THE UNIVERSAL PERIODIC REVIEW OF SOUTHEAST ASIA

CIVIL SOCIETY PERSPECTIVES

EDITED BY
James Gomez and Robin Ramcharan

ASIACENTRE

The Universal Periodic Review of Southeast Asia

James Gomez • Robin Ramcharan
Editors

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Civil Society Perspectives

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Preface

Asia Centre is a think-tank whose Human Rights Programme takes an evidence-based research approach in examining the three main mechanisms that hold the potential to enhance human rights protection in the region. The three mechanisms are national human rights institutions in Southeast Asian countries, the ASEAN Intergovernmental Commission on Human Rights and the Universal Periodic Review (UPR) of the United Nation's Human Rights Council. Asia Centre, through this programme, seeks to enhance human rights protection through policy engagement with academia, civil society and stakeholders in government.

Asia Centre conducts and commissions evidence-based research, convenes expert conferences, undertakes capacity-building trainings and produces publications. The Human Rights Programme aims to produce actionable, policy-oriented research that will serve to enhance the capacity of all stakeholders, especially civil society organizations (CSOs), to advance the protection of human rights in Southeast Asia. The Centre also brings together different stakeholders regularly to foster constructive dialogue and exchange best practices on human rights and other related issues. It fosters and nurtures networks of stakeholders in order to improve engagement with each of the mechanisms over time.

Through an examination of the UPR thus far, Asia Centre and the contributors to this volume conclude that the UPR has been an effective mechanism for putting human rights issues on the agenda and engaging states in conversation about critical issues. Under the UPR process,

member states report on their national human rights situations every four and a half years and receive input from multiple stakeholders including civil society. However, systemic problems remain with regard to engagement with other stakeholders, the implementation of recommendations by governments, the efficacy of follow-up processes and the UPR's ability to address hard political issues. Scrutiny of the protection function of the UPR and the critical role of civil society in furthering this function is warranted as Southeast Asian states proceed to the third round of reviews starting in 2017.

This book emanates from a regional conference to evaluate the impact of civil society engagement to advance human rights protection through the UPR process. The conference, "Universal Periodic Review in Southeast Asia", was convened by the Asia Centre in Bangkok, from 15 to 17 September 2016. The conference was convened to accomplish the following: (1) identify thematic areas and strategies that will assist civil society stakeholders in better engaging with the third round; (2) publish the findings for public dissemination to civil society and other stakeholders and (3) nurture and sustain a regional follow-up network of CSOs and stakeholders in tracking the implementation of the UPR recommendations accepted by states.

The evidence-based research undertaken by the author-practitioners assembled in this book tracks the participation of CSOs in the UPR, the issues that they have highlighted and the tactics that they have employed in pursuing their advocacy across the two cycles between 2008 and 2016. The authors identify strategies for future CSO engagement, namely, follow-ups and implementation of recommendations, with the third cycle of the UPR, commencing in 2017 and beyond as well as the critical role civil society can play in regional mechanisms and via national human rights institutions.

The dearth of analytical works on the impact of the UPR gave rise to this book. There was, at the time of writing, no work on the regional impact of the UPR, and we see this book as a building block to future works on the UPR. As such Asia Centre welcomes collaboration with prospective partners to monitor developments in the UPR, the implementation of recommendations, mid-term reporting and the role of civil society. In the meantime, the Asia Centre will contribute to the discourse and capacity-building initiatives to improve engagement with the UPR process

and other human rights mechanisms and process in the region. Asia Centre will continue with its evidence-based research on the UPR moving forward.

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Acknowledgements

This book was conceived amidst conversations with academics, civil society activists and professional staff in international non-governmental organizations and the United Nations about the state of human rights protection in Southeast Asia.

The conversations centred around the role of the United Nation's Universal Periodic Review (UPR) and its effectiveness in enhancing human rights protection. Collectively, the conversations identified a need to go beyond consultations and submissions and to focus on follow-ups and implementations.

One way to understand the gap was to draw lessons from past two UPR cycles to inform future engagement with the UPR. Thus, the need for evidence-based research to take stock of the two cycles of the UPR that ended in 2016 was established. We are grateful to the Taiwan Foundation for Democracy and the Heinrich Böll Stiftung Southeast Asia office for their support in convening the International Conference "Universal Periodic Review in Southeast Asia: An Evidence-Based Regional Assessment," held from 15 to 17 September 2016 at Asia Centre's premises in Bangkok.

Thanks, therefore, are due to the authors who marshalled their experiences into these chapters and who were diligent in revising and editing their submissions within a short time frame. Their insights point towards the critical role civil society plays in the UPR process and its potential relevance in regional mechanisms and national human rights institutions.

Thanks are also in order to the team at Asia Centre, especially Michelle D'Cruz and Patcharee Rattanarong, for their organizational and administrative support. The Centre is appreciative of its interns Anna Jeffries and

Silvia Waldbach who helped put together the 2016 UPR conference and contributed towards the Asia Centre's UPR mapping.

We are grateful to Gerakbudaya for the publication and distribution of the regional edition of the book and to Palgrave who came on board for the publication and distribution of the international edition of the book.

We are pleased to bring out this publication as the third cycle of the UPR gets underway, and we look to the UPR to contribute towards human rights protection in the region.

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Notes on Contributors

Destination Justice is social change organization committed to ending injustice. Structured as a non-profit, Destination Justice focuses on strengthening human rights, the rule of law and access to justice through activities such as the provision of legal services to vulnerable populations. Destination Justice works towards a more just world by creating sustainable change. Our work is framed around three interrelated pillars. We believe that everyone has the right to live in societies where the justice system respects international principles of justice and human rights (Justice Matters). We believe that everyone has the right to freely access decent legal information (Law For All). We believe that everyone has the right to proper legal representation and advocacy when their human rights have been violated (Justice For All). The paper from Destination Justice was written by Céline Martin, Programme Manager.

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Abbreviations

ACT	Action by Churches Together
AHRD	ASEAN Human Rights Declaration
AI	Amnesty International
AICHR	ASEAN Intergovernmental Commission on Human Rights
AITPN	Asian Indigenous and Tribal Peoples Network
ALRC	Asian Legal Resource Centre
ANTI	Timor-Leste National Alliance for International Tribunal
ASEAN	Association of Southeast Asian Nations
BHEUU	Legal Affairs Division
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT	International Convention against Torture
CAVR	Commission for Reception, Truth, and Reconciliation Timor-Leste
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention to Eliminate All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHR	Commission on Human Rights
CHRD	Centre for Human Rights and Democracy
CNRT	Conselho Nacional da Resistência Timorense—National Council of Timorese Resistance

COMANGO	Coalition of Malaysian NGOs in the UPR Process
CRC	Convention on the Rights of the Child
CRC—OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
CRC—OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
CRIN	Child Rights International Network
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organization
CTF	Commission of Truth and Friendship
ECLJ	European Centre for Law and Justice
ERT	Equal Rights Trust
ESC	Economic, Social and Cultural
ESCR	Economic, Social and Cultural Rights
FKUB	Forum Kerukunan Umat Beragama
GANHRI	Global Alliance of National Human Rights Institutions
GONGO	Governmental-Orientated NGO
GEN	Gender Equality Network
HRC	Human Rights Council
HRDs	Human Rights Defenders
HRF	Human Rights First
HRW	Human Rights Watch
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGLA-Asia	International Gay, Lesbian, Bisexual, Trans and Intersex Association—Asia
ILO	International Labour Organization
INGOFID	International NGO Forum on Indonesian Development
ISHR	International Service for Human Rights
JC	Jubilee Committee
KomnasHAM	Komisi Nasional Hak Asasi Manusia
LCG	Land Core Group

LGBT	Lesbian, Gay, Bisexual and Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intrasex Persons
LGBTIQ	Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer
LWF	Lutheran World Federation
MNHRC	Myanmar National Human Rights Commission
MoSWRR	Ministry of Social Welfare, Relief and Resettlement
MURPO	Muslim NGOs in the UPR Process
NAP	National Action Plan
NaTaLa	Ministry of Progress of Border Areas and National Races and Development Affairs
NGO	Non-Governmental Organization
NHRAP	National Human Rights Action Plan
NHRI	National Human Rights Institution
NLD	National League for Democracy
OD	Open Doors
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
PAPERNAS	National Liberations Unity Party
PBM	Joint Ministerial Regulations
PCI	Pax Christi International
PPPA	Printing Presses and Publication Act (Malaysia)
RRD	Relief and Resettlement Department
SADPC	Singapore Anti-Death Penalty Campaign
SMART	Specific; Measurable; Achievable; Results-focused; and Time-bound
SOGIESC	Sexual Orientation, Gender Identity and Expression, and Sexual Characteristics
SUHAKAM	Human Rights Commission of Malaysia
SuR	State under Review
TPPA	Trans-Pacific Partnership Agreement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UPR	Universal Periodic Review
UNTAET	United Nations Transitional Administration in East Timor
UNTOC	United Nations Convention against Transnational Organised Crime
WCADP	World Coalition Against the Death Penalty

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CHAPTER 1

Introduction—The Universal Periodic Review of Southeast Asia: A Regional Mapping

James Gomez and Robin Ramcharan

Introduction

Southeast Asia in the early twenty-first century appeared to be shying away from liberal democracy, the rule of law and attendant rights (Gomez and Ramcharan 2014). After impressive transitions across the region towards liberal rights-based governance enshrined in the ASEAN Charter of 2007, human rights appeared to be in regression as authoritarian governance surged.

A realist order hung over the region as seemingly progressive states appeared to be snubbing the ASEAN Charter. The founders of realism had warned that ethics in the relations between states would give way to perceived vital national interests (Morgenthau and Thompson 1948). Indeed, amidst global power transitions centred on the Asia-Pacific, the unending menace of international terrorism and the allure of global economic integration, upholding human rights norms appeared to be on the backburner, though they could not be ignored altogether, hence the creation of an ASEAN peer-review mechanism that serves more as a firewall mechanism to protect member states and regional economic interests.

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In this context, could the liberal institutionalist vision hold sway as advanced by some scholars? (Keohane and Martin 1995) The role of the United Nations and of regional organizations in the diffusion and protection of human rights is well treated in human rights literature (Steiner et al. 2008). Could ASEAN's regional mechanism, the Intergovernmental Commission on Human Rights, influence the behaviour of its members and hold states accountable to the standards they have adopted ultimately serving to protect human rights?

To date, while the creation of the ASEAN Intergovernmental Human Rights Commission on Human Rights (AICHR) is a welcome development that serves to enhance (secretive) rights communication between members, it has not publicly demonstrated such a capacity and it has focused largely on the promotion of human rights. A key problem afflicting this mechanism is the appointment by a majority of the governments of "state-connected" individuals as AICHR representatives, which impedes real independence. Deeper research into the impact on norms diffusion within the AICHR peer-review process and its impact on "reluctant" human rights norms takers is in order.

ASEAN's historic diplomacy of accommodation (Antolik 1990) or the vaunted "ASEAN way" is another avenue for the diffusion of human rights norms in line with constructivist arguments. It has been argued that the states of the region socialized each other into a common understanding of their common security concerns and thus produced a "security community" around the principle of non-interference (Acharya 2001). Human rights norms diffusion and ultimately the protection of human rights may yet be achieved in this way as has been argued (Finnemore and Sikkink 1998; Risse et al. 1999). After all, despite deep divisions on the issue, ASEAN states compromised sufficiently to create a regional human rights mechanism as called for by the Charter of 2007. However, this was done more for appeasing the international community as opposed to a genuine internal regard within the region to adhere to human rights principles.

As a result, the regional institution shows no signs of being able to influence the human rights policies and practices of its members. In 2017, 50 years after its creation and 10 years after the adoption of the ASEAN Charter, one of the world's most successful regional organizations struggles to live up to its new norms—good governance, democracy and human rights for its peoples. While it has successfully guarded over the national security of its members and their ruling elites and sought to integrate the ten economies to cater for increased business productivity, it has thus far

struggled to safeguard the universally recognized rights of its peoples. Instead, universal human rights standards, consented to by ASEAN in its own regional declaration of human rights, are flouted as many members are not party to the core international treaties on human rights and adopt contrary policies and practices. While electoral democracy has advanced in form regionally in some countries, the protection of universal human rights and the rule of law appear to be regressing on the ground.

Given the challenges of the ASEAN regional human rights mechanism, can the Universal Periodic Review (UPR) fill this void? The contributions are premised on the argument that the UPR, through its multi-stakeholder engagement—Southeast Asian states, international institutions and global and local civil society—constitutes a critical regional norms diffusion and protection mechanism. To date, states have fulfilled their reporting duties under the UPR to the Human Rights Council (HRC), and the UPR "dialogue" process is one in which Southeast Asian members appear to be comfortable engaging.

Unlike in AICHR, civil society actors are present at the UPR to hold up a mirror to their respective governments. The contributions of civil society in norms diffusion and in the protection of human rights are well documented (Korey 2001). In Southeast Asia, both at the regional and at the national level, if civil society can formally play a role in holding states accountable on human rights issues, perhaps it can help states to internalize human rights norms as part of the identity of states, as advanced by constructivist theorists. Hence continued evidence-based research on the UPR, regional mechanism and national human rights institutions (NHRIs) can help track the potential of civil society contributions to human rights advocacy in Southeast Asia.

The Universal Periodic Review

The Universal Periodic Review (UPR) of the United Nation's Human Rights Council was created in 2006. The UPR is one of the mechanisms that helps the Human Rights Council (HRC) to perform its duties, together with the Special Procedure, the Complaint Mechanism and the Human Rights Council Advisory Committee (UN Human Rights Council 2017).

The HRC was set up as a subsidiary body of the General Assembly of the United Nations (UN General Assembly 2006) to replace the Human Rights Commission which was criticized for becoming highly politicized and confrontational. The new HRC comprises 47 member states

and is directly responsible to the General Assembly of the UN and is serviced by the Office of the High Commissioner for Human Rights (OHCHR). Its overall objective is to "address human rights violations and make recommendations on them" (OHCHR 2017a).

The UPR is a mechanism established by the HRC, which aims to better the human rights record in each of the 193 United Nations (UN) member states by reviewing their human rights records every four and a half years. The OHCHR notes that the UPR "provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations" (OHCHR 2017b). The HRC Resolution 5/1 of 18 June 2007 stated, inter alia, a key objective of the UPR process: "The improvement of the human rights situation on the ground."

Thus, the UPR is as an important component of the new HRC to boost the profile of human rights and to establish norms of conduct to improve these rights via a feedback mechanism. It is a significant innovation that is based on equal treatment for all states. It provides an opportunity for all states to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. States are encouraged to prepare the information they submit through a broad consultation process at the national level with all relevant stakeholders. The UPR also aims to provide technical assistance to states and enhance their capacity to deal effectively with human rights challenges and to share best practices in the field of human rights among states and other stakeholders. By design, this state-driven UPR mechanism provides a unique form for all stakeholders to examine, criticize, support and suggest the promotion and protection of human rights on the ground. In short, it is designed to be a tool for states to use to measure themselves against other states and to improve their human rights performance. However, the government has the option to do as it pleases and often national interests prevail over its international human rights obligations in the event that the two clash.

The UPR was established by the UN General Assembly (UNGA) in resolution 60/251. The resolution mandated the UNHRC to "undertake a universal periodic review, based on objective and reliable information, of the fulfillment 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". There are three cycles of the UPR mechanism: preparation, review and implementation and follow-up.

There are three key documents for the UPR process at the level of preparation. First is the national report, which is prepared by the state under review (SuR). Second is the Office of the United Nations High Commissioner for Human Rights (OHCHR) report that is compiled by the OHCHR based on information contained in reports of treaty bodies, special procedures and other UN documents. Third is the stakeholders' report that is compiled by the OHCHR based on NHRI and CSO submissions. For the review stage, it involves interactive dialogue and adoption of an outcome report. During the interactive dialogue, the SuR presents its national report, and UN member states pose questions, comment and provide recommendations to SuR. The latter then may choose to accept, reject or comment on the recommendations. That leads to the summary of proceedings, recommendations and comments adopted in an outcome report. Thereafter, the most important stage is the implementation and follow-up. At this stage, the government is to implement accepted recommendations. Implementation of rejected recommendations is also encouraged. For monitoring and advocacy, NHRI and CSOs may monitor and push for the implementation of recommendations.

The UPR held its first session from 7 to 18 April 2008. By 2016, the UPR has completed two cycles of examinations of state reports on human rights situations in member states of the UN, including Southeast Asian countries. Even though the UPR is a state-centre mechanism, it provided CSOs a unique opportunity to engage with human rights as the mechanism had a built-in framework for CSO participation. In Southeast Asia, the UPR has become a focal point for CSOs, governments, intergovernmental organizations and donors through which to articulate and highlight human rights issues. To support civil society engagement with the UPR process, numerous consultations and trainings have been held to facilitate submissions to the UPR. For intergovernmental organizations, donors, international NGOs, the focus has been very much on facilitating the process of participation and collaboration in drafting and submitting reports. Governments in the region have also met with their local CSOs to demonstrate engagement with civil society. But what has been the impact of CSOs' advocacy in the UPR in terms of implementation? Ultimately, has it helped in enhancing human rights protection in the region? To answer these questions, this book identifies and analyses civil society engagement in the UPR of Southeast Asian countries over the past two cycles. In particular, the book seeks to track the types of civil society organizations (CSOs) engaging with the UPR, trends in CSO submissions to

the UPR process, dominant issues raised in the CSO submissions and the impact of CSO submission on furthering human rights protection under the UPR.

The editors begin by outlining the Asia Centre mapping of civil society trends and themes during the UPR of Southeast Asian countries. This is followed by an introduction of the chapters in the book.

Civil Society Trends and Themes in the UPR of Southeast Asia

Historically, CSOs have been hailed as a bulwark to the protection of human rights in other parts of the world. In Southeast Asia, thus far, CSOs do not have any institutionalized engagement with regional or national human rights mechanisms. With regard to AICHR, civil society lobbied over 20 years for its formation but has not been granted, thus far, any formal role in this mechanism (Gomez and Ramcharan 2013). With reference to the NHRIs in the six countries that have established one, civil society has not been able to effectively influence the limited work of these bodies (Gomez and Ramcharan 2016). Yet governments in Southeast Asia speak of engagement with civil society on matters related to regional and national human rights mechanisms and point to meetings with civil society members as evidence of engagement. It is not clear what benefits these interactions have yielded, except to provide states opportunity to demonstrate their "engagement" with civil society. But have these engagements been effective for human rights protection in Southeast Asia? With national human rights institutions (NHRIs) struggling to enhance their effectiveness in constraining domestic political contexts and with the ASEAN Intergovernmental Commission on Human Rights (AICHR) committed to a secretive, peer-review process and a promotional approach, can civil society organizations (CSOs) advance the protection of human rights across the region by using other platforms? In the contemporary human rights landscape in Southeast Asia, where illiberal democracy holds sway, what impact has the Universal Periodic Review (UPR) had on the protection of human rights in the region?

Asia Centre undertook a review of the UPR process in early 2016 following input from academia, civil society, donors, international NGOs and intergovernmental organizations alike, on the lack of evidence-based research into the impact of the UPR on human rights in Southeast Asia. The macro level analysis involved the mapping of trends in CSO participation,

nature of the submissions (individual or joint) and a thematic analysis of the key issues raised in the UPR over two cycles. Cycle 1 occurred between 2008 and 2011, while cycle 2 took place between 2012 and 2016. The review took place over a six-month period from January to June 2016 and involved a review of the national report from the state under review, compilation on UN information and summary of stakeholder information prepared by the Office of the High Commissioner for Human Rights, the report of the Working Group on the UPR and the addendum from the state under review, for all ten ASEAN countries and Timor-Leste, across both cycles of the UPR. A numerical analysis was undertaken of the number of CSOs participating in each country's review as well as the number and types of submissions; joint and individual. This was supplemented by a thematic analysis of the documents.

The research and analysis comparing the cycles revealed three key trends. Firstly that the overall number of CSOs participating in the UPR had increased by 27% from 592 CSOs in the first cycle to 811 CSOs in the second cycle (see Table 1.1). Secondly, corresponding with the increase in the number of participating CSOs was an increase in the overall number of submissions that were compiled into the stakeholder summary. In Table 1.1, we see that the total number of submissions, either individually or jointly, rose by 65% from 188 submissions in cycle 1 to 310 submissions in cycle. Thirdly, an analysis of the types of submissions revealed an increase in the number of joint submissions in cycle 2. A noteworthy trend in the submissions is the rise in joint submissions; for example, of the total rise in CSO submissions by 122 in cycle 2, some 68 were in joint submissions while individual submissions totalled 54.

The general trend is a larger increase in the number of joint submissions than individual submissions. Overall the trend across the board was an increase in CSO involvement from cycle 1 to cycle 2, thereby clearly establishing the important role of CSOs in the UPR process (see Table 1.1).

Table 1.1 CSOs engagement with the UPR on Southeast Asia: cycle 1 (2008–2011) and cycle 2 (2012–2016)

	Cycle 1	*Cycle 2*	*Number increase*	*Percentage increase*
CSO participation	592	811	219	27%
Submission	188	310	122	65%

Source: Various documents from the Universal Periodic Review

The preliminary research on the content of the key document that frames the interactive dialogue of the UPR also revealed some key thematic trends. Firstly, issues which were within the domain of treaty bodies were well captured by the compilation of UN information prepared by OHCHR. These include issues pertaining to the rights of women, children and people with disabilities which have specific treaties and treaty bodies on the issue. This is in line with the fact that all ten current ASEAN countries are parties to the Convention on the Elimination of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD), with prospective member Timor-Leste being party to the former two. Given that these issues were captured within the compilation of UN information, the preliminary review posited that these were areas where CSOs and NGOs previously campaigned and made some head away. The challenge was to identify new and emerging areas that we the focus on CSOs, as well as to identify areas that need more emphasis.

Secondly, the focus of the review moved to CSO participation and submissions captured in the stakeholder summaries. Here, the thematic analysis revealed that the core issues being raised by CSOs were in relation to the use of the death penalty, LGBTI issues, migrant workers' rights and the right of refugees. For these issues, the level of ratification and engagement with treaty bodies is far less, but CSO participation and submissions were relatively higher compared to other areas. This trend was substantiated by the manner in which CSO chose to make submissions on issues. Across the countries surveyed, we see that there were broad efforts at coalition building through the submission of joint reports covering a range of issues and highlighting the intersectionality of various rights. CSOs, which focused specifically on death penalty and migrant worker issues, also submitted individual reports which went into more detail about their issue areas, while CSOs focusing on LGBTIQ issues banded together with international LGBTI NGOs to submit an issue-specific joint report. The analysis revealed similar patterns of strategic engagement in many ASEAN countries through CSOs participation in coalition joint reports alongside individual submissions. There was also greater transnational coalition building through joint submissions by local and INGOs

Thirdly, the review of stakeholder summaries also showed that hard political issues such as civil and political liberties tended to be sidelined or not raised. The areas states resisted include civil and political rights, independent institutions (election commissions, NHRIs) (all countries), extrajudicial killings (Philippines), indigenous peoples/minority rights (Lao-Hmong, Myanmar-Rohingya), freedom of religion and belief (Brunei, Vietnam),

persecution of minority religions (Indonesia), freedom of expression/lèse majesté (Thailand), autonomy claims (Indonesia-West Papua, Philippines-Mindanao, Southern Thailand), truth and reconciliation and past grievances (Timor-Leste), terrorism-related arbitrary detention (Malaysia, Singapore). These issues overlap in one or several Southeast Asian countries and are areas on which states are not willing to engage on and actively resist. The reports of the Working Group which summarized the interactive dialogue of the review and the addendum which provided the SuR views on conclusions, recommendations and voluntary commitments saw states using language such as noting the recommendation, rejecting the recommendation or stating that the recommendation was based on inaccurate information, false information or mistaken underlying assumptions.

Cumulatively, the preliminary analysis pointed to increased CSO participation and submissions, CSOs favouring joint submissions over individual ones and CSOs prioritizing certain issues over others. There is a strong correlation between the volume of participation and submissions. The greater the increase in total number of CSO participation between cycle 1 and cycle 2, the greater the increase in the number of total submissions. As previously mentioned, apart from individual reports by CSOs, in cycle 2 in particular, there were significant efforts at coalition building through the submission of joint reports as well as CSOs participating in multiple joint reports. There were also a strong correlation between the volume of participation and submissions and the kinds of themes that are emphasized. For instance, the issues related to the use of death penalty, LGBTI rights, migrant workers' rights and rights of refugees also reflect the larger number of CSO participation and submissions in these areas.

The identification of these trends and themes warranted further research and more in-depth analysis and thus was the foundation on which Asia Centre's 2016 conference on the UPR was convened. The objective of the *Universal Periodic Review in Southeast Asia: An Evidence-Based Regional Assessment* was to determine whether the Asia Centre's preliminary analysis and mapping of trends and themes resonated with the experiences on the ground. The conference thus convened a mix of practitioners and academics who were actively engaged with the UPR across both cycles. The conference themes addressed the role of the UPR in relation to other UN mechanisms and processes such as the treaty bodies, advocacy themes that were prevalent in the interactive dialogue and UPR submissions by CSOs as well the issues that showed little movement across both cycles. The key takeaways from the conference were that the UPR has been an effective

mechanism for putting human rights issues on the agenda and civil society played an active part in engaging states in conversations about critical issues. However, systemic problems remain with regard to engagement with other stakeholders, the implementation of recommendations by governments, the efficacy of follow-up processes and the UPR's ability to address hard political issues.

Outline of Book and Chapters

This book is organized in four parts. Part One has two chapters that discuss the overview of the UPR in general and in relation to Southeast Asia. In Chap. 2, *Addressing Human Rights Protection Gaps: Can the Universal Periodic Review Process Live Up to Its Promise?*, Michael JV White provides the background to the establishment of the UPR and notes that unlike previous mechanisms and instruments, "While States appear to take the UPR more seriously than they take other human rights treaty bodies, the process has been criticised as being overly politicised and less rigorous than a system reliant on independent experts." He argues that regardless of these criticisms, there is no doubt of the potential of the UPR to improve the realization of human rights within member states. At the heart of this is the partnership model that is an integral feature of the UPR. The UPR provides a unique opportunity for NGOs, individuals and civil society groups to influence a state's human rights landscape and improve the realization of rights across all sectors. It envisages states, National Human Rights Institutions and civil society working together. In Chap. 3, the *Universal Periodic Review on Southeast Asia Norm Building in Transition: A Hermeneutic Approach*, Theodor Rathgeber demonstrates that the Universal Periodic Review (UPR) has focused states to confront their human rights record in public. Out of the total of 11 Southeast Asian states, Rathgeber examines the cases of Cambodia, Indonesia, Malaysia, Myanmar, Philippines and Thailand where he demonstrates that the majority of these governments did not like their human rights record placed under scrutiny. Nevertheless, he argues that the UPR presents civil society organizations with the opportunity to engage with governments in terms and procedures, while the issue of follow-up and implementation of recommendations still remains and remains low in Asia compared to other parts of the world.

Part Two examines those themes that received substantial civil society attention during the UPR such as issues related to the use of death penalty, LGBTIQ issues and migrant worker rights and rights of refugees both at the regional and country levels. In Chap. 4, *The Abolition of the Death*

Penalty in Southeast Asia: The Arduous March Forward, M. Ravi compares how the death penalty regimes of Singapore, Malaysia, Brunei Darussalam and Myanmar were discussed and analysed over two cycles of the UPR. He notes that while the region is often associated with the liberal use of the death penalty, particularly for drug-related offences, in recent years trends suggest a move towards abolishment, through moratoriums and legal reform. Ravi's analysis of the UPR discourse in the four countries reveals that CSOs and other states participating in the review have placed an emphasis on the use of the death penalty for drug-related offences and the imperative to move beyond moratorium and establish an outright abolishment. He suggests that moving into the third cycle, the UPR is likely to continue to be an important platform for advocacy against the death penalty. Chapter 5, *LGBTIQ Rights in Southeast Asia: Implementing Recommendations from the Universal Periodic Review*, is written by Destination Justice which discusses the implementation of recommendations from the UPR process of Southeast Asian countries. The chapter analyses the impact of the UPR on the work of LGBTIQ human rights defenders (HRDs) in ten ASEAN countries and Timor-Leste, over the two cycles of the UPR. Destination Justice notes that same-sex relationships are criminalized in four of the eleven countries under Section 377 of their penal codes, resulting in LGBTIQ HRDs facing a greater risk in Malaysia, Myanmar, Brunei, Singapore, and since 2016, in Indonesia with a resurgence of public homophobic statements by authorities. The chapter shows that even though the countries have made and received recommendations on how to promote and protect human rights in general and LGBTIQ rights in particular, the UPR has had little impact on LGBTIQ HRDs in the region. Destination Justice concludes the chapter by noting that the appointment of the UN SOGIE expert to promote LGBTIQ rights still does not rule out the relevance for the UPR. In Chap. 6, *Singapore's Universal Periodic Review: Civil Society Trends and Themes*, James Gomez and Michelle D'cruz examine the role of Singaporean CSOs and their participation in the UPR over two cycles in 2011 and 2016. Gomez and D'cruz find that the issues that have gained prominence in the UPR process are the ones that have had the larger and sustained CSO participation, with the three main concerns being migrant workers, LGBTI and the death penalty issues. They note that concerns related to hard political issues received comparatively lesser attention and that more advocacy and representation are needed in the next UPR process in 2020 if politically related issues such as civil liberties, independent institutions and racial discrimination are to gain more traction.

Part Three examines some of the hard political issues that states resist. Here examples from Timor-Leste's challenge for restorative and transitional justice, the issues of religious intolerance in Indonesia and the strategy of non-confrontational engagement with the government of Myanmar are considered. In Chap. 7, *The Universal Periodic Review of Timor-Leste: Achieving Justice for Past Human Rights Abuses Under Indonesian Rule*, Cristian Talesco and Brigette S. Valentine discuss Timor-Leste's UPR experience. They begin by reminding readers that the Indonesian invasion in 1975 which lasted 24 years resulted in lots of human rights abuses. Indonesia withdrew from the country, when the international community brokered self-determination for Timor-Leste. However, the issue of justice for Timorese people who were subjected to human rights abuses is still not achieved. There have been various reconciliation efforts but the perpetrators of human rights abuses have yet to be all tried and punished. The chapter argues that the Timor-Leste government does not want go down this route and risk confrontation with Indonesia. CSOs have taken to advocacy through the UPR to bridge this gap. However, the UPR advocacy by CSOs over cycles 1 and 2 has not proven to be effective. In Chap. 8, *Freedom of Religion and Belief in Indonesia: Raising Awareness Through the Universal Periodic Review*, Hesty Dewi Maria Siagian examines the state of protection of religions and beliefs in Indonesia. There are several articles in the country's constitution that guarantees the rights to religious freedom. However, Indonesia's laws prohibiting and punishing the "abuse or defamation of religions" are contrary to international human rights law. Hesty's review of Indonesia's UPR cycle 1 and 2 shows there have been more states and CSOs making interventions and submission on this issue. The main challenge is that the Indonesian government's rhetoric of demonstrating that the national legal framework supports religious freedom which does not match with ground realities. Non-recognized religions face discrimination and restrictions and are often victims of violent attacks by extremist factions and fundamentalist groups. Hence freedom of religion and belief is something that needs to be addressed moving forward during Indonesia's third UPR cycle. In Chap. 9, *Non-Confrontational Human Rights Advocacy: Experiences from the UPR Process in Myanmar*, Francesca Paola Traglia considers how and why the Lutheran World Federation in Myanmar (LWF Myanmar) has sought a constructive engagement with the government of Myanmar rather than adversary exchanges in their work for the advancement of human rights in the country. This approach she notes has led to concrete results in terms of engaging the diplomatic community

and steering Myanmar towards engagement with human rights compliance. The chapter highlights that Myanmar is in a process of democratic transition and notes that Myanmar chose to reject recommendations on the civil and political issues related to indigenous people, Rohingyas and internment camps; however, it accepted other recommendations that would improve the situation. Hence, the political context of the country dictates the nature of the issue and language that is appropriate in raising political sensitive issues; human rights advancements are possible if policy dialogue is carefully designed.

Part Four examines how other mechanisms such as NRHIs and AICHR engage with the UPR process. In particular, they highlight the weak follow-up and implementation of UPR recommendations. In Chap. 10, *Can NHRIs Bridge the Implementation Gap? Assessing SUHAKAM's Effectiveness in Malaysia's Universal Periodic Review*, Khoo Ying Hooi assesses Malaysia's Human Rights Commission (Suhakam) and its follow-through on UPR recommendations. She notes that despite the growing prominence of the UPR, a number of challenges continue to hinder the realization of the process. One key question confronting the peer-based UPR is whether the UPR is succeeding in influencing states to respect their obligations under international rights regimes. This is so because the states have the option of not complying with UPR recommendations in the name of national interests which will prevail over its international human rights obligations in the event that the two clash. After two cycles of the UPR process with the government of Malaysia in 2009 and 2013, the debate remains as to whether the UPR has any meaningful influence on Malaysia's human rights performances. In Chap. 11, *The UPR and Its Impact on the Protection Role of AICHR in Southeast Asia*, Celine Martin explores the growing interest in AICHR and what could be its role in the UPR process. The chapter notes some ASEAN states are recommending to fellow ASEAN state to foster their role and engagement towards building a protective regional human rights mechanism in Southeast Asia. It highlights the high number of those recommendations made by fellow ASEAN states in a bid to internationally recognize the efforts made since the creation of the AICHR in 2009, as well as to acknowledge the individual contribution made by the ASEAN states to participate into the development of a protective mechanism. Yet with a total of 20,452 recommendations given over the past eight years worldwide, only 14 of them address the AICHR, which is almost a negligible number. Another surprising element was that 85% of the UPR recommendations on the AICHR were given by Southeast Asian states to

their peers. This singularity shows the lack of interest from the international community for the AICHR or at least a small interest compared to other issues. Additionally, there is also a low level of follow-up with regard to the recommendations. Nevertheless the chapter argues that the UPR presents opportunities to contribute to the development of AICHR.

Conclusion

The book ends with a conclusion where the editors reconcile the mapping undertaken by Asia Centre and the experiences articulated by the chapter writers. The editors take stock of the two UPR cycles and make some observations about the patterns of CSO participation and submissions. They conclude that civil society's critical role in the UPR process should be extended to regional mechanisms and at the national levels.

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PART I

Regional Perspective

CHAPTER 2

Addressing Human Rights Protection Gaps: Can the Universal Periodic Review Process Live Up to Its Promise?

Michael J.V. White

Introduction

The Universal Periodic Review (UPR) of the United Nations (UN) Human Rights Council (HRC) was designed to be a more inclusive, fairer and universal process. The enjoyment of all human rights in all states is reviewed. The process relies on a co-operative model to catalyse human rights implementation rather than the traditional confrontational model. Unlike the concluding observations of the United Nations treaty bodies, states must formally accept or reject recommendations made through the UPR. Accepted recommendations reflect a political commitment from each state to implement them before the next review.

While states appear to take the UPR more seriously than they take other human rights treaty bodies, the process has been criticised as being overly politicised and less rigorous than a system reliant on independent experts.

Regardless of these criticisms there is no doubt of the potential of the UPR to improve the realisation of human rights within member states. At the heart of this is the partnership model that is an integral feature of the UPR. The UPR provides a unique opportunity for NGOs, individuals and civil society groups to influence a state's human rights landscape and improve

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the realisation of rights across all sectors. It envisages states, national human rights institutions and civil society working together.

But is it living up to its promise and achieving change? Without relevant follow-up, the UPR will not achieve the requisite improvement of human rights on the ground. There are challenges for members of the Human Rights Council and civil society if the UPR is to deliver on its promise.

This chapter examines the effectiveness of the UPR across the first two cycles. It identifies areas of good practice, ongoing gaps and opportunities for the maturing of the process to better achieve the realisation of rights within states.

Background

The UPR mechanism was introduced under Resolution 5/1 by the United Nations Human Rights Council (HRC) in 2007. Before considering the UPR in detail, it is useful to consider its creation and development.

The institutionalisation of the idea of monitoring human rights implementation through periodic review of state reports has its genesis in a 1956 ECOSOC Resolution. The Resolution requested states to submit reports to the Commission on Human Rights (CHR) on progress achieved within their territories every three years, in advancing the rights enshrined in the Universal Declaration of Human Rights. This review process was never particularly successful and, with the promulgation of human rights Covenants and Conventions—which included reporting requirements—was progressively considered obsolete. The process was formally abolished in December 1980 (United Nations General Assembly, Resolution 35/209).

Over the years CHR was increasingly being criticised as being a forum for politically selective "finger-pointing" which did not engage in constructive discussion of human rights issues. The CHR was described as a "completely broken mechanism for intergovernmental decision-making" by the United States Ambassador to the United Nations, John Bolton (Bolton 2006). In 2003 UN Secretary General chastised the CHR for its "divisions and disputes" which in his view had seriously weakened the strength of its voice (Annan 2003). In 2005 Kofi Annan released a report *In Larger Freedom: Towards Development, Security, and Human Rights for All* in which he called for major reform of the United Nation's human rights promotion efforts. The Secretary General referred to the declining professionalism of the CHR and the consequential impact on credibility (UN General Assembly 2005: 182).

It should be recalled that the CHR was not the sole mechanism for reviewing the extent to which states implement their human rights obligations. The core international human rights treaties[1] created independent bodies of experts to monitor the implementation of the provisions of each treaty (treaty bodies).[2] Each treaty body is composed of independent experts who are nominated and elected by state parties.

Treaty bodies are mandated to receive and consider periodic state reports setting out how well they are applying the treaty domestically.[3] The relevant treaty body examines the report—and any other relevant information it has received—and engages in a dialogue with the state party. Following the dialogue, the treaty body publishes its "concluding observations" which detail concerns and recommendations to the state party.

While the treaty body framework provides a platform for expert review of each state's human rights records, it has and continues to be problematic in several areas.

There has been an increase in ratification of the core human rights instruments over time. The Office of the High Commissioner for Human Rights (OHCHR) reported that "the six core international human rights treaties in force in 2000 had attracted 927 ratifications. In 2012, this total increased by over 50 per cent to 1,586 ratifications" (Pillay 2012: 17). This does not, however, equate to universal ratification, meaning that there are some states that have not had their human rights records, or some part of it, scrutinised by the expert treaty bodies. Furthermore, while periodic reporting is a key legal obligation, many states do not fully comply with this obligation. For example, as set out in Table 2.1 (Ibid: 21) in 2011 approximately 16 per cent of reports across all treaty bodies were submitted on time.

Table 2.1 State reporting to treaty bodies

Treaty body	*Reports received*	*Reports on time*	*Per cent on time*
CAT	13	4	31
ICCPR	13	2	15
ICESCR	15	2	13
CEDAW	27	4	15
CERD	15	1	7
CRC	14	2	14
CRPD	17	6	35
CMW	5	0	0
CRC-OPSC	8	0	0
CRC-OPAC	10	1	10
Total	137	22	16

The OHCHR noted:

> With such a persistent high level of non-compliance with reporting obligations, treaty bodies have established an ad hoc schedule of work based on the submission of reports by States as they come in. As a consequence, a State that complies with its reporting obligations faithfully will be reviewed more frequently by the concerned treaty body compared to a State that adheres to its obligations less faithfully. Non – compliance therefore generates differential treatment among States. (Ibid: 22)

In 2016, the United Nations Secretary General submitted his first biennial report on the status of the human rights treaty body system (UN General Assembly 2014). The report found that the large majority of states continued to face challenges in submitting reports in a timely manner to the treaty bodies. "Two Treaty Bodies counted more than 20 States Parties whose periodic report was more than 10 years overdue (Committee on the Elimination of Racial Discrimination, Human Rights Committee)" (Ibid: 3).

The treaty body system also has an endemic issue with coherence. Each treaty body has its own scope and processes and, in some cases, different interpretations or priorities on cross-cutting issues. This can result in a lack of consistency in advice and guidance given to states, meaning that states can be reluctant to implement certain recommendations.

Perhaps the biggest challenge with the treaty body system is that it relies entirely on the willingness of states for implementation. There is no requirement to respond to recommendations and little (if any) pressure to implement recommendations in between cycles. It is not uncommon for states to ignore concluding observations domestically and continue to operate with little regard for the treaty bodies' views until its next periodic report is due. Commitment to human rights treaties can often be more rhetorical than real.

Some states have also shown a reluctance to engage in the treaty body process because it is seen as an adversarial process.

A New Mechanism: A Noble Aim

Both the HRC and the UPR stem from Kofi Annan's 2005 report. During a speech to the CHR on 7 April 2005, Kofi Annan recommended that the new HRC "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" (Annan 2005). He believed that the peer-review procedure should complement but in no way replace the states' reporting system under the treaty bodies. Annan stressed that the procedure should be fair, transparent and workable, whereby states are reviewed against the same criteria (Ibid).

Accordingly, the General Assembly when creating the HRC decided to include an innovative peer-review process—the UPR. The HRC 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" (UN General Assembly 2006: 5(e)).

