The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground?

A Critical Evaluation of the First Cycle and Recommendations for Reform

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Abstract: This thesis critically evaluates the performance of the Human Rights Council's Universal Periodic Review (UPR) process at the conclusion of its first cycle. In order to do so, it integrates a number of assessments: Firstly, the focus is on evaluating how the UPR in practice in its first cycle has compared to its stated principles and objectives. Secondly, this thesis relies on a case study of the experiences of India and the UK to analyse whether the UPR is achieving its key objective of improving the human rights situation on the ground in the states under review.

Adopting this multi layered approach enables me, finally, to establish a firm framework from which to provide concrete recommendations for improvements to the system in respect of: a) the modalities of UPR; b) implementation and follow up of recommendations made; and c) UPR's added value to the other UN mechanisms already in existence. At its conclusion, this thesis hopes to have convinced readers of the merit and sustainability of UPR yet simultaneously ensure that the difficult task of addressing its weaknesses is not neglected.

Keywords: first cycle, human rights, human rights council, India, UK, United Nations, universal periodic review

I. INTRODUCTION

March 16, 2012 was a pivotal date on the UN's timeline as it marked the conclusion of the first cycle of the Human Rights Council (HRC or the Council)'s Universal Periodic Review process by the adoption of Haiti's Outcome Report, the 192nd country,[1] by the Council plenary. By establishing a review of the human rights record of every UN member state, it was hoped that the recurrent criticisms of selectivity, politicisation and double standards that had plagued the Human Rights Council and its predecessor the Commission on Human Rights, could be alleviated.

As pointed out by Elvira Domı́nguez Redondo, the introduction of UPR was "*the most dramatic answer to years of criticisms of the work of the Commission when dealing with situations of violations of human rights in specific countries*" and was a bid to overcome its alleged politicisation.[2] During the first cycle, in excess of 20,000 recommendations were made to the 192 countries on ways they should improve the human rights situation on the ground in their countries.

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[1] South Sudan became the 193rd UN member state in July 2011 but had been part of Sudan's review in May 2011.

[2] Redondo, 2008, p.722.

A. Research Aim and Methodology

In choosing this research topic, I felt it was the opportune time to carry out a critical evaluation of how the UPR procedure operated during its first cycle. In doing so, I framed my thesis hypothesis as:

Whether the UPR process, during the first cycle, succeeded in achieving the principles and objectives as stated in the Human Rights Council's own Resolution 5/1 and, in particular, its primary objective of improving the human rights situation on the ground.

Having provided this analysis, I thereafter seek to identify deficiencies, and propose recommendations for reform in order that UPR can better achieve its objectives.

Given the relative closeness in proximity of this research to the conclusion of the first cycle, my methodology was mainly focused on an analysis of primary data, of which an impressive body has been generated during the course of the first cycle. This included the Working Group Outcome Reports, state and OHCHR reports together with mid-term implementation reports and NGO and NHRI reports. I also looked in depth at state practices through domestic legislation, parliamentary debates and media coverage.

As my topic selection was based in part on the novelty of the process, there is a shortage of peer reviewed and academic material on the topic and this thesis seeks to add to the academic literature. It is designed as a critical evaluation of the first cycle of the UPR. In order to increase the validity of the conclusions reached, I have undertaken a case study of two country specific situations to support my findings.

B. Thesis Structure

In this thesis, I seek to provide a critical evaluation of the UPR process as a whole yet focus in particular on the elements which I consider to be key to the success or otherwise of the process. Accordingly I adopt the following structure:

➢   Chapter 1 provides a brief overview of the creation of the UPR process and its operation to date.

➢   Chapter 2 critically analyses each of UPR's stated principles and objectives and considers if, and how, these have been translated into action during the procedure. I develop the most crucial of these in greater detail in the following chapters.

➢   Chapter 3 evaluates whether the key objective identified in the previous chapter, i.e. the improvement of human rights on the ground, is being realised. I seek to accomplish this, firstly, by examining whether states are implementing recommendations made during the interactive dialogue phase and, secondly, by assessing the effectiveness of follow up.
In order to achieve this, I select two case studies from the first session of the first cycle, namely the UK and India, and I undertake a detailed analysis of the UPR's impact on their respective domestic legislation and state practices. The latter two countries were chosen because (a) both countries are powerful and influential members of the UN; and (b) one is a highly developed state while the other is a developing one.
I specifically selected countries from the first session as they have now had in excess of four years to put the recommendations into practice. In addition, this allowed me to provide an early evaluation of how the second cycle (which commenced in May 2012) will police implementation of recommendations.

➢   In Chapter 4, I make recommendations for improvement of UPR having analysed in depth in the previous chapters the concerns that exist in relation to the process generally, and in respect of implementation and follow up in particular. This chapter details those recommendations that have already been implemented by

way of Resolution, and those that have been generated through state practice itself. I then provide additional recommendations which I consider necessary to improve the system. I deal with both the modalities of the process and, most crucially, implementation and follow up. I analyse the role which other stakeholders such as NGOs and NHRIs can, and should, play in implementation and follow up.

➢ Chapter 5 analyses an additional stated objective of UPR – namely, to add value to the UN system and to avoid an overlap with other mechanisms. This brings together the conclusions reached in previous chapters on UPR's worth. I consider how UPR can, and should, interact with the Special Procedures and Treaty Bodies and I build upon the recommendations already made in the preceding chapter. Finally, I assess the impact of the UPR on the Council's operations, to determine whether it is succeeding in depoliticising the system and making it more transparent and objective.

This thesis can thus be considered as integrating a number of assessments: the first part is focused on evaluating how the UPR in practice has compared to its stated principles and objectives (chapters 1 and 2). The second part relies on a case study to analyse whether the UPR is achieving its key objective of improving the human rights situation on the ground in the states under review (chapter 3). Adopting this multi layered approach enables me, in the third part, to establish a firm framework from which to provide concrete recommendations for improvements to the system in respect of: a) the modalities of UPR; b) implementation and follow up (chapter 4); and c) UPR's added value to the other UN mechanisms (chapter 5). At the conclusion of this thesis therefore, I hope to have convinced readers of the merit and sustainability of UPR yet simultaneously ensure that the difficult task of addressing its weaknesses is not neglected.

II. WHAT IS UPR?

A. The Creation and Development of UPR through Resolutions

Although other precedents exist based on Article 64 of the UN Charter, the institutionalisation of the idea of monitoring human rights implementation through review of periodic reports was established in 1956 by an ECOSOC Resolution (at the Commission on Human Rights' (CHR) initiative) which requested states to submit reports on progress achieved within their territories every three years, in advancing the rights enumerated in the Universal Declaration of Human Rights (UDHR) as well as the right to self determination.[3] With the entry into force of international human rights treaties that included human rights reporting requirements, the review of periodic reports (which never yielded significant results) was considered progressively obsolete and was formally abolished by General Assembly Resolution 35/209 of 17 December 1980.

The idea for the UPR process itself came from the former UN Secretary General, Kofi Annan when he was addressing the issue of replacing the CHR with a new Human Rights Council. During a speech to the Commission on 7 April 2005, he recommended that the Council "*should have an explicitly defined function as a chamber of peer review...to evaluate the fulfilment by all states of all their human rights obligations...Under such a system, every member state could come up for review on a periodic basis.*"[4] Annan's vision for UPR was outlined in the Addendum to his report *In Larger Freedom* published in May 2005. He believed that the peer review procedure should complement but in no way replace the states' reporting system under the Treaty Bodies and the procedure should be "*fair, transparent and workable, whereby States are reviewed against the same criteria.*"[5]

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[3] ECOSOC Resolution 624 B (XXII), 1 August 1956 and UN doc. E/2844-E/CN.4/731 Resolution I, and reform of this procedure introduced by ECOSOC 1074C Resolution (XXXIX), 28 July 1965.
[4] Secretary General's Address to the Commission on Human Rights, Geneva, 7 April 2005.
[5] Secretary-General, 23 May 2005, *In Larger Freedom*, paras. 7 – 8.

The General Assembly took over the mantle of promoting the peer review process and when creating the Human Rights Council, it decided to include UPR in its mandate. In Resolution 60/251, the Council was instructed to: "*undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states.*"[6] The Resolution left the elaboration of the modalities of the UPR itself to the Council. The first task of the newly formed Council in June 2006 was thus to 'review, rationalise and improve' the mechanisms that it had assumed from the CHR and to establish the working methods of the UPR. This was duly attended to by the HRC and after its first year of operation it adopted Resolution 5/1 in June 2007. This was the Council's so called "institution building package" and included detailed provisions for the UPR mechanism.

The review is based, inter alia, on the International Bill of Rights[7] and, in consequence, embraces the whole spectrum of human rights irrespective of the Treaties which the state under review (SuR) has ratified. The Resolution established a four year cycle for review and also set out both the principles and objectives of UPR.[8] Following the conclusion of the first cycle, the key question that must be addressed is whether the UPR process is making any significant headway in achieving its own stated principles and objectives.

B. The UPR process in the Resolutions and translated into practice

The modalities of the process are outlined broadly in Resolution 5/1. Nevertheless it became evident as UPR got underway that there were gaps remaining in the working procedures that required filling in, during the course of the first cycle.

In terms of the practicalities of the procedure during the first cycle, a unique three dimensional approach was adopted in which three documents had to be submitted to the HRC at least six weeks in advance of the review namely:
1. A report prepared by the state containing a self assessment of its own human rights situation and altogether not exceeding 20 pages;
2. A compilation of information from the OHCHR in relation to the Treaty Bodies and Special Procedures not exceeding 10 pages;
3. Additional, reliable and credible information provided by other relevant stakeholders (e.g. NHRIs and NGOs) in reports and summarised by the OHCHR in not more than 10 pages.[9]

In practice, the deadline for submissions of relevant stakeholders' information to the OHCHR during the first cycle was six–eight months (to allow the OHCHR the opportunity to compile the submission documents).

Each review is carried out by a Working Group, chaired by the President of the Council and composed of all 47 member states of the Council. A troika of three member state rapporteurs prepare the review process and transmit questions to the SuR in advance of the interactive dialogue stage.[10] This interactive dialogue, during the first cycle, lasted for three hours per country with observer states (i.e. non HRC members) also having the right to participate. Each SuR was allocated one hour to present its report, answer both written and oral questions and make concluding remarks, and enjoyed discretion as to how to use this time and which issues to deal with. Member states of the HRC were entitled to three minutes and observer states two minutes, to present their comments, questions or recommendations but this was limited, during the first session, to approximately

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[6] GA/RES/60/251, 3 April 2006, para.5(e).
[7] The International Bill of Rights is comprised of the UDHR, the ICCPR with its two optional protocols and the ICESCR.
[8] A/HRC/RES/5/1 18 June 2007, paras.3 and 4.
[9] A/HRC/RES/5/1, 18 June 2007, para.15.
[10] States selected as part of the troika can decline this position. This happened during the first selection of troikas on 28 February 2008, when Pakistan declined to serve on the troika reviewing India.

45 speakers as the demand exceeded the two hour time period available. Speaking slots were allocated on a first come, first served basis. However, the latter arrangement gave rise to many difficulties and is an issue which will be addressed in later chapters.

The troika, with the full involvement of the SuR, drafts the Outcome Report for adoption, first, by the Working Group, at least two days after the review, followed by the HRC plenary some months later during the tri-annual Council sessions. This takes the form of 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*".[11] There was considerable controversy about how the recommendations should be framed during the first session and whether it was necessary to identify the particular state which had made the recommendation. Eventually, after a suspension of the proceedings in the review of Indonesia, it was agreed that a standard phrase should be included in all reports stating: "*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 attribution of individual recommendations to states allows for the inclusion of recommendations that may not enjoy the support of the entire Working Group, or would be weakened if they had to be subject to negotiations, for example, those dealing with sexual orientation.[12]

The Outcome Report is adopted by the plenary of the Council, by a resolution or decision, preferably by consensus to underline the cooperative nature of the mechanism.[13] All reports in the first cycle were adopted in this manner although the passage of some reports was far from smooth. There were considerable negotiations before the report of Israel was finally adopted by consensus.[14]

C. Recommendations made to the States under Review

Recommendations are made by both the Council members and observer states during the Working Group phase. The SuR can respond to recommendations made by other states during the session of the Working Group, as well as at any time between the Working Group phase and the plenary of the Human Rights Council. The primary concern encountered in respect of the recommendations directed to states is that they have a sovereign right to choose which recommendations they will support.

SuR have invoked a whole host of reasons for defending their rejection of certain recommendations. Iran, for example, stated that it considered 28 of the recommendations submitted to be inconsistent with Resolution 5/1, or not to be internationally recognised human rights, or not in conformity with its existing laws, pledges and commitments.[15] Gambia used an argument based on traditional values to reject a recommendation that it decriminalise homosexuality.[16] And in the most extreme case of all, the Democratic People's Republic of Korea rejected outright all of the 50 recommendations submitted, and merely took note of the remaining 117 that it had left for consideration.[17]

It is clear from the foregoing that a failure by states to make clear commitments to recommendations limits the HRC's ability to measure or follow up progress on the ground, as only those recommendations that are out-

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[11] A/HRC/RES/5/1, 18 June 2007, para.26.
[12] ISHR, 2008, Analytical Overview of the UPR, April – June 2008, p.11.
[13] If this is not possible, the decision is taken by simple majority.
[14] ISHR, 2009, Overview of 10th session p.12.
[15] A/HRC/14/12 Outcome Report on Iran, 15 March 2010, para.92.
[16] A/HRC/14/6l Outcome Report on Gambia, 24 March 2010, para.62.
[17] UPR Info, 2010, List of all recommendations made to the DPRK and the delegation's responses.

rightly accepted will be monitored within the formal process.[18] States that avoid responding to recommendations contravene the requirements of Resolution 5/1, which states that recommendations that enjoy the support of the SuR will be identified and that other recommendations, together with the comments of the state, will be noted.[19]

The practice in respect of the actual making of recommendations encountered to date has varied from very precise calls for action to the other extreme of the spectrum where recommendations are so imprecise in nature that proper tracking of implementation would prove almost impossible to achieve. This divergence has been evident even within individual state reviews. For example, in the review of Afghanistan which took place in May 2009, the Philippines made the somewhat imprecise submission that Afghanistan "*continue its efforts to promote the rights of women and gender equality*" whereas, in respect of the same issue, the UK unequivocally recommended that Afghanistan should "*complete implementation of the 10 year National Action Plan for Women, with a particular focus on the most vulnerable.*"[20]

In addition, the proliferation of recommendations during the first cycle would seem to suggest that the more critical issues will tend to get diluted and that, consequently, follow up will be impeded. Also, states with generally recognised poor human rights records frequently accept vague recommendations and tend to reject specific ones. China is a case in point in this regard: At the time of the HRC plenary, it had accepted 42 recommendations, rejected 50, adopted no clear position in respect of 4, and 3 responses were pending. The majority of those that were rejected fell within category 5 of McMahon's categorisation requiring concrete action.[21]

Edward McMahon's categorisation model is a useful tool which will be referred to on a number of occasions in this thesis. He examined a database of 6,077 recommendations made during the first five UPR sessions and he categorised each recommendation based on action requested as follows:[22]

1. Category 1 requires the least cost and effort by the state. They are recommendations directed at non-SuR states, or calling upon the SuR to request financial or other assistance from, or share information with, non-SuR states.
2. Category 2 concerns recommendations which emphasise continuity in actions and/or policies (verbs in this category would include continue, persevere, maintain).
3. Category 3 embraces recommendations to consider change (consider, reflect upon, review, envision).
4. Category 4 includes recommendations of action that contains a general element (take measures or steps towards, encourage, promote, intensify, accelerate, engage with, respect, enhance).
5. Category 5 represents the greatest potential cost, as specific and tangible actions are being requested (undertake, adopt, ratify, establish, implement, recognise – in the international legal sense). These tend to be the farthest reaching and most important.

McMahon's research confirms that those in category 5 are the most difficult for the state to accept and the percentage of recommendations accepted decline as the perceived cost to the state of accepting the recommendations increases.

A further challenge that has arisen in respect of recommendations is in relation to so called friendly states bestowing meaningless praise upon each other which is not reflective of the human rights situation on the ground. Often these countries succeed in obtaining valuable speaking slots and leave little speaking time for other more

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[18] It is still of course open to the reviewing states and civil society to keep the pressure on the state in question to implement rejected recommendations.
[19] A/HRC/RES/5/1 18 June 2007, para.32.
[20] A/HRC/12/9 Outcome Report on Afghanistan, 20 July 2009, p.16.
[21] A/HRC/11/25 Outcome Report on China, 3 March 2009, pp.27 ff.
[22] McMahon, 2010 p. 7 ff.

critical or objective countries. Venezuela, for example, was accused of manipulating its list of speakers by rallying allied states to speak before the Working Group and thus monopolise speaking time, resulting in the exclusion of more pertinent recommendations.[23] Similarly, in China's review, the majority of the early speakers were complimentary of China's efforts and very few concrete recommendations were forthcoming, with the result that sixty states were unable to take the floor due to time constraints.[24] The review of Cuba painted a similar picture where many critical states were denied the opportunity to speak. This situation forced Human Rights Watch, one of only two critical voices in the adoption process before the Council plenary, to protest that Cuba had tried to silence criticism, provoking the Ambassador of Cuba to respond that they were 'mercenaries of the counter-revolution' who had 'come here to do the clowns act.'[25]

D. Implementation and Follow Up

It is important to distinguish between these two terms: Implementation is the actual action that is incumbent upon the state; Follow-up is a means to measure implementation and is primarily done by others, although certain limbs of government may also be involved.

The state has primary responsibility for implementation of the recommendations although, as appropriate, other stakeholders can also have a role.[26] This is qualified by the following paragraph in Resolution 5/1 which states that the international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned (emphasis added). The emphasis on consent leads to the conclusion that countries are largely free to decide themselves whether or not to seek assistance unless they specifically accept a recommendation which requires them to obtain assistance. Nevertheless it is clear that countries have sought to invoke this provision, particularly the smaller and less developed countries. The first request came from Benin during the Second Session[27] and other requests have since followed suit.

As of 2011, from when the last data is available, nine countries – Cape Verde, Tuvalu, Ecuador, Republic of Congo, Burkina Faso, Chad, Belarus, Mali and Senegal - had formally requested the OHCHR's assistance to follow up and implement outcomes emanating from the UPR. The Office had at that date responded positively to seven such requests for assistance [28]

Although as discussed above, states have a right to reject recommendations, there is evidence that states sometimes do implement rejected or noted recommendations in the follow up process. An example of this arose in the case of the UK. At the time of its first review in April 2008, it rejected the recommendation made by Indonesia:

"To withdraw its reservation to the Convention on the Rights of the Child, concerning the provision that detained children be separated from adults while in detention, as well as the reservation concerning refugee and asylum-seeking children."

Nevertheless, the UK government announced in September 2008, that it was removing its final two reservations to the UN Convention on the Rights of the Child (Articles 22 and 37c). These final two reservations were formally removed in November 2008.[29]

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[23] UN Watch, "Venezuela rigs U.N. speakers list to ensure stellar review of rights record", 15 March 2012.

[24] A/HRC/11/25, Outcome Report on China, 3 March 2009.

[25] ISHR, Overview of 11th Session, June 2009, p.8.

[26] A/HRC/RES/5/1 18 June 2007, para.33.

[27]ISHR, Review of Benin 2nd session, 7 May 2008.

[28]Presentation by Giuliano Comba, 23 March 2011 available at: http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/C907DADE034B0400C125785C004912C5?OpenDocument

[29] UPR Mid-term Progress Update by the UK, p.14.

This, in turn, leads on to a consideration of the follow up provided for in the mechanism. Resolution 5/1 specifically states that the subsequent cycle of the review should include, inter alia, consideration of whether or not the previous recommendations have been implemented.[30] In particular, this element of the follow up should focus on any progress the state has made in relation to the rejected or noted recommendations, as this is evidently one of the prime areas of concern. In addition, the Special Procedures and Treaty Bodies can play an important role in following up on recommendations which fall within their specific mandates.

