

HALFWAY TO WHERE? THE UPR IN 2009

INTRODUCTION

The second year of the universal periodic review (UPR) mechanism of the Human Rights Council (the Council) saw a broad consolidation of practices from 2008, to the point that the UPR process is now reasonably well-defined. There was an emergence of good practice in 2009, including an increase in specific and realistic recommendations, increased cross-referencing of treaty body recommendations and calls for ratifications of international instruments, as well as submissions of overdue reports, a number of innovative approaches by States under review (SuRs) to reporting back to the Council on pending recommendations, and the use, although limited, of the Council's general debate on the UPR to report back to the Council on steps taken to implement UPR recommendations.

Not all embedded practices have been positive, however, and many continue to impact negatively on the ability of the UPR to meet its own objectives. These include continued attempts to fill the speakers list with 'friendly States'; rejections of recommendations that should not have been rejected on the grounds of treaty or customary international legal obligations; attempts to position national sovereignty or national law as a grounds for justifying non-adherence to interna-

tional standards; and an increase in recommendations that bear little or no relevance to human rights law or that seek to introduce relativist views into a universal review mechanism. 2009 also witnessed heightened challenges for civil society, where a small number of States have appeared to sponsor organisations to fill the speakers list at the stage of adoption at the Human Rights Council, and at the same time have pursued a policy of sidelining or attacking genuine non-governmental organisations (NGOs) that are critical of States' human rights records.

It was also clear that the outcomes of a number of reviews in 2009 did not reflect the reality of the human rights situation on the ground, due in part to those tactics described above, coupled with a political unwillingness to cooperate. At the halfway point of the UPR, this raises the question of whether the UPR can be considered to be working sufficiently well if the mechanism is relatively successful in a number of possibly less 'significant' reviews but fails in the more critical cases. In other cases we will have to wait for the second cycle of the UPR to assess its effectiveness in improving the human rights situation on the ground.

Finally, any assessment of the UPR needs to take into account financial and human resources. It appears that the UPR has placed a huge strain

on the UN resources allocated to human rights, and critical decisions need to be made concerning its sustainability. This is compounded by the fact that staff from the Office of the High Commissioner for Human Rights (OHCHR) are being drawn from departments other than the UPR unit to assist in preparation for country reviews, not least staff that are expected to work with the UN human rights treaty bodies. This may have a more adverse impact on the effective functioning of other mechanisms than any foreseen concerns about duplication of effort.

are now using the strategy of raising questions in their written submissions, and then making recommendations on the same topic in the Working Group, whether or not the SuR addresses the written submission in their opening presentation.

In relation to the interactive dialogue, the standard practice for SuRs has remained that they interject only once or twice during the review following their initial presentation,⁹ meaning that there is rarely a sense of an interactive dialogue or open exchange.

2009 also saw a significant rise in the **demand to speak** in a number of reviews, far outstretching demands in 2009 for Pakistan (70 States inscribed on the speakers list) and Sri Lanka (61 States inscribed, of which five were unable to speak due to time constraints). In the review of China, 115 speakers inscribed on the speakers list, for Cuba 110, for the Russian Federation 73, and for the Democratic People's Republic of Korea (DPRK) 71. This even extended to less active States in the UN such as Bhutan, where 59 States wished to take the floor and only 51 were able to do so. In the case of China, only 60 States were able to speak, which meant that the recommendations of 55 States were excluded from the report and from consideration by China. The same huge imbalance occurred in the case of Cuba, where 50 States were unable to contribute.¹⁰ An agreement to reduce speaking time to two minutes for both member and observer States did little to redress the problem.¹¹ This serious anomaly was taken up as part of the general debate under Item 6 at the Council (see below), although to-date the problem is unresolved and is not likely to be resolved until the end of the first cycle of the UPR. At the other end of the spectrum, only 27 States raised comments or questions to Dominica, a comparable low to 2008. Nonetheless, participation in the reviews tended to be more sustained in 2009.

A corollary to this increase in demand was an increase in **speakers lists being filled with friendly States**, leading to laudatory praise of the SuR, an effective filibustering of critical comments and/or recommendations, and (although difficult to prove) ultimately a distortion of the situation of human rights on the ground, thus ensuring that the UPR fails to meet its primary objective. This practice was most visible among Arab States in 2008, and this was again the case in 2009, when

PRACTICES WITHIN THE UPR

Among the impressive achievements of the UPR is that all 96 States have sent delegations to the UPR in its first two years, with almost all sending **high-level delegations** headed by ministers or deputy ministers. This may be attributed to the fact that, unlike the treaty bodies, the time of reviews are fixed, and States therefore know that they will be reviewed at a given time irrespective of whether they are present.¹ There was an even divide of delegations headed by departments of justice² and foreign affairs³ (the former being preferable as it indicates an understanding of the UPR as a domestic concern rather than a foreign affairs exercise), and then human rights departments,⁴ if in existence. Among the few lower-level delegations in 2009 were China and Jordan, who were headed by their permanent representatives to Geneva.⁵

States under review have generally continued to **use the allocated time** with the delegation presenting itself in less than 30 minutes,⁶ leaving 30 minutes for responding to questions and comments. The majority of States continued to focus their presentation on reiterating the content of their national report,⁷ with a still unsatisfactorily low number of States adequately addressing questions submitted to them in writing. Good practice was exhibited by Mexico, for example, who devoted most of their 25-minute presentation to answering the majority of the 27 questions received through written submissions either directly or indirectly.⁸

As a way of addressing the lack of response to written submission, States in the UPR Working Group

¹ In the case of the treaty bodies, the date of examination is only determined after the submission of (usually overdue) reports, and can also be rescheduled if necessary. Treaty bodies are therefore generally mobilised through the submission of State reports, unlike the UPR.