The UPR was intended to work co-operatively with states and not divisively against them. It was designed to prompt more regular reporting within a four-year period with 48 members to be reviewed every year, to be more inclusive, to be fairer and to be universal. All United Nations members are reviewed in much the same manner and by the same process and much the same criteria (Human Rights Council 2007). The enjoyment of all human rights in all states is reviewed. The review is based on the Charter of the United Nations, the Universal Declaration of Human Rights, human rights instruments to which the state is a party and other voluntary commitments made by states. This is considered by many to be one of the benefits of the UPR because "it epitomises the unity of human rights" (Tomuschat 2011: 614).

The review is informed by three sets of documents:

a) A 20-page report prepared by the state under review (SuR). This report should be prepared through broad consultation domestically;
b) A compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in treaty body reports and reports from other United Nations mechanisms;
c) A ten-page summary of additional information provided by other relevant stakeholders.

It should be noted that if a state fails to submit a written national report or chooses not to do so, this does not excuse them from review as it does with the treaty bodies. In such a situation, an oral report can be presented.

Central to the process is the interactive dialogue with the state under review. The state presents its report, other states can then comment on it,

ask question and/or make recommendations. While an innovative process, the timeframes for the dialogue are short. Three hours are allocated for each review with each state being given approximately two minutes to comment.

Perhaps most importantly the Human Rights Council has embedded the participation of stakeholders as the central principle of the UPR since its inception:

> (m) Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions, in accordance with General Assembly resolution 60/251 of March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decision that the Council may take in this regard. (UN Human Rights Council 2007: Annex, 3(m))

In practice this translates to civil society and national human rights institutions being formally invited to contribute to the review by submitting their own submissions on the human rights situation domestically. Furthermore, "States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders" (UN Human Rights Council 2007: Annex 15(a)).

In relation to follow-up and implementation, the Human Rights Council has recommended the involvement of all relevant stakeholders:

> While the outcome of the review, as a cooperative mechanism, should be implemented primarily by the State concerned, States are encouraged to conduct broad consultations with all relevant stakeholders in this regard. (UN Human Rights Council 2007: Annex 17)

Taken collectively the requirement of participation and the universal scope of the UPR provide a unique opportunity to promote human rights in all settings. The UPR, captured in Fig. 2.1, is a continuous process and requires each cycle to focus on the implementation of accepted recommendations from previous cycles.

Defining Success: How to Assess the Effectiveness of the UPR

As the second cycle of the UPR ended in 2016, all states have been examined in the process twice. At the outset of its third cycle, it is worthwhile considering the effectiveness of the process and whether it is living up to

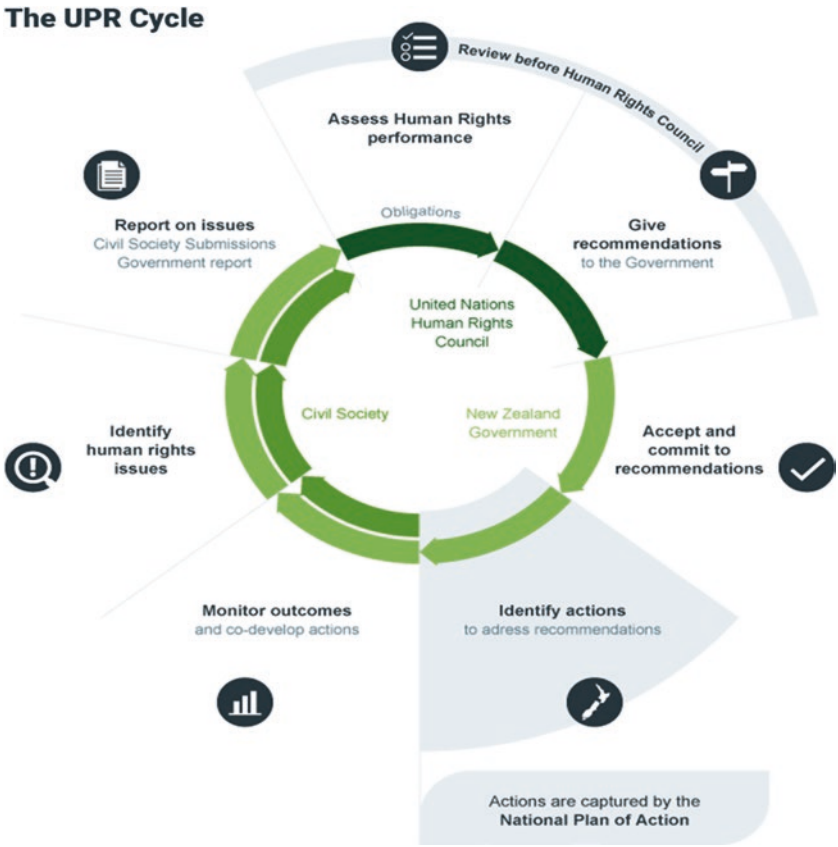

Fig. 2.1 The UPR process
Source: New Zealand Human Rights Commission

its promise of improving the human rights situation on the ground. Before doing so it is useful to recall the principles and objectives of the process. The principles of the UPR include that it:

- should promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
- is a cooperative mechanism based on objective and reliable information and on interactive dialogue;
- be an intergovernmental process that is UN member nation driven and action-oriented;

- fully involves the country under review;
- complements but does not duplicate other human rights mechanisms;
- not be overly burdensome on the state, not be overly long; be transparent, objective and non-confrontational and non-politicised;
- fully incorporates a gender perspective;
- takes country development into account without derogating from basic human rights; and
- ensures the participation of all relevant stakeholders including non-governmental organisations and national human rights institutions.

The objectives of the UPR are:

- the improvement of human rights on the ground;
- the fulfilment of the state's human rights obligations and commitments;
- assessments of positive developments and challenges faced by the state;
- enhancing the state's capacity and technical assistance; and
- the sharing of best practice.

The UPR has been described as both a mechanism and a process: a mechanism to improve the realisation of human rights domestically and a process of engagement—engagement between states at the international level and engagement between states and their constituents domestically. In this regard, depending on how one looks at the UPR will have a bearing on any analysis of its effectiveness and impact.

First Impressions

The UPR process has meant that all countries' human situations are scrutinised and that every state has been reviewed in the same manner and on an equal basis.

Dominguez-Redondo has described and analysed the major fears and criticism of the UPR. She suggests that the "non-confrontational, peer-review features of the UPR have been subject to significant criticism even before their merit could be assessed" (Dominguez-Redondo 2012: 673–706). These criticisms relate in broad terms to the reliance on the goodwill of the state under review and fears of duplication. Olivier de Frouville has voiced concerns about the quality and strength of questioning during the UPR and believes that better questions are asked by treaty

bodies (independent experts) than by members of the HRC (Bassiouni and Shabas 2011: 253). Manfred Nowak believes that states take the UPR more seriously than other human rights treaty bodies, but he suggests that political bodies are less rigorous than a system or reporting reliant on independent experts (Bassiouni and Shabas 2011: 23).

On the other hand, the UPR has been described as "incontestably an overwhelming and unprecedented success in terms of State engagement with a human rights review process" (Dominguez-Redondo 2012: 694). UPR Info concluded—following the first cycle of the UPR—that:

> Several aspects of the UPR were deemed successful. Firstly, all 193 UN member states had participated in a review of their human rights records, voluntarily subjecting their national activities to international scrutiny. Secondly, over 21,000 recommendations were issued and 74 per cent of those recommendations were accepted by the States under review. Hopes were running high for the youngest child of the UN family. However, while the participation in the mechanism and the acceptance of recommendations are integral to the effectiveness of the mechanism, the main purpose of the UPR is to improve human rights in the member States through the implementation of the recommendations. (UPR Info 2016: 13)

The first two UPR cycles have also provided an additional and unique opportunity for civil society and national human rights institutions to advocate for human rights.

Analysing the Success of the UPR; Delving Deeper

Before one can assess and measure the impact of the UPR, it is necessary to define what is being assessed. As mentioned above the UPR has been referred to as both a mechanism and a process. Whether the UPR should be assessed as a process or a mechanism (for improved realisation of rights) will depend on the stakeholder's eyes, depicted in Fig. 2.2, through which one looks. It is of course a sliding scale with "affected people" most concerned with a mechanism for change and states under review perhaps more focused on constructively engaging in the process.

While focus on the process itself may in turn result in positive human rights impacts, where this is limited to the international arena without due regard to follow-up and implementation domestically, there is cause for concern. The International Service for Human Rights has pointed out:

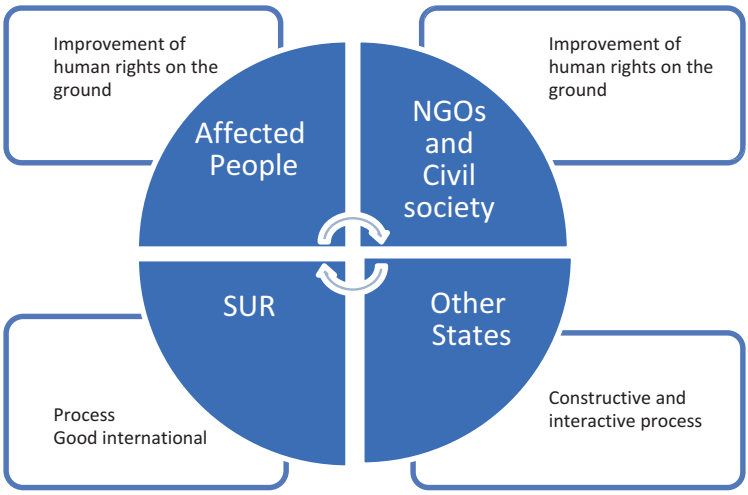

Fig. 2.2 Stakeholders and the UPR process

> Throughout the second cycle, fears that the UPR will disintegrate into a purely ritualistic review have exacerbated and the effectiveness of the UPR has been limited by the lack of follow up mechanisms, procedural weaknesses, patchy implementation and obstacles to NGO participation. (International Service for Human Rights 2016)

Charlesworth and Larking have gone further and have opined that "in the context of the UPR, ritualism may mean participation in the process of reports and meetings but an indifference to or even reluctance about increasing the protection of human rights" (Charlesworth and Larking 2014: 10).

The focus of this chapter is on whether the UPR is achieving its promise—to improve the human rights situation across the globe. In other words the impact of the UPR domestically. However, this should not be implied to suggest that the author does not see the value in the process and the platform that this provides on an ongoing basis. As acknowledged above, the UPR is characterised by unprecedented and constructive engagement from all states. They seem to take this process more seriously than the complimentary treaty body reporting processes. The progressive impact of the UPR as a process will become more evident over time as the process continues to mature. More research at an individual state level is required as the third cycle progresses.

Affected Person/Civil Society Perspective

Across the two cycles of the UPR, there has been an ever-increasing awareness amongst and engagement from affected people and civil society. It is important to reflect on why this engagement has occurred. The promise of the UPR is one of progressive universal realisation of rights across the globe. This is no small goal, but it is one that has been embraced domestically by those whose rights are infringed and their advocates. Anecdotal evidence suggests that there is a feeling in some quarters—as there was at the international level—that existing review mechanisms were not garnering the change necessary or at the rate required.

When considered against the purposes of the UPR, affected people and civil society are particularly interested in seeing progress in the following areas:

- the promotion universality, interdependence, indivisibility and interrelatedness
- the improvement of human rights on the ground;
- the fulfilment of the state's human rights obligations and commitments and assessments of positive developments and challenges faced by the state;
- enhancing the state's capacity and technical assistance.

Effectiveness of the UPR must therefore be assessed against these criteria. If the UPR is not delivering in this regard, engagement from civil society and affected people may invariably decrease or disappear as there is little value to their objective of improving the realisation of rights for people in their countries on the ground. If this were to occur, then one of the fundamental pillars of the UPR would crumble leaving the mechanism vulnerable. This is not intended to sound overly pessimistic. However, it is important to acknowledge the potential impact of the UPR failing to achieve the change on the ground to understand why assessing the UPR as a mechanism—from the perspective of civil society—is vital.

The UPR has shown an equal recognition of economic, social and cultural rights and civil and political rights (see Fig. 2.3). This is even more evident in the second cycle where there is a growing salience of the fact that economic, social and cultural rights underpin many of the human rights concerns of vulnerable groups.

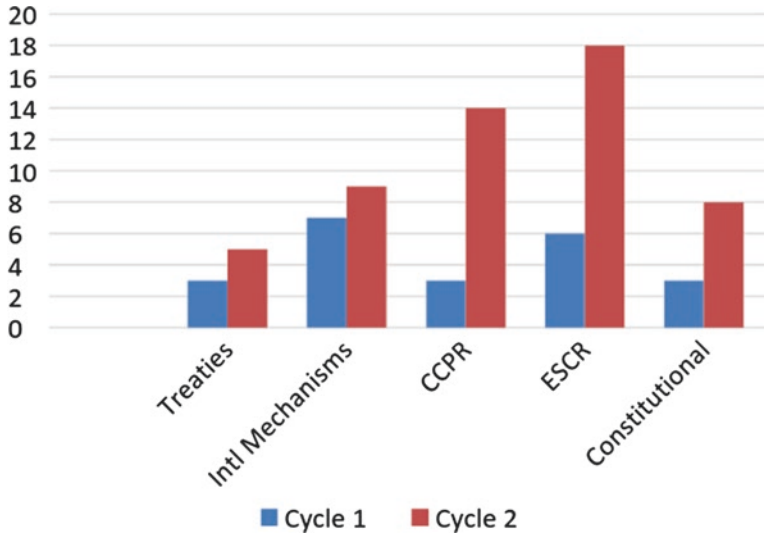

Fig. 2.3 Recommendations by topic
Source: UPR info

Approximately 74 per cent of the recommendations were accepted by the SuR across both cycles. The mid-term implementation assessments that UPR Info have developed and provide information from 165 countries involved show that two and a half years after the initial review of those states 48 per cent of UPR recommendations triggered action. However, as this research shows, a more nuanced approach to what is meant by the language of recommendations used in the UPR, the degree of specificity of recommendations and the meaning of words and descriptions attached to "acceptance" make critical the need for a continuing refinement of evaluation *(*UPR Info 2016). There are essentially five categories of recommendations used in the UPR (see Fig. 2.4):

- General action—approximately 40 per cent
- Specific action—approximately 34 per cent
- Continuing action—approximately 16 per cent
- Considering action—approximately 8 per cent
- Minimal action/share—approximately 2 per cent

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

Fig. 2.4 Number of recommendations made against levels of action Source: UPR Info data

financial or other assistance from, or share information with, non-SuR states. Category 2 concerns recommendations which emphasise continuity in actions and/or policies (verbs in this category would include continue, persevere, maintain). Category 3 embraces recommendations to consider change (consider, reflect upon, review, envision). Category 4 includes recommendations of action that contains a general element (take measures or steps towards, encourage, promote, intensify, accelerate, engage with, respect, enhance). 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.

Most recommendations have tended to be in the continuity, consider change and general action categories. In the Asia region, the generality of recommendations is even more stark, as set out in the below pie graph (Fig. 2.5):

While this trend shows the non-critical and constructive framework within which the UPR operates, it does inherently limit the ability for follow-up and implementation. The situation becomes even more problematic when we consider the recommendations to which states respond (Fig. 2.6). Approximately 39 per cent of accepted recommendations are general, with 17 per cent continuing action and around 9 per cent considering action.

It should not be overlooked that there are a significant number of specific action recommendations that are accepted—approximately 33

Fig. 2.5 Number of recommendations made against levels of action in Asia
Source: UPR Info

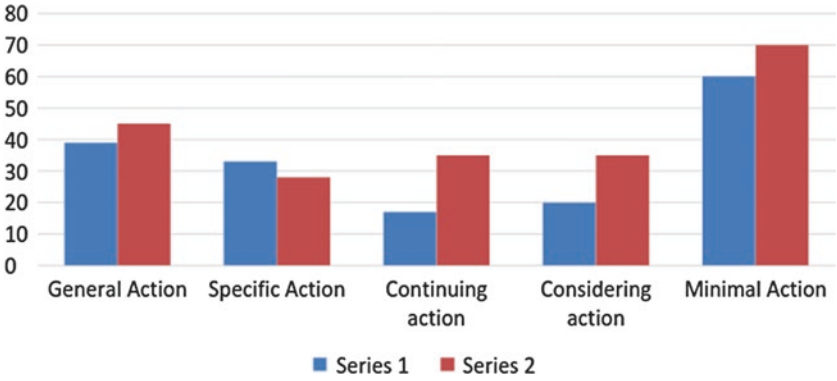

Fig. 2.6 Acceptance by type of recommendation
Source: UPR Info

per cent. However, whether this results in any real impact depends on how the state responds. Across both cycles states continue to use vague language in responding to recommendations, such as:

- is exploring;
- is working towards;
- will consider;
- is beginning to;

- will be able to;
- Will continue, continues to;
- is committed to;
- is developing, has developed;
- has established;
- will meet;
- already ensures;
- has placed and so on.

Assessing whether a state has complied with its commitment when framed in these terms is a virtually impossible task.

In terms of implementation and follow-up, there has been little concrete action from states. While there is a voluntary process of submitting mid-term reports to the Human Rights Council on implementation, there has been little uptake. Some states have developed action plans in various forms. While these action plans provide transparency of what the state has agreed to and what work they are undertaking, they do not provide any assessment of impact or whether the issue that the recommendation relates to has improved. More often than not the state actions are framed in vague wording and are generally existing work programmes that have been developed without engagement with affected people and civil society. There is an emerging trend towards "SMART"[4] actions and mechanisms to hold states more to account through action plans, but this is in the early stages.

Concluding Comments

States cannot avoid the UPR and the universality and absence of selectivity in electing which states to examine, which was a flawed characteristic of the Commission of Human Rights, have been welcomed (Lauren 2007). Across two cycles we have seen some significant positive developments including the constructive engagement of all states, the increasing engagement of civil society and a commitment from states—at least at the political/international level—to take action.

However, the promise of the UPR to achieve increased realisation of rights on the ground remains a challenge. There are many reasons for this:

- a commitment from states that is limited to the political dialogue, not the implementation;
- a failure to report and analyse implementation of recommendations from cycle to cycle;

- an absence of robust follow-up and implementation mechanisms domestically;
- vague language both in recommendations and in responses;
- "friendly States" not wanting to ask the hard questions and make the hard recommendations; and
- the failure to engage in an ongoing dialogue with stakeholders between cycles.

As we head into the third cycle, it is critical to ensure that the goals of the UPR are at the forefront of states' and stakeholders' minds. While the UPR has proved an unprecedented success in terms of process, as a mechanism for change there is a lot of maturing to be done. The UPR cannot and should not be seen as an international process but as a domestic one that is ongoing. If this can be achieved and constructive ongoing, transparent dialogue can be developed and maintained between states and civil society domestically, then the promise of the UPR can still be achieved.

The third cycle will be of important interest to the human rights world, and individual state analysis of impact should be undertaken to strengthen the understanding of the UPR and the realisation of its promise.

Notes

1. International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of Persons with Disabilities; International Convention for the Protection of All Persons from Enforced Disappearance.
2. Note, in the case of the International Covenant on Economic, Social and Cultural Rights, the treaty body is established through an ECOSOC resolution.
3. Note, the SubCommittee on the Prevention of Torture, which is technically a treaty body, is the exception and does not have this mandate.
4. SMART is mnemonic acronym giving criteria to guide in the setting of objectives or actions. Each letter refers to a different criterion: S = Specific; M = Measurable; A= Achievable; R = Relevant; T = Time-bound.

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CHAPTER 3

Universal Periodic Review on Southeast Asia Norm Building in Transition: A Hermeneutic Approach

Theodor Rathgeber

Introduction

The UPR, created in 2007,[1] subjects all current 193 UN member states, without distinction based on size or power, to the same review, applying the same methodology and purpose equally to all (International Bar Association 2016; Arredondo and Nicolle 2013; Domínguez-Redondo and McMahon 2013; Sen 2011).

Being a mixed form of peer-based interactivity, the state-to-state interaction of UPR (*interactive dialogue*) additionally offers non-governmental organisations (NGOs), national human rights institutions (NHRIs), other civil society actors or academic institutions—altogether identified as "other stakeholders"—to submit written assessments in reflecting the human rights situation in the state under review. These written assessments are summarised by the UN Office of the High Commissioner for Human Rights (OHCHR) into one report (so-called Summary), which can be used by the states for further observations and recommendations during the interactive dialogue with the state under review. Meanwhile, the original submissions by other stakeholders are published at length at different websites (Danish Institute 2011).[2]

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Obviously, for truly assessing the human rights situation on the ground, an empirically based research would be needed. The widespread inputs by the stakeholders are addressing a large variety of human rights issues, specific information and details. Some submissions contain observations, action statements, observations by third persons, articles published in newspapers or based on a genuine fact finding with statistics and narratives of victims. Some NGO reports are influenced or even managed by governments through so-called governmental-orientated NGOs (GONGOs) contradicting other stakeholder submissions. What may principally challenge the validity of the submissions can be curbed by the fact that the number of GONGOs' contributions has been limited up to now, with few exceptions related to certain states. Conversely, a large size of NGOs' submissions proved to be reliable as, for instance, being counter-checked with assessments by others. Due to eight years of submissions, there is enough evidence for stating that stakeholder reports allow an insight into the ground reality though not each of the views are *per se* the only truth reflecting that ground reality (McMahon and Johnson 2016; Hickey 2011; Frazier 2011; Moss 2010).

There is further relevance in the stakeholders' reports: The stakeholders can genuinely criticise and call for a policy change on matters that are controversial in the country concerned. Governments recommending a better compliance with the human rights norms might be inclined to avoid stronger terms during the UPR interactive dialogue in order to not risking strains in bilateral political, economic and security relationships with the state undergoing the review. Bringing the different perspectives together, it is possible to measure the effectiveness of the UPR in comparing outcome and documentation of the two UPR cycles (Landman 2009; Brems 2009).

Thus, this chapter examines a number of documents provided to the UPR of the first and second cycle: the national reports by the governments of Southeast Asian countries, the questions and recommendations made by the peers, the responses given by the country under review as well as statements of other stakeholders to the review process. The database used is available online and comprises in particular the websites of OHCHR and the Geneva-based NGO UPR Info.[3] The database includes additional information provided by human rights organisations and studies on thematically subdivided analysis of the two UPR cycles (McMahon and Johnson 2016; McMahon et al. 2013; Frazier 2011; Hickey 2011).

The chapter adopts a hermeneutic approach comparing the two cycles and its wording related to recommendations and statements by states and

non-state stakeholders. The text aims to analyse at the level of language the changes in the normative understanding on human rights. The outcome will again be compared with the situation on the ground identified by non-state stakeholders and finally embedded into a discussion on how far the scope of the UPR procedure may prospect improving the Southeast Asian states compliance with the human rights norms and determining the extent to which the normativity has entered into practice. Out of the total of 11 Southeast Asian states, this text concentrates on Cambodia, Indonesia, Malaysia and Myanmar, with comments on the Philippines and Thailand for being two countries which experienced a notable shift in governance. The selection is foremost due to the constraints of space while the ultimate choice followed considerations of having unhindered access to electronically available and cross-checked information.

General Remarks on Language and Normativity in the UPR Context

The UPR procedure and its founding documents[4] allow a first approach to analyse the scope of favourable impacts on human rights, on its ground realities as well as on its institution building at national, regional and international level. The UPR as such gathers a broad set of information including written and verbal communication by the HRC institutions in terms of normative interpretation as well as the communication and pre-understandings provided by states, UN institutions and other stakeholders during a period of two UPR cycles. To avoid a misunderstanding in this context at the beginning: The acknowledgement and implementation of human rights standards and corresponding recommendations during the UPR do obviously not follow exclusively normative considerations but (geo) political ones as well (Weiss et al. 2014: Part Two).

A first finding relates to the observation that though the mandate of the UPR permits all human rights issues to be discussed, states have shown certain preferences for exposing some aspects of human rights challenges more than others. A number of statistical assessments made in recent years reveals that some issues have not been raised that frequently compared to others and not to certain states either. According to a recent study, the economic, social and cultural rights (ESCR) have been distinctively less addressed during the UPR procedure compared to civil and political rights: around 18 per cent on ESCR out of all recommendations compared to 37 per cent on civil and political rights (CESR 2016). Others are sensitive

about subjects which immediately cast doubts about the governance of the state under review, such as torture, enforced disappearance, sexual violence, women's rights, racial discrimination, civil and political rights, in particular freedom of speech and press, detention conditions, minorities and indigenous peoples, economic, social and cultural rights in particular relation to people with disabilities, migrants and trafficking. Autocratic states, such as China or some Southeast Asian states, have reversely avoided questions or recommendations on those topics as they may politically challenge the state's power (McMahon and Johnson 2016; McMahon et al. 2013; Oishi 2014; UPR Info 2014).

Among the preferred wording, states were frequently recommended to adhere to international standards on human rights, and most recommendations accepted by the state under review deal with the legal status on a variety of human rights standards and other international instruments though not necessarily ratifying or adapting them to domestic laws. The topic of adherence to international instruments, which refers to nine core internationally agreed-upon treaties,[5] other documents comprising mechanisms for promoting human rights or issuing a standing invitation to the UN Special Procedures,[6] is the single largest (McMahon and Johnson 2016; McMahon et al. 2013; UPR Info 2014).

In addition to the distinction between these preferences, there is a second level of distinguishing the impact based on language regarding the recommendations by the states. Terms such as "continuing," "ensure," "take the necessary steps" or "establish" are preferentially used which allow a large variety of action, while compliance can be proved by minimal action. Such recommendations leave it up to the state under review to determine the kind of activity, time and implementation procedure. Similar engagement can be distinguished by the term "consider" although the term requires a more active engagement and activities in order to show compliance at least to the national and international public. Beyond the fact that such terminology leaves the states a broad space for implementation, it requests, embedded into the UPR context, a certain level of accountability. Furthermore, the terminology is not absolutely free for the state's only and unique interpretation. For instance, some recommendations by UN treaty bodies also distinguish alongside such terms the state's compliance with legally binding UN conventions. Altogether, even the soft terminology will embed the language of human rights within the UPR monitoring context and place the state under review, whether democratic or autocratic, into a specific discourse on their human rights practices (Center for Economic and Social Rights 2016; Arredondo and Nicolle 2013).

A third characteristic of the UPR relates to the different angles of accountability depending on each of the public fora set by the UPR procedure. During the national consultation, accountability will be potentially demanded by civil society organisations, NGOs and NHRIs. During the interactive dialogue and adoption of the working group report by the specific HRC Working Group, the working group members, that is, member states of the HRC, will take the floor for comments, questions and recommendations. Thus, the accountability is requested at international level by the peers. In between the interactive dialogue by the HRC Working Group and the adoption of the final outcome, the other stakeholders may have had also the chance to press the state under review for accepting more recommendations and commitments as indicated at the end of the interactive dialogue. During the discussion on and adoption process of the final outcome at the plenary of the HRC, NGOs and NHRIs are allowed to participate again along with states. The critical assessment of the domestic situation is extended in terms of accountability to national as international non-state actors too. This may be followed up during the period of implementation. Altogether, the UPR process anchors the accountability of the state into a complex setting of procedures and discourse. The dynamic of this setting and wording cannot be imposed though the state under review will try to defend its record, demonstrate concern for the human rights at national level and appear being honest in complying with the obligations. The UPR procedure has opened a new avenue to frame the governance at national, regional and international level specifying what actions and behaviour are wanted from the government in terms of human rights compliance; in particular when a public audience and press are following attentively (Arredondo and Nicolle 2013).

A fourth general remark refers to the number of stakeholder submissions comparing the first and second cycle of reviews. The second UPR has generally shown significant increases in the total number of NGOs submitting reports to the OHCHR, in some countries they have more than doubled. The only exception in the context of Southeast Asia is Thailand where the military dictatorship may have constrained the stakeholder's accessibility to the procedure. In Cambodia, the first UPR in 2009 yielded 23 submissions by other stakeholders; in 2014 a total of 37 non-state actors have submitted reports to the OHCHR. The figures for the other selected countries in Southeast Asia are as follows: Indonesia (2008:17; 2012:32), Laos (2010:14; 2015:18), Malaysia (2009:11; 2013:28), Myanmar (2011:24; 2015:47), the Philippines (2008:31; 2012:42) and Thailand (2011:27; 2016:27). The burst

of interest in the second cycle indicates the wide range of engagement with the UPR process by the rights holders and stakeholders emerging an extended level of accountability, both by involving the international and national communities. It indicates further, as a kind of side effect, that any intention by states to avoid a critical assessment runs the risk to be blatantly countered by national evidence and priorities set by the rights holders. Contrary to the intended image, at least at the level of discourse, the UPR procedure reveals the benchmarks for governance.

Country Situations in Southeast Asia

Turning to regional patterns, the Southeast Asian countries also preferred recommendations phrased in terms of "consider" or "continue" or claiming compliance on what a state under review has been already doing. This is true for other Asian states as well as for the large majority of African states. It reflects the historically grown understanding for a less direct and confrontational approach to the promotion of human rights. Similarly, Asian states reflect or direct fewer recommendations in a more rigorous language. Such language is generally avoided which would require a closer adherence to defined human rights standards as well as a specificity of actions and help to identify a clear idea of accountability; such as issues mentioned above in terms of justice, torture, detention conditions, freedom of expression and press media, minorities and indigenous peoples, women's rights and gender equality. Asia is also the region where the least number of recommendations have been implemented, for instance, concerning torture and other inhuman treatment, women's rights, international monitoring instruments or justice (McMahon and Johnson 2016; McMahon et al. 2013). Nevertheless, each Southeast Asian state selected for this assessment shows genuine ways of responses.

Cambodia

Cambodia accepted in the first UPR cycle 2009 all 138 recommendations (UPR Info 2016a) on a number of issues, among them were right to land, freedom of expression, women's rights, justice, labour, ESCR in general terms, human rights education, the implementation of international human rights standards and pledged to create an independent National Human Rights Institution as well as the ESCR in terms of poverty reduction, education, health or gender issues (UN Human Rights Council 2009a, b, c; 2010a).

In the second cycle, Cambodia was commended for the progress achieved with respect to the ratification of a number of international instruments, the reforms in the legal and judicial systems and in the field of women's rights (UN Human Rights Council 2013a, b, c; 2014a, b).

The second UPR cycle on Cambodia took place in 2014, when serious concerns were articulated about the deterioration of the human rights situation since the national elections in July 2013. Many recommendations by states urged the Cambodian government to resolve the crisis emerged from the alleged manipulation of the election. The UPR debate stressed reforming the electoral system and to ensure that future elections are free and fair. The debate also echoed numerous calls, among others, to lift the restrictions on the rights to freedom of expression as well as peaceful assembly and association, holding accountable those responsible for excessive use of force to suppress demonstrations, strikes and social unrest and to go against impunity enjoyed by the state security forces. At the end of the review of the second cycle, the Cambodian government received in total 205 recommendations, of which 163 were accepted, 38 noted and 4 rejected as being contrary to the constitution and national laws. Among those accepted were the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), or the UNESCO Convention against Discrimination in Education (UN Human Rights Council 2013c).

The four rejections dealt with the use of excessive force and conditions of arrest and pre-trial detention compared to international standards, to combat discrimination suffered by the children of marginalised and vulnerable groups including to eradicate gender-based stereotypes, to protect free and independent media through revocation of Article 305 of the Penal Code and Article 13 of the Press Law and to sign and ratify the Optional Protocols to the International Covenant on ESCR (ICESCR) and to the Convention on the Rights of the Child. It was interesting to note that the issues on the use of excessive force, the revocation of Article 305 and the ratification of international standards in its entirety had been accepted in 2009.

In addition, a number of recommendations were noted only in the UPR 2014, that is, the euphemistic version of saying no, while they were accepted in 2009. Among them were the right to land, the ratification of international standards, the application of international instruments, specific measures to prevent torture, rule of law and systematic cooperation with civil society. In relation to international standards, states recommended to ratify in particular the Optional Protocols to the core human rights standards

which entitle individuals to complain against the non-compliance by the government through UN Expert Committees. The recommendations on international instruments included the ratification of the Rome Statute and the acknowledgement of the International Criminal Court as well as extending a standing invitation to all mandate holders of the UN Special Procedures.

Interestingly, Cambodia pledged in 2014 to continue its reform programme on individual rights, consolidation of the pluralistic democratic system, separation of power and rule of law as enshrined in the Constitution. Cambodia also vowed to strengthen the law enforcement against corruption through education, accountability and institutional capacity. The government further assured to respect freedom of expression and human dignity, and to implement policies against all kinds of discrimination, while safeguarding the country's sovereignty, national interests, reputations, dignity and harmony in the society. Finally, the government promised its willingness to reform the land management including distribution of land in the framework of national goals for poverty reduction, food security and the protection of environment and natural resources in accordance with free market principles.

The wording used for the reviews presented a clear message to the Cambodian government to engage in serious reforms. However, the situation on the ground manifests the impression that the government is rather paying lip service to human rights principles making practices a routine that violate them (UN Special Rapporteur on Cambodia 2016; Human Rights Watch 2015a, b, c, d, e, f). The government accepted, for instance, to carry out legal and judicial reform in line with international standards. At the same time, the government has strengthened its control over the judiciary, depriving judges of independence and ensuring that the courts continue to be used for politically motivated prosecutions. Nevertheless, in its own wording, the government contributes to setting the benchmarks for complying with the standards on human rights. The procedure made spread them as well as the scope of accountability. All those expectations are reflected in the stakeholder's reports as well as echoed in some of the national press and social media. No doubt, the current gap between expected aspirations and reality is big, while there are non-state actors at national and international level to address the subject. The UPR is not the only monitoring procedure at UN level but, compared to the UN treaty bodies, has turned eyes towards an increasing public attention on the domestic human rights situation. In the Asian context, it is the only supranational procedure of such nature.

Indonesia

Indonesia was among the very first countries reviewed in 2008 when the UPR was for all participants a new terrain to be explored. This explains why the government received altogether only 13 recommendations of which 9 were accepted and 4 noted (UPR Info 2016a). Among those accepted were the issues to accede to the Rome Statute of the International Criminal Court as well as to a number of Optional Protocols to UN treaties enabling individual complaints, to combat impunity, to include the crime of torture in the criminal code, to cooperate at regional and international level on human rights as well as to share best practices, to provide human rights training and education and to support and protect the work of civil society (UN Human Rights Council 2008a, b, c, d). The government further emphasised its broad National Action Plan on Human Rights. The Indonesian government was hesitant on the rights of Ahmadiyya communities, death penalty and extending a standing invitation to the UN Special Procedures. Indonesia pledged to involve civil society and national human rights institutions in the consultation and socialisation of the UPR up to the next review (Ibid). For the Indonesian civil society engaged in the UPR, the consultation to the first national report was an extraordinary experience as most of the stakeholders had never before experienced a dialogue with government institutions on human rights and problematic situations on the ground.

During the UPR interactive dialogue of the second cycle, Indonesia was widely commended for having followed the National Action Plan 2011–2014, its cooperation with civil society and the media and its continued efforts to strengthen its law and justice institutions, such as the protection of victims and witnesses in legal proceedings and the agency established in 2009. A number of states acknowledged that Indonesia had ratified the Convention on the Rights of Persons with Disabilities (CRPD) and the ICRMW as well as for its work towards establishing the Independent Permanent Human Rights Commission of the Organisation of Islamic Cooperation (OIC) and the Intergovernmental Commission on Human Rights of the Association of Southeast Asian Nations (AICHR/ASEAN). In 2012, Indonesia also responded to the recommendations of 2008 and ratified the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict as well as on child trafficking, child prostitution and child pornography. Signed but yet to be ratified remains the Convention for the Protection of All Persons from Enforced Disappearances.

The implementation progress was weak between the two cycles in garnering the political support necessary for the implementation of the truth and reconciliation mechanisms, and in implementing measures to prosecute serious crimes and establish truth seeking measures (Human Rights Council 2012a, b, e). Torture was still practised by state agencies, and the national criminal code was to be amended in order to include torture as a crime. Concerns and recommendations were raised regarding freedom of religion and beliefs and the increasing incidents of mob violence, notably against Ahmaddiyah, Shia and Christian communities (UN Human Rights Council 2012c). Some states recommended that Indonesia accept a visit from the Special Rapporteur on Freedom of Religion and Belief as part of the country's effort to address this issue and extend the state protection for minorities (UN Human Rights Council 2012d). Further concerns were expressed on freedom of political expression in Papua including lack of access by foreign media there, or the failure to end impunity (UN Human Rights Council 2012d).

At the end of the review of the second cycle, the Indonesian government received in total 180 recommendations of which the government finally accepted 150 and did not support 30 recommendations. No recommendation was directly rejected. Among those accepted were the issues of ratifying the Rome Statute of the International Criminal Court, impartial trials and detention standards that meet international norms, effective measures against impunity and establishing an independent review mechanism. A number of delegations recommended that Indonesia declare a moratorium on the death penalty, to abolish all corporal punishment of children, to revoke laws (1965 Blasphemy Law) and decrees (1969 and 2006 ministerial decrees on building houses of worship and religious harmony, 2008 Joint Ministerial Decree on Ahmadiyya) that limit the right to freedom of religion and beliefs, to ensure the rights of indigenous peoples and local forest dwellers in law and practice, to curb activities of the military and other security forces in Papua in accordance with human rights standards, to extend a standing invitation to Special Procedures, to ratify Optional Protocols on complaint mechanisms or to prevent discrimination based on sexual orientation. The government remained hesitant and declared those recommendations as noted. No pledges were made.

The interactive dialogues and the entire two UPR cycles were characterised by the issues of institution building, international and regional cooperation on human rights, cooperation among various stakeholders at the provincial levels and involvement of civil society. In the wording used for the UPR procedure, the state institutions, including ministries, were

addressed to overcome impediments among themselves and to adopt comprehensive measures in order to address the gap between policy and practice. Indonesia is confronted with institutional and economic modernisation. The UPR contributes with language and concepts to ensure that the national development follows related to human rights standards and does not override the rights of the rights holders. Obviously, such process needs the actors but the legitimation has been founded.

Malaysia

Malaysia accepted 80 out of 147 recommendations in the first UPR cycle and treated 67 as noted (UPR Info 2016a). Among the accepted were issues such as independence of justice, working on core international human rights instruments, poverty reduction, human rights education, child and women's rights within a traditional context, but also to improve the implementation of Shari'ah law in the country (recommended by Iran). Except Canada, Cuba and Venezuela, Malaysia did not accept any recommendation made by states from Latin America and Europe or other Western states like the USA, Australia, New Zealand or Israel. Conversely, with few exceptions like Belarus, South Africa, Djibouti or South Korea, all the recommendations dealt with as noted were issued by the group of states mentioned before. As Malaysia only acceded to three of the nine core human rights standards—child rights (CRC), women's rights (CEDAW) and rights of persons with disabilities—a number of the noted recommendations addressed the ratification of the other core standards, Optional Protocols, withdrawing reservations to CRC and CEDAW as well as acceding to the Rome Statute. Also noted were recommendations on freedom of opinion, expression and press, the right to peaceful assembly, combating violence against women including marital rape, full access for migrant workers to legal remedies in case of abuse, establishing an independent and impartial police complaints commission, guaranteeing freedom of religion and belief, making arrest and detention conditions compatible with international human rights standards, eliminating the discrimination against people on the grounds of their sexual orientation from the Penal Code, publishing official figures concerning executions and death sentences. No pledges were made (UN Human Rights Council 2008e, f, g; 2009d, e).

During the two cycles, the human rights situation in Malaysia experienced some positive and a number of unfavourable steps taken by the government. A positive step was in the field of the judiciary—the Emergency

(Public Order and Crime Prevention) Ordinance 1969 expired in June 2012. The ordinance had been regularly used to hold criminal suspects without charge or trial. Up to a certain extent, the Internal Security Act, used for abusive administrative detention, was replaced by the Security Offences (Special Measures) 2012 Act which has reduced the previously unlimited administrative detention to 28 days, mandates judicial oversight and a fair trial and provides immediate access to relatives and legal counsel. However, the definition of a security offence is left to the police rather than judges, and secret witnesses and unsourced information can be used as evidence. Here one lingering issue is that of preventive detention in the context of the Prevention of Crime Act 1959, which permits suspects to be held without charge in pre-trial detention for up to 72 days.

Another positive was that the government had voluntarily presented a mid-term assessment on the implementation of the accepted recommendations. The government stressed its programmes and plans to allocate, for instance, 30 per cent of the country's development expenditure to the social sector for people and groups that are most in need in terms of basic infrastructure and services. The government indicated that it had conducted various meetings with stakeholders in order to exchange views and suggestions pertaining to the UPR follow-up and to have taken numerous measures in order to promote gender equality; such as providing training to develop women entrepreneurs, appointing two female Sharia judges in May 2010, introducing guidelines to address sexual harassment issues in the workplace and the possibility for the guideline to be made compulsory for employers adoption and implementation.

In relation to normativity at international level, Malaysia had not ratified the six core UN instruments and neither had it brought its national law into compliance with international human rights standards. Malaysia has not signed the Geneva Conventions on Refugees, nor the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, nor implemented the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. Thus, refugees and asylum seekers face extortion and abuse from law enforcement officers and remain excluded from key provisions of Malaysia's labour law.

Despite the rights-protecting rhetoric, the government has continued to curtail a number of freedom rights. The Printing Presses and Publication Act (PPPA) impedes access to information. The PPPA imposes a three-year prison term for "maliciously published false news" and places the legal burden on the accused to disprove guilt. The PPPA has been used to

block printing of publications that the government considers hostile, such as cartoons. Amendments to the Evidence Act in 2012 were an overt attempt to censor the Internet by classifying computer owners and operators of computer networks as publishers, responsible for whatever is displayed on their screens. Unless those accused can prove they had nothing to do with the offending content, they can be convicted.

