
The First Two Years of the UPR: An Analysis and Summary

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Introduction

The new human rights architecture at the United Nations has been a subject of speculation and, as it has become better established, it now becomes a topic of analysis. There has been discussion on the nature of engagements at the Human Rights Council and the potential of moving away from what has been characterised as the politicised Commission that predated it. Both hope and cynicism – or perhaps scepticism – have entered these debates and although the breadth of activity and areas of interest should rightly be part of these discussions, much attention has turned to the UPR. Are the discussions a repeat of the past in which there were ‘usual suspects’ repeatedly targeted for human rights violations? Would the big political players be excused critique? Would the human rights debates simply become a proxy for political score settling?

Such debates reflect a legitimate interest in the pursuit of substantive and meaningful means through which to seek real change and progress on human rights. The many areas of work undertaken by the HRC (such as the Durban Review and work on the right to development) provide an appropriate base from which to seek to make a full determination in response to these key questions. Yet inevitably much attention has focused on the UPR as the ‘flagship’ mechanism of the Council, in which a level playing field was promised. The HRU has not had the resources to engage in the full range of the HRC’s work, so is not in a position to comment on the wider workings of the Council. It has, however, had considerable engagement in the UPR, with a focus on Commonwealth states and comment on the nature of these interactions.

Overview

Twenty-five Commonwealth states began their journey into the UPR in the period 2008–2009, the first two years of the new mechanism. There are some general and common features in the Commonwealth UPR story, while in other ways there is diversity. Both are mapped here.

In the first two years, all Commonwealth states have participated in the Geneva element of the process, with almost all finding the experience a positive boost to increased efforts on the promotion of human rights at home. All states submitted reports and sent high-

level delegations and all Troika members were accepted by the state under review.⁵ The involvement of regional neighbours in Troikas was appreciated by many.

Advance questions

All states under review have received questions in advance and there may be some overlap with those raised in Geneva. Some Commonwealth states have shared with the HRU that they have found it helpful to have time to consider and provide responses, as compared to dealing in haste with comments and queries raised in the Interactive Dialogue. Clearly, those received with a longer lead time, two weeks or so, are easier to handle than those that are received a day or less in advance.

Few of the advance questions have brought written responses, so the nature of those engagements and the degree to which they have garnered positive conversations is difficult to gauge. However, these questions have provided a useful indicator as to the issues that are likely to be raised during the Interactive Dialogue.

There is a perception that it is mainly Western states that put advance questions and there is perhaps a case for wider involvement in this mode of engagement. The process allows a more considered and thorough response from the state under review, which is something that should be used more often.

Speakers list

The Interactive Dialogue has proved to be a great success in terms of the number of speakers that seek to make a contribution. Ambassador Uhomoibhi refers to the UPR being a 'victim of its own success' (see pages 48–49); there have been long queues of people wanting to put their names on the speakers list, sometimes involving overnight queuing (with refreshments and entertainment provided by those in the queue)!

Inevitably there have been times where not all names on the list have been accommodated. In the years 2008–2009 there was a total of 1,010 speakers from Commonwealth states. The number of speakers on the list from all the Commonwealth countries ranges from 19 for Belize to 69 for Pakistan. Seven Commonwealth states, including Nigeria and Malaysia, had 92 speakers on their lists who could not be accommodated. Even with speaking slots being limited to less than three minutes there have been Dialogues where there has been considerable over-subscription.

The problem of speakers list over-subscription has been the subject of a great deal of dis-

⁵ In this one case, Pakistan voluntarily withdrew from India's Troika, with no apparent ill feeling or consequence.

cussion in the assessment of the UPR; there has been consensus on the need for improvements in the second round.

At the end of November 2010, a proposal that seemed to enjoy the support of many states and that progressed to regional groups for discussion had the following elements: the speakers list would require those wishing to speak to sign up one week in advance of the UPR working group; speakers would be listed in alphabetical order; and the selection of the first speaker would be done by lot, drawn by the President of the HRC with alphabetical sequence being followed from that point.

If the two hours allocated to delegations for the Interactive Dialogue does not prove sufficient for all inscribed speakers, the time would be divided by the total number of listed speakers. This would guarantee that all delegations that wish to speak are able to do so, but maybe only briefly. The proposal includes a provision that the microphone would be switched off if anyone spoke for longer than the time allocated. At the time of writing there was no news of any group objecting to this proposal.

