

Malaysia's Human Rights Performance: Assessment of its First Session of Universal Periodic Review in the United Nations Human Rights Council

Ying Hooi Khoo
University of Malaya

Abstract

Since its inception, the Universal Periodic Review (UPR) has been subjected to a substantial amount of criticism. The mechanism began functioning in 2008, however little has been made known about the roles and functions of the UPR. This article explicitly examines the first UPR process of Malaysia in 2009, in order to illustrate how the mechanism operates in practice by highlighting the engagement of Malaysia government with the stakeholders, the follow-up process and the main issues concerned. This article argues that in spite of the excellent diplomacy skills that were portrayed by the Malaysian government in the UPR session, the human rights situation in the country has not improved much. This paper seeks to determine how effective the UPR has been at encouraging human rights reforms nationally by analyzing and assessing the implementation actions of the Malaysian government in response to their accepted UPR recommendations.

Introduction

The United Nations General Assembly Resolution 60/251 of 15 March 2006¹ established the United Nations Human Rights Council (hereinafter referred to as the Council) and included the Universal Periodic Review (UPR) as one of its function under paragraph 5(e). The Resolution was adopted by the General Assembly by a majority vote², after five months of protracted negotiations (Meghna 2006, pp. 11-12) with the objective of being less politicized and selective than its predecessor, the Commission on Human Rights (CHR) (OHCHR 2010, p. 3). The CHR was widely perceived as ineffective in its mission to 'weave the international legal fabric that protects fundamental rights and freedoms'³. The Council was therefore

¹ A/RES/60/251 of 15 March 2006, para 5 (e).

² A/RES/60/251 was adopted with 170 votes to 4 (United States, Israel, Marshall Islands and Palau), and 3 abstentions (Belarus, Venezuela and Iran).

³ The UN Commission of Human Rights was established in 1946 with the intention to this particular purpose. Initially formed by only 53 member states, the roles were expanded from time to time to allow it to cover the holistic human rights problems.

created with the introduction of several mechanisms, among them the UPR, to better facilitate the advancement of that particular mission. The Resolution provides that:

The Council shall undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies⁴.

By nature and by its structure, the UPR is clearly a state-driven exercise. All state actors repeatedly emphasized impartiality, tolerance, cooperation and a harmonious approach in order to conduct a UPR. Such an approach is unique because the mechanism was introduced to consistently and periodically scrutinize a member state on their human rights records on the ground.

According to the UN Secretary General, Ban Ki-Moon, the UPR ‘has great potential to promote and protect human rights in the darkest corners of the world’. On 7 April 2008⁵, the UPR mechanism began functioning. While many parties challenge the effectiveness of this process, there has been very little research conducted to evaluate the process and implementation of the mechanism.

Literature on Universal Periodic Review

Overall, there have been very limited academic writings on UPR. Since its inception, the UPR has been subjected to a substantial amount of criticism from particularly the stakeholders. The following literatures generally provide constructive criticisms and valuable of the UPR process and implementation. Of particular highlight is, nonetheless, the usage of the mechanism for political purposes.

Mutual Praise Society, produced by UN Watch, is one of the earliest analyses of UPRs. This study found that ‘out of 55 countries examined including all 47 members of the UN Human Rights Council, only 19 had average scores indicating that overall, the countries whose reviews were analysed, had contributed positively’ (UN Watch 2009, pp. 3-4). UN Watch

⁴ A/RES/60/251 of 15 March 2006, para 5 (e).

⁵ The 1st Session of the UPR took place from 7-18 April 2008, with the review of 16 UN member states: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, United Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, the Czech Republic and Argentina.

was critical of such a congratulatory report, noting the effect of bloc voting on the peer review process. It called on free democracies to act as free democracies in carrying out the UPR process and urged countries not to overlook information on human rights violations submitted by NGOs and to permit a greater role for NGOs in the review process itself.

Universal Periodic Review: An Ambivalent Exercise, published by the International Federation of Actions by Christians for the Abolition of Torture (FIACAT), addresses similar issues. In the report, FIACAT notes that the review process is institutionally weak and allows countries to make selective choices where they could categorically reject relevant and important recommendations. FIACAT observes that: ‘the reviews of some countries presented a singular problem: a lack of objectivity. Indeed, on several occasions there was a clear contradiction between the image portrayed of a country at the conclusion of its review... and the issues raised by special procedures, treaty bodies and NGOs’ (2009, pp. 15-16).