² Macedonia, Djibouti, Canada, the Russian Federation, Cuba, Senegal, Nigeria.

³ Uruguay, Vietnam, Slovakia, Germany, Bangladesh, Azerbaijan, Cameroon, Malaysia.

⁴ Central African Republic, Yemen, Comoros. Others included Mexico (Ministry of Interior), Vanuatu (Labour), Malta (Deputy Attorney General), Mauritius (Attorney General).

⁵ One other notable decision was to appoint Saudi Arabia's vice-president of the Saudi Human Rights Commission as the head of delegation, which would not stand to benefit that Commission's perceived independence from the Government, were it to apply for accreditation with the International Coordinating Committee of National Human Rights Institutions.

⁶ For example, Cuba, Cambodia – 30 minutes; Germany – 26 minutes; the Russian Federation, New Zealand, Bhutan – 20 minutes. The Central African Republic recorded the shortest presentation, at only ten minutes.

⁷ For example, the Russian Federation and China.

⁸ See ISHR's report on the review of Mexico at the 4th session of the UPR, 10 February 2009, at www.ishr.ch/component/docman/doc_download/259-ishr-report-on-the-review-of-mexico-under-the-upr.

⁹ Among those who spoke only once were the Russian Federation, Belize, Yemen, and Equatorial Guinea.

¹⁰ 19 were unable to participate in the review of the DPRK, 17 in the case of the Russian Federation and eight in the case of Bhutan.

¹¹ UPR modalities traditionally provide for three minutes for Working Group members, and two minutes for observer States.

the review of Jordan resulted in laudatory comments and vague recommendations from 17 of the first 22 speakers.¹² The same practice was repeated for Yemen in the 5th UPR session and Brunei Darussalam in the 6th UPR session.

During the review itself, States in the Working Group continued to divide their time between **comments, questions, and recommendations**. The same broad range of recommendations are being made covering all civil, cultural, economic, political and social rights, although it may be noted that in 2009 there was a perceptible widening of the gap between more targeted questions and recommendations,¹³ and at the same time an increase in vague recommendations that call on States to 'continue their efforts' in various areas,¹⁴ most often in efforts to realise economic and social rights, or to 'consider' taking action rather than to take action, a caveat that eases acceptance but where 'consideration' in practice would likely mean no action.

A number of States also continued to ask **stock questions** on issues of particular interest to them, such as the protection of human rights defenders,¹⁵ the establishment of national human rights institutions¹⁶ and ratification of particular human rights treaties.¹⁷ During the general debate on the UPR under Item 6 of the 11th Council session, Germany also claimed to have observed a decrease in questions and an increase in recommendations, thus diminishing the UPR's 'authenticity and liveliness', and losing a 'necessary component of the constructive nature of the UPR.'¹⁸

2009 also witnessed a continuation of the practice of providing recommendations to a State even though it had already expressed its position in its responses to the same issue. Often, for example, SuRs retook the floor to explain the reasons for non-ratification of certain treaties, only for pursuant Working Group States to then ask the SuR to ratify the same treaty. The tendency of Working Group States to read from the script may be unavoidable when States are represented by junior staff that would be uncomfortable or unauthorised to deviate from the text in front of them, but it also has the effect of making the UPR appear like a pro-forma exercise, devoid of genuine interaction.

Concerning the content of recommendations, a development of serious concern relates to the practice of a number of States presenting rec-

ommendations that run contrary to the SuR's treaty obligations, to customary international law, or to emerging consensus in international law. These recommendations continue to focus on the death penalty,¹⁹ discrimination on the basis of sexual orientation,²⁰ implementation of Shar'ia law,²¹ and the concept of religious defamation.²² Often such recommendations are also rooted in notions of cultural relativism or the concept that national law supersedes international obligations, despite clear provision in the *Vienna Convention on the Law of Treaties* that a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.²³ Examples include, for example, the Sudan's justification of China's re-education through labour programmes (RTL) as being rooted in Chinese culture and important to long-term rehabilitation, and Algeria's recommendation that China 'explore...implementation of human rights in harmony with its characteristics, its realities and the needs of Chinese society'.²⁴ China's general response was also that it would only accept UPR recommendations 'that suit China's realities'. All of the above remain critical concerns if the UPR is to avoid developing recommendations that undermine or contravene international human rights law.