In terms of a state's persistent reluctance to engage with the UPR process, the only attempt to deal with this in the Resolution is a vague reference to the fact that "*the Council will address, as appropriate, cases of persistent non-cooperation*."[31] The Council never sought to invoke this provision during the first cycle despite some very dubious reports submitted by certain countries. The USA expressed frustration with this state of affairs during the Council's final debate on UPR which took place under item 6 of its agenda on 16 March 2012. It pointed out that the Libyan and Syrian governments, among others, had created "fictional accounts" of the human rights records in their states and their Outcome Reports were adopted notwithstanding.[32]

It is clear that follow up is a problem which plagues all of the UN's Human Rights Mechanisms. One of the primary topics for discussion at the annual meetings of both the Special Procedures and the inter committee meeting of the Treaty Bodies over the last number of years has been how to better ensure coordinated follow up of the work and recommendations of the human rights mechanisms. The issue will be returned to later in the paper. In the next chapter the UPR process will be evaluated against its stated principles and objectives to identify in more detail how the system has played out in practice.
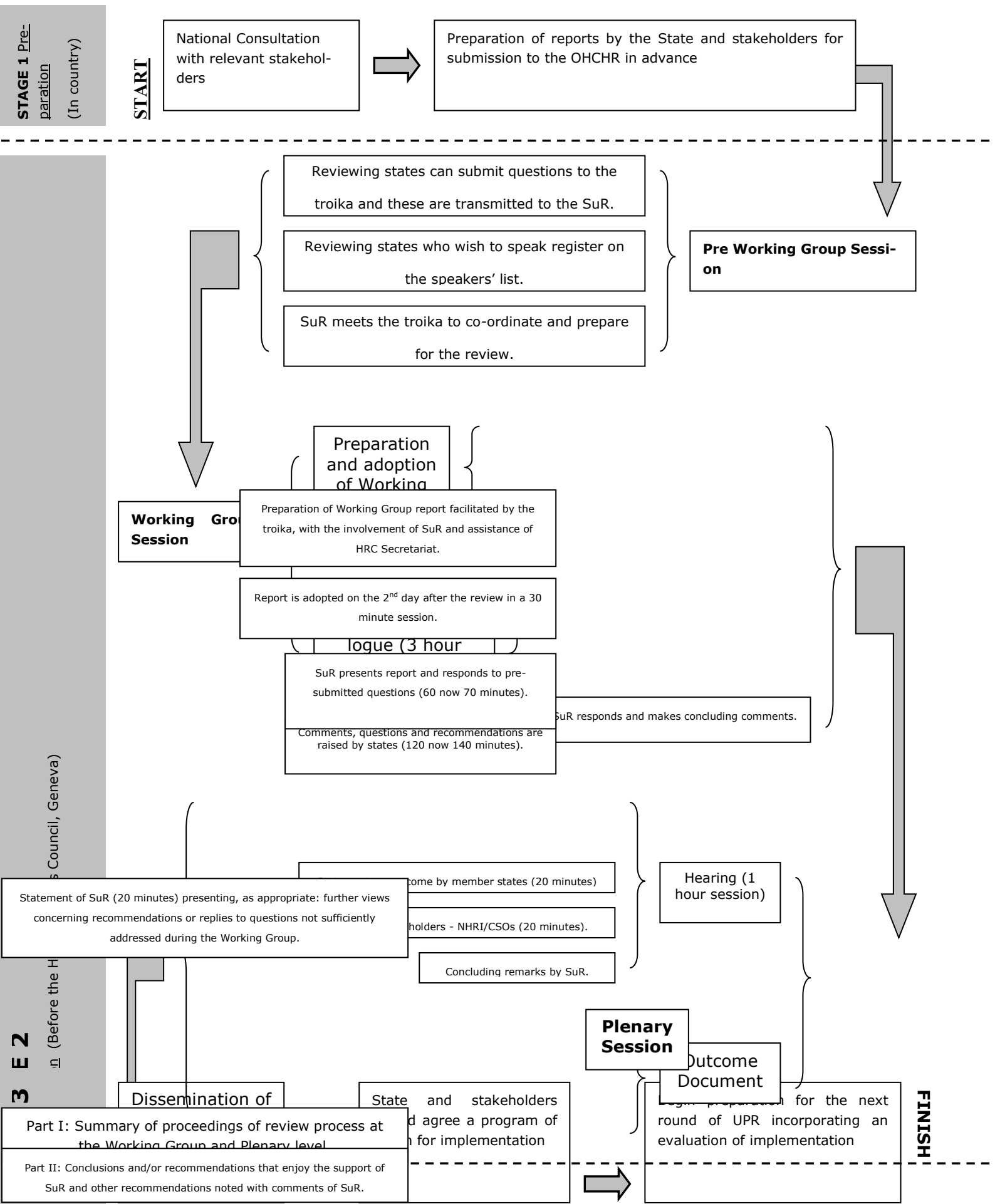
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[30] A/HRC/RES/5/1, 18 June 2007, para.34.

[31] A/HRC/RES/5/1, 18 June 2007, para.38.

[32] See webcast available at: http://www.unmultimedia.org/tv/webcast/2012/03/usa-gd-item6-43rd-meeting-19th-session.html

THE STAGES OF UNIVERSAL PERIODIC REVIEW (UPR)

STAGE 1 Pre-paration (In country)

START

National Consultation with relevant stakehol-ders

Preparation of reports by the State and stakeholders for submission to the OHCHR in advance

Reviewing states can submit questions to the troika and these are transmitted to the SuR.

Reviewing states who wish to speak register on the speakers' list.

SuR meets the troika to co-ordinate and prepare for the review.

Pre Working Group Session

Preparation and adoption of Working

Working Group Session

Preparation of Working Group report facilitated by the troika, with the involvement of SuR and assistance of HRC Secretariat.

Report is adopted on the 2nd day after the review in a 30 minute session.

logue (3 hour

SuR presents report and responds to pre-submitted questions (60 now 70 minutes).

SuR responds and makes concluding comments.

Comments, questions and recommendations are raised by states (120 now 140 minutes).

Statement of SuR (20 minutes) presenting, as appropriate: further views concerning recommendations or replies to questions not sufficiently addressed during the Working Group.

come by member states (20 minutes)

holders - NHRI/CSOs (20 minutes).

Concluding remarks by SuR.

Hearing (1 hour session)

Plenary Session

Outcome Document

STAGE 2 (Before the Human Rights Council, Geneva)

3 E 2

Dissemination of

State and stakeholders d agree a program of n for implementation

begin preparation for the next round of UPR incorporating an evaluation of implementation

FINISH

Part I: Summary of proceedings of review process at the Working Group and Plenary level

Part II: Conclusions and/or recommendations that enjoy the support of SuR and other recommendations noted with comments of SuR.

III. A CRITICAL EVALUATION OF UPR'S PRINCIPLES AND OBJECTIVES

As detailed in chapter one, Resolution 5/1 enshrines the Human Rights Council's vision for UPR in its thirteen principles and five objectives. The key test for whether a procedure is achieving its aim – in the case of UPR whether it is improving the human rights record of the UN member states – is to evaluate its operation in practice against its own goals. This chapter thus sets out to use each principle and objective separately as benchmarks to assess UPR's achievements and failings in the first cycle. There is, of course, inevitable overlap amongst some of the principles and objectives, and in such instances, the issue was examined under only one of the potential headings. Alternatively, some of the principles/objectives were treated together.

A. Principles

1. Promote the universality, interdependence, indivisibility and interrelatedness of all human rights.

The principles of universality, interdependence, indivisibility and interrelatedness of human rights as first emphasised in the UDHR in 1948 are now accepted by most as being the cornerstone of international human rights law. As Daniel J. Whelan, University of Connecticut notes; "*this formulation is ubiquitous in the scholarly literature, the language of advocates and activists and the UN reports. It is a 'boiler plate' recital in literally hundreds of Resolutions adopted by UN bodies.*"[33] The first cycle of UPR included a number of states which entirely reject the concept of universal, inter-related human rights.[34] Accordingly, one must consider if is it acceptable that this is one of the criteria against which all 193 UN member states are assessed.

As already discussed in chapter one, the SuR is evaluated against its obligations as contained in the International Bill of Rights, among other things. This trio of covenants and the UDHR is the epitome of the definition of human rights as developed by the UN and thus it would seem appropriate that the member state signatories are judged against this backdrop. The comprehensive basis of the review in incorporating legally binding and non-legally binding human rights standards emphasises the indivisibility of human rights and its inter-relatedness with the other two pillars of the United Nations, namely security and development.
It has also been highlighted that for the first time, UPR offers the possibility to contrast cultural assertions and determine its players i.e. those that contend that human rights are dependent on the context in which they are applied and therefore, on a respective culture.[35] The opportunity therefore arises to discuss cultural relativism in an open forum and consider the obstacles that this may pose to accepting the universality of human rights.

With the procedural matters aside, the question that therefore must be asked is whether the UPR is succeeding in implementing this principle in practice. The first point of note is that the oft cited division between civil and political rights on the one hand, and economic social and cultural rights on the other, was noticeably absent from the majority of the first cycle with both so called 'categories' receiving relatively equal attention. The most frequently cited issues during the first cycle represented a mix of both categories and indeed often spanned the two. Based on the number of recommendations made, the most frequent issues raised were:

1. International instruments (4234)
2. Women's rights (3692)
3. Rights of the Child (3443)

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[33] Whelan, 2008, p.1.

[34] This attempt to undermine the notion of universality of human rights has been attributed to such countries as China, Colombia, Cuba, Indonesia, Iraq, Iran, Libya, Malaysia, Mexico, Myanmar, Pakistan, Singapore, Syria, Vietnam and Yemen. They say that because of cultural and social differences in their countries, they should not be held to the same standards. (Cerna, 1994, pp. 740 – 752)

[35] Blakburn, 2011, p.7.

4. Torture and other CID treatment (1744)
5. Justice (1562)

Of note is the fact that not one country has yet declared that human rights is a concept that does not apply in their country's context; every country has submitted and engaged with the UPR on the basis that the promotion and protection of economic, social, cultural, civil and political rights in line with the UDHR is an aim worthy of pursuit.[36]

These positive aspects, however, were also countered by negative trends. Although the Western countries generally displayed more openness towards addressing criticisms directed against them than other groups of states, they also sought to avoid the most sensitive, controversial issues in their own domestic policies. The UK is a noticeable example in this regard. While in his opening statement, Michael Wills, the UK's Minister of State for Justice, did admit that the UK had received considerable criticism with regard to extraordinary renditions and its terrorism policies, there was also evidence to demonstrate his delegation's attempt to avoid dealing with the matter of its controversial immigration policies, as the latter issue was barely addressed. This trend was particularly apparent amongst the Western countries in relation to the issues of minorities, discrimination and xenophobia.
In addition as Theodor Rathgeber identifies, issues like Human Rights defenders, indigenous peoples and minorities have generally been underrepresented in the process to date.[37]

It must also be borne in mind that the UPR process is not merely confined to the making of recommendations by one state to another. Nurturing universality occurs not only during the peer review stage but also through the awareness raising, information exchange and constructive dialogue which are indispensable for the smooth and productive conduct of the UPR process.[38]

2. Be a cooperative mechanism based on objective and reliable information and on interactive dialogue.

The nature of a cooperative mechanism has the potential to be both the strength and the downfall of the UPR procedure. As Conzelmann has noted, since strict enforcement mechanisms are often technically inappropriate or politically unfeasible in global affairs, peer reviews (like UPR) have become one of the most widely used "soft instruments" of global governance. He argues that peer review mechanisms are "*a tool for international cooperation that respects sovereignty and diversity*"[39] He states that although they are void of sanctions stronger than peer pressure, they have the potential to remove the process of assessing policy performance from full control by the state itself, and thus may contribute to a transformation of global governance in general.

Breaking this principle down into its core elements, in terms of basing UPR on "objective and reliable information", there have been few complaints to date about the quality of the OHCHR's document summaries even from aggrieved NGOs who find that their five page detailed submission may result in only a footnote in the final draft. In contrast, however, the quality of the state reports has varied widely. The complementary submissions, designed for comparison purposes with the state reports, often confirm the widespread and systematic human rights violations taking place in certain SuRs as well as the states' reluctance to find solutions. Thus they highlight the often glaring misrepresentations found in the state reports. In the case of Sri Lanka for example, the UN OHCHR compilation questioned whether the Sri Lankan government was, in fact, applying and enforcing the

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[36] Sen, 2011, p.46.
[37] Rathgeber, 2008, p.6.
[38] The Danish Institute for Human Rights, 2011 p.8.
[39] Conzelmann, 2011, p.321.

Treaties it had ratified.[40] Furthermore, in the section entitled 'implementation of human rights obligations on the ground', a number of specific concerns were identified which stood in direct contradiction to the situation portrayed in the state report, including the issues of discrimination against women[41] and persons of Indian origin[42] and torture.[43]

The first cycle of UPR can certainly be characterised as having been cooperative in nature, perhaps even to too great an extent. The most innovative feature of the UPR has been its focus on interactive dialogue between the SuR and the other member states.

Nevertheless, the interactive dialogue phase in practice has not been without its flaws. As mentioned in the first chapter, the SuRs have relative discretion in how they utilise their hour on the floor and often spend the time immersing themselves in self praise. Similarly, when it comes to the comments and recommendations stage, a trend has emerged whereby there are two distinctive groups of examining states: one representing those who 'condemn' with concise recommendations, and the other those who 'commend', and recommend to 'continue to'[44] often in circumstances where their admiration is unwarranted. The division between these two groupings can be drawn roughly along the lines of the Western Europe and Others Group (WEOG) and Eastern European countries (EEG) adopting the former stance, with the majority of the Latin American and Caribbean Group (GRULAC), African and Asian states preferring the latter option. In the review of China for example, the Western states, while in most cases recognising progress in human rights in China as a whole, directed clear recommendations at areas where, they felt, further improvement was still required. In contrast, the other faction praised China's efforts in human rights and limited its demands to a continuation and sharing of its best practices.[45] A further criticism which can be levelled against many SuRs is that they frequently reflect their state's own priorities when framing recommendations but these issues are not always indicative of the most serious human rights concerns in the SuR.

3. Ensure universal coverage and equal treatment of all States.

Possibly the greatest success of the first cycle has been the fact that every single member state submitted to the UPR process, albeit with varying degrees of commitment. This can be favourably contrasted with the compliance level with other UN procedures. Thus UPR offers a unique opportunity to promote the universality of human rights where every country is reviewed with equal scrutiny, equal time and on the basis of the same standards.[46] This meant that even those states that generally escape the wrath of the Special Procedures were subjected to the scrutiny of the other 191 member states of the UN. Therefore the procedure has directed attention toward human rights concerns that are frequently overlooked in other forums and has helped to encourage countries of all development levels to act to protect human rights.

However universal coverage and equal treatment on paper does not necessarily translate into practice. Smaller states were less inclined to engage in interactive dialogues with states from regions other 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. The same could be said of the GRULAC and the Asian Group, while engagement by the European states tended to be more evenly spread across the regions. This raises questions about the 'universality and non-selectivity' of the review process so far, suggesting that states from one region may not be particularly interested in what is happening in states from other regions, as

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[40] A/HRC/WG.6/2/LKA/2, OHCHR'S UN Compilation on Sri Lanka, 8 April 2008 p.2, para. 2.
[41] A/HRC/WG.6/2/LKA/1, Sri Lanka's State Report 2 May 2008, para. 80 v para.7 UN Compilation.
[42] Para. 85 State Report v para 8 Compilation.
[43] Para. 62 State Report v paras 40 and 41 Compilation.
[44] Blackburn, 2011, p.35.
[45] A/HRC/11/25 Outcome Report on China, 3 March 2009.
[46] Sen, 2009, pp.5 and 37.

regards human rights.[47] In addition, approximately forty states made no recommendations at all.[48] This is possibly symptomatic of not having a presence in Geneva or apathy towards the system. Regardless of motive, this is certain to have an impact upon the equal treatment of states particularly as the WEOG made 41 percent of all recommendations. This is a huge proportion given that WEOG is one of the smaller regional groups.[49]

Another trend identified by UN Watch was that bloc affiliations played an important role in determining how countries reviewed each other. It concluded that, in general, members of the 57-strong Organisation of the Islamic Conference (OIC) strongly praised each other's records.[50]

In addition, Edward McMahon's research highlights that a 'softer' approach is taken by the Africa and Asia Pacific groupings among themselves as well as to the GRULAC when making comments and recommendations. In contrast, a somewhat 'tougher' approach is taken by them towards the EEG and to an even greater extent towards the WEOG. There is a far more even geographic distribution in relation to recommendations made by the WEOG and EEG. The approach of states from the Latin American region in this regard sits somewhat between European states on the one hand, and Asia and Africa on the other. [51]

Finally, what many have identified as an undoubted achievement of the UPR to date has been its ability to make in-roads into long entrenched regional allegiances by focusing on bilateral engagements. Although regional alliances continued to be present particularly during the review of African states, the practice of speaking on behalf of regional groups was almost absent.

4. Be an intergovernmental process, United Nations Member-driven and action-oriented.

This principle clearly demonstrates that UPR is first and foremost a peer review mechanism that relies on the support of the member states both during the procedure and in terms of implementation and follow up. It is not, nor was it designed to be, a protection mechanism. Rather it is a voluntary political tool whose function is to promote human rights. UPR relies: "*more on the carrot of positive reinforcements and inducements rather than the stick of punitive measures.*"[52] The first cycle involved for the most part, extremely high level state delegations which certainly made a contribution towards achieving this principle. As Michael Forst, Independent Expert to Haiti, explained, the UPR is a living embodiment of the principle that there are human rights issues that deserve discussion in all states, irrespective of their level of development, their political system, or geographic region.[53]

In terms of being an action orientated process, whether the first cycle succeeded in achieving this is questionable and this issue will be addressed in detail below. Suffice it to say for now that many of the recommendations generated during the dialogue stage did not serve as a useful tool for igniting action. Once such example was a recommendation made by Benin to Burundi to: "*continue its efforts to address the challenges it faces, with the support of the States Members of the United Nations.*"[54]

5. Fully involve the country under review.

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[47] Sweeney and Saito, 2009, p.211.
[48] ISHR, UPR: Examining the Opportunities from the First Cycle, 2012, p.23.
[49] Ibid p.23.
[50] UN Watch, A Mutual Praise Society, 2009, p.3.
[51] McMahon, 2010 pp.23 and 35.
[52] McMahon, 2010, p.4.
[53] Forst, 2010, Report of Conference on Improving Implementation and Follow up, p.15.
[54] A/HRC/10/71 Outcome Report on Burundi, 8 January 2009, Recommendation 39, p.19.

This is a principle that received full adherence during the first cycle. The SuR has a wide discretion as regards the issues it chooses to address when it takes the floor before the Working Group. In addition, it is involved in the drafting of the Outcome Report with the troika and can decide which recommendations it wishes to accept and reject. The practice of the first cycle has shown that the UPR process has, in many cases, helped mobilise different government departments or ministries around the human rights agenda particularly through the formulation of national action plans which have been created by many member states following their UPR including Bahrain[55] and Australia.[56]

Obviously the involvement of the SuR is pivotal to the process but one could argue that at certain stages this involvement was to too great an extent. States do not need to give reasons for rejecting recommendations and in many cases even got away with not providing any definitive response to recommendations which contravenes the requirements of Resolution 5/1.[57]

In a similar vein, states also have discretion as to whether or not to accept assistance offered to it by the international community,[58] notwithstanding that this assistance may be the determining factor as to whether or not a state's human rights situation can be improved.

6. Complement and not duplicate other human rights mechanisms, thus representing an added value.

As one of UPR's key principles, this principle will be considered in detail in chapter five. Complementarity versus fragmentation and duplication is a debate that took place amongst academics and practitioners alike during the first cycle and continues to dominate the UPR discourse and thus warrants more detailed investigation and analysis. No further guidance is provided in the UN legal framework about how this principle should be achieved in practice.

7. Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner.

This principle is couched in the very terms which identify precisely the challenges faced by UPR and by osmosis by the HRC, in seeking to improve the human rights situation in member states. This is due to the fact that the UPR "*is a setting in which states become judges and defendants, hence the difficulty to undertake a balanced and objective evaluation of the human rights situation.*"[59]

Throughout the first cycle, states sought to adhere to this principle by adopting a variety of tactics. Some states attempted to avoid politicisation by intervening rarely in other reviews whereas others seemed to seek the same end goal by making comments and recommendations at every opportunity. Canada, for example, delivered approximately 800 recommendations throughout the first cycle compared with only 12 made by Croatia over the same period.[60]

A number of reviewing states clearly violated this principle by bestowing praise on allied states yet out-rightly condemning other states notwithstanding their better human rights record.[61] Turkey is a case in point in this

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[55] Action Plan to Implement Bahrain's Pledges, Voluntary Commitments and UPR Outcomes, May 26 2008.