The right to freedom of association was continuously restricted by requiring that any society (other than trade unions, cooperative societies, school committees) comprising seven or more people be registered by the Registrar of Societies. The Registrar can refuse or cancel the registration of a society when the latter seems to prejudice the security of Malaysia or public order or morality. The Peaceful Assembly Act was used to prosecute organisers of peaceful opposition rallies being charged that they had violated the ten-day advance police notification requirement. Also, the police continued to use excessive force to shut down protests, obtain coerced confessions and mistreat persons in custody, while the government continues to reject the establishment of an independent and impartial police complaints commission. In relation to discrimination, lesbian, gay, bisexual, transgender and intrasexual persons (LGBTI) are excluded; festivals are considered being a threat to national security. Malaysia still criminalises what it identifies as "carnal intercourse against the order of nature" under Article 377 B of the Penal Code (UN Human Rights Council 2008e, f, g; 2009d, e).

At the end of the second UPR, Malaysia received 232 recommendations of which 149 were supported and the rest noted. A large part of the recommendations reflected the concerns about the fact that Malaysia did not sign and ratify core UN human rights conventions and did not bring its domestic legislation into conformity with international law. Consequently, the government did not support those recommendations referring to international treaties or standing invitation to the Special Procedures. Malaysia did neither support recommendations on the prevention of torture by, for instance, developing protocols and manuals for the use of force by state agencies. Malaysia did not agree to review the consistency of the Prevention of Crime Act and the Security Offences Act either. Supported were recommendations on ESC Rights, women's rights or eradication of poverty. Malaysia also pledged to ensure that women's rights are promoted and protected, to remove legislative and other impediments to the enjoyment of the full range of human rights, not to reintroduce broad powers of preventive detention, or to maintain effective mechanisms to ensure an independent investigation of alleged misconduct by government officials,

including law enforcement personnel (UN Human Rights Council 2013d, e, f, g; 2014c).

The UPR procedure manifested a certain political will of the government to remain involved into the human rights discourse at UN level while substance is still lacking. On the ratification chart, Malaysia remains at the bottom ten countries in the United Nations. The UPR further drew attention to the domestic institution building, for instance, in terms of a national human rights action plan in order to have a frame for monitoring progress and implementation. The Human Rights Commission of Malaysia (Suhakam) felt encouraged and legitimised to push such plan. In 2012, at least a steering committee at the Legal Affairs Division of the Prime Minister's Department was established in order to coordinate the development of the plan. The UPR contributed substantially to disseminate information on human rights norms and expectations from in- and outside. The UPR procedure encouraged NGOs with Muslim background to engage with and creating awareness among their constituencies. UPR provided the platform for building relationship among domestic actors to run for the appropriate institutionalisation and normativity ruling the country in a mid-term perspective.

Myanmar

Myanmar embarked on a major political and economic reform process after November election in 2010 and after the new government took power in March 2011. In previous decades, Myanmar was denounced for its gross violations of human rights, including crimes against humanity and war crimes. There was practically also no domestic framework for the protection of human rights through rule of law. Since 2011, the government promoted a people-centred development, economic growth, stability and poverty reduction, released hundreds of political prisoners and showed greater tolerance for freedom rights. However, until now the reform process did not lead to ratify key UN human rights treaties. Similar to Malaysia, Myanmar has only ratified three of the nine core human rights standards: on child rights (CRC), women's rights (CEDAW) and persons with disabilities while cultural norms, practices and traditions disfavouring the roles of women in all spheres of life still persist to date. In 2015, Myanmar signed ICESCR and the Optional Protocol to CRC on the involvement of children in armed conflict. In the context of the International Labour Organization (ILO), Myanmar has ratified three out of the eight fundamental ILO Conventions:

Convention No. 29 on Forced Labour, Convention No. 87 on Freedom of Association and Protection of the Right to Organise and Convention No. 182 on the Worst Forms of Child Labour. Myanmar has not ratified, for instance, ILO Convention No. 169 on Indigenous and Tribal Peoples.

At the end of the first UPR cycle, Myanmar received 190 recommendations and accepted 74 (UPR Info 2016a). The then government delegation performed in an ambiguous manner. The same subject was sometimes agreed and sometimes not. A large number of states urged Myanmar to consider acceding to core human rights instruments and to adapt domestic laws to international standards, inter alia, on freedom rights. When Jordan and Ukraine proposed those recommendations, they were accepted, while the larger number of recommendations dealing with that subject was taken for noted. For instance, Brazil and Slovenia issued the same recommendations in a slightly differing wording. Timor-Leste, Maldives or New Zealand specified the standards. Accepted recommendations were on issues such as ensuring the independence and impartiality of the judiciary and guaranteeing due process of law; ending and prohibiting torture; cooperating with the Special Rapporteur and the OHCHR; ensuring better respect and protection of all human rights, in particular in the fields of ESC Rights; engaging with international human rights bodies and mechanisms; ending forced labour and child labour; or promoting and safeguarding the rights of multi-ethnic people in Myanmar. Noted were recommendations, inter alia, to fully cooperate with ILO, to repeal laws that are not in compliance with international human rights law, to establish a National Human Rights Commission in line with the Paris Principles, to cooperate with Special Procedures in particular on the country situation, to abolish capital punishment, to review domestic legislation that criminalises peaceful political dissent or to take appropriate measures to end de facto and de jure discrimination against all minority groups (UN Human Rights Council 2010b, c, d; 2011a, b).

Since the first cycle, Myanmar has progressed in democratisation, human rights and institution building on national and to a minor extent at international level. The government did not ratify the international standards, but showed openness to cooperate with the UN Special Procedures, even with the Special Rapporteur on Myanmar's country situation. At the domestic level, the government has established the Myanmar National Human Rights Commission. The parliament passed the according law in 2014. The mandate includes receiving, verifying and investigating complaints of human rights violations and submitting reports to the President.

In July 2012, the Parliament's Farmland Investigation Commission was established being mandated to accept complaints about land disputes and expropriations from the public. In September 2014, the Commission presented a critical report to the parliament on extreme delays in returning land to farmers.

However, the judicial system remained under-resourced, lacking independence from the government, and its administration was still subject to corruption, bribes, delays, and obstructions. The access to legal aid was constrained for many who could not afford time and money to use the court system. The police lacked training and capacity to enforce the rule of law. The government tried to address those lacunas by setting up a non-judicial grievance mechanism for the time being. The Rule of Law and Stability Committee was formed to lodge complaints about government departments. A non-judicial labour dispute settlement system was in place in order to resolve disputes between workers and employers. However, the implementation was hampered due to the lack of adequate knowledge about the new labour laws. The ILO and the government had agreed a complaints mechanism to allow victims of forced labour to seek redress from the authorities.

A major cause of concern has been the issue of minorities. Ethnic minorities make up an estimated 30 per cent of the population. Ethnic minority areas have a long history of discrimination, marginalisation, displacement, lack of religious freedom, of self-governance and resource sharing with the central government, and even armed conflicts. Anti-Muslim sentiment and discrimination are widespread, such as inter-communal violence against Muslims in Rakhine State. Rohingyas face longstanding restrictions on their movement, which prevent them from travelling in search of work. Other religious minorities including Christians face discrimination and marginalisation too UN Human Rights Council 2015a, b, c, d; 2016a). The ongoing discrimination as well as misuse and mismanagement of natural resources and land grabbing generate social disorders, poor incomes and massive poverty among minority groups.

At the end of the second cycle, Myanmar received 281 recommendations of which 166 were accepted. The views of the government to the recommendations showed a very similar picture compared to the first cycle. Generally formulated recommendations in terms of "continue to accede to the core human rights conventions" found the government's approval, specific recommendations in terms of "ratify" the core standards or specific standards were noted. Among the recommendations 20 referred

to minorities of which the government accepted 6 and noted 14. The accepted ones included: to continue cooperation with human rights mechanisms and the international community in promoting and safeguarding the rights of multi-ethnic people in Myanmar, to ensure that ethnic and religious minorities are granted fundamental rights and end discrimination, to solve the conflicts in a peaceful manner, or to strengthen the promotion and protection of the human rights of the ethnic groups in Northern Rakhine State. The ones noted were recommendations to take appropriate measures and immediate steps to end de facto and de jure discrimination, violence, forced assimilation and persecution; to investigate and punish all cases of intimidation, harassment, persecution, torture and forced disappearance against minorities; to modify the Citizenship Law of 1982 to ensure all minorities equal rights as citizens; or to allow access for international organisations to ethnic minority areas.

As a country in a transition process, the government and the non-state stakeholders benefitted in particular from the second cycle of the UPR. The government took the opportunity to indicate actionable recommendations to effectively—in accordance to its own understanding—address human rights violations, to peacefully settle conflicts and to provide redress. The stakeholders reiterated that despite reforms, significant human rights challenges remain in Myanmar, and that the international community, including programmes on development and business promotion, have to play an active role in addressing and overcoming the lacunas.

Philippines

The Philippines rank as an advanced country in Southeast Asia in terms of institutional settings of human rights standards and rule of law. With the exception of one standard, all others have been ratified, including some Optional Protocols to enable the individual complaints mechanism. The missing standard till date is the International Convention for the Protection of all Persons from Enforced Disappearance. Such institutional setting was reflected in the first UPR cycle in 2008 when the government accepted 15 of 24 recommendations, including specific ones as "sign and ratify the Optional Protocol to the Convention Against Torture" (CAT) or to "completely eliminate torture and extrajudicial killings." No acceptance found recommendations in relation to signing and ratifying the Convention on disappearance, to harmonising national legislation, customs and traditional practices with the normativity of CRC and CEDAW, to extending a

standing invitation to special procedures or to taking into account the recommendations of Special Rapporteurs following their country visits in previous times. That time, there were 13 requests for visits pending, such as the Special Rapporteur on Human Rights Defenders, on Independence of Judges and Lawyers or the UN Working Group on Enforced and Involuntary Disappearances. Among the voluntary commitments made by the Philippines were to maintain the momentum on addressing killings of activists and media professionals and to continue to find additional measures to answer the basic needs of the poor and other vulnerable sectors UN Human Rights Council 2008h, i, j, k, l).

Since the UPR session in 2008, the Philippines had passed a number of laws on human rights in relation to the UPR recommendations. After the session, the government ratified the Convention on the Rights of Persons with Disabilities (2008) and signed the Optional Protocol to CAT (2009), finally ratified in 2012. The Philippines acceded to the Rome Statute of the ICC in 2011. The outcome of the UPR added substance to the Magna Carta of Women or the Anti-Torture Act, both established in 2009, while the laws on the Commission on Human Rights Charter, compensation to victims of human rights violations, and laws on protection against extra-judicial killings, enforced disappearance and protections for internally displaced persons were pending. On crucial issues such as extrajudicial execution, enforced disappearance, and torture, there was not much progress. Stakeholder reports stated that the Government has failed to achieve notable progress in, for instance, holding perpetrators accountable. While the number of extrajudicial executions decreased since the then President took office in 2010, no perpetrator has been convicted in any case under his administration. Also, no focal institution in the executive branch was established to coordinate a strategic approach to reduce or eliminate torture and extrajudicial killings. Policies and laws intended to address basic needs sometimes were poorly implemented or not enforced. For instance, pharmacies refuse to comply with the law granting discounts for medicines for persons with disabilities. Contrary to that, funds allocated to educational, health, and anti-poverty programmes increased (UN Human Rights Council 2012f, g, h, i, j).

Immediately at the end of the interactive dialogue of the second cycle, the government announced its acceptance of 53 out of the 88 recommendations, whereas 8 were already in the process of being implemented, such as to ratify the Rome Statute. After consulting domestic stakeholders, among them the national Commission on Human Rights, the government accepted 9 additional recommendations while 26 remained as noted. Among the

accepted ones were to consolidate the national human rights infrastructure in particular the Commission on Human Rights; to enhance human rights-based training including all security forces; to enhance human rights education, labour and migrant workers' rights; to provide more resources to support the effective implementation of the Magna Carta of Women; to intensify the efforts to protect the rights of vulnerable groups such as persons with disability, minorities and indigenous peoples; to effectively eliminate extrajudicial killings and to intensify efforts to carry out the prosecution of such crimes; to improve the capacity of the penal system to combat impunity; to increase the social programmes essential for the eradication of poverty and social marginalisation; and to ratify ILO Convention No. 189 on domestic workers. Among the noted remained the recommendation to consider ratifying the International Convention on the Protection of All Persons from Enforced Disappearance, to ensure that the Rome Statute was fully implemented in the national legislation, to extend a standing invitation to Special Procedures such as to invite the UN Working Group on enforced or involuntary disappearances, or to dismantle and disarm all paramilitary forces and militia. The government pledged to ensure that members of the security forces are continuously trained on human rights and International Humanitarian Law, specifically in their responsibility to protect human rights and the rights of human rights defenders.

In June 2016, a new President was elected who, during his election campaign, insulated to kill drug users and urged citizens and the police to conduct extra-judicial killings of suspects. In September 2016, the Philippines' Permanent Representative to the United Nations in New York told the UN that the President had not empowered police officers to shoot to kill any individual suspected of drug crimes. In the same month, polls have been saying that about three quarters of Philippines' population supported the governance by the President, which obviously comprises more than the issues mentioned.

Nevertheless, under such circumstances and given also the long-standing domestic institution building, is there any indication that the outcomes of the UPR procedures may be used as a kind of firewall against gross breaches of human rights standards? At least reference is made by politicians, the Commission on Human Rights and human rights defenders to keeping international and national standards, and to inviting, for instance, the UN Special Rapporteur on Extrajudicial, Summary or Arbitration Executions to look into cases of alleged extrajudicial killings in the country. According to CNN, the average number of persons killed daily increased alarmingly

since June 2016, and there was no sign of a downtrend in the figures by then (Bacungun 2016). In response, the President stated that he was prepared to explain the killings to the United Nations, though without exactly identifying to which institution. By mid-November 2016, the President was openly thinking that he might follow Russia's step to withdrawing from the ICC (Forster 2016). Though it may be premature for a definite conclusion as well as drawing attention to only a small selection of issues, this altogether leaves the impression that the current dominant discourse does not exactly correspond to what is expected from a firewall.

Thailand

In 2011, Thailand received a total of 172 recommendations during the first UPR cycle, of which 134 were finally accepted in whole or in part. Accepted recommendations, among others, were on international standards or harmonising domestic laws. Noted recommendations included to ratify or accede to the Rome Statute, the Optional Protocols of CAT and other standards, to consider becoming a party to the ICRMW, to accede to the UN Convention on the Status of Refugees and the 1954 Convention on the Status of Stateless Persons, to abolish provisions in the Martial Law Act and Section 17 of the Emergency Decree which grant immunity for criminal and civil prosecution to state officials, to review the imposition of the death penalty, to adopt all necessary measures to eradicate the recruitment of children by armed groups, to undertake a thorough review of the relevant laws to safeguard the basic rights to freedom of opinion and expression, to engage in a review of special security laws, with a view to amending legislation and regulations which restrict or deny freedoms of expression, association and peaceful assembly that are inconsistent with obligations under international law, including the Internal Security Act, the Computer Crimes Act, the Emergency Decree, the Official Information Act, and lèse-majesté [insulting the Monarchy] provisions. Thailand pledged, among others, to become a party to the Convention for the Protection of All Persons from Enforced Disappearance, to ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organise and to No. 98 on the Right to Organise and Collective Bargaining, or to issue a standing invitation to the Special Procedures (UN Human Rights Council 2011c, d, e, f; 2012k).

The government had established a National UPR Committee chaired by the Permanent Secretary for Foreign Affairs as well as involved the National

Human Rights Commission of Thailand to monitor the implementation of the recommendations and voluntary pledges as well as to prepare a mid-term UPR report. The UPR Committee developed a National Action Plan in 2013 in order guide government agencies. Among the states of Southeast Asia, Thailand was the only one who established such specific institution. It may have been an acknowledgement to the mock consultation with stakeholders in preparing the national report for 2011.

According to the mid-term report delivered by the government before the military coup, a number of issues related to UPR recommendations were indeed implemented; acknowledged by other stakeholders (UN Office of the High Commissioner for Human Rights 2014). Thailand ratified the UN Convention against Transnational Organised Crime (UNTOC) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2013, and revised accordingly the domestic legislation. Thailand was among the first countries that ratified in September 2012 the Optional Protocol to the CRC on the complaints procedure. In February 2014, Thailand established a national committee to consider ratifying the International Convention for the Protection of All Persons from Enforced Disappearance (CED) and the Optional Protocol to CAT. The government had signed CED already in 2012. The Military coup in 2014 stopped further considerations. In 2012, Thailand withdrew the reservation on Article 16 of CEDAW (women's rights related to marriage and family) and started efforts to incorporate the definition of "torture" into the domestic laws by amending the Criminal Code and the Criminal Procedure Code. Thailand further issued a standing invitation to all Special Procedures mandate holders.

With specific regard to the domestic situation, manuals on international human rights instruments were distributed and nationwide training organised for government officials and the public. The government increased access to justice by establishing the Centre for Remedy of Victims of Crimes in order to assist victims in this regard. The Compensation and Expenses for Injured Person and the Accused Act of 2011 had also been reviewed with an intention to cover more criminal offences. In October 2013, the Bureau of Legal Enforcement, Human Rights and Forensic Science under the Internal Security Operations Command, Region 4 was established and mandated to strengthen the prevention of human rights violation and protection of people in the Southern Border Provinces. In the area of prosecution and law enforcement, the number of investigations, prosecutions and convictions increased in the year 2013. Law enforcement agencies, such as

Police and Attorney General, had been working closely to coordinate their efforts to bring human traffickers to justice. The Department of Rights and Liberties Protection had organised seminars about the possibility to abolish the death penalty.

Other measures were implemented to address violence against women, including domestic violence, and children. In this regard, a provincial Memorandum of Understanding was concluded in 31 provinces (out of 76) and to be developed in the near future. Gender-based violence was introduced into the National Action Plan. The issues of sexual orientation and gender identity are very contentious, not only in Asia. In addition to Vietnam, Thailand was among the few countries from the Southeast Asian context who reported in its mid-term report that steps were taken to recognise same-sex unions and to legitimise the role of lesbian, gay, bisexual, transsexual and intersex persons. With regard to the protection of migrants with irregular status, the government established in 2012 a national mechanism under the framework of the Comprehensive Strategy on Addressing Illegal Migrants (Ibid).

On the occasion of the second UPR cycle in May 2016, the government had submitted its national report saying that it "attaches utmost importance to the promotion and protection of human rights of all groups of people." At the same time, the junta of the National Council for Peace and Order had in reality severely repressed fundamental rights with impunity, tightened military control, and frequently disregarded further international human rights standards. Under the rule of section 44 of the 2014 interim constitution, the government's pledge to respect human rights and restore democratic rule are mostly meaningless. Section 44 provides the junta unlimited administrative, legislative, and judiciary powers, and explicitly prevents any oversight or legal accountability of junta actions. The current political structure, imposed by the junta, seems designed to prolong the military's power. The new draft constitution, written by a junta-appointed committee and approved by referendum in August 2016, endorses unaccountable military involvement in governance even after a new government may take office. The government continues to prosecute opponents to the coup, charging them with sedition for criticising the military rule or with computer crimes for posting satirical comments. The authorities, as well as private companies, use defamation lawsuits to retaliate against those who report human rights violations. Unlike Malaysia and Indonesia, Thailand refuses to work with the UN High Commissioner for Refugees to screen Rohingya fled from Myanmar, and instead holds many

in indefinite immigration detention. Despite measures set up in previous years against human trafficking, migrant workers from Myanmar, Cambodia and Laos are still vulnerable to police extortion and to employers who seize workers documents and hold workers in debt bondage, for instance, in sex work or onto fishing boats (Human Rights Watch 2015f; 2016; UN Human Rights Council 2016b, c, d, e, f).

Though the UPR session at the second cycle effectively turned the public eyes onto these and other gross human rights violations, there is currently no effective mechanism or instrument—national, regional or international—to make restore standards on human rights and rule of law. The existing legal and procedural institutions remain currently a mere facade and simple reference for future, rather long-term aspirations. Nevertheless, there are still non-state actors who have already proven to be able in raising human rights concerns under the military dictatorship. It was exactly within the framework of the UPR preparing for the second cycle that a number of civil society stakeholders gathered in December 2015 in Bangkok on a two-day national consultation. More than 165 participants attended the consultation including government representatives and representatives from 64 NGOs including from local communities. After the interactive dialogue in Geneva in May 2016, the government invited this coalition to present their views on the recommendations that Thailand had received. The multi-stakeholder dialogue may further act on the implementation. The civil society coalition is also interacting with representatives from the Malaysian and the Myanmar UPR coalitions (UPR Info 2016b).

Reflections on Lessons Learnt

The Universal Periodic Review made all 193 UN member states participate in a review of their human rights records in which they voluntarily subjected their governance on human rights to international scrutiny. Within the UN human rights system, the UPR works as a complementary mechanism including political methods. This allowed states, including those who showed a poor human rights record, to care about their international image through political rhetoric and building alliances with like-minded countries.

The UPR as such triggered governmental actions by fully or partially implementing at least parts of the recommendations received by the state under review, with lower rates in Asia compared to other regions. The references to acceding to international instruments comprised one of the

highest numbers of recommendations that triggered action. The experience of the two UPR cycles suggests that the UPR helps to achieve improvements of the human rights situation on the ground, predominantly in mid-term and long-term perspectives (UPR Info 2014, 2016b), while Subhas Gujadhur and Marc Limon (2016) underline the current obstacles which may mark the way ahead containing the UPR as mere ritual. Irrespective of the prognosis, national institutions and structures emerged, which bear the capacity to improve the ground reality. The pertinent activation and participation of civil society stakeholders has been constitutive. The increasing number of stakeholders' participation, including Southeast Asia, indicates that they share at least the expectation to be able to improve and influence the governance on human rights.

Compared to existing UN mechanisms on human rights, the UPR as a new procedure modified in particular the engagement of governments, national human rights institutions and civil society stakeholders at the level of communication, interaction and cooperation on human rights issues. The solution-oriented modalities of the UPR have facilitated discussions by providing a platform for seeking a common understanding among different actors within the same procedure, time frame and normativity (Arredondo and Nicolle 2013). However, there is not one route to progress as the modifications went into two directions: deepening the substance in terms of normativity, institution building and ground reality, but also aggravating the resistance to pressure on addressing the human rights governance, including shrinking space for civil society engagement. Irrespective of the direction, the procedural part of UPR is more than a mere supplement to existing UN mechanisms, as critically assessed by US colleagues (Weiss et al. 2014).

From the written submissions, oral statements and further documents, the UPR has changed the international human rights discourse not only by offering a new forum for discussion. The UPR also provided a consultation process, which made a variety of actors interact, in some cases based on a high frequency of contacts between civil society and government at national and international level. Based on a comprehensive framework comprising all aspects of human rights for scrutiny, the participants are in a position to become fluent in the framework of human rights. In addition, the discourse is open and available for public observation during the interactive dialogue and HRC plenary as well as via webcast or its archive. The increased number of actors and the extended number of fora for discussion, consultation and follow-up debate have also introduced an extended form of accountability.

Even countries under autocratic government had to confront an interactive dialogue which included critical remarks and recommendations of which some were accepted even by those countries. Obviously, the accepted recommendations had a different wording compared to more specific ones while they revealed the scope and potential for meaningful improvements in the domestic human rights situation. Some recommending states have seized this opportunity to ask their peers questions about topics that would not have been aired in such a direct interaction at the HRC's plenary session or before other intergovernmental bodies (McMahon and Johnson 2016; UPR Info 2016b).

In the Southeast Asian context, the majority of the examined governments did not like much the expansion of the human rights discourse. Nevertheless, taking the example of Thailand under military dictatorship, the junta sent a delegation to Geneva in order to engage in the interactive dialogue and had prepared the national report in consultation with national stakeholders. The human rights situation of the country was assessed in human rights terminology and set the normative framework which required at least a functional consideration of the human rights situation in the nation. The government was expected to rationalise its position while showing its preparedness to constructively cooperate with the UN human rights mechanisms. Correspondingly, certain recommendations that did not meet the restrictive domestic policy were not objected to too harshly. The rhetoric was determined rather by showing openness for cooperation; even more in an Asian context (Oishi 2014). Doubtless, the UPR is confronted with the risk of ending up in a routine with low or no substance and simply providing the appearance of action (Gujadhur and Limon 2016; UPR Info 2014). At the same time, and up to a certain extent irrespective of the substance in singular cases, the UPR and its monitoring tools can be understood as a form of—global—governance, as Thomas Conzelmann concluded in his research on peer reviews (Conzelmann 2011, 2012, 2014), at least setting universal and fundamental benchmarks.

The normativity for such governance is principally established by the founding documents of the UPR but also constantly developed, enhanced and specified by UN institutions and civil society stakeholders. While the UN treaty bodies develop the human rights standards in legal terms, the HRC and the UPR provide a matrix and guidelines on monitoring the implementation also in political terms. The reference to the universal standards as well as the stakeholders' contributions and expectations is constitutive and conducive to argue against cultural relativity and the insistence on national sovereignty when scrutiny and implementation is conducted. The UPR

supports establishing the human rights vocabulary and mechanisms, and the overall participation by the states legitimates the reference standard as such (Posner 2014). The UPR may finally help to find a way in order to establish a regional procedure at ASEAN level which is genuinely based on the normative standards of human rights and the participation of civil society stakeholders.

Though the UPR is a procedure with its automatisms, it requires—as the entire HRC (Rathgeber 2013)—actively engaged civil society stakeholders in order to make the scrutiny, monitoring and implementation progressing and sustainable in terms of the international human rights standards, its language and normativity. The number of civil society organisations taking interest in the UPR mechanism has definitively increased. In addition to the monitoring by the UN treaty bodies and Special Rapporteurs, the UPR has proven to be an effective awareness-raising and advocacy mechanism as long as there are pro-active state and non-state actors. Above all, the UPR is an opportunity, in particular in Southeast Asia, to discuss human rights issues between civil society and governments in order to achieve a convergence of normativity, policies and practices concerning human rights. There are good chances to make more civil society groups and citizens aware of the UPR who may push their governments for a more meaningful participation in future years.

Future Strategies

Implementation efforts remain a major challenge, and vice versa the UPR has shown teething problems still in the second cycle, not only in the Southeast Asian area. A number of reviews disintegrated into rituals, follow-up mechanisms were weak, and NGO participants obstructed by domestic measures to participate (Gujadhur and Limon 2016; International Service for Human Rights 2016). At the same time, the review process has made it feasible to scrutinise the national framework compared with the international legislation and mechanisms available for the protection of human rights. Hence in the Asian area where there is no supranational, regional monitoring mechanism, the UPR has become a key aspect for the monitoring issue. Thus, the number of civil society organisations taking interest in the UPR mechanism has definitively increased.

Civil society stakeholders are among the most explicit promoters of making the UPR a more efficiently operating mechanism leading to a concrete impact on the ground by formal or rather informal adaptations for the third cycle (2017–2021). Knowing the delicate circumstances for formally

changing modalities at the HRC, the discussions among civil society stakeholders centre primarily on the aspiration of states to improve its public reputation and therefore to be perceived performing a good practice. Academics address the institutional UPR setting with high relevance in order to identify the weakness and, thus, the prospected dynamic of the future course of UPR and the needs for structural change respectively. Subhas Gujadhur and Marc Limon (2016) provide a large and detailed list of modifications. Principally, there is nothing wrong with such approach while the entire history of the HRC is full of pragmatic adjustments to better meet the HRC's mandate and to improve its working methods (Rathgeber 2013). In terms of strategy, the following reflections include obviously some structural challenges but focus predominantly on the expectations of civil society stakeholders in terms of practical impacts and rather short-term improvements. These include the management of implementation, the reporting system and a follow-up procedure at the level of the HRC as well as establishing an appropriate domestic structure by transferring good practice.

The Geneva-based NGOs International Service for Human Rights (ISHR) and UPR Info are among the prominent platforms for such discussions at international level comprising also governments. The proposals of both organisations emerged from discussions with partners worldwide and are complementary to each other while each emphasising some genuine experiences of their constituencies. The UPR Info focuses on two aspects: to ensure a sustainable implementation and the reporting. In order to improve the implementation, it is suggested that states should be encouraged to provide clarity on their responses to the recommendations. In order to improve the reporting, UPR Info suggests that states should report—on a voluntary basis—on five recommendations of their choice within one year after the review. This reporting could be conducted either under the HRC Agenda Item 6 or in the framework of a public side event during the regular session of the HRC. UPR Info promotes that the state should provide a mid-term report, approximately 2.5 years after the review, and make sure that the next national report may include all recommendations. At domestic level, the state should establish a national mechanism for reporting and follow-up and to develop a human rights action plan (UPR Info 2016c).[7]

The ISHR further advocates for making the civil society's role stronger and more central in assessing the state's human rights policy (International Service for Human Rights 2016). One of the immediate requests, which could be established without any formal amendment, appeals to the HRC Presidency, Bureau and Secretariat to guarantee the free engagement of civil society stakeholders with the UPR. They should elaborate a policy in

order to prevent, investigate, remedy and promote accountability when states are intimidating or oppressing civil society stakeholders for engaging with the UPR. The ISHR further promotes to enable NGOs to speak during the interactive dialogue in order to provide up-to-date information from the ground. The OHCHR is requested to monitor the state's compliance with the recommendations by its own reporting system. Similar to the previous proposals on Item 6, the ISHR suggests to insert into Item 6 an alert procedure which would address situations where states adopt measures that contradict previous commitments made during their UPR. ISHR also encourages other states to use the general debate on Item 6 in order to seek information regarding implementation of recommendations.

A number of civil society organisations including those from Southeast Asia attended the so-called pre-sessions to the review of their countries organised by UPR Info during the period 2012–2016. They took that opportunity to discuss the future of the review process and shared their experiences. This collective information gathering has been condensed into a document providing ideas and guidance for the domestic part of the review, particularly the implementation aspects (UPR Info 2016c). Among the main subjects for modification related to the government's structure for implementation are the establishment of inter-ministerial and departmental committees responsible for the follow-up as well as of national action plans. In relation to such follow-up procedures, some participants further suggested to also organise a broad national consultation after the review reverse to the beginning of the process. The civil society stakeholders recommended their governments as well as the reviewing states to consider more often on the feasibility of technical and administrative assistance by the OHCHR in cases where capacity gave rise to compliance problems. A number of states have already availed of such assistance. Vice versa, the regional and national field presences of the OHCHR should seek the agreement of the concerned state to integrate at least some recommendations into their work and planning. Assistance may also include capacity building with inter-ministerial delegations particularly to prepare for the UPR third cycle.[8] Altogether, the UPR has proven to be an effective awareness-raising and advocacy mechanism particularly in the Southeast Asian area.

Conclusion

The UPR remains an ambiguous procedure, both with merits and challenges. A hermeneutic approach tends to accentuate the potentials. The analysis beforehand shows that at the level of institution building, the UPR

contributes to establishing the human rights vocabulary and mechanisms. Thus, the UPR substantially contributes to legitimate and sustain the ensemble of the universal human rights standard as the normative minimum. The UPR has succeeded when in particular civil society organisations are able and prepared to advocate for the compliance of the government with the human rights norms, its UPR-related language and pledges. The UPR is a pertinent platform to make use of the international scrutiny providing language, concept, legitimacy and a mechanism to address issues that the government would otherwise have preferred to ignore or suppress. The UPR has turned into a catalyst for the human rights standards including countries which—still—are not party to all conventions and, thus, not legally bound to the pertinent norms. As said in a previous paragraph, the UPR has been an opportunity until now, in particular in Southeast Asia, to discuss human rights issues between civil society and governments in order to achieve a convergence of normativity, policies and practices concerning human rights. The UPR has proven to be at least an effective advocacy mechanism as long as there are pro-active non-state actors allied with an international audience.

Nevertheless, the UPR relationship to ground reality remains complex and complicated. In cases of blatant disregard of the human rights obligations, the crisis has to be resolved beyond the capacities of the UPR procedure while to date no government has finally declined to be subject of the UPR. While in open societies, also local groups and communities will potentially become more fluent in the discourse of human rights, the experiences with shrinking space for civil society activities indicate that there is no guarantee for their future vibrant participation and subsequently the greater footing of human rights in the policy-making on national, regional and international level. This article and its analytical approach was meant to encourage the civil society stakeholders for attempting the challenge within an ambiguous environment.

Notes

1. For details see http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx. The founding documents are UN General Assembly Resolution 60/251; Institution-building of the United Nations Human Rights Council Resolution 5/1 (18 June 2006); HRC Universal Periodic Review Decision 6/102 (27 September 2007); Modalities and practices for the universal periodic review process PRST/8/1 (9 April 2008); Follow-up to President's statement 8/1 PRST/9/2 (24 September 2008); Human Rights Council resolution 16/21: Review of the work and functioning of

the Human Rights Council 12 April 2011; Human Rights Council decision 17/119: Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review 19 July 2011; Human Rights Council decision OM/7/101: Non-cooperation of a State under review with the universal periodic review mechanism 29 January 2013; Letter from President of the Human Rights Council on rules and practices of the Universal Periodic Review Working Group, 18 September 2013; all documents are accessible via http://www.ohchr.org/EN/HRBodies/UPR/Pages/BackgroundDocuments.aspx.

2. See, for instance, the OHCHR website via http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx / documentation by country and click asterisk 3 at Summary of stakeholders' information.
3. See www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx and www.upr-info.org. Please note, that sometimes the figures on the number of recommendations received by a country differ between the official outcome report and the database displayed at the website of the NGO UPR Info. For reasons of reference to governments' statements, this text uses the figures of the official documentation.
4. See footnote 1.
5. Including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), Convention Against Torture (CAT), Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), or ICRMW.
6. The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective; for details see http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.
7. See further details on that discussion at https://www.upr-info.org/en/news/for-effective-third-cycle-two-elements-of-the-upr-process-must-be-prioritised.
8. UPR Info has already provided fact sheets on five issues, at https://www.upr-info.org/en/news/morocco-launches-upr-3rd-cycle-preparation-with-upr-infos-support.

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PART II

Thematic Perspectives

CHAPTER 4

The Abolition of the Death Penalty in Southeast Asia: The Arduous March Forward

M. Ravi

Introduction

Southeast Asia comprises a region often associated in the media with the liberal use of the death penalty, particularly for drug-related offences. In recent years, however, trends suggest slightly more leniency, through moratoriums and legal reform (UN Office of the High Commissioner for Human Rights 2013a, b). This is especially the case in former British colonies where the death penalty has been long established. In 2012, Singapore amended its laws on the death penalty, giving judges more discretion by partially lifting the mandatory requirement in some limited cases.[1] In Malaysia, while the death penalty is still handed down for drugs and trafficking, the reluctance to carry out these penalties has been noticeable (Leechaianan and Longmire 2013). In Brunei Darussalam and Myanmar, a *de facto* moratorium is in place, where executions have not taken place since 1957 in Brunei (Cornell Law School 2011) and all death sentences were commuted in Myanmar in 2014 (UN Office of the High Commissioner for Human Rights 2014). The death penalty in Southeast Asia has featured in deliberations in the Universal Periodic Review (UPR) process of the

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United Nations (UN) Human Rights Council (HRC). UN member states throughout the region are on the precipice of a third cycle of UPR, set to begin in 2017. Judging by the emphasis on the death penalty in the previous two UPRs, it is likely that the topic will again be a focus of attention at the third review and these member states will be urged to step further towards abolishment. Previous reviews included emphasis by other member states and human rights groups on the use of the death penalty for drug-related offences and the imperative to move beyond moratorium and establish an outright abolishment.

In the lead up to the third UPR cycle of the UN Human Rights Council, this chapter will provide a comparison of four UN member states—Singapore, Malaysia, Brunei Darussalam and Myanmar—and the prominence their first and second cycle UPR gave to each of their respective death penalty regimes. In doing so, it will ultimately show that while there are glimmers of hope, the road ahead for abolishing the death penalty in these countries will be long and arduous. The chapter draws from several primary UPR sources including national reports, submissions from UN Special Procedures and treaty bodies, summary of stakeholder information (including submissions by non-governmental organisations (NGOs)) as well as the final outcome reports. It is divided into five primary sections: (1) The Universal Periodic Review, (2) A Cross Country Analysis of CSO Recommendations at the UPR, (3) Issues for the Third UPR Cycle: Developments in National Laws, (4) Strategies for CSOs in the Third UPR Cycle, (5) National Justifications for the Death Penalty, followed by concluding remarks.

The Universal Periodic Review and the Death Penalty

At the time of writing, the UPR mechanism was concluding its second cycle, with the third set to begin in 2017 (Ibid). Various analyses of the first cycle generally found cautious optimism. Some suggested that, although an imperfect process, the UPR enables dialogue and cooperation between member states and with stakeholders (Conte 2011). Challenges, however, echo current reflections on the second cycle, in particular, the fundamental test of recommendation implementation. Cycles can come and go, but ultimately human rights law practitioners and supporters value practical outcomes. At the precipice of the third cycle of review, this element of implementation will be closely watched. At its conclusion, a decade and a half of experience will clarify trends in this respect.

The UPR process has been met with universal participation from member states (UN General Assembly 2013). Commentators have highlighted the value that the UPR process brings to increasing dialogue between governments and non-state actors, while creating a baseline of valuable documentation for reference (McMahon 2012). Furthermore, it has facilitated a self-evaluation process for states, creating a norm, which, although arguably generating lip service, has nevertheless heightened the awareness of human rights at a universal level. Generally, the UPR has cemented its role as an important element of the application of human rights law internationally; creating a vital system for valuing human rights, relied upon by governments and stakeholders alike. Some have hailed the UPR as a paradigm shift in the way CSOs and governments interact, facilitating cooperative rather than adversarial communication (Chauville 2016).

The UPR has also been met with criticism that it does not go far enough to include NGO involvement (International Service for Human Rights 2013). This is a delicate topic in a system that is organised and carried out by the UN member states themselves, where some less democratic states may wish to suppress the voice of human rights NGOs critical of their record. NGOs and CSOs often bring critical detail and practical examples to the process that shed light on human rights abuses that may otherwise go unnoticed. From the perspective of NGOs, the efficacy of the UPR lies in its ability to achieve the objective of 'improving the situation of human rights on the ground' (UN Office of the High Commissioner for Human Rights 2008: Paragraph 4(a)). Early NGO assessments of the UPR underscored the need for the mechanism to pressure states to uphold their international commitments to human rights, asserting that time would tell of the usefulness of the UPR (Sweeney and Saito 2009). Later analysis found that there is difficulty in evaluating the implementation of recommendations arising from the UPR and that the recommendations themselves are often imprecise in nature, confounding the challenge of implementation (Hickey 2013). In 2013, Hickey noted that in the 12 sessions of the first cycle, 75% of all recommendations were accepted (Ibid). However, the gulf between accepting recommendations and implementing them remains a challenge.

In each review, fundamental sources of international human rights law are called upon to hold each member state to account. These include, broadly, the Universal Declaration of Human Rights, the Charter of the United Nations, pledges and commitments made by a state and the various human rights instruments to which a state is a party (UN Human

Rights Council 2007). Within these sources of law are a wide range of human rights standards which member states can choose to accept, and some that can be considered a part of international custom. Among all the topics highlighted from this framework during UPR cycles for review, the death penalty is consistently among the issues that are reiterated yet go unimplemented by countries with capital punishment laws (UPR Info 2014).

Among the recommendations made by states during the UPR are those to abolish the death penalty, impose a moratorium on implementing the death penalty and ratifying the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) to abolish the death penalty (Morrison and Riordan 2015). Other recommendations on the subject are myriad and reflect a spectrum of abolitionist views, from upholding moratoriums to increasing education and awareness around the denial of human rights constituting the death penalty.

As most countries in Southeast Asia retain the death penalty in domestic law, the region is no stranger to recommendations against the death penalty during the Universal Periodic Review. A closely associated aspect of these recommendations is the fact that a significant proportion of member states in the region has not ratified the ICCPR (UN Office of the High Commissioner for Human Rights 2013a, b). Stemming from that international legal instrument is Article 6, which states that '[e]very human being has the inherent right to life' (Second Optional Protocol ICCPR 1989). With very limited exception, this article is a cornerstone of criticism for the death penalty. Clause 6 of the article states, 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant' (Ibid). Viewed through this lens, member states that have ratified the ICCPR often recommend to member states within Southeast Asia to take steps to align with the Covenant. The corresponding Optional Protocol 2 is also a foundation stone for abolitionist countries to make recommendations against the death penalty during the UPR.

Beyond the central position against the death penalty arising from the ICCPR are related corollary recommendations. These include the use of the death penalty on 'protected persons' and beyond 'most serious crimes' such as in cases of drug use and trafficking, provisions for fair trial in death penalty cases, the urging of use of moratoriums and the methods by which the death penalty is carried out which can be considered cruel and inhumane (UN General Assembly 2012). Altogether, taking into consideration both UPR cycles to date, a total of 157 recommendations were made regarding the death penalty to the member states comprising ASEAN and 69 to the

countries highlighted in this chapter particularly (UPR-Info 2016). The top five member states making these recommendations were France, Spain, Italy, Australia and Belgium—all abolitionist states (Ibid).

