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CLUSTERING AND THE INTEGRATED IMPLEMENTATION OF RECOMMENDATIONS: THE KEY TO UNLOCKING THE COMPLEMENTARY POWER OF THE UN'S COMPLIANCE MECHANISMS

**The Universal Periodic Review, Treaty Bodies and
Special Procedures: A connectivity study**

Part of a series of reports on the 'Global human rights
implementation agenda'

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UNIVERSAL RIGHTS GROUP

IMAGE CREDITS

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ACRONYMS

CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CED Convention for the Protection of All Persons from Enforced Disappearance

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CERD Convention on the Elimination of All Forms of Racial Discrimination

Council Human Rights Council

CRC Convention on the Rights of the Child

CRPD Convention on the Rights of Persons with Disabilities

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

NGOs Non-governmental organisations

NHRIs National Human Rights Institutions

NMIRFs National mechanisms for implementation, reporting and follow-up

NMRFs National mechanisms for reporting and follow-up

SDGs Sustainable Development Goals

OHCHR Office of the High Commissioner for Human Rights

SNRCMs Standing national reporting and coordination mechanisms

SPT Subcommittee on the Prevention of Torture

SuR State under Review (at the UPR)

UN United Nations

GA UN General Assembly

UPR Universal Periodic Review

EXECUTIVE SUMMARY

Over the past seventy years, United Nations (UN) member States have elaborated and adopted eight ‘core’ international human rights treaties. Together with the Universal Declaration of Human Rights, these conventions provide the normative and legal backbone of the UN human rights system. Since their adoption, the number of States choosing to ratify and thus become Party to those treaties has grown exponentially. Today, all UN member States have ratified at least one of the core treaties, 80% have ratified four or more and just under a third have ratified all eight.

Notwithstanding, while States have made remarkable progress in elaborating and agreeing the human rights normative framework at international level, they have tended to make far less progress in implementing and complying with their human rights obligations and commitments at domestic level. To help bridge this ‘implementation gap,’ States have, over the past fifty years, created three broad types of international human rights mechanism: the Treaty Bodies, the Special Procedures, and the Universal Periodic Review (UPR).

Each of these mechanisms has emerged and evolved separately, responding to a particular context and time. Consequently, each mechanism has its own characteristics and methods of work, and its own particular strengths and weaknesses.

Due to this parallel – and seemingly uncoordinated - development, the three mechanisms have traditionally been seen as institutionally separate, uncoordinated and unconnected. This policy brief argues, however, that this fragmented understanding of the international human rights compliance system is outdated and, crucially, serves to perpetuate the aforementioned ‘implementation gap.’

The pervading narrative of a compartmentalized compliance system, with each mechanism operating at the centre of its own distinct ecosystem, is harmful for a number of important reasons.

First, as noted above, States tend to respond to this narrative or understanding by engaging with each mechanism and each ‘eco-system’ in a distinct and – usually – uncoordinated manner. This in turn means States have tended to set up different national implementation and reporting systems depending on which mechanism it needs to engage with (e.g. UPR or Treaty Bodies), and even depending on which Treaty Body! (A State’s national decision-making system for reporting to the Committee on the Elimination of all forms of Discrimination Against Women, for example, will usually be completely different from its system for reporting to the Committee Against Torture). As a consequence, effective State engagement with all the mechanisms (and, within that picture, with all Treaty Bodies) becomes enormously burdensome – thereby perpetuating the implementation gap. Second, the narrative/understanding is harmful because it perpetuates the idea that the three mechanisms operate in competition or tension and may even critically undermine each other. Finally, such a perspective weakens the possibility of relevant stakeholders coming together to identify and leverage synergies and complementarities between the three mechanisms, or of coordinating reforms to ensure the better delivery of the system as a whole.

Moreover, as this brief argues, traditional perceptions of the international human rights mechanisms, as three ostensibly

separate and distinct engines of change, do not accurately reflect the mechanisms’ shape and function, or the nature of their interactions. In reality, each mechanism shares the same fundamental purpose, and each executes its mandate in broadly the same way.

On the former point, each of the three mechanisms has the same basic *raison d’être*: to work with States to promote improved compliance with their international human rights obligations and commitments. On the latter point: each mechanism works (in principle) through engagement and cooperation with States; each seeks information from national civil society; each seeks to review and assess levels of State compliance with international human rights standards; and each produces recommendations to States on how to improve performance and compliance in the future.

This policy report calls for a fundamental rethink of the international compliance system: instead of the three main implementation mechanisms being perceived (and, in the case of Treaty Bodies and Special Procedures, perceiving of themselves) as separate, distinct, unconnected and – even – as operating in tension; they should be seen as three complementary parts of a single human rights compliance engine.

This understanding, will, in turn, serve to improve the accessibility of the overall human rights system (for all States, including Least Developed Countries and Small Island Developing States) by encouraging States to streamline and unify national tracking and reporting processes. It will also allow States to collate, manage and coordinate the implementation of all human rights recommendations together (i.e. rather than deal with the outputs of each mechanism/Treaty Body separately). By doing so, States will significantly lighten their implementation and reporting burdens, and will open up the possibility of making major advances in the national enjoyment of human rights. On the latter point, this is because, taken together and clustered by specific theme and objective, the outputs of the three human rights compliance mechanisms (international human rights recommendations) are mutually-reinforcing, and provide each and every UN member State with a rich, comprehensive and politically-nuanced roadmap for human rights reform and progress; a ‘blueprint’ for human rights, democracy and sustainable development.

This sea change in international perceptions of the three main UN implementation mechanisms (as complementary parts of a single compliance engine) has already begun to take root in several parts of the world – especially amongst Small States. Over the past five years, these States, often driven by a combination of severe capacity constraints and (yet) a determination to engage fully and effectively with the UN human rights mechanisms, have begun to build single, unified ‘national mechanisms for implementation, reporting and follow-up,’ (NMIRFs). These national mechanisms receive all recommendations from all UN (and in some cases, regional) human rights mechanisms; cluster those recommendations based on specific theme and objective; manage key clusters of recommendations in single national databases; coordinate the implementation of key clusters across ministries, parliament and the judiciary; engage with national human rights institutions (NHRIs) and civil society; and coordinate all necessary national (e.g. to parliaments) and international (e.g. back to the Treaty Bodies or UPR) periodic reporting on progress and impact.

IN

TRODUCTION

The United Nations (UN) has made enormous progress since its creation in the aftermath of the Second World War in debating, clarifying, and setting down universal human rights norms. Most importantly, the international community has negotiated and adopted - and States have increasingly ratified - eight core international human rights treaties.

However, while States have made impressive strides in norm setting, they have tended to make far less progress in implementing and complying with their new human rights obligations and commitments at domestic-level.

To help bridge this 'implementation gap,' UN member States have, over the past fifty years, created three broad types of human rights mechanism, each designed to work with States to review compliance with their human rights obligations and commitments, and to provide recommendations for improvement. These mechanisms are: the Treaty Bodies, the Special Procedures, and the Universal Periodic Review (UPR). The first of these mechanisms are treaty-based (i.e., they are established by the UN human rights treaties to oversee compliance with those treaties), while Special Procedures and the UPR are Charter-based (i.e., they are established and work on the basis of an intergovernmental mandate provided by the Human Rights Council, and ultimately by the UN General Assembly).

Each of these compliance mechanisms plays a distinct role in the overall human rights system. Each emerged and evolved separately, depending on the prevailing geopolitical situation and needs of the time; and consequently, each mechanism approaches the issue of compliance from a different angle, is possessed of particular characteristics and methods of work (though the mechanisms also share important similarities), and has its own particular strengths and weaknesses. As a consequence, the three mechanisms have traditionally been seen as separate and unconnected; and governments (as well as other interested stakeholders such as

civil society) have tended to engage with each one in isolation. This has, in effect, created a series of silos, with each mechanism inhabiting a singular political 'ecosystem,' comprising its own particular set of constituents, its own reporting cycles, its own sets of recommendations to States, its own follow-up systems, and its own national processes and contact-points for implementation.

However, this traditional understanding of the international human rights mechanisms - as three ostensibly separate and distinct engines of change - is increasingly out-dated, and indeed has come to represent an important barrier to the improved on-the-ground delivery and impact of the UN's human rights pillar.

It is time, instead, to move towards a new understanding of the human rights mechanisms as three different parts of a single compliance engine, each generating a common output (namely recommendations to States offering guidance for improved compliance) and requiring a common input (periodic compliance-progress reports, including updates on the implementation of earlier recommendations). Each part plays a distinct and unique role in the overall engine, each has its own ways of working, and each its own particular characteristics – with different strengths and weaknesses. Crucially, those characteristics are complementary, with the strengths of each mechanism compensating for certain weaknesses in the others.

This nascent understanding of the interconnected and complementary nature of the three types of universal human rights mechanism is especially important in the context of national implementation and reporting. Where States have begun to perceive of the mechanisms as component parts of a single compliance engine, it has tended to be followed by an emergent understanding (as noted above) that the principal outputs of those mechanisms (i.e., recommendations) are also complementary and mutually reinforcing, and thus can and should be implemented as a single set of thematically clustered

recommendations. Based on this understanding, States are then able to put in place single, streamlined procedures or mechanisms at national-level to coordinate the implementation of, and reporting on, all (clustered) recommendations from all the mechanisms (together with, in some cases, those from relevant regional mechanisms).

This substantially reduces the bureaucracy of implementation and the burden of periodic international reporting. However, most importantly, it also provides a significant boost to the effective implementation, by States, of their international human rights obligations and commitments. This is because, taken as a whole (and clustered according to theme), the collected recommendations of all UN human rights mechanisms provide each and every UN member State, in theory, with a comprehensive, rich and textured human rights 'blueprint,' offering detailed guidance on how it might improve human rights performance at national-level.

This policy brief seeks to support and contribute to this emergent understanding of the complementary nature - especially when seen from a national perspective - of the three main international human rights mechanisms and their common output (i.e., recommendations). It begins by considering the differential emergence of each mechanism, partly to explain why they have tended to be seen as institutionally separate and distinct from each other, but also to show why and how this view is wrong – that, in reality, the approaches, modes of operation, and strengths/weaknesses of the mechanisms complement and reinforce one another. The second part of the brief then explores the nature of that complementarity – the nature of the interconnections and interactions between the three mechanisms. Finally, part three explores the main 'inflection point' between the three mechanisms – namely their equal and complementary contribution to the generation, for each UN member State, of a rich, comprehensive and politically nuanced framework of human rights recommendations and guidance: a 'blueprint' for domestic human rights implementation, reform, and progress.

PART

01

THE UN HUMAN RIGHTS MECHANISMS

In 1946, the first session of the UN General Assembly (GA) considered a draft 'Declaration on fundamental human rights and freedoms' and transmitted it to the Economic and Social Council (ECOSOC) 'for reference to the Commission on Human Rights for consideration [...] in its preparation of an international bill of rights.'¹ The Commission on Human Rights (Commission), at its first session in early 1947, duly authorised its officers to formulate what it termed 'a preliminary draft International Bill of Human Rights.'² Later the work was taken over by a formal Drafting Committee, consisting of eight members of the Commission.

During the talks, different views were expressed as to what form such a Bill of Rights should take. In the end, the Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights, and the other in the form of a convention, which would define specific rights and their limitations. Accordingly, the Committee transmitted to the Commission draft articles of an international declaration and an international convention on human rights.

At its second session in December 1947, the Commission established three working groups: one on the declaration, one on the convention (which was renamed 'the covenant') and one on implementation. The Commission revised the draft declaration at its third session in May-June 1948, taking into consideration comments received from governments. It did not have time, however, to consider the covenant or the issue of implementation. The declaration was therefore submitted to the GA (meeting in Paris) via ECOSOC.

By its resolution 217 A (III) of 10 December 1948, the GA adopted the Universal Declaration of Human Rights as the first international human rights instrument. At the same time, it requested the

Commission to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation. The Commission examined the text of the draft covenant in 1949, and the following year it revised the first 18 articles on the basis of comments received from governments. In 1950, the GA declared that ‘the enjoyment of civic and political freedoms, and of economic, social and cultural rights are interconnected and interdependent.’³ The Assembly, thus, decided that the covenant, now under development, should also cover economic, social and cultural rights, and contain an explicit recognition of the equality of men and women. Consequently, in 1951 the Commission drafted 14 articles on economic, social and cultural rights on the basis of proposals made by governments. It also formulated 10 articles on ‘measures of implementation’ (these would basically require States Parties to submit periodic ‘compliance’ reports).

After a long debate at its sixth session in 1951-1952, the GA decided that the human rights covenant then under development should be split in two. It, therefore, requested the Commission to prepare two draft covenants, ‘one to contain civil and political rights, and the other to contain economic, social and cultural rights.’⁴

The Commission completed preparation of the two drafts in 1953-1954 and transmitted them to the GA. The GA in-turn instructed its ‘Third Committee’ to begin an article-by-article consideration of the texts (1955). Although the Third Committee began its work on schedule, it was not until 1966 that the preparation of the two Covenants was completed.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were adopted by the GA on 16 December 1966.⁵

In addition to preparing an international bill of rights, a further priority for the Commission (as set by ECOSOC) during the early decades of its operation was ‘the prevention of discrimination on the grounds of race, sex, language or religion.’⁶ In the early 1960s, following incidents of anti-Semitism in several parts of the world, as well as continued concerns, especially in Africa and the Caribbean, about racial discrimination, the GA adopted a resolution condemning ‘all manifestations and practices of racial, religious and national hatred’⁷ as violations of the UN Charter and the Universal Declaration of Human Rights. This was followed by an ECOSOC resolution on ‘manifestations of racial prejudice and national and religious intolerance.’⁸

However, following further debates on these issues, it became clear that States were more likely to agree on steps to address racial discrimination than they were to agree steps to combat religious intolerance. Therefore, a number of African States led by the Central African Republic, Chad, Dahomey, Guinea, Côte d’Ivoire, Mali, Mauritania and Upper Volta, called for UN discussions to be split in two, and for States to immediately begin a process of negotiations

to produce a new international convention focused solely on racial discrimination (i.e., separate from discussions on religious intolerance).

In 1962, the GA proceeded to adopt two resolutions: resolution 1780 (XVII) on ‘the preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination,’⁹ and resolution 1781 (XVII) on ‘the preparation of a draft declaration and a draft convention on the elimination of all forms of religious intolerance.’¹⁰

This sundering of UN efforts to combat racism and religious intolerance was a key moment for both initiatives. Debates on the former culminated rapidly (1965) in the adoption of a new UN human rights convention (the UN’s first): the International Convention on the Elimination of Racial Discrimination (CERD). Meanwhile, the latter became the subject of increasingly politicised and divisive debate. This made agreement on a new convention impossible. In the end, States were only able to reach agreement on a declaration (i.e., soft law) – the 1981 Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief.¹¹

Following the adoption of the CERD in 1965 and the two Covenants in 1966, the UN went on to negotiate and agree a range of other human rights treaties covering: the elimination of discrimination against women (1979); the prevention of torture (1984); rights of the child (1989); protection from enforced disappearance (2006); and the rights of persons with disabilities (2006)¹².

