

Montreal, May 31st 2010

THE HUMAN RIGHTS COUNCIL'S UNIVERSAL PERIODIC REVIEW MECHANISM

THE CONDITIONS OF ITS PERENNITY

WORKING NOTE

As a consequence of the last paragraph of the 2006 United Nations General Assembly Resolution A/RES/60/251, the Human Rights Council (HRC) has to be reassessed five years following its creation, that is, in 2011. That review is ongoing and reunions to assess the HRC abound on all continents. The General Assembly's President, Ali Abdussalam Treki, for his part, designated two facilitators for the negotiation of the review process of the HRC's status: the heads of the diplomatic missions of Morocco and Liechtenstein at the UN in New York, Ambassadors Mohammed Loulichki and Christian Wenaweser.

This working note is to be seen as a first contribution from UPR Watch to the analyses, reflections and suggestions in the preparation of that important review. It is made public to further the discussion, and its contents will evolve along with that discussion.

Focused exclusively on the **Universal Periodic Review (UPR)**, a major program of the HRC, this note was prepared and made available by the team of the **Global Observatory on Human Rights**¹, hosted at the University of Montreal's *Centre de recherche en droit public* and whose works can be viewed on the following website: <http://upr-epu.org>.

CONTEXT

- To learn more about the context of the creation of both the HRC and the UPR, the following text can be consulted on our website:

- *Le mécanisme de l'EPU : quelle valeur ajoutée?*

- With regards to the significant issue of the implementation of recommendations issued to the states during their review, one can again refer to our website and find the following

¹ **Jean-Louis Roy**, Head; **Jonathan Burnham**, Coordinator and translator; **Saïd Hammamoun**, Main Legal Advisor; **Jérôme Youmani Lankoandé**, Researcher.



texts: *L'EPU : quelle mise en œuvre?* and *L'Examen périodique universel et les pays membres de l'Organisation internationale de la Francophonie (OIF)*.

- Concerning, finally, the following issues raised by the functioning of the HRC when it holds sessions of the UPR, the methodology used, the status, functions and compartments of the actors involved, the nature of the recommendations, the answers of the reviewed states to these recommendations and their implementation, our website will provide some answers through the **integral audio recording as well as the written synthesis of the interventions** at the roundtable organized by UPR Watch on April 12th 2010 at the University of Montreal. That roundtable was aptly called: **Human Rights, a Global Perspective**.

OBJECTIVES

This working note has the following 3 objectives:

1. Contribute to the negotiation process on the **review of the Human Rights Council status** (2011).
2. Identify, among the **UPR's missions and functions**, those that do not call for a substantial review as well as those that must be reviewed in whole or in part. Accordingly, **make hypotheses for changes or improvements that are likely to strengthen the UPR and guarantee its perennity**.

These reviews can take place with regards to the way the UPR mechanism has worked since 2008. They are also justified by the evolution from a first cycle (2008-2011) to a second cycle (2012-2015).

At the risk of oversimplifying, one could say that the first cycle was exclusively, and normally, dedicated to country reviews and to the elaboration of the recommendations they received. According to HRC Resolution 5/1 dated June 18th, 2007, the second cycle should focus on the implementation of the recommendations and conclusions of the first review. Such action could lead to the formulation of new recommendations in relation with that implementation, although not exclusively since the states have to remain free to issue new recommendations with regards to the evolutions of the human rights situation since the end of the first cycle (2011).

3. Make **hypotheses for changes or improvements** for the 2nd UPR cycle (2012-2015) that are likely to strengthen the UPR and guarantee its perennity. These improvements do not imply the re-opening of the institution-building package, which identified the UPR's modalities.



1- THE HUMAN RIGHTS COUNCIL STATUS REVIEW

The work that is undertaken at the Observatory is essentially dedicated to the UPR. However, general questions related to the HRC that are likely to affect the UPR, which is after all an HRC mechanism, deserve our attention here as well, albeit summarily. This note will thus successively examine questions related to the Council's status and its membership conditions as well as the questions related to the institutional cohesion between the UPR, the Office of the High Commissioner for Human Rights (OHCHR), the treaty bodies and the special procedures.