The UPR, then, presents an apparent opportunity for abolitionist member states to recommend moves away from the death penalty to countries that still maintain capital punishment, on the global stage. These recommendations are an important part of the peer review process of the UPR that ensures equal human rights record scrutiny for every member state. Issues raised in relation to the four countries, the subject of this chapter, ranged in the two cycles from urges to ratify the ICCPR to specific comments regarding Sharia law, to abolishing the death penalty for drug crimes, to unequivocally urging the abolishment of the death penalty altogether. In response, these member states' replies ranged from 'noting' to accepting in limited circumstances (Ibid), yet avoiding any voluntary pledges. Malaysia accepted Egypt and Sudan's recommendation to maintain national sovereignty in carrying out the death penalty and 'maintain a good example' in observing legal safeguards around the death penalty. At the same time, Singapore accepted France's recommendation to modify legislation and shift the burden of proof of person facing death penalty to the prosecution. Singapore also accepted Finland's recommendation to make available statistics and facts on the use of the death penalty in Singapore (Ibid). Overall, however, Singapore has rejected almost half of all total recommendations it received (Think Centre 2016).

In any case, the engagement of these countries in a dialogue about the death penalty over the course of a decade now can be seen as an important accomplishment and a testament to the efficacy of the UPR as a mechanism for highlighting the use of the death penalty. Equally important is the contribution that NGOs and CSOs make within that mechanism.

A Cross Country Analysis of CSO Recommendations at the UPR

Throughout the first two cycles of the UPR, NGOs and other CSOs have played an important role in highlighting human rights violations in the region, where other member states have not. Of these, Amnesty International (AI) is particularly active in its stakeholder submissions and is essentially the foremost international non-governmental organisation raising death penalty issues at the UPR for Brunei Darussalam, Malaysia, Myanmar and Singapore. Other international organisations include World Coalition Against the

Death Penalty (WCADP), International Bar Association's Human Rights Institute and Child Rights International Network (CRIN). Regional and local organisations are numerous and include MARUAH-Working Group for an ASEAN Human Rights Mechanism, Singapore Anti-Death Penalty Campaign (SADPC), the Human Rights Commission of Malaysia as well as coalitions of Malaysian and Singaporean NGOs.

These organisations raised varied and overlapping death penalty-related issues during the first and second UPR cycles for each country. There is a noticeable increase in highlighted issues between the first and second cycles for each country, bar Brunei Darussalam where the second review made no apparently direct references to the death penalty or capital punishment. Generally, the number of organisations contributing to the UPR was higher for Singapore and Malaysia, resulting in richer emphasis for these countries. Brunei and Myanmar also have *de facto* moratoriums on the death penalty, consequentially attracting minimal attention.

First UPR Cycle

In the summary of stakeholder information for the first cycle (2008–2011), Amnesty International was especially active. For Brunei Darussalam, it noted that the country was a *de facto* 'abolitionist' country as an execution has not been carried out there since 1957. Still, it highlighted the offences punishable by death including murder, drug trafficking and the unlawful possession of firearms and explosives (UN Human Rights Council 2009). Furthermore, AI recommended a permanent abolishment of the death penalty by repealing relevant laws to replace the death penalty with other punishments (Ibid). AI's light touch of the death penalty issue was raised again with Myanmar in a similar manner. It commented that Myanmar was abolitionist in practice; however, a number of crimes including murder and drug trafficking maintained capital punishment (UN Human Rights Council 2010).

In the review of Singapore and Malaysia, AI made a number of other recommendations. For both, it mentioned that details of inmates on death row or those who have been executed are not made public, creating suspicion that more are executed than reported in the media UN Human Rights Council (UN Human Rights Council 2008, 2011b). In the case of Malaysia, it highlighted that the timing of executions is often not made public. It also noted that for certain crimes, such as drug trafficking, a mandatory death penalty remains in place (UN Human Rights Council 2011b: 4–6). This was particularly so for Singapore, where AI highlighted that any possession

of drugs over a certain weight draws the mandatory death sentence (UN Human Rights Council 2011b: 4). As with Brunei Darussalam and Myanmar, AI invoked the 18 December 2007 General Assembly resolution 62/149.39, calling for complete abolition of the death penalty. Accordingly, AI recommended a moratorium on the death penalty come into effect with the ultimate aim of complete abolition (UN Human Rights Council 2008: 4). It also put forward that the imposition of mandatory death sentences violated the human right to life, recommending that all laws carrying the death sentence be rewritten to use a different form of punishment.

Contributions from local organisations were less numerous in the first cycle. From Singapore, MARUAH, a local NGO, recommended that the death penalty be reviewed and imposed only for the most serious crimes (UN Human Rights Council 2011b). It also recommended that capital punishment not be used on accessories in group crimes and highlighted the need for 'rigorous' pretrial and trial processes where legal counsel is immediately available to the accused after arrest. MARUAH also went on to recommend that Singapore publish persuasive and objective evidence of the deterrent effect of the death penalty, presumably relying on the fact that there is little, if any, evidence to demonstrate the deterrent effect of the death penalty (Ibid:4). The SADPC also contributed to this cycle. It argued that the death penalty was not consistent with absolute necessity and proportionality requirements in the case of drug-related offences. SADPC went on to recommend an independent clemency appeals board so case-by-case reviews could be conducted.

Malaysia's review had contribution from local organisations in the form of the Human Rights Commission of Malaysia (SUHAKAM) and coalition of Malaysian NGOS that submitted jointly to the UPR review (COMANGO).[2] SUHAKAM recommended the that Pardons Boards review death row cases and COMANGO lamented that no public information existed on the number of prisoners on death row (UN Human Rights Council 2008).

Second UPR Cycle

The number of recommendations from NGOs and CSOs, both local and international, increased significantly in the second cycle (2012–2016), highlighting a range of important human rights issues related to the death penalty. This with the exception of Brunei Darussalam, where a *de facto* moratorium remains in place, where the most significant concern was with its new Syariah Penal Code set to introduce the death penalty for a wide array of offences (UN Human Rights Council 2014: 8–10).

In the second cycle, AI was again an active participant in making recommendations to Malaysia (2013) and Singapore (2015) related to the death penalty. It noted government reports that 930 prisoners were on death row and that drug offences under certain circumstances would avoid mandatory death penalty (UN Human Rights Council 2013, 2015b). Both the reporting and the consideration of reforming the mandatory sentence showed a marked improvement from the first cycle. AI also raised the 'most serious crimes' threshold for the death penalty, perhaps pushing for an incremental approach to eventual abolition. A joint submission from JS8 highlighted the use of the mandatory death penalty for drug trafficking and recommended that Malaysia limit the use of the death penalty to the most 'serious crimes', highlighting a similar issue to AI (Ibid). In other words, avoiding the death penalty for drug-related offences. AI did, however, note the positive step Singapore took to maintain a moratorium while the Misuse of Drugs Act 2012 and the Penal Code Act 2012 were reviewed (the moratorium ending in 2014). AI was concerned that while reform allowed judges to use more discretion in deciding whether to impose the death penalty (such as for group crimes), the laws still don't go far enough to align with international human rights law and standards (UN Human Rights Council 2015b: 3). It also noted that families with members on death row are not notified far enough in advance of execution dates.

Another international organisation, Child Rights International Network (CRIN) commented that the death penalty was lawful for children under 18 years of age and recommended reform in both the Malaysia and Singapore reviews (Ibid). Other legal reform recommendations came from JS1, a joint submission from 54 organisations.[3] It recommended that parliamentarian, judges and judicial officers be trained to have greater awareness of human rights issues, including the right to life. AI also recommended to Singapore that the presumption of innocence be maintained in death penalty cases and the burden of proof be placed on the prosecution. It also stated that Singapore should ensure the right to fair trial and the presumption of innocence in its cases (Ibid).

In Singapore's review, the local anti-death penalty NGO, Second Chances, raised the issue of the legality of execution of persons who are mentally ill, where there was no legal requirement to consider clemency. It also echoed the first cycle recommendations in that public information was lacking in Singapore related to the death penalty and very little notice given to families (Ibid). These points were also reiterated by AI.

A further point of recommendation came from MARUAH expressing concern that in Singapore accused persons facing death penalty crimes can be denied access to legal counsel for a period of time after arrest to allow police to conduct investigations. It also noted that in Singapore a conviction can be made on confession recorded during police investigation. Both of these issues raise significant challenges to the right to fair trial and presumption of innocence that should be afforded as human rights.

Myanmar's review (UN Human Rights Council. 2015c) had brief recommendations related to the death penalty in the second cycle. AI and a joint submission from global NGOs commented that the death penalty remained a part of Myanmar law and death penalties were still handed down, although a moratorium is technically in place (UN Human Rights Council 2015a). They urged Myanmar to go the step further to move towards abolition (Ibid).

Issues for the Third UPR Cycle: Developments in National Laws

With the third cycle of the UPR process imminent, a brief consideration is in order of key developments in law in Brunei, Malaysia, Myanmar and Singapore. Increasingly, CSOs are urging Southeast Asian nations to take a united stand on abolishing the death penalty (ASEAN People's Forum 2015). However, the reality on the ground suggests that capital punishment's place in national laws in the region is deeply seated. Below is a look at some of these laws, highlighted by key UN human rights instruments. The Philippines is also briefly mentioned as the current administration appears to be on a path towards reversing the country's ban on the death penalty.

Brunei Darussalam

Since 2014, Brunei Darussalam has maintained a new Syariah Penal Code that carries the death penalty for certain offences. As part of this new Code, a third phase of implementation focuses on offences carrying the death penalty to be enforced from 2018. The types of offences that will attract this law include rape, extramarital sexual relations for Muslims, insulting the verses of the Quran or Hadith, blasphemy, declaring oneself a prophet or non-Muslim, and murder. This list will also include death by stoning for sodomy and adultery (World Coalition Against the Death Penalty 2016a).

This is a concerning development, as currently Brunei maintains the death penalty as a punishment, in theory only, for offences that are more serious in nature, such as terrorism and murder. However, the penalty still remains in place for drug trafficking, possession, arson and treason (Death Penalty Worldwide 2015). In practice, a *de facto* moratorium has been in place since the last reported execution in 1957. This is a promising sign towards gradual elimination of the death penalty. However, the Syariah Penal Code, which lies on the horizon, poses a serious challenge to progressive elimination. Ending the death penalty still appears to be a distant possibility.

Brunei has maintained a *de facto* moratorium since 1957, though this does not amount to a denouncement of the death penalty. In fact, the death penalty is still handed down and there are thought to be 4 known prisoners technically on death row (Ibid). While the moratorium is a positive step, it is quite possible that the country will engage in executing prisoners again when the totality of the new Syariah Penal Code is implemented.

Malaysia

Malaysia imposes the death penalty for a wide range of offences including arguably less serious crimes such as drug trafficking, and in certain circumstances, robbery, resisting arrest with a firearm, kidnapping and burglary.[4] Mandatory death sentencing is imposed for drug trafficking.[5] The Penal Code of Malaysia and the Dangerous Drugs Act of Malaysia set out most of these offences.[6] In total, the death penalty is mandatory for 12 of 20 total offences in Malaysia (Yu Ji 2016). Although death sentences are carried out yearly, there is a potential change on the horizon for Malaysia. A recent government backed report on the death penalty is nearing publication as highlighted recently by Nancy Shukri, Minister in the Department of the Prime Minister (Ibid). At the 6th World Congress Against the Death Penalty, the Minister commented that based on this report, Malaysia was on a path to change in death penalty laws. What this means in practice remains to be seen.

Malaysia does not currently maintain any moratorium on the death penalty. At least 3 executions were carried out in 2016 (Holmes 2016).

Myanmar

The Burma Penal Code maintains the death penalty for a number of offences including murder, terrorism and treason.[7] The Myanmar Narcotic Drug and Psychotropic Substances Law imposes a mandatory death penalty

for drug possession and trafficking.[8] In 2014, Myanmar took a widely lauded step to commute all death sentences (UN News Centre 2014). Signs of gradual elimination are only conceivable in steps like these and the fact that no death sentence has been carried out since 1988 (Cornell Law School 2015).

Myanmar maintains a *de facto* moratorium on the death penalty. The last execution in the country was carried out in 1988 (Ibid). The Special Rapporteur on the Situation of Human Rights in Myanmar commended the government for this effective moratorium; however, it noted that lower courts still hand down death sentences (UN Human Rights Council 2011a: 18). The fact that the member state voted against a UN moratorium resolution in 2012 (World Coalition Against the Death Penalty 2016b) suggests that it is still unclear whether progress towards abolition is occurring.

Singapore

As a starting point, Singapore's constitution says that the state may not deprive someone of his or her life, 'save in accordance with law'.[9] Singapore is not the only state to have such a constitution (Hor 2004). The first legal issue, then, concerns the presumption of innocence absent from the law relating to drugs (United States Department of State 2015). Singapore upholds the death penalty in cases of trafficking or manufacturing drugs. In such cases, a presumption of innocence is not granted to the accused. The Misuse of Drugs Act empowers courts to presume a defendant in possession of a low requisite quantity of drugs is a drug trafficker. At every point, the burden is on the defendant to prove those presumptions incorrect, effectively creating a presumption of guilt in Singapore (Ibid). This is significant especially because there have been historically a large number of executions in Singapore for drug convictions (Amnesty International 2004; Singapore Government 2007).

Another legal issue is the broad interpretation in Singapore of what amounts to a 'serious crime' attracting the death penalty. Singapore claims it only uses the death penalty for the 'most serious crimes'. But this is a controversial question in many jurisdictions around the world and Singapore's highest court has not had to decide this issue directly (Hor 2001). It is also significant that Singapore is not a signatory to the ICCPR or any international legal instruments that would place limitations of Singapore's use of the death penalty. This creates a limited international recourse,

although some commentators have discussed that there may be an argument for appealing to international custom (Ibid). While Singapore amended its laws in 2012 on the death penalty, making it no longer mandatory for those convicted of drug trafficking or murder to receive death sentences, this is a far cry from eliminating the death penalty.[10] While some may view it as a gradual step towards this end, Singapore still adamantly maintains the death penalty for drug and other offences. A glimmer of hope in the law reforms of 2012 may prove to be a tiny step towards elimination of the penalty, but ultimately the prospect of this is hard to conceive at present.

Singapore maintained a brief moratorium on the death penalty, while it reviewed the Misuse of Drugs Act 2012 and the Penal Code Act 2012. However, this did not last and executions were carried out both in 2015 and 2016 after amendments were made to these laws giving judges slightly more discretion in certain cases.

National Justifications for the Death Penalty

Historically speaking, countries maintaining the death penalty in the region have cited cultural reasoning for excusing the death penalty for offences seen as 'lighter' by other member states, such as drug possession (Bünte and Dressel 2016). For Malaysia and Singapore, this is generally still the case.

Malaysia maintains that it imposes the death penalty for the most serious offences (UN Human Rights Council 2013). However, Malaysia uses similar arguments to Singapore in arguing that culturally drug possession and trafficking is a 'most serious crime'. Singapore's response to recommendations and comments regarding the death penalty is to rehash old arguments connecting capital punishment with drug and crime deterrence (Singapore Ministry of Foreign Affairs 2016). In fact, from Singapore's independence, the death penalty was used as deterrence to drug addiction and trafficking by mandating the death penalty for drug trafficking and manufacturing offences. The Minister for Home Affairs and Education at that time, Chua Sian Chin, commented, 'unless drug trafficking and drug addiction [are] checked, they [will] threaten our national security and viability. To do this, both punitive and preventive measures must be taken. The [Misuse of Drugs] Act was thus amended to provide enhanced penalties for traffickers, including mandatory death penalty for drug trafficking and manufacturing' (Chin, Chua Sian 1977). The reality today is that the deterrence argument is dubious (Hor 2001). Similar to Malaysia, justifications are also made on a cultural basis, arguing that drug offences are

culturally considered the most serious crimes. However, the Special Rapporteur on extrajudicial, arbitrary or summary executions has stated that these types of justifications are counter to the spirit of universality of human rights law (Hood 2006). Further, the UN Assistant Secretary General for Human Rights recently expounded on the empirical facts which demonstrate that there is 'no evidence [the] death penalty deters any crime' (UN News Centre 2015).

While each of the countries considered above maintains the death penalty in some form, the Philippines technically bans the death penalty. However, recent developments in Philippines' political landscape suggest that the country is on the cusp of legally reinstating capital punishment for 'heinous crimes', including murder, piracy, trafficking and possession of illegal drugs (Human Rights Watch 2016). This has already drawn the attention of national and international human rights CSOs.[11] Should it become law, the Philippines will likely be held to account by the international community. In enacting the death penalty into law, the Philippines will attract particular scrutiny due to the fact that it is a member party to the Second Optional Protocol to the ICCPR, which commits the country to the abolition of the death penalty (Second Optional Protocol to the ICCPR 1989). The likelihood that the Philippines will significantly regress in its commitment to abolishing the death penalty leaves a bleak outlook for proponents of abolishment in the Philippines and internationally. The third UPR session will provide ample opportunity for UN member states and CSOs to highlight this deterioration in commitment to international human rights law.

Conclusion

Without a doubt, CSOs play a vital role in each UPR cycle in holding up a mirror to the violations of human rights perpetrated in countries throughout the region. As evidenced by the previous cycles, their role in highlighting violations of the right to life and fair trial is just as crucial. To avoid repeating methods of the past, the challenge before CSOs will be to devise new strategies for drawing attention to the death penalty at the UPR. This may include the formulation of death penalty-specific submissions and finding creative ways to highlight the violations of the rights of individual death penalty victims. In any case, central to the strategies for the next cycle must be a unified approach to examining and demonstrating violations. Comparatively, the overall number of CSOs based in Southeast Asia

advocating against the death penalty are limited. Networks such as the Anti-Death Penalty Asia Network, however, enable a louder voice through the pooling of resources and knowledge (Anti-Death Penalty Asia Network 2016). Such pan Southeast Asian networks provide context and perspective that augment efforts of international CSOs such as Amnesty International. Together, national, regional and international NGOs have the capacity to shine a light on the region during UPRs that peer governments around the world cannot.

The wide range of offences attracting the death penalty in these countries suggests a complicated relationship with capital punishment that goes deeper than peer review. The universality of human rights law, the socio-cultural acceptance of the death penalty and the lack of human rights law education for law makers make up just a few of the challenges that must be faced across the four countries and throughout the Southeast Asian region. Still, the universality of the UPR mechanism promises the emergence of internationally accepted best practices that may guide member states to an eventual abolishment of the death penalty. There is no doubt that, particularly in this region, an arduous road lies ahead. This path calls for more involvement from NGOs and CSOs to march side by side in using the UPR as a vital mechanism to highlight death penalty issues across each UN member state highlighted in this chapter.

Notes

1. Evidenced from the Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed). These limited situations may include those where murder is not intentional and drug possession within certain (low) thresholds.
2. These NGOs included 56 NGOs: All PJ Residents' Association Coalition (APAC) (a coalition of 9 residents' associations), All Women's Action Society (AWAM), Centre for Independent Journalism (CIJ), Centre for Orang Asli Concerns (COAC), Centre for Public Policy Studies (CPPS), Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Community Action Network (CAN), Education and Research Association for Consumers, Malaysia (ERA Consumer), Health Equity Initiative, Human Rights Committee of the Malaysian Medical Association, Independent Living and Training Centre (ILTC), Indigenous and Peasant Movement Sarawak (Panggau), International Association for Peace (IAP), Indian Malaysian Active Generation (IMAGE), Knowledge

and Rights with Young People through Safer Spaces (KRYSS), Malaysian Animal-Assisted Therapy for the Disabled and Elderly Association (Pet Positive), Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST) (a coalition of 9 religious organisations), Malaysian Trade Union Congress (MTUC), Malaysian Youth and Students Democratic Movement (DEMA), Myanmar Ethnic Rohingya Human Rights Organisation Malaysia (MEHROM), Persatuan Sahabat Wanita Selangor (PSWS), Persatuan Masyarakat Selangor and Wilayah Persekutuan (PERMAS), Persatuan Guru-guru Tadika (PGGT), Positive Malaysian Treatment Access & Advocacy Group (MTAAG+), Protect and Save the Children (PS the Children), PT Foundation, Pusat Jagaan Nur Salam, Pusat Komunikasi Masyarakat (KOMAS), Research for Social Advancement (REFSA), Sarawak Dayak Iban Association (SADIA), Sisters in Islam (SIS), Tenaganita, United Dayak Islamic Brotherhood, Sarawak, Women's Aid Organisation (WAO), Women's Centre for Change, Penang (WCC), Writers' Alliance for Media Independence (WAMI), Youth for Change (Y4C), Youth Section of the Kuala Lumpur and Selangor Chinese Assembly Hall.

3. Joint submission No. 1 by 54 organisations: [Pusat Kesedaran Komuniti Selangor (EMPOWER), Suara Rakyat Malaysia (SUARAM), Education and Research Association for Consumers, Malaysia (ERA Consumer), All Petaling Jaya, Selangor Residents' Association (APAC), All Women's Action Society (AWAM), Amnesty International, Malaysia, ASEAN Institute for Early Childhood Development, Association of Women's Lawyers (AWL), Association of Women with Disabilities Malaysia, Coalition to Abolish Modern Day Slavery in Asia (CAMSA), Centre for Independent Journalism (CIJ), Childline Malaysia, Christian Federation Malaysia, Community Action Network (CAN), Centre for Rights of Indigenous Peoples of Sarawak (CRIPS), Dignity International, Foreign Spouses Support Group, Good Shepherd Welfare Centre, Health Equity Initiatives, Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM), Jaringan Rakyat Tertindas (JERIT), Justice For Sisters, Pusat Komunikasi Selangor (KOMAS), Knowledge and Rights with Young people through Safer Spaces (KRYSS), KLSCAH Civil Rights Committee, Land Empowerment Animals People (LEAP), Malaysians Against Death Penalty and Torture (MADPET), Malaysian Child Resource Institute (MCRI), Malaysian Physicians for Social Responsibility, Malaysia Youth & Student Democratic Movement (DEMA), Migration Working Group (MWG), PANGGAU, Persatuan Masyarakat Selangor dan Kuala Lumpur (PERMAS), PS The Children, PT Foundation, People's Service Organisation (PSO), Seksualiti Merdeka, Perak Women for 13 Women Society, Persatuan Guru-Guru Tadika Semenanjung Malaysia (PGGT), Persatuan Komuniti Prihatin Selangor dan Kuala Lumpur,

Persatuan Sahabat Wanita Selangor, Rainbow Genders Society, Sabah Women's Action-Resource Group (SAWO), Southeast Asian Centre for e-Media (SEACem), Sinui Pai Nanek Sengik (SPNS), SIS Forum (Malaysia) Bhd (SIS), Tenaganita, Voice of the Children (VOC), Writers' Alliance for Media Independence (WAMI), Women's Aid Organisation (WAO), Women's Centre for Change, Penang (WCC), Yayasan Chow Kit, Young Buddhist Association, Youth Section, Kuala Lumpur and Selangor Chinese Assembly Hall, Youth Section].

4. Penal Code of Malaysia, art. 307(2), 396, 194 and 305, 1936, as amended by Act 574 of 2006.; Firearms (Increased Penalties) Act of Malaysia, art. 3(A), 1971.
5. Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980.
6. Penal Code of Malaysia, 1936, as amended by Act 574 of 2006; Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980
7. Government of Myanmar (2016) 'Burma Penal Code', art. 302, No. 45 of 1860, 1 May 1861.
8. Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22–23, No. 1 of 1993; Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22–23, 26, No. 1 of 1993.
9. Constitution of the Republic of Singapore (1999 Rev. Ed.), Article 9(1).
10. Marked by Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
11. Amnesty International, for instance, has led a campaign to convince Philippines lawmakers to vote against the death penalty. See https://www.amnesty.org/en/get-involved/take-action/stop-reintroduction-of-death-penalty-philippines/.

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CHAPTER 5

LGBTIQ Rights in Southeast Asia: Implementing Recommendations from the Universal Periodic Review

Destination Justice

Introduction

By 11 November 2016, when the second cycle of the United Nations Universal Periodic Review (UPR) ended, the 11 Southeast Asian countries that are the subject of this chapter—Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Timor-Leste, and Vietnam—received recommendations on various human rights-related issues over both the first and the second cycles.

This chapter discusses the situation of the lesbian, gay, bisexual, transsexual, intersex, and queer (LGBTIQ) communities and human rights defenders (HRDs) in the 11 mentioned countries based on the recommendations made in first and second UPR cycles. The chapter is based on a methodology adopted by Destination Justice's Rainbow Justice team, which has been working from March 2016 to February 2017 on a report highlighting the situation of LGBTIQ HRDs in Southeast Asia.

For Destination Justice, anyone striving for the realization of human rights and fundamental freedoms and working towards achieving change is a HRD. Students, civil society activists, religious leaders, journalists,

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lawyers, doctors and medical professionals, and trade unionists are often identified as HRDs, but the list is not exhaustive. Accordingly, this chapter identifies an HRD as anyone striving to promote and/or protect LGBTIQ rights. Moreover, throughout this chapter, "LGBTIQ" will be used at all times, unless a cited source uses another acronym. At the beginning of each county profile, reference is made to the acronym commonly used by the country's civil society, NGOs, and/or government.

The UPR process constitutes an "unprecedented opportunity for [Sexual Orientation, Gender Identity and Expression, and Sexual Characteristics] SOGIESC human rights defenders to raise human rights violations against LGBTI people and proactively engage with governments" (Arc International et al. 2016). Despite growing dialogue on LGBTIQ rights in the UPR process, much remains to be done in Southeast Asia regarding the protection of LGBTIQ HRDs and their ability to freely advocate for LGBTIQ rights. Some Southeast Asian countries have taken positive steps to reform their legal framework to include explicit protections of LGBTIQ HRDs and the LGBTIQ community. Conversely, others have actively circumscribed the rights of LGBTIQ HRDs and the LGBTIQ community through the imposition of harsh sentences for same-sex conduct or through the restriction of the freedoms of assembly, expression, and speech of those advocating on behalf of the LGBTIQ community. Overall, UPR recommendations impacting the work of LGBTIQ HRDs over the course of the past eight years have remained largely unaddressed by most Southeast Asian countries. The stark reality is that LGBTIQ HRDs in Southeast Asia continue to be at risk—and with them, the future of LGBTIQ rights in the region. In this chapter, after a quick outline on the LGBTIQ rights situation in Southeast Asia, it will analyse the role of the UPR process in addressing this issue, followed by an assessment of the level of implementation of the recommendations made during the UPR process. From this analysis, the chapter will highlight some observations for the stakeholders involved in the process. Finally, the chapter will reflect if the newly appointed UN Independent Expert (IE) on SOGI would be better way to engage SOGIESC-related issues, or if the expert is a complementary mechanism in the United Nations human rights architecture.

LGBTIQ Rights in Southeast Asia

The law applicable to the LGBTIQ communities in Southeast Asia differs greatly from one country to another. In Malaysia, Myanmar, Brunei Darussalam and Singapore, Section 377 of the Penal Code criminalizes

same-sex relationships (APCOM 2016). The same is true under recent by-laws in Aceh (Northern Indonesia Province), while in Cambodia, a large part of Indonesia, Laos, Thailand, Timor-Leste, and Vietnam, such practices are not forbidden by the law. However, discriminations based on SOGIESC remain in every one of the 11 countries. The added value of the UPR process is to consider both national and international legal obligations. Therefore, the 11 states being member states of the United Nations must all comply with the fundamental international legislation starting with the Universal Declaration on Human Rights (UDHR).

In Destination Justice's ongoing research, the specific country situations of LGBTIQs and their HRDs have been analysed through the lens of the following rights and freedoms, included in the most relevant international human rights instruments: the right to equality and non-discrimination, the right to liberty and security of person, the right to privacy, the right to work, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association, the right to participate in public life, and the right to participate in the cultural life of the community. While the following lines do not have the purpose of explaining the interpretation of these rights in international law, we will highlight a few fundamental principles that will guide the rest of our paper.

While the UDHR is not a legally binding instrument, its principles are fundamental and were developed further through United Nations human rights treaties. It has been recognized that several UDHR principles such as human rights universality, interdependence and indivisibility, equality, and non-discrimination are now considered as International Customary Law (United Nations 2016). Therefore, those principles are binding to all states whether they agree to them or not and are used as a legal basis during the UPR process. Especially in the case of the Southeast Asian countries which are known to have a low level of ratification of the UN human rights treaties.[1]

Over the years, the UN human rights treaty bodies, through their jurisprudence, have clarified the applicability of those fundamental principles to SOGIESC issues. As such, in the case Toonen v. Australia, the UN Human Rights Committee[2] held that reference to "sex" in the Articles 2(1) and 26 of ICCPR is to be taken as including "sexual orientation" (Toonen v. Australia 1994). Sexual orientation is therefore a proscribed ground of discrimination. This interpretation was later reaffirmed in the cases Young v. Australia and X. v. Colombia. Since then, in its Concluding Observations on state's reports, the Human Rights Committee has regularly expressed concerns about the criminalization of consensual acts between adults of the

same sex (Concluding Observations: Barbados 2007) and welcomed the decriminalization of sexual acts between adults of the same sex (Concluding Observations: United States of America 2006).

Similarly, the Committee on Economic, Social, and Cultural Rights held that "other status" in Article 2(2) includes sexual orientation. The Committee further held that "States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights" (Committee on Economic, Social and Cultural Rights 2009). The Committee on the Elimination of Discrimination against Women for the first time referred to "sexual orientation" as part of the term "sex" in a 2010 General Recommendation. In particular, it stated:

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. (Committee on the Elimination of Discrimination against Women 2010)

Despite being non-binding, David Brown noted the influence of the Yogyakarta Principles of 2010, stating:

> Despite the tension between activism and strict legal accuracy, the Principles have already attained a high degree of influence. They have become a fixture in the proceedings of the United Nations Human Rights Council; have been incorporated into the foreign and domestic policies of a number of countries; been acclaimed and debated by regional human rights bodies in Europe and South America; and have worked their way into the writings of a number of United Nations agencies and human rights rapporteurs. (David Brown 2010)

The 2012 ASEAN Human Rights Declaration (AHRD), adopted in Phnom Penh on 18 November 2012, fails to protect LGBTIQ even though it contains a set of General Principles that address discrimination broadly. This Declaration is not binding and heavily criticized by the civil society (International Commission of Jurists 2012). Per the international literature, the expressions "sex" and "gender" are not synonyms, and the effort made by ASEAN here should be acknowledged. Sex refers to male and female, while gender refers to masculine and feminine, which means that gender is more inclusive for the LGBTIQ community (Milton Diamond 2002). Nonetheless, the AHRD fails to address SOGIE issues and to protect minorities such as the LGBTIQ community (ASEAN LGBTIQ Caucus 2013).

CSOs and LGBTIQ Advocacy in the UPR Process

Civil society in Southeast Asia is comprised of thousands of organizations working in different areas from human rights to development, human security, and aid relief. Its engagement with ASEAN commenced in 2005, with the first regional ASEAN People's Forum. At the sixth ASEAN Peoples' Forum in September 2010 in Hanoi, Vietnam, for the first time, included the human rights of LGBTIQ people in the meeting's final statement (Ging 2011). Workshops on the promotion and protection of human rights for LGBTIQ people in ASEAN were held at the 7th ASEAN People's Forum in 2011 and every year since then. This platform has allowed activists and human rights defenders from the region to gather around the same table and to learn from each other, connect, and work together. These workshops were held even in countries prohibiting homosexuality such as Malaysia where the rainbow flag flew over the stage with the national flags in 2015.

In the region, two umbrella organizations, ILGA-Asia and ASEAN SOGIE Caucus, are known to focus exclusively on the promotion and protection of the LGBT rights through engagement with the United Nations mechanisms, regional mechanisms, or at the national level. As such ILGA, established in 1978, enjoys consultative status at the UN ECOSOC Council, and ASEAN SOGIE Caucus advocates to the ASEAN Human Rights Commission for a better protection of people's rights regardless of their SOGIE. They are both committed to working for the equality of LGBTIQ community and their liberation from all forms of discrimination. They are organizations that grassroots NGOs from the region can rely on for advocacy or reporting to the United Nations, included the UPR mechanism. These organizations have drafted reports in the last two cycles; however, more coordination is needed among local organizations to allow the production of UPR civil society reports addressing cross-cutting and cross-sectoral issues.

As of November 2016, following the completion of the two cycles, it is possible to assess the effect of the UPR process on the improvement of the situation of the LGBTIQ HRDs in Southeast Asia. Whether states have acted or omitted the recommendations they received on that subject, it has to be acknowledged that the UPR process has largely contributed to the advancement of the LGBTIQ rights globally (Arc International and al. 2016).

The UPR mechanism involves the submission of three types of reports that help in generating a holistic view of the human rights situation in the country being reviewed. The recommendations made to the state under review during the interactive dialogue and in the outcome report are meant to be neutral. They should also be S.M.A.R.T. (Specific, Measurable,

Achievable, Relevant and Timebound) to ease their implementation by the state reviewed, and therefore guide it in improving its rights situation, either by improving its legislation, building new institutions or freeing political prisoners for instance. However, in practice, some of those recommendations are not impartial as such as they are always based on the state's history and vision. For instance, it is unlikely that North Korea would recommend to another state to drop its nuclear programme. Our point here is to highlight a weakness of the mechanism and to better analyse the recommendations, especially regarding the rights of the LGBTIQ.

In general, recommendations addressing human rights defenders' safety and/or LGBTIQ rights' promotion and protection are made by the same set of countries, notably Canada, France, Norway, and Switzerland to mention only four of them. It is quite rare for Asian countries to make recommendations on those specific topics, even more so for Southeast Asian countries to do so. Indeed, recommendations from countries like Korea, Nepal, or Thailand appear sporadically to mention human rights education or the reinforcement of national human rights institutions. However, few recommendations from Southeast Asian countries to other Southeast Asian countries have been made, some of which are directly linked to human rights defenders and/or human rights in general while others specifically address LGBTIQ rights.

Recommendations on HRDs from SEA Countries to Other SEA Countries

Generally, the majority of ASEAN states do not give recommendations to one another in line with the principle of sovereignty governing the regional group. Nevertheless, there have been some UPR recommendations on HRDs made by Southeast Asian states to other Southeast Asian states and these are highlighted in Table 5.1. Even then the few recommendations that have been made are not groundbreaking recommendations and have so far been made by the traditional ASEAN leaders (Indonesia, Thailand, and Vietnam), at least during the first UPR cycle. However, an analysis of the recommendations for the second cycle shows the "smallest" states stepping in, with Timor-Leste leading the way. Looking at Table 5.1, it is without a doubt that Timor-Leste is the Southeast Asian state most compliant with the human rights universal standards.

The lack of recommendations during the second cycle from Southeast Asian states to their peers can be interpreted as a will to keep their recommendations behind closed doors in keeping with ASEAN's principle of sovereignty and non-interference. Table 5.1 is a compilation of recommendations made

Table 5.1 UPR recommendations from and to Southeast Asian states on HRDs

Country	*Cycle 1*	*Cycle 2*
Brunei	None	None
Cambodia	Take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly (Indonesia);	None
Indonesia	None	Further promote human rights education and training at all educational levels in partnership with all relevant stakeholders to promote and protect the rights of every person (Thailand, Myanmar)
Laos	None	Establish a national human rights institution in accordance with the Paris Principles (Timor-Leste)
Malaysia	Continue to focus efforts on ensuring full protection of human rights for all vulnerable groups, one such avenue is through the ongoing rigorous capacity building programmes that Malaysia has initiated in this area, particularly for public officers (Thailand)	None
Myanmar	Take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly (Indonesia);	None
Philippines	None	Continue efforts to tackle extrajudicial killings and enforced disappearances to strengthen the rule of law and respect for human rights (Singapore, Timor-Leste);
Singapore	None	None
Thailand	Continue efforts in promoting and protecting the human rights of its people, in particular those of vulnerable groups (Brunei Darussalam);	Continue support the work of the National Human Rights Commission in line with the Paris Principles (Indonesia)

(*continued*)

Table 5.1 (continued)

Country	*Cycle 1*	*Cycle 2*
Timor-Leste	Expedite the completion of statutes that provide a guarantee for further human rights promotion and protection (Indonesia); Strengthen the state of laws and good governance, especially on the legal enforcement and capacity building for national agencies on human rights (Vietnam) Further increase regional and international cooperation on human rights, particularly with the ASEAN nations and with the Human Rights Council (Vietnam); Continue efforts to promote and protect the human rights of the vulnerable (Indonesia)	Review in November 2016
Vietnam	None	None

Source: UPR Info

towards human rights defenders and their protection, which is a highly sensitive issue in Southeast Asia. Indeed, Southeast Asian states have made broader recommendations regarding other human rights issues, such as women, children, or migrant workers that have not been recorded in Table 5.1 because of our specific topic of interest.

Recommendations on LGBTIQ Rights to Southeast Asian Countries

Recommendations on LGBTIQ topics have been rare during the first UPR cycle (2008–2012), but eight of the eleven countries made recommendations during the second cycle. Only Indonesia, Myanmar, and Timor-Leste did not receive recommendations on those topics, which cannot be interpreted as a good situation for the LGBTIQ community in those countries. In those countries there was focus on other important issues.

A second observation is the total of absence in recommendations made by a Southeast Asian country to another on SOGIESC issues. Recommendations have always been made by the same set of countries from Europe and Latin America, and Canada (See Table 5.2). Those recommendations focus on

Table 5.2 UPR recommendations on LGBTIQ rights to Southeast Asian states

Country	*Cycle 1*	*Cycle 2*
Brunei	Decriminalize same-sex relationships (Sweden, Canada, Spain) and repeal the criminalization of "carnal intercourse" to ensure the non-discrimination of LGBT individuals (the Netherlands);	Repeal the criminalization of same-sex relationships (Spain, Canada, France) and sections of the Penal Code that prevent LGBT persons from having equal rights (the Netherlands); Decriminalize sexual activity between consenting adults (Czech Republic);
Cambodia	None	Eradicate gender-based stereotypes (Colombia and Uruguay)
Indonesia	None	None
Laos	None	None
Malaysia	None	Take legislative and practical steps to guarantee that LGBTI persons can enjoy all human rights without discrimination (Germany, Argentina, Chile); Introduce legislation that will decriminalize sexual relations between consenting adults of the same sex (Croatia, France, the Netherlands, Canada) Enact legislation prohibiting violence based on sexual orientation (Canada);
Myanmar	None	None
Philippines	To establish an organic legal framework for eliminating gender-based discrimination and promoting gender equality (Italy);	Consider establishing comprehensive legislation to combat discrimination faced by LGBT people (Argentina);
Singapore	None	Repeal laws criminalizing homosexuality, especially Section 377A of the Penal Code (Norway, Slovenia, Spain, Sweden, United Kingdom, United States, Austria, Czech Republic, France, Greece) and laws which discriminate against LGBTI persons (Brazil, Czech Republic) Remove discriminatory media guidelines to provide a more balanced representation of LGBTI persons (Canada)

(*continued*)

Table 5.2 (continued)

Country	*Cycle 1*	*Cycle 2*
Thailand	None	Intensify efforts to promote policies in the area of prevention, sanction and eradication of all forms of violence against women, including measures aimed at promoting their rights regardless of its religion, race, sexual identity or social condition (Mexico);
Timor-Leste	None	None
Vietnam	None	Enact a law to fight against discrimination which guarantees the equality of all citizens, regardless of their sexual orientation and gender identity (Chile)

Source: UPR Info

improving legislation, especially in countries where Article 377 of the Penal Code is still applicable (usually former British colonies).

The recommendations above have all been extracted from the outcome reports; however, they do not reflect entirely the position of reviewing states as bolder recommendations were made during the various interactive dialogues. For instance, during its first review, Singapore received a specific comment from France in the UPR's interactive dialogue, welcoming its resolution to no longer apply the provision of the Penal Code criminalizing homosexuality (Human Rights Council 2011). In response to the comments made by various states, Singapore held that individuals were free to pursue their lives, noting however that Singapore's parliament had debated the issue of the decriminalization of homosexual acts but decided to maintain the status quo. The issue arose again during the second review to which Singapore reiterated that laws criminalizing homosexuality were not proactively enforced (Human Rights Council 2016). Therefore, formal recommendations on this issue was made in the outcome report of the second cycle, which demonstrate the importance of the interactive dialogue, as well as the necessity for the CSOs, together with the reviewing states, to raise the same issues.

In a second example, in its summary of the proceedings of the review process, Malaysia held that matters involving LGBT people would be handled carefully and consistent with cultural traditions, religious doctrine, societal norms, and domestic laws and regulations. Malaysia also received a specific comment in the UPR's interactive dialogue concerning

the ill-treatment of HRDs, including those defending LGBT rights. Malaysia did not respond directly to this comment; however, it reaffirmed its commitment to transforming its legal agenda and removing legislation that impedes the enjoyment of a range of human rights (Human Rights Council 2013).

Assessing the Implementation of Recommendations on LGBTIQ Issues

Even though the volume of recommendations has been low, the key in ensuring LGBTIQ rights are observed lies in the implementation of the several recommendations that were made. In this section the countries reviewed are grouped according to the level of implementation of the recommendations (from willingness to implement, partly willing to implement, to unwilling to implement). By highlighting the implementation gaps in the first two UPR cycles, stakeholders can make better use of the process in its third cycle. It also indirectly highlights the level of success of the UPR process for advocating LGBTIQ issues.