[56] Australia's Draft National Human Rights Action Plan 2012.

[57] See for example the UPR of Israel and the DPR of Korea.

[58] A/HRC/RES/5/1, 18 June 2007, para.33.

[59] Global Observatory on Human Rights, 2011, p.14.

[60] Obtained from UPR's database of recommendations available at: http://www.upr-info.org/database/

[61] See the Cingranelli-Richards (CIRI) Human Rights Data Project for 2010 available at: http://ciri.binghamton.edu/. This University of Connecticut project, annually produces standards-based quantitative information on government respect for 15 internationally recognized human rights that is used by a gov-

regard. It directed twelve recommendations to Greece[62] yet at the same time bestowed praise on its long term ally Israel in respect of the state's efforts to uphold human rights and its institutions, its creation and amendment of legislation and even asked that it share some best practices in the field of children's rights.[63]

Many SuRs were also guilty of contravening this principle. Iran, for example, accepted certain recommendations while simultaneously it rejected almost identical recommendations which were worded in a slightly different way or which were presented by a different State.

On the whole, the first cycle ran relatively smoothly in the sense that there were very few episodes of conflict and most states respected that the procedure was designed to be executed in a constructive, non-confrontational manner. Nevertheless, elements of tension did creep in from time to time as was evident during the extensive discussions that took place before the report of Israel could be passed by consensus. Similarly during the final session, tensions arose when the Syrian delegation denied all allegations of human rights abuse, arguing that a 'double standard' existed within the Council and that weaker States were being held to a much higher standard than more powerful ones. The situation reached boiling point when the United States explicitly called on the Syrian Government to formally step aside and make way for peaceful reform.[64]

However, the main criticism that can be levelled against the failure of the process to adhere to this principle is that "*the reviews of some countries presented a singular problem: a lack of objectivity. Indeed, on several occasions there was a clear contradiction between the image portrayed of a country at the conclusion of its review … and the issues raised by Special Procedures, Treaty Bodies and NGOs.*"[65] This was undoubtedly a recurring problem encountered, as the Outcome Reports are frequently not reflective of the SuRs current human rights situation. In the case of Sri Lanka, for example, 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.[66]

8. Not be overly burdensome to the concerned State or to the agenda of the Council;

9. Not be overly long; it should be realistic and not absorb a disproportionate amount of time, human and financial resources;

10. Not diminish the Council's capacity to respond to urgent human rights situations.

There is considerable overlap between these three principles and therefore they have been analysed together. No guidance is provided in the Resolution as to what would constitute being 'overly' burdensome. It is evident from the practice of the first cycle that considerable time and energy needs to be expended by states, civil society and the UN. In respect of the UN, the greatest burden has fallen not on the Council but rather on the OHCHR which is tasked with the responsibility of compiling the UN and stakeholder summaries. In addition, it is indisputable that a considerable bulk of the Council's agenda is now taken up with UPR. During the first cycle,

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ernments and global development agencies, including the UN, World Bank, and USAID. Greece's results were superior or at least equal to those of Israel in every category.

[62] UPR Info's List of all recommendations made to Greece and the delegation's responses available at: http://www.upr-info.org/IMG/pdf/recommendations_to_greece_2011.pdf

[63] A/HRC/10/76 Outcome Report on Israel, 8 January 2009, paras.21 and 31.

[64] A/HRC/19/11 Outcome Report on the Syrian Arab Republic, 24 January 2012, paras.31 and 40.

[65] FICAT, 2009, p.15.

[66] ISHR, 2008, Analytical Overview of the UPR, p.6.

there were three UPR working group sessions per year, each lasting two weeks in duration. Furthermore, when the Council met in plenary session, usually three times per year, an average of three days out of each session was dedicated to UPR.

A frequently cited criticism concerning the impact of UPR on states has been that the less developed states do not have adequate resources to sufficiently prepare for and participate in the process. Evidence in support of this can be ascertained from observing the first cycle. Some of the lesser developed countries did not submit a state report at all such as Cape Verde or others were extremely scant. Such countries were also unable to fund large scale delegations to attend Geneva. The US delegation was comprised of over forty members including three assistant secretaries of state, compared to a one-member delegation from the Dominica (the US Ambassador).[67]

The creation of trust funds has been a positive development in an attempt to alleviate the pressure on less developed states. Resolution 5/1 envisaged the establishment of a voluntary trust fund "*to facilitate the participation of developing countries, particularly the Least Developed Countries, in the said mechanism*". Two financial mechanisms, the **Universal Periodic Review Voluntary Trust Fund** and the **Voluntary Fund for Financial and Technical Assistance** were established in 2007 pursuant to Resolution 6/17 to facilitate the participation of developing countries in the UPR mechanism, and support its follow-up at country level, respectively. However both funds have been underfinanced which limits their utility. For example, Morocco noted at the review of the first cycle that the latter fund contained only $1.4 million, which had been donated by a total of seven States.[68]

In assessing these principles it becomes clear that UPR must add considerable value to the existing mechanisms to justify the additional burden on all parties involved; something that this thesis seeks to prove.

11. Fully integrate a gender perspective.

This is an extremely vague principle and it is difficult to ascertain what precisely is required in practice. The first cycle does demonstrate that the issues of women's rights and discrimination on the basis of sexual orientation and gender identity drew significant attention during the course of the interactive dialogue. Slovenia asked a majority of states a general question on gender integration in preparation for the UPR, and a tailored question related to other gender issues. (It made approximately 170 recommendations on this matter alone during the first cycle).[69]

During the 6th session of the Human Rights Council in September 2007, integrating a gender perspective into the work of the HRC (and by extension into the UPR) was an issue on the agenda. Specific proposals for UPR were made, such as:

1. Placing the integration of a gender perspective as a standing item on the list of issues that would be presented by the UPR rapporteurs to the UPR Working Group to structure the interactive dialogue with the concerned country.
2. Ensuring that the outcome document had a separate item on proposals and follow-up to gender integration and other gender-specific issues.
3. Assessing the advancement in gender issues in national policy through the UPR.

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[67] This detail is available in the annex to the Outcome Reports.
[68] ISHR, 2012, Council debate on UPR: Raising the bar for the second cycle.
[69] This detail was obtained from UPR's database of recommendations available at: http://www.upr-info.org/database/

4. The submitting of gender-specific information and information related to women by states and other stakeholders in their reports under the UPR.
5. The identification by the SuR of best practices and lessons learned in the implementation of national policies through a gender perspective.[70]

Although none of these are specifically provided for in the UPR's working document, it became apparent that the latter three recommendations were implemented in practice during the first cycle and even the first and second were largely adhered to, albeit not in the precise formula envisaged.

12. Without prejudice to the obligations contained in the elements provided for in the basis of review, take into account the level of development and specificities of countries.

This principle has to be welcomed as it allows tailor-made country-specific evaluation without detriment to consistency and universality of the human rights standards within the Review. It is very difficult, and even arguably impractical, to create one artificial benchmark for success and failure for all countries as the human rights situation in every country is unique.

However, it must be emphasised that there is a fine line between having regard to a country's level of development and allowing the specificities of countries to be used as a vehicle to enable states to evade their responsibility not to breach human rights. The tendency was apparent, on occasion, to exempt the country under review from a critical assessment by referring to difficult objective conditions. Examples encountered during the first cycle included excusing draconian arrest and detention measures in the UK on the basis of the need to combat terrorism,[71] or defending the treatment of minorities in France due to the fact that the law in France does not recognise minorities per se and the incompatibility of certain minority rights with the French Constitution.[72] These instances should, of course, be distinguished from situations of natural disasters as occurred in Haiti, or extreme poverty, which genuinely impact on a state's ability to improve the human rights situation on the ground.

The cultural relativism argument also comes into play here. Blackburn argues that, while governments proclaim at an international level that 'diversity' allows for cultural values, their practices demonstrate that diversity, at the local level, is precisely their greatest fear. As such, they appeal to the cultural excuse on the international stage, whereas within their borders they themselves exercise the most repressive approach towards a social contract, with extreme fear of contradiction or dissidence, despite purporting to represent the will 'of the people' or 'of God'.[73] There were a plethora of examples of SuRs seeking to use the cultural values argument to shield themselves from ardent criticism. The most notable of these was Iran which opened its interactive dialogue by stating that "*its human rights situation had consistently been used by some Western countries to apply political pressure and advance ulterior political motives.*"[74]

Country specific factors should be taken into consideration not as a matter of assessment and analysis but rather in providing support to overcome the obstacles in improving the state's human rights record.

13. Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions.

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[70] ISHR, HRC, 6th Session Daily Update, 21 September 2007.
[71] A/HRC/8/25 Final Report on the UK 23 May 2008 paras. 8, 14, 17 and 25.
[72] A/HRC/8/47 Final Report on France 3 June 2008 paras. 21, 28, 37, 38, 42 and 54.
[73] Blackburn, 2011 p.35.
[74] A/HRC/14/12, Final Report on Iran 15 March 2010, para. 9.

This principle is extremely far reaching as through the use of the term 'ensure', it demands the involvement of all relevant stakeholders. Furthermore, their participation is not limited temporally or to any particular aspect of the process. The participation of NGOs and NHRIs is critical to ensuring that an objective picture is painted of the human rights situation in the SuR. Detailed below are a number of stages at which the contribution of stakeholders is vital. In particular they play a crucial role in implementation and follow up, an aspect that will be explored in further detail in the next chapter.

Submitting Information in advance of the dialogue

The submission of information to the OHCHR is open to all relevant stakeholders, regardless of accreditation. This has significantly expanded participation in the Council by domestic NGOs. However, and as alluded to briefly above, the stakeholder reports have to be submitted several months in advance of the UPR in question and this means that the information is often out of date by the time of the dialogue phase. Notwithstanding the fact that the OHCHR often has to summarise hundreds of pages of documentation into a ten page submission, most NGOs have appeared to be relatively satisfied to date with the summary document of their prepared information. In addition, in an attempt to counter any staleness in reporting, some NGOs have begun to create an updated report immediately in advance of the actual Working Group session. Furthermore, NGOs can also publish and disseminate their reports independently of the OHCHR summary.

It is important that apathy creep does not begin to fester among NGOs in the so called developed states in dealing with human rights violations in their own countries. There were glimmers of this visible during the first cycle. In the Netherlands' UPR, for example, only five NGOs submitted reports whereas in the less developed countries in excess of twenty NGO reports are frequently provided to the OHCHR.

Involvement in the preparation of state reports

This principle, unlike the majority of others, is elaborated further upon in Resolution 5/1 which outlines that: "*States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders*."[75] Although this national consultation is not mandatory it was actually perceived and performed as such by the SuRs during the first cycle. Again, the quality of this consultation process varied hugely from country to country. Germany's consultation with civil society was undertaken in two stages: in the first, the draft framework of the report was submitted to the German Institute for Human Rights and to the fifty or so NGOs which make up the "Human Rights Forum" in July 2008, asking them for comment. Actual consultation on the draft report took place on 23 October 2008 and gave rise to a number of amendments and additions to the report.[76] In contrast, there is no evidence that any official national consultation took place in advance of many other reviews including that of Saudi Arabia's which also occurred during the 4th session.[77]

A useful tool to encourage stakeholder involvement in the preparation of the national reports was exploited by the UK. It frequently included a standard question to the SuR asking for clarification on the role of civil society in the preparation of its national report.[78] In addition a further beneficial practice has also developed whereby the majority of states informed the Working Group of their national consultation process either through their state report or in the introductory statement during the review.[79]

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[75] A/HRC/RES/5/1, 18 June 2007 para. 15.
[76] A/HRC/WG.6/4/DEU/1, Germany's state report, 10 November 2008, para.2.
[77] ISHR, Overview of the Review of Saudi Arabia, 6 February 2009, p. 2.
[78] Information obtained from the UPR-Info Database available at: http://www.upr-info.org/database/
[79] See the "methodology/consultation process" section present in nearly all state reports and the "summaries of the proceedings of the review process – presentation by the state under review" as detailed in all states' Outcome Reports.

NGOs and NHRI role during the interactive dialogue

While NGOs play no active role in the review before the Working Group, they often lobby states to take their concerns on board when posing questions. Indeed, the recommendations made by the states are frequently reflective of the NGOs submissions.[80] The first cycle has demonstrated that states such as Brazil, Guatemala, Mexico, The Republic of Korea and some in the Western group have been receptive to being approached by NGOs even immediately before, or during, the review of a state. In the review of Morocco, for example, the stakeholder submissions identified eight main human rights concerns. Four of these were raised by states during the dialogue and eventually adopted by the Moroccan delegation. [81]

Although NGOs cannot take the floor during the review, they can be present to provide briefings to state representatives, to observe and to report nationally and internationally on the examination. Furthermore, they often organise parallel events during the Working Group sessions. In May 2012, India's Working Group on Human Rights (WGHR) travelled to Geneva to conduct an event addressing forced land acquisitions, the security laws and India's failure to ratify CAT.

The prevailing view appears to be that the examinations within the UPR Working Group should remain a peer process and should not be opened up to NGOs. One can argue that other ways should be found to enhance the roles that national NGOs can play within the UPR examinations. For instance, the Troika might hold an informal briefing with non-state stakeholders before the interactive dialogue with the concerned government, replicating the customary procedure of the UN Treaty Bodies.[82]

NGOs and NHRI role at the plenary session

The stakeholders' first opportunity to have official involvement in the process is to make "general comments" before the adoption of the outcome by the plenary.[83] The right to speak under Item 6 at the Council plenary session is limited to ECOSOC-accredited NGOs and NHRIs that are accredited by the International Coordinating Committee of NHRIs.

The vague expression of the stakeholders' role caused problems in the early sessions of the UPR with many states objecting on the basis that the NGO in question was over-stepping their mandate. Whereas, during the plenary, member and observer states are limited to expressing their views on the 'outcome of the review', other relevant stakeholders are entitled to 'make general comments before the adoption of the outcome by the plenary'. This broader language was inserted so that NGOs and NHRIs would be able to provide some substantive input to the discussion at the Council phase.[84] However, from the very first opportunity for NGO participation, in the review of Bahrain, it was clear that there were differences of understanding of the meaning of 'general comments'.

During the first cycle, many NGOs were interrupted while trying to speak and states often requested that their comments be removed from the official record of the session e.g. Egypt and Cuba.

Nevertheless, as the process developed, NGOs increasingly linked their references to human rights to recommendations in the UPR report, which lessened the opportunity for states to interrupt the proceedings with 'points of order'.[85]

Nevertheless, the involvement of NGOs and NHRIs is extremely important at this stage as they are generally more critical than the member states and contribute to the objectivity of the Outcome Report. Many NGOs used

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[80] To date there is no quantitative study assessing the impact of NGO information and same would be useful.
[81] The Danish Institute for Human Rights, 2011, p.40.
[82] Rathgeber, 2010, p.8.
[83] A/HRC/RES/5/1, 18 June 2007, para.31.
[84] Saito and Sweeney, 2009, p.216.
[85] ISHR "UPR Analytical Overview April – June 2008" pp.12 – 15.

their speaking time to propose means by which states could implement recommendations and/or challenged the state's position on particular issues or recommendations that the state had rejected. Furthermore, 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 e.g. Algeria or that recommendations had not addressed the most critical issues in the country e.g. Argentina. [86]

Many states, including Ecuador and Argentina, acknowledged and underlined the importance of the stakeholder contribution at this stage of the process in their statements. It is also worthy of note that a large percentage of SuR did respond to issues posed by NGOs in their concluding remarks. Bahrain dealt in detail with a question raised by the Bahrain Women's Association on women's participation in society[87] and Brazil addressed the issue of human rights defenders and collaboration with civil society in reply to a statement made by Conectas Direitos Humanos.[88]

Post UPR Implementation and Follow up

Given that the outcome reports are published, the media, NHRIs and NGOs have a very critical role to play in putting additional pressure on governments to comply with the recommendations. They need to be the main instruments involved in dissemination of the outputs of the UPR, especially in pressing for changes at domestic level until the next cycle of review takes place. This will be elaborated upon further in chapter 4.

B. Objectives

1. The improvement of the human rights situation on the ground.

This is undoubtedly the guiding objective of UPR and merits analysis in a separate chapter. Accordingly, this said analysis is carried out in chapter 3. This paper seeks to argue that UPR has created a profound - albeit not completely equal - forum for the fulfilment of states' obligations to promote and protect the human rights of its citizens.

2. The fulfilment of the State's human rights obligations and commitments[89] and assessment of positive developments and challenges faced by the State.

The first cycle of UPR succeeded in shining a spotlight publicly on situations of human rights violations in all of the member states. In doing so, it exposed where the states in question were failing to adhere to the obligations and commitments they had given towards fulfilling human rights and encouraged debate as to how best this could be remedied. In relation to an assessment of positive developments, the SuRs themselves did not restrain from highlighting the improvements they had made to human rights in their own countries.

However, the final element of the objective, namely assessing the challenges faced by the state in question was disappointingly absent from many of the Outcome Reports. Numerous states demonstrated reluctance in high-lighting flaws in the human rights protection in their respective countries and on the limited occasions where they did, sought to justify these breaches on conditions outside of their control. Multiple examples abound from the first cycle: Sri Lanka, in its state report and during the interactive dialogue, accepted there were areas of concern such as child soldiers and enforced disappearances but blamed these on the rebel groups' conflict which had been raging in the country. Similarly, when it came to criticisms of poverty and the rights of internal-

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[86] Sweeney, 2008.
[87] UN Press Release on the Report on Bahrain, 9 June 2008.
[88] UN Press Release on the Report of Brazil, 10 June 2008.
[89] The SuR's human rights record is reviewed for compatibility with: 1.The UN Charter; 2.The UDHR; 3. The Conventions and Protocols to which the relevant state is a party; 4. Voluntary pledges and commitments undertaken by the State; and 5.International Humanitarian Law.

ly displaced persons, the 2004 Tsunami was emphasised by the Sri Lankan delegation as being the primary contributory factor.[90]

It was also difficult to determine the challenges facing states during the dialogue phase as countries were frequently selective in relation to the questions they responded to. Furthermore, the general trend of answering questions in clusters meant that intentionally or otherwise, many of the questions went unanswered. This was particularly apparent in the review of Brazil.[91]

During the plenary session there is also little incentive for SuRs to break their silence and respond to either the states or NGOs which take the floor as it has no real bearing on the outcome of their review. The recommendations have already been made and it will not impact upon the final report. This is in marked contrast to the procedure before the Treaty Bodies where a failure to respond to questions may result in more pointed concluding observations.

The reviewing states also frequently did not contribute to satisfying this objective. UN Watch carried out a review of 55 countries—including all 47 members of the UN HRC - and indicated that their findings demonstrated that only 19 had average scores indicating that they contributed positively to the process. It claims that a majority of 32 out of 55 countries acted as a mutual praise society, misusing the process in order to legitimise human rights abusers, instead of holding them to account.[92] It identified 19 of these countries which it considered "destructive" i.e. those that specifically praised, legitimised and encouraged country policies and practices that violate human rights.[93]

3. The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

As already alluded to in this chapter, a state's lack of resources and capacity is often the main determining factor in whether or not a state is in a position to implement recommendations. It is thus positive to have witnessed adherence to this objective throughout the first cycle. From the earliest sessions states have sought to take advantage of the offer of assistance and often the recommending states themselves suggest that the SuR requests assistance in meeting their obligations. The UPR has helped to give countries specific guidance, and individualised, achievable goals to meet in progressing respect for human rights. The trust funds discussed above are also an invaluable tool in fulfilling this objective and, already, in excess of seventy states have availed of assistance under either or both funds.[94]

Nevertheless, one could argue that more should be done to ensure that this objective is reached. In this regard, it is imperative that the aforementioned funds remain adequately financed. As part of the process, SuRs should be requested to convey their needs in terms of the nature of the support they require, in order to enable them to implement the recommendations made and to improve institution building.

4. The sharing of best practice among States and other stakeholders;

5. Support for cooperation in the promotion and protection of human rights;

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[90] A/HRC/8/46 Outcome Report on Sri Lanka 5 June 2008, paras.11 , 13 and 49; A/HRC/WG.6/2/LKA/1 Sri Lanka's National Report 2 May 2008 para.4.

[91] A/HRC/8/27 Outcome Report on Brazil, 22 May 2008.

[92] UN Watch, 2009, Mutual Praise Society.

[93] Azerbaijan, Bahrain, Bangladesh, China, Cuba, Djibouti, Indonesia, Libya, Nigeria, North Korea, Pakistan, the Philippines, Qatar, Syria, Sudan and Zimbabwe.