As with the first year, the **number of recommendations accepted, rejected, and left pending** varied enormously in 2009. European Union (EU) States continued to adhere to the unwritten practice of leaving all recommendations pending until the Council adoption stage, while Latin American States continued to be the most open to accepting recommendations. As with Ecuador in 2008, Uruguay in 2009 had the commendable distinction of accepting all 88 recommendations made to them.²⁵ At the other end of the spectrum, the DPRK left pending 117 recommendations, but rejected a record 50 recommendations at the initial adoption of the draft outcomes by the Working Group, including to 'implement its obligations under the human rights instruments to which it is party and cease the use of arbitrary detention, labour camps and collective punishment', to provide but one egregious example.²⁶

A development of particular note in 2009, and one that managed to escape the attention of many observers of the UPR, was the **possibility of SuRs to negotiate with Working Group States to amend the exact content of their recommenda-**

12 The first 21 speakers were Algeria, Finland, Egypt, Bahrain, Qatar, the Sudan, Kuwait, Djibouti, Azerbaijan, Saudi Arabia, Mexico, Yemen, Oman, Indonesia, Malaysia, Palestine, the United Kingdom (UK), Germany, Pakistan, Morocco, and Tunisia.

13 For example, the UK asked Jordan about the steps to implement the Committee against Torture's recommendation to abolish exceptional courts (A/HRC/11/29, 29 May 2009, Para. 38); Ireland requested further information from the DPRK related to the length of detention without charge; time between arrest and trial; availability of free legal aid and representation in court; the availability of trial by jury in an open court; and the question of visiting rights for remand prisoners. Available on the OHCHR extranet (after login) at <http://portal.ohchr.org/portal/page/portal/UPR/6th%20Session/Democratic%20People%E2%80%99s%20Republic%20of%20Korea/Ireland.pdf>.

14 For example Indonesia recommended that Djibouti 'stick to its present course, which is directed towards the improvement of all as well as to the effective promotion and protection of human rights (A/HRC/11/16, 3 March 2009, Para. 67(3)), and Algeria recommended that Vietnam 'continue fulfilling its obligations under international law to which it is a party' (A/HRC/12/11, 5 June 2009, Para. 99(1)).

15 Norway to Afghanistan, the Central African Republic, Chad, Vietnam, Yemen; Ireland to the Russian Federation and Macedonia.

16 Australia; the UK to Belize, Chile, Comoros, Monaco, Uruguay, and Vanuatu.

17 France on ratification of the *Convention on Disappearances* to Cameroon; Mexico on ratification of the *Convention on Migrant Workers* to Canada and Norway.

18 Statement by Germany at the 11th session of the Council, 12 June 2009, available on the OHCHR extranet (after login) at <http://portal.ohchr.org/portal/page/portal/HRCExtranet/11thSession/OralStatements/120609/Tab/Tab4/Germany.pdf>.

19 For example, Egypt recommended to China 'that in light of its national realities, China continues to implement the policy of strictly controlling and applying the death penalty', A/HRC/11/25, 3 March 2009, Para. 114(30).

tions in order that they be more palatable for the SuR. This is most apparent in the case of Côte d'Ivoire,²⁷ for example, where there are eleven footnotes at the end of the draft report's recommendations that present the original language of recommendations which have been amended. While the majority of these amendments serve to correct factual inaccuracies or remove elements that limit that State's possibility to accept the recommendation as a whole,²⁸ the process is nonetheless a new one and raises questions about the principle of negotiating content outside the official review. It is also critical that troika States ensure that any amendments continue to be fully reflected in footnotes in order to avoid any serious misuse of this new approach.

ADOPTION OF REPORTS BY THE HUMAN RIGHTS COUNCIL

The same issues tended to arise in 2009 in relation to the presentations by SuRs prior to the final adoption of their UPR outcomes by the Human Rights Council. As in 2008, the problem remained that States were not sufficiently clear on the **status of pending recommendations**, and this remains a serious challenge, not least for national stakeholders who are left with a lack of clarity regarding the State's position. Concomitantly, those Working Group States that provided the original recommendations have not sufficiently used the adoption phase through interventions to hold SuRs to account for not addressing pending recommendations made by them.

Model practice in responding to pending recommendations was exhibited by Botswana in the adoption of its report at the 10th session of the Council in March 2009, where the State presented a grid to the Council detailing the pending recommendation (and from whom) and the State's response to that recommendation, as well as their consequent acceptance or rejection.²⁹ The format could serve as a template for other States.

The **Council's adoption of the UPR report of Israel**, however, constituted far less favourable practice and reflected badly on all parties involved. Israel, firstly, set a new record in bad practice by accepting only three recommendations and agree-

ing to 'promote' eleven others. Before the debate even started, Egypt raised a point of order, claiming that Israel had violated the institution-building text by not clearly indicating in advance which pending recommendations it had accepted and rejected. Various other States also objected that Israel had not responded to the recommendations in the Working Group's report,³⁰ while Syria dismissed Israel's engagement in the UPR as 'a waste of time'. While States complaints had merit in isolation, the reality was that the same States had not held other SuRs to the same standard, and were thus clearly singling out Israel for condemnation. Similarly, Egypt had a track record for interrupting NGOs in 2008 on the basis that their interventions sought to 're-open the debate' and were not expressing their views on the outcome of the review. Yet Egypt did precisely that in the case of Israel, re-opening the debate by calling on Israel to end its occupation of Palestine.³¹ It should therefore be noted that, as with the Council and the Commission on Human Rights before it, many of those States that claim to seek the end of selectivity through the UPR, are in fact at the forefront of its perpetuation.