Curing the Selectivity Syndrome, published by Human Rights Watch, also criticizes the response of countries to recommendations particularly in the implementation stage. This report discusses the ‘absence of clear responses’ by some countries and notes that, ‘without such responses, the UPR cannot achieve its purpose of fostering tangible improvements in the protection of human rights. Failure by states to make clear commitments limits the Council’s ability to measure or follow up progress on the ground’.

Based on the first cycle of the UPR, McMahon (2012) considered the UPR process an evolutionary process and not revolutionary. He notes that although first cycle of the UPR has resulted in many positive elements, one significant finding is that the UPR still functions through a regional prism. For example, states in Asia and Africa particularly tend to take a softer approach in addressing human rights among themselves. While the UPR’s support from the states may be broad enough because no state refused to take part in the UPR process, this does not necessarily mean that UPR is a robust mechanism.

Contrary to most of the other reports, Dominguez Redondo (2012) argued that the UPR as a non-confrontational approach to human rights implementation can have an added value provided it acts as a supplement to other work by the UN Charter and treaty-based bodies. Beyond the “naming-and-shaming” approach, this article suggests two key outcomes of the UPR. First, the existence of the compilations of human rights information at country level can

be used as the basis of follow-up for improving human rights in every State. Second, the UPR could contribute to the sources of international human rights.

Generally, most of the reports tend to lean towards the negative or rather unsuccessful in their consideration of the implementation of the UPR. At its core, the UPR represents a new and largely untested forum in which states make policy recommendations to each other. The multilateral context in which it functions is highly complex and sensitive. To date, there is limited information and analysis about the actual functioning of the UPR, and virtually no related comparative analysis in the literature (McMahon 2010, p. 5).

The Universal Periodic Review Mechanism

The detailed basis for the UPR mechanism was set out under the Council Resolution 5/1 of 18 June 2007. There are six purposes of the UPR: (a) the improvement of the human rights situation on the ground; (b) the fulfillment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state; (c) the enhancement of the state's capacity and of technical assistance, in consultation with, and with the consent of, the state concerned; (d) the sharing of best practice among states and other stakeholders; (e) support for cooperation in the promotion and protection of human rights; (f) the encouragement of full cooperation and engagement with the Council, other human rights bodies and Office of the High Commissioner for Human Rights (OHCHR)⁶.

Under this resolution, the UPR reviews, in a four-year cycle, the fulfillment by each of the United Nations' 192 member states of their human rights obligations and commitments. So to speak, the mechanism oversees and evaluates the human rights records and addresses human rights violations of each member state. At the same time, it allows the opportunity for all member states to declare their actions in improving their human rights situation and to overcome challenges to the enjoyment of human rights. The mechanism also intends to enhance the capacity of member states to deal effectively with human rights challenges and for them to share best practices around the globe. Recommendations are presented by interested parties and can be accepted or turned down by the state under review (SuR).

⁶ Human Rights Council Resolution 5/1 of 18 June 2007.

The Human Rights Council established a special Working Group for UPR⁷ consisting of all 47-member states to conduct the UPR, with the Council president of the year as chairperson. One of the reasons for creating the UPR was that, previously, the UN mechanisms focused too much on certain regions. Therefore, the UPR was designed to be more universal and consistent in its approach. For example, the examinations of the states' human rights records are based on the Universal Declaration of Human Rights (UDHR) and UN Charter together with the human rights conventions to which the individual state is party. International humanitarian law, recommendations from Special Procedures and other UN mechanisms, voluntary pledges and commitments including those undertaken when presenting candidature for election to the Council⁸ are also included. That basically forms the basic criteria of review.

In accordance with its institution-building package, there are three documents on which state reviews should be based. These are information prepared by the state concerned, which could be presented either orally or in writing; information contained in the reports of treaty bodies and Special Procedures, to be compiled in a report by the OHCHR; and information provided by other relevant stakeholders to the UPR including non-governmental organizations (NGOs), national human rights institutions (NHRIs), human rights defenders, academic institutions and research institutes, as well as civil society representatives.

In one of the earliest studies on the UPR mechanism, Rathgeber (2008, p. 2) put forward five expectations of the potential contribution of the UPR. According to him, the UPR could: contribute to reveal the truth on human rights violations; do justice to victims of human rights violations by exposing the violations; suggest ways of rehabilitation for such victims by strengthening the national law and justice system; and last but not least, prevent gross human rights violations and improve the situation on the ground by focusing international attention on human rights.

Apart from creating the domestic momentum for human rights strengthening, the UPR also provides legitimization and entry points for NGO stakeholders' engagement with governments. On top of that, the UPR too provides a forum and catalyst for extensive human rights dialogue between the SuR and recommending states, and the international institutions

⁷ Working Group on UPR holds three sessions per year.