[94] See OHCHR documents " UPR Follow-up: list of countries that have requested assistance and/or are being supported as part of OHCHR's on-going activities (as of 29 March 2011)" and "Requests for financial assistance under the Voluntary Fund for Participation in the UPR Mechanism (as of 24 February 2012)."

Flowing from the previous objective, UPR is designed to provide member states with the opportunity to disclose any obstacles to the enjoyment of human rights in their countries and to provide assistance to them based on the interactive dialogue between states and other stakeholders. In its greatest sense, UPR involves sharing best practices and there are numerous examples of this in the first cycle. Many reviewing states have even commented on the value of the dialogue, advising that it has impacted positively upon their own state action: the Bolivian representative in the troika for Finland specifically referred to the fact that Bolivia had learned a lot from the experience.[95] Another example arose in somewhat unexpected circumstances. Burkina Faso engaged an independent expert to help with the drafting of their national report. Thereafter, it was in a position to provide similar assistance to the Niger government when they came to draft their state report.[96]

Another trend discernable was the tendency on the part of recommending states to request that SuRs share best practices in areas in which they have readily acknowledged expertise. Algeria for example, asked that 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*."[97]

6. The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights (OHCHR).*[98]*

This is another objective which will be developed in further detail in the following chapters. For the present however, it is useful to comment that UPR has demonstrated that a cooperative framework can be used to debate human rights situations and that Resolutions are not the only way in the Council to address human rights problems. Although the UPR is an insufficient tool for responding to situations that require sustained or urgent engagement by the Council, some of the modalities used in the UPR could inspire more effective responses by the Council to situations of concern.

IV. IMPROVING THE HUMAN RIGHTS SITUATION ON THE GROUND THROUGH IMPLEMENTATION AND FOLLOW UP

There is great expectation placed on the shoulders of UPR that its sheer existence is designed to lend legitimacy to the Human Rights Council as a reformed institution. As Gareth Sweeney and Yuri Saito point out, UPR is under considerable pressure to review UN Member States in an objective, non-selective and non-politicised manner as this will have a significant bearing on the future of the HRC. However, they are quick to point out that what matters most to NGOs is whether UPR can deliver on its primary objective of improving the situation of human rights on the ground.[99] One would have to agree that this is the crucial test by which UPR should be evaluated.

This chapter analyses the extent to which UPR is succeeding in its principle objective of improving the human rights situation on the ground. As this thesis has indicated thus far, the only way to achieve tangible improvement in the protection of human rights, is through implementation and follow up. Section 1 provides a brief overview of the difficulties hampering implementation. This chapter then moves on to consider in section 2, through an in-depth evaluation of India's and the UK's experience whether, notwithstanding these difficulties,

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[95] A/HRC/8/24, Outcome Report on Finland 23 May 2008, para.22.
[96] The Danish Institute for Human Rights, 2011, p.23.
[97] A/HRC/8/26 Outcome Report on India, 23 May 2008, para.42.
[98] A/HRC/RES/5/1, 18 June 2007, para.4.
[99] Saito and Sweeney, 2009, p.204.

UPR has contributed to an enhancement of the human rights situation in both countries. Finally, the third section seeks to identify lessons to be learned from the UK's and India's reviews.

A. Implementation on Paper and in Practice

It is obvious that no matter how well the peer review process is operating, the critical period is that between one phase and the next when the states are tasked with implementing and following up on the recommendations made. Resolution 5/1 does affirm the state's primary responsibility to implement recommendations – it sets a specific calendar and creates a system of international assistance to help. But the first cycle added very little in developing these terms of reference for implementation.

It is important to ask what the first cycle has taught us. As David Frazier points out, **"***no consequences beyond embarrassment have been developed to enforce the implementation of recommendations***.***"***[100] The lack of punitive sanctions attached to the process was very likely a sine qua non for the support of certain developing states, which feared that the UPR could turn into a one-sided mechanism for western states to criticize their human rights records, warranted or not.[101] This is unfortunate as follow up is the only mechanism with the capacity to measure the realisation of UPR's ultimate objective.

Therefore one needs to consider a) whether the UPR's peer political pressure has proven to be a sufficient incentive for states to accept recommendations, implement them and thus initiate reform; b) if not, what is impeding implementation of the recommendations; and c) what more can be done, and by whom, within and outside the confines of the UPR process to ensure implementation and follow up and thus improve the human rights situation on the ground.

1. States' reaction to recommendations

In terms of the SuR's actual reaction to recommendations, from a review of responses to recommendations made in the twelve sessions of the first cycle, 75% of all recommendations were accepted, 15% were rejected and there was 10% where no clear position was taken or a response remains pending.[102]

Number of Recommendations	Accepted	No clear position/pending	Rejected
Session 1	205	79	32
Session 2	359	106	74
Session 3	404	187	141
Session 4	729	100	174
Session 5	1008	166	138
Session 6	1233	332	181
Session 7	1562	121	240
Session 8	1450	162	260
Session 9	1433	147	296
Session 10	1572	222	286
Session 11	1632	74	306
Session 12	1795	108	467
Total	**13382**	**1804**	**2595**

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[100] Frazier, 2011, p.3.

[101] Ascherio and McMahon, 2010, p.3.

[102] This information was extracted from country information provided by UPR.info: http://www.upr-info.org/-Sessions-.html

A number of different considerations are at play here. First, states are likely to want to have as high an acceptance rate as possible. There are divergent reasons for this. Some states believe that the recommendations are constructive while others are worried about the negative international publicity which might ensue if a large number of recommendations are rejected. In addition, or alternatively, recommending states seek, to a significant extent, to make their recommendations palatable to the SuR. The overall high acceptance rate reflects the view of many states that reform through the UPR must be largely evolutionary, rather than revolutionary.[103]
On the negative side, over half of the recommendations rejected related to category 5 recommendations i.e. those that have now generally come to be classified as requiring the most action to be taken and therefore have the greatest value from the perspective of actual improvement in the human rights situation.[104]

A further unsatisfactory custom apparent amongst some of the SuRs has been that in order to avoid criticism, they advise that implementation is underway. This approach was adopted by eleven states in the first cycle's final session. This means that while the recommendation 'enjoys the support of the state under review', it is not registered as having been accepted by the state as the recommendation would seem superfluous. However the first cycle is replete with examples where this is clearly not the case. In the review of Syria, the latter stated that 26 of the 179 recommendations made to it had already been implemented, including a recommendation to fully respect freedom of association and expression.[105]

Another difficulty impeding an improvement of the human rights situation on the ground is the fact that SuRs are not obliged to explain or justify why a recommendation is rejected. As mentioned in the previous chapter, it is clear that these are the very recommendations which are likely to make a concrete difference in practice. When recommendations are not accepted, they thus fall outside the framework of implementation. The duty should remain on states to provide reasons for rejecting recommendations and the position could be revisited again in the following cycle.

2. The Imprecise Nature of Recommendations

Aside from the difficulties in encouraging states to actually accept concrete recommendations, another obstacle hampering implementation of reform is the imprecision of many of the recommendations. It has been argued that "*during the first 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*."[106] For a comment to qualify as a recommendation, it is important that the SuR can give effect to the recommendation through a readily identifiable action, thus allowing for this implementation to be verified; but this was not the practice witnessed during the first cycle.

3. The Difficulty in Evaluating Implementation

In addition to the problem of following up vague recommendations, there is no system to measure even those that require specific action. The UN, and in particular the OHCHR, currently does not have the resources to undertake such a mammoth task and thus the process is very much reliant on the cooperation of the states themselves and the pressure of civil society.

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[103] McMahon, 2010, p.16.
[104] Information obtained from analysing the statistics collated by UPR Info see: http://www.upr-info.org/database/
[105] ISHR, 2012, UPR: Examining the Opportunities from the First Cycle, p.25.
[106] Global Observatory on Human Rights, 2010, p.10.

B. Case Study – An Analysis of Implementation by the UK and India

In order to concretely assess whether or not UPR is having a genuine impact on human rights violations within the member states, notwithstanding the deficiencies identified in the preceding paragraphs, the situation in the UK and India - two countries reviewed during the first session in 2008 - have been analysed in depth in this thesis. It charts their experiences during the review process, their progress in implementing the recommendations made, considers what impediments exist to the implementation of recommendations, and, finally, compares their reactions to the UPR process.

These two countries were chosen for a number of reasons that merit consideration. The reviews of India and the UK took place during the first session in June 2008 which has given the countries ample time to make progress on the recommendations received. In addition, it has allowed an evaluation of the impact the second cycle has had on assessing implementation and follow up. Both countries were reviewed on the same day, 10 April 2008 and therefore differences in treatment cannot be explained on the basis of a maturation of the process.

In terms of their status, both countries are considered relatively high profile players on the international scene and were members of the Human Rights Council at the time of their review. (India will remain a member until 2014 while the UK's membership lapsed in 2011). However, this is where the similarities end. The UK is a highly developed nation and is part of the WEOG. It is considered to have a comparatively good human rights record although concerns have been raised recently about a retreat from some of the strong human rights protections it traditionally provided.[107] In contrast, India remains a developing country and is a member of the Asian group together with BRIC which tends to be vocally critical of many of the UN's policies.

One should point out that as these were two of the first countries to be reviewed, they had very little time to prepare for the process compared to other countries and had no precedent to base their preparations upon. Accordingly, this analysis must be reviewed against this backdrop.

1. The State Reports and Delegation Presentations

Both countries sent relatively high level delegations. The UK's delegation was composed of 23 members and was headed by H.E. Michael Wills MP, Minister of State for Justice. The Indian delegation was comprised of 13 members and was chaired by H.E. Mr. Swashpawan Singh, Ambassador and Permanent Representative of India to the UN Office at Geneva.[108]

When presenting the state reports, a marked contrast in attitudes from the delegations was apparent. Michael Wills claimed that the UK viewed the UPR as "*less as an examination, but more as a discussion about how countries could tackle difficult issues responsibly and creatively, without ever losing sight of the importance of respect for human rights.*"[109] Notwithstanding bestowing considerable praise upon the UK's achievements and the financial contributions the country makes to the UN, Michael Wills was prepared to admit that the UK had received criticism recently in the light of "*new information about the past use of British territory for extraordi-*

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[107] See for example calls to abolish the Human Rights Act such as the comments of Theresa May, Home Secretary reported in: "Home Secretary Theresa May wants Human Rights Act axed", BBC News, 2 October 2011 available at: **http://www.bbc.co.uk/news/uk-politics-15140742**
Also, in 2006, research commissioned by the Government found that, 43% of people surveyed believed that too many people (notably asylum seekers, foreigners, people seeking financial advantage, and lawyers) took advantage of the Human Rights Act (*Human Rights Insight Project,* Ministry of Justice Research Series 1/08, January 2008).
[108] See annexes to both countries' Outcome Reports.
[109] See webcast of the session available at: http://www.un.org/webcast/unhrc/archive.asp?go=021 and also the first session's meeting's highlights reported at:
http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights10April2008am.aspx

nary renditions, about treatment of detainees in Iraq, as well as issues about how long terrorist suspects can be held properly without charge."[110]

Mr. Singh on the other hand, advised that the objective of the report was: "*to provide an overview of how pluralism and respect for diversity inform all aspects of the polity and society in the world's largest democracy.*"[111] The report and the presentation make very little reference to the human rights challenges encountered by India and the problems it has, save to do so in a generic fashion e.g. "like all developing countries" and claim that for over two decades India had faced the scourge of terrorism which is aided and abetted from outside. The report stated that India's approach towards protection and promotion of human rights had been characterised by a holistic, multi-pronged effort[112] which focuses on the concept of "inclusive growth" in society.[113]

Both reports provided significant detail about the human rights legislative framework in place in the respective countries but there was a noticeable lack of self criticism on the actual impact the various provisions were having on the human rights situation on the ground, particularly so in India's case. For example, although the Indian report comprehensively discusses the policies and affirmative action measures allegedly taken to protect minority and caste rights, it does not mention that fact that these policies are largely failing to achieve their stated objectives.[114] Similarly notwithstanding the UK's particularly advanced approach to promoting non-discrimination and equality, its report failed to deal with the fact that inequalities continue to affect minority ethnic communities in the fields of employment, education, housing, health and access to justice.[115]

From a positive point of view, the UK government did seek to address concerns raised by the UN Treaty Bodies and Special Rapporteurs in its state report[116] and focused, in particular, upon human rights education, the terrorist challenge and asylum seekers, although the latter element was only scantily addressed. In terms of voluntary pledges, those made by the UK were extremely vague however and only related to improving the UN system as a whole, rather than addressing specifically the human rights situation in the UK itself.[117]

2. Stakeholder Involvement

As regards stakeholder input, the UK state report advised that the government twice consulted with stakeholders, firstly at an early stage of the drafting and secondly, before the report was finalised[118] and civil society confirmed that this was the case.

The Indian report claimed that all relevant Ministries had contributed to the preparation of the report, along with other stakeholders including the national and state human rights institutes (N/SHRIs) and the NGOs working in the field of human rights and related aspects.[119] It advised that a number of meetings and a broad consultation process had occurred where "*a liberal exchange of views, suggestions and information regarding protection and implementation of human rights took place, which helped in evolving the contours of the national report.*"[120] This was reiterated by Mr Singh but was contested by many NGOs. In their opinion, the state contacted a very small number of NGOs, giving them no notice, and asked that they meet in Delhi the following

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[110] ibid

[111] A/HRC/WG.6/1/IND/1 India's state report 2008 p.1 para.1.

[112] ibid p.3 para.12.

[113] ibid p.11 para.50.

[114] A/HRC/WG.6/1/IND/2 UN Compilation on India, 2008, p.5 para.12, p.7 para.24 and p.8 para.30.

[115] A/HRC/WG.6/1/IND/3, Stakeholder Compilation on India, 2008, p.3 para.9.

[116] A/HRC/WG.6/1/GBR/1 UK state report 2008 p.5 para.19.

[117] Ibid p.20 para.108.

[118] Ibid p.2 para.3.

[119] A/HRC/WG.6/1/IND/1 India's state report p.3 para.6.

[120] Ibid p. 3 para 7.

day to discuss a draft report that they, the NGOs, had not even seen. According to local NGOs, the outcome of the 45 minute meeting had no bearing on the final draft submitted to the UPR.[121]

3. The Working Group's Interactive Dialogue

During the interactive dialogue, 38 HRC members and observers raised issues pertaining to the human rights situation in the UK and 42 countries did so in respect of India.[122]

India certainly received more praise than the UK during its review. In terms of those who spoke – Qatar, Tunisia, Sri Lanka, Nepal, Ghana, Bhutan, Mauritius, Malaysia, Saudi Arabia and Cuba - all only positively praised India, while a further 10 countries[123] merely sought further information rather than making recommendations for change.[124] The comments and recommendations directed at the UK tended to be far more specific and critical, which is surprising in light of the development status of each country. This demonstrates that state allegiances and politics do play a significant role in the UPR process.

The analysis of India's UPR reveals that it is an example of a country where the recommendations made do not address sufficiently the human rights violations occurring on the ground and where certain issues were not even debated during the interactive dialogue e.g. farmer suicides. Another issue which escaped the scrutiny of the review process was the clogged judicial system in India; according to estimates, there are over thirty million cases pending before the courts in India.[125] There were several other issues such as the protection of journalists, land rights, the deplorable standard of prison conditions, and access to clean drinking water which did merit further deliberation but were neither part of the state report nor were taken up during the deliberations.

4. Recommendations

Ultimately, the UK received thirty recommendations.[126] Of these, it accepted nineteen, rejected ten and one response remained "pending". When accepting recommendations the UK also helpfully agreed to implement some immediately. This assists with implementation assessment, as it is instantly evident whether or not the UK is living up to its responsibilities. In addition, the UK government provided detailed responses to all recommendations, including those that it rejected, which enables ease of follow up on the controversial issues in the next cycle.

The replies made by India to the recommendations were far less comprehensive than those provided by the UK. Its attitude can be summed up in the comment: "*Acceptance characterised the response to less controversial questions; on recommendations dealing with specific matters the response was ambiguous*"[127] Despite receiving more comments than the UK, only eighteen recommendations[128] were directed toward India. It accepted five recommendations and adopted no clear position in relation to the remaining thirteen.

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[121] Saito and Sweeney, 2009, p.218.
[122] See the 2008 Outcome Reports for India and the UK.
[123] Singapore, South Africa, Palestine, Syria, China, Bangladesh, Iran, Venezuela, Morocco and Malaysia.
[124] A/HRC/8/26 India's Outcome Report, 2008.
[125] Oberoi, 2011.
[126] A/HRC/8/25 UK's Outcome Report p.16 para.56. Although these are numbered 1 – 28, two of these contain double recommendations.
[127] UPR Watch, 2011, p.17.
[128] A/HRC/8/26 India's Outcome Report p.16 para.86

According to the aforementioned categorisation model adopted by UPR Info among others, both the UK and India received eleven recommendations each which required a specific action (category 5). India did not accept any of these while the UK accepted five.[129]

The recommendations made to both countries demonstrate how it is often easy for states to accept recommendations if they are framed on the basis of aspirations. In addition, other recommendations were vague enough that the UK or India could interpret them in a way that led to the conclusion that they were already being implemented in practice.[130]

Both countries sought to use the threat of terrorism as a defence to their draconian security measures, the latter representing a violation of human rights. Both relied on the fact that their highest courts had upheld the constitutionality of these laws[131] but this does not provide confirmation they are in conformity with human rights law.

5. Implementation

The implementation by India is particularly difficult to assess given its vague responses to recommendations. Although it only accepted five recommendations, other recommendations cannot be considered as outright rejections. In any event, given that one of the criticisms levelled at UPR by this paper is that follow up relates only to the accepted recommendations, implementation efforts have been reviewed in respect of all recommendations made to the UK and India. Since the review, this chapter shows that there is clear evidence that the UK has implemented, or at least has taken steps to implement, more recommendations than India.

This thesis has grouped the recommendations thematically to assist with an analysis of how successful both countries have been in implementing the recommendations made. Another important factor to consider is whether the action is a direct result of the UPR process or if it has been influenced by non-UPR factors. Due to space constraints in this paper, it has not been possible to carry out a comprehensive review of each recommendation but those that are generally felt to be the most pertinent for each country have been considered.

a. Implementation by the UK

aa. Detention
The UK received four recommendations in respect of detention and accepted two of these. It agreed to immediately elaborate a national programme to combat the problem of overcrowding of prisons, at the request of Russia. While the UK had met its targets up to 2010 - of creating an additional 10,500 prison spaces by 2014 as set out in its national plan - this action was primarily the response to Lord Carter's review of prisons in England & Wales, published on 5 December 2007[132] rather than being solely a reaction to the UPR process. Furthermore, in its state report for the second cycle, the UK government advised that due to the "*need to make considerable savings to public expenditure*" it would not be in a position to provide the additional places required to eliminate overcrowding.[133] Thus this recommendation has not been fully implemented.

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[129] Information extracted from UPR Info's database see: http://www.upr-info.org/database/

[130] See the addendum to India's Outcome Report containing the responses of the GoI to the recommendations made and in particular response to recommendations 4,5,6,10,13 and 18 and the addendum to the UK's Outcome Report containing the views on recommendations, and in particular the response to recommendations 2,3,8,11,14,19 and 23.

[131]A/HRC/8/26 India's Outcome Report p.10 para.47.

[132]Lord Carter, *Securing the future: proposals for the efficient and sustainable use of custody in England and Wales,* 2007.

[133] A/HRC/WG.6/13/GBR/1, UK's state report, 2012, p.7 para.42.

The second accepted recommendation - also made by Russia - asked the UK to enshrine in legislation the right of access of detainees to a lawyer **immediately** after detention, and not after 48 hours. The difficulty with this recommendation is that it was vaguely framed. Russia was in fact referring to the situation that when a person is detained under the Terrorism Act 2000, a senior police officer of Superintendent rank can authorise a delay in permitting access to legal advice for up to 48 hours in limited specified circumstances.

The recommendation as drafted, however, allowed the UK to accept the recommendation on the basis that legislation already provides for an immediate right of access except in the case of terrorist subjects. In respect of the terrorism legislation, the defence made is that "*the Government recognises that this is a power which should only be used in exceptional circumstances where there is an overriding public interest.*"[134]The recommendation in question can therefore not be considered as implemented.

ba. Armed Conflict and Counter Terrorism

Improvements in the situation on the ground are evident in this category but, once again, it is unclear precisely how much can be attributable to UPR. The UK received five recommendations within this sphere and agreed to implement all but one.