1.1 The Human Rights Council status

Does the current HRC status reflect the central place of human rights in today's civilization, the importance of the values and aspirations written in the UN Charter, the Universal Declaration of Human Rights and in the series of treaties, conventions and protocols that result from it? Is that status compatible with the oft-repeated affirmation that *“peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing”* (Resolution 60/251).

Since 2006, the HRC has the status of subsidiary organ of the General Assembly. That decision put an end to an “impossible” situation that had relegated the now defunct Human Rights Commission to the level of one “technical commission” among others, of the Economic and Social Council. That had to be remedied to.

The HRC cannot be assimilated to the technical commission of another council. It is neither a specialized agency nor a UN program. The same goes for the “subsidiary organ” category it was inappropriately put into in 2006, alongside both the Council of the United Nations University (Resolution 3081, XXVIII) and the Trade and Development Board (Resolution 1995, XIX). Anyhow, the current status of the HRC within the UN system is insufficient and inadequate, to say the least.

Are the circumstances there, or will they be, in order to change what must be changed next year, when comes the time of the “review”? Truth be told, they will never be unless a strong political will manifests itself.

The HRC, given the importance of the field of human rights, consecrated in the UN's founding documents, given also its attributions and responsibilities, clearly belongs to the group of main bodies within the UN. It should consequently benefit from such a status. This normalization would place it in the first category of General Assembly bodies, along with the Security Council and the Economic and Social Council.



1.2 Conditions of eligibility to the Human Rights Council

Any UN member state is eligible to HRC membership for a **3-year mandate renewable once**. That possibility must be maintained in its principle because it expresses and entrenches the idea of universality. With regards to the **freedom of the candidacies**, it cannot be contradicted by a preceding selection by the regional groups. Were that to be the case, the General Assembly vote would lose all its meaning, just as the capacity for initiative of the states at the HRC would be seriously tainted if reliant on a logic of regional blocs.

No UN member state can move away from the practice and institutions of the human rights doctrine and policies while claiming a seat at the HRC table.

Given all that precedes, it appears normal, critical even, for a state that bids for a seat at the HRC to be subjected to the following three requirements:

1.2.1 Be party to both International Covenants, that on Civil and Political Rights and the other, on Economic, Social and Cultural Rights (1966); be party to both or pledge to become so in a reasonable timeframe, say, 18 months following its election to the HRC.

1.2.2 Extend a standing invitation to the Special Rapporteurs and pledge, save exceptional circumstances, to answer favourably to their request for a visit.

1.2.3 Have a national institution for the promotion and protection of human rights that meets the Paris Principles, set one up if it doesn't already exist or update it if it exists but with deficiencies, within an 18-month timeframe.

It is more than a question of simple criteria among others that would be likely to change or be interpreted. It's a question for the countries to effectively adhere to the two texts that identify all the requirements with regards to the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [being] the foundation of freedom, justice and peace*", as is stated in the preamble of the Universal Declaration of Human Rights.

It is a question, with regards to the special procedures, to demonstrate the state's engagement in strengthening its responsibility in terms of promotion and protection of human rights and the acknowledgment by all countries of "*the highest aspiration of the common people*", that of being free "*from fear and want*".

Finally, with regards to the national institutions, it is a question of consenting to the guarantees, and strengthening them at the institutional level, of an effective protection of rights according to standards recognized by the international community.



1.3 Institutional cohesion between the UPR, the OHCHR, the Treaty bodies and the Special procedures

The United Nations system of human rights promotion and protection is composed of two types of bodies.