A noticeable development in 2009 was the **increased use of the time provided** by member and observer States of the Council at the point of adoption of the UPR outcome under Item 6 of the regular Council sessions. Perhaps due to the newness of the UPR in 2008, and the fact that States are to only 'express their views on the outcome of the review',³² the space was not fully utilised. In many cases in 2009, however, the 20 minutes allocated to States was fully used, often resulting in a number of States left unable to take the floor.

It also coincides that in most cases where the speakers list is full, the majority of speakers use the opportunity to **laud the State under review**. The adoption of the report of the Russian Federation saw all States that took the floor commenting in an overwhelmingly positive manner on the role the Russian Federation had played in the creation of the UPR process, and during its own review. States that could be expected to raise even mildly critical points were very far down the list, and therefore did not get an opportunity to speak. It was also notable that several interventions by States had little to do with the reports under consideration, a clear departure from the focus of the adoption of UPR reports. Neither States, nor the President recalled the

²⁰ The interesting but, in fact, incorrect and therefore contradictory approach taken by Bangladesh in this regard was to claim that 'as there is no treaty obliging Tonga to do otherwise [this is incorrect], it is recommended that the Government continue to criminalize consensual same sex, which is outside the purview of universally accepted human rights norms, according to Tonga's national legislation', A/HRC/8/48, 5 June 2008, Para 58. Egypt also applied the same reasoning by advising States not to accept the imposition of the values of one society on another.

²¹ See for example Iran to Malaysia to 'undertake more effective measures to further improve the implementation of Shari'ah law in the country', A/HRC/11/30, 3 March 2009, Para. 65(b).

²² See for example, Iran to the Netherlands, A/HRC/8/31, 13 May 2008, Para. 11.

²³ Article 27.

²⁴ A/HRC/11/25, 3 March 2009, Paras 33 and 45.

²⁵ A/HRC/12/12, 4 June 2009, Para. 78.

²⁶ A/HRC/13/13, 4 January 2010, Para. 91(2).

²⁷ A/HRC/10/69/Add.1, 17 March 2009.

²⁸ See footnote 5, for example, where the SuR sought to clarify the scope of the pledges made in its own national report.

²⁹ A/HRC/10/69/Add.1, 17 March 2009.

³⁰ Palestine, Cuba, Syria, Yemen, and Malaysia.

³¹ Iran and Malaysia also called for an end to occupation. See ISHR's report on adoption of reports from the 3rd session of the UPR Working Group and general debate, at www.ishr.ch/component/docman/doc_download/315-ishr-report-on-council-adoption-of-upr-outcomes.

³² A/HRC/RES/5/1, Para. 30.

scope of discussion. This was particularly regrettable since the permitted scope of statements is brought to the attention of NGO speakers at every opportunity.

The adoption of the report of Cuba provided a new anomaly in the UPR procedure. Allied States first filled the speakers list, and spoke of Cuba's achievements in a tone of almost total adulation, while 25 additional States were unable to speak. In the same manner, a large number of national NGOs managed the previous day to enter the UN before it was officially open to NGOs in order to inscribe first on the speakers list. These NGOs then proceeded in unison to inform the Council that Cuba 'protects all rights of all its peoples'. This situation forced Human Rights Watch, one of only two critical voices able to participate, to protest that Cuba had tried to silence criticism. This in turn provoked the Ambassador of Cuba to respond that they were 'mercenaries of the counter-revolution', had 'come here to do the clowns act', and that Cuba would 'continue victorious'.

Finally, in relation to NGO participation, it could be generally observed that disputes over the content of NGO interventions subsided in 2009, compared to serious disagreements in 2008 in relation to the scope of statements and their connection to the issues raised during the UPR review itself.

GENERAL DEBATE UNDER ITEM 6

2009 witnessed a new procedural challenge in relation to the **modalities of the speakers list during the review**, when a high number of States were inscribed on the speakers list for Cuba and China but were unable to provide comments and recommendations due to time restrictions.³³ A recurrent issue during the general debate under Item 6 of the Council in March 2009 was the need to revise the modalities on participation in order to ensure that the recommendations of all States inscribed on the speakers list were included,³⁴ and to avoid that the majority of the total time allocated to speakers be taken up by 'uncritical praise by friendly States'.³⁵ The Republic of Korea proposed that once the speaker's list is closed, the secretariat could divide 120 minutes by the number of speakers and

stick to that time limit. It also urged that States should be encouraged to 'get to the point'. Portugal recommended that all written statements not delivered should be collected and the recommendations included in the draft Working Group report. Japan proposed that Council member States be given priority. Cuba, however, dismissed such ideas as being pursued for 'dramatic effect', while Egypt (on behalf of the African Group) described such suggestions as 'unfounded and illegal'.³⁶ Bhutan also raised the question of whether a change at this stage would result in unequal treatment for those States already reviewed. As mentioned the issue remains unresolved.