It accepted the recommendation from several states to continue to review all counter-terrorism legislation and ensure that it complies with the highest human rights standards.

Unfortunately for the purposes of assessing implementation, this is a subjective standard. At the time of the review, the UK emphasised that its counter-terrorism legislation is already subject to annual independent review. A complete review, however, was launched by the Home Office in July 2010 which was "*aimed at reconciling counter-terrorism powers with civil liberties*." This appears to have been in direct response, at least partially, to UPR.[135] The Home Secretary announced the outcome of the review of counter terrorism and security measures to Parliament on 26 January 2011.

The review replaced control orders with a new process known as Terrorist Prevention and Implementation Measures (T-Pims) which is said to have fewer controls but greater surveillance. The new system took effect from 26 January 2012. Changes include the fact that curfews of up to sixteen hours have been replaced by a more limited overnight home residency requirement and the power to move a suspect away from their home town has been removed. Electronic tagging and a ban on overseas travel continue to exist.

Counter terrorism 'stop and search' powers were also reformed significantly in March 2011. This was in response to the *Gillan and Quinton v UK* case[136] in the ECtHR, however, rather than as a reaction to UPR.

The Equality and Human Rights Commission (EHRC), England's NHRI, while welcoming the Government's review of counter terrorism measures, remained concerned, however, that there were still significant processes in respect of those suspected of terrorist offences that operated differently and with fewer protections compared to other criminal offences. It recommended that the usual criminal law should apply to those suspected of terrorist offences.[137]

The UK rejected Switzerland's recommendation that it, the UK, should consider any person detained by its armed forces as being under its jurisdiction, but it did agree to respect its obligations concerning the human rights of such individuals. This position pertains today, notwithstanding pressure from a number of quarters, aside from the UPR, including the Human Rights Committee and judgments of the ECHR in 2011.[138]

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[134] A/HRC/8/25/Add.1 Addendum to the Outcome Report, 2008, p.3.

[135] A/HRC/WG.6/13/GBR/1, UK's state report, 2012, p.10, para.63.

[136] *Gillan and Quinton v United Kingdom* [2009] ECHR 28 12 January 2010.

[137] EHRC, UPR of the UK – May 2012 Submission, p.12,para.25.

[138] *Al Jedda v UK* 27021/08 [2011] ECHR 1092 (7 July 2011) and *Al Skeini and Others v UK* 55721/07 [2011] ECHR 1093 (7 July 2011).

ca. Women

The UK accepted the two recommendations received under this heading and its implementation of both does appear to have resulted in a significant improvement in human rights protections, notwithstanding that the responses do not precisely address the recommendations made. India asked the UK to set up a strategic over-sight body, such as a commission on violence against women, to ensure greater coherence and more effective protection for women and the UK agreed to do so. However, in doing so, the UK government emphasised the role of the EHRC whose mandate already covers violence and "*provides a robust oversight mechanism.*"[139] As no further measures were required to be taken by the UK, it was therefore easy for it to accept this recommen-dation on this basis.

The UK did point out in its mid-term report that it had launched a cross-Government strategy to address vio-lence against women and girls in November 2009 and the Call to End Violence Against Women and Girls (VAWG) Action Plan was published in March 2011. This measure is certainly to be welcomed but cannot be seen as being a direct reaction to UPR. Instead, it formed part of the government pledge when taking office and is a particular favourite of the Rt. Hon Theresa May, MP Home Secretary.[140] Somewhat interestingly, however, in the VAWG Action Plan Progress Review in November 2011, a reference was made to UPR in the context of the fact that the government was ensuring that women's rights remained a priority on the international human rights agenda by raising women's rights issues with 27 countries through the UPR process.[141] Nevertheless, it made no reference to the government adhering to the pledges that it had itself made at its own UPR either in the action plan or in the progress review. This warrants criticism as UPR should first and foremost be a tool for self-reflection by states. Only thereafter is a state entitled to raise issues with the other member states.

In its second national report, the UK defended having not set up a Commission on the basis that the "*strategy goes beyond a body or Commission that may be constrained by its terms of reference or rigid structures.*"[142] While this may well be the case, it does not avoid the conclusion that the UK again chose to interpret recom-mendations to suit its own wishes and India's recommendation was not fully implemented.

The second recommendation concerning women was the generic and often repeated request of Slovenia that the UK integrate fully a gender perspective in the next stages of the UPR review, including the outcome of the review. While agreeing to implement the recommendation immediately, no detail was provided at the time about what the UK intended to do in order to adhere to this. In its mid-term implementation report, the UK used the opportunity to discuss the "*Ministerial Priorities for Women, setting out the Government's plans and ambitions to address significant aspects of gender inequality*"[143] which had been published in July 2007. Similar-ly, in its state report for the second cycle, the government advised that its "*overarching approach to advancing gender equality and determination to eliminate discrimination is set out in the cross-Government Equality Strategy, 'Building a Fairer Britain', published December 2010.*"[144] However, neither of these strategies appear to be directly relevant to the recommendation in question and does not demonstrate that the recommendation has been implemented in full.

da. Ratifications or withdrawal of reservations to Conventions

This category is one of the easiest to measure in terms of implementation and the UPR had a substantial impact on the UK's attitude to the Convention on the Rights of the Child (CRC).
While during the review it had accepted Russia's recommendation that it consider removal of its reservations to the Convention and the Optional Protocol on the involvement of children in armed conflict, it simultaneously

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[139] A/HRC/8/25/Add.1 Addendum to the UK's Outcome Report p. 5.
[140] UK Government, 2010, Forward to the Strategic Vision for the VAWG Action Plan, p.3.
[141] UK Government, 2011, Call to End VAWG: Action Plan Progress Review, p.25.
[142] A/HRC/WG.6/13/GBR/1 UK state report 2012 p.14, para. 90.
[143] UK's Mid Term Implementation Report, 2010, p.4, recommendation 4.
[144] A/HRC/WG.6/13/GBR/1 UK's state report, 2012 p.14, para 86.

refused to withdraw its reservation concerning the provision that detained children be separated from adults while in detention, as well as the reservation concerning refugee and asylum-seeking children, as requested by Indonesia.[145]

In spite of this rejection, the UK government announced, in September 2008, that it was removing its final two reservations to the CRC (Articles 22 and 37c). These two reservations were formally removed in November 2008.

The UK also advised that there were no reservations against the Optional Protocol (OP) on the Involvement of Children in Armed Conflict. It claimed that the declaration made upon signature of the OP is an interpretive statement rather than a reservation. In the declaration, the UK stated that the British Armed Forces would continue to recruit from age sixteen but included a commitment to take all feasible measures to ensure those who had not yet reached the age of eighteen did not take a direct part in hostilities. The UK claimed that it did not consider this inconsistent with its obligations under the OP, to which it stated it remained firmly committed. The UK's reading of its declaration to the OP would appear to be the correct one. Nevertheless, maintaining a recruitment policy of accepting children into the army and not completely ruling out the possibility of such children being involved in armed conflict is clearly contrary to the spirit of the OP, namely the protection of the rights of the child and their removal from the armed forces.

The influence of the UPR should not be overestimated however. The UK maintained its firm policy stance in relation to other Conventions and refused to consider ratification of the Convention on Migrant Workers. It justified this on the basis that its existing laws, such as the Human Rights Act 1988,[146] already provide adequate protection to migrant workers.[147] If this was actually the case, one fails to see why the government would have reason to refuse to ratify the Convention as this would therefore merely be a confirmation of the practice already in existence. It also refused to accept recommendations calling for the removal of its interpretive statement to Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination. The UK's interpretive statement was included due to its belief that individuals have the right to express views which are contrary to those of the majority of the population, so long as they are not expressed violently or do not incite violence or hatred against others. This attitude is perhaps more justifiable than that taken to the CRC OP Declaration, as many other states[148] also adopted a similar stance on the basis that the measures required in Article 4 must be undertaken with due regard to the principles embodied in the UDHR and therefore must be read in conjunction with the freedom of expression and assembly protections provided for in the Declaration.

The UK agreed to work towards the implementation of France's recommendation that it reflect upon and consider setting a date for signing the Convention on the Protection of All Persons from Enforced Disappearance (ICPPED).

The UK Government advised during its UPR that it continues to support the Convention and is now examining the reforms that would be needed in order to bring its domestic law in line with its requirements.[149] In its mid-term report it then stated that, given that the Convention requires the creation of new law - for example, a new criminal offence of enforced disappearance, including elements of extraterritorial jurisdiction – they anticipated that this process would be a lengthy one, requiring a substantial amount of Parliamentary time.[150]

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[145] A/HRC/8/25/Add.1 Addendum to UK's Outcome Report, p.10 para.25.
[146] See previous comments about a desire on the part of some to repeal this Act.
[147] A/HRC/8/25/Add.1 Addendum to the UK's Outcome Report, p.9, para.20.
[148] Including Austria, the Bahamas, Belgium, Fiji, France, Ireland, Italy, Japan and Tonga.
[149] A/HRC/8/25/Add.1 Addendum to the UK's Outcome Report, p.6, para. 12.
[150] UK's Mid Term Implementation Report, 2010, paragraph 9, page 14.

The last time that the issue of ratification was addressed in the UK parliament was in March 2009. The Government responded to questions posed by MP Lidington and Lord Avebury by saying that it is currently examining the potential impact of the Convention on the law of the UK.[151]

The UK had advised that it does not sign a Convention until it is ready to move to ratify it reasonably immediately thereafter i.e. within 12 months. Therefore, it confirmed that it did not intend to sign until it has carried out a full review of the Convention's impact on its existing laws. This mantra was repeated again during the UK's second review.

On July 30, 2009, a report of the UK Institute of Public Policy Research's security commission[152] recommended that the UK sign the Convention. Despite the fact that the Commission was composed of highly influential figures, no concrete action to adhere to this recommendation has been taken by the government. It is clearly of critical importance that the UK, as one of the permanent members of the Security Council, ratifies such a Convention as soon as possible, as there are currently 91 signatories and 32 parties to the Convention.[153] The Convention is of particular importance, as the offence of enforced disappearance is considered a crime against humanity under international law and should, therefore, be criminalised within the UK's domestic law.

b. Implementation by India

'*Work in progress*' is a phrase that can be used to exemplify various initiatives in India, especially those relating to human rights.[154]

As echoed by this phrase, the process of implementation of the recommendations has yielded mixed results. There has been progress made on certain issues but the lack of improvement in the implementation of others is acutely visible. The NGO coalition noted that much more remains to be done at the national policy and legislative levels.[155]

aa. Ratifications

The majority of recommendations can be grouped under this heading and embraced a wide range of issues which are all of concern in the Indian context. None of the recommendations in this category were definitively accepted or rejected.

Torture

When requested to expedite ratification of the Convention against Torture (CAT) by a number of countries, the official response was that ratification was "*being processed by the Government of India."*

The delegation noted that India is a signatory of CAT and is committed to its objectives. It claimed that the Indian Penal Code also has clear provisions regarding torture and the Supreme Court of India, in a well known judgment, *D. K. Basu vs. State of West Bengal[156]*, had issued important guidelines on provisions of detention that are applicable throughout India.[157] In reality, however, ratification has hit a stalemate and torture remains endemic in India.

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[151] Answer of Under Secretary Merron to questions of MP Lidington and of Minister of State Lord Mallboch on questions of Lord Avebury available at:
http://www.icaed.org/fileadmin/user_upload/UK_answers_to_questions_MP_01.pdf
[152] IPPR Commission on National Security, 2009, Shared Responsibilities: A national security strategy for the UK, p.25.
[153] See the Convention's statistics available at:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en
[154]UPR Watch, 2011, p.2.
[155] A/HRC/17/NGO/50 Joint written statement submitted by NGOs, 16 May 2011, p.2.
[156] (1997) 1 SCC 416.
[157] A/HRC/8/26 India's Outcome Report p.10 para.46.

The Select Committee of the Upper House of Parliament, which was constituted to consider the bill, was unhappy with the original Prevention of Torture Bill 2010 and presented its re-drafted version to the parliament. As the Bill has been totally altered, it has to be placed before and passed by both Houses again. It is crucial that there is no dilution of the Bill as amended by the Select Committee. Any dilution will fall foul of India's obligations under CAT and undermine meaningful ratification. In addition, the Working Group on Human Rights (WGHR) has pointed out that there remain a number of shortcomings in the Act as currently drafted.[158] In India's national report for the second UPR, GoI claimed that in advance of ratification, "*Article 21 and other Articles of the Constitution of India and the relevant provisions under the Indian Penal Code, 1860, provide for adequate safeguards*."[159] This is clearly incorrect when one examines the practice.

Enforced Disappearance

Similarly in relation to Nigeria's recommendation on the ICPPED, India advised that "*ratification is underway*."
However, virtually no steps have been taken to progress this, despite large-scale enforced disappearances in the country. The government is also yet to undertake an attempt to codify enforced disappearance as a criminal offence in domestic law. Existing provisions are not being used to penalise those implicated in enforced disappearances. In cases where initial momentum is made, the government does not grant the required sanction to prosecute security forces personnel. Four years on, India merely reiterated in its most recent state report that the government is studying the extent of changes in the domestic laws that would be required to ensure compatibility with the Convention.[160]

Children's Rights

India was also asked by several countries to consider ratification of the ILO Conventions No. 138 and 182 and to review its reservation to Article 32 of the CRC. India's official response was that it "*fully subscribes to the objectives and purposes of the Conventions and... has taken a wide range of measures including prescribing the minimum age of 14 years for employment in hazardous occupations, as domestic helps, at eateries as well as in certain other areas.*" It argued that conditions are not ripe in society to ban child labour as prescribed in the Conventions due to poverty but this provides no defence.

There are approximately 12.6 million child labourers in India[161] and the existing legislative and other measures mentioned by India have been inefficient in curbing child labour. No steps to improve the situation have been taken since the UPR. In an encouraging development, the Human Resource Development Minister, Kapil Sibal told the parliament in August 2011 that an inter-ministerial group was contemplating putting a blanket ban on child labour in every walk of life[162] but no developments in this regard have been forthcoming.

According to the WGHR, not only is there very poor implementation of the law in the newly prescribed 'hazardous' sectors, but the current child labour law itself stands in direct violation of the Constitution and of a child's fundamental right to education (as introduced in 2002 by Article 21 A and now supported by the powerful *Right to Free and Compulsory Education Act, 2009*.). The WGHR suggests that current inconsistencies within all child-related laws need to be addressed immediately. It recommends that the government needs to invest in child labour elimination programs, better child tracking systems, inter-departmental coordination and convergence of services, legislative provisions to regulate placement agencies and similar measures.[163] The only advance made

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[158] WGHR, Joint Stakeholder's Report for UPR Second Cycle, December 2011, p.16, para.36.

[159] A/HRC/WG.6/13/IND/1India's state report 2012 p.7 para.29.

[160] A/HRC/WG.6/13/IND/1India's state Report, 2012, Recommendation 12 Annex 1.

[161] ILO, *Child Labour and Responses in South Asia* available at:
http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/index.htm

[162] The Hindu, 2011, *Pre-school education sans formal teaching*.

[163] WGHR, Independent Assessment of the Implementation of the Recommendations made to GoI in its First UPR, October 2011, p.2.

in India's latest state report has been to advise that "*the Government is working on the modalities of ratifying these ILO Conventions, particularly on No. 182.*"[164]

The Status of Women

India was asked to sign the Optional Protocol to CEDAW by Brazil, and was requested by Slovenia to amend the Special Marriage Act 1954 to give equal rights to property accumulated during marriage, as required by Article 16 of CEDAW.

Rather than rejecting the first recommendation out-rightly, India argued that there already existed an "*effective legal and constitutional framework to address individual cases of violations within India*". However, the very nature of the Optional Protocol makes it a complementary mechanism to the domestic framework and would not involve considerable change in the domestic legal order. The recommendations of CEDAW under the OP typically provide structural solutions, and cannot be viewed as being parallel to or substituting the domestic mechanisms available for addressing discrimination against women.

As well as the constitution, India made reference to the existence of several other statutory mechanisms to address such violations, including the N/SHRIs, as well as separate National and State Commissions for Women. Although India has 8 national and over 180 SHRIs which have great potential to improve the human right situation on the ground, systemic impediments affect the effectiveness of many. A number of state commissions are yet to be fully set up and some lack chairpersons and thus are not equipped to address violations of women's human rights. Since the completion of the first review in 2008, there has been no tangible progress made by India to sign and ratify the CEDAW Optional Protocol and the GoI reiterated the same comments in the annex to its second state report.

In relation to equal property rights on the dissolution of marriage, India defended its decision not to provide for same on the basis of "*its policy of non-interference in the personal affairs of any community without its initiative and consent*", which it claims is essential to respect minorities and cultural diversity.[165] It should be pointed out, however, that the Special Marriage Act 1954 is a secular law, not a personal law. Therefore, the policy of non-interference does not apply to the Act.

There has been marginal progress on this recommendation notwithstanding that it was not one of India's accepted recommendations. The Marriage Laws (Amendment) Bill, 2010 has been proposed and it introduces the concept of irretrievable breakdown of marriage and endeavours to make it easier to obtain a divorce if the other party abstains from court proceedings. The bill was referred for additional enquiry by a parliamentary standing committee. The committee has recommended, among other measures, an effective "legal mechanism" to provide to women their part in the matrimonial property, accumulated during the course of marriage, before the divorce. But that is again a recommendation for the government and further action is needed.

ba. Special Procedures

India also received two recommendations, concerning: (a) extending a special invitation to Special Rapporteurs; and (b) receiving, as soon as possible, the Special Rapporteur on torture. India's initial response was that it had been "*regularly receiving and will continue to receive Special Rapporteurs and other Special Procedures mechanisms of the Human Rights Council taking into account its capacity, the priority areas for the country as well as the need for adequate preparations for such visits*". India stated that it could not agree to standing invitations, but that it had been extremely open and had extended invitations whenever approached.[166] This was in direct contradiction to the practice which existed at the time of review, when there were over two dozen

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[164] A/HRC/WG.6/13/IND/1 India's state report 2012 p.16, para.78.

[165] WGHR, Joint Stakeholder's Report for UPR Second Cycle, December 2011, p.21, para.59.

[166] A/HRC/8/26 India's Outcome Report p.15 para.81

requests outstanding from Special Rapporteurs, all of which had been ignored. In addition the Special Rapporteur on the question of torture had made two requests to India (with the third being made in December 2010) and had not had a positive reply.

Nevertheless, in arguably the greatest success for the UPR of India, the government in September 2011 announced that it was extending a standing invitation to all Special Procedures.[167] This is an extremely important achievement for a developing country such as India, as evidence has shown that countries make a sincere effort to address violations in advance of Special Rapporteur visits. Nevertheless, this standing invitation must be translated into practice and currently there are eight requests awaiting a response.[168] Furthermore, since the standing invitation was announced, only one visit has taken place, namely, that of the Special Rapporteur on arbitrary executions.[169] The planned visit of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography which had been scheduled for April 2012 was cancelled at the request of the GoI less than a week before it was due to take place.[170]

ca. National Action Plans

India accepted Mexico's request that it: "*take into account recommendations made by Treaty Bodies and Special Procedures, especially those relating to women and children, in developing a national action plan for human rights which is under preparation*." The development of the National Action Plan on Human Rights has been a matter of discussion since 1999. As stated in India's national report, the NHRC has been put in charge of developing the plan. To this end, the Commission constituted a working group as well as an advisory committee to formulate a National Action Plan but even after various deliberations by the working group as well as by the advisory committee, the national action plan has yet to see the light of day. UPR has not provided any impetus in this regard, despite some countries being vocal in their praise for this still phantom action plan.

In a similar vein, and in response to Italy's recommendation that India strengthen human rights education, specifically in order to address effectively the phenomenon of gender-based and caste-based discrimination, the government advised that it had "*adopted a National Action Plan for Human Rights Education to promote awareness about human rights among all sections of the society.*"[171]

Nevertheless, there has been no noteworthy policy change since 2008. The NHRC has been engaged in the promotion of human rights education in India and has organised conferences, seminars and trainings. However, there is no evidence within the public domain that this has been completed as part of the National Action Plan on Human Rights Education, as alleged by the Indian government, or in fact, that such a plan is in existence at all. [172] In its most recent national report, India made no reference to this plan.