MEASURES FOR IMPLEMENTATION

TREATY BODIES

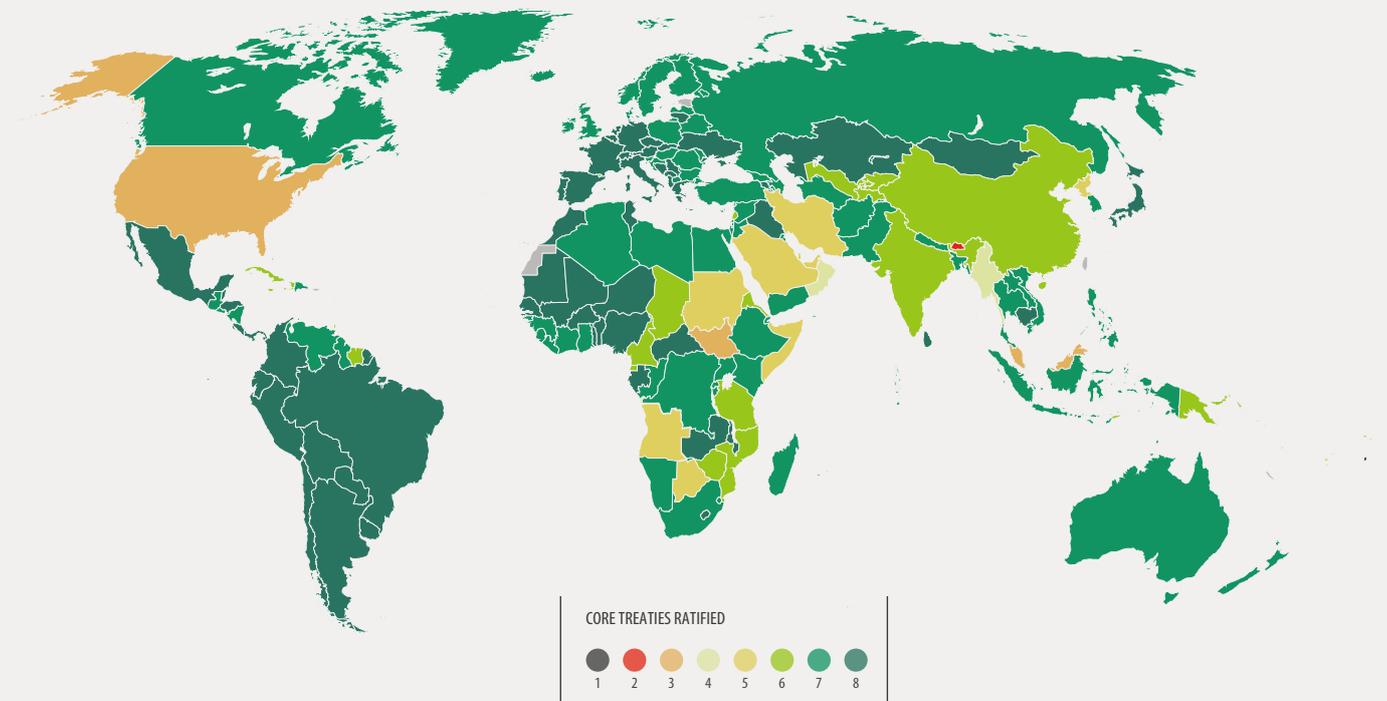
The ‘measures for implementation’ considered by the Commission in the late 1940s and early 1950s found their earliest practical manifestation in the CERD (1965) and the two Covenants - the ICESCR



Navi Pillay, United Nations High Commissioner for Human Rights addresses during the 20th Session of the Human Rights Council. 18 June 2012.

FIGURE 2.

Ratification status by country and treaty



Party concerned and to the petitioner.³⁰ In the case of the ICESCR and ICCPR, such individual communications procedures were established separately, through optional protocols to the Covenants.

The Treaty Bodies established under the conventions adopted since 1965-1966 were each given a similar mandate to these early Committees. In essence, each Treaty Body seeks to promote and support implementation by receiving periodic compliance reports from States Parties, analysing those reports, engaging in a dialogue with delegations from the reporting State, and then publishing a set of 'concluding observations' (i.e., conclusions and recommendations for improved compliance). They may also receive and consider communications from individuals or groups claiming to be victims of a violation of any of the rights set forth in their convention.

THE MARCH OF UNIVERSALITY

Today, as noted above, there are eight core international human rights treaties in force.³¹ All UN member States have ratified at least one core international human rights treaty. 80% of States have ratified

four or more of the treaties; 41% have ratified seven, and 29% have ratified all eight. Only 13 States (8%) have ratified only one or two core treaties (See Figure 1).

As a result of the high numbers of ratifications and accessions over recent decades, today nearly every country on the planet is Party to the CRC (the only exception is the US), whilst significant majorities are Party to CEDAW (96%), ICERD and CRPD (around 90%), and the ICCPR, ICESCR and CAT (around 80%) (See Figure 2).

TREATY BODY REFORM

Since 1988, a number of initiatives have sought to reform how the Treaty Bodies operate. These reform efforts have been made necessary by the rapid expansion of the system over time (more Treaty Bodies, more Treaty Body members, more States Parties, more reports, etc.), by increased divergence in the working methods used by each Committee, and by the need to strengthen effectiveness (i.e. make the system more accessible to all States Parties, improve levels of State cooperation and reporting, promote the improved implementation of recommendations, etc.)



ECOSOC Meeting: Treaty body strengthening, Consultation for States Parties to International Human Rights Treaties, 2 April 2012.

The four main reform debates / initiatives since 1988 have been:

- **Changes instigated by the reports of Philip Alston (1988 - 1996).**
- **Reactions to the then UN Secretary-General's proposals for a single report (2002-2006).**
- **Reactions to the proposals from the then High Commissioner for Human Rights, Louise Arbour, for a single unified (standing) Treaty Body (2006).**
- **The 2009-2014 Treaty Body strengthening process, resulting in GA resolution 68/268.**

The most recent of these initiatives – the Treaty Body strengthening process – was launched in 2009 by the then High Commissioner for Human Rights, Navi Pillay. Initial consultations with States, Treaty Body members and other stakeholders led to the publication of a landmark report,³² which was presented to the GA in 2012. In April 2014, after two years of negotiations among States, the GA adopted resolution 68/268. This built on a number of the High Commissioner's proposals. A key goal of the agreed reforms was to boost 'the full and effective implementation of international human rights instruments by States Parties'³³ by making the Treaty Body system more accessible to all States (e.g. by promoting a simplified reporting procedure), by strengthening the capacity of the system to examine 'the progress made by States Parties [...] in fulfilling their relevant obligations,'³⁴ and by providing 'recommendations to States Parties on the [strengthened] implementation of such treaties.'³⁵ On the last point, the GA made clear that recommendations (contained in Treaty Body concluding observations) should be 'short, focused and concrete,'³⁶ and 'reflect the dialogue with the relevant State Party.'³⁷ Furthermore, the GA agreed to strengthen the delivery 'of capacity-building and technical assistance, provided in consultation with and with the consent of the States Parties concerned, to ensure the full and effective implementation of and compliance with the international human rights treaties.'³⁸

Importantly, GA resolution 68/268 recognised that, in addition to changes and improvements at international-level, strengthened domestic implementation, compliance and reporting (and, by extension, the enjoyment of human rights) would require improved mechanisms and procedures at national-level. The GA therefore recognised 'that some States Parties consider that they would benefit from improved coordination of reporting at the national level, and requests the Office of the High Commissioner to include among its technical assistance activities relevant assistance in this regard, at the request of a State party, based on best practices.'³⁹

This was a rather oblique and watered-down official reference by UN member States to a vitally important topic of debate during High Commissioner Pillay's consultations (2009-2012), and - by extension - a key part of her 2012 report to the GA: namely, the establishment of 'standing national reporting and coordination mechanisms.'⁴⁰ In her report, the High Commissioner drew attention to the emergence of this new type of mechanism, designed to facilitate 'timely reporting and improved coordination in follow-up to Treaty Body recommendations and decisions.'⁴¹ Although not fully reflected in the GA's final resolution, the High Commissioner's report made clear that such 'standing national reporting and coordination mechanisms (SNRCMs)'⁴² are not only a vital innovation for the implementation of, and reporting on, Treaty Body recommendations, but also for dealing 'with all United Nations human rights mechanisms.'⁴³

The report correctly argues that the place – ultimately - where efficiencies, complementarities, and improved 'coordination, coherence and synergies' in the delivery of the international human rights compliance system (the Treaty Bodies, Special Procedures and UPR) must take place is at 'the national level.' SNRCMs are, in other words, the 'keystones' of the human rights compliance system, where recommendations 'from all human rights [compliance] mechanisms, [...] with the possible support of the Universal Human Rights Index database (UHRI),'⁴⁴ may be collated,

‘analyse[d] and cluster[ed] [...] thematically and/or operationally’⁴⁵ (i.e., according to the institutions responsible for implementing them), and where the implementation of, and reporting on, those clustered recommendations ‘by the relevant actors’ might be coordinated. SNRCMs, the report continues, ‘should also lead periodic consultations with NHRIs, and civil society actors to cooperate on reporting and implementation processes.’⁴⁶ ‘Within parliaments, appropriate standing committees or similar bodies should be established and involved in monitoring and assessing the level of domestic implementation of the recommendations, particularly those related to legislative reform. [...] SNRCMs should also liaise with members of the judiciary to inform them on Treaty Bodies’ recommendations.’⁴⁷

SPECIAL PROCEDURES

UN Special Procedures are considered by many to be, in the words of former UN Secretary-General Kofi Annan, the ‘crown jewel’⁴⁸ of the international human rights system. From their first appearance in 1967, when the Commission on Human Rights established an ad hoc Working Group to inquire into the situation of human rights in Southern Africa, the Special Procedures have grown into one of the UN human rights pillar’s most important compliance mechanisms.

As is clear from the previous section of this report, the UN’s primary focus in the years after its establishment was on the promotion rather than the protection of human rights.

This stance was determined by the major Western powers, which did not want the UN to shine a light on, or otherwise interfere with, human rights violations that were taking place in the context of colonialism (in the case of United Kingdom - UK - and France) or of segregation and racial discrimination (in the case of the United States - US). The predominant position of these States (together with emerging Cold War dynamics) in the post-war era meant that the foundations of the international human rights system – most particularly the Charter and the early output of the Commission – reflected their pro-sovereignty views.

As has been widely noted: ‘the Charter nowhere explicitly provides authorisation for the political organs of the United Nations to assume monitoring competences in the field of human rights.’⁴⁹ Indeed, the term ‘protection,’ was deliberately left out of the Charter, *inter alia* on the grounds that it ‘would [...] raise hopes going beyond what the United Nations could successfully accomplish.’⁵⁰ So it is that the Charter states that the UN should merely seek to ‘achieve international cooperation [...] in promoting and encouraging respect for human rights.’⁵¹ If there was any doubt as to the UN’s reluctance to hold States accountable for human rights violations, it was immediately dispelled when members of the Commission met for the first time at Lake Success in 1947 and declared that the Commission had no power ‘to take any action in regard to any complaints concerning human rights.’⁵²

This post-war ‘no power to act’ consensus was not seriously challenged until 1965 when a group of newly-independent states from Africa, the Middle East and Asia started to press the UN to



Nassir Abdulaziz Al-Nasser, President of the 66th session of the GA speaks at informal meeting on ‘Strengthening and enhancing the effective functioning of the human rights treaty body system’. 2 July 2012.

respond to human rights violations associated with colonialism, racism and apartheid. In June of that year, the UN Committee on Decolonization called on the Commission 'to consider individual petitions concerning human rights violations in the territories under Portuguese Administration, South Africa and South Rhodesia.'⁵³ Pursuant to this request, ECOSOC invited the Commission 'to consider as a matter of importance and urgency the question of the violation of human rights and fundamental freedoms (...) in all countries.'⁵⁴ Two years later (1967), a similar cross-regional group of States from Africa, Asia, the Middle East and the Caribbean secured the adoption of two Commission resolutions (2 (XXIII)⁵⁵ and 7 (XXIII)⁵⁶) establishing the first two Special Procedures mandates: an Ad-Hoc Working Group of Experts on South Africa and a Special Rapporteur on Apartheid. These early mandates were soon followed by further Special Procedures focused on the Occupied Palestinian Territories (1969) and on Chile (1975).

It is clear from the foregoing that the Special Procedures mechanism was originally established as a human rights protection mechanism. It was designed to monitor, investigate and report back to the UN (in order to seek and contribute to accountability) on serious human rights violations in a specific geographical context.

The mandate on the situation in Chile was established against a backdrop of international concern at the violent 1973 coup d'état and its aftermath, especially widespread reports of enforced disappearances. Such serious violations were, however, by no means limited to Chile - during the second half of the 1970s, the phenomenon of disappearances was particularly associated with Argentina.

At the 1979 session of the Commission, a draft resolution was introduced concerning the practice of disappearances. This mentioned Argentina by name and proposed the establishment of a mechanism with more or less similar competences to the Ad hoc Working Group on Chile. However, fearful of being 'named and shamed,' Argentina launched a major diplomatic offensive to 'avoid the condemnation and institutionalisation'⁵⁷ of its case at the UN. By arguing that the issue of disappearances was also a concern in many other parts of the world and that focusing only on Argentina would, therefore, be unfair and discriminatory, Argentina successfully moved the Commission towards establishing a mandate with a thematic rather than country-specific focus: the Working Group on enforced or involuntary disappearances.

This marked the (accidental) beginning of thematic Special Procedures – mandates with a predominant focus on promoting rather than protecting human rights. For the next 18 years, this new type of mandate would remain less quantitatively significant than the original country-specific mandates (which peaked in number at

just less than 20 in 1994). However, from 1997 onwards, the number of thematic mandates (covering both civil and political rights and, especially after 1993, economic, social and cultural rights) began to rapidly outstrip those focused on situations. Today, the Human Rights Council maintains a system of 55 Special Procedures mandates,⁵⁸ of which 43 (78%) are thematic and 12 are country-specific. Notwithstanding their different focus, thematic Special Procedures have maintained the particular approach and broad methods of work - especially the focus on engaging with national-level stakeholders that characterised the early country-specific mandates. As Charter-based mechanisms, moreover, Special Procedures have the advantage of being able to address any human rights concern in any State – irrespective of whether a State has ratified a given convention.

As explored in the 2014 Brookings-Universal Rights Group report 'Special Procedures: Determinants of Influence',⁵⁹ the Special Procedures mechanism (especially its thematic mandates) seeks to drive domestic implementation and impact in three broad ways.

First, mandate-holders carry out country missions at the invitation of States. This capacity – to visit countries, talk directly to policymakers and meet with victims – is central to the mechanism's influence and value. It allows mandate-holders to assess and gain a first-hand understanding of a State's progress in promoting and protecting the right(s) covered by the mandate, as well as to provide counsel to duty-bearers on how to overcome obstacles to further progress. Field missions also allow Special Procedures to offer face-to-face support to vulnerable or marginalised groups, civil society organisations and victims, and to engage with UN Country Teams and other development partners to mobilise international support for improved implementation. After concluding a mission, Special Procedures mandates present a report, containing their main findings and recommendations, to the State concerned and to the Council.

Second, thematic Special Procedures produce annual reports (presented to the Council and also often to the Third Committee of the GA), which seek to explore, clarify and set-down human rights norms related to their mandate. Thematic mandate-holders will sometimes take this norm-setting role one stage further, by proposing draft international standards, guidelines, or other soft-law instruments.

Third, Special Procedures, like Treaty Bodies, are able to receive and act upon individual complaints or petitions alleging violations of rights. Where the relevant mandate-holder finds a complaint to be admissible, it will communicate with the State concerned in order to seek information on the allegations made, and, where the allegations prove well-founded, to press the State to provide due remedy and redress.



A senior multi-agency U.S. delegation presented the most recent U.S. periodic report on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
13 August 2014.

UNIVERSAL PERIODIC REVIEW (UPR)

As we have seen, it was primarily countries of the global South that took the decisive steps in the 1960s and 1970s to dismantle the UN's prevailing 'no power to act' doctrine. However, as soon as Western powers overcame their initial doubts, they quickly began establishing new mandates to address violations in different parts of the world – provoking a deeply negative reaction on the part of many developing countries.