Also under discussion is an option to increase the Interactive Dialogue session to four hours. Additionally, there is a proposal that NHRIs⁶ should have a dedicated speaking slot during the Interactive Dialogue. The extended Dialogue session would result in cycles of four and a half years, with 14 sessions of 14 reviews each.

Presentations from states under review

It has already been noted that all states have appeared for UPR in Geneva as scheduled. Some delegations have been large – the largest Commonwealth delegation had 32 members (Malaysia) and the smallest was from Dominica (one person – the New York Ambassador); 14 have been headed by ministers (see Annex 2). The ratio of men to women in these delegations is also noted there: 131 women to 186 men for Commonwealth states in total. From Tonga, with its population of 10,000, to India, with 1.1 billion people, states have submitted a single short written national report on human rights in their country and undergone the review in Geneva.

Civil society and stakeholder participation

One of the foundation principles of the UPR is that not only is the state the primary duty bearer, but also that other stakeholders have a critical role to play and should be recognised and actively involved in national human rights work. While states undertook national consultations with local civil society organisations, the engagement of domestic

⁶ This is for A status NHRIs.

stakeholders through the submission of reports and/or participation at the report adoption stage (where they are able to make an oral contribution) was limited. This is a matter of concern and regret in the Commonwealth, where there is a commitment to the active role of civil society.

Our analysis of the data shows that a total of 309 stakeholder reports were submitted for the 25 Commonwealth states that underwent UPR in the first two years, but only 89 were from national NGOs and an additional ten were from NHRIs. For eight Commonwealth states there was no national stakeholder report⁷ (see Annex 3).

It is of concern if there is poor knowledge in civil society of UPR or of international human rights systems and how they can be used to promote national human rights aims. It is especially important for local capacity and engagement to be strong; this is a key element for successful in-country follow-up. The HRU has sought to spread UPR briefings and encourage UPR participation across civil society. All of the national NGOs that participated in Commonwealth pre-UPR briefing seminars in 2009 subsequently submitted stakeholder reports. The region of most concern is the Caribbean, where until the review of Jamaica in November 2010, there had not been a single wholly domestic national stakeholder report from the region.⁸

The first two years of the UPR saw NGO communities develop ways of working and lobbying that have seen their issues feature increasingly in the recommendations put to states under review. Examples include the international movement to stop physical punishment of children and the lesbian, gay, bisexual and transgender (LGBT) movement. Their work has led to questions, issues and recommendations being taken up by country representatives during the Interactive Dialogue. Sometimes sentences or extracts from stakeholder submissions have been copied and pasted into questions asked at the HRC.

There is limited opportunity for stakeholders to address the UPR discussions and this comes late in the review process. Few civil society organisations from Commonwealth states were able to travel to Geneva to address the UPR deliberations or to lobby/advocate with states to raise their concerns. The importance or effectiveness of such efforts can be debated; nevertheless it is noteworthy and regrettable that it is beyond the financial reach of many NGOs in the South to consider such work and that it is thus left to the richer, international NGOs. It is our experience that NGOs from Commonwealth states have begun to network with each other to learn new strategies and to find alternative ways of doing their advocacy from home.

⁷ For four states there were joint submissions from national and international NGOs.

⁸ In 2009 for Belize, and in 2010 for Guyana, each country had one stakeholder report submitted which was a joint report from an international collective of LGBT rights organisations and a national branch of the international LGBT coalition.

Common themes

There appeared to be a gradual establishment of common themes of interest, on which most, if not all, states being reviewed were questioned. There were four dominant themes in the first year for Commonwealth members: increasing ratifications; establishing or strengthening National Human Rights Institutions, promoting the rights of the child, and promoting gender equality and ending violence against women. Other commonalities obtained for countries facing similar circumstances – for example, all countries that use the death penalty were questioned on this and requested to change their practice and all those that criminalise same-sex sexual behaviour received recommendations on decriminalisation.¹⁰ The same pattern featured in year two.

A level playing field?

Year one saw 12 Commonwealth states reviewed in Geneva, including a P5 member, the UK – also a Commonwealth state. It also saw Tonga, the first small island state, with no Geneva mission, undergo UPR, as well as South Africa, Barbados and India.