6. The Current Situation on the Ground

As alluded to earlier, the recommendations received by India barely scratched the surface in terms of necessary human rights reforms and demonstrate that reviewing states need to ensure that the most pressing human rights issues are raised within the UPR process.

For example, according to the most recent World Bank estimates (which are outdated, dating from 2005), 41.6% (about 455 million people) of the total Indian population at the time fell below the international poverty

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[167] A/HRC/WG.6/13/IND/1 India's state report, 2012, p.22 para.118.

[168] A/HRC/WG.6/13/IND/2 UN Compilation on India 2012 p.6.

[169] From 19 - 30 March 2012.

[170] See announcement of the Civil Society Coalition on Human Rights in Manipur and the UN available at: http://humanrightsmanipur.wordpress.com/2012/04/.

[171] A/HRC/8/26/Add.1 Addendum to India's Outcome Report p.4, recommendation 13.

[172] WGHR, Joint Stakeholder's Report for UPR Second Cycle, December 2011, p.2, para.3.

line, living on less than US\$ 1.25 a day.[173] Though India has achieved a sustained 'growth' rate, the promise of 'inclusion' has not been fulfilled. As per two UPR Recommendations[174], India committed to address inequity but while the average growth rate over 2007- 2011 was 8.2%, poverty declined by only 0.8% during the same period. Data indicates further marginalisation for more than three quarters of the 1.2 billion Indians. India's economic policies continue to perpetuate "exclusion" and violate the Fundamental Rights and Directive Principles of the Constitution.[175]

All of civil society has also called for the repeal of the *Armed Forces Special Powers Act.* In India's conflict areas, several special security laws operate which violate national and international human rights guarantees, provide extensive powers (to arrest, detain without trial, conduct warrantless searches and "shoot to kill" on suspicion) to security forces and exempt them from prosecution in the absence of executive sanction, spawning a culture of impunity. This military approach and the ongoing conflicts[176] contradict the GoI's position at the UN, that "*India does not face either international or non-international armed conflict.*"[177]

While the situation in the UK is not quite so bleak, problems do persist. Examples highlighted by the UN Compilation include an increasing racial prejudice against ethnic minorities, asylum-seekers and immigrants,[178] and the fact that some elements of criminal procedure in Northern Ireland continue to differ from those of the rest of the UK.[179] Other major concerns stressed by NGOs include the absence of a genuinely independent mechanism for judicial inquiries into serious allegations of human rights violations[180] and that since the mid-1990s, policies and legislation for refugees and asylum seekers in the United Kingdom have become increasingly restrictive.[181] None of these issues were addressed in the recommendations arising from UPR.

7. Follow Up

The UK has been one of the most prolific countries in terms of reporting back on its progress to the HRC and has taken the opportunity to do so on three occasions.[182] Firstly, it reported on the fact that it was removing reservations to the CRC, secondly, in relation to ratifying the Convention on the Rights of Persons with Disabilities (CRPD) (which did not even form part of the recommendations) and, thirdly, to present its mid-term report which very much assists with monitoring implementation levels and keeps attention on the human rights situation. However, in terms of addressing issues in Wales, Scotland and Northern Ireland, it only tended to do so when there was a considerable improvement in the situation under review in that specific territory.

The UK Parliamentary Joint Committee on Human Rights is central to the follow up of UPR. Since the first cycle, it has pursued dialogue on implementation and reviewed the action plan presented by the Ministry.

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[173] World Bank Report, 2008, p.31, table 6. Although there are more up to date figures available from India's planning commission which reports a fall in poverty from 37.2% in 2005 to 29.8% in 2010, these statistics have not been relied upon as these figures have been discredited by some sources on the basis that India has increased the threshold for poverty and this partly explains the dramatic 8% decrease.

[174] See India's Addendum to the Outcome Report, Recommendation 10: "*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*" and Recommendation 18 "*Continue efforts to guarantee a society constituting one-fifth of the world's population to be well fed, well housed, well cared for and well educated*"

[175] WGHR, 2011, Report for the Second Cycle p.2, para.4.

[176] The conflicts in India in certain regions have been classified by many bodies such as the University of Essex, ADH Geneva and Ploughshares as amounting to non-international armed conflicts.

[177] WGHR, 2011, Joint Stakeholder's Report for UPR Second Cycle, p.15, paras.32 and 33.

[178] A/HRC/WG.6/1/GBR/2 UN Compilation on the UK, 27 March 2008 p. 5, para.10.

[179] Ibid p. 8 para.20.

[180] A/HRC/WG.6/1/GBR/3 Stakeholder Compilation on the UK, 11 March 2008 p.5 para.20.

[181] Ibid p.8 para.34.

[182] See details of follow up statements made available at: http://www.upr-info.org/Review-2008,986.html.

In contrast, India is critical of Item 6's General Review on the Council Agenda and claims that any reporting on follow up would result in another "updating cycle."[183] As a consequence and as mentioned above, the WGHR submitted a mid-term report in the absence of one being forthcoming from the government. In addition, in 2011, a number of NGOs made an oral and written statement[184] under Item 6 to the Council. They wished to update the Council on preparations taking place in India for the second cycle. They advised that in April 2011, a high-level national workshop was held in New Delhi, in which the government, the NHRC, NGOs and independent experts, for the first time, collectively discussed the implementation of the eighteen recommendations made to India during its first review in 2008, as well as preparation for its second review.

The NGOs advised that they regretted that for India's first UPR in 2008; the government did not adequately engage with civil society. Consultation was minimal, hurriedly organised and not participatory. Consequently, they were of the view that India's national report suffered in its substance and relevance. In this context, they welcomed the commitment expressed by the Ministry of External Affairs at the aforementioned workshop to make the upcoming UPR process wide-ranging and genuinely inclusive by engaging with all relevant stakeholders throughout the country, including in the preparation of the national report. Additionally, they appreciated the Ministry's commitment to consider posting the draft national report on its website and invite comments from stakeholders. These initiatives on the part of the government, they believed, would enable a more comprehensive review of India's human rights situation leading up to India's second review. [185]

Civil society appears to be playing a greater role in India's follow up compared with the UK's e.g. the WGHR submitted a mid-term implementation assessment and has held consultations in advance of UPRII. This is also reflected in the fact that only three NGOs spoke during the UK's plenary session, in comparison to seven for India's plenary. Arguably there is more of a need for civil society to play a central role in India given the reticence exhibited on the part of the Indian government to fulfil its promises.

It is important that Item 6 is not used as a vehicle by states to highlight any positive step it takes in the human rights sphere (as the UK did in relation to ratification of the Convention on Disabilities). Rather, it should be restricted to reporting on implementation of the recommendations made.

8. Preparations for the Second UPR Cycle

In spite of the impending second review of both countries, it did not appear that implementation efforts heightened to any considerable extent as the date of the second reviews approached. This suggests that states do not feel pressurised into action by the process, which is extremely disappointing from the perspective of improving implementation. For example, in relation to Convention ratification, both India and the UK ratified only one UN Convention each since the first UPR, namely, the Convention Against Corruption 2003 and the CRPD 2006, respectively, neither of which formed part of the UPR discussions.

The UK submitted its state report in March 2012 and within the opening paragraphs noted that while progress had been made since the last review, there remained room for improvement. Helpfully, the report sets out the current threats to human rights protection in the UK and does not merely address implementation efforts. In an improvement from the first cycle, its report also provides a more thorough analysis of the situation in Scotland, Northern Ireland and Wales.
The EHRC Stakeholder Report recommends that, as well as ratifying the outstanding Conventions and Protocols, the UK should adopt action plans following Treaty Body examinations and UPR to ensure implementation and

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[183] ISHR, Daily Update, 18 September 2008.
[184] A/HRC/17/NGO/50 Joint submission by NGOs, 16 May 2011.
[185] A/HRC/17/NGO/50 Joint submission by NGOs, 16 May 2011 p.2.

follow-up of outcomes, and should lay the UPR outcome before Parliament and report periodically on progress.[186] These steps have not been taken to date.

NGOs have had a greater participation in the lead up to the second cycle. 44 NGOs came together to submit a joint submission. They voiced concern about the way in which recent political and institutional developments risk undermining the framework for human rights protection in the UK. BIHR facilitated two events in England and one in Wales, involving about seventy representatives of national and local NGOs.

In India, the second state report focuses more on emphasising achievements the government introduced itself (even those prior to 2008) rather than addressing in a coherent manner the efforts taken to implement the recommendations made to it during the first cycle. It relegated the actions it had taken to comply with recommendations to an annex to the report.[187]

The WGHR submitted its report in December 2011 which was the product of five regional consultations and one national consultation with over 210 people.[188] It advised that: "*proper implementation of the many progressive laws and schemes, demand that the many structural and functional problems in the justice system be addressed*"[189] WGHR noted that in spite of India's 2011 pledge, the Government had not held any formal consultation with civil society. In its 2012 national report, GoI advised that it had held consultations with "several NGOs" and had posted the draft report on its website. While this is an improvement on the first cycle, its engagement with civil society remains insufficient.

9. UPR II

The second cycle reviews of both India and UK have presented some welcoming trends. As both states received a disproportionately low level of recommendations in the first cycle compared with latter SuRs, it was encouraging to see that, as well as addressing the recommendations made during 2008, reviewing states chose to go further. They raised other areas of human rights concerns which did not receive adequate coverage during the first cycle. Examples in this regard included the lack of equal pay in the UK and the issue of impunity in India. Furthermore, new human rights concerns which have come to light in both countries since 2008 also received attention such as the 2011 riots in the UK and freedom of expression on the internet in India. The UK received 132 recommendations and India 169, which are broadly in line with the numbers of recommendations generated during the final sessions of the first cycle. These figures reveal that efforts to reduce or synthesise the numbers of recommendations have not proven fruitful to date.

The majority of the reviewing states were considerably clearer in identifying what constituted a comment, question or recommendation, which will greatly aid monitoring. Similarly, there were far more category 5 type recommendations delivered. Slovenia was particularly specific in requesting that India spend at least 3% of its budget on health and 6% on education.

In relation to India, it was positive to see its delegation adopt a more constructive and open attitude to UPR than was the case during the first cycle. The delegation dealt with nearly every question addressed to it, both those submitted in advance and those raised during the interactive session. In its concluding remarks, the Attorney General also accepted that some of India's traditions may be out of tune with current values and would have to change but that this must be done in a democratic way, for example, through social awareness. This was an encouraging step for the Indian delegation to take, as it represents an acknowledgement of the universality of human rights.

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[186] EHRC, Submission for UPR of the UK, May 2012 p.1, para.1.
[187] A/HRC/WG.6/13/IND/1 Annex one, 2012.
[188] WGHR, 2011, Report for the Second Cycle, p.1, para.1.
[189] WGHR, 2011, Report for the Second Cycle, p.19, para.51.

In relation to the non implementation of accepted recommendations, follow up by the reviewing states was piecemeal at best. Neither state was probed on any progress they had made in ratifying the Convention on Enforced Disappearances. Reviewing states merely recommended ratification again without highlighting the UK or India's failure to implement accepted recommendations. There were exceptions to this negative trend however. During the review of the UK, Burkina Faso (a country that had not had significant involvement in the first cycle) advised that it was aware that the UK still needed to make progress in implementing some of the recommendations. Similarly, in India's review, Sweden drew attention to the fact that the ILO recommendations had not been implemented, and Slovenia regretted that the Special Marriage Act (a rejected recommendation) had not been amended.

The reviews of the UK and India both supported the assertion that more emphasis is being placed on the findings and recommendations from the Treaty Bodies and Special Procedures than was the case during the first cycle. This is important in order to ensure coherency within the UN and is an issue which will be addressed in the final chapter.

It was only during the adoption by the Human Rights Council of the Working Group reports in September 2012 that the UK and India identified, in addenda, which recommendations they were accepting which is unhelpful from the perspective of reviewing states and NGOs. Out of the 169 recommendations received during their review on 24 May 2012, the Indian delegation accepted only 67 which is disappointingly low[190]. Furthermore, in 11 of these, the original wording of the report of the working group had been altered. Whiile three to four were purely editorial, others involved the removal of requests to withdraw India's reservation to Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women and to take proactive measures to address the issue of impunity.[191] The UK faired better in accepting 72 recommedations fully and 19 partially and consequently rejecting 41[192].

C. Lessons Learned

As this paper illustrates, in spite of the, on the most part, comprehensive legislative frameworks and judicial mechanisms available for the protection of human rights in the UK and India, civil society has time and again raised concerns regarding the stream of human rights violations still occurring in both countries. As pointed out by the WGHR, it is difficult to hold national authorities accountable. Hence, the UPR has become a key aspect in the whole paradigm. The review process makes it feasible to scrutinise the national policy framework on an international stage, where all the issues can be analysed in a broader context.[193]

As David Frazier has shown, implementation levels correlate directly with a country's development level. The more developed countries have been far better at implementing a higher percentage of their recommendations.[194] This is due to a number of factors including a greater deference to human rights and superior financial means. The comparison of the experiences of India and the UK reinforces this point.

What is an important lesson for all states to bear in mind is that the process of implementation is cyclical and must begin immediately upon the conclusion of the Geneva phase. This is due to the fact that four years is a relatively short period of time for commitments to be realised, particularly when this often involves amendments to the law or changes in attitudes on the part of governments and society. The reviews of India and the UK show that thus far, states have not been complying with this.

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[190] A/HRC/21/10/Add.1 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 17 September 2012
[191] UPR Info, India changes the wording of the recommendations they accepted, 2 October 2012
[192] A/HRC/21/9/Add.1, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 17 September 2012
[193] UPR Watch, 2011, p.3.
[194] Frazier, 2011 p. 3.

So far, this paper has highlighted that the principle weakness in the UPR armoury is a failure to monitor imple-mentation and follow up. The next chapter will consider which avenues should be pursued in order to remedy this. This is important as, for the developing and least developed states, implementing even a few recommen-dations may have a profound impact on human rights on the ground. The role the second cycle will play in monitoring implementation is also critical in order to judge the efficacy and credibility of the UPR mechanism, and as the cases of the UK and India have demonstrated, it will monitor how much progress the states have made in the promotion and strengthening of human rights in line with the recommendations made to them, and in the overall context of the current situation on the ground.

V. A REVISION REQUIRED RATHER THAN AN OVERHAUL – RECOMMEN-DATIONS FOR THE SECOND CYCLE

"*When it comes to the UPR, a revision is required, not a substantive reform at this stage*."[195]
The early stages of any new procedure are inevitably fraught with teething problems. However, from listening to the comments of the states and stakeholders regarding agenda item 6 at the 19th session of the Council which took place on 16 March 2012, it is clear that the majority viewed the first cycle as being a worthwhile process. While problems were identified, this was in order to seek to rectify them rather than to call for the procedure's demise.
The Council of Europe feels that the process has brought real progress and is an expression of universality. It believes that the thematically comprehensive reviews which had taken place during the first cycle were holistic in nature rather than fragmented. These thoughts were echoed in the main by all those organisations which took the opportunity to speak.[196]

This chapter, in sections one and two, details the changes which have already been implemented in advance of the second cycle, by both the HRC itself as well as those instituted by the member states. It then considers , in sections three and four, what further improvements are required to tweak the process, with a particular em-phasis on making recommendations to improve implementation and monitoring, following on from the findings in the previous chapter that this has been the major weakness of the UPR until now. Finally, section five con-siders whether any improvements are discernable to date in the practice of the second cycle.

A. Changes implemented by the Council ahead of the Second Cycle

The aforementioned Resolution 60/251 tasked the HRC with carrying out a review of its own functioning within five years of its creation, and this was duly attended to by the appointment of an open ended intergovernmen-tal working group in 2010. The product of this was Resolution 16/21[197] which was adopted on 25 March 2011 and which also received the support of the General Assembly. While the review process has been criticised by some as akin to "*an elephant giving birth to a cockroach*",[198] the changes made to UPR were more expansive than those bestowed upon the Council itself generally.

The Resolution contained the new modalities for the functioning of the HRC and although UPR comprised a substantial chunk of the Resolution, some issues relating to UPR were left pending.
On 17 June 2011, the Council completed the review of its work and functioning by adopting decision A/HRC/DEC/17/119 on the Follow up to Resolution 16/21 with regard to UPR. The Resolution provides that the second cycle will be four and a half years in duration commencing in May 2012 and will follow the same order

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[195] The Global Observatory on Human Rights undated, *Should we aim for the Perennity of the UPR?* p.1.
[196] See webcast available at: http://www.unmultimedia.org/tv/webcast/2012/03/general-debate-item6-43rd-meeting-19th-session.html.
[197] A/HRC/RES/16/21, Review of the work and functioning of the Human Rights Council, 12 April 2011.
[198] Peter Splinter, Amnesty International, 3 March 2011, reported in "An unlikely unifier: Outrage over the Qad-dafi regime has given tired institutions a new lease of life", *The Economist*.

as the first cycle[199] (although the longer time frame means that the last two listed countries from one phase will be moved into the next).

Emphasis is placed on the fact that subsequent cycles should "*focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the state under review.*"[200] One hopes, however, that this does not mean that those recommendations rejected in the first cycle are overlooked, as clearly these are likely to be the most serious human rights concerns for the country under review. Other relevant stakeholders are encouraged to include, in their contributions, information on the follow-up to the preceding review and this is evidently an important barometer of the implementation of recommendations.

Another improvement has been the fact that the Working Group session has been extended from the three hours allotted in the first cycle,[201] to three and a half hours. This enables further comments from the member and observer states as they receive an additional twenty minutes; with the SuR's time only being extended by 10 minutes.[202] This is a critical factor, as all states should have an equal opportunity to intervene in the reviews to ensure that the dialogue is as interactive and balanced as possible.

One of the most criticised elements during the first cycle was not, in fact, even contained in Resolution 5/1, but instead developed in response to the fact that demand for speaking slots frequently exceeded the time available. In order to enrol on the list of speakers for a given review, states had to register at the HRC Secretariat the day before the review and the list opened at 8.45am. On many occasions, state representatives were observed staying overnight in order to ensure that they obtained a speaking slot in the most sought after lists (as those below number 45 on the list rarely received an opportunity to speak). Another worrying trend was the strategies employed by states to ensure that blocks of ally nations got to speak together and thereby increase the impact of their praise or criticism. States adopted extreme measures to engineer the speakers' lists. Despite a well-established practice that the list is drawn up by OHCHR on a first-come first-served basis one day before the review, Cuba and Venezuela - during the 9th session, in which the USA was being reviewed - started their own list more than a week before, which delegations then rushed to get on. The attention and complaints this event generated pushed the Secretariat to make a statement clarifying that such lists would not be taken into account: The official lists of speakers would start on the day before the review, in accordance with the usual practice.[203]

Decision 17/119 has introduced a fairer and more transparent process for the second cycle. The list of speakers opens on the Monday of the week preceding the beginning of the Working Group session. For each review, States are arranged in English alphabetical order and the beginning of the list is drawn by lot. States are however, able to swap places. If needs be, time per speakers is reduced to two minutes each or the 140 minutes is divided by the number of speakers.[204] This ensures that all states who wish to speak are given the opportunity to do so and prevents the time from being completely consumed by comments from allied states. During UPR II's first session, the new modalities for speaking slots were a success and the time limits were strictly enforced by the HRC President. Furthermore, the swapping of places was not a common occurrence and happened on only eight occasions during the entire session.

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[199] A/HRC/RES/16/21 paras.2 – 4.
[200] A/HRC/RES/16/21 para.6.
[201] A/HRC/RES/16/21 para.11.
[202] A/HRC/DEC/17/119 Part III.
[203] ISHR "UPR of the United States: no new commitments", 11 October 2010.
[204] A/HRC/DEC/17/119 part IV.

The three-type documentation and the troika system worked relatively well in the first cycle and accordingly have been left unchanged,[205] aside from a minor adjustment to the guidelines for the drafting of the reports to lay greater emphasis on the need for states to report on the implementation of recommendations.[206]

In an attempt to remedy the proliferation of recommendations, the Resolution provides that these should be clustered thematically.[207] This should represent a significant improvement as, in the case of the Bahamas, they received some 67 questions or recommendations. However, when clustered, they amounted to only 24.[208]

The Recommendation also explicitly provides that the SuR should submit "*its positions on all received recommendations*", preferably prior to the Council plenary.[209] This is important, as it ensures a more constructive dialogue during the plenary session and aids monitoring. Furthermore, it should be clear which recommendations have been accepted.

The Resolution also recommends that both the UPR voluntary trust fund and the fund for financial and technical assistance should be strengthened. If this transpires, it should improve the participation of the developing states in both the process and with implementation.