As a consequence, the Commission became increasingly divided between developing countries, which accused the West of using the body to selectively target them for political ends, and Western States and civil society, which accused countries with poor human rights records of seeking membership of the Commission as a way of avoiding or deflecting international scrutiny and censure. Kofi Annan reflected on this situation in his 2005 report 'In Larger Freedom',⁶⁰ noting that 'States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others.'⁶¹ 'As a result,' he asserted, 'a credibility gap has developed, which casts a shadow over the UN system as a whole.'⁶²

It was in this context that the Secretary-General proposed replacing the Commission with 'a smaller standing Human Rights Council [...] whose members would be elected directly by the General Assembly'⁶³ and should 'undertake to abide by the highest human rights standards.'⁶⁴ In an addendum to his report,⁶⁵ he further proposed that the new Council would have a 'new peer review function'⁶⁶ that would scrutinise all States with regard to all human rights commitments, helping 'avoid, to the extent possible, the politicization and selectivity that are the hallmarks of the Commission's existing system.'⁶⁷

The idea of conducting periodic reviews of State human rights performance was not a new one. Already in 1956, ECOSOC had

passed a resolution requesting States to submit regular (three-yearly) reports on progress achieved, within their territories, in advancing the rights contained in the Universal Declaration.⁶⁸ With the adoption of the first human rights conventions, which - as noted above - had their own in-built implementation and reporting processes, this early precursor of the UPR was deemed superfluous and was abolished in 1980.⁶⁹ The concept of a regularised peer review also borrowed from the African Peer Review Mechanisms of the New Partnership for Africa's Development (NPAD).

With his dual proposal – to create a smaller standing Council with defined membership criteria, and a universal peer review mechanism – Kofi Annan sought (successfully, as it turned out) to balance Western (especially US) demands over membership with Non-Aligned Movement (NAM) and African Group demands over the elimination of 'selectivity' and 'double standards' in addressing human rights situations.

In a statement to the Commission on 7 April 2005,⁷⁰ Kofi Annan set out a vision for the reform of the 'intergovernmental machinery' of the human rights pillar, so as to 'build a United Nations that can fulfil the promise of the Charter.'⁷¹ Central to his proposed reforms was the establishment of the Council and its peer review mechanism:

'I have proposed that the Council be a standing body, able to meet when necessary rather than for only six weeks each year as it is at present. It should have an explicitly defined function as a chamber of peer review. Its main task would be to evaluate the fulfilment by all States of all their human rights obligations. This would give concrete expression to the principle that human rights are universal and indivisible. [...]

Under such a system, every Member State could come up for review on a periodic basis. Any such rotation should not, however, impede the Council from dealing with massive and gross violations that might occur. Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.'⁷²

By the time of the adoption of GA resolution 60/251 establishing the Council, States had agreed on the creation of a new slightly smaller standing body, with defined membership criteria (though these were less robust than some had hoped for). States also agreed that the Council would ‘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.’⁷³ The Council met for the first time in June 2006 and immediately began negotiations on an ‘institution-building package’ (IBP) – the detailed framework governing the operation of the body and its mechanisms, including the Universal Periodic Review (UPR). One year later, the President of the Council, Luis Alfonso de Alba of Mexico, presented his final IBP proposals. These were adopted as resolution 5/1.⁷⁴

Although the ‘P’ in UPR was, at some point during negotiations at the GA, switched from representing the word ‘peer’ to ‘periodic,’ the mechanism that emerged from deliberations in New York and Geneva is nevertheless very clearly and explicitly State-led, and based on peer-to-peer dialogue and review. Resolution 5/1 is clear that the UPR is ‘an intergovernmental process [and] member State-driven,’⁷⁵ must ensure ‘[universality] of coverage and equal treatment of all States,’⁷⁶ and should ‘be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner.’⁷⁷

Although resolution 5/1 did concede that reviews should ‘ensure the participation of all relevant stakeholders, including non-governmental organisations and national human rights institutions,’⁷⁸ in reality, it was clear that the UPR would be a political mechanism dominated by States. The main input into the process would be a national report of the State-under-review (SUR), only States would be allowed to speak during discussions in the main review chamber (the

UPR Working Group), and only States would be allowed to present recommendations to the SUR. Moreover, at the end of the review, SURs would have complete power over whether to accept or merely take note of (i.e., gently reject) recommendations extended to them. The overwhelmingly State-to-State nature of the UPR has led to a number of criticisms of the mechanism, especially from NGOs and academics. Criticisms have included: that States often fail to consult widely when preparing their national reports; that insufficient weight is afforded, as a basis of review, to the perspectives of domestic civil society and NHRIs; that reviews lack robustness, as States care more about maintaining good political relations than they do about driving human rights progress in the country concerned; that recommendations are often vague, unambitious or lacking in legal precision; and that States can pick and choose which recommendations they like and which they reject out-of-hand. Moreover, (former and current) members of Treaty Bodies and Special Procedures mandate-holders have regularly expressed concern that, contrary to the clear stipulation in the IBP that the UPR must ‘complement and not duplicate other human rights mechanisms, thus representing an added value,’⁷⁹ the UPR can in fact often undermine the other compliance mechanisms.

Notwithstanding, many other stakeholders (especially States) argue that the UPR has been one of the most important achievements of the Council and has driven significant progress in the implementation of human rights obligations and commitments. While conceding that the UPR is an overtly political mechanism, proponents point out that peer-to-peer dialogue and recommendation, especially when it involves senior members of national governments, can help persuade States (that might otherwise be unmoved by independent experts) to: provide a more honest ‘assessment of positive developments and challenges faced;’⁸⁰ ‘[fulfil their] human rights obligations and commitments;’ ‘share best practices;’⁸¹ and improve overall



The US delegation presents its fourth periodic report on implementation of the ICCPR before the Human Rights Committee, at the UN Office at Geneva. 13 March 2014.



The Working Group of the Universal Periodic Review. 11 May 2015.

‘cooperation and engagement with the Council,’⁸² Treaty Bodies, and ‘the Office of the UN High Commissioner for Human Rights;’⁸³ thereby contributing to ‘the improvement of the human rights situation on the ground.’ These, indeed, are the key objectives of the UPR, as set down in Council resolution 5/1.

In 2010-2011, States and NGOs conducted a review of the early operation of the UPR, as part of its wider five-year review of the work and functioning of the Council. While leaving the modalities of the UPR broadly as they were (i.e., as set by the IBP), the outcome of the review did include a number of important refinements. In particular, Council resolution 16/21 (adopting the outcome) made clear that ‘the second and subsequent cycles of the [UPR] should focus on, *inter alia*, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review.’⁸⁴ In recognition of the growing number of recommendations directed towards States and the increasing difficulties faced by States in managing and coordinating the implementation of these recommendations, the Council also decided that ‘the recommendations contained in the outcome of the review should preferably be clustered thematically.’⁸⁵ Resolution 16/21 also stipulated that ‘States may request the UN representation at the national or regional level to assist them in the implementation of follow-up to their review [...] The Office of the United Nations High Commissioner for Human Rights may act as a clearing house for such assistance.’⁸⁶

Finally, in 2015 and 2017, Brazil and Paraguay presented draft resolutions to the Council on ‘Promoting international cooperation to support national human rights follow-up systems and processes.’ With these texts, eventually adopted as resolutions 30/25⁸⁷ and 36/29,⁸⁸ the Council acknowledged that ‘the effectiveness of the universal periodic review as a cooperative mechanism, depends on the progress achieved by the State concerned, and as appropriate by other relevant stakeholders in the implementation of accepted recommendations.’⁸⁹ Moreover, the resolutions made clear that in order to achieve such progress and secure the effective implementation of human rights obligations and

commitments, the UPR must work in concert with the other principal compliance mechanisms - the Treaty Bodies and the Special Procedures. Each of these mechanisms, the Council reaffirmed, has an ‘important, valuable and mutually-reinforcing role and contribution, to make to improved implementation, as constituent parts of a single international [...] human rights system.’⁹⁰

Resolution 36/29, in particular, reflects a significant shift in the way UN member States think about the interconnectedness of the three main human rights implementation mechanisms - i.e., as three complementary parts of a single system; and thus, in the way States understand, and are seeking to strengthen, the mechanics of domestic implementation. In addition to referencing the ‘mutually-reinforcing roles of the three mechanisms,’⁹¹ the resolution urges States to adopt a holistic approach to the common output of these mechanisms (i.e., recommendations) - which would greatly ‘facilitate the task of clustering and prioritising recommendations and of mainstreaming them into national human rights action plans, policies and working programmes.’⁹² Importantly, resolution 36/29 also makes the case that the adoption of such a ‘holistic approach to all human rights recommendations’⁹³ can help States not only to make progress with the implementation of their human rights obligations and commitments but also with the realisation of the 2030 Agenda for Sustainable Development through the ‘better alignment of human rights and sustainable development efforts at the national level.’⁹⁴

Both resolution 30/25 and resolution 36/29 are clear that the place where the ‘mutually-reinforcing’ nature of the three main human rights compliance mechanisms becomes apparent, where the recommendations they generate should be clustered and prioritised, where implementation should be coordinated, and where reporting managed, is at national level - in particular through dedicated ‘national mechanisms for reporting and follow-up’ (NMRFs). The resolutions recognise that States, ‘with the support from the UN system,’ are increasingly establishing NMRFs to provide ‘comprehensive and permanent approaches to reporting to the international human rights system and to implementing recommendations.’⁹⁵

PART

02

INTERACTION OF THE THREE IMPLEMENTATION MECHANISMS: A CONNECTIVITY ANALYSIS

The primary goal of the Universal Rights Group's project on the 'connectivity' of the UN human rights system's three main implementation/compliance mechanisms, is to understand the degree to which these mechanisms interact or interconnect with one another, and whether those interactions are characterised by/ result in:

- Unnecessary duplication, (the word 'unnecessary' is important here, as some duplication can be positive, for example where the outputs of the mechanisms reinforce each other – see below);
- Mutual reinforcement – i.e., where the mechanisms complement one another to drive progress, or where they might duplicate/overlap with one another but with positive consequences; or
- A weakening of one or more of the mechanisms.

In order to conduct this analysis, the Universal Rights Group (URG) looked, in turn, at the three 'connections' between the mechanisms, i.e., between the:

- **Universal Periodic Review and the Treaty Bodies;**
- **Universal Periodic Review and the Special Procedures; and**
- **Treaty Bodies and the Special Procedures.**

UNIVERSAL PERIODIC REVIEW AND TREATY BODIES

Because the UPR is a relatively young mechanism, arriving decades after the emergence of the Special Procedures and Treaty Bodies, the impact of its establishment on the other mechanisms has been a regular subject of contemporary discussion at the Human Rights Council. Although (as noted above), the new mechanism is supposed to ‘complement and not duplicate other human rights mechanisms, thus representing an added value’⁹⁶ (emphasis added), the first decade of its existence was marked by regular accusations, especially from Treaty Body members, Special Procedures mandate-holders, and relevant OHCHR officials (i.e., officials from the Treaty Body division, or the Special Procedures branch), that it was, in fact, undermining the work and delivery of the other main compliance mechanisms. These criticisms have fallen, broadly, into two camps: general criticisms that the UPR is somehow ‘overshadowing’ or drawing State attention away from the Treaty Bodies and Special Procedures; and more specific criticisms related to ways in which the UPR interacts with the other mechanisms. Notwithstanding, other stakeholders

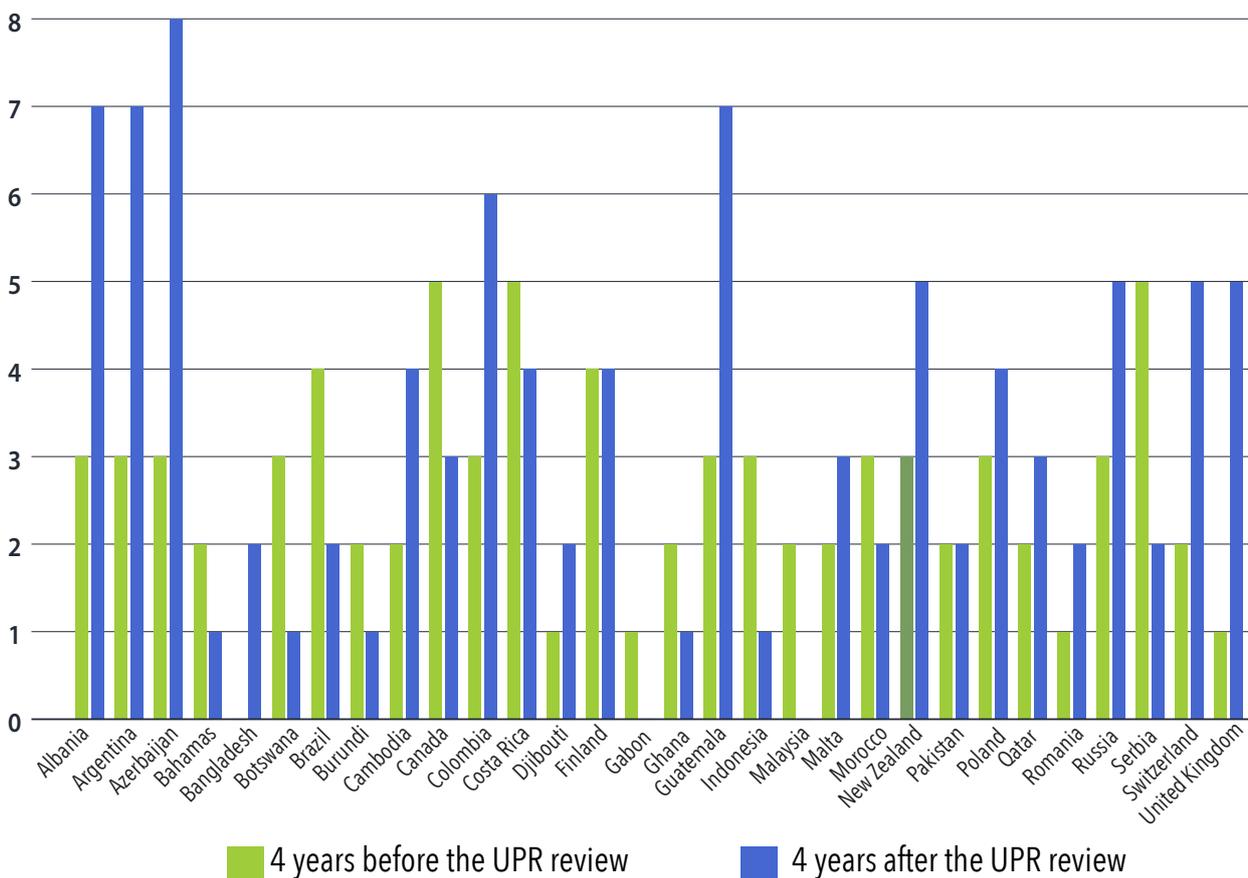
- especially developing country delegations at the Council - argue that, on the contrary, the UPR has served to support and reinforce the work and effectiveness of the other two mechanisms and has brought coherence to the overall human rights promotion system.

In the case of the UPR’s ‘connectivity’ with the Treaty Bodies, a common criticism of the mechanism is that it’s overtly political or diplomatic character (i.e., State-to-State), coupled with its emphasis on friendly dialogue and cooperation, mean that States find it far more amenable or attractive as a compliance mechanism, especially when compared to the more legally robust and traditionally confrontational nature of the Treaty Bodies. Thus, so the argument goes, States are diverting resources and attention away from their reporting obligations under the human rights conventions, and towards a ‘softer’ or ‘easier’ engagement with the UPR.