⁸ Human Rights Council Resolution 5/1 of 18 June 2007.

(McMahon 2011, p. 4). It is worth mentioning that some countries make full use of these salient positive characteristics that have assigned to the UPR.

Malaysia's Experience in the Universal Periodic Review

The UPR provides an important opportunity to hold the Malaysian government to account for its domestic human rights records. The political significance of the mechanism is that it allows other countries to examine Malaysia's human rights records. As of now, Malaysia remains in the bottom 10 countries in the UN on its human rights treaty ratification record. Malaysia has only ratified three of the nine treaties, namely the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). Most importantly, it has not ratified the two major human rights treaties; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Malaysia is also being criticized because of its reluctance to permit the UN Special Rapporteurs to visit Malaysia.

According to Council Resolution 5/1 of 18 June 2007, states are encouraged to prepare the information they submit through a broad consultation process at the national level with all relevant stakeholders. In the case of Malaysia, that refers directly to the Human Rights Commission of Malaysia (SUHAKAM) and various NGOs and civil society representatives. Aside from the state's submission of its UPR, SUHAKAM and other stakeholders may also submit separately their own reports for the UPR on Malaysia.

There are basically two stages in the UPR process. The first stage involved the 3-hour interactive debate, which took place at the 4th Session of the UPR on 11 February 2009. The draft report was subsequently adopted on 13 February 2009. It contained 62 recommendations that enjoyed the support of Malaysia. Malaysia rejected 22 recommendations and reserved comments on 19 recommendations. The second stage was the tabling of the UPR outcome report on Malaysia; this took place on 12 June 2009 at the 11th Regular Session⁹. This time a draft report of the outcome of the review prepared by the UPR

⁹ The Council holds three regular sessions per year, including a main session, for a total duration of no less than ten weeks.

Working Group was adopted. The response to the 19 reservations was also provided on the same day.

a) First Stage – 4th Session of the UPR, 11 and 13 February 2009

On 11 February 2009, the UPR process involved a three-hour interactive dialogue in the UPR Working Group between Malaysia and the 47-member states of the Council and the observer states. During the session, any UN member is allowed to ask questions and make recommendations. Three Council members serve as Troika¹⁰ for the review. The state concerned has the right to request that one of the Troika members should stem from the same regional group. The state concerned can also reject one of the Troika members. Members chosen for the Troika have the right to refuse to become members of a specific Troika. The members of the Troika for Malaysia were Nicaragua, Qatar and Egypt.

Relevant stakeholders like SUHAKAM and several NGOs representatives also attended the February 2009 sessions as observers. SUHAKAM's delegation was headed by the then Chairman Tan Sri Abu Talib Othman¹¹. The NGOs' delegation was from the Coalition of Malaysian Non-Governmental Organisations in the UPR Process¹² (COMANGO), and the Indigenous Peoples Network of Malaysia (JOAS).

Malaysia brought in a large delegation of 31 officials, led by H.E. Tan Sri Rastam Mohd Isa, the then Secretary General of the Ministry of Foreign Affairs and supported by Tan Sri Abdul Gani Patail, the Attorney General as Alternate Head of Delegation. Apart from the Ministry of Foreign Affairs and the Attorney General's Chambers' representatives, the delegation also consisted of representatives of several ministries including the Ministry of Home Affairs; Ministry of Women, Family and Community Development; Ministry of Higher Education; Ministry of Unity, Culture, Arts and Heritage; Ministry of Housing and Local Government; Ministry of Education; Ministry of Defence; National Security Council, Department of Orang Asli Affairs; Legal Affairs Division of the Prime Minister's Office; Sarawak State Office and the Permanent Mission of Malaysia to International Organizations in Geneva.

¹⁰ Three countries chosen from Council members of the regional groups Asia, Africa, Latin America and the Caribbean region, East Europe, Western states and others.

¹¹ Also attended was former SUHAKAM Commissioner Dato' Choo Siew Kioh and the writer whom was formerly the Head of International Issues and Cooperation in SUHAKAM.

¹² The COMANGO comprises more than 50 Malaysian NGOs.

Tan Sri Rastam in his opening presentation reaffirmed that Malaysia's UPR was prepared in consultation with civil society and SUHAKAM. Nevertheless the presentation highlighted the country's composite nature, being made up of various cultures, religions and ethnicities. He said that Malaysia's efforts to secure the promotion and protection of human rights and fundamental freedoms for its people had been much focused on achieving inter-racial harmony within the society, with equitable socio-economic development and concern for the human rights and fundamental freedoms of the individual. He further highlighted that individual rights come with the responsibility of maintaining national unity and security (SUHAKAM Bulletin 2009, pp. 10-11).