Importantly, the role of the NHRIs has been bolstered. Those with A status will now have a dedicated section in the summary of the stakeholders' information[210] and will be given the floor directly after the SuR during the adoption at the HRC plenary session[211] (and, therefore, in advance of the other states).

Unfortunately, the remaining provisions on follow up are disappointingly weak. States are merely "*encouraged*" to conduct consultations with stakeholders and submit mid-term reports but neither action is made mandatory.[212]

B. Changes which have been implemented by State Practice

Although not provided for in the Resolution, the practice of the second cycle so far has witnessed a lengthening of the deadline for the submission of state reports. While the reason for this was not decided by the Council and was instead due to the internal constraints of the UN e.g. time needed for translation and editing,[213] it has had a positive unintended effect in that it allows member states and civil society greater time to scrutinise the SuR's own report. For Session 13 (21 May - 4 June 2012) the deadline was 5 March 2012 i.e. 11 weeks in advance, and for Session 14 (22 October - 5 November 2012) the deadline is 23 July 2012 i.e. 13 weeks beforehand. However, the NGOs must continue to submit their reports to the OHCHR considerably further in advance to enable the summary reports to be drafted. This means that they are not as up to date as one would hope. For example, the deadlines for session 14 (22 October - 5 November 2012) for the submission of NGO reports are 9 and 16 March 2012 which is over 32 weeks in advance.

Another welcome trend which developed during the course of the first cycle has been the fact that states are now voluntarily submitting optional mid-term implementation reports. To date, the Council Secretariat has been in receipt of 22 mid-term reports[214] and one must hope that this tendency continues to gather momentum. Even in the absence of a report from the state itself, NGOs have often taken over the task, as occurred, for

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[205] A/HRC/RES/16/21 paras.5 and 10.
[206] A/HRC/DEC/17/119 part II.
[207] A/HRC/RES/16/21 para.15.
[208] Sen, 2011, p.52.
[209] A/HRC/RES/16/21 para.16.
[210] A/HRC/RES/16/21 para.9.
[211] A/HRC/RES/16/21 para.13.
[212] A/HRC/RES/16/21 paras.17 and 18.
[213] Email from Eeva Holopainen, Associate Human Rights Officer, OHCHR, 22 May 2012.
[214] Information obtained from the OHCHR website, see:
http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx.

example, in the case of India. From the second session onwards, UPR-Info has also begun collating its own mid-term implementation assessments for each state.[215]

A further positive development has been the voluntary commitments made by states during item 6 of the Human Rights Council agenda. This was particularly visible during the most recent session. Algeria[216] spoke on behalf of a diverse range of forty states from all over the world, to advise that all of the latter countries were giving three voluntary commitments in advance of the second cycle, as follows:

1. To exercise restraint when delivering recommendations - the forty countries promised to adhere to a maximum of two per state, so as to bring the number of recommendations to a more manageable level and to give the SuRs the best chance to successfully implement them.

2. To always give high quality recommendations to other states that are precise, practical, forward looking and implementable.

3. To continue to support the UPR as a unique and universal mechanism to ensure that a sustainable process is created.

They hope that other countries will follow their lead.

C. Recommendations for Improvement during the UPR

Having identified the flaws in the system in the preceding chapters, it is essential to move to consider how the situation can be remedied. While the changes detailed above are to be commended, there are other elements of the practice of the first cycle that require fine tuning.

1. Procedural changes

There are a number of procedural issues which were not addressed in the Council's reform Resolution and Decision and which require attention. It has been emphasised by a number of experts that the expeditious translation of all reports into the official working languages of the UN is a necessity, as it provides for greater transparency and access which is an important aspect of the preparatory process.[217]

As identified previously in the critique of the UPR, the procedure whereby questions can be transmitted in writing, in advance, to the troika was under-utilised during the first cycle, as SuRs often neglected to deal with these points when presenting their national reports. More emphasis should be placed on this option during the second cycle, as it gives the SuRs more time to respond to the issues raised. This is particularly important for those countries which do not have a permanent presence in Geneva and who are obliged to consult with delegates at home prior to making comments.

Broad-based consultation by the state with all stakeholders at all stages should also become a mandatory requirement of the UPR process, including obligatory follow-up consultations, to replace the current situation whereby states are merely *encouraged* to engage.

2. Changes to recommendations – quality and quantity

In terms of the recommendations, the minor adjustments mentioned above have been made in advance of the second cycle but these do not go far enough. The HRC should clarify what exactly a recommendation is and proscribe a threshold below which a recommendation does not qualify i.e. all recommendations made should be

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[215] See http://followup.upr-info.org/.

[216] Webcast available at: http://www.unmultimedia.org/tv/webcast/2012/03/algeria-gd-item6-43rd-meeting-19th-session.html.

[217] See for example the comments of H.E. Ambassador Joshua Sears, Director General, Ministry of Foreign Affairs, The Bahamas and H.E. Ambassador Martin I Uhomoibhi, Permanent Secretary, Ministry of Foreign Affairs, Nigeria in Sen, 2011, pp.48 and 51.

sufficiently clear, precise and implementable. The UPR recommendations should vigorously challenge countries on specific human rights violations, as this forms an integral part of UPR's purpose. Conzelmann contrasts the scenario before the World Trade Organisation (WTO) and the Organisation for Economic Co-operation and Development (OECD) as regards the recommendations emanating from both organisations. [218] He notes that the key weakness of the WTO trade policy review mechanism[219] is that it lacks clear recommendations and therefore civil society and the media have nothing upon which to pinpoint their attention. Under the OECD peer review process,[220] on the other hand, clear policy recommendations are in existence and this has given rise to public attention and finger pointing. UPR can certainly be more closely aligned with the OECD, but it is important to ensure that all recommendations emanating from the second cycle are unambiguous and concrete.

A vast increase in the number of recommendations being made to SuRs was evident as the first cycle matured. By the final sessions, it was not unusual for SuRs to be receiving in excess of 150 recommendations, with examining states making up to four or five in each review. Although it must be said that many of these recommendations overlapped and did not represent a new departure from recommendations already received by the state from Treaty Bodies and Special Procedures, the situation is, nevertheless, unmanageable from the perspective of both the SuR and for follow up purposes. Thus, and as forty states themselves aimed to do by way of a voluntary commitment, it would be advantageous if the Council itself introduced a cap on recommendations, for all states, of two per examining state. Taking into account the overlap that frequently occurs, this would substantially reduce the number of recommendations and hopefully introduce a more balanced spectrum of recommendations. In addition, there should be coordinated planning among states, so that the duplication of questions frequently witnessed during the first cycle could be avoided. Unfortunately, the practice observed during the first session of UPRII does not lend support to a claim that this is occurring, as the number of recommendations to each SuR continued to exceed 150 and even eleven of the aforementioned forty states persisted in making more than two recommendations to each SuR.[221]

Another possible solution to reduce the burden on SuRs in respect of the volume of recommendations would be for the Council to indicate areas of priority within its recommendations; for example, those that require immediate implementation and those, alternatively, which should be implemented in the medium or longer term.[222] Because of the possible danger with this approach, however, that the State in question would neglect to pay any attention to the latter recommendations, it would have to be emphasised that immediate steps were required in respect of all, notwithstanding that some recommendations should be prioritised.

3. Responses to Recommendations

In relation to the Governments' response to recommendations, Resolution 16/21 did introduce an improvement as detailed above, but this is still not sufficient. One would suggest that, as well as indicating clearly which recommendations they are accepting and rejecting, states should also be obliged to provide reasons for their rejection of recommendations. This information can assist in ascertaining a better picture of the state's true human rights record. A time limit for submitting this information - possibly at least two weeks ahead of the adoption of the final outcome of the UPR by the Council Plenary - should also be introduced, as this would allow NGOs and delegations to make properly informed comments about the UPR process of the reviewed state. During the first cycle, the comments made by the states prior to the adoption of the final outcome were noticeably weak and were often simply a mere repetition of what transpired before the Working Group, rather than provid-

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[218] Conzelmann, 2011, p.329.
[219] WTO, 1994, Uraguay Round Agreement, Trade Policy Review Mechanism, Annex 3.
[220] OECD, 2003, L'Examen Par Les Pairs: Un Instrument de L'OCDE pour la Cooperation et le Changement.
[221] Azerbaijan, Ecuador, Ireland, Japan, Maldives, Moldova, Netherlands, Qatar, Saudi Arabia, Sweden and Thailand.
[222] Abraham, 2006, p.83.

ing commentary on the SuR's responses to recommendations.[223] In other cases, no reviewing state opted to speak at all as occurred in the reviews of the Netherlands, Finland, Poland and the Czech Republic during the first session.

D. Improvements to Implementation of Recommendations and Follow Up

As is evident from the patchwork nature of implementation witnessed following the SuRs' first review, it is clear that a system of analysis and evaluation of the implementation of recommendations is urgently required. Implementation of outcomes of the first UPR must be a priority for the second cycle of the UPR and emphasis must be placed on follow up.

1. States' Initiatives in respect of implementation and follow up

It is worth mentioning that states on their own initiative have taken positive steps towards improving implementation and follow up and these must be built upon in the second cycle. Dr Hammamoun[224] has suggested that "*a steering dynamic is starting to take place, which is headed towards harmonisation of the implementation process at the national level.*" Examples of this dynamic include the establishment of inter ministerial/departmental committees responsible for follow up and the creation of national action plans as developed by Mauritius and Bahrain, among others. The case of Sri Lanka is a useful example of a country which incorporated both aforementioned elements. Specifically, an inter-ministerial committee was appointed to monitor the overall implementation of the five-year National Human Rights Action Plan (a plan voluntarily prepared by the government in response to a pledge made at its first UPR in 2008.)[225]

As early as the adoption of the outcome report by the Council, states have themselves taken the initiative to provide details on implementation. This was useful, as it created an immediate follow-up mechanism through the consideration of the reports by the Council. The practice of Ecuador, in listing initiatives in relation to each UPR recommendation, proved to be a particularly good example.[226] In terms of follow up, another commendable practice which has developed has been the provision of updates on implementation to the HRC under item 6 of the agenda. A number of states have availed of this opportunity and this keeps each country's human rights situation in the public eye.

An innovative approach has been taken by Norway. It prepared a matrix where all recommendations, as well as the ministries responsible for follow up, are listed. The matrix is published and can thus be used by all interested parties in monitoring follow up.[227]

Another follow up practice that is gaining momentum is that of states producing interim reports, although models vary in this regard. In the absence of states' willingness, NGOs have also often taken over the mantle.

2. Recommendations for further reform

These are undoubtedly useful instruments in aiding and monitoring implementation but many argue that these do not go far enough. Many academics are now calling for a framework of measurable benchmarks for implementation to be developed.[228]

To this end, a number of suggestions have been made by stakeholders. These have included the identification of indicators, particularly for vague recommendations, and that all parties to the process should have a role to

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[223] In Bahrain's plenary session for example, eight out of the nine States which had the opportunity to speak were all members of the OIC and were entirely complimentary towards Bahrain on its efforts.

[224] Hammamoun, 2010, Conference Report, p.12.

[225] See the Sri Lankan government website at: http://www.priu.gov.lk/index.html.

[226] ISHR, Overview of the UPR April – June 2008, p.13.

[227] DIHR, 2011 p.21.

[228] These include Dr Hammamoun, Senior Legal Advisor UPR Watch.

play here.[229] In this regard, there is a great need for further research into, and development of, human rights indicators, a task that could be taken up by NHRIs.

National Action Plans and Mid Term Implementation Assessments

A suggestion which has been implemented by a limited number of states to date has been the submission of national action plans that outline timeframes, responsible agencies, and consultative processes for UPR recommendations,[230] plans which facilitate the provision of assistance for effective follow-up and implementation. In further developing this, Rachel Brett advocated instituting a reverse broad national consultation after the review, the purpose of which would be to re-engage national actors, NHRIs, government departments and civil society actors in developing a plan of action for implementation. She considered this to be particularly necessary, given the large number of recommendations now being issued (and accepted) through the UPR process.[231]

Through imposing a requirement that states create national action plans for UPR implementation together with mid-term implementation reports, sufficient pressure could thereafter be placed on the SuRs to institute change. A government monitoring committee could be created for the purpose of implementing the plan, monitoring the information being generated by the different Ministries responsible and guaranteeing that all recommendations are being addressed whilst avoiding duplication of tasks. Interim reporting on UPR progress should be incorporated into HRC Agenda Item No. 6, so as to ensure that UPR is never too far from the member states' programme. This view is shared by Human Rights Watch which points out that creating a formal mechanism for follow up would help ensure that the focus of the UPR is as much on implementation and improving human rights on the ground as it is on reviewing and making recommendations and commitments.[232]

Learning lessons from other models

One would also suggest that it is useful to use other systems as models for implementation and follow up. Conzelmann[233] helpfully details the procedures at play by the WTO, OECD and the African Union (AU) and their respective review mechanisms.

He outlines that, under these bodies, poor performance can lead to:

i.   The provision of technical and/or administrative assistance in cases where capacity gave rise to compliance problems;

ii.   A formal identification of points of inadequate compliance, coupled with duties to improve the record, if the SuR is considered to be wilfully transgressing the rules.

He also notes that the AU is the only organisation with an institutionalised process of follow up.[234] Governments are required to report on implementation of the country action programmes between the actual reviews. This process is precisely along the lines of the approach advocated by this paper.

Assistance with Implementation

In terms of assistance with implementation and with the UPR process itself, it was obvious from the first cycle that the resources allocated for UPR are severely restricted. Nevertheless, more of the available funds should be directed towards the least developed states as, currently, their lack of resources means that they are unable to constructively contribute to the process, notwithstanding their desire to do so. The latter view is one shared by the OHCHR, which has confirmed that additional attention should be given to the least developed countries,

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[229] DIHR, 2011 p.7.
[230] Recommendations of the Önference on Improving Implementation and Follow up, 2010.
[231] Brett, 2010, Conference, Report of Proceedings p.16.
[232] HRW, 2011, *Curing the Selectivity Syndrome.*
[233] Conzelmann, 2011, p.327.
[234] AHG/235 (XXXVIII), 2002 Annex II NEPAD APRM, para.23.

land-locked developing countries and other small developing island states, which face particular challenges in attaining the realisation of human rights.[235]

A proposal made by the International Service for Human Rights (ISHR), which has not been realised to date, has been the suggestion that the Outcome Report should contain guidance on additional measures that should be taken to build the capacity of the State to implement its human rights obligations, including via technical assistance programs.[236] This would focus attention on the obstacles impeding implementation and place some of the responsibility on the international community as a whole. It would also facilitate aid, granted to the state in question, being prioritised towards the most pressing human rights violations on the ground.

In addition, the HRC, through the OHCHR or otherwise, should collate a collection of good practices to aid states with implementation particularly in the infant stage of the process. This could include sample action plans and examples of collaboration between the state and civil society. Some stakeholders such as the Commonwealth Secretariat have already begun to engage in such a process.[237]

3. Stakeholder Involvement

Stakeholders, namely, NGOs, NHRIs and the media bear a considerable duty in terms of the implementation and follow up stages of the UPR process. As has been evidenced in the first cycle, many states are unable, and others are unwilling, to implement the commitments they have made. Although states have the primary duty to implement recommendations, maintaining a distinction between implementation and follow up should not be used as a tool to demarcate the duties of state and stakeholders respectively. Rather, their roles should be seen as complementary and the two should play a part in both tasks. The "*scope and complexities of actions that are needed to give expression to the recommendations*" [238] should not be underestimated and require concerted efforts from all stakeholders. This is particularly the case in respect of the so called category 5 recommendations.

The call for the introduction of national action plans, which this chapter recommends, has often been the result of NGOs exerting considerable pressure on the state in question and thereafter having significant involvement in their formulation and implementation.

Like the member states, there are numerous examples of best practices introduced by stakeholders themselves which should be replicated on a greater scale. An important step which the WGHR in India has taken, and hopefully which other states will emulate, is that as well as submitting their stakeholder report to the OHCHR before the deadline, they also published a more detailed report on the human rights situation in India prior to its second review.[239] It is also encouraging to see in their report that they did not solely focus on the recommendations made in the first cycle but also contextualised them against the backdrop of the current human rights situation on the ground.

In South Africa, the SAHRC decided to connect areas of its work with the recommendations made to its country. All 22 recommendations have been allocated for the responsibility of either a committee, programme or topic co-ordinator. In addition, the Commission's work is either being specifically aligned to each recommendation, or the relevant committee or staff must monitor issues related to their allocated recommendation(s). For example, following UPR, the Commission ran a campaign calling on the state to ratify the ICESCR and its relevant optional protocol. [240]

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[235] Ndiaye, 2010, Conference Report of Proceedings, p.22.
[236] Abraham, 2006, p.83.
[237] Sen, 2011.
[238] Kyung-wha Kang, 2010, Conference Report of Proceedings, p.2.
[239] WGHR, Human Rights in India Status Report May 2012.
[240] Sen, 2011, p.34.

In West Africa, human rights defenders formed a regional coalition in sixteen countries. Efforts were placed on the hearing process and civil society participation in the review of the West African countries in Geneva. However, the monitoring of the recommendations in the countries was also highly prioritised. Two years after each UPR review a mid-term evaluation which included government participation was conducted to assess the degree of progress. In countries with human rights ministries and NHRIs, these were always involved.[241]

The Human Rights Unit of the Commonwealth Secretariat organised a Commonwealth Mid-Term Review of the UPR in March 2010.[242] This was highly effective, as it assisted those Commonwealth countries which had already undergone the process with implementation, and those countries still awaiting review could learn from the experiences of its fellow members.

The states themselves have also been responsible for promoting the value of stakeholders. During the first cycle a number of undertakings were given by states to establish[243] or improve[244] the operational capacities of national human rights institutions or improve engagement with NGOs.[245] Undertakings of this nature must be encouraged. The implementation stages of the UPR demands an efficient working relationship between the state and civil society in order to improve the human rights situation and all stakeholders should work toward this. Strategies focused on human rights education and advocacy, implementation and monitoring should be employed jointly.

The recognised definition of stakeholders must also not be limited only to NHRIs and NGOs. The EU, for example, has also played a role in follow up by including UPR on the agenda of EU human rights dialogues with third countries and in country Strategy Papers. The EU, for its part, should also employ similar strategies internally towards its own member states, and other regional organisations must be encouraged to do likewise.

4. Human Rights Council's involvement

Another shortcoming of the UPR as it operated during the first cycle involves those situations where there is an obvious need for the Council to move from recommendations made by individual governments to a response by the Council itself. To date, the UPR has not triggered any further action by the Council as a whole, despite there being many situations discussed in the reviews that warrant more sustained action or examination by the Council. The UPRs of Afghanistan, Kyrgyzstan, and Sri Lanka are clear illustrations of this gap.

This is particularly important in cases where breaches of international law (particularly *jus cogens*) are identified. Mechanisms should be in place to enforce such breaches. Agenda item 6 could have a section reserved for further consideration of initiatives arising from the UPR. This would allow for discussion of situations that the Council considers merit more continued engagement following the UPR. The section could include debates on proposals for technical cooperation arising from the review, discussions on the need for follow up and monitoring by the Council itself, or dialogues on issues which should best be addressed in other UN forums such as the Security Council or Treaty bodies.

Dr. Hammamoun suggests the insertion of an alert procedure under item 6 of the HRC agenda which would allow the Council to address situations where states adopt measures that contradict prior commitments they made during their UPR review (for instance, Egypt's two-year extension of the Emergency Law in May of 2010).[246]A related issue which will be addressed in the next, and final, chapter is the necessity to promote more convergence between the work of the Treaty bodies and UPR and whether the competences of other UN experts should be employed during the UPR process.

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[241] DIHR, 2011 p.47.
[242] Sen, 2011, p.12.
[243] Bahrain.
[244] Central African Republic.
[245] Portugal.
[246] Dr. Saïd Hammamoun, 2010, Conference Report of Proceedings, p.12.