One way of testing this claim is to look at and compare the frequency with which States Parties to the core human rights conventions submitted periodic reports to the Treaty Bodies before and after the advent of the UPR mechanism. According to the results of URG’s comparative analysis on this point (see Figure 3 - based on a cross-

FIGURE 3.

States Treaty Body reporting patterns four years before and four years after their first UPR reviews (total number of reports presented)



regional sample of 30 States), since they began engaging with the UPR from 2007 onwards a majority of countries have actually improved the frequency with which they submit periodic treaty reports.

Moreover, a separate URG analysis of the reporting behaviour of 105 States that are Party to at least five of the core conventions (see Figure 4), shows that during the first two cycles of the UPR, States complied with their treaty reporting obligations in almost three quarters of all cases (i.e., 73% of all scheduled treaty reports were submitted). During this time, nearly 80% of these States submitted at least four periodic reports to the Treaty Bodies.

It therefore appears, from URG's analyses, that States have continued to present regular compliance reports to the Treaty Bodies, irrespective of the establishment of the UPR mechanism (and the additional reporting requirements related to that mechanism). Indeed, URG data (albeit based on a relatively small sample) actually suggests that States Parties are submitting more periodic reports now than they were before the creation of the Council and the UPR.

These findings tend then to support the arguments of those (especially developing country diplomats) who contend that,

far from distracting attention away from or overshadowing the Treaty Bodies, the peer-to-peer and cooperative nature of the UPR actually reinforces the work and delivery of the committees – precisely because the two mechanisms are complementary. This conviction is further supported by an analysis of the effects of the UPR mechanism on State accession/ratification of the core human rights treaties. URG data together with assessments undertaken by others⁹⁷ show that since the beginning of the first cycle of the UPR in 2007, proposals for States to sign, accede to, or ratify the international human rights treaties and their optional protocols have been the most popular type of recommendation delivered by reviewing States in the UPR Working Group.⁹⁸ Around 13% of all UPR recommendations ask the State-under-review (SUR) to ratify or accede at least one or more international conventions.⁹⁹ This type of recommendation has tended to be accepted by the SUR; indeed 54% of all recommendations to accede or ratify a human rights treaty have been supported.¹⁰⁰

Partly as a consequence of these recommendations, and their acceptance by SURs, the period since 2007 has seen an increased rate of State accession to/ratification of all eight core conventions (See Figures 2, 5, 6 and 7).

FIGURE 4.

States reviewed under the first two cycles of the UPR that also presented Treaty Body reports

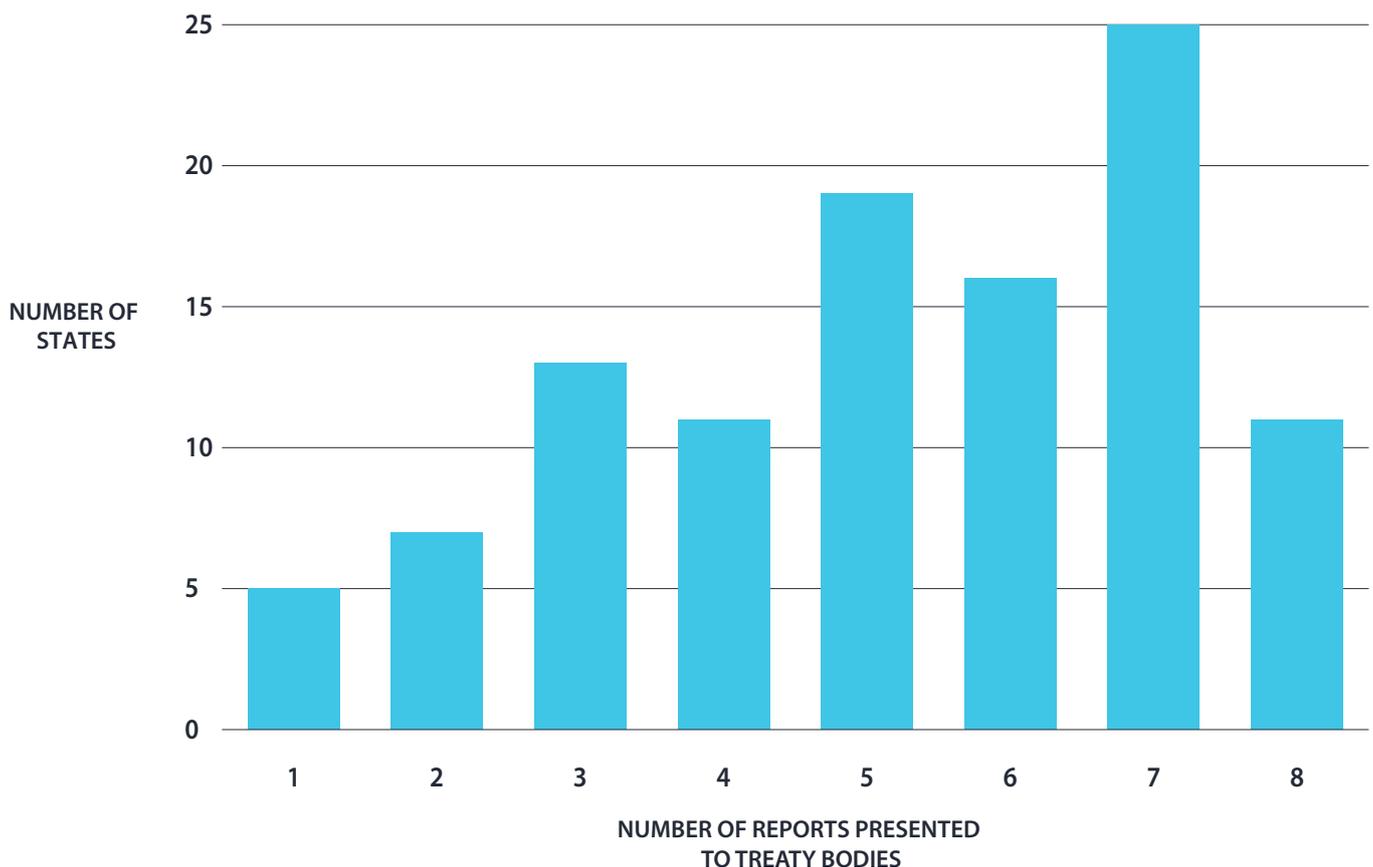


FIGURE 5.

Average ratifications before and after the creation of the UPR

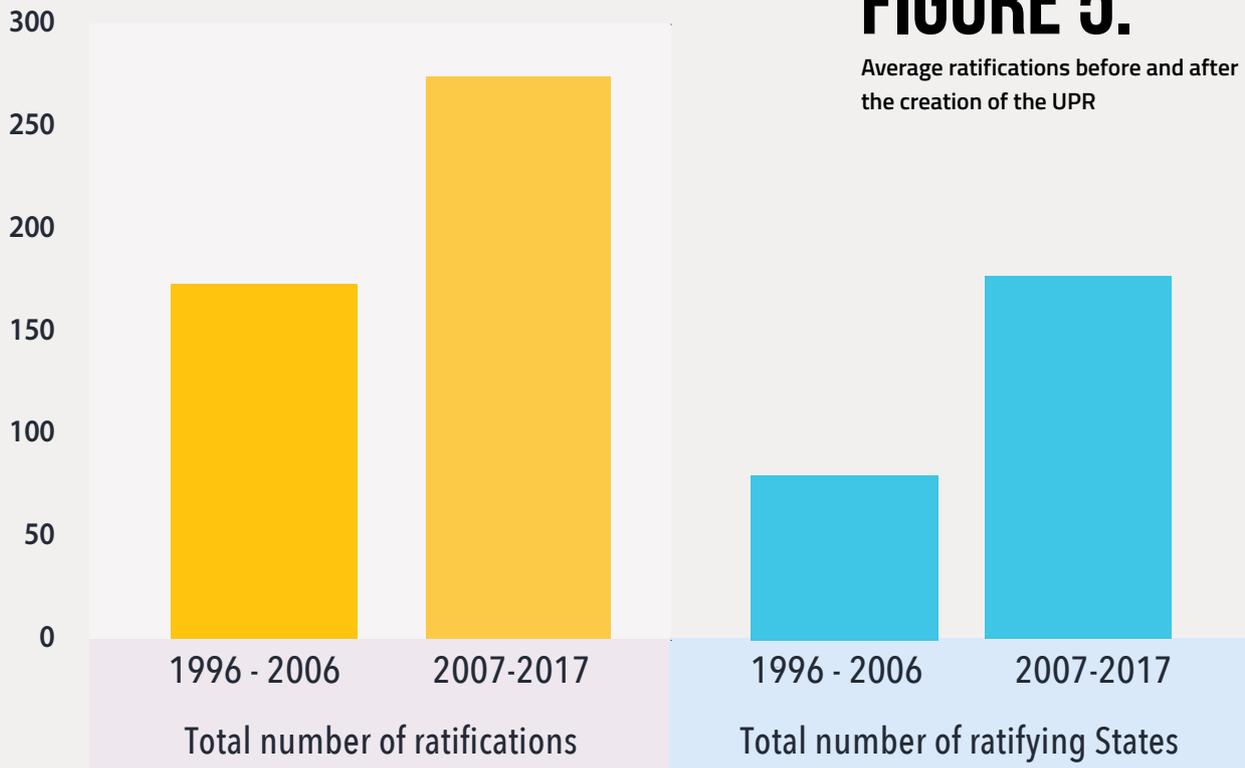
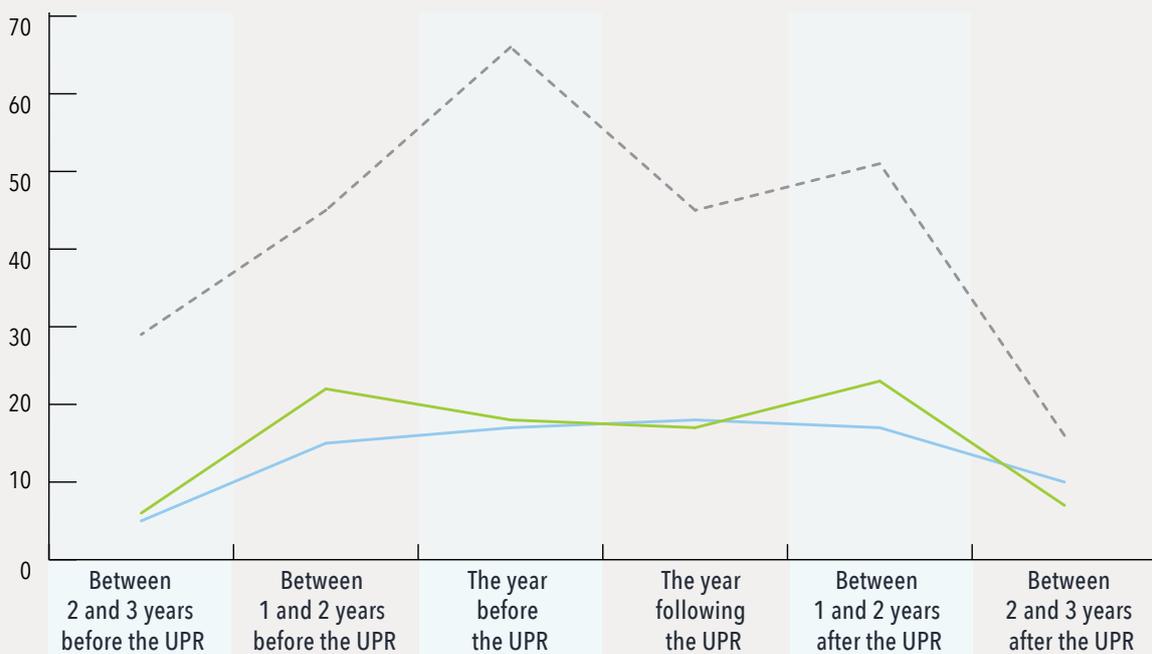


FIGURE 6.

Number of ratifications in line with UPR recommendations (since 2007)

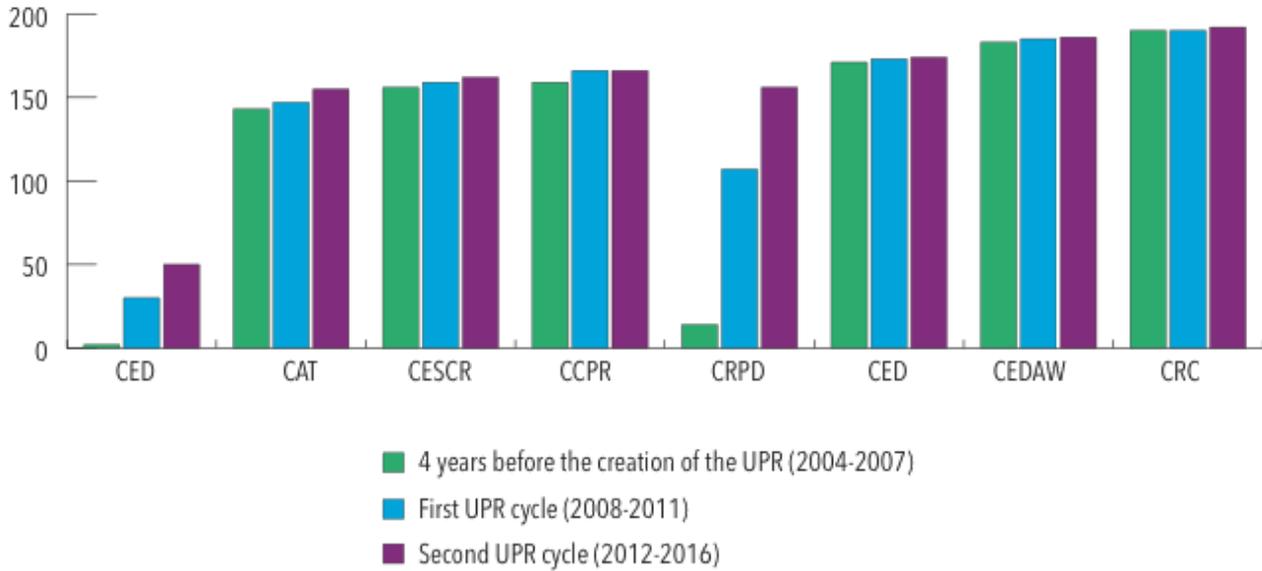


- Total number of ratifying States (without ratifications of CRPD)
- Total number of ratifications* (without ratifications of CRPD)
- Total number of ratifications* (including CRPD ratifications)

Includes ratifications by one State of two or more treaties

FIGURE 7.

Ratifications by treaty before and after the creation of the UPR



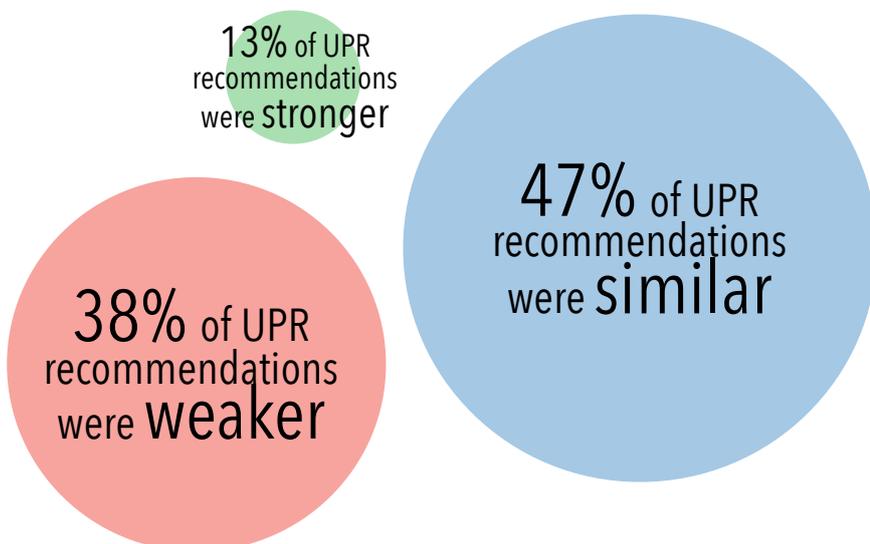
Considering the Treaty Body system can only work where States voluntarily decide to become Party to the different conventions, the apparent boost to accession/ratification provided by the political UPR process suggests that it is indeed providing important ‘added value’¹⁰¹ to the overall human rights promotion system.