Willingness to Implement Recommendations on SOGIESC Issues and/or HRDs

Since its first UPR session, the Philippines has implemented reforms that address the recommendations it received from other delegations. As a result, LGBTIQ HRDs in the Philippines now enjoy a greater degree of visibility and freedom, including in the political sphere. However, the LGBTIQ community and its HRDs working for the promotion and protection of LGBTIQ rights continue to face discrimination and obstacles because of the absence of protective legislation, which is however due to be adopted by the Congress during the next session. They also are particularly vulnerable to hate crimes, which the Government of the Philippines struggles to address.

Similarly, since its first UPR session, Thailand has demonstrated a willingness to address some—but not all—of the recommendations it received. The ruling military junta currently displays a relative apathy to LGBTIQ issues of freedom of expression; it appears willing to capitalize on its reputation as an LGBTIQ destination without tackling major issues facing LGBTIQ HRDs and the wider LGBTIQ community. The enactment of the Gender Equality Act is a positive step forward; however, it remains to be seen whether the

provisions of the Act will be enforced. The drafting of a new constitution was an opportunity to embed LGBTIQ rights in Thailand; however, the removal of draft clauses protecting LGBTIQ people perpetuates the unwillingness to protect Thailand's LGBTIQ population.

In Vietnam, legalization on sex reassignment and simplification of name and gender identity changes have allowed for the greater expression, association, and participation in cultural life of the LGBTIQ community and LGBTIQ HRDs. The progress in developing the "Work with Pride" campaign and the apparent non-interference by the Vietnamese government is especially encouraging as it demonstrates that the LGBTIQ community may have greater possibilities to obtain employment and to work in such employment with more favourable working conditions and protections. Since its two UPRs, Vietnam has demonstrated an apparent willingness to address many of the recommendations received that impact LGBTIQ HRDs. As a result, LGBTIQ HRDs enjoy a greater degree of visibility and freedom.

Only Partially Willing to Implement Recommendations on SOGIESC Issues and/or HRDs

Through its non-interference with public pride demonstrations, and the willingness of certain officials to work with LGBTIQ HRDs and civil society, Cambodia has seen greater freedom of expression, association, assembly, and participation in cultural life by the LGBTIQ community and LGBTIQ HRDs. Since its two UPR sessions, however, Cambodia has made little effort to address many of the recommendations it received which impact HRDs and the civil society. Many government officials continue to maintain the position that further legal protection of the LGBTIQ community is unnecessary, subsequently denying the presence of systematic discrimination towards the LGBTIQ community. In light of Cambodia's review scheduled for 2018, members of the civil society have already started to organize themselves, and to work with the government to implement better policies to protect the LGBTIQ community.[3]

Since its first UPR session, Laos has made efforts to address some of the recommendations received by other delegations. As a result, LGBTIQ HRDs in Laos enjoy a greater degree of visibility. However, much is left to be done in terms of acceptance and recognition of the LGBTIQ community. According to Lae Pasomsouk, "The LGBT advocates know how to use the UPR but we aren't sure it will work well if we use it. So, I think we

know how to use it, but we don't know if it's going to work well, so we decided not to use it just yet."[4]

Myanmar has made efforts to address some, but not all, of the recommendations received by other delegations. As a result, LGBTIQ HRDs in Myanmar enjoy a greater degree of visibility and freedom. However, the LGBTIQ community as well as HRDs working for the promotion and protection of LGBTIQ rights continue to face discrimination and obstacles consequent to both the action and inaction of the government.

Since its first UPR session, Timor-Leste has demonstrated its willingness to address the concerns and recommendations expressed by various states. Even though there have been positive strides taken and increasing interactions between government and civil society, work remains to be done to address protections for the freedoms of expression, association and assembly of the LGBTIQ community members and HRDs. In Timor-Leste the LGBTIQ community and its HRDs continue to struggle against a lack of awareness and discriminatory treatment.

Not Willing to Implement Recommendations on SOGIESC Issues and/or HRDs

Since its first UPR session, Brunei has made no efforts to address the recommendations received by other delegations in regard to LGBTIQ HRDs and the community. With the application of the new Syariah Penal Code, the LGBTIQ community as well as HRDs working for the promotion and protection of LGBTIQ rights will see their situation worsening. According to a local activist, "Most people are not even aware of the UPR process. Very few people know what it is actually going on. But the mechanisms are there, it's just a matter of making them more accessible and understandable to the people. They need more education on how they can play a more active role in the process and how to access it as a tool for positive change."[5] Therefore, to foster the utilization of the UPR process by the HRDs during Brunei's third cycle, trainings and capacity building from the other stakeholders will be needed.

A significant number of the recommendations received by Indonesia in the UPR concerned the education of civil society and the public service. Following both its first and second UPR sessions, Indonesia has consistently failed to address the oppression, discrimination, and violence experienced by LGBTIQ HRDs and community. There has been no behavioural change by the police force in order to ensure the protection of LGBTIQ

HRDs, resulting in the ongoing disruption and targeting of LGBTIQ HRDs and wider LGBTIQ community by state and non-state actors. As a result, LGBTIQ HRDs' human rights are imperilled, stifling their ability to freely express themselves, assemble, or participate in the cultural life of the community.

Malaysia has been unsuccessful in addressing the concerns and recommendations expressed by various states from the first UPR. Malaysia has particularly failed to address the many recommendations and interactive dialogue statements made by delegations which have encouraged Malaysia to eradicate discrimination faced by those with diverse sexual orientation and/or gender identity. This failure is evidenced by the ongoing harassment, both verbal and physical, faced by HRDs who publicly stand up for LGBTIQ people's rights. The Malaysian government has not taken action to intervene and prevent the discrimination and harassment faced by LGBTIQ HRDs.

Since its first and second UPR sessions, Singapore has acted slowly to address the concerns and recommendations expressed by various delegations. Singapore has particularly failed to address recommendations encouraging the eradication of discriminations faced by those with diverse sexual orientation and/or gender identity. In particular, Singapore has failed to repeal or amend media censorship laws which continue to circumscribe LGBTIQ HRDs' ability to freely express themselves. While Singapore has not prevented the hosting of Pink Dot since its inception in 2009, it has ensured that Pink Dot's celebrations do not exceed the limits of Hong Lim Park and has attempted to challenge its sponsorship by large companies. The Government of Singapore has not taken action to intervene and prevent the discrimination and harassment faced by LGBTIQ HRDs.

This brief analysis of each country's adherence to the UPR recommendations is an important tool for preparing the next cycles for civil society advocacy. Indeed, unsurprisingly, it appears that the countries criminalizing same-sex relationships[6] are the ones not implementing recommendations on SOGIESC issues. Contrary to that trend, Myanmar which is also criminalizing same-sex relationships has shown a willingness to partly implement the UPR recommendations on SOGIESC issues, together with Cambodia, Laos, and Timor-Leste which despite no criminalization have not yet implemented protective and non-discriminatory policies. With a rather

good level of implementation, the Philippines, Thailand, and Vietnam are showing the way to the other Southeast Asian states in legislating to protect the LGBTIQ HRDs and their communities.

The trends in the willingness to implement UPR recommendations are a clear reflection of the level of openness of the various states. One may say that the UPR process is a mechanism that may foster greater openness by states, leading to better implementation of the recommendations for the improvement of LGBTIQ rights. Even if the way forward is long and paved with obstacles, different studies have shown that CSOs need to organize themselves in a more efficient manner to submit thematic reports containing S.M.A.R.T. recommendations as well as including LGBTIQ issues in every other possible UPR submissions. *LGBT rights are human rights* and should not be treated apart, for instance, from children rights, women rights, or environmental rights.

Conclusion: Is UN SOGI Expert a Better Prospect Than the UPR?

Capitalizing on this experience of two cycles of UPR, HRDs, civil society, and the states will also have the possibility to rely on the expertise of a new special procedure created by the United Nations in 2016. On 30 June 2016, the UN Human Rights Council, in its 32nd session, passed a groundbreaking resolution (United Nations 2016) that has established the first global-level lesbian, gay, bisexual, and transsexual monitor in the form of an Independent Expert on Sexual Orientation and Gender Identity. Through this historic appointment, the UN Human Rights Council (HRC) reaffirms its commitment to eradicating violence and discrimination against LGBT people around the world.

The resolution was introduced by a core, seven Latin American countries and received support from more than 600 civil society organizations (ILGA 2016). Among the HRC members, 23 states voted in favour of the resolution, 18 against with 6 abstaining. While this is not the first HRC resolution addressing sexual orientation and gender identity, it is the broadest in scope and most ambitious to date, coming just after the UN Security Council's unprecedented condemnation of the Orlando attacks in the USA. Previous resolutions have authorized reports on discrimination based on sexual orientation and gender identity. The current resolution, by contrast, signals a more active engagement with LGBT rights advocacy.

The Independent Expert, Professor Vitit Muntarbhorn, will have a powerful mandate to address violence and discrimination based on sexual orientation and gender identity, exercising a strategic role in assessing existing human rights law, identifying gaps in legal protections, developing best practices, engaging in dialogue with states and other stakeholders, and in facilitating the provision of advisory services, technical assistance, and capacity building strategies to help end violence and discrimination against LGBT people at a global level. The Independent Expert (IE) is a welcome addition to other ongoing UN LGBTIQ initiatives, such as its global public education campaign, "Free & Equal", which focuses on education as a tool to end homophobia and transphobia. The Independent Expert will add much-needed weight behind all the work currently conducted, and might be a new reliable source of information for the third cycle of the UPR process.

While the IE can receive communications from individuals and therefore on urgent and/or worrying situation of LGBTIQ HRDs, it is not a replacement of the other special procedures neither of the UPR process. The new IE is a complementary procedure that can be used holistically with all the UN mechanisms and processes. To this date, the UPR process remains the only mechanism dealing with all human rights issues (including LGBTIQ and SOGIESC issues) in all the 193 member states of the United Nations. The UPR process is the only mechanism able to hold a discussion and give recommendations on human rights to every states, even the less compliant with international human rights standards.

Notes

1. For a comprehensive overview, see, generally, Status of ratification, http://indicators.ohchr.org/.
2. The UN Human Rights Committee is the treaty body in charge, inter alia, of interpreting the ICCPR (International Covenant on Civil and Political Rights) adopted in 1966.
3. See the work of the NGOs Rainbow Community Kampuchea (RoCK) and CamASEAN.
4. Interview with Destination Justice for Destination Justice's 2017 Report on the situation of the LGBTIQ HRDs in Southeast Asia.
5. Interview with Destination Justice for Destination Justice's 2017 Report on the situation of the LGBTIQ HRDs in Southeast Asia. For safety reason, we prefer to keep the name of the activist anonymous.
6. Brunei-Darussalam, Indonesia, Malaysia, and Singapore

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CHAPTER 6

Singapore's Universal Periodic Review: Civil Society Trends and Themes

James Gomez and Michelle D'cruz

Introduction

Singapore has undergone two Universal Periodic Review (UPR) cycles to date. The first review was on 6 May 2011 led by Ambassador-at-Large Ong Keng Yong. On that occasion the city-state was the 168th country to be reviewed. In 2011, the troika facilitating Singapore's review was Bahrain, Djibouti and Spain. After the review, an MFA statement noted that 54 member and observer states spoke and noted the "substantial progress" made in Singapore (8 May 2011, Ministry of Foreign Affairs, Singapore). During the interactive dialogue in cycle 1, Singapore received a total of 112 recommendations, the state accepted 52, 17 of which are considered to be implemented or in the process of implementation (UN Human Rights Council 2011d; UPR Info 2011). The remaining 39 were given further consideration and addressed in the Addendum to the final report where 9 out of the 39 were accepted, 21 were accepted only in part and 7 rejected.

The second review was on 27 January 2016. Ambassador-at-Large Chan Heng Chee led an inter-agency delegation (comprised of civil servants from 11 ministries and government agencies). In 2016, Singapore was the 14th country to be reviewed in the 24th session of the UPR Working Group and the troika for this review comprised of Botswana, Ecuador and Maldives. After the review, Ambassador Chan proclaimed that the outcome

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of the second UPR was "good" as the majority of the 113 states commended the Republic (28 January 2016, Channel News Asia). In cycle 2, Singapore received a total of 236 recommendations, 116 of these were accepted, 9 were accepted in part and 111 were noted (UN Human Rights Council 2016a; UPR Info 2016). This time the state mostly supported recommendations pertaining to healthcare, children, education, support for lower income households and ageing society. In other areas, it supported recommendations "in part," and for those it disagreed, it used the language of noting recommendations.

The number of states participating in the interactive dialogues during Singapore's review has increased over the two cycles. In the first cycle in 2011, 54 states participated, while in the second cycle in 2016, 113 states participated (UN Human Rights Council 2011d, e, 2016a). In spite of the significant commendations, some member states did raise certain human rights concerns, but those concerns were dismissed. Ambassador Chan in 2016 said, "There are of course the usual recommendations urging us to abolish the death penalty and to sign more human rights conventions. But it is up to the state whether they want to accept or reject the recommendations" (28 January 2016, Channel News Asia). In 2016, Singapore used the language of exceptionalism, unique social status, inaccuracy and under review to respond to recommendations the city-state did not want to address directly (UN Human Rights Council 2016b).

The above presents the statist nature of the UPR process. It also demonstrates how Singapore highlights through the local media that UN member states in their majority have congratulated the city-state on its human rights record, while downplaying or dismissing human rights concerns raised by some member states.

In spite of the statist approach, on each occasion Singapore government officials have highlighted their engagement with CSOs. In 2011, Ambassador Ong said in his opening address to the UPR that Singapore welcomes a dialogue with its citizens, CSOs and member states. In the month before the January 2016 review, the Singapore media reported that since the 2011 review, the government had initiated consultations with CSOs. Interviews undertaken for this chapter with Singaporean CSOs also confirm that governmental officials engage, and want to be seen publicly as engaging, with local CSOs.

CSOs have several points of entry into the UPR process. First, pre-UPR, CSOs can lobby their national governments or participate in government consultation processes. Second, they can submit information to

the "Summary of stakeholder information" compiled by the UN. These stakeholder submissions are often a counternarrative to the human rights situation presented in the national report by the state under review. Third, before the interactive dialogues, CSOs can make their way to Geneva to lobby governments individually and speak at specially convened pre-sessions where foreign government officials attend. During the interactive dialogue, CSOs which hold consultative status with United Nations Economics and Social Council (ECOSOC) can be accredited to attend as observers. Fourth, accredited CSOs can make statements at the regular session of the Human Rights Council when the outcome of the review is considered.

Given the rhetoric of engagement with civil society, this chapter reviews CSO participation in Singapore's UPR process. First, it sketches out the legal framework within which CSOs operate in Singapore. Next, it identifies the types of CSOs that participated in the UPR process in 2011 and 2016. Third, it maps the trends in CSO submissions over the two UPR cycles. Fourth, it plots the key issues raised by CSOs over the UPR cycles. Fifth, it evaluates the CSO submissions and its impact on human rights in Singapore. This chapter is based on a content analysis of key documents submitted to UPR process in 2011 and 2016 that shape the actual review; these include the national report, Compilation prepared by the Office of the United Nations High Commissioner of Human Rights (UN Report), Summary of stakeholder information prepared by the Office of the United Nations High Commissioner (Stakeholder Summary), Report of the Working Group on the Universal Periodic Review (report of the Working Group) and the Addendum of the state under review. The documents were analysed to identify the key human rights issues raised by CSOs, how the discourse on these issues changed over the two cycles and the consequent impact on the state's position. To supplement the content analysis, online semi-structured interviews were also conducted with Singaporean civil society activists to ascertain their experiences over the two UPR cycles.

The findings show that over the two UPR cycles, the volume of CSO participation and the number of submissions have increased. This rise in participation and submissions correlate to the prominence of issues such as the use of the death penalty, LGBTI concerns and migrant workers' rights had received. Issues related to detention without trial, civil liberties and the need for independent national institutions received less attention. Over the two cycles on issues related to death penalty, LGBTI and migrant workers, there were some movement, while there was little movement on issues related to civil and political rights and independent institutions. For the next UPR

process in 2020, more CSO participation and submissions are needed on issues related to civil liberties and independent institutions if these are to gain prominence. The UPR processes as it stands are not adequate as implementation of specific recommendations remains a problem; effective regional engagement and the establishment of an independent national human rights institution (NHRI) are needed to complete the human rights framework for Singapore. The Singapore pattern of CSO participation and submission and how they correlate to the emphasis on different human rights themes is broadly reflective of trends in the region.

Emerging Research on CSOs and the UPR

The emerging literature on UPR research shows that states are more comfortable participating in the peer-review style of the UPR than they are with the treaty body system and the special procedures both of which comprise independent experts (Schokman and Lynch 2014). This is evidenced by the fact that states have almost unanimously accepted the system and the number of states actively participating in each review session has increased (Schokman and Lynch 2014). Additionally, the literature on CSO involvement in the UPR indicates that states favour the peer-review style of the UPR because of the ability to ring-fence the already limited CSO participation in the process (Redondo 2012; Chauville 2014; Beckstrand 2015; Hodenfield and Van Severen 2015). Hodenfield and Van Severen term this as "targeted obstructionism" to prevent effective CSO participation in the UPR; this includes creating legal obstructions to participation, targeting organisations, placing restrictions on civil society activities and harassing and intimidating activists (2015; Chauville 2014). For instance, the Malaysian government attempted to dissolve Coalition of Malaysian NGOs (COMANGO); a diverse coalition of 54 CSOs in Malaysia; and deemed it an unlawful organisation that was "championing rights that deviate from Islam" (Hodenfield and Van Severen 2015).

UPR research also shows that states have participated in misinformation arranging for voluminous submissions by government-organised NGOs (GONGOs) and enrolling supportive CSOs to speak during the session at the adoption of the Working Group report by the HR (Hodenfield and Van Severen 2015; Chauville 2014). Attempts to subvert CSO engagement also take the shape of coopting sympathetic groups and undermining efforts at CSO collaboration, for instance, by conducting consultations only with partisan groups and refusing to work with CSOs

that are more critical of official policy (Hodenfield and Van Severen 2015). The Vietnamese government asserted that it engages in comprehensive dialogue with independent CSOs; however, human rights defenders and unregistered CSOs were not permitted to attend pre-UPR consultations (Hodenfield and Van Severen 2015). This lack of engagement is buttressed by a regulatory framework that hampers the work of CSOs (Hodenfield and Van Severen 2015).

The literature also revealed some very practical considerations such as whether it was worth it for CSOs to even participate in the plenary session, which is the only part of the process where CSOs get to speak, as it merely accorded them a two-minute statement. This is because the delay between the review and the final plenary often meant that some of the momentum and media interest in the issues would have waned, the significant costs involved for non-Geneva based organisation and the content they could raise during their statements were in some cases heavily contested by states who tried to prevent CSOs from raising controversial issues (Kirchmeier 2008).

Nevertheless, some research points to the benefits accrued to CSOs who engage in the UPR; for instance, by creating a formal process for CSOs to engage with the UPR through the submission of documents, the UPR has legitimised CSO engagement with the international human rights regime and spurred civil society participation within the UN (Chauville 2014). The UPR aids the efforts of CSOs by internationalising their issues, thus giving them legitimacy in their home countries and the opportunity to build connections (Hodenfield and Van Severen 2015). Furthermore, the simplicity and regularity of the process allow CSOs to plan ahead, and by becoming involved in the acts of gathering data, writing reports, coalition building, CSOs develop their capacity and are more likely to engage with other mechanisms such as the treaty body and special procedures (Chauville 2014). Others point out that CSO reporting under the UPR process has retained the naming and shaming, confrontational mechanism of human rights governance (Redondo 2012). Redondo argues that when this approach is used to highlight the results of the UPR this can complement the diplomatic posture of the HRC and the UPR (Ortmann 2012).

With regard to Singapore, there has been very little on the city-state's participation in the UPR. There is one study that looked at the first cycle of the UPR process and showed how it spurred the formation of civil society coalitions (Ortmann 2012). The author discussed the example of Coalition of Singapore NGOs (COSINGO), which comprised of groups from a broad spectrum of issue areas and was able to produce a report that

reflected the key human rights issues but did not follow up the report with concerted pressure on the government to implement recommendations (Ortmann 2012). Ortmann goes on to two tracks of challenges to civil society coalition building: firstly that the narrow political space makes many groups unwilling to join and secondly groups are unable to agree on the goals and tactics (Ortmann 2012). On the latter point, Ortmann points to disagreements between conservative and progressive group on how strong a stand to take on controversial issues. There is also competition between groups that represent the same issue. Some also see the need to have a clear distinction between civil and political society so as not to appear partisan despite the fact that there are political parties like Singapore Democratic Party that have taken a stand on human rights issues and would thus be a potential ally (Ortmann 2012).

The emerging literature on UPR shows the role of civil society in the UPR process has been a point of focus (Koh and Soon 2012). There has been some attention on selected countries in Southeast Asia such as Malaysia, Singapore and Vietnam. Thus, from the perspective of contributing to the development of human rights literature on the subject, a discussion of the Singapore case in a comparative manner over two UPR cycles can be highly relevant.

Legal Framework for CSOs in Singapore

To understand CSO participation in Singapore's UPR process, it is important to understand briefly the legal framework in which they operate. CSOs in Singapore can be broadly categorised as societies, political associations, business entities and informal or unregistered associations. Several key pieces of legislation govern the registration and operation of CSOs, and these include the Societies Act, the Political Donations Act (PDA), the Public Meetings and Entertainment Act (PEMA) and the Public Order Act.

The Societies Act is administered by the Registry of Societies (ROS) which places a number of restrictions on a prospective society's constitution at the point of registration; for example, that a society's activities must be restricted to Singaporean citizens and permanent residents. The ROS thus has broad powers to order changes to a society's constitution and consequently is able to restrict its activities. Next the PDA gives the prime minister the power to gazette an organisation (societies, business, websites) as a political association if its objectives or activities relate "wholly or mainly to politics in Singapore." Once gazetted, the CSO is restricted from obtaining funding from foreign sources or those deemed

impermissible, organisations are required to submit a donor report and while anonymous donations are allowed, they cannot exceed an aggregate of $5000 in a financial year (Elections Department Singapore 2012). Political associations are also required to register their websites, including personal details of the webmaster and editorial board with the Media Development Authority. The organisations that have been gazetted as political associations all share a common feature of advocacy and conducting activities or reporting on civil and political rights.

Other legislations such as the PEMA and Public Order Act regulate the operational activities of CSOs by requiring organisations to obtain licences and permits from the police, for meetings and cause-related activities. Under PEMA, any public meeting of more than five persons also requires a police permit, and permits are required for almost all forms of public address and entertainment, as long as they are not sponsored by the government (McCarthy 2006). Indoor meetings are exempt from as long as they are organised by Singapore citizens, feature only Singaporean speakers, steer clear of issues related to race or religion and are conducted in one of the four official languages or related dialects (Kenyon et al. 2014). Speakers' Corner at Hong Lim Park is the only outdoor venue where citizens can give speeches without permits or licences; in lieu of a permit, there is an online registration system where speakers have to state their topic (Au Yong 2008a, b). Issues concerning to race and religion remain prohibited for all events at Speakers' Corner (National Parks Board n.d.). The Public Order Act requires police permits for public assemblies and public processions. One of the key articulated objectives of the Public Order Act is to allow police to distinguish cause-related activities from socio-cultural and recreational ones and consequently accord the former greater regulatory oversight. In addition to being a procedural hurdle and requiring that the permits be issued in the name of the person rather than the entity, there is a lack of transparency as applications are routinely rejected without explanation.

Some CSOs which operate as societies or businesses also choose to apply for charity status so as to allow them to enjoy income tax exemption. In order to qualify for charity status, the organisation has to operate on a not-for-profit basis, be exclusively set up for a charitable purpose and carry out activities to that end which benefit the public. What constitutes a charitable purpose is defined by the Charities Unit of the Ministry of Culture, Community and Youth to include activities for the relief of poverty, advancement of education or religion and other purposes deemed

beneficial to the community such as for the promotion of health, arts and heritage and environmental protection. They can also apply to be an Institution of Public Character (IPC) which will enable the organisation to issue tax deductible receipts for qualifying donors; this makes IPCs more appealing in terms of their ability to attract donations. The registration status of an organisation thus has a very direct and real impact on its ability to obtain and attract funding.

Types of CSOs in Singapore's Universal Periodic Review

The types of CSOs engaging in Singapore's UPR process are drawn from the city-state's legal context. In 2011, the overall number of CSOs listed as contributing to the Stakeholder Summary was 23, of which 14 were Singaporean and 9 international (UN Human Rights Council 2011c). Of the 14 Singaporean CSOs in 2011, 7 were registered under the Societies Action of which 3 were gazetted by the government as political associations under the Political Donations Act. One was registered as a company limited by guarantee under the Companies Act and six were unregistered networks of individuals. Of the Singaporean CSOs, well represented were CSOs that advocated for migrant worker rights and death penalty abolition (Tables 6.1 and 6.2).

In Table 6.1 we see that in 2016, overall CSO participation in Singapore's UPR rose to 34, of which 19 were Singaporean CSOs and 15 international (UN Human Rights Council 2015b, c). There was thus an increase in both local and international CSO engagement with the UPR for cycle 2. Of the 19 Singaporean CSOs in 2016, 5 registered under the Societies Act, 3 were incorporated as companies under the Companies Act, 1 under the Trade Union Act and 11 were unregistered networks of individuals. Of the 19 Singaporean CSOs, two registered under the Societies Act and one incorporated under the Companies Act were gazetted by the government as

Table 6.1 Types of CSOs in Singapore's UPR

	2011—Cycle 1	*2016—Cycle 2*
Total no of CSOs	23	34
International CSOs	9	15
Local CSOs	14	19

Source: UN Human Right Council 2011c, 2015c

Table 6.2 Legal status of Singaporean CSOs participating in UPR 2011

Society (ROS)	*Companies Act*	*Unregistered*
AWARE	Function 8	Challenged People's Alliance and Network
Singapore Institute for International Affairs		Deaf and Hard of Hearing Federation
HOME		Organization for the Empowerment of Singaporeans
TWC2		People Like Us
MARUAH[a]		Singapore Anti-Death Penalty Campaign
Singaporeans for Democracy[a]		Migrant Voices
Think Centre[a]		

Source: Registrar of Societies, Individual CSO websites

[a]Gazetted as Political Association

Table 6.3 Legal status of Singapore CSO organisations participating in UPR

Society (ROS)	*Companies Act*	*Trade Union Act*	*Unregistered*
AWARE	Function 8	Migrant Workers Centre	Bear Project
HOME	Oogachaga		SAFE Singapore
TWC2	TOC[a]		Sayoni
MARUAH[a]			Young Out
Think Centre[a]			PinkDotSG
			Project X
			Community Action Network
			Singapore Anti-Death Penalty Campaign
			We Believe in Second Chances
			WWF Singapore

Source: Registrar of Societies, Individual CSO websites

[a]Gazetted as Political Association

political associations under the Political Donations Act (Table 6.3). A review of the participating Singaporean CSOs revealed that unregistered network of LGBTI advocacy groups was the largest followed by groups advocating for migrant worker rights and abolition of death penalty. Overall, net CSO participation has increased over the two cycles.

Another trend that has become apparent over the two cycles is the proliferation in the number of unregistered groups; these include organisations that only have a web presence, operating as informal networks or coalitions. In 2011, unregistered CSOs comprised of organisations working on issues

Table 6.4 CSOs participating in UPR which had political association and charity status

Cycle	*Political associations*	*Charities*
2011	1. Singaporeans For Democracy	1. HOME
	2. Think Centre	2. TWC2
	3. MARUAH	3. AWARE
2016	1. Think Centre	1. HOME
	2. MARUAH	2. TWC2
	3. TOC	3. AWARE
		4. WWF Singapore

Source: Registrar of Societies, Charities.gov.sg, Individual CSO websites

as diverse as rights of the people with disabilities, LGBTI rights, anti-death penalty, protection of human rights defenders and migrant worker rights (UN Human Rights Council 2011c). In the 2016 cycle, there was a significant increase in the number of submissions from unregistered organisations working on LGBTI issues; from one in 2011 to five in the 2016 cycle (UN Human Rights Council 2015c). This is notable because the ROS has twice refused to allow LGBT organisation People Like Us to become a registered society (People Like Us 2010).

Among the registered CSOs, Table 6.4 shows political associations and charities which participated in the UPR over the two cycles. Groups that fall in the political association category are notably groups that advocate for civil and political rights as well as the promotion of democracy. Issue-oriented CSOs which focus on the rights of specific vulnerable or marginalised groups such as migrant workers have greater autonomy in their capacity to attract funding. On one end of the spectrum, there are the political associations which are highly restricted in their ability to attract funding and the other end organisations whose charity status enhances their ability to attract funding.

The first UPR in 2011 saw only two CSOs in Geneva—MARUAH and Think Centre—both registered and gazetted as political associations. In 2016, five CSOs headed to Geneva, Switzerland. These included LGBT groups Oogachaga and Sayoni, migrant worker advocates Humanitarian Organization for Migration Economics (HOME), anti-death penalty group We Believe in Second Chances and human rights advocates MARUAH. The latter three organisations, Sayoni, We Believe in Second Chances and Home, also represented a coalition of ten local NGOs that

includes Aware and Think Centre. In short, Singaporean CSOs of different legal status made their way to Geneva during the second cycle (See Ghani and Koh 2011).

Across the two cycles, the trends in CSO participation and submissions point to a strong clustering around the death penalty, LGBTI and migrant worker rights issues. We will see in sections "Types of CSOs in Singapore's Universal Periodic Review" and "CSO Submissions to the Stakeholder Summary", the volume of submissions and the prominence of issues in the UPR process broadly correlate to the number of groups and submissions made in 2011 and 2016.

CSO Submissions to the Stakeholder Summary

In the 2011 review, there were a total of 18 submissions, 5 of those were joint submissions and 13 individual (UN Human Rights Council 2011c). Among the individual submissions, six were made by international CSOs and seven by local CSOs. Among the joint submissions, one was from an international CSO and the remaining four were joint submissions by local CSOs. In the first cycle, independent members of civil society also contributed towards the reports (Table 6.5).

The joint international submission dealt with LGBTI rights, while the two of the four joint submissions from local CSOs focused on migrant worker rights and rights of people with disabilities. The remaining two joint submissions from local CSOs were from coalitions of local CSOs and addressed points of agreement on a range of human rights issues from death penalty and civil liberties to media freedom, equality and non-discrimination and economic rights.

In 2016, the number of CSO submissions increased to 22; 14 of these were individual submissions, while 8 were joint submissions (UN Human Rights Council 2015c). Nine of the fourteen individual submissions were from international CSOs, while five were from local groups. There was

Table 6.5 CSO submissions integrated into the stakeholder summary report

	Cycle 1—2011	*Cycle 2—2016*
Total no. of submissions	18	22
Individual submissions	13	14
Joint submissions	5	8

Source: UN Human Rights Council 2011c, 2015c

also an increase in the number of joint submissions; four were submissions by local groups, one was an international CSO joint submission and the remaining three were submissions made by partnerships between local and international CSOs.

When we do a cross comparison between the type of CSO (International or local) and the type of report (individual submission) contributed, we see that the number of international CSOs submitting individual reports has increased from five to nine between 2011 and 2016, while the number of local CSOs submitting individual reports has decreased from seven to five over the two cycles. An analysis of the submissions reveals that some of the issues taken up in individual submissions from international CSOs include the death penalty, children's rights, freedom of expression, association and assembly, military service, right to privacy, women's health and trafficking. Individual submissions from local CSOs tended to coincide with their cause issue or main area of work.

The number of joint submissions for local and international CSOs has remained consistent with four local and one international joint submission in each cycle. A new addition in the 2016 cycle was joint submissions between local and international counterparts; there were three such submissions. In comparison between the first and second cycle, there was an overall increase in the number of individual submissions as well as joint submissions among local CSOs, as well as between local and foreign CSOs.

These joint submissions involving local and international CSOs centred on common areas of work between the organisations. For instance, the World Alliance for Citizen Participation (CIVICUS) partnered with MARUAH on a submission about restrictions on civil society space and freedom of expression. The other two joint submissions done in partnership with local and international organisations covered LGBTI issues and media freedom. According to the interviews with Singaporean CSOs, joint submissions were seen as mark of coalition building and expressing solidarity on issues where they could find agreement. The joint submission from the Alliance of Like-Minded Civil Society Organisations in Singapore (ALMOS) in the 2016 cycle, for instance, dealt with a broad range of issues of equality and non-discrimination, right to liberty and security of the person, administration of justice and rule of law, freedom of movement and freedom of expression, association and assembly. But joint submissions do have their limitation as these issues first had to be jointly agreed to and expressed succinctly given the space constraints of joint reports. The individual submissions were also made by groups that want

to go into more detail and provide more specifics. For instance, in the coalition submission issues like LGBTI rights, death penalty and civil and political liberties were raised, and then some groups went on to substantiate this with more detailed submissions apart from their coalition.

Key Issues in the UPR Process

In the preceding section, we saw that the number of CSOs over the two cycles had risen and that these CSOs also cluster around several key issues. Of these, three main issues are the rights of migrant workers, concerns of the LGBTI community and abolition of the death penalty; while those related to detention without trial, civil liberties and fundamental freedoms and independent institutions ranked lower. The content review confirmed these key tension points between the government and CSOs.

One key issue raised over the two UPR cycles was the challenges faced by migrant workers and foreign domestic workers. The national report for the first cycle laid out the legislative and administrative framework in place governing the treatment of foreign workers and discussed the monitoring and evaluation framework in place to deal with errant employers and foreign workers in distress. CSO submissions in the first cycle were critical of the legal and administrative framework which they stated fell short of providing an effective system for seeking redress and for protecting the basic worker rights of foreign domestic worker. These issues were raised by 12 CSOs and independent members of civil society (with AI being the only international organisation that dealt with the issue).

Individual submissions were made by Think Centre and AI, while the remaining ten were part of joint submissions. The first was a coalition formed specifically to address migrant worker issues: Solidarity for Migrant Workers comprising Humanitarian Organizations for Migration Economics (HOME), Transient Workers Count Too (TWC2) and Migrant Voices. The second was COSINGO, a coalition of local CSOs comprising AWARE, Challenges People's Alliance and Network (CAN), Deaf and Hard of Hearing Federation, HOME, MARUAH, People Like Us, Singaporean for Democracy and TWC2. The third was a joint submission by Think Centre, Singaporeans for Democracy, Singapore Anti-Death Penalty Campaign, HOME and independent members of civil society. In terms of patterns of engagement, the first cycle already showed efforts at capacity building and involvement in submissions which address issues they work on.

In the national report for the second cycle, the state addressed a number of these issues that had been previously raised by the 11 local CSOs and independent civil society members in the first cycle, and it outlined the steps taken to improve the situation (UN Human Rights Council 2015a). For instance, foreign domestic workers were granted a mandatory day off, new legislation was enacted to ensure the adequate living standards for migrant workers housed in dormitories and additional protections were put in place to educate foreign domestic workers about settling in and on their employment rights. In addition to these measures, the state indicated that there was significant interaction with other stakeholders such as the state and trade union-affiliated Migrant Worker Centre which oversees the welfare of foreign workers, as well as HOME and TWC2 who refer cases and complaints to them. In the second cycle, TWC2, a joint submission by coalition ALMOS and a joint submission by HOME and Think Centre highlighted how structural problems enabled the violations to occur along with the continued ineffective enforcement of the law. It was pointed out that the employer sponsor model for employment affected migrant workers' freedom of movement, the ability to change jobs and living conditions. This included the lack of due process in the deportation of migrant workers and the dangerous self-administered abortions by female worker permit holders who faced deportation for being pregnant. The analysis of the submissions across the two cycles reveals CSO building on the intersectionality of issues and providing more nuanced critique; it also demonstrates efforts by the state to mitigate those issues and offer its own narrative, for instance, through the state-affiliated Migrant Worker Centre.

Another key issue was that of LGBTI rights. The national report in 2011 made no mention of the LGBTI community at all (UN Human Rights Council 2011a). The matter was raised in the UN and Stakeholder summary report; the latter saw where 4 CSOs representing LGBTI interests highlighted the lack of legal protection facing LGBTI individuals who experience discrimination at work and the continued criminalisation of homosexuality (UN Human Rights Council 2011b, c). This was done through an individual submission by local CSO People Like Us and a joint submission by three international LGBTI organisations—Arc International, ILGA and ILGA Europe. The state addressed the matter during the interactive dialogue in the first cycle, stating that all individuals were free to pursue their lifestyles, LGBTI individuals did not have to hide their sexual orientation for fear of recriminations and that Singapore remained a conservative society and that this could not be changed by legislation alone (UN Human Rights Council 2011d). In the second cycle, the national report indicated that the

criminalisation of homosexuality had been debated in Parliament which opted to retain it, and that two legal applications made to challenge the constitutionality of the law resulted in the Court of Appeal upholding its constitutionality in both cases (UN Human Rights Council 2015a). The national report went on to deny any discrimination of LGBTI individuals at school or in the workplace and reiterated that Singaporean society continued to have a conservative outlook and that countries ought to be allowed to deal with sensitive issues based on their socio-cultural context (UN Human Rights Council 2015a). As with the approach taken in discussing migrant worker rights, a joint submission by Oogachaga and Pink Dot SG and by Kaleidoscope Australia Human Rights Foundation, Sexual Rights Initiative as well as local groups Safe Singapore, Sayoni, Bear Project and Young Out raised the problem of structural discrimination and state's unwillingness to recognise sexual orientation being used as grounds for discrimination (UN Human Rights Council 2015c). In the second cycle, LGBTI issues were addressed by a total of 21 organisations either individually or as a member of a joint submission. They then pointed to a broad spectrum of violations of the right to work, in the administration of justice and freedom of association, the right to health and education as well as the skewed portrayal of LGBTI individuals in the media (Ibid).

The death penalty was the other main issue. The state's position here was laid out very clearly in the first cycle—that the death penalty remains legal under international law, it is applied only in the most serious cases and that it views the death penalty as a criminal justice issue rather than a human rights one (UN Human Rights Council 2011a). In the first cycle, CSOs such as Amnesty International, MARUAH, Singapore Anti-Death Penalty Campaign and International Harm Reduction Association highlighted a number of substantive issues with regard to the application of the death penalty; for example, the use of the death penalty for a broad spectrum of offences including drug-related offences and the existence of a mandatory death penalty which was inconsistent with the criteria of absolute necessity (UN Human Rights Council 2011c). Amnesty International highlighted the lack of information on the number of death sentences, executions or details about those executed and MARUAH called on the government to review the criminal process to ensure fair pretrial and trial processes and to present objective evidence on the deterrent effect of the death penalty (Ibid).

In the time between the first and second cycle, there was a review of the legislation during which a moratorium was put in place. Later amendments were made to the mandatory death penalty regime to allow for a life

sentences in cases where strict criteria was met. CSO submissions for the second cycle by Amnesty International, We Believe in Second Chances, MARUAH and the joint submission by a local coalition adopted a more tailored approach by focusing on more specific issues alongside general condemnations of the use of the death penalty (UN Human Rights Council 2015c). For instance, We Believe in Second Chances brought to light the fact that there was no express legal prohibition against the execution of persons who are mentally ill at the time of execution and that the Cabinet was not obliged to consider the accused's representation when considering if clemency should be granted (Ibid). We Believe in Second Chances, Amnesty International and the joint submission by ALMOS also highlighted procedural inadequacies such as the lack of sufficient notice of execution given to inmates and their families and the persistent lack of factual information on the use of the death penalty (Ibid). Core issues such as the fact that the broad range of offences which attracted the death penalty not meeting the most serious crimes threshold imposed under international law, continued to be championed. CSOs such as Amnesty International also welcomed the progress that had been made since the first UPR, but noted that the amended legislation still did not conform with international human rights law and standards (Ibid).

On the issue of arrest and detention without trial, in the first cycle the state's position has been that preventive detention without trial is used as a measure of last resort and that there are checks and balances in place to prevent arbitrary use or abuse ((UN Human Rights Council 2011a). It also laid out that preventive detention has been effectively used to thwart terrorist attacks and indicated that in some cases the detention had achieved rehabilitation and subsequent release (Ibid). CSO submissions by Singapore Institute of International Affairs, Function 8, MARUAH and Human Rights Watch during this first cycle stated that preventive detention laws provided the state with unchecked powers for arrest and administrative detention without warrant or trial and that such detention without trial was arbitrary and a violation of the rule of law (UN Human Rights Council 2011c). Function 8 further noted that the ISA continued to be a threat to opposition parties and activists, thus producing a chilling effect on dissent, free speech and free association (Ibid). The use of preventive detention for counterterrorism purposes was also discussed by Amnesty International and Alliance for Reform and Democracy in Asia which stated that the Internal Security Act (ISA) had initially been intended to deal with subversion and organised violence and was more recently being applied to detain those suspected of links to armed

Islamist organisations (Ibid). Both noted it provided for unchecked and indefinite detention. CSOs also highlighted that the Criminal Law (Temporary Provisions Act) allowed for detention without trial for up to 12 months and that this period could be extended indefinitely, making it more problematic (Ibid).