He defended the human rights record in the country by quoting that the basis for the promotion and protection of human rights in Malaysia was enshrined in the Federal Constitution, as the primary source of law in Malaysia. Basically, the issues that served as the focus of his presentation were derived from economic, social and cultural rights such as the importance of poverty eradication as a major effort for promoting and protecting human rights. For example, in order to improve the quality of life and well-being of the Malaysian population, the government placed great emphasis in providing adequate, affordable and quality housing for the people. He also drew attention of the Working Group towards some discrepancies in the UN compilation report. The report highlighted specific communications addressed to Malaysia and noted where the government had not responded to particular communications (SUHAKAM Bulletin 2009, pp. 10-11).

During the three-hour interactive discussion, delegations noted a number of positive achievements of Malaysia. Most states complimented Malaysia's achievements in the promotion and protection of human rights despite the challenges of its multi-cultural background. They also offered constructive criticism and made specific recommendations. The delegation acknowledged Malaysia's shortcomings and did its best to provide detailed and frank responses. Nevertheless little attention was given to concerns put forward by the NGOs and addressed in the OHCHR compilation report.

A few states made critical remarks and raised questions on some of the issues as follows: Malaysia is not party to major international conventions on human rights; there is a lack of and general vagueness in legislation concerning migrant workers and refugees, and the resulting abuse of migrant workers; there is discrimination against lesbian, gay, bisexual and

transgender persons in legislation and in particular the criminalization of homosexuality; there is repression of fundamental freedoms, such as freedom of expression and association, as well as arbitrary arrests related to the exercise of these; capital punishment persists for a wide range of crimes; there is a need to share the best practices on reducing the poverty levels and so forth.

On 13 February 2009, a total of 30 minutes was allocated for the adoption of the report of Malaysia. Malaysia was given the opportunity to make final remarks and to indicate which recommendations it supported and which it might not and such would be identified and noted in the report. Malaysia adopted 62 recommendations in the outcome report, which included, among others, the ratification of international treaties, the review of existing laws and judicial system, national policies and strategies in human rights, economic, social and cultural rights, human rights of the vulnerable groups, foreign workers and trafficking in persons.

As noted above, 22 recommendations were rejected and comments were reserved on 19 recommendations. The response to the 19 recommendations was brought forward for the second stage on 12 June 2009, in conjunction with the tabling of the UPR outcome report on Malaysia, at the 11th Regular Session of the Council.

b) Second Stage – 11th Regular Session of the Council, 12 June 2009

The second stage in the UPR process is the adoption of the report and for Malaysia this session took place on Friday 12 June 2009. This time, H.E. Ambassador Datuk Othman Hashim, the then Permanent Representative of Malaysia to the UN in Geneva, led Malaysia's delegation. Apart from the representatives from the Permanent Representative office, the representatives of the Ministry of Foreign Affairs, Ministry of Home Affairs and Attorney General's Chambers also presented. Malaysia, as a state, submitted a written document prior to the consideration of the outcome in the plenary.

Relevant stakeholders, including NGOs and SUHAKAM, also attended the session and delivered an oral statement. The former Chairman Tan Sri Abu Talib Othman headed SUHAKAM's delegation, while the NGOs' delegation consisted of representatives from the COMANGO, and the Abolish ISA Movement (GMI).

During this session, additional time of up to 60 minutes was allocated for the consideration and the adoption of the outcome by the plenary of the Council. The 60 minutes was distributed equally among the three main entities: Malaysia; UN member states, observer states and UN agencies; and stakeholders. However, due to time constraints, states were given only 2 minutes each to raise questions and issues on Malaysia's UPR. There were 21 states inscribed to speak, but only 12 were able to do so due to time limitation. Also speaking were Malaysia's stakeholders. Apart from that, several other regional and international NGOs also took the floor, such as the Amnesty International, Asian Forum for Human Rights and Development (Forum Asia), Action Canada for Population and Development, Commission of the Churches on International Affairs of the World Council of Churches, Islamic Human Rights Commission, National Consciousness Movement, and Arab Commission for Human Rights.