E. UPR II: Any improvement so far?

Clearly, it is too early at this stage to provide a thorough analysis of what changes are being made and whether they are having an impact in the second cycle, but some preliminary observations can be made in the aftermath of UPRII's first session. In total, about 2,000 recommendations were made during this 13th session, which is broadly in line with the last sessions of the first cycle. This is a disappointingly high number, particularly given many of the states' own acknowledgment that the situation was unmanageable. Another concern is that half of the states have chosen to postpone their responses to recommendations until the Human Rights Council adoption in September. One must hope that these are communicated in advance, in order to allow for input from the reviewing states and stakeholders. Most of the SuRs adhered to the requirements of Resolution 16/21 to: a) look into developments since the first review, and b) assess the implementation of 2008 recommendations, in both their national reports and during their opening statements. A worrying feature however, has been that, overall, few reviewing states referred to the recommendations they had made, or others had made, during the first cycle. It was particularly noticeable that most of the states which had battled during the 2011 HRC Review to have the second cycle focus predominantly on the implementation of 2008 recommendations, made no reference to them at all.[247]

The most concerning development so far has arisen during the 15th session in January 2013 when a member state was not present for its own UPR. Israel had suspended its relations with the HRC since May 2012. As a consequence, it did not submit a national report due in October 2012, was not present for the selection of its troika on 14 January 2013 and it was therefore expected that it would not participate in its own UPR.

In reaction, the Human Rights Council decided to reschedule its UPR in 2013, at the 17th Working Group session (21 October - 1 November 2013) at the latest, and called upon Israel to resume its cooperation with the UPR mechanism. The HRC President was also requested to report at the 22nd or 23rd session of the HRC on his efforts to bring Israel back to the UPR. The decision A/HRC/OM/7/L.1 adopted by consensus by the HRC containing those steps will constitute a precedent to be applied to future cases of non-cooperation. The steps outlined in the HRC's decision are extremely weak and are unlikely to act as a disincentive to prevent other states from non co-operation. Nevertheless, the fact that the decision was adopted by consensus demonstrates that member states are anxious to preserve the universality of the mechanism and one must hope that Israel's co-operation can be secured by the 17th session.

VI. THE HRC, UPR, SPECIAL PROCEDURES AND TREATY BODIES WEB

As briefly alluded to in chapter two, principle (f) requires that UPR should "*complement and not duplicate other human rights mechanisms, thus representing an added value.*" This chapter considers the extent to which this has transpired to be the case in the first cycle. The first section analyses UPR's existing relationship with the Treaty Bodies and Special Procedures and how each impacts upon the other, while section two proposes recommendations for reform to this relationship as a follow on to those recommendations already made in the previous chapter. The penultimate section addresses the added value that the UPR brings to the UN system while the final section considers the impact UPR has had on the functioning and reputation of the Council.

A. UPR's Relationship with the Treaty Bodies and Special Procedures

UPR Watch succinctly summarised the importance of the UPR to the functioning of the other UN instruments when it claimed: "*the specialised 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. The UPR is a genuine catalyst for the other instruments of the system. It brings to-*

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[247] UPR Info, Newsletter 31: May-June 2012.

gether their knowledge….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."[248]

The UPR has allowed a wider discussion on human rights on the ground in countries than is sometimes possible under the treaty body system. For example, countries such as the Bahamas and Malaysia were not, at the time of their UPR, party to the ICCPR and ICESCR and therefore the respective Treaty Bodies were not able to discuss these issues.[249] While, in theory, it is arguably inappropriate to review countries' performances against Conventions that they have not ratified, the UDHR is the fundamental constitutive document of the UN and was adopted for the purpose of defining the meaning of the words "fundamental freedoms" and "human rights" appearing in the UN Charter, which is binding on all member states. Many also now consider the UDHR to be part of customary international law and thus binding upon all states. This contains the principles underpinning the ICCPR and ICESCR, and can be used as a benchmark for assessment even in the absence of ratification of the other elements of the Bill of Rights.

1. Ratifications

As discussed earlier in this paper, arguably one of the greatest successes of the procedure has been its ability to exert pressure on states to ratify conventions or withdraw reservations. Most importantly, this pressure has had an actual impact on the ground as there are numerous examples of SuRs signing or ratifying conventions in the days or weeks immediately preceding a review or, alternatively, in response to recommendations made during their review. Pakistan ratified the ICESCR and signed the ICCPR and CAT on 17 April 2008, less than three weeks before it was reviewed under the UPR.[250] Similarly, a number of states extended standing invitations to special rapporteurs[251] or at least agreed to allow entry to a certain rapporteur.[252] Many States have also used their presentation to commit to submitting overdue reports to various Treaty Bodies within a fixed period of time.[253]

2. National Report preparation

Another positive development has been the fact that the national consultation process that takes place in advance of most UPR reports has had a knock-on beneficial effect for most Treaty Body work, as states have drawn on Treaty Body findings as a basis for addressing UPR. Similarly, a trend developed whereby the mechanisms used for preparing the UPR state reports were also adopted simultaneously, or at least drawn on, in the preparation of the reports for the Treaty Bodies. Ethiopia provides an excellent example in this regard. In conjunction with preparing its overdue treaty specific reports, the country also prepared its state report for its UPR in 2009, with the assistance of a project jointly engineered by the OHCHR East Africa Regional Office and the Ethiopian Human Rights Commission. The project was designed with the objective of preparing all the over-due initial, combined and periodic reports the country had to make under the various international and regional human rights instruments. To carry out the project, a Legal Experts' Committee, a Drafting Committee, and an Ad hoc National Inter-Ministerial Committee were established, and focal persons at relevant government organs were identified. UPR was made part of the project and benefited from, inter alia, the ad hoc institutions devised, data gathered, and workshops organised for the overdue reports.[254]

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[248] Global Observatory on Human Rights, 2010, Conditions of its Perennity, p.5.

[249] Sen, 2011, p.46.

[250] See the UN Treaty Collection available at:
http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[251] States including Chile, Lebanon and Zambia agreed to extend standing invitations to all special rapporteurs.

[252] Botswana expressed its ommitment to cooperate with the Special Rapporteur on Contemporary Forms of Racism including in the event that the Special Rapporteur expressed a wish to visit the country.

[253] Cyprus pledged to submit all reports due to the human rights mechanisms within 24 months and Peru set out a timetable in respect of each overdue report.

[254] Relief Web, Update on Ethiopia's National Report for UPR, 2009.

3. The OHCHR Compilations

The compilations prepared by the OHCHR for the UPR have also proved to be a useful resource for the Treaty Bodies in order to focus on key problems and issues. Similarly, Treaty Body country rapporteurs have declared that they had found UPR reports helpful in preparing for the examinations of states. The UN compilation also publicises the status of the SuR's interaction with the Treaty Bodies and Special Rapporteurs. Further, it sets out the precise number of communications a state has replied to (which across the board is at a relatively low level) and the number of reports that remain outstanding. This is important, as, generally, successful implementation tends to occur in cases of high political visibility.[255]

4. Treaty Body and Special Procedure findings

Moving on to the UPR process itself, there is clear evidence to demonstrate that states are crafting questions to each other based on Treaty Body findings. According to the statistics compiled by UPR Watch for the first seven sessions of UPR, 676 recommendations to states explicitly mentioned the Treaty Bodies and Special Procedures. State answers to these recommendations were as follows: 66% and 44% were accepted, respectively; 10% and 26% were rejected; and 22% and 30% received no clear answer.[256] In addition, the interactive dialogue drew more attention to the recommendations of Treaty Bodies and Special Procedures than anticipated, with many states specifically referring to the fact that the SuR had not implemented certain recommendations.**[257]** This is important due to the fact that reference to Treaty Body recommendations adds normative weight, as the SuR is not permitted to reject recommendations disseminating from the Treaty Bodies. Furthermore, given the numerous instances where states are failing to report to the Treaty Bodies, they nonetheless undergo UPR which can raise the same issues as would arise before the Treaty Bodies. In this regard, it has been pointed out that UPR "*gives a renewed visibility to their work and a second life to many of their observations.*"[258]

There have also been signs that the Special Procedures and Treaty Bodies are performing an equivalent interim follow up function for the UPR within their mandated areas. [259] Both made in excess of thirty references to UPR recommendations during their concluding observations.[260]
A critical point emphasised by Dr. Purna Sen is that when Treaty Body and UPR recommendations coincide, and are accepted by the state under review, there is a confluence of legal obligation and political will placed upon the state.[261]

5. Concerns do exist

However it must be pointed out that a number of concerns in respect of the relationship between the UPR and the Treaty Bodies and Special Procedures have been highlighted.

The first is that "*UPR is sapping energy from the Treaty Body system, such that the Treaty Body dialogue gets the residual energy of states that are vigorously engaging with the UPR.*"[262] A similar argument is made in re-

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[255] Goldston, 2010, Conference Report of Proceedings p.3.

[256] Hammamoun, 2010, Conference Report of Proceedings p.12.

[257] There are examples in nearly every review. Belgium, for instance, accepted a request from Kyrgyzstan to develop a comprehensive national strategy to combat all forms of VAWG, as recommended in 2008 by CEDAW.

[258] Global Observatory on Human Rights, 2010, The Conditions of its Perennity, p.5

[259] Belarus came for review before the Committee against Torture on 11 – 14 November 2011. In its concluding observations, it urged Belarus to: "Strengthen further the cooperation with UN human rights mechanisms, particularly by permitting visits by the Special Rapporteurs on torture, freedom of opinion and expression and human rights defenders, as accepted by the State party in the context of UPR as soon as possible." CAT/C/BLR/CO/4 7 December 2011.

[260] See the UN Human Rights Index database at: http://uhri.ohchr.org/en.

[261] Sen, 2011, p.59.

spect of NGOs i.e. that they are focusing too much attention on UPR and further, that the capacity required of the OHCHR to service the Council and UPR has drawn resources away from the Treaty Bodies. Nevertheless, these issues lose sight of the fact that the UN system should be a unified one where the various procedures support one another. States and NGOs focusing on UPR should be viewed in a positive light, as it means that attention is directed towards improving human rights on the ground. The "energy" now given to UPR can be harnessed to also benefit Treaty Body reporting as the UPR provides an impressive data base on a state's human rights situation.

A second concern raised is that UPR has the potential to weaken the UN human rights system e.g. when recommendations from the other mechanisms are rejected at the UPR. (Hammamoun refers to this as fragmentation.) [263] Although this practice did occur during the first cycle, this does not mean that a state can escape its Treaty Body obligations by simply rejecting a similar recommendation before the UPR. Rather, a rejection of a recommendation by a SuR should encourage the Treaty Bodies to exert further pressure to comply on the state in question.

A third, more warranted, concern identified relates to incoherence, in that the UPR could lead to an entirely different assessment of the human rights situation in a country than the other two mechanisms, as occurred in cases such as Tunisia and Sri Lanka. Given that UPR is a co-operative procedure based on the dialogue between states, often the situation as represented in the final outcome report is hugely different from the picture painted in the Treaty Body reports which are prepared by independent experts and whose outcomes are not reliant upon the acquiescence of all 193 states, including the SuR. The practice witnessed in the first cycle certainly confirms that the concern of contradictions is justified. However, as a member state driven process (principle d), it is the responsibility of reviewing states to change their practices to ensure that an accurate portrayal of the SuR takes place during the interactive dialogue.

B. Recommendations for improvement

There remains room for improvement in capitalising on complementarity. No guidance is contained in the Resolution about how to deal with contradictions, as complementarity is only addressed in very broad terms. It is crucial that a cyclical process is employed to ensure that all of the UN mechanisms can individually and collectively play a beneficial role in improving the human rights situation on the ground.

1. Streamlining

Some streamlining of the various mechanisms would be beneficial. For example, a national report preparation and production method for all reports should be introduced to reduce over-lap, and a master calendar of reviews should be created to ensure better synchronisation between the several reporting cycles. UPR findings should also be cross-referenced in Treaty Body concluding observations, and vice versa, to develop an enhanced system of mutual follow-up. Technical assistance should also be better co-ordinated between the bodies, to ensure that funds are allocated where they are most needed and that states are not receiving similar assistance from different bodies.

All of this could be assisted by bi-annual meetings of the chairs of the Treaty Bodies, Special Procedures and UPR. Such meetings already take place on an annual basis amongst the Treaty Body heads and, separately, between the Special Rapporteurs, Independent Experts and chairs of the Council's Working Groups. A more unified approach would be beneficial.

2. An increased role for the OHCHR or UN experts

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[262] O'Flaherty, 2010, Conference Report of Proceedings p.21.
[263] Hammamoun, 2010, Conference Report of Proceedings p.11.

A further issue which merits discussion is the possible role that existing UN bodies and experts could play in the UPR process. More consultation between the troika and the Treaty Bodies and Special Rapporteurs would certainly be beneficial in this regard. A recommendation proposed in the NGO Response to the Dublin statement, in respect of improving follow up amongst all of the mechanisms, has been the establishment of a Treaty Body Follow-up Coordination Unit within the OHCHR and the appointment of dedicated focal points for Treaty Bodies, Special Procedures and UPR at the OHCHR regional offices.[264] This would, of course, be a welcome addition to strengthening follow up but, clearly, in order to achieve this, considerable additional resources would be required to be allocated to the OHCHR.

A more realistic recommendation in terms of resources, suggested by HRW, is that the task of the OHCHR could be to observe the whole of the review process and to present its conclusions during the adoption of the final report of the SuR. In this scenario, the OHCHR expert, as a rapporteur of the process, would explain the different stages of the review, painting an overall picture of the main issues raised and the commitments made. The rapporteur would present the main elements of the UN and stakeholders' reports (a practice absent from the first cycle), and would advise the HRC regarding recommendations that were inconsistent with human rights standards. The rapporteur's comments would not alter the final report of the UPR, but would serve to bring together the different aspects of the process and add expertise helpful to both the SuR and the Council itself.[265]

A somewhat similar proposal was made by the Commission Nationale Consultative Des Droits De L'Homme which suggested that a working group of five independent experts be set up, appointed for the duration of the UPR cycle and according to the same modalities as those used in the designation of Special Procedures mandate holders charged with monitoring whether an assessment was undertaken in "*an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country*."[266] One favours the HRW recommendation, however, which is merely an extension of the role already assumed by OHCHR. The latter suggestion could be accused of duplicating the work of bodies already in existence and the financial implications are likely to be more substantial.

The UN's various agencies could also, within financial constraints, assume a function in follow up after the completion of the UPR review. A country rapporteur, at the request of the state, could be appointed to monitor the situation in the SuR; or at a minimum, established OHCHR offices could carry out a monitoring function and/or work with the State. A useful proposal in this regard generated from within the UN itself came from Homayoun Alizadeh, Regional Representative of OHCHR for South-East Asia. He recommended that a "Three Pillar Strategy" be adopted by all OHCHR field presences whereby they integrate recommendations from the Treaty Bodies (pillar one), Special Procedures (pillar two) and UPR (pillar three) into their work and planning.[267]

C. Political v Technical Review

In the final analysis, it must be borne in mind that the UPR is not a rigorous technical review of the human rights situation in a country. Unlike Treaty Bodies, which consider the detailed application of specific human rights obligations by a state party, the UPR only paints a general picture. Peer review cannot be a substitute for the expertise that Treaty Bodies and Special Procedures bring to bear upon a human rights situation, and states should keep in mind that the UPR should be a tool to help enforce existing recommendations by Special Procedures and Treaty Bodies, rather than compete with them.[268] Within the UPR process, as indicated in chapter two, states have a sovereign right to decide which recommendations they accept, whereas they have no discretion when it comes to the recommendations of Treaty Bodies. Where the percentage of recommendations ac-

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[264] NGOs Response to the Dublin Statement, November 2010, p.11, para.25.
[265] HRW, 2010, *Curing the Selectivity Syndrome.*
[266] Commission Nationale Consultative Des Droits De L'Homme, 2010, p.7.
[267] Alizadeh, 2011, p.844.
[268] Human Rights Watch, 2010, *Curing the Selectivity Syndrome*.

cepted by a state is particularly low, the country specific procedures acquire a heightened importance. Ultimately, one would argue that the UPR is a valuable political process that should not replace country specific scrutiny by the HRC, Special Procedures, or Treaty Bodies.

D. UPR's Impact on the functioning of the Human Rights Council

The fact that suggestions during the Human Rights Council's review concerning the UPR were about 486 out of all 1,565 suggestions made, or 31 percent,[269] demonstrates the extent to which UPR has become an integral part of the reform of the Council.

The publicity which the UPR has garnered since its foundation has been impressive and has ensured that international focus remains on the human rights situation within member states. UPR has also shown that the problem of selectivity and double standards can be tackled by developing a more universal approach to the examination of specific situations, rather than avoiding engagement altogether.

Collaboration between the Council and the UN Treaty Bodies could, and should, be greater. Although Treaty Body independence should not be infringed upon, the Council is a political body capable of exerting pressure on states and, in certain cases, may be a useful tool to press for implementation.

It is important to remember that in contrast to the more technocratic functions held by the Treaty Bodies and Special Procedure experts, the HRC, when in UPR session, must add a political dimension as, that is, after all, its specificity.[270] Therefore any criticisms of the system should be levelled in this context, where the Council and UPR form the political piece of this intricate human rights puzzle. This chapter, hopefully, has demonstrated that UPR, if viewed in its appropriate context - that of being a political process - achieves its stated principle of complementing, and not duplicating, other human rights mechanisms. While improvements can certainly be made, as detailed above; the UPR's added value to the Council's functioning and legitimacy is beyond question.

VII. CONCLUSIONS

This thesis demonstrates that UPR has the potential to serve as a mechanism through which human rights situations, of concern, can be addressed, and accountability and co-operation amongst States can be increased. Ultimately, it is in the hands of the member states themselves as to whether or not UPR is successful in improving the human rights situation on the ground and "*bridging the gap between the excess over human rights in the halls of the United Nations, and its sobering realities on the ground*"[271]. The HRC is cognisant of this fact itself, as one of the stated principles in the UPR's founding Resolution is that UPR should: "*be an intergovernmental process, United Nations Member-driven and action-oriented*".

From my analysis of the translation of UPR's stated objectives into action during the first cycle, I have shown that many member states have embraced the process and have even begun to adopt a human rights based approach to policy making as a consequence of UPR, for example in the use of actions plans. Many states have also now become advocators of the UPR process and wish for it to remain and flourish.[272] In addition, UPR has become a catalyst for the increased involvement of civil society stakeholders, both NHRIs and NGOs, in assisting and monitoring the states' implementation of UN recommendations and human rights best practices generally. This, in turn, has led, in many cases, to improved relations between state and civil society.

At the same time, I have highlighted where flaws exist within the process and I have proposed recommendations for reform in order to optimise UPR's potential. The second cycle, as it has played out to date, has witnessed some of these reforms translated into practice. The reviewing states have been far clearer and structured when delivering questions and recommendations. Furthermore, recommendations, on the whole, have been more concrete, which will make follow up of implementation easier. The recent postponement of Israel's

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[269] Hilale, 2010, Conference Report of Proceedings, p.14.
[270] Global Observatory on HRs, 2011, The Review of the Human Rights Council, p.23.
[271] OHCHR, A/59/2005
[272] A considerable number of states spoke positively at the review of the HRC in 2011.

review is a worrying precedent however and the HRC must ensure it develops strong guidelines for how to address situations of persistent non co-operation.

Focusing on the two most pivotal objectives, namely, adding value to the status quo and improving the human rights situation on the ground, my evaluation has revealed mixed results. The first cycle has witnessed a consensual approach more similar to standard setting and institution building than the traditional state review mechanisms currently in existence under the UN and other international bodies, and thus undoubtedly adds value to the existing web of mechanisms. UPR has also provided a platform for new, or neglected, human rights issues to be raised, particularly those which are not dealt with under the other UN human rights mechanisms, such as sexual rights.[273]

Through my case study of India and the UK, I have shown that implementation efforts have varied. While successes have been achieved, particularly in securing the ratifications of Conventions and the removal of reservations, it is also the case that States are not willing to alter their firmly entrenched policy positions on sensitive issues, notwithstanding international pressure to do so. However, this is a reality of international relations and cannot merely be seen as a failing of the UPR process. Rather, it is reflective of the status quo across all international and regional accountability mechanisms. The case study has also lent support to the conclusion that implementation efforts increase in line with a state's developmental level as I have demonstrated that the UK has implemented more of its recommendations than India. A united stakeholder approach to implementation and follow up in each state is essential to ensure maximum benefit for human rights on the ground.

However, in order to be able to comprehensively assess the improvement of human rights on the ground, it will only be possible to analyse the true value of UPR once the second cycle has been completed in four and a half years time when the rate of implementation can be truly quantified. Nevertheless, I hope that this paper provides food for thought for all those involved in the process. I would argue that this thesis has demonstrated that the question of whether UPR adds value has been answered in the affirmative and efforts should now concentrate on improving the process. Amidst the publicity generated by the review phase in Geneva, the overall aim of the UPR process – the actual implementation of human rights in all 193 states – must never be forgotten

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