A related ongoing problem remained the issue of timely **translation** of documents into all official UN languages. This was particularly problematic for the Russian Federation, and the inability of UN services to cope with this can be linked to other human resource and funding constraints (see below). This resulted in the adoption of a decision³⁷ of the Human Rights Council at its 11th session in June 2009 that the Secretary-General ensure that translation take place on time and that reports remain within the **word limit** as set out by the UPR *Presidential Statement* 9/2 of 24 September 2008.³⁸

The issue of word limits provided on opportunity to streamline the **format of reports**. Beginning with the report of Afghanistan at the 5th session on 7 May 2009, recommendations were removed from the dialogue under the 'summary of proceedings' and were collected only under the collected 'conclusions and/or recommendations' heading.³⁹ As this applies to all recommendations, both accepted and rejected, it therefore gives increased visibility to rejected recommendations, where in the past the reader had to cross-reference the rejected recommendations by paragraph number to their corresponding paragraph in the summary of proceedings. The new approach therefore presents a clearer and less time-consuming summary of recommendations and the SuR's initial responses to them.

One very notable new development in 2009 related to the reflection of bilateral disagreements in UPR reports. This was visibly a problem in the case of Cyprus, which was the **first State to disassociate itself from the outcome of its review** on the grounds that that the report

33 See for example the reviews of Cuba and China, at www.ishr.ch/index.php?option=com_content&task=view&id=170&Itemid=240.

34 The Czech Republic (on behalf of the EU), Chile, Morocco, Poland, Japan, the Republic of Korea, Portugal, Bhutan, Egypt (on behalf of the African Group), Cuba, Algeria.

35 The phrase used by Poland to warn against such negative practice.

36 Opposition to amendments to the speakers list have also been voiced by the Russian Federation and China.

37 A/HRC/11/L.2, 12 June 2009.

38 PRST/ 9/2 (Follow-up to *President's Statement 8/1*), available on the OHCHR extranet (after login) at http://portal.ohchr.org/portal/pls/portal/IPORTAL.wwwob_page.show?_docname=3612326.PDF.

39 A/HRC/12/9 20, July 2009.

contained 'non-UN terminology with regard to the sovereignty, territorial integrity and unity of the Republic of Cyprus'. This followed references by Turkey to the abrogation by force of the Republics of Cyprus by Greek Cypriots in 1963. However, the Vice President at the time did not rule Turkey's comments to be out of order and this was endorsed by the Chairperson at adoption of the report, who stated at the adoption of the report (in the absence of Cyprus) that while States should respect each other's point of view, he supported the Acting Chairperson's assessment that the language was not inconsistent with UN terminology and that the content of the report cannot be modified to adapt opinions expressed. So while Cyprus dissociated itself from the report, it remains to be seen whether it will address the actual recommendations, all of which are pending, before the Human Rights Council in February 2010.

This development also relates to an exchange between Japan and the DPRK in the review of the DPRK and the **scope of points of order related to the characterisation of bilateral disputes in the final UPR reports**. Japan requested a point of order during the review to respond to comments by the DPRK that 'various DPRK-Japan agreements...resulted in the complete settlement of the abduction issue'.⁴⁰ It wished to state that Japan did not consider the abduction issue closed and it was therefore factually incorrect to state that Japan-DPRK agreements had concluded this. However, in this instance the Chairperson interrupted Japan to declare that it could not make a point of order 'on an issue of substance'. Firstly, it remains unclear why such an interpretation was not applied to the back-and-forth between Cyprus and Turkey the previous week. Secondly, the inability of Japan to correct a factual error about themselves raises serious questions about the possibility of States under review to manipulate their responses in order to present the 'last word' on an issue of bilateral dispute. This may occur very rarely, but nonetheless if the ruling of the current Chairperson is correct that points of order may only address points of procedure, then this may be classed as a shortcoming of the UPR.

While it was too early in 2008 to expect such practice, one positive development of 2009 was the practice of a small number of States to use the general debate under Item 6 of the Coun-

cil agenda to follow up on implementation of UPR recommendations. The Czech Republic (on behalf of the EU) stated that it was only by using the general debate to inform the Council of national achievements that the Council would be able to say that the UPR was a success. The most impressive example in this regard was Tunisia in March 2009, which provided a detailed list of efforts undertaken to implement recommendations, including bringing its national human rights institution in line with the Paris Principles; promulgating new laws on women's rights; acceding to the *Convention on the Rights of Persons with Disabilities* and the optional protocol to the *Convention on the Elimination of Discrimination against Women*; agreeing that Human Rights Watch may visit prisons, and the need for written authorisation for prolonged custody. Other worthy examples of follow-up came from the Czech Republic and Poland (changes in national legislation), the United Kingdom (removal of reservations to the *Convention on the Rights of the Child*), Bahrain (development of its national action plan), Switzerland (police training on discrimination and ratification of optional protocol to the *Convention against Torture* (OPCAT), the United Arab Emirates (development of model for migrant workers), and Colombia (visits of special procedures and consultations with civil society on protection of human rights defenders). It should be noted that Egypt (on behalf of the African Group) referred to this practice as 'illegal'.