Datuk Othman Hashim, the head of Malaysian delegation, said, in accepting the majority of the recommendations, that Malaysia exercised considerable flexibility with a view to effecting improvements to the human rights situation in the country. He reaffirmed that the Malaysian government since February 2009 had commenced several programs to implement those recommendations, and was committed to ensuring that they were implemented. Some of the programs mentioned were the human rights awareness and training, harmonization of national legislation with international human rights instruments and compliance with treaties that it had acceded to, and regional and international cooperation for capacity building. Taking a similar stand to that adopted by Tan Sri Rastam at the 4th Session of the UPR, he stated that Malaysia reiterated its efforts to secure the protection and promotion of human rights and fundamental freedoms for its people based on these principles of achieving inter-racial harmony within society, equitable socio-economic development, while taking into account the human rights and fundamental freedoms of the individual¹³.

During the debate session, generally the speakers were encouraged by Malaysia's cooperation during the review session in responding to the recommendations put forward by other member states, and commended the voluntary commitments presented by Malaysia towards the protection and promotion of human rights in the country. Malaysia highlighted several

¹³ Official Statement by H.E. Othman Hashim, the Permanent Representative of Malaysia, on the Adoption on Malaysia's Universal Periodic Review Outcome Report for the 11th Session of the Human Rights Council, 2-18 June 2009.

practical measures that were being undertaken to further strengthen the system for the protection on promotion of human rights, such as the establishment of a technical committee in the area of the rights of children; the consolidation of its national human rights infrastructure, and the emphasis placed on the advancement of economic, social and cultural rights¹⁴.

Malaysia's Engagement with the Stakeholders

Even though the UPR guideline documents do not oblige states to organize consultations with relevant stakeholders before and after the review, nevertheless the states are strongly encouraged to conduct proactive dialogue and broad consultation at the national level whilst preparing the national report. This is one of the main components of the UPR process. However, prior to preparing their national report, there was only one consultation organized by the Malaysian government, which was held on 21 August 2008¹⁵. Apart from that, the government did not communicate with the other stakeholders formally or on a regular basis. In general, local NGOs under the umbrella of COMANGO expressed their disappointment over the UPR exercise on Malaysia mainly due to this lack of consultation.

On the other hand, the stakeholders themselves played a much more pro-active role than the government in facilitating debate. During the 4th Session of the UPR, for example, immediately before the adoption of the Malaysia report on 13 February 2009, the regional NGO Forum Asia organized a discussion on the UPR of Malaysia. The purpose was to share views and observations after the plenary UPR session on Malaysia that morning, as well as to discuss the way forward for the promotion and protection of human rights on the national level after the session. Among the participants were members of NGOs, the SUHAKAM delegation, representatives from the United Nations of High Commissioner for Refugees (UNHRC), and several representatives from the Malaysian government delegation.

SUHAKAM, as the national human rights institution in the country, was actively involved at both the preparatory and review stages in Malaysia. It undertook steps to follow-up and monitor the implementation of the UPR recommendations. They included, among others, establishing an internal UPR Follow-up and Monitoring Committee comprising focal officers

¹⁴ Media statement by the OHCHR dated 12 June 2009.

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9370&LangID=E>

¹⁵ The author was in attendance.

of various groups and divisions within the Commission itself; conducting awareness and training programs on the importance of the UPR mechanism and Malaysia's obligations under the international human rights mechanism; engaging with government agencies and other relevant stakeholders through consultation and briefing sessions; sharing of best practices and contribution in UPR-related training materials and engaging with regional and international human rights bodies through information exchange and delivery of statements ¹⁶.

Apart from that, SUHAKAM also published an information booklet in both English and Bahasa Malaysia on the mechanism itself, which served as an awareness-raising tool regarding the UPR process. The objective was to provide an explanation on the UPR and, more importantly, to highlight recommendations that were accepted by the Malaysian government. In addition, SUHAKAM also recommended that the government include the UPR recommendations as a point of reference in the development of Malaysia's National Human Rights Action Plan (NHRAP).

SUHAKAM also submitted a mid-term progress report and delivered an oral statement on Malaysia's UPR implementation at the 18th Regular Session in September 2011 (Khaw 2012). The objective of this mid-term report was to remind the Government of the pledges made to the international community. SUHAKAM provided an interim report on the UPR implementation to the Council in its 18th session under agenda item 6. However, the Malaysian government did not provide such a report although they could have done so.

The biggest challenge for the Malaysian government is the follow-up on UPR as well as their engagement with the NGOs and NHRIs. Rathgeber (2008, p. 8) has, in this regard, also listed a number of challenges which are faced by the Malaysia government itself: to disseminate the report and outcomes of the UPR in each of the countries involved in the review; to design and propose an action plan; to discuss a time frame for implementation; to request a yearly meeting for further consultation and assessment on the implementation; to keep reporting to the Council; and to make use of further complaint procedures.

