

Introduction



On August 23, 2010, the United States submitted its first report [\[1\]](#) to the United Nations Human Rights Council for review under that body's Universal Periodic Review ("UPR") mechanism. The report describes U.S. efforts to comply with international human rights standards, highlighting shortcomings and identifying areas in which the nation needs to renew and strengthen its human rights commitments. The United States will appear before the Council on

November 5 to present the report and respond to questions and criticisms. This *Insight* examines the U.S. UPR report in the context of the UPR process.

Background and Procedure of UPR

The UPR process is an outgrowth of the recent reform of the UN human rights machinery. The Human Rights Council was established in 2006 to replace the UN Commission on Human Rights, which had been the principal international human rights body since 1946. [\[2\]](#) Over time, the Commission had been increasingly criticized for excessive politicization, double standards, and selectivity in the treatment of country situations.

The Council was created primarily to remedy these defects. One of its mandates is to "undertake a universal periodic review" of each of the 192 member states of the United Nations every four years. A UPR Working Group began functioning in April 2008. The Working Group, which consists of the forty-seven members of the Council and operates in effect as a committee of the whole, was designed to hold three two-week sessions per year, reviewing sixteen countries per session or forty-eight per year, with the goal of reviewing all 192 member states by the end of 2011.

Each state's report is initially reviewed by groups of three states, known as "troikas," which serve as rapporteurs. The troikas, which are selected by a drawing of lots prior to each Working Group session, prepare comments and questions on the report. The actual "review" consists of a three-hour interactive dialogue for each state [\[3\]](#) with the Working Group in Geneva. Any UN member state may participate in the dialogue. The United States is scheduled to be reviewed at the ninth session of the Working Group, to be held on November 5, 2010, from 9:00 AM to 12:00 PM. [\[4\]](#) The troika for

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the United States is made up of Cameroon, France, and Japan.

The working documents for each review comprise: (1) the report prepared by the state under review; (2) reports submitted by the human rights treaty bodies, independent human rights experts and groups within the UN system (referred to as the Special Procedures), and other UN entities; and (3) information from other stakeholders, including non-governmental organizations (“NGOs”) and national human rights institutions.[5]

The UPR process is premised on the idea that there is intrinsic value in a non-selective examination of the human rights record and policies of every member of the United Nations. No state or government can legitimately claim total compliance with all international human rights obligations. And no state or government need fear the UPR process since it results only in recommendations, not in any vote or resolution by the Council praising or condemning individual countries for their human rights performance. Routine self-examination and regular international review and commentary, the logic of UPR suggests, can motivate improvement in national performance, especially when the system is administered fairly and objectively across the board, without political bias or motive.

That said, for at least some observers, the UPR process is destined to function at a level of generality that frustrates incisive analysis and invites states to indulge in self-congratulatory superficiality. The national report itself is limited by UPR rules to twenty pages, and a three-hour examination of a state’s human rights record and policies is unlikely to be comprehensive.[6] Moreover, the track record of the Human Rights Council to date is hardly free from the political motivations and biases that plagued its predecessor Commission.[7]

The U.S. UPR Report

It was perhaps predictable, therefore, that the U.S. report, like that of any other country, would deal in generalities and expend considerable effort to present its human rights record and policies in the best light. The United States has much to be proud of in its espousal, promotion, and implementation of human rights norms and practices over the years, and many of its domestic institutions, laws, and practices (however imperfect) can legitimately be held up as models for other societies to emulate.

At the same time, the report does not shy away from identifying a number of significant problems and issues involving discrimination and inequality. Civil and political rights take center stage in the report, although some focus is on issues of economic, social and cultural rights such as access to education and affordable health care and housing. Notably, but only towards the end, the report mentions the “war with Al Qaeda and its associated forces,” which in its overall context remains perhaps the single most important and controversial issue for the United States on the international human rights agenda.

The U.S. report states clearly that the United States remains “fully committed to complying with the Constitution and with all applicable domestic and international law, including the laws of war, in all aspects of this or any armed conflict. We start from the premise that there are no law-free zones, and that everyone is entitled to protection under law.”[8] This may well be a focal point of the troika’s questions. A different view has been set forth in the reports of various UN human rights mechanisms submitted to the UPR. For example, the second report of the three that comprise the working documents of the dialogue, prepared on the work of UN

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entities, notes that the United States has previously argued that Guantanamo detainees are subject neither to international human rights law nor international humanitarian law (in other words, that they inhabit a “law-free zone”).^[9] The UN Human Rights Committee was concerned that the proceedings to which they are subject “may not offer adequate safeguards of due process” and that those detained in Afghanistan and Iraq may be protected by even “fewer guarantees.”^[10] The human rights community will be listening carefully to the interactive dialogue, looking for the U.S. delegation to offer some examples that the Obama Administration has taken concrete steps to comply with international law and the laws of war as regards Guantanamo detainees, as well as other evidence that the United States is committed to reversing the policies of the previous administration that have been criticized by these UN human rights bodies.

Submission of the NGOs and Civil Society

The third report of the three working documents of the dialogue, a summary of the UPR submissions of 103 civil society stakeholders, calls upon the United States to become a party to additional human rights treaties, including the UN Convention on the Elimination of All Forms of Discrimination against Women, the Organization of American States’ American Convention on Human Rights, and the UN Convention on the Rights of the Child. Others urge the United States to ratify the Rome Statute and join the International Criminal Court. Major NGOs, such as the International Commission of Jurists and Amnesty International, recommend that the United States give extraterritorial effect to its obligations under the various human rights conventions. They also urge the United States to apply human rights (in addition to international humanitarian law) in cases arising out of armed conflicts.