- a) Those such as the Human Rights Council and the Special procedures, the latter being specifically responsible for a country (national rapporteurs) or for a human rights theme (thematic rapporteurs) in every part of the world. These special procedures are at the heart of the human rights mechanism of the UN, **UPR included.**
- b) The Treaty bodies that were created to monitor and implement the provisions of the said treaties.

These bodies benefit from the research, logistic and secretarial services of the OHCHR.

What is the UPR's value added in that system and what are its effects on the institutional cohesion of the UN's promotion and protection of human rights? That question deserves scrutiny.

The specialized or sector-based character of the various instruments in place before the UPR's development is undeniable: situation in **one** country, questions relating to **one** theme, monitoring and implementation of **one** treaty. These missions are critical and are not questioned by the UPR. Quite the opposite. The UPR is a genuine catalyst for the other instruments of the system. **It brings together their knowledge** in the compilation by the OHCHR of the UN information regarding this country. **It strengthens** their observations and proposals by giving them a global tribune and, in many cases, by including them in the recommendations issued to the reviewed countries.

- In the case of treaties, the UPR **adds an official tribune** where it is possible to request their signature and ratification, to remind the states party of the obligations that stem from their adherence to international instruments. Regional treaties also benefit from that tribune. Many states have seized the occasion of the UPR to announce the ratification of treaties.

- In the case of special procedures, the UPR gives **a renewed visibility** to their work and a second life to many of their observations. Further, it provides many states with the opportunity to follow-up on the observations and recommendations of the treaty bodies and special procedures.

- In any case, the UPR allows the **national and international stakeholders** to plead and submit the case again for the acknowledgment and implementation of the treaties. It also gives them the opportunity to show their support for the special procedures, their work and their recommendations.



One of the main effects of the UPR is to reposition the work of the treaty bodies and special procedures in a greater ensemble that includes all the obligations of human rights promotion and protection for all UN member states, without exception; to reposition that work by including fields that could otherwise be ignored. By doing so, the HRC's mandate to ensure the coordination of the UN system and its human rights activities finds fertile ground. The texts are clear regarding that coordination: The Council "*should also promote the effective coordination and the mainstreaming of human rights within the United Nations system*" (Resolution 60/251, page 2).

Some contend that the system is too fragmented and creates heavy responsibilities for the states that have to submit themselves to the UPR's requirements as well as report themselves to the treaty bodies and take into account the demands and opinions of the special rapporteurs. Others consider that the aims pursued by the treaty bodies and special procedures remain critical and must be pursued jointly with the aims of a different nature that define the very existence of the UPR.

We are of the latter opinion. It is undeniable however, that **bridges** need to be raised between these bodies. For example, one thinks about a **national report preparation and production method**, a cumulative system that would alleviate the work of the national teams, the **troika's consultation with the treaty bodies** when the time comes to pen down the recommendations, the **possibility for that same troika to appeal to the special rapporteurs** in the more sensitive cases regarding countries or human rights fields for which they recently had to intervene. One can also think about **discussions regarding the volume and nature of the help** to any given state that wishes to implement the recommendations it received during its review and that asks for the support of the international community. More generally, one can also think about the upholding and **systematisation of the meetings that are already taking place between the HRC and the treaty bodies presidents, to which could be added the representatives of the special rapporteurs.**

Bringing the knowledge and resources together is essential for this ensemble to avoid the risk of fragmentation and for it to produce real results through the measurable improvement of the promotion and protection of rights, the effective implementation of norms and the consolidation of national institutions that together constitute one of the United Nations fundamental objectives.

In these improvements, it will be necessary to **measure the additional mandates asked of the OHCHR and make matching financial commitments.** Otherwise, we simply consent to the erosion of its capacity to support the undertakings aiming at the promotion and protection of human rights. These improvements must strengthen the OHCHR rather than turning it into an agency of specialized services lacking vision and power.