¹⁶ Datuk Dr. Khaw Lake Tee, Progress in Human Rights Over the Past Three Years, *New Straits Times*, 12 November 2012.

Preliminary Assessment on Malaysia's Performance in the Universal Periodic Review

The 4th Session of UPR revealed a procedural problem caused by the extensive list of states willing to take the floor. This situation worked to the great advantage of the Malaysian delegation. First, due to long queues for the speaker's list, the time was extended to 25 minutes before the normal time for registration (half a day before the review). Second, with too many states competing to participate, the allotted 2 hours were not enough to accommodate all. With so many states registered to speak, the number of states admitted within the time allotted was restricted to no more than 60 at the maximum, with each state given 2 minutes. In tactical consideration, in two minutes, not much can be said for or against any part of a state's UPR. Hence Malaysia was at no time under pressure and it could choose to give general replies to questions by clusters. Successful lobbying to ensure that a large number of speakers would be present guarantees the dilution of the oral impact from speakers taking to the floor. This is one of the factors which contributed to Malaysia's success in its UPR. Other countries will no doubt use the same technique in diplomatic defense when their turn comes for review.

A second point which the Malaysian government turned to their advantage was the commitment to a broad definition of human rights. The government of Malaysia made important commitments to the promotion and protection of human rights in Malaysia in its UPR and placed a heavy emphasis on the economic, social and cultural rights. COMANGO indicated that more needed to be done in accordance with the spirit of the UDHR 1948. COMANGO had highlighted issues such as: the implementation of the CRC with particular reference to the right of children to make decisions; standing invitation to the Special Procedures; the right of assembly and freedom of expression; and the lack of consultation on the appointment of members in the Judicial Appointment Commission. The Malaysian delegation opted not to respond to critical questions particularly on civil and political rights and gave no concrete commitment to improve the situation. Some of the sensitive issues were not attended to or appropriately responded to by the government, for example, the welfare of the foreign workers, as well as refugees and asylum seekers.

A third factor which can work in the favour of any state is that the UPR is an inter-governmental process, which means that states are judging states. It is easy to see that eventually no state would care to be over critical of another state's performance as one day that state itself would be open to similar scrutiny. Again, as had happened to the defunct

Human Rights Commission, political alliances and bilateral relations among the states of the world are very likely to undermine the UPR process.

The Malaysian government undertook the UPR exercise as a major diplomatic event to defend its record and performance on human rights. For that purpose it had brought along one of the largest delegation of senior officials from every relevant Ministries and agencies including the Attorney General. If we examine the dynamic, rhythm and language used during the UPR on Malaysia, be it written or oral statements, they clearly indicate the excellence of diplomacy skills at the international level. The Ministry of Foreign Affairs had also done extensive lobbying amongst friendly countries to gain support or at least neutrality in their statements. The government operation was a success because it minimized exposure on weaknesses of performance and utilized the constraints of time to circumscribe the length of discussion. The irony was that the government's success meant that critical issues of human rights concern were obfuscated.

The UPR nevertheless has some positive aspects. In the process, important documentation becomes available to the public on the human rights situation of the country under review. The final report adopted by the country under review with a list of recommendations could be used as a catalyst to ensure full and prompt implementation of the outcome of the review. The UPR has been a great challenge for not only the Malaysian government, but also to SUHAKAM and the NGOs who have worked to elicit commitments and obligations from the government to promote and protect human rights. The UPR has been a catalyst for the civil society stakeholders, both NHRIs and NGOs, to take stock of their own national performance as well as for governments to change their general approach to policy making on human rights issues.

There is the risk that the state-driven consensual approach will become a template for all other assessments, including even Special Procedures and the High Commissioner's reports. Although the focus of the UPR is such that it should not be possible for it to substitute for other mechanisms which evaluate the situation in countries, nevertheless, the current approach of the Council means that there is the possibility that a UPR may overlap with other mechanisms.

Another negative aspect of the UPR process is the poor outcome in terms of a genuine and immediate improvement for the human rights situation on the ground. These limited outcomes have been critically assessed by several NGOs and NHRIs. For example, the national NGO coalition from Indonesia expressed their utter disappointment with the process and showed their regret by suggesting that UPR may take on a new meaning, now standing for 'Universal Periodic Rhetoric'. Through this phrase, these Indonesian rights groups were indicating that the UPR was a rhetorical exercise because the process was hampered by self- and mutual exoneration statements and comments from the "friends" of Indonesia.