In the second cycle, the national report did not touch on the issue specifically (UN Human Rights Council 2015a), but CSOs such as Function 8 and MARUAH as well as two coalition submissions continued to raise it as a key human rights concern by elaborating on the points raised in the first cycle (UN Human Rights Council 2015c). Firstly, they highlighted that powers for detention without trial exist under three different pieces of legislation: the Internal Security Act, Criminal Law (Temporary Provisions) Act and the Misuse of Drugs Act. Secondly, a joint submission by MARUAH and CIVICUS pointed out that there have been reports of violence and mistreatment those held under ISA detention. Thirdly, the same joint submission indicated that such powers had been used against civil society activists; and finally, the local coalition ALMOS and Human Rights Watch questioned the efficacy of the purported checks and balances in place given that the processes for renewing detention orders are limited to the executive branch. MARUAH further recommended that all detention cases be reviewed in court and all detainees be granted a fair trial. The use of preventive detention for counterterrorism purposes was raised by Function 8 which noted that all the 11 individuals being detained under the ISA at that point in time were Muslim. Function 8 went on to highlight the length of the detention was indefinite (Ibid).

The trajectory of the issue of fundamental freedoms and civil-political rights has by and large remained consistent throughout both cycles, with the state taking the position that Singapore's diverse demographic required that state balance the need for social harmony with the rights of individuals (UN Human Rights Council 2011a, 2015a). CSOs have stated that the significant restrictions on fundamental freedoms stifle the enjoyment of these rights and that critics of the government were particularly at risk for sanction (UN Human Rights Council 2011c, 2015c).

In tracking the discourse over the two cycles, we see that the call for institutions, such as an independent national human rights institutions (NHRIs), was championed in cycle one but not sustained through to cycle two. In the first cycle, nine organisations and independent civil society members called for the establishment of an independent national human rights institution. Singapore Institute of International Affairs stated that

such an institution could be a focal point for human rights and could provide input to ASEAN- and UN-related human rights mechanisms (UN Human Rights Council 2011c). A joint submission by Solidarity for Migrant Workers, HOME, TWC2 and Migrant Voices pointed out that there were other ASEAN countries with NHRIs. A separate joint submission by Think Centre, Singaporeans for Democracy, Singapore Anti-Death Penalty Campaign, HOME and independent civil society members called for an independent commission on equal opportunities to review and abolish statutory guidelines that contribute to discrimination and racial inequality. Additionally, Singaporeans for Democracy and Alliance for Reform and Democracy in Asia called for an independent elections commission (Ibid). In cycle 2, the issue of independent institutions was not sustained or developed in the Stakeholder Summary, with only MARUAH calling for independent election commissions manned by members of the public as election officials, as they noted the Elections Department was currently under the Prime Minister's Office (UN Human Rights Council 2015c).

CSO Involvement with the UPR Highlights Issues

The content analysis of key UPR documents shows that the key issues identified in the preceding section to some extent have been on the UPR agenda because of the work and efforts of the different special issue CSOs that have advocated on their respective areas either through single or joint submissions. In some cases, there have also been cross-issue collaborations among the CSOs giving voice to some of the less prominent issues.

The migrant worker rights issue attracted attention because it was considered a hot political issue domestically and several CSOs such as TWC2, HOME and Migrant Voices that have submitted reports over consistently over the two cycles. It was also an issue that some member states had raised including states of migrant worker "sending" countries during the review; hence, this issue did get significant traction in the UPR process. To underscore the importance of this issue, it is important to note the setting up of the Migrant Worker Centre under the National Trade Union Congress (NTUC) and Singapore National Employers Federation (SNEF) which is facilitated through the Trade Union Act. In terms of the UPR, this is the first instance of a government-organised non-governmental organisation (GONGO) engagement defined through its close government affiliation, ties and project funding. This perhaps signals a precursor to future participation of Singapore GONGOs in an attempt to dilute or

neutralise the work of independent CSOs flagged by the literature reviewed earlier on Vietnam.

The proliferation in the number of local LGBTI groups participating in the UPR process also helped increase the profile of the issue from cycle 1 to 2. For instance, from just People Like Us in 2011 to seven in 2016—Oogachaga, Pink Dot SG, Project X, Sayoni, Safe Singapore, Bear Project and Young and Out. In addition to this, two foreign LGBTI CSOs also contributed—Kaleidoscope Australia Human Rights Foundation and Sexual Rights Initiative. The involvement of multiple stakeholders representing individuals from across the LGBTI spectrum clearly paved the way for the human rights issues affecting the community to be brought to the forefront in 2016. The focus on the intersectionality of the lack of legal protection with the inability to enjoy other substantive human rights was also a key factor that brought LGBTI issues to the forefront of the discourse.

In contrast with the first cycle, we see that the submissions on the key issues such as the death penalty have taken a more nuanced approach. The reports suggest a deeper understanding and a more technical approach in dealing with those issues such as highlighting the intersectionality of issues, coalition building on interest areas and raising more specific evidence-based critique (UN Human Rights Council 2011c, 2015c). We see the same shift in focus in submissions on arrest and detention. In the first cycle, the focus was on the problematic legal framework which allowed for indefinite detention and unchecked state power (Ibid). In the second cycle, the discourse moved onto the systemic problems with the application of these laws, such as reports of abuse and mistreatment, its use against civil society and the potential for abuse when used as a counterterrorism measure (Ibid).

On the issue of fundamental freedoms, the push for independent institutions seems to have been abandoned in favour of focusing on existing problems such as lack of media freedom, creating a culture of self-censorship and regulatory and operational obstacles to NGOs and civil society (Ibid). This could be explained in part as a response to the government's continued discomfort with independent institutions and its continued use of exceptionalism as a justification. The government's continued use of exceptionalism reflects a lack of commitment to core human rights principles.

Following the session in Geneva, both international and local CSOs also made effective uses of the media to evaluate Singapore's performance and respond to the positions taken by the state. This again helped frame a counternarrative in the media, as there were representations by the state that its pragmatic approach to human rights had received significant endorsement (28 January 2016, ChannelNewsAsia)

Conclusion

The UPR aims to improve the human rights situation on the ground in all countries through engaging in interactive and constructive dialogue on their respective human rights situation. Like elsewhere, we can see the UPR process for Singapore government is very much a state-centric one (See generally McMahon 2010). In response, Singaporean CSOs have tried to participate by providing individual and joint submissions. But the issues that have gained prominence were the ones that have had the larger volume of CSOs participation and submissions such as issues related to migrant workers, LGBTI and the death penalty. Issues related to detention without trial, civil liberties and independent institutions covering the conduct of such as elections and the protection of human rights were much lower. The findings suggest that more participation and submissions are needed in the next UPR process if political related issues and independent institutions are to gain importance. Singaporean CSOs individually, collaboratively and in partnership with INGOs can engage in this process, in the preparation of reports to inform the next UPR review as well as in making statements when the outcome of the review is being considered in 2020. Such CSO interactions with the UPR give civil-political issues a better airing when the Singapore state next comes under review. However, the success of such a strategy will lie in the follow-up and implementation of recommendations made.

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PART III

National Perspectives

CHAPTER 7

The Universal Periodic Review of Timor-Leste: Achieving Justice for Past Human Rights Abuses Under Indonesian Rule

Cristian Talesco and Brigette S. Valentine

Introduction

Timor-Leste tortuously suffered 24 years of Indonesian invasion. In 1975, Indonesia invaded Timor-Leste to annex it to West Timor. This rendered the country one of the poorest in all of Southeast Asia. Notwithstanding, the terrifying invasion also cost the lives of hundreds of thousands of East Timorese. Indonesia only left in 1999, after Timor-Leste was granted a UN managed referendum, and the nation voted for independence. Since Timor-Leste's independence on 20 May 2002, the nation, with the support of the United Nations, has begun to rebuild the land and its institutions from scratch. Unique within Southeast Asia, Timor-Leste has established a human rights framework which includes an Ombudsman: helping to give a voice to civil society and to assist in the advancement of free political elections. Thus, Timor-Leste has created the basis for a democratic society which grants

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rights to its citizens. However, more steps must be made to facilitate justice for past human rights abuses. This shortcoming has been particularly revealed by two cycles of Universal Periodic Review (UPR), that from 2011 and 2016. In particular, as this chapter argues, the UPR has proved to be an important mechanism in advocating the protection of human rights in Timor-Leste. Both UPR cycles evinced two human rights dimensions: one domestic and one international. At the domestic level, Timor-Leste received suggestions to ameliorate human rights problems, namely, improving women's and children's rights that could be addressed at the national level with the introduction of relevant laws. At the international level, the feedback focused on achieving justice for past human rights abuses which requires a cross-border solution as it involves an external aggressor—Indonesia. From this perspective, the UPR has thus far provided a platform for non-governmental organisations (NGOs) to advocate justice for past human rights abuses. However, the UPR has also shown a contrasting discourse between what reviewing states and NGOs advocate, proving that reviewing states very often avoid the issue of justice. This is particularly evident in the case of ASEAN countries, which abide by the principle of non-interference in each other's internal affairs. Nevertheless, while surveying the range of human rights issues raised in relation to Timor-Leste, the UPR has shed light on the need to have an international answer to past human rights abuses—as such, an answer which should involve the United Nations. This is important for the long-term peace and prosperity of the nation, for its foreign relations, for its reconciliation with Indonesia and for the stability of the entire Southeast Asian region.

Based on these notions, this chapter attempts to answer the following research questions: is the UPR an effective mechanism to achieve justice for past human rights abuses in Timor-Leste? What are the UPR's limitations in facing international human rights violations in Timor-Leste? These questions are answered by assessing the feedback received by Timor-Leste, and also that given by Timor-Leste to Indonesia, and other ASEAN countries. This chapter's analysis relies on the documents of the UPR as well as on the discourses of the civil society and those of the government officials of Timor-Leste.

UPR of Timor-Leste

The UPR mechanism provides feedback to all member states regarding their human rights achievements, breaches and hindrances (UN Human Rights Council 2007). Timor-Leste completed its second cycle on 3 November

2016, and overall, its performances in democracy and human rights far exceeded those of all the ASEAN member countries (Talesco 2016). This is noteworthy, as although Timor-Leste excelled beyond all ASEAN countries, and despite Timor-Leste's geographical location indicating that it clearly should form part of ASEAN, its steadfast six-year bid to be included has continued to be refused.

The UPR evidenced one issue that so far has not been solved either by the government of Timor-Leste or the international community: granting justice to the victims of past human rights abuses. In the first UPR for Timor-Leste conducted on 12 October 2011, it received 126 recommendations by 39 participating states, and accepted 118 and rejected 8 (UPR Info 2012). The main issues raised by the recommending states to Timor-Leste, the state under review (SuR), focused on two different levels: one domestic and one international. On the domestic level, recommending states have urged Timor-Leste to improve women's and children's rights, the rights of people with disabilities and to make improvements to the justice system. These problems can be fixed in a liberal democracy by implementing specific laws to grant rights to disadvantaged categories. Timor-Leste has signed several international human rights treaties, but is yet to ratify the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance. On the international level, recommending states pressed Timor-Leste to achieve justice for past human rights violations during the Indonesian invasion. This latter case is more convoluted than that pertaining to solving domestic violations as it involves cross-border aggression. In fact, when Timor-Leste was invaded by Indonesia, there were several international players, including Australia and the USA, which did not discourage the invasion in any way. Therefore, in this instance with Timor-Leste, granting rights for past human rights abuses requires an international answer. Thus, Timor-Leste should be supported through the United Nations system in achieving justice and in prosecuting those responsible for human rights abuses during the Indonesian invasion. Meanwhile, the UPR evinced that the entire burden for justice had mistakenly been placed on the SuR, Timor-Leste.

During the first UPR, 15 governments raised questions or made recommendations about past human rights abuses. These countries included the Czech Republic, Ireland, the Netherlands, New Zealand, USA, Germany, Argentina, Austria, Canada, South Africa, Norway, France, the UK, Korea and Indonesia (UN Human Rights Council 2012). Indonesia focused its stance on achieving the recommendations of the Commission on Truth and

Friendship (CTF), which is—as the following section shows—a commission created by both countries to achieve a peaceful settlement of past human rights abuses. However, it is highly criticised because it does not seek to bring the actual perpetrators responsible for the crimes against humanity in Timor-Leste, before the courts. Countries that failed to raise this issue were the Holy See, Australia, Portugal, Japan and Brazil. Notwithstanding this, on several occasions these countries have reinforced their support to achieve justice for the abuses occurred during the Indonesian invasion (Ibid).

In March 2016, the civil society organisations (CSOs) submitted a report to the HRC with a critical overview about what has happened since the last UPR cycle in 2011. For the first time, local East Timorese civil society organisations produced a report as a coalition of organisations. This put strong emphasis on the critical analysis of the human rights issues in Timor-Leste and has shown today that the nation's civil society organisations have the capacity to speak with one voice when it comes to justice. For what concerns international justice regarding the reparations of past human rights abuses, the coalition has asserted that not much has been done in terms of transitional justice. The coalition argues that "the large majority of perpetrators of gross human rights violations committed during the Indonesian occupation of Timor-Leste remain at large" (Timor-Leste Civil Society 2016: 14).

Impunity is still rampant in Timor-Leste, particularly because foreign judges were expelled from Timor-Leste in 2014 (Sonali 2014). Therefore, the Special Panel for Serious Crimes Unit, established by the United Nations in 2000 as an inquiry into past human rights abuses, cannot convene because of the mandatory requirement for the panel to include two foreign judges. In addition, the government has not progressed in its adoption of a law for reparations for the victims of the Indonesian invasion, nor has the Public Memory Institute progressed. The coalition of civil society organisations has suggested that the government should progress in at least one of these areas, and that it recuperate the Special Panel for Serious Crimes Unit. One important suggestion pointed out how the government of Timor-Leste should try to get the support and assistance of the United Nations, to continue the process of prosecuting the human rights abusers during the Indonesian invasion (Timor-Leste Civil Society 2016: 14).

This suggestion is extremely relevant because for the first time the onus of granting justice is not just in the hands of Timor-Leste politicians, but also in the hands of the United Nations and the international community.

Restorative and Transitional Justice in Timor-Leste

The discourses of human rights and justice in Timor-Leste are paramount to developing an understanding of the historical challenges the country and its people faced. Most comparative studies juxtapose Timor-Leste with Cambodia. The comparison relates to the notion of genocide (or attempted genocide), which occurred in Cambodia at the same time as Timor-Leste, and the establishment of an international tribunal. Kiernan (2003) analyses the death toll in Cambodia and Timor-Leste, arguing that one-fifth of the population of both countries was decimated. Others (Katzenstein 2003; Linton 2002) point out the necessity for justice in Timor-Leste, and the establishment of a hybrid tribunal or an internationalised domestic tribunal.

Other scholars (McCloskey and Hainsworth 2000; Taylor 1991, 2000; Dunn 1983, 2003; Robinson 2006, 2009; Cristalis 2009) have analysed human rights abuses in Timor-Leste and have mostly reached the common, shocking conclusion, that human rights abuses in Timor-Leste included inhumane practices of widespread killings, "starvation, deaths from preventable diseases, torture, forced movement of populations, coerced sterilization of women, rape and imprisonment without legal redress" (McCloskey and Hainsworth 2000: 4). Taylor (1991, 2000) has provided an historical account of the abusive events and has given voice to the story of individuals. One of Taylor's interviewees recalls the fear of the Indonesian military, and their arbitrary killings: "I saw a Missionary Sister helping two men from Quelicai who were injured when some soldiers suspected them of being guerrillas. They were stoned to death in front of me and the nun, by Indonesian soldiers from battalions 315 and 731" (Taylor 2000: 109). The civil society organisations in Timor-Leste have strongly advocated, on the basis of these accounts, in favour of granting justice to the East Timorese.

During the first UPR cycle in a joint submission of CSOs and the National Human Rights Institution of Timor-Leste, it has been made clear that the "victims of the armed conflict from 1975 to 1999 continue to wait for truth, justice and reparations. This situation threatens the process of peace-building in communities, ignores the rights of victims to truth, and attempts against fair and timely justice" (Timor-Leste Civil Society 2011). Amnesty International, which had a solid position on the issue of justice during the last decade, has indicated in its submission to the UPR the need to "establish a long-term comprehensive plan to end impunity and, as part of that plan, to request the UN Security Council to

immediately set up an international criminal tribunal with jurisdiction and over all crimes committed in Timor-Leste between 1975 and 1999" (Amnesty International 2011).

These individual accounts have been accompanied by other reports about foreign countries' silence and connivance during the Indonesian invasion of Timor-Leste. James Dunn (1983, 2003), former Australian consul in Timor-Leste, explained in his publications how diplomatic relations worked during the Indonesian invasion. He also, sometimes passionately, disclosed his own country's poor standing in relation to the human rights abuses by the Indonesian militia. Amnesty International (1994) and Human Rights Watch (1994) have also prepared two detailed reports on the human rights violations by Indonesia in Timor-Leste. Both reached the conclusion that the Indonesian military's arbitrary use of power was a widespread practice in Timor-Leste.

Nevertheless, there is a necessary publication to which any scholar writing on Timor-Leste and human rights should make reference: *Chega!* (Enough!): *the report of the Commission for Reception, Truth, and Reconciliation of Timor-Leste* (CAVR 2005). This report is the most comprehensive piece of writing on what happened in Timor-Leste between 25 April 1974 and October 1999. It portrays the veracity about the Indonesian human rights abuses in Timor-Leste, addressing violations related to widespread killings and disappearances, displacements, detention, torture, sexual abuses, self-determination and so on. The report is also made freely available on the internet, with the intent to objectively and impartially deal with the horror of the bloody invasion. It recognises the key role of civil society in upholding the principle to self-determination of Timor-Leste, and in fighting the indifference of other governments (ASEAN, Australia, the USA), which turned a blind eye to the atrocity perpetrated by the Indonesians (CAVR 2005: 50). Moreover, the report itself inspired a workshop in June 2000 on transitional justice organised by the East Timorese civil society, the Catholic Church and community leaders, and with the support of the Human Rights unit of the United Nations Transitional Administration in East Timor (UNTAET). The aim of the CAVR was to reconcile with Indonesia, with the intention to acknowledge "past mistakes including regret and forgiveness as a product of a path inherent in the process of achieving justice" (CAVR 2005: 18).

Yet, justice, in the form of bringing the human rights abusers before a court, remains largely unachieved. Cristalis (2009: 263) poses a very relevant question: "reconciliation, but where is the justice?" In fact, independence and reconciliation are not enough to heal the wounds of those who

suffered loses. Only justice in the form of a tribunal could have relieved the feelings of the East Timorese. Dunn (2003) and Robinson (2006) had been commissioned to complete a report from the UN on the human rights violations, and they both suggested that a tribunal needed to be established. This, however, did not happen. Both presidents Ramos-Horta and Gusmão suggested that reconciliation was of utmost importance, rather than a focus on justice.

The UPR process, with its two cycles, has attempted to shed light on past human rights abuses. The process has shown that justice in Timor-Leste is yet to be achieved, although the process has provided a platform to keep discussions open.

Seeking Truth and Reconciliation Between Indonesia and Timor-Leste

In 2005 Timor-Leste and Indonesia established a bilateral Commission on Truth and Friendship (CTF 2008), which also investigated the violence perpetrated by the Indonesian military. The CTF submitted a final report on 15 July 2008 to both presidents of Indonesia and Timor-Leste. On that occasion Indonesian President, Susilo Bambang Yudhoyono, did not formally apologise. Instead, he expressed his and the country's regret over what happened. He accepted the report and expressed remorse (The Associated Press 2008).

The CTF report, however, has not been considered as trustworthy as the CAVR report. CSOs, in particular the Aliansi Nasional Timor-Leste Ba Tribunal Internasional (Timor-Leste National Alliance for an International Tribunal—ANTI), complained about the lack of consultation with victims and of parliamentarians' approval of the commission. ANTI—in a letter to the commission dated 15 July 2008 and whose object states: "We have the Truth, now we need Justice"—pointed out that the CTF report was nothing new compared to what was already discovered in the CAVR report *Chega!* There was a difference however; the CAVR report gives a strong emphasis on the establishment of an international tribunal "to try cases of 1999 crimes" (CAVR 2005: 10); it further recommends that the UN and the Security Council remain committed to achieving justice for crimes against humanity in Timor-Leste (Ibid: 187). On the contrary, the CTF avoided the justice issue by claiming institutional responsibility, rather than individual responsibility, which it assigned to Indonesia. This, according to ANTI, goes against the principles of international law and against

Article 160 of the Timor-Leste Constitution, which states that "Acts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts" (Constitution of RDTL). ANTI emphasised the importance of reconciliation with Indonesia, although the organisation sustained the view that justice for the victims should be the cornerstone for true reconciliation. This follows the lines of the reconciliation definition adopted by the CNRT (Conselho Nacional da Resistência Timorense—National Council of Timorese Resistance) in August 2000, which states that "Reconciliation is a process, which acknowledges past mistakes including regret and forgiveness as a product of a path inherent in the process of achieving justice" (CAVR 2005: 18). Nevertheless, scholars at the War Crimes Studies Center at the University of California Berkeley, who have been involved in the CTF, have argued that despite the criticism, the report can be acknowledged as credible (War Crimes Studies Center, n.d.). Moreover, recognition of the crimes and regret by the Indonesian president are indications that the right direction is being taken in the discourse of reconciliation. In addition, Indonesia's commitment to support Timor-Leste's bid for ASEAN membership is an indication of the willingness of both countries to make amends regarding the wrongs of the past, and to look towards a positive, progressive and peaceful future relationship.

The philosophy of José Ramos-Horta, as well as that of Xanana Gusmão, has promoted reconciliation and forgiveness of Indonesia, which are further indications of Timor-Leste's willingness to live in a peaceful, stable society. This perspective has not been easy to accept by many East Timorese. Ramos-Horta, himself, lost two brothers and one sister, all killed by the Indonesian militia. Of his brothers, he does not even know where they are buried. Many have criticised Ramos-Horta for being too forgiving, especially as in 2008 he publicly forgave the men who attempted to kill him, and he has supported the forgiveness of reconciliation with those Indonesians and the militia who committed genocide in Timor-Leste. However, Ramos-Horta has an interesting perspective about justice, which is one that is not granted by the judgement of a tribunal, but rather from the historical happenings in Timor-Leste. He affirmed in 2012, "[…] the greater justice is that we are free," adding "[…] let us forgive those who did harm because God gave us a greater gift: our independence. Let's forget about an international tribunal – it will never happen" (McDonnell 2012). Many East Timorese have disagreed with him, and feel betrayed by his comment. The capacity of

Ramos-Horta and Gusmão to forgive for the wrong of the past is in light of achieving peace and stability, two factors that can grant the long-term development of Timor-Leste. Both of them knew that Timor-Leste would have developed faster by having good relationships with its neighbours; which is why reconciliation was on the top of their political agenda. Gusmão—talking in a lecture in Singapore in 2013—affirmed that for his country, it was very important to pursue reconciliation. He clearly stated that fighting in the style of Palestinian Intifada was not in the interest of his country. In order to prosper, countries need peace and Timorese leaders realised this very soon (Timur 2013). Moreover, on the same occasion, Gusmão made clear that pursuing a claim of crimes against humanity against Indonesian military would have also rendered responsible all of the countries that furnished weapons to Suharto. As such, several powerful Western countries would have faced blame.

This led Robinson (2009) to question the reasons behind the East Timorese leadership's position regarding justice. Robinson suggested that Ramos-Horta and Gusmão had no interest in jeopardising the relationship with Indonesia. They knew that the economic development of Timor-Leste would have been unquestionably related to the relationship with Indonesia. Notwithstanding this, during the whole period of the resistance, Timor-Leste successfully claimed its independence by relying on the principles of International Human Rights Law; the very law the East Timorese government, and the international community, are now reticent to apply. Robinson (2014) has also pointed out that the resistance movements have been responsible for serious crimes during the Indonesian invasion. Given which, any tribunal would have probably implicated those who are currently running Timor-Leste.

Overall, Indonesian military, as well as Timor-Leste's government officials, are well aware of the wrongs perpetrated against the East Timorese. Nowadays, Indonesia is a strong supporter of Timor-Leste joining ASEAN. A key reading of this stance is that Indonesia sees the necessity for peaceful coexistence in the Southeast Asian region. However, although Ramos-Horta did not call for a tribunal of the type called for by Cambodia and Rwanda, Indonesia's responsibility for the killing of thousands of East Timorese is, at least on moral grounds, a national shame for the country. In other words, Ramos-Horta left both the choice of whether to prosecute and the timing of now or later: to the culprit, Indonesia—the culprit responsible for the attempted genocide in Timor-Leste. This attitude is in line with the recognition to award Ramos-Horta and the renowned

Catholic bishop in Timor-Leste, Carlos Ximenes Belo, the Nobel Prize for Peace in 1996. During the ceremony, the chairman of the committee, Francis Sejersted, affirmed that this prize is in recognition "for their long-lasting efforts to achieve a just and peaceful solution to the twenty-year-old conflict in East Timor" (Sejersted 1996).

In this light, the redress and remedies have been pursued through two cycles of the UPR, in order to achieve justice and peaceful solutions. Evidence shows that since 2011 NGOs have tried to advocate in favour of implementing the suggestions received by the two commissions. However, in the UN country report submitted to the HRC in March, it was noted that the "Timor-Leste – Indonesia Commission for Truth and Friendship had not seen progress" (UN Country Team 2016: 8). At the same time, the Committee on the Elimination of Discrimination against Women submitted another report to the HRC in which it sustained that the Indonesian and the East Timorese governments have begun a "survivor healing programme" for women abused during the Indonesian invasion. The Committee also urged Timor-Leste to further implement the recommendations of both commissions concerning abused women (UN Human Rights Council 2016b: 8).

However, in the national report submitted for the second UPR cycle, the East Timorese government clarified that the government is currently drafting a law on Victims' Reparations "to establish criteria for victims that includes how to obtain international assistance for victims and also the second legislature of the National Parliament in its Annual Action Plan will establish a Memorial Institution" (UN Human Rights Council 2016a: 8). The government has clarified that these steps have been taken following the feedback received during the first UPR cycle. In the report of the working group, Indonesia has also asserted its total commitment to "forward-looking bilateral relations with Timor-Leste" (UN Human Rights Council 2016c: 9).

Moreover, Indonesia praised the commitment of Timor-Leste to implement the CTF, and welcomed the grade A status of the Timor-Leste national human rights institution. However, no other reviewing state has mentioned the issue of justice for past human rights abuses. This has been probably in light of some, albeit slow, steps taken by the Timor-Leste government in this direction. Another relevant aspect is that no reviewing state has pushed Indonesia to implement the CTF during its second UPR cycle. Therefore, the backdrop of this situation is that the burden of achieving justice is again only in the hands of the SuR.

Overall, the whole UPR process of the last nine years has shown that steps in the direction of justice have been taken, although they are long overdue, complicated, and painstakingly slow. This is particularly so in consideration of the limited capability of the government of Timor-Leste, which is still facing most of the primary challenges of development.

The Absence of "Justice" During Timor-Leste's UPR

An analysis of the UPR documents reveals no mention of the justice issue in Timor-Leste amongst ASEAN countries. In fact, all ASEAN countries are profoundly committed to the ASEAN way of "non-interference." Timor-Leste, in its recommendations, has used simple and non-confrontational language. Most of the feedback given appears to be a ritual and devoid of direct reference to past human rights abuses. For a country like Timor-Leste, with a positive human rights and democratic record, it is a contradiction to not take a position in relation to the abuses against the Rohingya in Myanmar. This issue is extremely insightful as it reveals how countries in Southeast Asia are committed to the norm of non-interference. Timor-Leste uses diplomacy to build "friendship," and to show that its government complies with the ASEAN way, as well as to avoid creating tension with other states. This, however, is achieved at the cost of human rights' progress in the region.

Again the language used by ASEAN countries is simple, direct and non-confrontational. Ritualism is recurrent in both cycles. Notwithstanding this, Indonesia has pushed Timor-Leste to implement the findings of the CTF, which tends more to forgive, rather than to seek justice. Overall, from the UPR processes, it becomes clear that compliance with the ASEAN way of non-interference in the politics of another member state is something considered much more important, than the granting of justice to victims of human rights abuses. Other states have illustrated they too wish to avoid any topic which could strain their relationship with Indonesia.

The shift from granting justice to reconciliation without justice is evident in the UPR process when it comes to the government's position. Moreover, until 2010, Ramos-Horta accused the UN of "hypocrisy" in not setting up the tribunal for prosecution of human rights abusers (Amnesty International 2010). Later, in 2012, the discourse of justice changed. Horta claimed: "The greater justice is that we are free. Let us forgive those who did harm because God gave us a greater gift: our independence. Let's forget about an international tribunal – it will never

happen" (McDonnell 2012). By the same token, the most prominent figure in the struggle for independence of Timor-Leste, Xanana Gusmão, affirmed that "for his country it was very important to pursue reconciliation. Fighting for justice was not in the interest of Timor-Leste. Rather peace and stability were the ingredients of Timor-Leste's future" (Timur 2013).

The position of the government of Timor-Leste in relation to justice can be more clearly explained in the words of an East Timorese diplomat who said, "The UPR process is important for Timor-Leste. We need to be part of these international forums to express ourselves as an independent country. However, we cannot use aggressive language, or confront other states. The capacity of Timor-Leste to argue about specific matters is limited. We are a small state, struggling to develop, we cannot jeopardize our future by taking a very tough stance on human rights issues, especially with our neighbours" (East Timorese diplomat 2016). This position explains significantly the dynamics of international politics, which often underestimate the importance of achieving and granting justice in favour of an opportunistic neoliberal plan of international relations. In this sense, the UPR process has been very important in disclosing these dynamics, and it is also very important to see the role of CSOs. In fact, CSOs have a different role and standing position during the UPR in comparison to governments. CSOs in Timor-Leste have always repeated that Timor-Leste is "still not yet free of the shadow of serious crimes committed during the 24 years of Indonesian occupation. We have suffered a lot during that period; physically and psychologically… […]… [W]e must not sacrifice fundamental principles of human rights and justice in favour of diplomacy" (A-N-T-I 2011).

Within these contrasted positions evinced in the UPR processes, something has been done to achieve justice. Indonesia set up an ad-hoc tribunal, the Commission of Inquiry into Human Rights Violations. The tribunal accused 22 people of crimes against humanity, but many were later released without charges. However, the CSOs have taken a strong stance during the UPR process by recommending that the government of Timor-Leste request the assistance of the United Nations in continuing investigations and prosecutions of past human rights abuses (Timor-Leste Civil Society 2016).

Within this panorama, the burden of achieving justice for past human rights abuses is mostly put on the Timor-Leste government. Even if an international tribunal is set and could trial people in contumacy, it is impossible to jail those judged because there is no agreement with Indonesia for extradition. Prior to the first and second cycles, several countries submitted questions and in both cases those countries asked the Timor-Leste

government to clarify what steps had been taken to achieve justice for the past human rights abuses. By the same token, most of the suggestions given from recommending states were focused on adopting points from the CTF and the CAVR. No recommending state has attempted to push Indonesia to prosecute the perpetrators of human rights abuses in Timor-Leste. In fact, in both cycles, Indonesia has never been put before the reality of its abusive past in regard to Timor-Leste.

CSOs, instead, have used the second UPR cycle to become more cohesive and compact. A joint group of CSOs have presented advanced assessments of human rights in Timor-Leste, as well as indications on how to achieve justice and overall guidance. Therefore, the UPR process can be viewed as an overall effective tool to provide CSOs with a platform to express their guidance and directions.

Conclusion: Looking Towards the Third Cycle

Overall, the two UPR cycles have been necessary to remind the international community that not much has been done to achieve reparation for past human rights abuses. The UPR helps Timor-Leste to be part of an international forum which can give and receive feedback, and support human rights improvements, including the achievement of justice. However, positive outcomes of the UPR cycle are limited by the so-called ASEAN way of non-interference, which prevents the East Timorese government from freely advocating for justice in ASEAN. Moreover, the UPR has no enforcement mechanisms, but instead is only a forum to discuss how human rights can be improved. Therefore, implementation remains in the interest and responsibility of the individual SuRs. Thus far, the UPR has provided a forum where NGOs can give extensive feedback and opinions about past human rights abuses. NGOs represent the outspoken voice, which seeks solutions on how to achieve justice. However, this "voice" is in contrast with the non-confrontational language used by recommending states, especially other ASEAN members. The UPR has clearly shown the different stances between civil society and the diplomatic apparatus of the SuR, and the recommending states. However, the UPR, as seen, puts the burden of achieving justice for past human rights abuses on Timor-Leste, while in reality, Indonesia has the main responsibility as well as those Western states which supported the invasion of Timor-Leste. The UPR also has another important flaw, which is related to the lack of responsibility of the international community in helping Timor-Leste with past human

rights violations. The process, in fact, seems to be too heavy on ritualism, and disturbingly, too light on effective solutions.

Generally, Timor-Leste's willingness to enter into a reconciliation process with Indonesia has been notable and successful. Two commissions have established the reconciliation path of these two countries. The UPR process has evinced the necessity to implement the recommendations given by both commissions. However, the process is still ongoing and the CSOs have proved to be the only responsible entities readily advocating in favour of granting justice to past human rights victims, through the UPR process. During the second cycle, the CSOs were much more cohesive and presented their cases in a joint submission, which made their cases much stronger than if they had acted as single, fragmented organisations. In substance, the UPR process has been effective in keeping alive the desire to achieve justice.

However, much still needs to be done, and the CSOs have indicated the probable way forward is one of greater reliance on the role of the United Nations, as a key player in the achievement of justice in Timor-Leste. In this regard, to leverage from the third UPR cycle to address past human rights abuses, likely requirements include: (a) A clear strategy by the state seeking justice for past human rights abuses. This may require an objective membership in ASEAN and the support of its members to solve the current impasse to achieve justice; (b) In the next four years, NGOs should be much more cohesive and assertive in shifting the burden of granting justice from the government of Timor-Leste to the Indonesian government and the United Nations. Local and regional coalitions will need to help too. In particular, joint submissions from East Timorese NGOs, together with regional partners and international organisations such as Amnesty International, will be of great help and support in the bringing about of justice; (c) Lobbying of key states to raise the issue is crucial. So far, Indonesia has taken a very limited, and elusive, stance regarding its responsibility for past human rights abuses. Australia, New Zealand and the USA should also be more committed to advocating for justice and in pushing the government of Indonesia—the most populous democracy in Southeast Asia—to comply with the human rights treaties signed. During the next four and a half years, the UPR process should focus on shifting the burden from the SuR to Indonesia, Australia, the USA and all the other countries which supported the catastrophic, bloody invasion. They are countries, who, still today, have neglected to seek, nor encourage, justice.

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CHAPTER 8

Freedom of Religion and Belief in Indonesia: Raising Awareness Through the Universal Periodic Review

Hesty Dewi Maria Siagian

Introduction

Over the past two decades, Indonesia has taken important steps domestically and at the international level to protect fundamental human rights. This chapter reviews the protection of religious beliefs in Indonesia as contained in the documents submitted to the two cycles of the Universal Periodic Review (UPR) of the United Nations Human Rights Council.

Indonesia is the world's fourth most populous country with over 252 million people living within its archipelago. The country is culturally diverse with 19 ethnic groups of one million or more, 700 regional languages and 5 main religions (Russell 2016). Indonesia has the largest Muslim population in the world with 87% of the population subscribing to the faith (see Table 8.1). The country's diversity is enshrined in the Constitution through non-sectarianism (Russell 2016).

Indonesia is a secular state that follows the Pancasila ideology introduced by Sukarno referring to 'belief in the One and Only God' as a core premise for statehood (Muktiono n.d.), effectively excluding non-monotheistic religions and atheists (Russell 2016). Nevertheless, freedom of worship and belief is guaranteed by Article 29 of the Constitution and secondary

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Table 8.1 Composition of Indonesia's six official religions

	Percentage share (of total population)	*Absolute numbers (in millions)*
Muslim	87.18	207.2
Protestant	6.96	16.5
Catholic	2.91	6.9
Hindu	1.69	4
Buddhist	0.72	1.7
Confucian	0.05	0.1

Source: Statistics Indonesia (Badan Pusat Statistik), Population Census 2010

legislation protects the official religions Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism (Ibid). Non-official religions are not explicitly forbidden but there are a number of obstacles facing practitioners of non-official faiths. For example, until 2006 it was necessary to indicate membership of one of the six faiths in order to obtain birth and marriage certificates, and employment within the civil service is also limited to practitioners of the official faiths (Ibid). This effectively creates a situation with anomalies at the constitutional level and even in the day-to-day administrative acts of the state which allow the violations of human rights of certain religious groups (Muktiono n.d.). The target of violations almost always tends to be minority groups such as the Christian, indigenous and Ahmadiyya faiths (Djamin 2014).

Since its first National Action Plan (NAP) on human rights adopted in 1998,[1] concrete measures have been undertaken by the government over a five-year period for the promotion and protection of human rights, in accordance with cultural, religious and traditional values, and without discrimination as to race, religion, ethnicity and faction. The pursuit of the protection of human rights appears to have taken root normatively and institutionally across the country.[2] This includes the protection of freedom of religion and beliefs, which is a right guaranteed by the Constitution and supported by Indonesia's adherence of key international human rights instruments. Indonesia reports to the Human Rights Council every four and a half years and has completed two cycles. Through the UPR process one can gain an appreciation of the state of the protection of religions and beliefs in Indonesia. Prior to reviewing this evidence, it is useful to examine the religious diversity of Indonesia.

Laws Guaranteeing Rights to Religious Freedom

The Constitution addresses the issue of freedom of religion in Article 28E, 28I and as previously mentioned in Article 29. The cumulative effect of these Articles is that the Indonesian state is established as one that believes in one God, while citizens' rights to freedom of belief and worship are also established.

Article 28E stipulates that:

1. Each person is free to worship and to practice the religion of his choice, to choose education and schooling, his occupation, his nationality, his residency in the territory of the country that he shall be able to leave and to which he shall have the right to return.
2. Each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience.
3. Each person has the right to freely associate, assemble, and express his opinions.

Article 28I, stipulates that:

1. The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.
2. Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminatory treatment.

Article 29

1. The state is based on the belief in the One and Only God.
2. The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.

Article 28J sets out the boundaries of freedom of religion including the obligation to 'respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state' and state that 'each person has the duty to accept the limitations determined by law'

so as to respect the rights of others. Djamin suggests that while the restrictions in Article 28J are at face value necessary to enjoy equal enjoyment of rights by all, the reality is that they are often applied to restrict free expression and the enjoyment of religious freedom (Djamin 2014). Furthermore Article 29 is often interpreted and applied by Islamic idealist groups to reflect Islamic monotheism, and thus not being inclusive of other religions or beliefs (Muktiono n.d.).

Indonesia is also bound by a number of international human rights instruments having ratified all the core human rights treaties. It also has national legislation that expounds on its human rights obligations, such as Human Rights Law no 39/1999. The impact of this legislation is that it strengthens the guarantees on freedom of religion and freedom of expression (Article 19 1996, Djamin 2014 and International Journal of Human Rights 2010). For example, Article 23 (3) relates to freedom of belief and speaks to individual's rights to 'hold, impart and widely disseminate' beliefs, taking into consideration factors such as 'religious values, morals, law and order, the public interest and national unity', while Article 25 provides for the right to freedom of expression. Djamin notes that this law is said to be widely disregarded with legislation in direct violation of religious freedoms being far more prevalent (Ibid).

NGOs have raised the inconsistencies between domestic law and international human rights obligations, for instance, through application for judicial review of Indonesia's defamation law which were said to be impinging on freedom of expression, freedom of thought and conscience, freedom of religion and the right to equality before law (Article 19 2010, Forum Asia 2010). Law Number 1/PNPS/1965 which prohibits 'interpretation and activities that are in deviation of the basic teachings of a religion adhered to in Indonesia'; which means it applies to some faiths but not to others was thus submitted to the Indonesian Constitutional Court for review in 2010 (Ibid). The submission recommended that the law be amended to bring it line with international standards.

The Universal Periodic Review and Freedom of Religion and Belief in Indonesia

The process leading to the UPR was well engaged by all sides concerned with the preparation of the UPR documents for Indonesia's review: a national report, a report that is compiled by the OHCHR, and the stakeholders' report that is compiled by the OHCHR based on national and international civil society submissions. As the UPR mechanism gives

important new opportunities for civil society involvement in the evaluation of states' human rights performance, this engagement aimed at both contributing to the follow-up on the UPR process in the context of Indonesia and assisting other states (as they prepare for their UPR participation). The engagements included conducting constructive consultations with civil society and identifying other lessons learned through the experience of the first states scheduled for a review.

Indonesia's First Cycle Review

The first review of Indonesia was held at the 4th meeting on 9 April 2008. The delegation of Indonesia was headed by H.E. Rezlan Ishar Jenie, Director General of Multilateral Affairs, Department of Foreign Affairs. At its 10th meeting held on 11 April 2008, the Working Group adopted the present report on Indonesia. On 28 February 2008, the Human Rights Council selected the following group of rapporteurs (troika) to facilitate the review of Indonesia: Jordan, Canada and Djibouti.