The **use of Item 6 for follow-up by NGOs** on implementation has not yet been tested, but is likely to face similarly stiff reaction from Egypt and others on the narrow reading that the 'general' debate on Item 6 is limited to the UPR process and excludes reference to country situations.

2009 also witnessed the first comprehensive **publication by a State, Colombia**, on the 'experience, advances and challenges' in implementing its UPR recommendations.⁴¹ The 40-page report included precise information on efforts to implement specific recommendations. It is intended to be complemented by a more detailed report, to be presented to the Human Rights Council in March 2010, and to-date represents best practice in documenting and reporting back on the status of follow-up to UPR recommendations.

The general debate of the Council also witnessed a sustained or even increased level of **criticism**

⁴⁰ A/HRC/WG.6/6/L.12, Para. 83.

⁴¹ *Colombia and the Universal Periodic Review (UPR) before the United Nations Human Rights Council: Experience, Advances and Challenges*, at www.cancilleria.gov.co/wps/wcm/connect/9ffc3200409e6e74b744bf37b711a12a/EPU+ENG.pdf?MOD=AJPERE&CACHEID=9ffc3200409e6e74b744bf37b711a12a.

by a minority of States in 2009 of the **contribution of NGOs to the process**. Cuba and Algeria argued that local stakeholders should be better reflected in the summary of stakeholders' information, based on credible and reliable sources. Cuba in particular alleged that 'Geneva cronyism' resulted in international NGOs being given priority over national NGOs by OHCHR in summary documents, and that Cuba would 'address this legal void' through the Council. Internal assessments on opportunities for NGO advocacy in the UPR do not fully support this allegation however. While showing that OHCHR does quote international NGOs more often than national NGOs, they also showed that joint NGO submissions were also highly cited, and the majority of these joint submissions were co-sponsored by national NGOs that did not have ECOSOC consultative status. However, this issue would certainly benefit from more quantitative analysis.

It also became clear in 2009 that the United Kingdom has placed importance on the need for continued **national consultations with civil soci-**

ety after the conclusion of the UPR in Geneva in order to debrief on the review and to explain next steps, possibilities for collaboration, and plans for follow-up. This can be considered a very positive procedural recommendation, although to-date the level of response by States under review has been relatively low. The same principle, however, is already being applied by the United States, which in preparation for its review in December 2010 has created a dedicated website for consultations, explaining that 'this website will facilitate communication between civil society and the United States government before, during, and after the preparation of the U.S. report to the UN Human Rights Council.'⁴²

THE UPR AND THE UN HUMAN RIGHTS TREATY BODIES

The following States were both reviewed under the UPR and examined by the treaty bodies in 2009:

HRC	CESCR	CERD	CEDAW
Azerbaijan	Cambodia	Congo	Cameroon
the Russian Federation	Chad (no delegation)	Azerbaijan	Dominica
Chad (no delegation in March, re-scheduled in July)	the Democratic Republic of the Congo (DRC)	Chad	Germany
		Chile	Azerbaijan
		China	
		Ethiopia	
CAT	CRC	CMW	
Chad	the DPRK	Azerbaijan	
Chile	the DRC		
New Zealand	Chad		
Azerbaijan	Bangladesh		
Yemen (no delegation)			

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It is worth noting that, according to OHCHR, 'during the first two sessions of the UPR working group, more than 600 references had been made to human rights treaty bodies in some way, and more than 200 recommendations made by the working group were based on the recommendations of treaty bodies.' A/HRC/12/G/1, 4 September 2009, Para. 26.

44

A random sample shows: Cambodia – five recommendations from three treaty bodies; Chile – six recommendations from two committees; Germany – 13 recommendations from four committees.

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This may even be extended to making recommendations sourcing a particular committee, to which the State making the recommendation itself has a long list of outstanding recommendations from the same committee. An interesting example is that of India, who echoed CESCR's recommendation to Cambodia on the absence of an anti-discrimination law for persons with disabilities (A/HRC/13/4, 4 January 2010, Para. 64), although India was examined by CESCR for only the second time in 2008, after a 22-year delay in the submission of its report. The list of concluding observations of the Committee were amongst the longest CESCR had ever drafted, and a large proportion of these remain unimplemented by India.

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For example, Qatar asked whether Germany intended to implement CERD's recommendation to adopt a legal definition of discrimination (A/HRC/11/15, 4 March 2009, Para. 29). Algeria also requested Germany to follow CERD's recommendation to enact legislation of a specific provision making ethnic racial or religious hatred an aggravated circumstance in criminal matters (Para. 47).