In the review of the HRC's status, it is imperative that the UN General Assembly **take into account the financial needs of the UN system of human rights promotion and protection.** The resources currently allocated are by far insufficient and, if maintained at that level, could represent a **challenging hurdle** to that key mission of the Organisation:



create the conditions for the recognition and effective implementation of the rights of all on a global scale. Of course, that task will never be fully accomplished. But the current momentum and thrust are undeniable and calls for a corresponding level of resources.

2.- THE FUNCTIONS AND MISSIONS OF THE UPR

The accomplishments

2.1 In a system that relies on the strict equality of requirements and treatment for all countries submitted to the same procedures and accepting identical ends, the **universality, impartiality and non-selectivity** that the UPR puts in place constitute a **precious and critical accomplishment**.

Indeed, it is important that in terms of promotion and protection of human rights, no state or group of states is allowed to place itself outside the common requirements, including the effective control of national policies' compliance with the imperatives of international human rights law. To state that is quite simple. To ensure it is practiced according to procedures that are not tainted by exception, including for the powerful, is an unprecedented undertaking.

The UPR is not without its limits and problems. We'll come back to that. But the mechanism has proved to be resilient and productive. **No state has backed out of the review, none has contested its procedures nor proven hostile to that singular mechanism which both entrenches and encloses national sovereignty.** Of course, the system has evolved. From one session to the other, the amount of recommendations has never ceased to grow. Adjustments, however, are of the essence. Among other things, one thinks of the cases, few it is true but still disgraceful in their complacency, of rejection by some states of recommendations regarding established international obligations.

2.2 At the heart of the mechanism, the troika that accompanies the reviewed state plays a double role: symbolic in terms of cooperation between Council members and operational by facilitating the relationship between states and by playing a significant role in sorting out the recommendations. Of course, the formula has its limits, but it has proved more than useful in the **consolidation of a spirit of dialogue and cooperation that constitutes the second accomplishment of the mechanism.**

2.3 The idea of enriching the contribution from the states (national report) with two syntheses that bring together, first, the UN knowledge about the human rights policies of the reviewed state, and second, the assessments and suggestions of stakeholders (NHRI, NGOs and INGOs²) has produced good results. That way of doing things somehow validates and consolidates the work of the treaty bodies and special rapporteurs that,

² National human rights institutions, Nongovernmental institutions and International nongovernmental institutions.



when added to the work of the OHCHR, bring a sizeable supplement of knowledge and suggestions. Finally, what the stakeholders' contribution is critical. It is taken into account by the states during the preparation of their national report. It is included in the decisions of the Council through the *Summary of stakeholders' information* and by the voice they have at the Council itself. **Such is the third accomplishment of the UPR: open the field of assessment and suggestions widely in an inclusive perspective that must be preserved and enriched.**

3. THE SECOND CYCLE (2012-2015)

In completion of what was said above, we continue our analysis by imagining the **modifications** that, in our judgment, are likely to **improve the UPR mechanism** and, as a consequence, **guarantee its perennity.**

Beyond its own merits, the mechanism benefited from the positive effects of a first. That situation, however, will lose its potency with time and nothing would be more afflicting than to see the UPR become a bureaucratic routine without a real take on the effective promotion and protection of human rights. In that regard, we must be careful with the impressions, appreciations and judgments on the fertility of the first cycle. **To that day, no reliable system that gathers information concerning the implementation of the recommendations received by the states allows to assess the level of that implementation.**

UPR Watch has started the groundwork on that question. In the current state of our research, we can only warn about those who started to propagate the idea that all that mechanism is sterile. Such is not our appreciation at this stage of our work. At the end of the first cycle of the UPR, it will be possible to measure its impact based, among other things, on the 5 following indicators, suggested by a participant in the round table mentioned above: signature and ratification of treaties, elimination of reserves with regards to treaties, creation or restructuring of national institutions promoting and protecting human rights, states' answers to the treaty bodies and special procedures.