The national report for the first cycle noted Indonesia was in the process of harmonising its laws, practices and policies with its international obligations, including revising the Criminal Code Bill in accordance with obligations under the International Covenant on Civil and Political Rights (ICCPR) (UN Human Rights Council 2008a, d). It highlighted that crimes relating to religion were included in the new Criminal Code Bill (Ibid). The government noted that a number of measures were taken at the community level identify problems and dynamics associated with freedom of religion and pluralism in Indonesia, including convening inter-faith dialogues (Ibid).

In spite of the official Indonesian government position, there were issues related to freedom of religion raised in the Stakeholder summary and UN reports. Take the case of Ahmadiyya, officially the Ahmadiyya Muslim community, which is an Islamic religious movement that currently is estimated to number between 10 and 20 million worldwide. Mainstream Islam has long opposed certain Ahamediyah beliefs and has consequently resulted in the persecution of Ahmadis. The Asian Legal Resource Centre (ALRC) reported attacks against the Ahmadis continued to occur and noted that the law required that any religious community desiring to having a place of worship needed to have at least 60% approval from the people who are living in the local area in question (Asian Legal Resource Centre 2008). This, in reality, makes it impossible for small communities to have a place of worship as it is impossible for them to secure the required percentage from the members of other religions.

On the issue of the Ahmadiyya, Indonesia stated that it was continuing efforts at encouraging dialogue between groups in the interest of fostering better relations (Puja 2008; UN Human Rights Council 2008e, f). The Ahmadiyya issue was characterised as not being simply an issue of freedom of religion but one that is highly sensitive as the religious doctrine was deemed deviant by some (Puja 2008). The state went on to clarify that with regard to violence and intolerance against the Ahmadiyya community, acts of violence perpetrated against members of the Ahmadiyya movement were punishable by law and that measures taken by the state took into account the need for dialogue and social cohesion(UN Human Rights Council 2008e). In response to criticism on its handling of the Ahmadiyya, the state reiterated that it did not interfere in religious practices, the interpretation of doctrine or in limiting the freedom of religion in the country (Puja 2008; UN Human Rights Council 2008b, e). The state also pointed to a specific decree that has just been issued as policy measure to take into account the need for freedom of religion alongside respect laws and regulations. The decree did not outlaw belief but rather the proselytisation of faith, and it appealed to the Ahmadiyyas to return to mainstream Islam while appealing to others to refrain from acts of violence against the Ahmadiyyas. The state argued that this was not an interference in or limitation of religious doctrine or freedom but an effort at maintaining law and order (UN Human Rights Council 2008e)

The Asian Indigenous and Tribal People's Network (AITPN) stated that an underlying problem with freedom of religion in Indonesia was the preferential treatment given to the official religions resulting in other non-recognised or official religions facing discrimination (2007). AITPN also noted that rise in fundamentalism was another critical issue impacting freedom of religion (2007). The International NGO Forum on Indonesian Development (INGOFID) outlined that many of the regulations pertaining to freedom of religion and belief were contradictory (UN Human Rights Council 2008c). Specifically it pointed to the constitutional guarantee of freedom of religion in Articles 28 and 29, which was to be subverted by Presidential Regulation No. 1/PNPS/1965, which effectively determined which religions or beliefs were to be acknowledged (Ibid).

On the issue of the ability to enter into marriage, the national report noted the existence of Law No. 23/2006 that allowed practitioners of non-officially recognised religions to have their marriages registered by a Civil Registrar by leaving the column on religion blank (UN Human Rights Council 2008a). It noted that there were still cases of believers

outside of the official religions not being able to register their marriages but that the government was committed to ensuring this right (Ibid).

Indonesia's Second Cycle Review

During the interactive dialogue of second review, 74 delegations made statements and several CSOs highlighted the worsened condition of religious minorities. A joint submission from Indonesia's NGO Coalition For Women and Children Rights stated that Ahmadi women were often the target of threats of rape and sexual violence and consequently faced reproductive problems and depression (Koalisi Perempuan Indonesia Untuk Keadilan dan Demokrasi 2012). Human Rights Watch reported on the increasingly worsening plight of religious minorities, pointing to an increase in the number of attacks against religious minorities from 135 incidents in 2007 to 216 in 2010 and 184 by August of 2011 (2011).

Impunity for acts of religious violence was identified as catalyst for more attacks in particular by Islamist militants against the minority Christian and Ahmadiyya community (Ibid). A joint submission by a coalition of media and freedom of expression NGOs stated that inequality between religions was firmly established and institutionalised, leaving minority religions at the bottom rung (Article 19 et al. 2012). Equal Rights Trust (ERT) presented research indicative of a connection between laws restricting freedom of religion and the burgeoning influence of extremism, particularly with regard to encouraging discrimination and violence against minorities (UN Human Rights Council 2012c).

The state took the position that Law No. 1/PNPS/1965, which officially recognised some religions and not others, has passed judicial review in the Constitutional Court and thus was a permissible means of maintaining religious harmony (UN Human Rights Council 2012a). It reiterated that Indonesia did not interfere in an individual's freedom of religion and belief and argued that the laws in place regulating religion did not prohibit the Ahamidiyas from subscribing to their religion but rather it offered them protection to do so, as the laws only regulated proselytisation (Ibid).

During the interactive dialogue, the state made the point that the perception that Indonesia has officially recognised only six religions was in fact false and came from an incomplete reading of the Law No. 1 of 1965 (UN Human Rights Council 2012d). The state clarified that the law merely acknowledged the existence of those religions rather than conferring on them any special status; it also did not have the effect of forbidding

or outlawing other religions (Ibid). Indonesia recognised that there were incidents of violence that suggested a rise in religious intolerance; however, it maintained that this was not exceptional to Indonesia and that other democratic countries had also experienced the incursion by extremist who propagated intolerance (Ibid).

The state reiterated its commitment to ensuring all believers including the Ahmadis were able to practise their faith properly but noted there were particular challenges such as disputes on building places of worship (Ibid). The national report noted the efforts of civil society at promoting religious harmony and dialogue between groups, for example, through the establishment of the Religious Harmony Forum (Forum Kerukunan Umat Beragama/FKUB) (Ibid). The FKUB, which has a presence at the national and community level, aims to improve relations by raising awareness on the rules and regulations relating to religion, gathering feedback and recommendations from the community and serving as mediator in resolving disputes between religious communities (Ibid). The government stated it will continue to evaluate existing policies to better promote and protect human rights as well as maintain public order. One of the examples cited was the initiative to formulate a draft Law on Religious Harmony, on which public debate has begun.

A coalition of media and freedom of expression NGOs stated that the Religious Tolerance Bill, first proposed in 2003 by the Ministry for Religious Affairs, has also called for a ban on the Ahmadiyyas. Once it was presented to Parliament in 2011 and found to be incompatible with Article 18 of the ICCPR (Article 19 et al. 2012). According to Pax Christi International (PCI), religious leaders had also raised objections to the bill on the premise that it would entrench discrimination and encourage support for extremism (2011). In the UN report, it was noted that the Committee of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) recommended that Indonesia investigate, prosecute and appropriately punish violence against persons based on their ethnicity or religious affiliation (UN Human Rights Council 2012b). It also recommended that Indonesia condemn hate speech and violent acts of racial discrimination and work to eradicate incitement as well as any official involvement in such violence (Ibid). The national report acknowledged that the government was duty bound to ensure public order alongside people's ability to exercise their right to practise their religion. It stated the measures and mechanisms in place such as the Joint Ministerial Regulations (PBM)

No. 9 and 8 of 2006 on the Guidelines for Head of Provincial/Local Governments in maintaining religious harmony, in empowering Religious Harmony Forum and in building places of worship were sufficient (UN Human Rights Council 2012a).

From the second cycle of Indonesia UPR, issues relating to freedom of religion and belief were raised in about 17 submissions including by the Centre for Human Rights and Democracy (CHRD), European Centre for Law and Justice (ECLJ), ERT, Human Rights First (HRF), Jubilee Committee (JC), OpenDoors (OD) and also PCI. Komnas-Ham recommended the formulation of a new law that guarantees the protection of freedom of religion or belief and that there be a shift in managing religious plurality from repressive and discriminatory practices to fair treatment of all religions and beliefs. Besides, the outcome of this cycle mentioned that there were many initiatives that Indonesia has robustly promoted such as the Interfaith Dialogues, whether among nations or within the country. The national report pointed to efforts in the Asia Pacific regions and to bilateral efforts at fostering tolerance and harmony between religious groups through dialogues; it noted Indonesia was an active participant and contributor to the Alliance of Civilization initiative and that the government supported similar dialogues organised by civil society (UN Human Rights Council 2012a).

Since the 2014 election in Indonesia, many have highlighted the rise of President Joko Widodo, commonly known as Jokowi, who made tolerance one of his priorities, and since he took office in 2014 his government has made some encouraging gestures. In 2015 the Indonesian NGO, Setara Institute, recorded 197 cases of religious intolerance (the number of cases decreased enough compared to years ago) including 16 instances of discrimination, 22 instances of hate speech along with cases of violence, arson involving a place of worship and vandalism (Russell 2016). The Wahid Institute also reported similar figures, and while both note a significant increase in intolerance in 2015, it remains small relative to the population size (Ibid). Recent developments have raised concerns about inreasing intolerance towards minority religions.

Hendrianto recommends that long-term change can only come about through constitutional reform as Indonesia being neither theocratic nor secular does not seem to be effective (2015). Hendrianto also suggests that the general limitations clause in the bill of rights be evaluated alongside the access to the Constitutional Court and he expressed hope in the positive impacts on religious minorities that the Jokowi presidency could have (Ibid).

Conclusion

Indonesia's participation in the UPR reflects its strong desire to share its progress on human rights issues (UN Human Right Council 2012d). From about 193 recommendations that Indonesia has received, 21 recommendations related to freedom of religion and belief.

During its first UPR in April 2008, Indonesia claimed that many initiatives have been introduced at the community level. This claim was based on the work of a prominent think-tank which, in 2006–2007, conducted research into monitoring the situation of pluralist dynamics and freedom of religion in Indonesia. Concerning the criticism regarding the government's handling of the issue of Ahmadiyya, Indonesia reiterated that it has never interfered in interpreting religious doctrine or limiting religious freedom in the country.

The government must balance the need to promote religious harmony with the obligation to uphold the law and eradicate extremism (UN Human Rights Council 2012e). The government has stated its intent to continually review and improve its policies to bring them more in line with its human rights obligations as well as need to maintain public order (Ibid). An example of this renewal and review process was the judicial review of Law No. 1/PNPS/1965, to ensure it protected the Ahmadis. This law does not prohibit the Ahmadis from professing and practising their religion, instead it protects them when undertaking such activities.

After two cycles of review in the UPR, Indonesia is becoming increasingly aware of the right to freedom of religion or belief as a human right, and the associated obligations of the state to guarantee this right. The Indonesian government has not been able to satisfactorily address the challenges faced by non-recognised religions and threats they face from extremist and fundamentalist groups. Nevertheless, the Indonesian government has clarified the law related to some of the non-recognised religions, allowing them to practise their faith as long as they do not proselytise. Indonesia harnesses the law to promote religious tolerance and harmony, including through supporting moderates. Moreover, numerous dialogues, including one on building multicultural understanding and tolerance, have been conducted in many provinces in Indonesia.

However, the rise in the number of states and stakeholders from the first cycle to the second cycle highlighting the issue means there are still challenges on this front. Changes of the law in support of religious freedom have not been significant and non-recognised religions in Indonesia

continue to face discrimination and threat. The UPR process so far has been useful in raising awareness and getting the Indonesian government to engage with this issue. This should be a good start to track Indonesia's progress in the third cycle.

Notes

1. The Indonesian government adopted the first NAP on human rights for the period 1998–2003. Renewed every five years, the second NAP was from 2004 to 2009, the third NAP from 2011 to 2014, and thereafter there has been an announcement in 2016 by the National Commission on Human Rights (Komnas HAM) that it is ready to launch a National Action Plan on business and human rights.
2. Based on available data, in total there are 436 implementing committees at the provincial and regional/city levels located in all provinces in Indonesia. These implementing committees are mandated to provide input on the situation of the promotion and protection of human rights on the ground in their respective regions. The implementing committees have also been entrusted with the mandate of ensuring that the regional regulations of the local governments at the provincial and regency/city levels are in compliance with the human rights instruments that have been ratified by Indonesia. This principle is in line with Article 5 (2.b) of Presidential Decree No. 40/2004 on RAN-HAM for 2004–2009, and with Law No. 10 of 2004 on the Rules to Draft National Legislation which, inter alia, should be adjusted with higher legal products and should not contradict public interests. To this end, the Ministry of Law and Human Rights holds training programmes on a regular basis for regional parliaments on the formulation of human rights-oriented regional regulations.

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CHAPTER 9

Non-Confrontational Human Rights Advocacy: Experiences from the UPR Process in Myanmar

Francesca Paola Traglia

Introduction

Myanmar is in the middle of three interrelated processes of transitioning from over 50 years of military rule to democracy; emerging from over 60 years of on and off armed conflict towards peace; and after years of neglect towards ensuring the economic development of the country. Since 2003 there have been claims to a "new Myanmar" and the forms of development, progress and modernization, Myanmar was to undergo (*New Light of Myanmar* 2003). However, it is today that we see the complexities of Myanmar's internationally touted 'transition'—and the processes of modernization, development, peace and democratization and how both government and citizens, as well as donors, investors and civil society are struggling to grapple.

Currently there is a further push for democratization and transition in the country from authoritarian military rule to a more open and democratic society that respects human rights. Nonetheless, much is needed to be done, not least the reestablishment of a judiciary system and legal framework, in addition to a fundamental change of attitudes and behaviors.

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In the meantime, the Universal Periodic Review (UPR) Process of the United Nations (UN) Human Rights Council has been an instrument the government has been willing to engage with, and accept recommendations emanating from this process, even if implementation at times has been slow. Constructive engagement (Traglia 2016) from civil society with the government has been lacking, with many still being locked in the old adversarial mode of conducting advocacy. However, experience with the previous government has shown that engagement pays off if done with patience and expert knowledge. It is likely that under the new government, the same mode will pay off.

This chapter considers how and why the Lutheran World Federation in Myanmar (LWF Myanmar) has sought a constructive engagement with the government of Myanmar rather than adversary exchanges in our work for the advancement of human rights in the country.

Myanmar in Its Three Interrelated Processes of Transition

From UPR process facilitated by LWF Myanmar, the human rights situation in Myanmar is complex and multifaceted (Newall 2016). Major concerns relate to the fragmented legal and political framework; restrictive and discriminatory laws and practices; absence of clear and functioning mechanisms to protect rights and HR defenders; weak mechanisms to monitor, track and report on HR situation; weak rule of law; the absence of an independent judiciary; specific development-related issues and conflict-related concerns (A/HRC/31/71 2016). However, the general atmosphere is gradually changing as local and national level government and the Myanmar National Human Rights Commission has shown interest in actions that facilitate their ability to meet expectations to deliver services.

The Myanmar government has stated that the UPR process is the most dependable and uncontroversial monitoring mechanism to address and rectify human rights situations in all countries on an equal footing. It has noted that "Myanmar firmly believes that the Universal Periodic Review-UPR process is the most dependable and uncontroversial monitoring mechanisms to address and rectify human rights situations in all countries on an equal footing" (*Global New Light of Myanmar* 2015). For this reason, LWF Myanmar has focused its work on advancing human rights in Myanmar via the UPR mechanism, in order to reinforce the impact at local, national and global level (*LWF Myanmar Annual Report* 2015).

Since 2011, the government of Myanmar has taken significant strides to open up to the international community and to better provide for an enabling environment for advancement of and dialogue on human rights and democracy, while at the same time pursuing policies for economic development and peace.[1] Moreover, the country has seen so far a peaceful transition from the old government to the democratically elected new government led by the National League for Democracy (NLD). It remains to be seen whether the commitments made by the old government will be sustained by the new one.

The Lutheran World Federation in Myanmar

The Lutheran World Federation came to Myanmar in 2008 to respond to the devastation of Cyclone Nargis which prompted the country to grudgingly seek outside assistance as the military government was more focused on the constitutional referendum than the delivery of assistance to the Irrawaddy delta region (*Asia-Pacific Centre for the Responsibility to Protect* 2008). The disaster happened shortly before a constitutional referendum planned for 10 May and the regime decided to go ahead with that referendum despite the humanitarian crisis in the country's south.

In line with the rights-based empowerment process, which underpins one of two key strategic approaches that LWF Myanmar takes to its work, it is committed to the concept of strengthening the capacity of the primary duty bearer, the government, as well as other duty bearers and rights holders themselves. LWF Myanmar seeks to close the gap between rights holders and duty bearers, providing spaces for dialogue, negotiate and advocate for needed changes that would facilitate the realization of human rights in their communities.

LWF Myanmar collaborates with other partners to enable reinforcement of impact through complementary advocacy; for example, a key area of collaboration has been through established working groups in the country that work on specific topics, that is, the Land Core Group (LCG), The Food Security Working Group and The Gender Equality Network (GEN) as well as the National Child Rights Working Group.

Non-Confrontational Engagement

The non-confrontational engagement of LWF Myanmar in its human rights advocacy work is guided by the expectation that the empowerment process will generate more demand by communities for government services.

Accepting that the government line departments have limited capacity to provide those services, and that slow response from the government on specific issues, LWF Myanmar strives to collaborate with the line departments, similar to the approach historically used by the UN in providing technical assistance to developing countries, to assist in fulfilling these services, where possible. However, LWF simultaneously works to empower individuals and guides communities in advocacy campaigns and negotiations that are non-violent.

Consistent with this approach, currently LWF Myanmar has active humanitarian and development programs in Yangon and Ayeyarwady Delta Regions, Chin State, Rakhine State and Kayin State. With its present projects, LWF Myanmar coordinates with government line departments to strengthen service delivery. Resource sharing in the form of using the technical expertise of the government line departments is promoted. In the process, bonds of understanding and productive relationship are developed between rights holders and duty bearers when they work together on projects of mutual concern, by at joining hands with the communities to advocate with the line departments for their well-being. A non-exhaustive list of government departments LWF Myanmar works with includes The Relief and Resettlement Department (RRD) of Ministry of Social Welfare, Relief and Resettlement (MoSWRR), the Ministry of Progress of Border Areas and National Races and Development Affairs, the State Education Department, the Health Department, the General Administration Department and so on.[2]

This approach has been used in addressing the human rights challenges faced by Myanmar. The UPR requires all member states of the UN to report every four and a half years to the UN Human Rights Council on the situation in the country, where peers review each other. The mechanism itself is still new and has its critics; however, it is one that the majority now dominating the council are comfortable with and are willing to work with. Myanmar has gone through two rounds and the third round starts in 2017.

Solutions-Focused Engagement with the UPR

In Myanmar, engagement has to be constructive and targeted in order to make any impact. This requires a focus on priority themes which are consistently addressed. In the case of LWF Myanmar, the organization selected the following five issues, Right to Land, Right to Water, Right to Legal

Identity, Right to Nationality and Women's Rights. LWF Myanmar's engagement was targeted in order to make an impact through different mechanisms, rather than simply merely add to NGO "noise" or simply focusing on civil society capacity building and promoting only one UN human rights monitoring mechanism (i.e. The UPR mechanism).

Recommendations that come out of the LWF Myanmar UPR process [2015] were Specific, Measurable, Achievable, Results-focused and Time-bound (SMART). This required a focus on priority themes, as mentioned above, which are consistently addressed and correspond closely to the programmatic objectives LWF Myanmar or any organization is seeking to achieve through other project work. The alternative reporting process per se is an important tool in this, although its impact alone is limited.

In order to come up with a set of recommendations that are solution focused, there must be an in-depth understanding and analysis of the human rights issue in question. It is important to understand what the key barriers that are prohibiting access to the right(s) in question; what the solutions could be to overcome and address these barriers and who is responsible for implementing the solutions. Agreed solutions would naturally transform into recommendations to different stakeholders. Community members, local and central government officials and other key stakeholders must play a pivotal role in providing this information.

Furthermore, input may be captured from the community and other key stakeholders in a number of ways—a simple survey, a focus group discussion or a workshop. Input should be gathered from different groups of people—men, women, youth, persons with disabilities, older persons—to determine possible differing perspectives on the same issue.

Lastly, in the effort to design solution-focused recommendations LWF Myanmar strategically engaged government officials in the design of LWF Myanmar's UPR recommendations. The collection of recommendations formulated by community members and recommendations formulated by the government were then interpreted by LWF Myanmar and edited into recommendations with language that would produce an acceptance by the government of Myanmar during its review.

Evidence-Based Engagement with the UPR

Issues should be those that matter to the community, which are likely to have already been raised by them, but should be those that LWF Myanmar can and does work on. This will better ensure LWF Myanmar is enabled

to play their role in influencing and enacting positive change within their communities, and that desired change can be measured.

LWF Myanmar, between October 2014 and March 2015, captured the views of 303 people (134 male, 169 female) on five issues, relating to Right to Land, Right to Water, Right to a Legal Identity, Right to Nationality and Rights of Women. These consultations were made through a series of consultation workshops, focus group discussions and individual meetings in 7 villages in Ayeyarwaddy Delta, 4 villages in Kayin State, 12 villages in Chin State, Sittwe, Rakhine State and Yangon. Those consulted included women, men, youth groups and local government officials, LWF Myanmar staff, ACT Alliance partners and representatives from Gender Equality Network (GEN) and Land Core Group (LCG).

The primary data was analyzed and compiled into a set of barriers to the realization of the human right(s) at risk, solutions to overcoming these barriers and draft recommendations, further supported by an analysis of existing research and documentation on the context and the human rights situation in the country—such as reports from the Special Rapporteur. The five-page or ten-page alternative report would be the outcome of this analysis (Traglia 2015).

The key findings that emerged from the analysis of data describe that in Myanmar 70% of population live in rural areas and are engaged in agriculture-related activities. That in many areas of the country, rural livelihoods are under threat as smallholder farmers are being displaced from their land due to large-scale land confiscations. Finally, the rights of farmers such as those in Chin State, who practice shifting cultivation, are further compromised since the existing farmland law specifies that farmers have to continuously cultivate the land. Additionally, the lack of an efficient governmental mechanism to monitor and assess groundwater quality poses serious threats to the health of community members.

The field survey conducted shows that water quality is endangered by existing practices and violations, such as factories discharging waste into water sources such as rivers, which causes pollution and threatens the well-being of neighboring communities. In addition, Myanmar currently has no functioning system to process complaints about the discriminatory legal frameworks, policies and practices that actively prevent equal access to safe water.

Furthermore according to UNICEF, three out of ten children under 5 in Myanmar have no birth certificate. In Chin State, 76% of children do not possess a birth certificate and 35% of children affected by armed

conflict are unregistered. Among other things, this has major implication for obtaining a Citizen Scrutiny Card (CSC) which is the main document confirming the legal identity of an individual. A large number of Myanmar's population do not possess the CSC, which is the main document to confirm one's own legal identity and nationality in Myanmar (Myint and Traglia 2015).

Other findings show that in some cases ethnic and religious minorities are discriminated against in the issuance of the CSC. Although the Myanmar government published the "National Strategic Plan for the Advancement of Women (NSPAW), 2012–2022", in 2013, so far little progress has been made to implement this strategy and there is a lack of equal access to land, education, property, employment and decision-making bodies for women (e.g. women account for only 4.42% of the members of Myanmar's National Parliament).

Additionally, concerns have been raised that new bills on interfaith marriage, religious conversions, polygamy and population control will violate women's rights to choose their own marital partner, impinge on religious freedom and could lead to further violence against non-Buddhist minorities, especially women. Myanmar lacks legal instruments to prevent and address the issue of gender-based violence (GBV).

Tangible Achievements

Armed with its evidence-based analysis, LWF proceeded to engage with the UPR process during the second cycle of reporting from 2014 to 2017 (UN Human Rights Council 2015). LWF sought support for its main findings and urged member states to make recommendations on the same. The diplomatic missions that LWF Myanmar was able to lobby following the submission of its alternative UPR report were The Diplomatic Mission of Canada, the Diplomatic Mission of Namibia, the Diplomatic Mission of USA and the Diplomatic Mission of Australia. In addition, the team also traveled to Sweden and Germany to meet with the Ministry of Foreign Affairs of these two countries.

Recommendations which could be considered as results from LWF Myanmar advocacy and which were accepted recommendations by the government of Myanmar include:Sweden and Namibia made recommendations on violence against women

143.66. Enact and enforce legislation that guarantees comprehensive protection from all forms of violence against women, and that addresses impunity for all perpetrators (Sweden);

143.67. Take positive action to ensure protection of women against sexual violence and their access to legal mechanisms without discrimination (Namibia);

Germany made a recommendation on the land registration system

143.123. Ease tensions in rural areas by developing an effective land registration system with a clear complaints handling mechanism (Germany);

Canada and Namibia made recommendations on the effective registration of all children; Namibia's recommendation was formulated exactly as recommended by LWF Myanmar.

144.55. Develop a simplified, effective birth registration system through which all can access a birth certificate, including a complaints handling mechanism (Namibia);

Canada, Germany and Australia have made recommendations around the "laws on protection of race and religion", which were not accepted, yet the same recommendation from Japan was accepted.

Myanmar's UPR and the Follow-Up

The Myanmar government received a total of 281 recommendations from 93 member states. In November 2015, the Myanmar government accepted 124 recommendations; 88 were pending a decision by 17 March 2016 and 69 did not enjoy the support of the government. In March 2016, the government accepted a further 11 recommendations in full; 30 recommendations in principle and one recommendation in part, making a total of 166 recommendations accepted out of the 281 recommendations. A total of 115 did not enjoy the support of the government

The most important part in the UPR process is the follow-up. In the phase following the announcement of the 166 accepted recommendations of the Government of Myanmar, it is important to come together in country as members of civil society, academics and other stakeholders, such as lawyers, religious leaders as well as government departments in order to

Year	*Received*	*Accepted*	*Rejected*	*Noted*
27 Jan 2011	190	74	70	46
6 Nov 2015	281	166	115	N/A

Recommendations that enjoyed support of the government

- Ratification of outstanding core international treaties
- Strengthen cooperation with international human rights systems
- Continue in its path towards peace, democratic transition and sustainable development Strengthen the Rule of Law and the Judiciary
- Combat impunity
- Combat corruption
- Address restrictions on fundamental freedoms
- Release of political prisoners
- Improve access to health, education and other basic services for all
- Improve birth registration and citizenship verification
- Improve the land registration system
- Improve protection
- Enhance women's leadership and empowerment
- Combat marital rape, domestic violence and violence and discrimination against women and children
- Counter hate-speech and incitement to violence
- Combat discrimination and violence against ethnic, religious and other minorities
- Strengthen interethnic and interreligious understanding and harmony

Recommendations that did not enjoy the support of the government

- All that contain the words "indigenous" and/or "Rohingya"
- All that mention ratification of the Rome Statutes of the International Criminal Court (and agreement on privileges and immunities of the court)
- All that contain the term "internment camps"
- All that call the government to repeal any of the four "protection of race and religion" laws
- Those that call for the disclosure of the Commission of Inquiry established to investigate excessive use of force by the police

reshape advocacy plans reflecting the new position of the government in relations to the 166 government commitments.

The LWF in a strategic partnership with the Myanmar National Human Rights Commission has held a meeting at Parliament and Ministry level[3] in order to concretely discuss steps the government intended to take in order to start implementing the 166 accepted recommendations. The concrete commitment that was the main outcome of this meeting was a commitment of the government to set up an interministerial committee that would draw out an Action Plan for the implementation of the recommendations that we as civil society can take as the roadmap for holding the government accountable for the 166 accepted recommendations.

The question, however, remains how does one follow up to the 115 non-accepted recommendations using the non-confrontation process and strategies for the next round of UPR.

If we are to learn from the experience of LWF Myanmar, one should start from analyzing the 115 non-accepted recommendations. One needs to understand what made the government reject specific recommendations. Recommendations that did not enjoy the support of the government include all that contain the words "indigenous" and/or "Rohingya", all that mention ratification of the Rome Statutes of the International Criminal Court (and Agreement on Privileges and Immunities of the Court). All that contain the term "internment camps", all that call the government to repeal any of the four "Protection of Race and Religion" laws, those that call for the disclosure of the Commission of Inquiry established to investigate excessive use of force by the police and recommendations that refer to the Constitution, the 1982 Citizenship Law and Citizenship in general (Newall 2016). In the LWF Myanmar analysis of recommendations. one can see explained why language and formulation of recommendations have made it difficult for the government to accept certain recommendations even if the concept was not alien to the government.

It is crucial to really study and understand the political context of the country and to let that shape how recommendations are formulated in the future. The recommendations need to be based on evidence collected and on concrete recommendations formulated by government themselves on specific human rights issues identified across the country. If recommendations come from government officials, they are more specific and allow the government to understand where bureaucratic changes need to happen.

It is arguable that the non-confrontational, evidence-based, solution-focused approach can be the way forward in becoming more successful in addressing sensitive human rights issues in the UPR process.

Timeframe for Follow-up

It is important that there be clear strategies and plans for follow up at the national level by civil society and other stakeholders. The framework below was developed by LWF in order to precisely achieve this in the lead-up to Myanmar's next UPR processin 2020.

Follow-up		**National Consultation Stage**			**Advocacy and Lobbying**
			NGO Parallel Report Drafting		
Last UPR 06/11/2015	Mid-term reporting 11/2018	National Consultation 05/2019	Drafting period 01/2020	NGO submission 19/03/2020	Next UPR 11/2020

2017	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	**Follow-up** on implementation of accepted recommendations • **Last UPR 06/11/2015** • **Mid-term reporting 11/2018**
2018	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	**National Consultation Stage** Work on collecting evidence to support grounded recommendations
2019	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	
2020	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	**NGO Parallel Report** Drafting period 01/2020 to Submission deadline 19/03/2020 **Advocacy and Lobbying** until next UPR 11/2020

Conclusion

This chapter has shared the experience of the LWF Myanmar in engaging with a tough government to dialogue with on human rights. It has highlighted the success of constructive engagement with the government of Myanmar as opposed to adversarial approach for advancing human rights in the country.

LWF Myanmar continues to promote, through its networks, a Non-Confrontational, Solutions-Focused, Evidence-Based Engagement to all human rights advocacy which follows the do no harm principle allowing for increased numbers of rights holders and duty bearers to engage in dialogue to advance human rights in any country.

This approach has the potential to ensure commitment from government officials to follow up on the implementation of recommendations they themselves formulated. It has the potential to achieve real change for the communities recommending focused changes and lastly has the potential to support the development of civil society actors that value the importance of constructive, non-confrontational, solution-focused, evidence-based policy dialogue and human rights advocacy.

Notes

1. For example, Framework for Economic and Social Reform—Comprehensive National Development Plan. National Ceasefire Agreement, Joint Monitoring Committee, all systems put in place by the Myanmar Government.
2. *Other entities include 6. Myanmar Agriculture Services, 7. Livestock Breeding and Veterinary Department, 8. Myanmar Red Cross Society, 9. Myanmar Police Force, 10. Fire Services Department, 11. Department of Meteorology and Hydrology, 12. Myanmar Maternal and Child Welfare Association.*
3. National Level Workshop in Nay Pyi Taw 9-10 August 2016.

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PART IV

The UPR and Regional Mechanisms

CHAPTER 10

Can NHRIs Bridge the Implementation Gap? Assessing SUHAKAM's Effectiveness in Malaysia's Universal Periodic Review

Ying Hooi Khoo

Introduction

Progress in addressing human rights concerns in Malaysia is a product of decades of struggles by its citizens, individually and collectively. Despite the recognition of civil liberties in the Federal Constitution, generally in Malaysia, the distribution of civil, political and socio-economic rights remains restricted. Malaysia has engaged with the Universal Periodic Review (UPR) of the United Nations Human Rights Council (UNHRC) over two cycles. The Human Rights Commission of Malaysia (SUHAKAM) is a key stakeholder in the advancement of human rights in Malaysia and contributes to the UPR process in Geneva as well as by seeking to hold the government accountable to its commitments domestically. A review of the evidence suggests that while SUHAKAM is making good efforts to push the Malaysian government to follow-through on its commitments, its overall effectiveness is in doubt.

In the case of Malaysia, it underwent the first UPR in 2009 and the second one in 2013. The latter UPR drew much attention especially with the differing views of political and civil society groups. Ironically, the UPR

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is based on mandatory and voluntary approaches, but what's worth noting is; nothing beyond the performance of the review is mandatory. The UNHRC has no power to reject or to enforce any recommendations because the mechanism is not legally binding.

This chapter discusses the role of national human rights institutions (NHRIs) in the UPR and then reviews the evidence on SUHAKAM's ability to secure state compliance with UPR recommendations.

National Human Rights Institutions

The current departure point to discuss NHRIs in the context of the UPR is the Paris Principles. Paris Principles were devised in October 1991 adopted by the UNGA in December 1993. The Paris Principles agreement is recognized as an important document for all the NHRIs because it provides an international standard, however, debatable (Lindsnœs and Lindholt 1998; Burdekin and Naum 2007), for such institutions. NHRIs are statutory bodies and generally state-funded. These human rights institutions are set up either under an act of parliament, the constitution or by decree with specific powers and a mandate to promote and protect human rights. NHRIs vary significantly in their composition and structure. It can take many forms, such as Ombudsmen, Hybrid Human Rights Ombudsmen and Human Rights Commissions (Cardenas 2001; Burdekin and Naum 2007; Pegram 2010).

To enable them to hold the state and other bodies to account for human rights violations, it is therefore crucial for these NHRIs to possess autonomy from the state so that they are able to investigate the state and other actors committing human rights abuses. This, however, leads to two paradoxes. First, states are creating institutions that will or should act as a watchdog over them. This raises the question as to why governments would want to create these institutions in the first place. One proposition as offered by Cardenas (2001) is, NHRIs are "created largely to satisfy international audiences; they are the result of state adaptation". This meaning, some governments believe that by establishing these human rights institutions, it "will be a low-cost way of improving their international reputation" (International Council on Human Rights Policy 2000).

Most often characterized as a bridge between international norms and local implementation, NHRIs are in principle constructed to assure the state's compliance with its international legal obligations (Cardenas 2001).

In relation to the UPR process, NHRIs accredited with "A" status are allocated a dedicated section in the summary of other stakeholders' information and given the floor directly after the state under review (SuR) during the adoption at the HRC plenary session.

SUHAKAM was established in 1999 by an act of parliament entitled the Human Rights Commission of Malaysia Act 1999. SUHAKAM is a member of the Global Alliance of National Human Rights Institutions (GANHRI), formerly known as the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), and it is accredited "A" status under the GANHRI accreditation system. SUHAKAM is Paris Principles compliant, although it faced the prospect of being downgraded to a "B" status position in 2009 as the then ICC found the selection process of the SUHAKAM members to be not transparent and exclusively dominated by the government. In response to this threat, SUHAKAM managed to persuade the government to amend the SUHAKAM Act twice within two months in 2009 because the first set of amendments were not entirely satisfactory to the Accreditation Sub-Committee of the ICC. This shows the effectiveness of international pressure on a government that is concerned about its international image and reputation. As a NHRI, SUHAKAM plays an active role in Malaysia's UPR process ever since the first UPR cycle.

Malaysia's UPR

Malaysia underwent its first UPR in 2009. Its troika consisted of Egypt, Qatar and Nicaragua. At its first UPR, Malaysia received a total of 103 recommendations: 62 of the recommendations enjoyed the support of the Malaysian government, while 22 recommendations did not enjoy the support of the government. Nineteen recommendations were noted and responded by the government. The 62 recommendations are clustered into the following categories by SUHAKAM: accession to international treaties, review of laws and judicial system, marginalized groups, trafficking in persons, education, poverty eradication, healthcare and housing. Table 10.1 shows the breakdown of UPR recommendations on Malaysia:

Malaysia's second UPR took place on 24 October 2013. During the session, 104 UN member states made interventions. Malaysia received a total of 232 recommendations. At the 25th session of the UNHRC, the outcome report of Malaysia's 2nd UPR was adopted. Of these,

Table 10.1 Recommendations of the UPR to Malaysia

Year	*Received*	*Accepted*	*Rejected*	*Noted*
2009	103	62	22	19
2013	232	150[a]	82	N/A

Source: SUHAKAM website

[a]113 accepted in full, 22 accepted in principle and 15 accepted in part

150 recommendations enjoyed the support of the government while 82 did not. Of the 150 recommendations that enjoyed the support of the government, 113 were accepted in full, 22 were accepted in principle and 15 were accepted in part.

For recommendations accepted in full, it indicates Malaysia's support for the spirit and the principles underpinning those recommendations as well as its ability to implement them. As for the recommendations that accepted in principle, it indicates that Malaysia is taking steps towards achieving the objectives of the recommendations but disagrees with the specific actions proposed; or that certain recommendations have already been implemented or are in the process of being implemented; or that Malaysia is not in a position to implement at this juncture. There is no specific definition for those recommendations accepted in part. Government provided clarification vis-à-vis recommendations accepted in part.

For the purpose of classification, SUHAKAM has grouped them into several categories and subcategories: international obligations, civil and political rights, economic, social and cultural rights, vulnerable/ marginalized groups, national mechanisms on human rights, trafficking in persons, national unity and social cohesion, enforcement agencies, human rights education and training, corporal punishment, conflict between civil and Syariah courts, international cooperation and general recommendations on promoting and protecting human rights.

According to SUHAKAM's analysis, recommendations relating to economic, social and cultural rights enjoyed are one of the highest percentages of support by the government (95%), followed by recommendations on trafficking in persons (93%), and recommendations on national mechanisms on human rights (86%). The government accepted 65% of recommendations on vulnerable/marginalized groups, 40% of recommendations on civil and political rights and 37% of recommendations on international obligations.

Gaps Between Advocacy and Implementation of UPR Recommendations

The UPR assesses the extent to which states respect their human rights obligations in various areas: the UN Charter, the Universal Declaration of Human Rights (UDHR), human rights instruments to which the state is party (human rights treaties ratified by the state concerned), voluntary pledges and commitments made by the states such as national human rights policies and/or programmes implemented, and applicable international humanitarian law.

SUHAKAM as the NHRI has been actively involved at both the preparatory and review stages on Malaysia. It has undertaken steps to follow up and monitor the implementation of the UPR recommendations. They include, among others, establishing an internal UPR follow-up and Monitoring Committee comprising focal officers of various groups and divisions within the Commission itself; conducting awareness and training programmes on the importance of the UPR mechanism and Malaysia's obligations under the international human rights mechanism; engaging with government agencies and other relevant stakeholders through consultation and briefing sessions; sharing of best practices and contribution in UPR-related training materials and engaging with regional and international human rights bodies through information exchange and delivery of statements (New Straits Times, 12 November 2012).

During the first UPR on Malaysia, SUHAKAM took the initiative to publish an information booklet in both English and Bahasa Malaysia on the mechanism itself, which served as an awareness-raising tool regarding the UPR process (SUHAKAM 2011). The objective was to provide an explanation on the UPR and more importantly to highlight recommendations that were accepted by the Malaysian government. The information booklet is widely distributed to stakeholders, including government departments and civil society organizations (CSOs) for the purpose of informing stakeholders about the UPR recommendations that have been accepted by the government. What is interesting is that SUHAKAM has also recommended to the government to include the UPR recommendations as a point of reference in the development of Malaysia's National Human Rights Action Plan (NHRAP).

SUHAKAM has held several nationwide briefing sessions on Malaysia's 2nd UPR such as Kuala Lumpur, Kuching, Kota Kinabalu, Johor Bahru,

Pulau Pinang and Kuala Terengganu. The briefing sessions not only involved the government agencies at the federal and state levels but also civil society organizations (CSOs) and the media. The two key objectives of the briefing sessions were to create awareness about the UPR and the commitments made by Malaysia, also to encourage active participation of all stakeholders including the CSOs and the media in the UPR process. SUHAKAM has then subsequently made the following recommendations to the government deriving from the inputs that they have gathered during the briefing sessions:

1. Establishment of Task Force and development of UPR plan of action;
2. Broad and meaningful consultations with stakeholders on implementation;
3. Cluster-based discussions between relevant agencies and CSOs;
4. Submission of midterm report and incorporation of UPR recommendations in NHRAP;
5. Translation of UPR information into national language and dissemination to public;
6. Discussion of recommendations not accepted by the government.

Malaysia accepted in full all three recommendations relating to SUHAKAM in Malaysia's 2nd UPR specifically to increase cooperation with SUHAKAM as well as to strengthen it. In December 2013, SUHAKAM submitted a proposal to the government to amend its enabling law with a view to strengthen its mandates and powers. The proposed amendments are: further strengthen the selection process of the Commissioners, appoint full time and/ or part time Commissioners, increase the period of the Commissioner's terms, enable the Commission to conduct unannounced visits to places of detention, enable the Commission to undertake mediations, formalize a consultation process between the government and the Commission in the formulation or amendment of laws, ensure that adequate funds are allocated to the Commission annually via parliament, enable the Commission to have an amicus curiae role in selected court cases that involve alleged human rights violations, and ensure that the Commission's Annual Report is debated in parliament. Unfortunately, the proposed amendments were not found favourable by the government (SUHAKAM Annual Report 2014).