These states were the first to experience UPR and it is through them that the process began to find its feet. The UK, South Africa and India came to the UPR having had very little time to prepare and having no other experiences to which to refer for their own preparations. They left Geneva with 28, 22 and 18 recommendations respectively; Tonga had 42 and Barbados 25. Compare this with Malaysia's 64 in 2009 and Kenya's 150 recommendations in 2010. As the mechanism becomes older it seems that it has become more exacting.

Our analysis suggests that in the infancy of the process, states faced a more lenient and less exacting process,¹¹ but those that came later found themselves part of a more exhaustive discussion in Geneva. The P5 as a grouping was not given less rigorous treatment than others; the UK received 28 recommendations when reviewed in 2008; the other four received 33 (France in 2008), 62 (Russia in 2009), 99 (China in 2009) and 228 (USA in 2010).¹² The totals increase with the age of the UPR. I am inclined to an analysis that the early days of the UPR found states showing more caution than in later years. The extent of suggestions made to states clearly showed an expansionary ten-

¹⁰ One Commonwealth state was asked to retain the death penalty and two Commonwealth states were asked to offer special protection and treatment for heterosexual family norms and traditional cultural values.

¹¹ Finland is not in the Commonwealth, but its experience exemplifies this pattern: it received and accepted a mere seven recommendations in 2008.

¹² Number of recommendations taken from the HRC report of the UPR working groups.

dency over the first few years and this was paralleled by increasingly effective stakeholder lobbying. It also appears that as the reviews progressed over time, states under review were subjected to greater expectations in terms of the level and number of recommendations they received.

If there was no deference or caution shown to the more powerful states, it is not the case that all had similar experiences. The eight Commonwealth small states that underwent UPR in 2008–2009 received the smallest number of inscribed speakers.

In 2008–2009 Commonwealth states received a total of 1,986 recommendations, an average of 79.¹³ The range across the countries spread from 18 recommendations for India to 103 for Malaysia. There was an increase in the average number of recommendations received by Commonwealth states from 60 in the first year of the UPR to 97 in the second year.¹⁴

Nature of engagement

The new mechanism was greeted with scepticism by some and fear among others that the process would be overly political and that no, or limited, human rights discussion would take place or that it would be merely superficial. There has been patchy realisation of pledges made by states during candidacy campaigns for HRC membership,¹⁵ which has undermined the serious intent claimed, and hoped for, in relation to the HRC. This has, in turn, reduced optimism about the UPR.

It has indeed been the case that friendly states have made supportive or uncritical remarks to states being reviewed. This has included co-members of regional groupings and has contributed to the urgency with which some states have sought to ensure their inclusion high on the speakers list. It has been perceived that this has been a tactic to minimise the time available for more critical or challenging contributions that might be anticipated from beyond the regional membership.

It has indeed been the case that opening comments in the Interactive Dialogues of a number of states have been commendatory and congratulatory. It is also the case that many of these have come from co-members of regional groupings. To deny or avoid this fact would be unrepresentative of the reality of the Geneva experience. What is also true though is that while it may be that in some cases this sort of behaviour is orchestrated, this is not necessarily or always the case. The loyalty that regional membership engen-

¹³ Number of recommendations taken from UPR info database – www.upr-info.org

¹⁴ Data for calculating average taken from UPR Info – www.upr-info.org

¹⁵ See, for example, *Easier Said Than Done* (Commonwealth Human Rights Initiative, 2008).

ders does not always need to be organised: it has its own momentum and dynamic. It is also right that where commendation or congratulations are due, they should be given.

Those states that reported finding the Geneva dialogue most useful and productive for their work in the promotion of human rights were also those that took an open and honest approach to the discussion of their achievements and challenges. They were the states that did not avoid difficult topics, that had done some preparation in terms of what subjects might be raised in their Dialogue and that acknowledged work still to be done.

It has also been argued that where 'friendly' states have engaged in the Interactive Dialogue, their recommendations have been less demanding than those of other states. In a thorough analysis of UPR debates by regional groupings, McMahon¹⁶ is concerned with what he calls 'regional gridlock' – i.e. North–South divisions – and finds that the UPR has fractured this pattern. He now sees three broad groupings: Asia and Africa at one end and Western Europe and other states at the other, with more democratically minded Eastern European and Latin American states in the centre. McMahon's analysis is thorough and useful; indeed it mirrors very closely the work we have undertaken in the HRU. The regional grouping of interest to us, however, does not feature in the analysis he has done.