Turning to more specific criticisms of the UPR’s (negative) impact on the work and functioning of the Treaty Bodies, the most

frequently levelled accusation is that reviewing States in the UPR Working Group have a tendency to take legally-precise and detailed recommendations provided by the Treaty Bodies, and reword or rework them as broader and (usually) weaker UPR recommendations. This, according to critics, can serve to let States ‘off the hook,’ because they can accept and implement more general and imprecise UPR recommendations, as a substitute for implementing relevant Treaty Body guidance.

FIGURE 8.

Strength of UPR recommendations compared to the Treaty Body recommendations



To assess this criticism, URG analysed the Treaty Body and UPR recommendations received by a randomly selected (cross-regional) group of 30 States. That analysis drew a number of conclusions. First, there is some truth to the suggestion that reviewing States in the UPR are using Treaty Body concluding observations as a substantive basis for their recommendations, and where that does occur reviewing States in the UPR are ‘weakening’ the original language in over one-third of cases (38%). Notwithstanding, this criticism is based on the notion that Treaty Body recommendations and UPR recommendations are somehow in competition with each other – i.e., that States will tend to choose between them. As this report argues, that is not necessarily the case (i.e., the recommendations of the mechanisms may actually complement and reinforce each other). It is also worth noting that in 13% of cases, the relevant UPR recommendations were stronger in nature than the Treaty Body concluding observations upon which they appeared to be based.

Moreover, this oft-heard criticism of the UPR ignores the fact that the direction of travel of recommendations can also be in the other sense – i.e., UPR recommendations can be (and often are) used by Treaty Body members to reinforce their concluding observations/recommendations to States Parties.

Using a sample of 30 States, URG found that all Treaty Bodies have, since 2007, used UPR recommendations to strengthen their concluding observations. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and the Committee against Torture (CAT Committee) are the committees that have most frequently referenced UPR recommendations in this way. 35% of CEDAW Committee concluding observations and 23% of CAT Committee concluding observations include such references. (Other Treaty Bodies appear to do so far less frequently – for example, only around 5% of Human Rights Committee concluding observations and 5% of Economic, Social and Cultural Rights Committee recommendations explicitly cite UPR recommendations).

BOX 1

Examples of Treaty Body concluding observations and recommendations based on or informed by the UPR include:

‘While taking note with satisfaction that the State party committed itself to making the recommendations made under the universal periodic review an integral part of its Government’s comprehensive human rights policy, the Committee would appreciate receiving information regarding the measures in force to prevent violence against women, compile information on violence against children, provide the same coverage in national legislation and anti-discrimination training activities on grounds of sexual orientation and disability as for other grounds of discrimination in areas such as the provision of services and health care and to consider using the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender

Identity as a guide to assist in the development of its policies’.

Concluding observations of the Committee Against Torture, review of Finland, fifth and sixth combined periodic reports, 30 May 2011.

‘The Committee, recalling its general recommendations No. 21 (1994) on equality in marriage and family relations and No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution, in addition to joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), recommends that the State party: (a) Urgently finalize and adopt the draft revised Code of the Person and the Family, as well as the bill on inheritance, matrimonial regimes and gifts, in line with the recommendations accepted by the State party during the universal periodic review in 2013 (see A/HRC/23/2, para. 515)’.

Concluding observations of the Committee on the Elimination of Discrimination Against Women, review of Burundi, fifth and sixth periodic reports, 25 November 2016.

‘Noting the State party’s acceptance to follow up on a recommendation from the universal periodic review in 2017 that it accelerate efforts towards the establishment of a national human rights institution, the Committee recommends that the State party establish a national human rights institution with a broad mandate to promote and protect human rights, in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).’

Concluding observations of the Committee on the Elimination of Racial Discrimination, review of Japan, tenth and eleventh periodic reports, 26 September 2018.

‘The Committee, recalling the State party’s acceptance of recommendation No. 40 under the universal periodic review to implement Act No. 91/1992 on Italian citizenship in a manner that preserves the rights of all children living in Italy (A/HRC/14/4/Add.1, p. 5), recommends that the State party: (a) Ensure by law the obligation of, and facilitate in practice, the birth registration of all children born in and living in Italy; (b) Undertake awareness-raising campaigns on the right of all children to be registered at birth, regardless of social and ethnic background and the resident status of parents; (c) Facilitate access to citizenship for children who may otherwise be stateless.’

Concluding observations of the Committee on the Rights of the Child, review of Italy, third and fourth periodic reports, 31 October 2011.

‘The Committee calls upon the State party to ratify the Optional Protocol to the Convention, as it undertook to do at the outcome of the second round of the universal periodic review (see A/HRC/22/3/Add.1, para. 6) and in line with the new National Plan on Promoting Equal Opportunities for Persons with Disabilities 2015–2020’.

Concluding observations of the Committee on the Rights of Persons with Disabilities, review of Australia, initial report, 21 October 2013.

UNIVERSAL PERIODIC REVIEW AND SPECIAL PROCEDURES

Regarding the nature of the connections/relationship between the UPR and the Special Procedures, the most frequent complaint heard at the Council is, like with the relationship with the Treaty Bodies, that the UPR somehow ‘overshadows’ the UN’s system of independent experts, monopolising State interest and enthusiasm.

To test this assumption, URG sought to analyse the impact of the UPR on State cooperation with the thematic Special Procedures mandates, in particular by looking at State standing invitations to mandate-holders to undertake missions, and by looking at increases or decreases in the number of missions actually taking place.

On the first point, URG analysed the first and second cycle recommendations presented to all UN Member States that did not already maintain a standing invitation, to identify instances where the State concerned made a voluntary pledge in its national UPR report, or received and accepted one or more UPR recommendation,

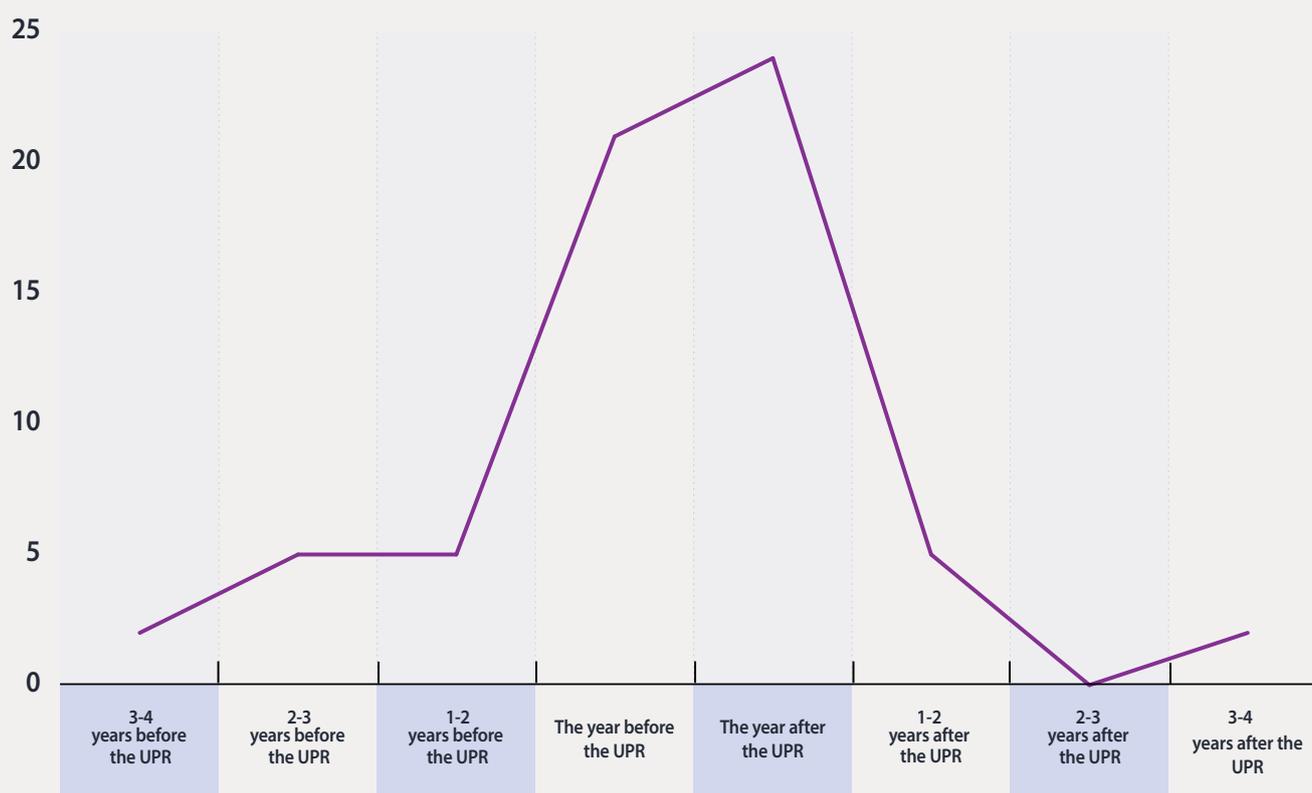
to extend a standing invitation. For those States that had pledged, or had accepted a recommendation to extend a standing invitation, URG then looked to see whether the State concerned had indeed moved to issue a standing invitation.

URG’s analysis found that since the advent of the UPR the number of standing invitations to the Special Procedures has increased from 53 (in 2005) to 119 (in 2018). This represents a 44% increase. Importantly, three-quarters of those new standing invitations appear to have stemmed, in whole or in part, from a UPR pledge or recommendation (see figure 9). During the first two cycles, URG found a total of 129 States under review receiving the recommendation to issue a standing invitation. It is, of course, impossible to say for sure whether a given State’s decision to extend a standing invitation was the direct result of relevant UPR pledges or recommendations. However, even with this uncertainty in mind, it is clear that the UPR has had a strong positive influence on the professed willingness of States to accept Special Procedures missions.¹⁰²

Concerning the completion of Special Procedures’ missions, URG found¹⁰³ that, since 2007, UPR reviewing States have presented

FIGURE 9.

Standing Invitations issued in line
with UPR recommendations



around 500 recommendations suggesting, in total, the conclusion of 660 Special Procedures visits to 123 States under review. 221 of these recommendations (43%) have been supported by the States under review, while the other 292 (56%) have been noted. Although most recommendations are formulated in specific terms, i.e., the reviewing States specified the concerned mandate-holder, a significant number of visits (197) were formulated in general terms, i.e., asking States to facilitate ‘all outstanding visit requests’ (rather than specifying the concerned mandate-holders).

Finally, it is important to recognise that the connectivity/relationship between the UPR and Special Procedures is not one way – the latter can and do contribute to strengthening the operation and effectiveness of the former. This is also the case with the UPR and Treaty Bodies. One important way in which both Special Procedures and Treaty Bodies complement and support the UPR is by providing independent and authoritative information as a crucial input into the UPR process. The principal input into, and basis of, each State’s review under the UPR is its own national report. However, in many

FIGURE 10.

Special Procedures mandate-holders whose missions were supported during the UPR.



cases, these national reports do not accurately or objectively reflect the actual human rights situation on-the-ground.¹⁰⁴ The other two reports that form the basis of each UPR review – the UN system report and the ‘other stakeholders’ report (NHRIs, NGOs) – thus become extremely important. In the case of the UN system report, much of the information is derived from (the very detailed and robust) reviews of the State concerned by relevant Treaty Bodies, and from the mission reports of Special Procedures mandate-holders following country visits. In the latter case, this information can be especially rich and textured, because it is the result of an actual visit to the country concerned, and of meetings with both rights-holders and duty-bearers.

Another way in which Special Procedures can and do help support and improve the UPR mechanism is by protecting those individuals

(e.g., human rights defenders, and domestic civil society) who have submitted information ahead of a country’s UPR review, and who have been targeted as a result (i.e., they have suffered reprisals). A number of Special Procedures have been very active in this regard, including, *inter alia*, the Working Group on enforced or involuntary disappearances, which has issued multiple press releases and statements related to concerns over possible reprisals against activists in China,¹⁰⁵ with some related to the death (in 2014) of the prominent human rights lawyer, Shunli Cao;¹⁰⁶ and the Special Rapporteurs on the situation of human rights defenders and on freedom of opinion and expression, who have, individually and jointly, addressed various communications to different States including Sudan, India, China, Uganda, and Viet Nam, concerning alleged travel bans, ‘look out circulars’, and other reprisals against a human rights lawyers and defenders wishing to cooperate with the UPR.¹⁰⁷

TREATY BODIES AND SPECIAL PROCEDURES

Treaty Bodies and Special Procedures interact and reinforce one another in a number of ways. Most importantly, the two mechanisms systematically share information about State compliance with relevant human rights obligations and commitments and use their recommendations to States as a tool to reinforce each other's operation (e.g., by encouraging States to improve cooperation with the other mechanism).

On the first point, for their part Treaty Bodies will often, during the review of a given State, consider the recommendations made by relevant Special Procedures mandate-holders to that State. For example, during the consideration of Albania's report, the Committee on the Rights of the Child identified the application of a customary law known as 'Kanun' as a priority concern. According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, 'Kanun' has resulted in the killing and/or confinement of a large number of children and young people. On the basis of the Special Rapporteur's analysis and conclusions, Committee members recommended that Albania take vigorous measures to end 'blood feuds' and the self-isolation of families and children, conduct outreach to affected families, and facilitate more effective forms of reconciliation by community leaders. These concluding observations closely reflected the recommendations of the Special Rapporteur.¹⁰⁸

The Committee on the Rights of the Child also borrowed from the work of the same Special Rapporteur in its 2004 review of Brazil. In this instance, the Treaty Body affirmed: 'While the Committee notes that the right to life, survival and development is integrated into domestic legislation, [the Committee] remains extremely concerned at the number of children murdered [in Brazil], as reported by the Special Rapporteur on extrajudicial, summary or arbitrary executions [...] in her 2004 report, which stated that the perpetrators of those crimes are mainly military policemen or former policemen.'¹⁰⁹

The Committee against Torture (CAT) has also used the reports and recommendations of Special Procedures to inform its concluding observations. For example, following its review of Indonesia's initial periodic report, the Committee expressed its concern at the 'numerous, on-going credible and consistent allegations, corroborated by the report of the Special Rapporteur on torture and other sources, of the routine and disproportionate use of force and widespread torture.' The Committee went on to express its regret that 'no State official alleged to have perpetrated torture has been found guilty, as confirmed by the Special Rapporteur on torture (arts. 2 and 12).'¹¹⁰ In its recommendations, the CAT reiterated 'the recommendations of the Special Rapporteur on torture on the report on his visit to Indonesia, that the State Party should, without delay, include a definition of torture in its current penal legislation in full conformity with article 1 of the Convention.'¹¹¹



Mireille Fanon Mendes France, member of the Coordination Committee of Special Procedures, during a Special Session of the Human Rights Council on Boko Haram. 1 April 2015.