Human Rights First submitted an assessment to the Office of the UN High Commissioner for Human Rights, stressing U.S. shortcomings in areas not highlighted in the Administration’s report, including refugee protection and immigration detention, counter-terrorism policies and detainee treatment, and prevention and prosecution of hate crimes.^[11] Others, by contrast, have criticized the U.S. report for stressing the Administration’s commitment to ensuring compliance with its obligations to provide consular notification and access for foreign nationals in U.S. custody, including under the International Court of Justice *Avena* decision^[12], on the grounds that it would “effectively elevate treaty law” above the Constitution and the Supreme Court.^[13] Arizona Governor Janice Brewer protested (as “downright offensive”) the report’s reference to her state’s recently enacted immigration law.^[14]

Conclusion

It can be expected that many states will seek to participate in the interactive dialogue with the United States on November 5. Many people will be watching the webcast of the interactive dialogue, and the United States, by submitting itself to such an open and public review of its human rights performance, will contribute to the legitimization of this universal review process and will be exhibiting a new level of international cooperation and engagement. At the same time, it is difficult to imagine that such an event will not be heavily politicized because many foreign states will seek to articulate their political agendas as they have done before the Human Rights Council since its inception.

It remains to be seen whether, given its limitations, the UPR process can produce an objective, informed, and productive assessment of a given state’s human rights

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situation. More importantly, only substantial time will tell whether the Universal Periodic Review process as a whole can in fact contribute to an improvement in the overall human rights situation in countries in the world, including ours. That is its main purpose and that is the standard by which it should be judged.

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ENDNOTES

[1] Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights In Conjunction with the Universal Periodic Review (2010), *available at* <http://www.state.gov/documents/organization/146379.pdf> [hereinafter Report].

[2]G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006). See Scott R. Lyons, *The New United Nations Human Rights Council*, 10 ASIL INSIGHTS 7 (Mar. 27, 2006), <http://www.asil.org/insights060327.cfm>. The United States was elected to the Council in 2009.

[3]The dialogue lasts the same amount of time no matter which country is under review.

[4]The dialogue will be webcast live on the UN <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

[5]The three documents are available on the Office of the High Commissioner for Human Rights ("OHCHR") [website](#).

[6]The OHCHR's *Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism* specify that the State report shall be twenty pages, and the UN and Stakeholder reports shall be ten pages each. Thus, the U.S. Report, just over twenty-three pages long excluding annexes, exceeded the UPR guidelines for length. See OHCHR, *Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism* 3 (July 2008), *available at* <http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf>.

[7]American Center for Law and Justice, Memorandum 3-4 (Sept. 20, 2010), *available at* http://www.aclj.org/media/pdf/Memo_Re_UPR_Response_20100920.pdf (sharply criticizing the Human Rights Council and the U.S. Report: "This report represents a new move by the Obama Administration to subject the actions of federal and state governments to international review by some of the world's most repressive countries.").

[8]Report, *supra* note 1, ¶ 82.

[9]The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has separately noted that the detainees are entitled under international law to "fair trials, regardless of whether persons are to be tried for crimes allegedly committed during peace or armed conflict." See Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Promotion and Protection of All Human Rights, Civil, Political,

Economic, Social & Cultural Rights, Including the Right to Development, H.R. Council, A/HRC/11/2/Add.5, ¶ 39 (May 28, 2009), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.5.pdf>. In June 2004, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on the Question of Torture, the Special Rapporteur on Freedom of Religion or Belief, and the Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (referred to as the five mandate holders) requested the United States to allow them to visit Guantanamo; but in the absence of assurances from the U.S. government that it would comply with the terms of reference, the five mandate holders decided to cancel the visit in November 2005 (¶ 16).

[10]Special Rapporteur, ¶ 51.

[11]Human Rights First, Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review: United States of America (2010), *available at* <http://www.humanrightsfirst.org/pdf/HRF-UPR-2010-submission-final.pdf>.

[12]Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31, 2004), *available at* <http://www.icj-cij.org/docket/files/128/8188.pdf>.

[13]Kay B. Day, *Justice Alert: Human Rights Report Pledges ICJ Avena Compliance*, US REPORT (Aug. 30, 2010 8:24 AM), *available at* <http://www.theusreport.com/the-us-report/2010/8/30/justice-alert-human-rights-report-pledges-icj-avena-complian.html>.

[14]Letter from Arizona Governor Janice K. Brewer to U.S. Sec'y of State Hillary Rodham Clinton (Aug. 27, 2010), *available at* <http://janbrewer.com/uploads/08-27-10%20Letter%20to%20Secretary%20Clinton.pdf>. *See also* Assistant Sec'y of State Philip J. Crowley, Daily Press Briefing (Aug. 30, 2010), *available at* <http://www.state.gov/r/pa/prs/dpb/2010/08/146439.htm> (responding to Arizona Governor Brewer's letter that, "We're very proud of our human rights record. We think it's second to none around the world. But the universal periodic review, we believe, can be a model to demonstrate to other countries – even other countries on the Human Rights Council – this is how you engage civil society. And where issues arise from a genuine discussion and debate within societies, there can be issues that are resolved under the rule of law. And the Arizona immigration law is a good example of how we are debating this as a society. There is a legal case ongoing, and this issue will be resolved under the rule of law.").