The final adoption of the outcome report of the UPR can consist of an assessment of the human rights situation in the reviewed country, including positive developments and challenges; sharing of best practices; emphasis on enhancing cooperation for the promotion and protection of human rights; provision of technical assistance and capacity building in consultation with and with the consent of the country concerned; and/ or recommendations for voluntary commitments and pledges made by the country reviewed. In Malaysia's case, there were also proposals for the outcome document to include an assessment of the implementation of recommendations relating to the ratification of treaties treaty and the implementation of Special Procedures and their follow up. However, these were rejected because of the opposition of some states supportive of the Malaysian government, including Pakistan on behalf of the Organization of the Islamic Conference (OIC), China, Indonesia, Iran, and the Russian Federation (Meghna 2007, p. 40).

The mechanism of the UPR can also generate positive aspects given the willingness of a government to simply acknowledge its reality at home. The true test for Malaysia government remains with the follow-up and implementation on the ground, which means bringing human rights to home. One of the important channels of communication to use is the media to promote the outcomes of the UPR process; however, it is no secret that only a minority among the UN member states is prepared to do so. Thus, it is difficult to make the UPR a working instrument for the people on the ground and in this sense generating a success story about its outcomes becomes a challenge. After more than five years, there is still an obvious reluctance on the part of the Malaysian government to publicize the human rights commitments made under the UPR mechanism.

UPR is also a big challenge for civil society stakeholders in discussing how to make it more useful. This requires at least certain coordination on national as well as on international level in order to attempt setting common priorities (Rathgeber 2008, p. 7). Council Resolution 5/1 under paragraph 15(a) spelled out clearly the obligation of the country under review to undergo a consultation process with stakeholders of the national civil society prior to concluding the state report to be submitted to the Council. Malaysia commented, 'In order for the UPR to be effective and meaningful, we believe that countries participating in the process must approach this important exercise in a spirit of sincerity, openness and transparency. We are of the view that observations and recommendations, raised during the session, no matter how difficult should be addressed and dealt with in a constructive manner. If we choose to be defensive, in denial, cynical and not wanting to engage with others in good faith, we will render the whole process meaningless'¹⁷. Although Malaysia publicly proclaimed the importance of broad consultation in a cooperative spirit, on the ground, this was apparently not the case. The Malaysian government only conducted one consultation with their stakeholders prior to their first review scheduled during the 4th Session of the UPR.

Nevertheless, there are countries that have actually conducted broad consultation and included as many stakeholder views as they could prior to drafting their national report and these can provide an example for others, such as Malaysia, to follow. The involvement of NGOs at that stage of the process can be positive for the government. It provides an opportunity for listening and responding to the concerns of civil society at the national level before these questions are raised internationally. A number of states have seen the benefit of this and made reference to these national consultations in their reports or in their introductory statements. In this respect, Guatemala is an especially remarkable example. The Guatemalan government worked closely with the OHCHR to consult with members of civil society and inform them about how they could participate in the UPR process. Another positive example is Tonga, where civil society as a whole publicly approved the national report. Switzerland¹⁸ published its draft national report on its Foreign Affairs Ministry website and invited members of civil society and all Swiss citizens to post their comments. The Finnish government organised a roundtable discussion with members of civil society, who were sent

¹⁷ Statement by Malaysia, 20 March 2009 under agenda item 6, 10th Regular Session.

¹⁸ More information can be obtained from the website of Switzerland's Federal Department of Foreign Affairs at <http://www.eda.admin.ch/eda/en/home/topics/intorg/un/humun/upr.html>

the draft report for their comments. In addition, a representative of civil society, who sits on the Advisory Board for International Human Rights Affairs, was part of the Finnish delegation.

Conclusion

The UPR exercise presents an opportunity for all stakeholders in human rights to call upon the state to strengthen and uphold its national and international commitments on human rights. It is a perfect platform for the exchange of best practice and it also creates further precedent for self and mutual assessment. It is a mechanism which reviews all the 192 member states of the UN in cycles of four years. It should not only be seen as an international obligation, but rather as an ongoing national process in which civil society organizations engage with their governments either to pressure them to comply with their human rights engagements or to increase their efforts in the promotion and protection of those same rights (AWOMI 2010, p. 1).

The entire UPR process can be very beneficial to the citizens of a country. The process of preparing the UPR report gave Malaysia the opportunity to assess and reflect on its achievements and shortcomings in the promotion and protection of human rights in the country. The UPR also offered an environment of cooperation and consultation as envisaged by the Council in the creation of the process. While some might be disappointed with the process, the issues raised during the Malaysia review, for example, gave holistic consideration covering a wide range of issues in the areas of social, economic, cultural, civil and political rights.