In the Commonwealth we find that the participation rate in making recommendations is low, even with a boundary placed on Commonwealth-to-Commonwealth dialogues. A total of 218 Commonwealth states participated in the Interactive Dialogues of sister Commonwealth members.

The universality of human rights

It has been noted by a number of observers that the UPR state participation rate has been 100 per cent – a sharp contrast with the reporting pattern for any of the treaty bodies. Several factors may have contributed to this, including that the UPR is a discussion with peers and seen as less exacting than an examination by experts and that the report writing process is less extensive and more manageable. These are relevant considerations and it is to be hoped that they will continue to serve as enabling and encouraging factors in the second and subsequent rounds.

It is of great benefit not only to states, but also to the human rights systems to maximise the complementarity of the UPR dialogue, treaty body reporting and special procedures

¹⁶ McMahon, E, *Herding Cats and Sheep: Assessing State and Regional Behavior in the Universal Periodic Review Mechanism of the United Nations Human Rights Council* (2010).

and, importantly, to consider the overlaps or continuity in the recommendations that flow from each. Indeed, the OHCHR report for UPR invites such an integrated overview and some states have made connections between the various processes in their contributions to the dialogue.

The UPR offers an opportunity to promote the universality of human rights: every country is reviewed with equal scrutiny, equal time and on the basis of the same standards. The other universal aspect of the UPR is that, thus far, 100 per cent of states have appeared in front of the Council for the Interactive Dialogue.

Of note is that 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 Universal Declaration on Human Rights¹⁷ is an aim worthy of pursuit. This may seem a natural enough statement now, but in a previous time this perception of human rights might not have been so universally upheld.

Where disagreements have surfaced on rights specifically (as distinct from a number of political disagreements), they have tended to be around the coverage of the framework – for example, whether or not the death penalty is a human rights concern or whether the prohibition of physical chastisement of children is contrary to their rights. These are not unexpected areas of debate or disagreement; indeed on the former issue many retentionist states have argued the unpopularity of abolition, whether or not they argue for the legitimacy or deterrence of execution; indeed, some have not put the latter case. These disputes relate to issues of political strategy, but do not offer a challenge to the substance or legitimacy of the human rights discourse on this topic.

A similar analysis would apply to the issue of same-sex consensual sexual activity, where many defences offered against decriminalisation can be categorised either as public intolerance or a moral objection; these are distinct from saying that the human rights discourse should not address issues of discrimination or equality. This is an extremely important development.

The UPR has allowed a wider discussion on human rights on the ground in countries than is possible under the treaty body system. For example, The Bahamas, Brunei Darussalam, Malaysia, Tonga and Vanuatu were not, at the time of the UPR, party to the ICCPR and ICESCR and therefore the respective treaty bodies are not able to discuss these issues. However, the UPR Interactive Dialogues of these countries allowed dis-

¹⁷ HRC Resolution 5/1 states that one item forming the basis of review for UPR is the Universal Declaration on Human Rights.

cussion on this broad range of rights as provided for in the Universal Declaration on Human Rights.

Over sixty years after the crafting of the Universal Declaration on Human Rights, to which Commonwealth leaders recommitted themselves in 2009,¹⁸ it seems that the validity of the human rights framework is well established. States have created a new way in which to assess their progress towards realising the vision of human rights; all are participating in this mechanism and all have agreed, through discussion with their peers, agendas for further action. This is a remarkable achievement.

Economic, social and cultural rights (ESCRs) have long been the poor cousin in the global hierarchy of rights, with greater legitimacy and weight being given to the area of civil and political rights. This hierarchy has ill served the inter-relationships between poverty, hunger and other dimensions of economic marginalisation, on the one hand, and lack of dignity, on the other. It is, after all, human dignity to which the philosophy of human rights brings a commitment. To strengthen and to consolidate efforts that seek a greater recognition and legitimacy for this branch of rights is an effort that must be supported. A great deal of work has been done to explore the justiciability and measurement of these rights, laying firm foundations for their greater realisation. The UPR arena has allowed ESCRs to be raised frequently in international discourse and has afforded the two sets of rights a place on the same platform. This can only serve to reduce the lower status long given to ESCRs and address more fully the rights concerns of poorer states.

¹⁸ Trinidad and Tobago Affirmation on Values and Principles (2009).