47

For example, Denmark to Cambodia on length of pre-trial detention (A/HRC/13/4, 4 January 2010, Para. 59); the Netherlands to Chile to amend the Anti-Terrorism Act 18.314 according to recommendations of the Human Rights Committee (A/HRC/12/10, 4 June 2009, Para. 25).

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For example, Denmark recommended that Chile undertake 'full and effective consultation of indigenous communities before granting licenses for the economic exploitation of disputed land', as recommended by the Human Rights Committee in 2007 (A/HRC/12/10, 4 June 2009, Para. 30).

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Mexico, Brazil, the Netherlands and Czech Republic to Malta (A/HRC/12/7, 4 June 2009); Ukraine, Slovenia, Germany, the Czech Republic to Belize (A/HRC/12/4, 4 June 2009).

The issue of the **reporting burden** continued to affect a number of States in 2009, as illustrated above. It is interesting to note that Azerbaijan, Chad, the DRC, and Chile were among those most affected by a reporting burden in 2009, with Chad having appeared before *five* treaty body examinations and a UPR review and Azerbaijan four – unfeasible numbers for any government. The additional strain of the UPR may indicate why Chad was unable to send delegations to New York in March for the Human Rights Committee and Geneva in November for the Committee on Economic, Social and Cultural Rights. Likewise for Yemen with the Committee against Torture, who claimed that they saw no reason to send a delegation to the CAT examination having already provided a delegation for the UPR, thus illustrating both the difficulties and/or misunderstandings that the additional obligation of the UPR has created. The potential strain could not have been more poignantly illustrated than the fact that Germany's UPR review and CEDAW examination took place at the same time on 2 February 2009, 200 metres from each other in Palais des Nations in Geneva. It also highlights that OHCHR has some way to go in improving coordination within the treaty body secretariats in timing examinations, both in relation to the fixed UPR schedules and amongst themselves.

2009 witnessed a general consolidation⁴³ of practices among UPR Working Group members to **draw reference to outstanding treaty body recommendations** when providing their own recommendations to States under review. The review of Jordan, to provide one example, resulted in recommendations referring to follow-up to specific recommendations of the CRC (the Sudan, Turkey, Slovenia), CEDAW (Mexico, the Netherlands, Slovenia, Bosnia-Herzegovina), CAT (Mexico, the United Kingdom), and the Human Rights Committee (Slovenia). Recommendations referencing treaty bodies tend to more often reference CEDAW and the CRC than others, perhaps on account of their wide ratification, although each treaty body to which the States are party are usually reflected.⁴⁴ The motivation for individual Working Group States to reference particular treaty body recommendations over others would make an interesting study, as States are less likely to reference recommendations on which they themselves are lacking.⁴⁵ Referencing of outstanding treaty body recommendations has proven to be one

of the strengths of the UPR, however, as a form of interim follow-up measure and (or at least *should* be) an express acceptance by States of their treaty obligations.

It is also the case that more specific recommendations are inclined to reference treaty body recommendations, perhaps reflecting States' recognition that treaty body expertise provides a more reliable basis. Types of specific recommendations include the needs for legal definitions of particular human rights violations; attempts to bring legislation into compliance with international law;⁴⁶ compliance with standards clearly enshrined in treaties;⁴⁷ or discrimination against particular groups.⁴⁸

The UPR also continues to strengthen the call for **submission of overdue reports⁴⁹ and ratifications of outstanding instruments⁵⁰**, although the latter can in some cases be somewhat pro-forma depending on the Working Group State's particular association with particular international instruments.⁵¹ The process runs the risk of being generic when SuRs are asked to ratify every instrument to which they are not party, as is the case in the vast majority of reviews. Nonetheless, the process does provide some interesting insights, such as the fact that the minority of African States that are party to OPCAT are willing to use the UPR to encourage their neighbouring States to do the same.⁵² Another possible positive outcome of this practice is a perceived increase in the submission of overdue reports, either in advance of the UPR review⁵³ or following the review itself as a means to fulfil recommendations. At the very least, this does serve as an awkward reminder to States of their procedural obligations, and the possibility of seeking technical assistance where obstacles to fulfilment exist.⁵⁴

Concerning the responsiveness of treaty bodies themselves to the work of the UPR, the issue of **complementarity** between the UPR and treaty bodies has also moved at a relatively slow pace and is far from integrated into the work of the treaty bodies, with varied practice within and across the treaty bodies as to the level of cross-referencing of the UPR. The **Inter-Committee Meeting** of treaty bodies (ICM) continued to place the UPR on its agenda, almost as a standing item, but the level of debate in July 2009 stagnated into repetition of the broad merits and

possible threats and challenges of the UPR. The UPR was not discussed at the December ICM session, on account of discussions focusing on treaty body follow-up, but even so there appeared to be little desire to further discuss the UPR. One concrete area where positive developments have taken place is in the acknowledgement by committees, following the already established practice of the Human Rights Committee that a prioritisation of treaty body concluding observations would assist in ensuring that the appropriate recommendations are picked up by OHCHR in its summary of relevant UN information.