This cooperation and coordination also work in the other direction. Special Procedures mandate-holders and their assistants in OHCHR regularly review Treaty Body reports on States they are about to visit.

For example, the Special Rapporteur on violence against women, its causes and consequences, considered the Committee on the Elimination of Racial Discrimination's concluding observations in preparation for her 2011 mission to the US, especially in order to identify the different ways in which women experience violence in the country. After reviewing these documents, the Special Rapporteur noted that: 'Although violence against women cuts across gender, race and immigration status, it has a particularly pernicious effect on groups that lie at the intersection of these categories. In 2008, the Committee on the Elimination of Racial Discrimination found that racial, ethnic and national minorities were disproportionately concentrated in poor residential areas with sub-standard housing conditions, limited employment opportunities, inadequate access to health care facilities, under-resourced schools and high exposure to crime and violence. The Committee expressed its concern about the incidence of rape and sexual violence experienced by women belonging to racial, ethnic and national minorities.'¹¹²

Likewise, the Working Group on the issue of discrimination against women in law and in practice (a Special Procedures mandate) used the Committee on the Rights of Persons with Disabilities' concluding observations following its 2011 review of Spain to help prepare for its 2014 mission to the country. This information allowed the Working Group to identify 'red flag' human rights concerns such as the impacts of employment policies on women in vulnerable or marginalized situations. In a good practice example of how the different strengths of the different mechanisms can complement each other, the Working Group was thus able to use its country mission to 'dig down' into this issue, and present detailed recommendations to the Spanish Government.¹¹³

On the second point, Treaty Bodies will often use their recommendations to States Parties to reinforce the complementary work undertaken by relevant Special Procedures mandate-holders, and vice-versa.

For example, in its concluding observations following the 2011 review of Djibouti, the CAT Committee recommended that the State Party strengthen its cooperation with all UN human rights mechanisms, including by permitting visits from, *inter alia*, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on arbitrary detention, and the Special Rapporteur on the situation of human rights defenders.¹¹⁴

Similarly, in 2008, the Committee on the Elimination of Racial Discrimination recommended that Switzerland 'consider implementing the recommendations made by the Special Rapporteur

on contemporary forms of racism, racial discrimination, xenophobia and related intolerance following his visit to Switzerland in 2006, as well as the relevant recommendations made by the UPR Working Group in 2008.'¹¹⁵ Likewise, in 2016 the Committee on the Elimination of Racial Discrimination called on New Zealand 'to consider adopting the recommendation by the Special Rapporteur on the rights of indigenous peoples that any departure from the decisions of the Waitangi Tribunal be accompanied by a written justification by the Government.'¹¹⁶

In addition to encouraging States to permit/receive visits by relevant mandate-holders, Treaty Bodies also use their recommendations to reinforce other aspects of the work of Special Procedures, such as communications/petitions about allegations of violations. For example, during the same review referenced above, the Committee against Torture expressed concern that Djibouti had failed to respond to various urgent appeals sent by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Committee urged the State Party to respond to such important communications in a meaningful and expeditious manner and to address the allegations of violations contained therein.¹¹⁷

Seen in the opposite sense, Special Procedures often use their recommendations to States following country missions, to urge them to consider acceding to or ratifying the core human rights conventions, or to strengthen cooperation with the Treaty Bodies (e.g., by submitting overdue reports).

For instance, the Independent Expert on the situation of human rights in Haiti encouraged the State, in various of the reports following his various missions to the country, 'to ratify the International Convention on the Protection of the Rights of All Migrant Workers; the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance; and the Inter-American Convention Against All Forms of Discrimination and Intolerance.'¹¹⁸ He further encouraged Haiti's Parliament 'to approve the Convention against Torture.'¹¹⁹

In another example, in 2014 the Special Rapporteur on the human rights situation in Myanmar urged 'the Government to ratify the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.'¹²⁰ Moreover, in order to help Myanmar strengthen its national laws and practice with regard to the rights to peaceful assembly and association, he recommended that the State ratify the ICCPR.¹²¹

Thematic Special Procedures mandates also regularly use their mission reports and recommendations to States to reinforce the operation and impact of relevant Treaty Bodies. For example, in 2016 the Working Group on people of African descent urged the US to 'ratify the Optional Protocol to the Convention against Torture, which creates a mechanism for unrestricted and unannounced visits to places of detention.'¹²²

MUTUAL-REINFORCEMENT OF SUBSTANTIVE RECOMMENDATIONS

As suggested from the foregoing section, a particularly powerful way in which the three principal UN human rights compliance mechanisms connect, interact and reinforce one another is via their recommendations to States. Indeed, this report argues that the generation of mutually reinforcing recommendations is key to understanding and unlocking the complementary strengths of the three compliance mechanisms.

At one level, as explained above, the recommendations produced by one mechanism can help reinforce the operation of another. For example, during a State's UPR review, it might receive a recommendation to ratify a given treaty (thereby strengthening the Treaty Body system), or it might be encouraged to accept a visit by a certain Special Procedures mandate-holder. As the various analyses conducted for this report demonstrate, such recommendations can have a powerful positive impact on the performance of the three mechanisms, as well as on the effectiveness of the UN's overall human rights compliance machinery.

At another, perhaps even more important level, the recommendations of the three mechanisms also support/complement each other substantively, thereby driving improved domestic implementation and impact.

As noted earlier in this report, the fact that one mechanism will often generate similar recommendations to one or both of the other two mechanisms, has often, in the past, generated concern and opposition. Such duplication, the argument goes, serves to weaken the recommendations of the other mechanisms (e.g., a reworded UPR recommendation may weaken the original Treaty Body recommendation upon which it was based). However, such opposition is based on an important misconception, namely that the three UN implementation mechanisms are institutionally separate and distinct. In fact, as this report argues, they are complementary parts of a single compliance engine. Seen in this light, the 'cross-referencing' or repetition of recommendations, even where the precise wording used is different, is both normal and potentially very useful.

To understand this point, it is instructive to understand the issue from the perspective of a State.

A given State, at a certain moment in time, will face a certain number of key human rights challenges. Depending on the State, those challenges (i.e. areas where it is struggling or failing to make progress) may relate, for example, to freedom of religion, freedom of expression/the press, independence of the judiciary, the right to water and sanitation, the

right to education, the poor performance of the national human rights institution, etc. The point is that this list of issues will nearly always be fairly limited in size, and will dominate the attention of the national government, parliament, judiciary, NHRIs and civil society alike. Because these national stakeholders are the main source of information about the national human rights situation, contained in periodic reports to the UN compliance mechanisms, it is clear, by definition, that these same issues and challenges will dominate discussions during the State's reviews under the UPR, Treaty Bodies and Special Procedures, and will be the main focus of any recommendations generated by those reviews. In other words, it is quite normal that the recommendations of the three mechanisms overlap.

It is also extremely useful. That is because each of the three mechanisms operates differently, and thus approaches the question of State compliance from a different angle. For example: Treaty Bodies, which are quasi-judicial in nature and made up of independent experts, conduct detailed legal assessments of State compliance with a given treaty; independent Special Procedures mandate-holders use on-the-ground visits to countries (and face-to-face discussions with rights-holders and duty-bearers) to develop a nuanced understanding of the human rights challenges faced by the State; and the UPR provides a high-level political platform for States to review each other and leverage peer pressure to drive change. As an extension of this point, the recommendations generated by each of the mechanisms is also different in content (for example, as we have seen, a UPR recommendation may be more general or less detailed than a Treaty Body recommendation) and in nature (for example, because it was extended by another government, perhaps in the presence of the State under review's prime minister or foreign minister, a UPR recommendation may be afforded greater domestic political priority than, say, a Special Procedures recommendation).

The point is: each of the three mechanisms is different but complementary, and each seeks to drive change in different ways. Seen in this light, the overlapping nature of many recommendations does not represent a weakness, but rather a strength. The recommendations complement and reinforce one another.

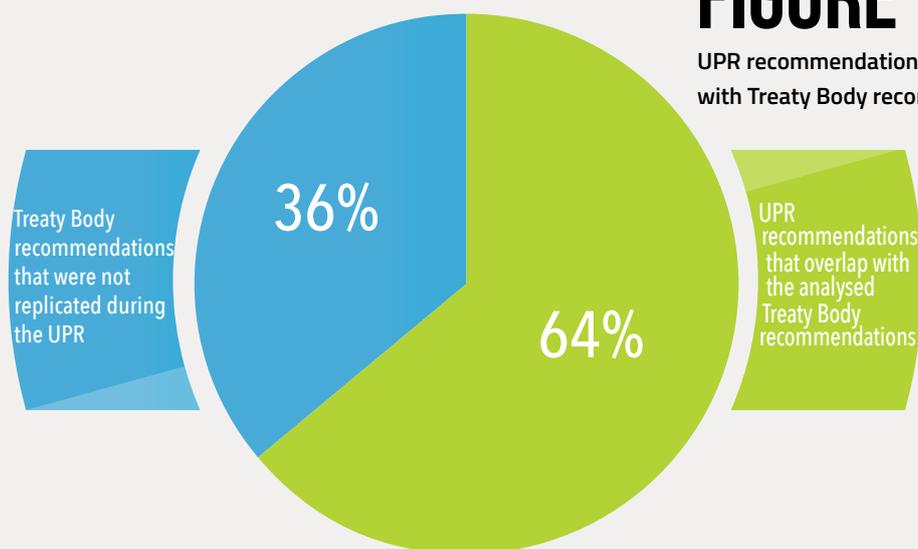
Again, from the perspective of a given State, if that State, over the course of a five-year period, receives a large number of recommendations from all three mechanisms focused on a certain set of issues (e.g., violence against women or religious discrimination), it provides a strong indication that those are areas of particular concern, where the State concerned is struggling to comply with its international human rights obligations and commitments. These are also, by extension, areas where the State (government, parliament, judiciary and national agencies), pressed/encouraged by domestic civil society, and supported by international development partners (where appropriate), should focus its efforts and strengthen implementation – thereby promoting and protecting the rights of affected groups and individuals.

As well as helping the concerned State, local civil society and the international community ‘arrow in’ on key human rights challenges and priorities, the overlapping yet complementary nature of recommendations (and their generation) also helps to move (or nudge) the State towards improved implementation of those recommendations. For example, on a given issue, relevant UPR recommendations may help give a (sometimes high-level) political ‘push’ to a State to begin a process of national reflection and change (especially where the State has accepted the recommendation); relevant Special

Procedures recommendations (based on a first-hand understanding of the domestic context) may provide realistic and nuanced policy guidance, and relevant Treaty Body recommendations might provide detailed legal direction on, say, necessary legislative amendments. When one considers that, according to URG’s analysis of recommendations (from all Treaty Body recommendations received by 30 States), 64% of those have been reinforced by UPR recommendations to those same States, the potential power of the complementary and mutually reinforcing compliance mechanisms becomes clear (see Figure 11).¹²³

FIGURE 11.

UPR recommendations that exhibit overlap with Treaty Body recommendations



BOX 2

Examples of overlapping UPR and Treaty Body recommendations

Examples of UPR recommendations overlapping with, and supporting the implementation of, corresponding Treaty Body concluding observations:

‘The Committee is concerned that Argentina has not defined racial discrimination as a crime in domestic law, and recommends that it considers doing so...’

Concluding observations of the Committee on the Elimination of Racial Discrimination, review of Argentina, third periodic report, 28 February 2016

[and]

‘Define racial discrimination as an offence in domestic law in keeping with CERD’s observation in 2010 and implement the recommendation of CERD to step up efforts to recognize itself as a multi-ethnic State ...’

Recommendation from South Africa to Argentina (accepted), UPR second cycle, 23 July 2012

‘The Committee, reiterating its previous recommendations, recommends that the State party: (a) Prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, and (b) Ensure that corporal punishment is explicitly prohibited in all schools and educational institutions and all other institutions and forms of alternative care.’

Concluding observations of the Committee on the rights of the child, review of the UK, third and fourth periodic reports, 20 October 2008

[and]

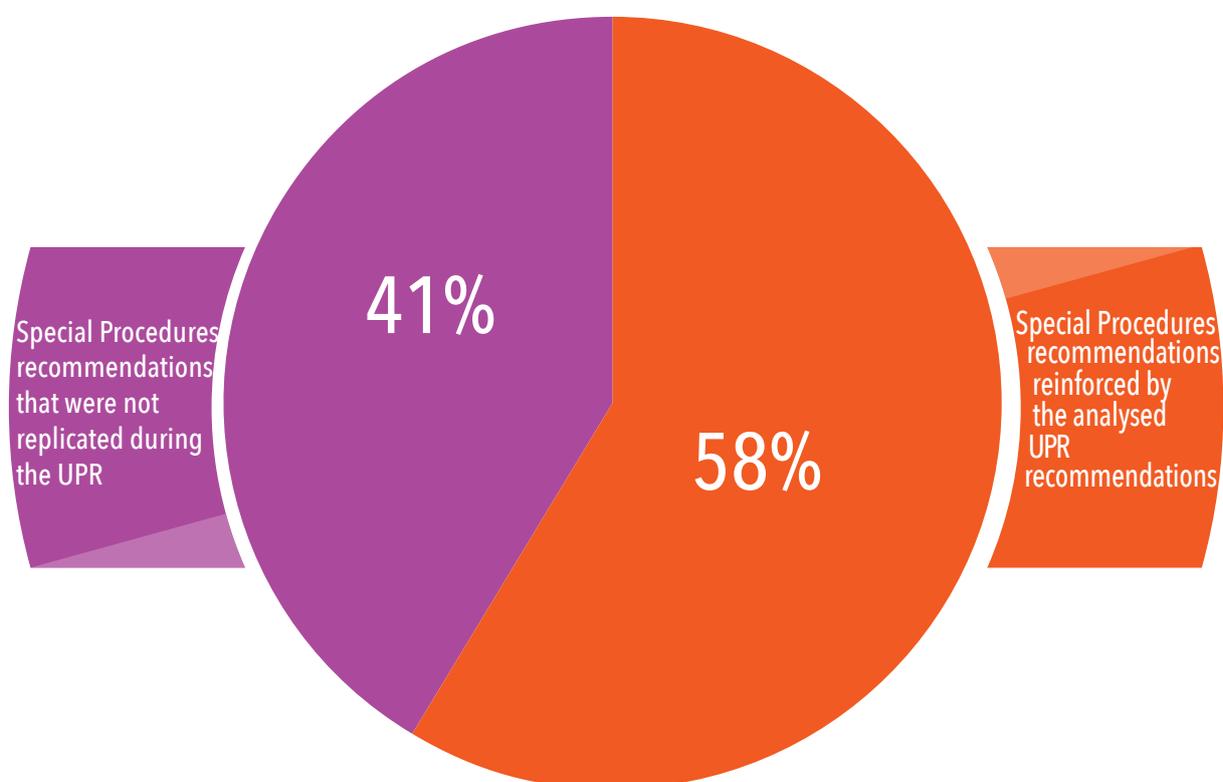
‘[The UK should] introduce a ban on all corporal punishment of children as recommended by the Committee on the rights of the child and other Treaty Bodies.’

Recommendation from Finland to the UK (accepted), UPR second cycle, 24 May 2012

UPR and Special Procedures recommendations demonstrate an even higher degree of substantive overlap. Around 60% of States-under-review in the UPR have received one or more recommendations that references Special Procedures recommendations (according to URG’s analysis of 30 States – see Figure 12).¹²⁴

FIGURE 12.

UPR recommendations that exhibit overlap with Special Procedures recommendations



BOX 3

Example of overlapping UPR and Special Procedures recommendations

Examples of UPR recommendations overlapping with, and supporting the implementation of, corresponding Special Procedures recommendations:

'[New Zealand should] strengthen efforts to secure Maori political participation at the national level, and pay particular attention to increasing Maori participation in local government.'