Minimal Engagement Between the Government of Malaysia and SUHAKAM

Aside from state submission of its UPR, SUHAKAM and other stakeholders may also submit separately their own reports for the UPR on Malaysia. That meaning, ideally, all stakeholders should play an active role in the UPR exercise especially in implementing the UPR recommendations. Stakeholders should consist of the government, the NHRI, CSOs, the media and the public. The government in this case should include the federal and state governments and local authorities as well as all three organs of government namely the executive, the legislature and the judiciary. Although the government is encouraged to consult regularly with the stakeholders, this is, however, not the case in Malaysia for reasons such as lack of resources and political will.

As reported by SUHAKAM in their mid-term report in April 2016, SUHAKAM had found especially from the two series of nationwide consultations it had organized in 2014 and 2016, that the involvement of state governments and local authorities in the UPR process has been minimal at most (UN Human Rights Council 2016). At the same time, CSOs operating at the state level in general have not been active in advocating for the implementation of the UPR recommendations.

There are misconceptions regarding the UPR and international agreements. Attacks by certain quarters against the Coalition of Malaysian NGOs in the UPR Process (COMANGO) who are exercising their constitutional rights and who are consistent with the UN guidelines are unacceptable and a violation of human rights. COMANGO's participation faced a severe backlash. Fundamentalist and ethno-nationalist groups, as well as state agencies, accused COMANGO of being anti-Islam and anti-Malay (Zurairi, 16 December 2013b). To some extent, these accusations had gained ground among the public, in particular Muslims. Such attacks reveal the ignorance about the UN system as well as the UPR process. Extremist Islamic NGOs such as the Coalition of Muslim NGOs in the UPR Process (MURPO) accused COMANGO of attacking the Malaysian government and baselessly branded them as traitors who incite violence (Zurairi, 24 October 2013a). The attacked focused on lesbian, gay, bisexual and transgender (LGBT) and freedom of religion, where were interpreted as "free sex" and apostasy. In 2013, there were 28 submissions for the UPR from various stakeholders reflecting strength of CSOs in Malaysia.

The claim that Malaysia consulted NGOs and civil society prior to making the acceptance decisions is unsubstantiated. This is especially so because the COMANGO was deemed illegal and all diplomatic doors were closed. The Home Ministry declared COMANGO illegal in 2014 on the basis that it is not registered under the Societies Act 1966 (The Star, 8 January 2014), but later on lifted the ban quietly. Yet, in its replies to the UPR review, it hypocritically stated that it had consulted and engaged with NGOs (UN Human Rights Council 2013a). SUHAKAM in a statement said that such act denied the CSOs' fundamental right to freedom of association and expression (The Star, 10 January 2014).

To date, the Malaysian government has yet to engage in formal consultations with SUHAKAM and CSOs since the adoption of Malaysia's 2nd UPR Outcome Report in Match 2014. Engagement with all parties' especially civil society is imperative. It was noted that this openness was lacking in the 2013 UPR process where engagement with civil society was selective. There is no open and transparent participatory approach like that instituted by the UN which has developed clear guidelines and accreditation process including making all documents public through their website.

Disconnection of Human Rights Obligations

Ideally, recommendations posed by UN member states and accepted by the SuR should be adequately substantial to effect meaningful improvements on the situation of human rights in the home country; however, it is a challenge in Malaysia. Thus far as observed by SUHAKAM, the majority of recommendations presented by UN member states to Malaysia are general and indefinite in nature. Moreover, recommendations, which are more specific and deliberate in character such as LGBT, are mostly not accepted by Malaysia. Such circumstances are likely to result in situation where the government may be able to fully implement the accepted recommendations without actually addressing the key concerns of the various human rights issues and without having much impact on the ground. In its reluctance to adopt the more substantive aspects of human rights obligations, it indirectly reveals the government's insincere and window-dressing commitment based on the benchmark of international human rights norms.

Through the analysis of the two UPR cycles, there is a similar trend that most of the recommendations to Malaysia pertained to accession to treaties and UN mechanisms. Ratification of core human rights conventions is another major area of concern. Malaysia is far behind in terms of its

ratification track record. So far, Malaysia has ratified only three of the nine core human rights conventions. They are Convention to Eliminate All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and the latest being the Convention on the Rights of Persons with Disabilities (CRPD). Malaysia has made reservations in these three conventions that it has ratified. Malaysia's unwillingness to ratify major human rights conventions such as Convention on the Elimination of Racial Discrimination (ICERD), International Convention against Torture (CAT), International Convention of Civil and Political Rights (ICCPR) and the International Convention of Economic, Social and Cultural Rights (ICESCR) is another indication of its disconnection with its human rights commitment in the UPR. At the Association of Southeast Asian Nations (ASEAN) level, Malaysia is among the last few comparing to its neighbour countries. The frequent excuses offered by the government are "we are not ready". The government has often argued that unless Malaysia has domestic legislation in place, it will not sign treaties.

With the involvement of human rights priorities and issues, the business community is another significant partner that, according to SUHAKAM, needs to be engaged to uphold human rights, with particular regard to workers' rights. Continuous engagement among the key stakeholders from diplomats, government and business to civil society and the media is needed. During the interactive dialogue in Geneva for the 2nd UPR, SUHAKAM noticed that none of the recommendations address the issue of business and human rights. There was only one recommendation made by Sierra Leone on the possible impact of the Trans-Pacific Partnership Agreement (TPPA) and how it affects access to healthcare (UN Human Rights Council 2013b). This shows the lack of recognition by states on the role of business entities in promoting human rights.

Human Rights Public Policy

One important advocacy by SUHAKAM in UPR implementation is the NHRAP. Malaysia accepted in full the recommendation to continue efforts to develop Malaysia's NHRAP. As early as in 2001, SUHAKAM has made recommendation to the government to formulate a NHRAP. An NHRAP is important for the country because such a plan could help strengthen the promotion and protection of human rights by placing the human rights discourse in the proper context of public policy. In 2012, the Cabinet announced the decision to develop Malaysia's first ever

NHRAP. The NHRAP is a direct impact from the UPR exercise. The progress in developing the five-year NHRAP has been rather slow, despite SUHAKAM's repeated calls for the process to be expedited.

Following the conclusion of the UPR in 2013, the government of Malaysia continues its effort in preparing the NHRAP by appointing the Legal Affairs Division (BHEUU) of the Prime Minister's Department as the focal agency. The proposed NHRAP contains five core features which are civil and political rights; economic, social, religious and cultural rights; rights of vulnerable groups, rights of the indigenous people and international obligations (BHEUU official portal 2012). In this regard, SUHAKAM is working closely with the government to ensure that the UPR recommendations will be taken into consideration in the preparation of the NHRAP so that it will be a more comprehensive and effective national plan. It was originally expected to be finalized in 2016; however, an external consultant had been commissioned by the government to develop the NHRAP in November 2015 and that the complete draft would be presented by external consultant to the government in April 2017 (SUHAKAM Annual Report 2015).

The Ministry of Foreign Affairs is the key focal point for the UPR recommendations, but a serious challenge is the coordination (or lack thereof) among the government agencies at the federal and state levels, for example, delay in responding or lacking the will to make strong commitments. The ministry also does not have the mandate to ensure that the commitments are followed through. Moreover, government agencies for the most part are not too familiar with the UPR recommendations and were slow and unenthusiastic in their implementation of these recommendations. Within the government machinery, the nature of UPR process remains a bureaucratic process and that leaves little role for member of parliament and politicians. SUHAKAM also submitted mid-term progress reports for the first and second UPR cycles. However, the Malaysian government itself had not provided such a report, although they could easily do so.

Conclusion

The position of SUHAKAM is a peculiar one. Although it is established by the government, but at the same time, SUHAKAM acts as the "watchdog" over the government's UPR implementation and follow-up. At the same time, SUHAKAM also serves as the bridge between the CSOs and the state. The key challenge for SUHAKAM is how to maintain its role by securing its independence and at the same time utilize its "advantages" in

pressuring the government to enhance the human rights promotion and protection back home. Currently, SUHAKAM is considered as an advisory body and therefore the government agencies and those in the public office do not take majority of its recommendations seriously. However, its role is crucial because they can have a powerful impact on the human rights performance in the country. Moreover, SUHAKAM in the context of Malaysia has more weight at the national and international levels than the CSOs in its capacity as neutral stakeholder.

It is also worth noting that SUHAKAM does not share the government's assessment of the police and the indigenous people. As noted by SUHAKAM in its mid-term report, various programmes and initiatives carried out by the government in promoting economic, social and cultural rights are mostly devoted to Malaysian citizens. As a result, vulnerable groups who are not Malaysian nationals such as migrant workers, refugees, asylum seekers and stateless persons continue to fall through the cracks and remain the most vulnerable to human rights abuses.

By and large, the government has made greater strides in fulfilling recommendations relating to economic, social and cultural rights in comparison to those pertaining to civil and political rights. Unfortunately, the government continues to consider SUHAKAM a cosmetic rather than an independent organization, as can be seen by appeals to SUHAKAM. It is only when national, regional and international pressures increase that in some events the government decides to act on SUHAKAM's recommendations.

Although Malaysia has gone through two cycles of UPR, SUHAKAM continues to face similar issues as in the lack of consultation provided by the government and also the follow-up implementation of what the government has agreed to during the sessions at the UNHRC. In preparation for the upcoming third cycle of Malaysia's UPR scheduled in 2018, SUHAKAM in various occasions has reiterated that there is a need to increase awareness about the UPR particularly among the general public (The Borneo Post, 8 January 2016).

The UPR demands a level of accountability, which explains the resistance of the Malaysian government in its consideration in accepting recommendations because it does not want to be blamed for not doing what it agreed to do. While acknowledging that the government has the primary responsibility to implement the UPR recommendations, there is a need for the government to engage with stakeholders in implementation process. The government in fulfilling its UPR commitments should ideally work together and in consultation with stakeholders including the NHRI

and CSOs. The NHRI and CSOs are well positioned to offer their respective expertise and input, which would complement the efforts of the government towards achieving the country's UPR goals.

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CHAPTER 11

The UPR and Its Impact on the Protection Role of AICHR in Southeast Asia

Celine Martin

Introduction

Established only three years apart, the Universal Periodic Review (UPR) and the ASEAN Intergovernmental Commission on Human Rights (AICHR) are two key components of the protection mechanisms of human rights in Southeast Asia. As of November 2016, all ASEAN states have completed their second cycle of review allowing an assessment of their willingness to protect human rights at the national level and evaluate their implications for the regional level. This chapter reviews the role played by the UPR in developing AICHR's protection capacity.

The diversity of political regimes in the region has made it difficult to establish a regional human rights mechanism, but other regional mechanisms elsewhere have needed time and they continue to improve steadily. It is reasonable to expect, therefore, that adherence to the UPR recommendations by the Southeast Asian states, even as modest as they may be, is a positive sign that needs to be highlighted.

The UPR provides an opportunity for the AICHR to receive recommendations from other states which have been enjoying a regional human rights mechanism for decades in Europe, Latin America or Africa.

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However, many of the recommendations calling for a better adherence to the AICHR are actually being made by fellow Southeast Asian states.

It must be borne in mind that the principal forum to address the protection role of the AICHR is the Commission itself while in practice ASEAN keeps an important role in guiding the role of the Commission. Nevertheless, UPR recommendations made to or about the AICHR should still be considered. UPR recommendations fostering the protection role of the AICHR are still rare but their number and pertinence have grown from the first to the second cycle.

Beyond the level of adherence of the states to the UPR recommendations, the question of its level of implementation also has a role to play. This chapter examines the follow-up reports and the civil society recommendations pertaining to the AICHR. It discusses how the UPR can serve as a platform to strengthen the functioning of AICHR thereby enhancing human rights protection in Southeast Asia.

UPR: A Forum for Improving the Protection Function of AICHR

The primary objective of the UPR is to improve the human rights situation in every country, but by stepping up the level of human rights implementation in each of every one country of a region, it can impact its regional mechanism. As such, if every one of the ten (soon-to-be eleven) ASEAN countries improves its relation with the AICHR and participate into its implementation, the mechanism has a better chance to grow into a binding mechanism.

Table 11.1 shows the list of recommendations for the improvement of the AICHR made during the UPR cycles one and two.

Given the peculiarity of the Universal Periodic Review process, recommendations cannot be addressed to organizations as such, and neither be received by organizations (UPR Info 2014). UPR recommendations are being made directly to the states. In the case of the ASEAN member states, the recommendations made during the first cycle were focusing on the improvement in AICHR. At the time of the first review (between 2008 and 2012), AICHR was in the process of coordinating the drafting of the ASEAN Human Rights Declaration, adopted on 18 November 2012 in Phnom Penh (AICHR 2012).

During the first review, Indonesia in its role as the major ASEAN country recommended to Laos and Myanmar to enhance their work with the

Table 11.1 List of all recommendations received by Southeast Asian states calling for a better regional mechanism

State reviewed	*Recommendation*	*State recommending*	*CY*	*CA*
Laos	Further enhance and strengthen the work of the ASEAN Intergovernmental Human Rights Commission to effectively promote and protect the human rights and fundamental freedoms of the peoples of ASEAN	Indonesia	1	4
Myanmar	Enhance its engagement with the ASEAN Intergovernmental Commission on Human Rights	Indonesia	1	4
Myanmar	Accede to the remaining core human rights treaties and core labour standards it has yet to become a party to, and continue to cooperate with international and regional human rights mechanisms in implementing its obligations	Thailand	1	5
Thailand	Continue to work closely with ASEAN to build on the mechanisms of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) to promote and protect the rights of the peoples of ASEAN	Singapore	1	2
Brunei	Take more concrete measures with a view to fostering a genuine human rights culture with due regard to national and regional particularities as well as historical, cultural and religious backgrounds	Iran	1	5
Timor-Leste	Continue to build partnerships with friendly countries and organizations, and explore all possible avenues of cooperation, either at bilateral, regional or international levels, to improve the country's capacity and to enhance its manpower in order to allow the people of Timor-Leste full enjoyment of their rights	Philippines	1	2
Timor-Leste	Further increase regional and international cooperation on human rights, particularly with the ASEAN nations and with the Human Rights Council	Vietnam	1	4
Brunei	Continue its engagement with various institutions to promote and protect human rights in the regional and international fora	Kuwait	2	2
Brunei	Continue and strengthen the active interaction with regional and international organizations of human rights	Morocco	2	4

(*continued*)

Table 11.1 (continued)

State reviewed	*Recommendation*	*State recommending*	*CY*	*CA*
Brunei	Continue its constructive role and contribution in the promotion and protection of human rights in the region, particularly through established regional frameworks in ASEAN, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)	Myanmar	2	2
Cambodia	Strengthen human rights cooperation and constructive dialogue, including those through the ASEAN Human Rights Commission and with the relevant United Nations human rights bodies and mechanisms	Vietnam	2	4
Indonesia	Ratify the Rome Statute of the ICC to be a front runner again within ASEAN	Germany	2	5
Laos	Enhance the implementation of the international human rights treaties, to which the Lao People's Democratic Republic is a party and the ASEAN Human Rights Declaration to benefit the entire Lao population	Cambodia	2	4
Laos	Strengthen international and regional cooperation in the protection and promotion of human rights	Vietnam	2	4
Vietnam	Continue to be actively engaged in regional human rights bodies, particularly those concerning the promotion and protection of the rights of women and combating trafficking in persons	Philippines	2	2

Source: http://www.upr-info.org/database/

CY cycle, *CA* category of recommendation

AICHR in a bid to "promote and protect the human rights and fundamental freedom of the people of the ASEAN." Indonesia still maintained its commitment to the AICHR with a similar statement made during the last ASEAN Summit in September 2016. "Indonesia has called for Southeast Asian leaders to strengthen their roles in the ASEAN Intergovernmental Commission for Human Rights (AICHR) to improve the protection of human rights for people living in the region" (The Jakarta Post 2016). This statement is surprising from a state that is currently under international pressure for its own backlash on human rights (Human Rights Watch 2016), but it is still encouraging even if the question of which type of human rights is being built needs to be asked.

In the first review, other ASEAN countries such as Singapore encouraged Thailand to further enhance the Commission, while Thailand was giving the same recommendation to Myanmar. One can observe a kind of hierarchy respected among the ASEAN countries. At first, there are few recommendations which can be seen as a translation of respect for the principle of sovereignty, one of ASEAN's foundations. Second, there are no recommendations from smaller states such as Cambodia, Laos or Myanmar to stronger states such as Indonesia, Thailand or Singapore, even if in theory, each ASEAN states' voice has the same weight.

In the first review, the Philippines and Vietnam—as well as Iran—made recommendations to Timor-Leste to increase its involvement with the ASEAN human rights mechanism in view of its future membership to the regional organization. Timor-Leste which separated violently from Indonesia in 2002 had difficulties in gathering unanimous support from the other ASEAN states members. Having signed and ratified the highest number of human rights treaties among the ASEAN states, it is without a doubt that Timor-Leste's full accession to membership which should be completed in 2017 (Hunt 2016) will be a valuable advocate of the AICHR for the achievement of a binding mechanism.

The second UPR cycle also received nearly the same amount of UPR recommendations as the first one (7 for the 1st one and 8 for the 2nd one), but with more and different countries receiving them. Except for Laos, countries which received recommendations during the second cycle were different from the first one. During the second cycle, more attention was focused on Brunei, Cambodia, Indonesia, Laos and Vietnam.

The most interesting recommendation of the second cycle is from Cambodia which highlighted the importance for Laos to "Enhance the implementation of the international human rights treaties, to which the

Lao People's Democratic Republic is a party and the ASEAN Human Rights Declaration to benefit the entire Lao population" (UPR Info 2016). In its recommendation, Cambodia is reminding Laos its obligations towards the AHRD even if the document is non-binding.

The distinction of the recommendations received between the two cycles leads to three questions: (1) Were the recommendations made during the first cycle implemented well enough not to be reiterated in the second cycle? (2) Did the countries that received recommendations in the second cycle experience a backlash on their human rights situation since the first UPR and necessitated a reminder of their regional engagement? (3) Did AICHR become more popular?

Limited Interest for AICHR

With a total of 20,452 recommendations (UPR Info 2016) given over the past eight years worldwide, only 14 of them address AICHR, which is almost a negligible number. The most surprising element in the collection of the UPR recommendations is that 85% were by Southeast Asian states to their peers. Only Iran and Germany showed an interest in delivering recommendations on this topic. This singularity shows the lack of interest from the international community for AICHR or at least little interest compared to other issues such as women and children rights, migrant workers or trafficking issues, for instance.

In a 2014 gathering of ASEAN states members and AICHR in Bangkok, it was highlighted that AICHR could enhance its role in the UPR process (AICHR 2014). Ideas thrown up went from encouraging the ASEAN states in sharing their experiences and learnt lessons with the others—following the Thai initiative of this 2014 workshop—to monitoring the implementation received by the ASEAN states.

In closing this 2014 workshop, the Representative of Thailand to the AICHR concluded that the current terms of reference (TOR) of the AICHR may not allow for the AICHR to take up all the recommendations of the workshop. This said, it may be open to creative interpretation in order to develop a regional plan of action and/or organize possible activities that can be used to support the ASEAN member states UPR processes (AICHR 2014). This new role could be a good opportunity for the Commission to empower itself and to gain experience and acknowledgment from the ASEAN states and from the international community.

However, a closer look must be taken at the interactive dialogue where recommendations and discussions were held on the AICHR that did not

make it to the final report. Those discussions have their importance as they are testimonies of a stronger interest in AICHR than the final recommendations suggest. The interactive dialogue can sometimes be the witness of unsuspected cooperation between states.

For instance, during Cambodia's first review,

> Brunei Darussalam was encouraged by Cambodia's efforts to develop institutional frameworks for human rights, poverty reduction and legal and judicial reforms. Brunei expressed appreciation for Cambodia's cooperative approach in building a strong commission on human rights within ASEAN. It made a recommendation to Cambodia. (UN Human Rights Council 2010)

The recommendation made by Brunei did not make it to the Working Group outcome report, while AICHR was not even mentioned in the stakeholder report. The same remark occurs for Indonesia which is receiving acknowledgement of its involvement in putting together a human rights mechanism by other UN member states (Philippines, Malaysia, Turkey) while the name of the AICHR does not appear in the stakeholders' report. It appears that no stakeholder, at least in the compilation made, did mention or recommend to the Southeast Asian states about AICHR. The critiques of AICHR by civil society are well known (see the criticism received for the AHRD) since they are largely ignored by AICHR; however, this analysis shows that despite this, the states are still committed in working towards the establishment and improvement of a proper ASEAN human rights mechanisms. The only question that remains is the implementation of those recommendations and the value of the interactive dialogue.

The Question of the Effectiveness of the UPR Recommendations

As mentioned above, the question of the implementation and the effectiveness of the UPR recommendations are not yet resolved. We will look at the following: (1) measuring the effectiveness of the recommendations; (2) and the role AICHR could play in assisting the states improve their human rights situation.

Measuring the Effectiveness of the Recommendations

UPR Info conducted a study in 2014 at the mid-term review which concluded that "Of the 11,527 commented recommendations, 2,068 (18 percent)

recommendations were fully implemented at mid-term, 3,428 (30 percent) were partially implemented and 5,602 (48 percent) were not implemented at mid-term. For 429 (4 percent) of the recommendations commented, the information provided by the stakeholders was not sufficient for determining the Implementation of the Recommendation Index (IRI)" (UPR Info 2014).

Further in its report, UPR Info provides the statistics on the participation of the regions to the commentary of the recommendations. Along with the African region, Asia is the most participatory region with 27%. This high percentage can be explained by the engagement of the states' or civil society with the UPR at mid-term, which is a positive note to take into account even if Southeast Asia's participation is only a small part of the Asian region (around 25%). However, this statistic is nuanced by the large number of states in the Asian region compared to other regions such as Latin America, for instance. Within each regional group, the percentages of recommendations that triggered action at mid-term are promising even if Asia with its 33% has the lowest rate (UPR Info 2014).

Other statistics, which are not flattering this time, show that over all the recommendations that are supposed to trigger action, 63% are not implemented in Asia, 22% are partially implemented and only 11% are fully implemented. The remaining 4% were not assessed. From those statistics, UPR Info concluded that

> Although the rates of implementation in Asia are discouraging, one should also bear in mind that Asia, as a region, covers countries that are very different in their nature, from Saudi Arabia to South Korea. If we examine the region in greater detail, we find substantial differences. In Mongolia, for example, 55 percent of the recommendations triggered action by midterm. In Saudi Arabia, on the other hand, an assessment was impossible because none of the stakeholders took part in the Follow-up programme. Therefore, a broad explanation for why the UPR is less successful in Asia compared to other regions is not possible and further studies should be carried out by sub-region. (UPR Info 2014)

Implementation of the recommendations depends also on their categories. Indeed, UPR recommendations are classified from category 1 (minimal action) to category 5 (specific action). UPR recommendations made under a category 4 or 5 can be costlier for the states but more efficient to improve the rights situation, while recommendations made under categories 1–3 are more general and will concern ratifications of legal instruments.

Of the 11,527 recommendations that were commented in the follow-up programme by the UPR Info team, the most common categories were 2 (14%), 4 (43%) and 5 (34%). These are the three categories that have been used by the states recommending on AICHR. Indeed, if we look back at our Table 11.1, 28% are recommendations from category 2, 57% are recommendations from category 4 and the remaining 15% are recommendations from category 5. Those statistics especially the high rate of general recommendations can be explained as "by the fact that states do face diplomatic or other constraints for making precise recommendations. At the same time, the rate of category 5 recommendations is encouraging because these recommendations are easy to assess and can help to identify the concrete actions taken to improve human rights" (UPR Info 2014).

However, even if recommendations from category 5 are more specific and easier to monitor the implementation, statistics show that "within category 5 recommendations, only 35 percent triggered action and 62 percent were not implemented at mid-term. Category 5 recommendations have the lowest rate of fully implemented recommendations at mid-term and the highest percentage of recommendations that are not implemented at mid-term" (UPR Info 2014).

For instance, if we take the ones made for AICHR:

- Recommendation to Myanmar by Thailand (first cycle) to focus on acceding to the remaining international and regional human rights instruments. Since this recommendation was made in 2011, Myanmar has indeed signed three more international HR treaties: The International Covenant on Economic, Social and Cultural Rights (ICESC) in 2015, The first optional protocol to the convention on the rights of children about the involvement of children in armed conflict in 2015, and the second first optional protocol to the convention on the rights of children against child prostitution in 2012.
- Recommendation to Brunei by Iran (first cycle) to "take more concrete measures with a view to fostering a genuine human rights culture with due regard to national and regional particularities as well as historical, cultural and religious backgrounds." Since then, Brunei has adopted the Sharia Law in 2014 (Ozanick 2015). It is not clear if it was what Iran had in mind when they mentioned the "genuine human rights culture" ….

- Recommendation to Indonesia from Germany (second cycle) to "*ratify the Rome Statute of the ICC to be a front runner again within ASEAN*." Indonesia first pledged to ratify the Rome Statute in 2008, but finally recognized in 2013 that the country will not ratify the treaty in a near future (The Jakarta Post 2013). So far, only two countries have ratified the Rome Statute in ASEAN: Cambodia in 2002 and the Philippines in 2011.

The implementation of the recommendations therefore needs a closer follow-up, not only by the Human Rights Council but also by the states issuing the recommendations and the regional mechanisms.

The Role AICHR Could Play in Assisting the States Improve Their Human Rights Situation

The UPR mechanism, after two cycles, has shown its strengths and weaknesses. As its name suggests, this universal mechanism has obliged even the most successful dictatorships to defend their human rights legislation and situation. No other United Nations (UN) mechanism has had achieved this before, nonetheless with a state-driven mechanism. The UPR is the only tool that allows the world to see the state of the human rights legislation, its implementation and the states' main focus.

As such, the Southeast Asian countries have shown a priority for rights related to women, children, education, work and health, leaving aside the civil and political rights, as well as their regional mechanism. To justify this choice of prioritizing rights of the second generation, most of the Southeast Asian countries argue that principles of non-discriminations, equality, rule of law and the most common fundamental freedoms are included in their Constitution and therefore already guaranteed and protected, except due to restrictions to protect the national security. Therefore, enforcing UPR recommendations made on those last issues can be challenging.

As said above, the UPR is a state-driven mechanism which has not been conceived to review the work of international, regional or even local human rights organizations. However, the UPR "outlines four avenues for stakeholders, including the Asean Intergovernmental Commission on Human Rights (AICHR) to participate in the process. This includes the preparation of the document, which will serve as the basis for the review, the review by the UPR Working group, the adoption of the recommendations and the follow-up to the review" (News Desk 2013).

Building on the workshop organized in 2014 (AICHR 2014), AICHR could organize more of those to increase collaboration and lessons-learned between the states but also the civil society. By increasing the capacity building of every one of the stakeholders, the quality of the review of the recommendations will help in improving the situation on the ground. AICHR could also assist the states parties during the drafting of their national report at first, and then it could keep them accountable of the recommendations they accepted, and/or offer assistance. AICHR has to go beyond its current term of references if it wants to achieve its mission of promoting and protecting the rights of the people in ASEAN.

Conclusion

The UPR is an opportunity for AICHR to step in and to position itself as a key partner of the United Nations in the region, the states and the civil society. Indeed, "*the UPR is a great tool for advancing human rights but it is not a panacea*" (UPR Info 2014). It needs the support and cooperation of all stakeholders possible.

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CHAPTER 12

Conclusion—The UPR and Human Rights in Southeast Asia: The Critical Role of Civil Society

James Gomez and Robin Ramcharan

When the United Nations resolved to replace the Human Right's Commission with the Human Rights Council in 2006, the aim was to move away from politicising human rights to focusing on human rights promotion and protection. The UPR is a new and ambitious process that seeks to advance the protection of human rights globally. After more than eight years and two cycles of review, has the UPR made a difference on the ground, notably in Southeast Asia? This concluding chapter recalls the key findings, highlights key issues for CSO engagement in view of the third UPR cycle and points to the need for continued evidence-based research on the UPR, and integrate CSO engagement across international, regional and national platforms, especially in light of the transition to a multipolar world order centred on the Asia-Pacific.

From the preceding chapters, it will be evident that the mapping performed by Asia Centre and reported in the introduction to the book broadly correlates with the evidence in the analyses of ground realities assembled in the chapters, namely, that the UPR is a useful process. The UPR is popular among CSOs in that it allows for CSO advocacy.

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CSOs have clearly seized the opportunity by making submissions through the UPR process. The evidence from Asia Centre's analysis and confirmed by the practitioner-authors in this book is that CSOs have increased their participation overall across the two cycles of the UPR. CSOs are not only increasing their participation but they are also making submissions to the process in concert with each other on issues. CSOs see the UPR as central but complemented by all the other human rights process and mechanisms afforded to them within the UN ecosystem, which include the UN Charter-based mechanisms, treaty bodies and Special Procedures.[1] To this end, the UPR has become an important component of the human rights regime but so has civil society.

In this regard, it is useful to note the potential contribution of CSOs in regional mechanisms and national human rights and institutions. Presently, CSOs may seek consultative AICHR status as per guidelines adopted by the latter in February 2015 (AICHR 2015). As part of the screening process to determine eligibility, ASEAN sectoral bodies and government representatives to ASEAN are consulted. CSOs with consultative status to AICHR must, inter alia, "support the work of the AICHR." Can they be fully effective given the obligation to "Respect and comply with the national laws and regulations of the concerned ASEAN Member State where their activities/programmes take place"? Most problematic is the fact that CSOs do not have a formal, institutionalised role in the peer-review process. The capacity for CSOs to advance the protective capacity of AICHR is constrained by their modes of engagement with AICHR under Article 18 of the guidelines, which include consultations, seminars, workshops, reporting/briefing, implementation of specific AICHR studies and project implementer of AICHR work plans.

However, at the national level, CSOs are facing a shrinking space. The challenges confronting civil society stem from pressures imposed by the state in the form of legislation and reporting measures to monitor and control civil society activities and funding sources prompting the ASEAN Parliamentarians for Human Rights to raise concerns over the plight of human rights defenders (APHR 2017). There are also problems within civil society's rank and file such as organisational structures, internal political divisions within organisations and cross organisational competition for limited grant resources which affect their effectiveness as advocacy organisations. CSOs also have to contend with an emerging trend in donor and grant funding who are adjusting their priorities to more politically conservative environments, both back home and in target countries in the region

thereby cutting resources off to activities related to civil and political rights. Finally the impact of China on national governments in Southeast on human rights issues connected to Chinese engagement in the region also needs to be taken into account.

Notwithstanding these challenges, civil society has a critical role in human rights advocacy in the region. We have seen this in the case of the UPR; however, civil society's role needs to be equally extended to the regional and national levels. No longer can these three levels been seen as distinct which civil society engages with separately. Instead the role of civil society needs to be integrated across international, regional and national platforms and this engagement across platforms need to be inter-linked.

Moving Beyond Traditional Advocacy Issues

Women's rights, children's rights and disability rights are issues that have been advocated for by CSOs over two decades following the 1993 Vienna Declaration and Programme for Action. These issues were seen by many in the region as issues states would be willing to engage with and they formed the first tier of rights advocacy that many CSOs were comfortable to come together on. States, to varying degrees, eventually acceded to the corresponding conventions. Over the years this led to many states in the region to engage on these issues domestically and regionally. In the UPR, these issues were documented in the OHCHR compilations of other UN mechanisms even though there were reporting challenges faced by some states. These topics continue to be taken by CSOs in the UPR as the issues continued to be fine-tuned.

As evidenced in Asia Centre's mapping and pointed out by several authors in the book, the UPR is allowing CSOs to amass around another range of issues related to the use of the death penalty, LGBTI issues, migrant workers' rights and the right of refugees. This is seen in the volume of CSO participation and in the number of joint and individual submissions in these areas to the UPR. One must note that this high volume of advocacy around these issues is influenced in part by support from donors and the willingness of some governments to engage on these issues. Additionally, in some Southeast Asian countries the political contexts in which CSOs operate may present less of a barrier to advocate on these issues compared to civil and political issues, prompting CSOs to more comfortably gravitate towards these topics. However, such engagement is not uniform across all countries and is determined partially by political and religious contexts of the different

Southeast Asian countries. There is also a CSO "politics" and "culture" within countries in the region that also restricts or keeps out individuals and groups based on issues and personalities. Nevertheless, one must pose the question whether CSOs are settling on the "low hanging fruit" that will attract donor financing, ensure non-punitive engagement by states and enjoy the support of their CSO peers at the expense of other issues.

Tackling civil and political issues is particularly important in the context of the UPR given that this where states push back the most. Asia Centre's mapping and the authors in the book point to gaps in human rights reporting and advocacy in the UPR, notably on civil and political issues such as the right to life, freedom of expression, freedom of religion and belief, extrajudicial killings, arbitrary detention, territorial autonomy and separation.

For instance, Indonesia initially appeared to be the main progressive member that has strongly pushed the human rights protection agenda forward in the wake of the Suharto era, yet there has been regression in light of its religious intolerance of minority religions and its spillover to electoral politics. Problems abound elsewhere, from Aung San Su Kyi's refusal to publicly acknowledge a potential genocide or ethnic cleansing of the Rohingya in Myanmar, to President Duterte's frivolous sanctioning of arbitrary killings in the Philippines, to the continued use of draconian preventive detention laws in Malaysia and the Singapore. The curtailment of freedom of expression and press freedom in Thailand is symptomatic of the ongoing restrictions on dissent in the wake of the military coup and a major rise in the use of draconian *lèse majesté* laws in the Kingdom (Amnesty International 2017) Strongman and one party dominance are the governance *du jour* in Cambodia, Laos, Singapore and Vietnam.

States resist discussion of these civil and political issues, while CSO submission on these issues is comparatively less. This points to a need to pick up the slack on civil and political rights. Failure to do so will render the UPR process a mere shadow-boxing exercise that is convenient for states who will remain content to engage on topics that they are comfortable dealing with while rejecting others. ASEAN member states have adopted universal human rights norms but nearly all of them seem reluctant to apply these norms and international human rights standards. At present states accept or note recommendations on which they are comfortable and reject ones, generally civil and political issues, which they are reluctant to concede on. The actions by the states point to the need for civil society to engage more on civil and political issues during the third cycle of the UPR in 2017 and beyond and pressing states to follow up and implement recommendations in this area. Failing which, the UPR process

will be reduced to civil society engagement only on issues that states are willing to cooperate on.

Ensuring State Compliance with UPR Recommendations

This leads to the great difficulty CSOs face in securing state compliance with their commitments resulting from the UPR process and with universal standards in general. States have thus far respected their reporting obligations compared to their record with the treaty bodies, but implementation and follow-up challenges to the UPR recommendation remain. The vagueness of the language used by states also does not lend itself easily to follow up, for example, State A "will consider," "is exploring" and so on. A human rights action plan that implements recommendations at the national level is an area that is in need of attention. Very few states have a national action plan through which to follow up on the recommendations. Despite the vagueness in language that is used by states in implementing recommendations, CSOs and other stakeholders must contribute to developing indicators to serve as monitoring tools and clear action plans on sustaining the scrutiny of states. This raises concerns about the overall utility of the submissions in comparison to submissions to the treaty bodies, where independent experts are present. CSOs will need to coordinate better and to strategise, starting with an overview of the opportunities and limitations presented by the process and then to develop common templates in terms of measuring the effectiveness of follow-up by states. This is something that can be relevant in the next cycle. The UPR requires follow-up otherwise it will not achieve the requisite improvement of human rights on the ground. While the Human Rights Council has encouraged states to conduct broad consultations with all relevant stakeholders, this seems to be lacking thus far. Generally, the danger is that CSOs are falling into a ritualistic review of their country situations and focus less on follow up on state implementation of recommendations.

Advancing CSO Effectiveness Through Strategic Partnerships

Given that the region is experiencing a regression towards authoritarianism, what is the prognosis for advancing the protection of universal human rights in Southeast Asia? In this regard, partnerships with other stakeholders,

notably national human rights institutions (NHRIs) in the region, could be forged to develop monitoring mechanisms. NHRIs across the region continue to succumb to the ebb of local politics as epitomised by recent concerns over the unpleasant atmosphere within the Thai National Human Rights Commission and the resignation by one Commissioner as a result (Mala 2017). This points to the need for a review of NHRI best practices worldwide in terms of follow-up monitoring of state implementation of UPR recommendations. There is an opportunity here for a fruitful partnership between CSOs and NHRIs. On that note, CSOs must also continually push for more engagement with AICHR. This regional mechanism is in its infancy and as noted by legal experts its parent entity, ASEAN, has yet to develop regional human rights law and practice in line with international standards (Muntarbhorn 2017). The UPR can be a platform that can be used to provoke improvement to the regional mechanism by making submissions during the UPR of states that make up AICHR. This makes the UPR mechanism at the global level a vital forum for CSO engagement on regional human rights issues. After all AICHR was set up to placate the international community's concerns amidst ASEAN's regional integration enterprise. To this end, the UPR can provide a vital platform for CSO engagement and that may yet lay the seeds for a formal, UPR-AICHR engagement. This leaves the UPR at present as the only body with the potential to help promote and protect international human rights standards. Part of the reason why the UPR has been effective is the role of CSOs in the advancement of human rights through their participation in the UPR process pointing towards its critical role for the promotion and protection of universal human rights.

The Need for Evidence-Based Research for Better Engagement

Continued evidence-based research on the UPR to serve as a guide to CSO engagement strategies is therefore in order. This need is especially pertinent as CSOs engage further with national, regional and international mechanisms. A difficulty facing many donors and INGOs, in particular their officers and representatives is that they may not fully appreciate the historical context, institutional history and experience to properly formulate policies and strategies for engagement with CSOs and the UPR. Consequently, there is strong emphasis on supporting the collaboration and submission process; however, the necessary due diligence in understanding the strategic

impact of CSO participation in advancing human rights protection via the UPR may be missing. The over-emphasis on process and not strategy is a problem. Deeper knowledge is required on where, why and how the UPR came into being. The goals of the UPR, notably to improve the situation on the ground, must be kept in view. While the UPR is a more cooperative process, it should not be a site of mere ritualistic behaviour at the international level. It is widely acknowledged that international human rights law is applicable to domestic law. It must be seen as part of the domestic processes for the implementation of international law. The UPR process must advance this basic fact by helping states to fulfil their obligations through implementation and reporting. CSOs have an important function in pushing states to live up to their international obligations and universal standards and ultimately to improving the protection of rights on the ground. This underscores the importance of the UPR at the United Nations.

UPR as Enabler for CSOs in Regional Dialogue on Human Rights

Despite its shortcomings, the UPR process enables CSOs to be part of the global and regional dialogue on human rights. While the peer-review UPR process may not be as rigorous as a mechanism that relies on independent experts, it nevertheless is a process with which states are engaging with and perhaps more comfortable with. To that extent, the perpetuation of a global and regional conversation about rights involving CSOs is positive. The language of human rights emanating from the UPR and the fact that states participate contributes to maintaining the minimum normative standards developed since 1948. While the UPR has been an effective mechanism for putting human rights issues on the agenda and engaging states in conversation about critical issues, systemic problems remain. These relate to engagement with other stakeholders, the implementation of recommendations by governments, the efficacy of follow-up processes and the UPR's ability to address civil and political issues.

The UPR is the site where CSOs from Southeast Asia can dialogue directly with big powers and thus participate in shaping global and regional discourse on human rights. This is especially critical for Southeast Asia in light of the transition to a polycentric world order in which China as a global power seeks to influence human rights advocacy in the region. As great powers collide in this transition, it is critical that human rights remain central to their foreign policies, as argued by Senator John McCain, who

stated that human rights transcend space and time and that "it is foolish to view realism and idealism as incompatible or to consider our power and wealth as encumbered by the demands of justice, morality and conscience" (McCain 2017). In the real world, he noted, "as lived and experienced by real people, the demand for human rights and dignity, the longing for liberty and justice and opportunity, the hatred of oppression and corruption and cruelty is reality." This reality only breeds resentment by billions. The UPR, at the apex of global human rights dialogue, is rendered even more critical in light of UN Secretary General Gutteres' call for an improved multilateralism and a reformed UN that must defend enlightenment values and reverse the trend towards "aggressive nationalism" and national "sovereignty agendas" (The Guardian 2017).

Asia Centre seeks to continue its engagement with the UPR by conducting evidence-based research and undertaking critical analysis of its impact on the region. The role of stakeholders such as national human rights institutions and AICHR as they impact these institutions and their relationship with the UPR also needs to be considered. These are issues that will be explored by the Asia Centre in the course of its Human Rights Programme. Such knowledge is needed for strategic engagement with the UPR for the 2017–2020 cycle and beyond. It will better equip CSOs, who must highlight those areas that have been neglected, in particular civil and political issues in the region. Without this emphasis, it is unlikely there will be much progress in the area of human rights protection.

Notes

1. The Charter bodies that have a bearing on the protection of human rights include: the General Assembly, the Human Rights Council, the special procedures of the HRC, the Security Council and the Economic and Social Council and their related subsidiary organs. The treaty bodies include monitoring mechanisms created under each of the core human rights treaties. They include Human Rights Committee (CCPR); Committee on Economic, Social and Cultural Rights (CESCR); Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); Committee against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED); and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). The treaty bodies meet in

Geneva, Switzerland. All the treaty bodies receive support from the Human Rights Treaties Division of OHCHR in Geneva. A brief description of each is available on the OHCHR website. http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

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[1] Note: Page numbers followed by "n" refer to notes.

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