Malaysia underwent its second review on 24 October 2013. While most of the comments offered by other Member States were generally positive and complimentary in nature as they had been during its first review, a few expressed concern regarding the government's amendments to the Prevention of Crime Act (PCA) that are retrogressive and inconsistent with human rights principles. More recently, there has been outrage that the Ministry of Home Affairs has deemed COMANGO an illegal ('haram') organisation in January 2014 and SUHAKAM has expressed its regret and concern at the move. Some Muslim groups within Malaysia have spoken in support of the denouncing of COMANGO and have accused it of trying to challenge the position of Islam. Judging from the two reviews of Malaysia under the

UPR in 2009 and 2013, it could be said that thus far, the government has not fully utilize the UPR as a tool to effectively promoting and protecting the human rights.

Ideally, the review is a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned. It is important for the Malaysian government and other stakeholders to work constructively with it. The UPR attracts not only international attention but also most importantly domestic momentum, and the mechanism itself has certainly opened up areas of core concerns for further improvement.

Bibliography

- Dominguez-Redondo, E. 2012, 'The Universal Periodic Review: Is there life beyond naming and shaming in human rights implementation?' *New Zealand Law Review*, vol. 4.
- Human Rights Watch 2011, *Curing the Selectivity Syndrome*, <http://www.hrw.org/sites/default/files/reports/hrc0610webwcover.pdf> Accessed 2 April 2014.
- International Federation of ACAT (FIACAT) 2009, *Universal Periodic Review: An Ambivalent Exercise*, FIACAT, Paris. <http://www.fiacat.org/-fiacat-and-the-universal-periodic-review-> Accessed 2 April 2014.
- Khaw Lake Tee 2012, 'Progress in human rights over the past three years, *New Straits Times*, 12 November. <http://www.nst.com.my/opinion/columnist/progress-in-human-rights-over-the-past-three-years-1.170216> Accessed 2 April 2014.
- McMahon, E. 2012, *The Universal Periodic Review: A work in progress: An evaluation of the first cycle of the new UPR mechanism of the United Nations Human Rights Council*, Friedrich Ebert Stiftung (FES), Geneva. <http://library.fes.de/pdf-files/bueros/genf/09297.pdf> Accessed 2 April 2014.
- McMahon, E. 2011, 'The 2011 United Nations Human Rights Council Reform Process: The status quo prevails'. Paper presented at the FES Conference on the Human Rights Council Review in Geneva, Switzerland 6-7 October 2011. http://www.fes-globalization.org/geneva/documents/Presentation_HRC%20Review_6-7Oct2011_McMahon%20notes.pdf Accessed 2 April 2014.
- McMahon, E. 2010, *Herding Cats and Sheep: Assessing state and Regional Behavior in the Universal Periodic Review Mechanism of the United Nations Human Rights Council*. UPR Info, Geneva.
- Meghna, A. 2007, *Building the new Human Rights Council: Outcome and analysis of the institution-building year*, FES Occasional Paper, no.33. FES, Geneva <http://library.fes.de/pdf-files/bueros/genf/04769.pdf>. Accessed 2 April 2014
- Meghna, A. 2006, *A new chapter for Human Rights: A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council*. FES, Geneva.

UN Watch 2010, *Mutual Praise Society*, UN Watch, Geneva.

http://www.unwatch.org/site/c.bdKKISNqEmG/b.4967647/k.7162/Mutual_Praise_Society.htm Accessed 2 April 2014.

Office of the High Commissioner for Human Rights 2010, *Working with the Universal Periodic Review in the United Nations Human Rights Council: A Handbook for Civil Society Organizations*,

<http://www.ohchr.org/EN/HRBodies/UPR/Documents/PracticalGuideCivilSociety.pdf>
Accessed 2 April 2014.

Rathgeber, T. 2008. *The Human Rights Council Universal Periodic Review: A Preliminary Assessment*, FES Briefing Paper 6. FES, Geneva.

SUHAKAM 2014, 'Ministry of Home Affairs' Statement on Comango a setback for the freedom of association and expression in Malaysia',

<http://www.suhakam.org.my/ministry-of-home-affairs-statement-on-comango-a-setback-for-the-freedom-of-association-and-expression-in-malaysia> Accessed 2 April 2014.

SUHAKAM 2009, Bulletin. January-June 2009, SUHAKAM, Kuala Lumpur.