Recommendation from the Special Rapporteur on the rights of indigenous peoples to New Zealand, following his mission to New Zealand, 18-23 July 2010, contained in addendum to the Special Rapporteur's 2011 report to the Human Rights Council, 17 February 2011

[and]

'[New Zealand should] set targets for increasing Maori participation in policing, the judiciary and the penal system and strengthen efforts to secure Maori political participation at the national level

aiming on increasing Maori participation in local governance.'
Recommendation from Slovenia to New Zealand (accepted), UPR second cycle, 27 January 2014

Although the 'direction of travel' of overlap and mutual support between recommendations often sees UPR recommendations repeating and supporting Treaty Body or Special Procedures (i.e., the expert mechanisms) recommendations, this positive dynamic also operates in the other sense. Box 4 shows that Treaty Body recommendations will also often refer to earlier UPR recommendations to the concerned State, while Box 5 demonstrates a similar trend in the case of Special Procedures recommendations.

As argued above, whereas UPR recommendations help promote the implementation of recommendations from the UN's expert mechanisms by lending them (often high-level) political visibility and weight, the Treaty Bodies and Special Procedures can help promote UPR recommendation implementation by providing more detailed legal guidance to the State concerned (in the case of Treaty Bodies), or by providing a dose of realism/nuance reflecting local political or social situation (in the case of Special Procedures).

BOX 4

Example of overlapping Treaty Body and UPR recommendations

Examples of Treaty Body concluding observations that overlap with, and support the implementation of, UPR recommendations, include:

‘While welcoming the recent legislation adopted by the State party to protect children from the worst forms of child labour [...] the Committee remains concerned about the absence of a coordinated strategy and of a dedicated budget for combating the worst forms of child labour, and takes note of the recommendations addressed to Costa Rica during its 2009 UPR.’

Concluding observations of the Committee the Rights of the Child, review of Costa Rica, fourth periodic report, 3 August 2011

‘The Committee recalls its general recommendations No. 14 (1990) on female circumcision and No. 19 (1992) on violence against women, as well as the recommendations addressed to the State Party during the UPR of Djibouti, [...] and urges the State Party to [...]’

Concluding observations of the Committee against Torture, review of Djibouti, combined initial, second and third periodic reports, 21 July 2011.

‘The Committee recommends that the State party: (a) develop a national action plan on business and human rights that incorporates a gender perspective, on the basis of the 2030 Agenda and in line with the recommendation made in the context of the second review cycle of the UPR.’

Concluding observations of the Committee on the Elimination of Discrimination against Women, review of Australia, eighth periodic report, 20 July 2018

‘The Committee notes the commitments pledged by the State party to promote equal rights of Afro-Colombians and indigenous peoples during the process of UPR and encourages the State Party to fulfil these commitments.’

Concluding observations of the Committee on the Elimination of Racial Discrimination, review of Colombia, tenth to the fourteenth periodic reports, 28 August 2009

‘The State party should [...] act upon its commitment to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, which the State Party accepted in the UPR processes in 2010 and 2015.’

Concluding observations of the Human Rights Committee, review of Lao People’s Democratic Republic, initial report, 23 November 2018

BOX 5

Examples of overlapping Special Procedures and UPR recommendations

Examples of Special Procedures recommendations overlapping with, and supporting the implementation of, UPR recommendations, include:

‘The Special Rapporteur [...] urges Member States, in their bilateral efforts to follow up on the UPR of the Democratic People’s Republic of Korea, not to lose sight of [important] rejected recommendations and to continue to raise the matters [at hand].’¹²⁵

Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, presented at the 28th session of the Human Rights Council, 18 March 2015

‘The Special Rapporteur [on freedom of religion or belief] has re-established the initial approach of sending follow-up letters after country visits in order to receive updated information about the implementation of recommendations at the national level. In this regard, the Special Rapporteur transmitted in November 2009 follow-up tables to the governments of the eight countries that she had visited from 2005 to 2007. These tables contain the conclusions and recommendations from her mission reports, and follow-up information from relevant UN documents, including from the UPR.’¹²⁶

OHCHR country visits portal of the Special Rapporteur on Freedom of Religion or Belief, 2018

‘The Special Rapporteur welcomes the inclusion of migration as a theme for cooperation in the UN Country Programme for Romania (2010–2012) and encourages both the UN Country Team and the Government to continue cooperating in this area, particularly in the follow-up and implementation of recommendations made by human rights mechanisms, including Treaty Bodies, Special Procedures and the UPR.’

Report of the Special Rapporteur on the human rights of migrants following his mission to Romania, 15-20 June 2009, contained in the addendum to the Special Rapporteur’s 2010 report to the Human Rights Council, 17 March 2010

‘The experts support the recommendation made during the UPR that the [National Anti-Corruption] Commission should be strengthened in order to be able to operate independently and effectively.’

Reports of the Independent Experts on access to safe drinking water and sanitation and on human rights and extreme poverty, following their joint mission to Bangladesh, 3-10 December 2009, contained in the addendum to the Expert’s 2010 report to the Human Rights Council, 22 July 2010

Finally, the recommendations of the two expert-led human rights compliance mechanisms (Special Procedures and Treaty Bodies) also frequently overlap and reinforce each other's on-the-ground impact (see Box 6).

BOX 6

Example of overlapping Special Procedures and Treaty Body recommendations

Examples of Special Procedures recommendations overlapping with, cross-referencing, or otherwise supporting the implementation of, Treaty Body recommendations, and *vice versa*, include:

'In relation to the protection of women in the context of migration, the Special Rapporteur recommends that the Government [...] implement the recommendations made by the Committee on the Elimination of Discrimination against Women, to keep under review and carefully monitor the impact of its laws and policies on women migrants, refugees and asylum-seekers with a view to taking remedial measures that effectively respond to the needs of those women.'

Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, following his mission to Romania, 15-20 June 2009, contained in the addendum to the Experts' 2010 report to the Human Rights Council, 17 March 2010

The Committee takes note of the concern expressed by the Special Rapporteur on the sale of children, child prostitution and child pornography, that corruption is a problem at all levels of administration and undermines the enforcement of the law, the delivery of social services and the overall capacity of the State to prevent and redress human rights violations.'

Concluding observations of the Committee on the Rights of the Child, review of Romania, third and fourth periodic reviews, 30 June 2009

'Both the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights urged Costa Rica to take all appropriate measures to remove the obstacles that currently prevent indigenous peoples, Afro-descendants and migrant workers [from having] access to basic services, including safe drinking water and adequate sanitation. [Any] new water law should: (a) expressly recognise, [...] taking into account general comment No. 15 (2002) on the right to water of the Committee on Economic, Social and Cultural Rights, that access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses constitutes a fundamental human right and a prerequisite for the realization of other rights enshrined in the International Bill of Rights, especially the right to life and the right to health.'

Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation water and sanitation following her mission to Costa Rica, 18 to 27 March 2009, contained in the addendum to the Expert's 2009 report to the Human Rights Council, 23 June 2009.



Press briefing by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar. 8 March 2010.



PART

03

RECOMMENDATION CLUSTERING AND NATIONAL MECHANISMS: THE KEYS TO UNLOCKING HUMAN RIGHTS IMPLEMENTATION

The previous chapter demonstrates how the three principal international human rights compliance mechanisms interact and connect, how they (in principle) complement each other, and how, through the recommendations they produce, they reinforce one another's operation and delivery - thus powering (again, in principle) domestic implementation and impact.

Notwithstanding these important findings, it is clear that implementation does not happen automatically, by default; but is rather dependent on the follow-up actions of States at domestic level. Most importantly, to unlock the mutually complementary and mutually reinforcing nature/potential of the output (i.e. recommendations) of the three compliance mechanisms, and to then use that output to drive improved national implementation and compliance, States must first combine or 'cluster' recommendations from the three mechanisms, and should then feed those clusters into a single national mechanism for implementation, reporting and follow-up (NMIRF).

CLUSTERING

This practice, known at the UN as 'clustering,' emerged during the early years of the UPR process, as States and officials at OHCHR sought to find ways to make the output of that process (i.e., recommendations) more manageable for the State-under-review.

Council resolution 5/1¹²⁷ establishing the institution-building package (IBP) of the Council, including the modalities for the operation of the new UPR mechanism, made clear that recommendations (with those recommendations that enjoy the

support of the State-under-review clearly referenced) would be a key part of the outcome of the process, and created a system of ‘troikas’ (made of up three Council member States) to facilitate reviews, collect and collate recommendations, and help prepare the outcome report. This was to happen in consultation with the State-under-review, and with the assistance of OHCHR. The outcome report would consist of ‘a summary of the proceedings of the review process, conclusions and/or recommendations, and the voluntary commitments of the State concerned.’¹²⁸

During the Council’s five-year review in 2011, States reflected on how the new mechanism was performing and how the modalities might be refined as the UPR moved into its second cycle. A key point of discussion, in this regard, was the rapid growth in the number of recommendations being received by States, and how to make this expansion manageable. At the end of the five-year review, Council members decided (with resolution 16/21) to maintain the role of the troikas in facilitating the reviews and preparing the outcomes (with assistance from OHCHR), but added the stipulation that ‘recommendations contained in the outcome of the review should preferably be clustered thematically [emphasis added] with the full involvement and consent of the State under review and the States that made the recommendations.’¹²⁹

As a result of this innovation, the second and third cycles of the UPR have seen subtle yet important changes in the format of the outcome report. During the first cycle, recommendations were listed in the order they were received, irrespective of the issue they addressed. From the second cycle onwards, the troika, with the assistance of OHCHR, began organising the lists of recommendations by broad themes or groups of rights (for example, starting with all recommendations related to the ratification of international treaties, then presenting all recommendations related to equality and non-discrimination, etc.) Even more importantly, efforts began to be made by the troika, with the consent of the State-under-review and the States that made the recommendations, to merge or combine demonstrably similar recommendations (i.e., recommendations calling on the State-under-review to undertake one particular action, even if the exact wording used in each recommendation might vary). For example, during the second and third cycles, the UK’s outcome reports listed the following combined recommendations relating to the International Convention on the Rights of Migrant Workers (ICRMW):

Ratify the ICRMW (Egypt, Guatemala, Sudan)/Accede to the ICRMW; (Uruguay, Iran).

Recommendation 110.18, UPR of the UK, second cycle, 24 May 2012

‘Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,’ (Kyrgyzstan) (Philippines) (Algeria) (Egypt).

Recommendations 134.24, UPR of the UK, third cycle, 4 May 2017

The above represent examples of clustering within a single mechanism (e.g., UPR). However, even more powerful, as an aid to implementation, is the clustering of recommendations within and between mechanisms – i.e., the collation and clustering of all recommendations received by a State through its interactions with UPR, Treaty Bodies and Special Procedures. The theoretical foundations of this type of clustering are set out in the preceding section of this report: i.e., a given State will tend to face a relatively limited number of core human rights challenges, and the recommendations of all three main UN compliance mechanisms will, by definition, tend to focus on those core concerns. By extension, there will be a high degree of overlap between the recommendations generated by the three mechanisms. By collating and clustering substantively similar/same recommendations (even if the precise wording used is different), a State can, therefore:

- Make the process of implementing recommendations at national level more manageable (because, instead of having to coordinate implementation actions for 500 recommendations over a 4-year period, the State would have to coordinate implementation for only, say, 50 clusters of recommendations).
- Prioritise recommendations/human rights challenges – if a State finds that, by clustering recommendations from all the mechanisms, it has several large clusters (i.e., lots of substantively similar/same recommendations on a few subjects), then it stands to reason that those issues represent an important ‘compliance gap.’ In other words, if a State has large clusters of recommendations calling on it to protect, for example, the right to water and sanitation in domestic legislation, or to establish a national preventative mechanism on torture, then it suggests that the State faces important challenges in these areas and should prioritise the implementation of relevant recommendations.
- Leverage the complementary power of the three compliance mechanisms and their recommendations – as noted in Part II, each of the three main UN compliance mechanisms has its own characteristics and strengths (and weaknesses) and, importantly, those strengths complement one another (and help compensate for each mechanism’s weaknesses). Thus, by clustering the recommendations generated by all three mechanisms, a State in effect combines politically powerful (but often inexact) UPR recommendations, with politically astute and nuanced Special Procedures recommendations, and legally detailed Treaty Body concluding observations.

This cross-mechanism clustering was first proposed in a 2012 report by the then High Commissioner for Human Rights, Navi Pillay, on Treaty Body strengthening. The report, which was developed on the basis of ideas gathered through expert and civil society consultations, offered a number of revolutionary (for the time) proposals including, *inter alia*:

- States were encouraged ‘to establish or reinforce a standing national reporting and coordination mechanism (SNRCM).’ This new

type of mechanism, argued the High Commissioner, ‘should be able to deal with all UN human rights mechanisms requirements with the objectives of reaching efficiency, coordination, coherence and synergies at the national level.’ (Today, the acronym SNRCM has been replaced by NMIRF – see below).

- SNRCMs should be linked with the new (at the time) Universal Human Rights Index database (UHRI – see below for more information), which collates and thematically clusters all recommendations from each of the three human rights mechanisms, as extended to each UN Member State.

- All recommendations from all human rights mechanisms should be clustered (by States at national level – preferably within in SNRCM) thematically and/or operationally (according to the institution(s) responsible for implementing them).

CONCEPTUAL CONFUSION

Notwithstanding this progress, the concept of ‘clustering’ in the UPR (and in the wider human rights arena – see below) remains an imperfect and often confused science. The reasons for this can be traced back to resolution 16/21 and the rather imprecise and circumscribed agreement that ‘recommendations contained in the outcome of the review should preferably be clustered thematically with the full involvement and consent of the State under review and the States that made the recommendations.’¹³⁰

At one level, this has led to problems of definition. Put simply, ‘be clustered thematically’ means different things to different people. Moreover, these differences in understanding appear to shift over time. Some understand ‘clustering’ to be the act of organising recommendations by broad theme or group of rights. For example, all recommendations relating to the ratification of/accession to a given treaty, or all recommendations related to civil and political rights, and, within that broad category, all recommendations related to the right to life, liberty and security of the person, might be grouped/ listed together.¹³¹ Others adopt a far more extensive interpretation of the Council’s call for recommendations to be ‘clustered thematically,’ based on the idea that, in addition to grouping/ organising recommendations by broad theme, demonstrably (substantively) similar/same recommendations should be combined (see above examples from the UK’s UPR). Others ‘muddy the water’ further by also using the term ‘clustering’ to refer to the division of UPR recommendations between those that were accepted by the State-under-review, and those that were not.¹³²

At another level, the stipulation that clustering should happen ‘with the full involvement and consent of the State under review and the States that made the recommendations’¹³³ has led to the unequal application

of the methodology. Some States-under-review have remained nervous about combining individual recommendations, even where they understand the reasons and benefits (i.e., making the process of UPR review and domestic implementation more manageable) of doing so. In many other cases, recommending States have refused to countenance the idea of their recommendation(s) being merged or combined with others, either for the (unfounded) reason that it might dilute or otherwise weaken their recommendations, or (more likely) because it touches upon issues of national pride. Even the troikas themselves, which are ultimately responsible for clustering and for the overall review outcomes, can often drag their feet or adopt a cautious/ conservative stance. All of this is exacerbated by a situation in which OHCHR has limited resources for the administration of hundreds of State reviews and the processing of thousands of recommendations, in which there are strict time constraints between the review in the UPR working group, and the provisional adoption of the outcome (by the Working Group), and in which recommendations can often take the form of ‘compound recommendations’ containing numerous sub-recommendations.