The following proposals deal with the main elements of the UPR, which are **the documents that serve as the basis of the review; the troika's mission; the interactive dialogue between the state under review and the HRC members; the role stakeholders' role; the nature of the recommendations; the degree of appropriation by the country of the recommendations that are issued and their implementation.**

3.1 The documents

As was reminded above, the evaluation work of the HRC concerning the UPR rests on three documents. The first is produced by the reviewed state and constitutes a synthesis



of its national human rights policies. The other two are produced by the OHCHR and are syntheses of the knowledge of the UN bodies, in the first case, and the assessments and suggestions of the stakeholders in the second case.

What documents for the second cycle, a second cycle that must “focus on the implementation of recommendations” issued by the states that take part in the interactive dialogue and directed at – and accepted by – the states under review?

Must these documents take only into account the question of implementation without surveying the general situation of human rights in a given country? Will two documents be necessary, the first being concerned with implementation of the recommendations and the second regarding the general human rights situation in that country?

We suggest that the 1st and 2nd cycles be considered as complementary and part of a same sequence. Consequently, the documents that are to be produced for the 2nd cycle should essentially focus on the central question of the implementation of the recommendations issued during the 1st cycle.

During the interval, the HRC should, as planned in its mandate, “*address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon*”. Furthermore, let’s note that the treaty bodies and special procedures should normally continue to fulfill their mandates.

3.2 The troika

Important in itself and essential at the operational level, the troika’s function for the 2nd cycle must integrate **consultation of the treaty bodies** when the time comes to write down the recommendations as well as a **recourse to special rapporteurs** in more sensitive cases regarding countries or domains in which they intervened recently.

3.3 The stakeholders

The 2nd cycle could be the occasion to present the stakeholders with an improved possibility of intervention at the Council during the UPR. One can imagine them **taking the floor twice**. At first through a representative of the stakeholders at the time of a country’s review and, at another time, the stakeholders that registered could also be heard when the report of the working group is debated by the HRC members.

As part of the mechanism, it is expected of the NGOs and INGOs that they will respect its spirit, which favours dialogue and cooperation.



3.4 The recommendations

What recommendations for the second cycle?

One thing we can learn from the work of the UPR concerns the receivability of the recommendations. Obviously, it must be the object of a thorough and stringent analysis. During the 1st cycle, encouragements, general suggestions, comments and recommendations were all mixed up. Recommendations were even accepted despite the fact that they contradicted the states' international human rights obligations. That way of doing things is unacceptable. It led to the multiplication of recommendations so vaguely worded that their implementation is unverifiable.

Of course, states have the liberty to express and formulate general opinions during the interactive dialogue. But a line must be drawn between these interventions and the final recommendations. **In the UPR context, it has to be possible to give effect to a recommendation through an identifiable intervention by the state that received it and through an implementation that can be verified.** Thus identified, a recommendation could be refused by a state. But in this new configuration, the states' discretionary authority must be practised in a precise framework and any recommendation rejection must be explained and justified.

3.5 The implementation of recommendations

As was written above, we must be careful with the appreciations and judgments on the fertility of the 1st cycle that are based solely on impressions or carried by rumour only. To this day, no reliable system that gathers information concerning the implementation of the recommendations received by the states allows to assess the level of that implementation. **That gap must be filled.** Our Observatory started the groundwork in that direction. At the current state of our research, we can only warn about those who started to propagate the idea that all that mechanism is sterile. Such is not our appreciation at this stage of our work.

We cannot overestimate the importance of that question. Indeed, without implementation of the recommendations, the UPR will slide towards absurdity. Must a **specialized secretariat** be created, **with a mandate of receiving and recording progress reports exclusively focused on the identification of measures taken by a state to implement the recommendations it received?** Or an **“effective result-oriented follow-up mechanism”** as proposed by the European Parliament? The question is out there.

NB: Our Observatory opens these reflections and suggestions to public discussion and thanks in advance anyone willing share their ideas, criticism and suggestions. We will find room for them on our website, <http://upr-epu.org>.