At the same time, a **parallel event** organised by the missions of the Netherlands, Colombia and Ireland at the 10th session of the Human Rights Council in March 2009 constituted the first attention given by States to the importance of **further examining ways to strengthen complementarity** and ‘ensure that the distinct roles of the UPR and the TMBs are developed in ways that respect their separate identities and roles.’⁵⁵ Among the conclusions arrived at by the organisers was that ‘both mechanisms had specific strengths and could be used as a form of follow-up to the other’; that national processes were being put in place which made it easier for States to prepare for treaty body submissions and examinations; that ‘treaty bodies will need to remain particularly attentive to instances where States reject UPR recommendations that are a matter of legal obligation, though this has not happened often to date’; and that there needed to be more structured contact between the treaty bodies and the Human Rights Council.⁵⁶

OTHER ISSUES

The separation of the UPR itself in Geneva and its financial management in the General Assembly’s Fifth Committee in New York has meant that few observers in Geneva have given much thought to the cost and **financial health** of the UPR. Although it is not very clear, it was rumoured that that the UPR had already spent its entire allocated budget for the first cycle by early 2009. Whether this is correct or not, what is widely accepted is that there is a disparity between the actual, unavoidable cost of the UPR, and the amount that the Fifth Committee

is willing to allocate to it. Accordingly, the UPR is financially in bad health and this is something that needs to be addressed in 2010.

On a related note of **human resources**, it is clear that the UPR is placing an unsustainable strain on an already under-resourced OHCHR. While the small dedicated UPR staff of ten are stretched with preparing materials, coordinating each review, and drafting the summary reports against the clock, country desk officers and treaty body staff are also being required to contribute to summarising the sources of information.⁵⁷ This is already having a negative impact on the ability to adequately assist treaty bodies in their functions.

2009 has seen a clear lack of development in relation to **media responsiveness and public awareness** of the UPR. In November 2009, a Google search of ‘UPR’ still ranked the University of Puerto Rico and a company selling Ford Mustang car parts in Florida as more relevant than the universal periodic review, and at the time of writing there is still no Wikipedia entry for ‘universal periodic review’, a useful gauge of public interest. The vast majority of international newspapers also made little or no reference to the mechanism or its reviews in 2009.⁵⁸ This remains a serious shortcoming of the process after two years, as one would consider that a review of States’ human rights records by peers, where one State makes critical comments and recommendations to another, would capture the public’s attention.⁵⁹ This is something that NGOs, among others, should seek to rectify, as more attention to the UPR will result in greater accountability and impetus to represent the reality on the ground in countries and to implement recommendations. As long as the UPR remains an obscure process in Geneva, this suits human rights-unfriendly States best and ultimately undermines the principles and objectives of the process itself.

50 For example, Chile, France, the Netherlands, the Czech Republic, Liechtenstein, Brazil, Mexico, Azerbaijan to Bangladesh (A/HRC/11/18, 5 October 2009); Mexico, Egypt, Brazil, Chile, Liechtenstein, Bolivia, Denmark, France, Azerbaijan, China, Argentina, Algeria, Norway, Czech Republic to Canada (A/HRC/11/17, 5 October 2009).

51 For example, France in relation to the *International Convention on Enforced Disappearances* and Portugal in relation to the optional protocol of the *International Covenant on Economic, Social and Cultural Rights*.

52 In the review of Cameroon, A/HRC/11/21, 12 October 2009, South Africa (Para. 44 (a)) and Djibouti (Para. 72) both recommended ratification of OPCAT.

53 Ethiopia, for example, cleared a backlog of 17 reports prior to its review in December 2009. Iran submitted its long-overdue State report to the Human Rights Committee on 27 October 2009, in advance of its review at the 7th session of the UPR in February 2010.

54 See for example: ‘Algeria encouraged Jordan to submit periodic reports, which have suffered some delays, to treaty bodies, and urged it to seek appropriate technical assistance from OHCHR if deemed necessary’ (A/HRC/11/29, 29 May 2009, Para. 22).

55 A/HRC/12/G/1, 4 September 2009.

56 *Ibid.* at pp. 2-3.

57 See ‘Organizational chart UPR Section’ (as at 15 July 2009), available on OHCHR extranet (after login) at <http://portal.ohchr.org/portal/page/portal/UPR/Organizational%20Chart%2015072009.pdf>.

58 The following English language papers made the following number of references to the UPR in 2009: the *Guardian* (0), *International Herald Tribune* (two – both in relation to the review of China), the *Hindu* (one – ironically on the failure of the media to adequately reflect on international criticism of India’s human rights record). In Russian, only the *Kommersant* provided a summary of the review of the Russian Federation in February, while the ‘*Russian Newspaper*’, official newspaper of the Russian Government, was silent on the February review. However, other Council-related news such as the re-election of the Russian Federation to the Council (‘*Nzavisimaya Gazeta*’, May 2009), were quite common.

59 This was the case in the Netherlands where media picked on the fact that the Dutch Government had accepted a recommendation from Iran relating to women’s rights, which subsequently sparked public debate on the appropriateness of such a decision.

