used as examples of the UPR process, and once again the issue was not resolved by the President.

Finally, concerning the **adoption of UPR reports by the Council**, the President had drafted a standard procedural decision to be used by the Council for all reports which simply states that the Council adopts the relevant report and the addendum report summarizing the information presented by the State under review, comments made by member and observer States and general comments by NGOs before the adoption of the outcome. There were no objections to the formulation, and in each instance the decision was adopted by consensus.⁷⁵

However, the final complication of the UPR process occurred after the close of the session, when the Council had to adopt its **draft report of the session**, which included an addendum containing a draft summary of the views expressed on the outcome of the UPR review.⁷⁶ Both were adopted *ad referendum*, with States given two weeks to propose any technical comments to the drafts. In the immediate aftermath, Egypt (on behalf of the African Group) and Pakistan (on behalf of the OIC) objected to the existence of a separate addendum of the UPR outcomes and to its descriptive content. The Ambassadors of Pakistan and Egypt sent a letter to the new President of the Council, Ambassador Martin Uhomoibhi of Nigeria, on 8 July 2008 claiming that the addendum did 'not conform to the agreement reached in paragraph 4.3 of the President's statement of 9 April 2008'⁷⁷ and 'accordingly, the report does not stand adopted'. The intention was to simply list the names of speakers and to remove the views and general comments expressed, in direct contradiction to Resolution 5/1

⁷² See for example, Bahrain in relation to women's participation in public life; Brazil in relation to human rights defenders and collaboration; Poland on renditions; Peru on the advancement of women; Switzerland on economic, social and cultural rights.

⁷³ For example no NGOs spoke in relation to Gabon and Mali, and only one in relation to Zambia.

⁷⁴ For a review of the general debate on the UPR on 13 June 2008, see ISHR's Daily Update at http://www.ishr.ch/hrm/council/dailyupdates/session_008/13_june_2008.pdf

⁷⁵ All decisions are available on the Extranet under the heading 'Resolutions, decisions and President's statements', at <http://portal.ohchr.org/>

⁷⁶ A/HRC/8/L.10/Add.1

⁷⁷ Paragraph 4.3 of the President's statement provides that 'A summary of the views expressed on the outcome of the review by the State under Review, and Member and Observer States of the Council, as well as general comments made by other relevant stakeholders before the adoption of the outcome by the plenary, will be included in the report of the Council's session.'

and the Presidential statement on modalities. This resulted in a decision from the new President two days later to appoint Ambassador Luis de Alba of Mexico to facilitate negotiations on the status of the report. On 28 July 2008 Ambassador de Alba published a note explaining the decision arising from his consultations. It was decided that the addendum report on the UPR would be included in the report of the Council and that the views expressed by the State under review in the plenary of the Council on the outcome of the review would also be integrated into the report, rather than as an addendum to the report of the Working Group.

Such disputes illustrate the sensitivity of certain States to the entire process. It is hoped, however, that this constitutes the last opportunity to procedurally undermine the UPR, and that the review process is now clear from beginning to end.

Concluding comments

Several positive elements can be drawn from the first two sessions of the UPR. States that would not be questioned before the Council or any other intergovernmental body on its human rights record, either by virtue of their size or influence, have to consider questions and criticism of the human rights situation in their countries. The fact that it is an intergovernmental process has on occasion been a positive factor in spurring States to challenge the human rights records of others. Certain States have used the opportunity to ask important and difficult questions to States on issues that would most likely not find a platform through the Council or other intergovernmental bodies. Likewise, States under review are on occasion answering questions that they would not consider to answer before the Council or in other fora. In so doing, this has opened new opportunities for NGOs to enter into dialogue with particular States that would not have existed in the past. The comments, questions and recommendations presented during the dialogue are also being recorded in official UN documents, as well as the States' commitments (or lack thereof) to implement these recommendations if they agree with them. Combined with the compilation of information submitted for the review (namely the national report, compilation of UN documents and summary of submissions by other stakeholders), this amounts to a useful compendium on the situation of human rights in the country under review. However, it could also be argued that the information submitted for the review has so far been of more value than the outcome, as it provides a more comprehensive overview of the human rights situation in the country.

The process has so far served to complement the work of treaty bodies and act as a form of interim follow up measure to outstanding recommendations. It has also in some cases encouraged States to make procedural commitments to the treaty bodies in advance of its examination under the UPR. Reference to the reports and recommendations of the Council's special procedures has also been relatively encouraging. In certain cases, concrete recommendations were proposed and a genuine political will was evident in accepting criticism and incorporating recommendations. During the consideration of reports before the Council, a reasonable number of States used the opportunity to outline specific plans to implement recommendations from the UPR, illustrating a tangible outcome of the process. The process has also generated a new avenue for dialogue and cooperation at the domestic level between governments and civil society, both in preparation for the UPR and in terms of developing plans for the future.

Many areas of concern can also be identified. The debates around the modalities of the process were very negative and sought to reverse agreements already contained in Council *Resolution 5/1*. The role of the troika was undermined by the fact that very few States under review referred to questions submitted to them via the troika. The role that the troika has played in ensuring that the outcome report adequately reflected the dialogue of the Working Group without undue interference by the State concerned has also been called into question. The practice of some States filling the speaking time to praise their allies also provided an excessively positive picture of the human rights situation in some States, and was contrary to the purpose of the UPR. Similarly, the selectivity exhibited by many States in what they chose to address and to which States

under review, and the manner in which they chose to address it, belied any collective commitment to adhere to a fundamental principle of the UPR, namely the ‘universal coverage and equal treatment of all States’. The lack of clear coordination among States also resulted in questions and recommendations being duplicated. The vagueness of recommendations needs to be improved and remains a very important issue prior to the third session of the UPR in December 2009.

A final broad and very serious concern remains whether States will attempt to argue at forthcoming Council sessions that the UPR replaces any need for discussing country situations, including country specific resolutions and country mandates of special procedures.⁷⁸ Recommendations of the UPR are usually very general and are not endorsed by the Working Group as such but reflect individual State’s concerns. Moreover, a country is only reviewed for three hours every four years under the UPR cycle, unlike the country mandates of the Council, which provide ongoing and systematic scrutiny. Attempts to replace such a system by deferring to the UPR would therefore constitute a serious setback to the relevance of the work of the Council.

In conclusion, while the UPR has not yet entirely settled in its practice and procedures, patterns have emerged that provide a clearer image of its possibilities and shortcomings. On that basis, the UPR should still benefit from the full critical engagement of all stakeholders.

⁷⁸ This was already attempted by the People’s Democratic Republic of Korea during the adoption of the resolution to continue the mandate of the UN Special Rapporteur on the DPRK at the 7th session of the Council in March 2008. For a summary of the discussion, see ISHR’s Daily Update of 27 March 2008 at http://www.ishr.ch/hrm/council/dailyupdates/session_007/27_march_2008.pdf, p. 11.

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