‘TRUE CLUSTERING’

In the view of URG, true ‘clustering’ means both the organisation or grouping of recommendations by broad theme and/or groups of rights, and, within that picture, the combination or distillation of demonstrably (substantively) similar/same recommendations (i.e. recommendations that may be worded somewhat differently but that are in-effect calling on the State-under-review to do one particular thing). Crucially, this must happen at national-level, preferably by the country’s NMIRF (see below) using a national database of recommendations.

It is only by combining both dimensions of clustering, that:

- The process of receiving, processing, implementing and reporting on UPR recommendations is made more manageable, especially for Small States and other developing countries. When one considers that over the course of the UPR’s four-and-a-half-year review cycle, States will receive, on average, around 200 recommendations each (some, such as Cuba and the US receive upward of 350), in addition to recommendations received following Special Procedures missions and Treaty Body reviews (see below), the importance of this point becomes clear.

- The complementary and mutually reinforcing character of the three UN compliance mechanisms, and their recommendations, comes into play (and, conversely, that concern over duplication and overlap are resolved).

The concept of clustering may have begun in the context of the development of the UPR, and been further

elaborated in the context of Treaty Body strengthening, but it has rapidly become an idea and movement with implications for all three main compliance mechanisms, and indeed of the entire international human rights system.

As with the clustering of UPR recommendations, the genesis of system-wide clustering stemmed from a determination, on the part of OHCHR and a number of NGOs, including URG, to make engagement with the human rights compliance mechanisms more manageable for States (i.e., make the system more accessible and productive), especially small developing States, and thereby to support improved domestic implementation.

A key moment in the development of a more expansive understanding of clustering came during the preparatory process for the third Glion Human Rights Dialogue (Glion III), which looked at ‘Human rights implementation, compliance and the prevention of violations: turning international norms into local reality.’¹³⁴ During a policy dialogue hosted by the Permanent Mission of Thailand on 17 February 2016, many developing States complained that they were increasingly overwhelmed by the number of recommendations received from the international human rights mechanisms. One diplomat remarked that: ‘We are drowning beneath a sea of recommendations.’ In response, representatives from OHCHR’s UPR branch, and from URG, described the possible role of system-wide clustering, as a means of reducing the burden of cooperating with the UN human rights mechanisms, and as a means of strengthening domestic implementation. The OHCHR official explained that: ‘Although a given State may receive hundreds of recommendations, from the UPR, Treaty Bodies and Special Procedures over the course of a year, if those recommendations are clustered (so organised/grouped, and demonstrably ‘same’ recommendations combined) then hundreds quickly becomes tens.’ Building on this point, a representative from URG explained that this process, as well as making engagement

and cooperation easier, has a number of other advantages. ‘By clustering recommendations from all three mechanisms, a given State can immediately benefit from the complementary strengths of those three mechanisms, and can build-up a picture of the key human rights challenges it faces and how to overcome them.’ ‘For example,’ he continued, ‘if, through the process of clustering, a hundred recommendations become twenty, and nearly all of those key clusters relate to freedom of religion, violence against women, and the right to water and sanitation, then it is clear that these represent important gaps in domestic implementation, and thus should be priority concerns (i.e. a focus of national implementation efforts) for the State concerned.’ One State speaker agreed with this analysis, explaining that, in theory, correctly organised and clustered recommendations from the UN mechanisms can provide, in principle, ‘a national blueprint for human rights reform.’

In parallel to these developments, OHCHR was also taking steps to redesign the Universal Human Rights Index¹³⁵ (UHRI) – the one-stop-shop web-portal built to collate and present all the recommendations received (from each of the three compliance mechanisms) by every UN Member State. Previously, the UHRI had presented a rather confused and difficult to use collection of recommendations received – in no particular order. However, with the improvements, the UHRI now presents recommendations in thematic clusters, guided by a new and detailed classification system.¹³⁶

Notwithstanding, as noted above the key place where clustering should take place, and where the complementary and mutually-reinforcing nature of the recommendations of the three mechanisms should be combined and organised into a living ‘national blueprint for human rights reform,’ is at national-level. In an increasing number of countries, this is done through single national databases for international human rights recommendations, managed by national mechanisms for implementation, reporting and follow-up (NMIRFs).



NATIONAL MECHANISMS FOR IMPLEMENTATION, REPORTING, AND FOLLOW-UP (NMIRFS)

Over recent years, a number of States (mainly Small States) from different world regions have begun to move from traditional, fragmented approaches to the national management and implementation of UN human rights recommendations, to more holistic and integrated strategies. Previously, the implementation and reporting processes employed by these 30-40 pioneer States had been entirely ad hoc, with different processes, led by different ministries, employed depending on the UN mechanism in question, and depending on the subject matter covered by that mechanism. These might be, for example, a 'UPR working group' led by the foreign ministry or justice ministry, or a cross-ministerial 'women's rights task force' led by the gender ministry and responsible for implementing recommendations received from the UN Committee on the Elimination of Discrimination against Women. Driven, it seems, by acute capacity constraints (which explains why many of the pioneering countries are Small States) and by a dawning realisation that these ad hoc and fragmented implementation/reporting procedures were inefficient and duplicative, these States (e.g. Paraguay, Ecuador, Samoa, Bahamas, Seychelles, Portugal) began to develop single national mechanisms that could potentially manage, coordinate the implementation of, monitor the impact of, and organise international reporting on, all human rights recommendations from all the different international and (where relevant) regional mechanisms. Today, these mechanisms are known as 'national mechanisms for implementation, reporting and follow-up' (NMIRFs).

NMIRFs are single (often standing/statutory) national mechanisms within government (supported at a high political level), mandated to receive all UN (and regional) human rights recommendations, cluster and prioritise those recommendations, and then coordinate implementation across a system of 'focal points' in relevant line ministries, as well as with parliamentarians, judges and lawyers, the police and other agencies of the State. NMIRFs also regularly request progress updates from these 'implementation focal points' and generate (in a streamlined manner) periodic reports for submission to the UN. More advanced NMIRFs also consult, on a systematic basis, NGOs, NHRIs and, in some cases, international development partners.

By including and engaging all relevant departments of government, State agencies, parliamentarians, judges and lawyers, NHRIs, and civil society, NMIRFs help turn implementation and reporting from a bureaucratic process into a democratic process. This 'democratisation of implementation' offers huge benefits for both human rights and for sustainable development,¹³⁷ (see below).

Many NMIRFs (e.g., Paraguay, Ecuador, Mexico, Samoa) have developed (with UN support), 'NMIRF software' – in effect national

databases of clustered human rights recommendations, showing responsible line ministries, progress updates, and – sometimes – impact indicators. This software automatically communicates and coordinates with the implementation 'focal points,' and is usually linked with a publicly accessible website – so that members of the public, NGOs, parliamentarians and NHRIs can track progress and hold governments to account.

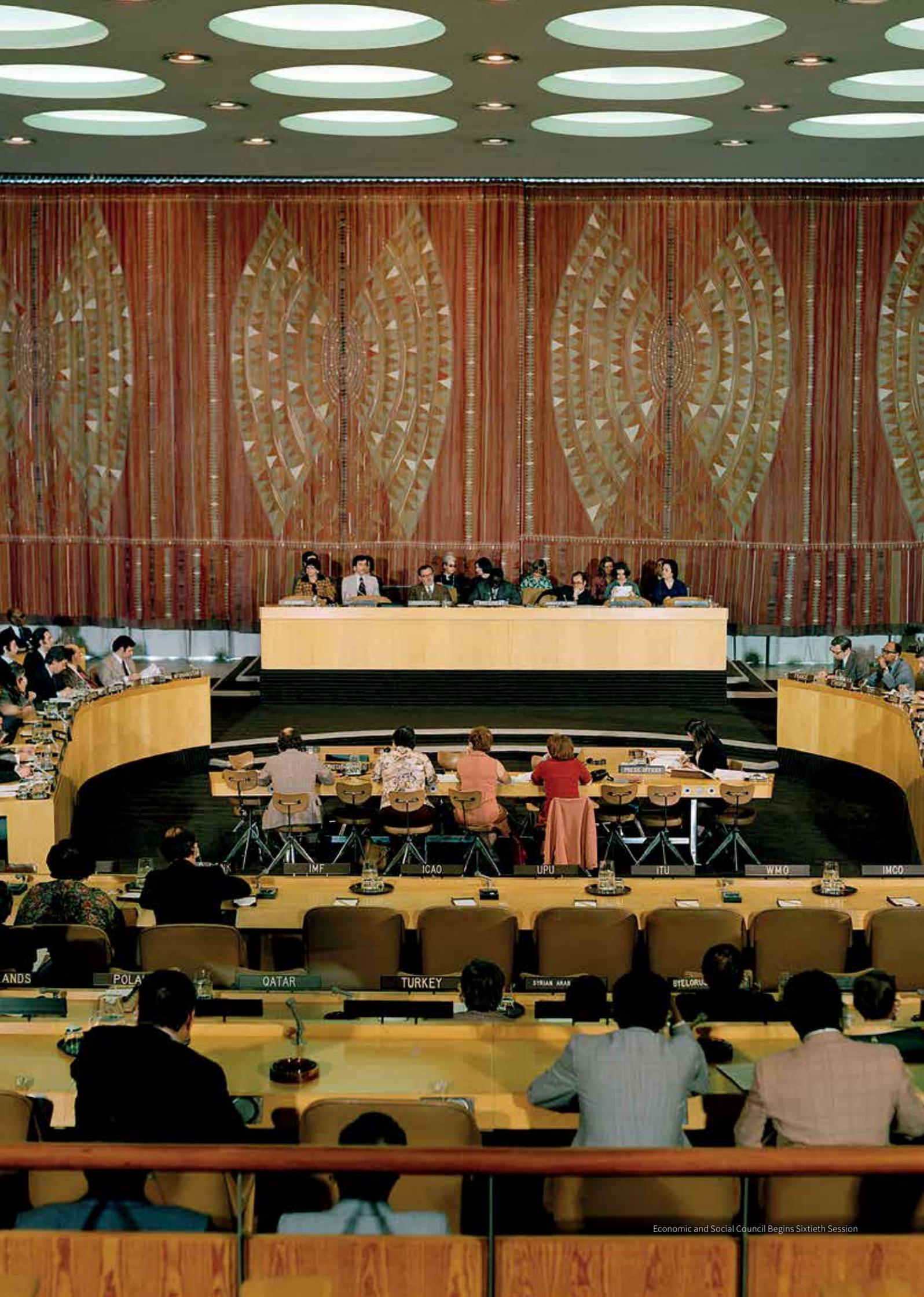
Some NMIRFs (and the software they employ), for example in Paraguay and Ecuador, are also used to report on progress towards the Sustainable Development Goals (SDGs) and targets (see below). Notwithstanding, even in these countries, NMIRFs are still primarily focused on human rights implementation (the link with SDGs is, at the moment, mainly done for informational and in-government advocacy purposes). Indeed, even in countries with relatively sophisticated NMIRFs, there is usually another, completely separate, institution or mechanism responsible for coordinating the implementation of the SDGs. UN Member States are increasingly coming to the understanding that this does not make sense.

INTERNATIONAL HUMAN RIGHTS RECOMMENDATIONS AND THE 2030 AGENDA

The 2030 Agenda for Sustainable Development is, at its heart, a human rights agenda. Over 90% of the SDG targets are grounded in international human rights law.¹³⁸ Even the central premise of the SDGs, i.e., 'leaving no one behind,' is founded upon human rights principles such as equality and non-discrimination.

During the 37th session of the Human Rights Council in March 2018, Chile, Denmark and over 70 other States tabled a new resolution on 'the promotion and protection of human rights and the implementation of the 2030 Agenda for Sustainable Development.'¹³⁹ The resolution, which was adopted by consensus, is centred on a conviction that, from a State perspective, human rights implementation and reporting, and SDG implementation and reporting, are mutually complementary, mutually-interdependent, and mutually-reinforcing.

In other words, where States are able to collate, cluster, manage, drive the implementation of, and efficiently report on, all the recommendations they receive from the UN's human rights mechanisms, they are also, by definition, making important progress towards the implementation of, and reporting on, the SDGs and targets. This is especially important when one considers that the SDGs are political commitments, whereas human rights norms are international legal obligations; and that the compliance mechanism for the SDGs, the High-Level Political Forum (HLPF) in New York, is rather weak – especially in comparison with the international human rights compliance mechanisms.



Economic and Social Council Begins Sixtieth Session

PART

04

CONCLUSIONS AND RECOMMENDATIONS

As the UN human rights mechanisms have emerged and evolved over the past fifty years, they have (generally speaking) done so in parallel, each developing its own working methods and outputs. As the first to develop, Treaty Bodies and Special Procedures both saw themselves as institutionally separate. Partly as a consequence, States also treated them as such. With the establishment of the UPR after 2007, a third de facto silo was added.

Today, State delegations to the Human Rights Council, national foreign ministries and relevant line ministries, NGO representatives, and UN officials, continue to both perceive of, and act towards, the three mechanisms as institutionally distinct and different. This perception is reinforced by the attitudes of Treaty Bodies members and Special Procedures mandate-holders themselves, who tend to see their own challenges, objectives and work in isolation, rather than with an eye on the system as a whole.

Two particular (negative) consequences of this compartmentalization of the international human rights system are that: first, a view has taken hold that the three mechanisms operate in competition or tension, and may even critically undermine each other; and second, States, especially developing States, often struggle to report to, and implement the recommendations of, (up to) nine Treaty Bodies, myriad Special Procedures, and the UPR.

Notwithstanding, as this report seeks to demonstrate, the three mechanisms actually have the same fundamental purpose and each executes its mandate in broadly the same way. Each mechanism works through engagement and cooperation with States; each seeks information from national civil society; each seeks to review and assess levels of State compliance with international human rights obligations and commitments; and

each produces recommendations to States on how to improve performance and compliance in the future. The mechanisms are, in short, three parts of a single international human rights compliance engine.

Crucially, the three mechanisms are complementary parts of that single compliance engine. The particular characteristics, strengths and weaknesses of each mechanism complement the characteristics, strengths and weaknesses of the others. The UPR provides political-level peer-to-peer encouragement to States to make progress in the field of human rights, Treaty Bodies offer detailed legal assessments and counsel, while Special Procedures, by undertaking country missions, are able to provide more politically realistic and nuanced analyses of State performance.

This means, in turn, that the recommendations generated by the three mechanisms are also complementary and mutually reinforcing. This point, together with the fact that any given State will usually face a relatively limited number of (principal) human rights challenges, and that – as a consequence – most of the recommendations it receives will tend to focus on those key challenges, leads to an important conclusion: that it is time for States to stop receiving, managing and coordinating the implementation of recommendations on a case-by-case basis, depending on whether they have been received from a Treaty Body (and, by extension, from a particular Treaty Body), from a Special Procedures mandate (and again, by extension, from a particular mandate), or from the UPR. Instead, States should see recommendations, irrespective of their origin, as the common and mutually reinforcing output of a single UN human rights compliance engine, and therefore as a body of advice/guidance that should be considered and acted upon jointly and holistically.

In other words, States should collate and cluster all recommendations received from all relevant mechanisms. These should be managed in a single national database of recommendations, and their implementation coordinated by a single national mechanism for implementation and follow-up (NMIRF). This would in turn allow for prioritization of action (if a State has received a large number of recommendations, from all mechanisms, on torture prevention, then this should be a particular priority for the government), for progress to be more easily tracked and impact/progress more easily measured, and for periodic compliance reports (i.e. back to the mechanisms) to be more easily generated (because all relevant information is contained in a single national dataset).

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