SEVENTEENTH ANNUAL STUDENT HUMAN RIGHTS CONFERENCE

UN Human Rights Council: Ten Years On

Panel 3 - Case Studies: The Universal Periodic Review: A useful tool for protecting rights?

Chaired by Mark Dawson, Student Conference Committee Member

Human rights promotion through diplomacy: explaining States' level of activism in the Universal Periodic Review

Pilar Elizalde, London School of Economics and Political Science

Ms Pilar Elizalde began by stressing the significance of state sovereignty as a norm in public international law. While States, over the years, have allowed international organisations a certain degree of interference in their domestic affairs to monitor and judge their compliance with their human rights obligations, the Universal Periodic Review (UPR) was to be an innovation in international human rights law because it is a peer review mechanism allowing States to scrutinise each other. Ms Elizalde highlighted the UPR's universal nature, whereby all States formally have the same incentives and opportunities to participate in reviewing each other's human rights record and can communicate their human rights agenda through an interactive dialogue.

She then moved on to outline the design of her research, explaining that it examines the factors which explain States' behaviour in the UPR's interactive dialogue. She focused specifically on the behaviour of recommending States, in particular their level of activism as measured in terms of the number of recommendations they made in the First Cycle of the UPR. In her view, it is wrong to merely assume that the Human Rights Council's UPR process is politicised; as a positivist, she highlighted the importance of empirical analysis. When looking at the UPR in particular, a global empirical comparison is important to test whether examples in the literature pertaining to the politicised nature of the UPR are the norm or the exception. Her research design was cross-sectional, monadic, looked at 192 countries and focused on the First Cycle in the UPR.

To begin with, she hypothesised that the level of activism of a state is evidence of its commitment to human rights promotion. Accordingly the hypothesis would be correct if there was a positive correlation between States' human rights records and the number of recommendations made, and a negative correlation between their human rights records and the number of recommendations they receive. She focused on three factors, namely women's rights, physical integrity rights and the death penalty, because these were amongst the most popular issues raised by States in their recommendations and there were reliable standard-based human rights measures to make consistency tests. Her preliminary statistical analysis indicated that States in fact do take recommendations seriously.

Ms Elizalde explained how she then submitted these findings to multivariate statistical analysis. Based on the theoretical framework guiding her research, which she derived from International Relations theories and works studying variations in human rights protection at the domestic level, she hypothesised that the more relative power States have, the greater ratification of human rights instruments, the greater monitoring by other stakeholders such as civil society, and a higher level of democracy and development, would indicate that a State is likely to make a greater number of recommendations.

In the multivariate analysis, she found that *inter alia*, a high level of development and adherence to international human rights law were statistically relevant explanations for States' level of activism in the UPR; National Human Rights Institutions and other civil society stakeholders had a relatively important influence on the UPR process; the levels of participation in armed conflicts did not provide any conclusive results; relative power and participation were rejected as insignificant indicators; crucially, and unexpectedly, the level of democracy, while not being a significant indicator, was also negatively associated with the variation in human rights promotion within the UPR.

To conclude, Ms Elizalde stressed that, while the statistical regressions she conducted explained only 40 to 48% of variation in the interactive dialogue in the UPR, they did indicate that the theoretical assumption that democracies tend to protect human rights more than other forms of government, does not get translated into practice. Therefore empirically, democracy is not the determining factor when examining States' level of activism in the UPR.

The effectiveness of the Human Rights Council's innovative mechanism

Alice Storey, Birmingham City University

Ms Alice Storey first provided an overview of how the UPR came to be, focusing on the US involvement in the process and then looked at the preparation of its national report- one of the three documents which the UPR is based on. After discussing the recommendations process itself, she concluded by considering some areas which could be strengthened.

To start with, Ms Storey underlined the significance of Resolution 60/251 which created the UPR, Resolution 5/1 which set its modalities, and Kofi Annan's address to the Commission on Human Rights in Geneva on 7th April 2005 where he stressed that conferring a peer review function upon the HRC would be the best expression of the principle that human rights are universal.

Highlighting the difficulties in getting all Member States of the UN to agree on a resolution, Ms Storey focused in particular on the role of the US in the negotiating process. At first, in favour of the HRC, the US made a number of suggestions with regard to Resolution 60/251, notably that countries found to have committed gross human rights violations should not be allowed membership in the HRC. When this proposal was rejected, the US voted against the Resolution and did not put itself forward for membership in the HRC. However over time it changed its stance and cooperated with the HRC. In August 2010 it submitted its first national report for its first review in November 2010.

Ms Storey noted that in the 2010 national report, the US dedicated one whole page to its methodology in putting together the report. In particular it indicated that there had been ten designated UPR consultations across different states, there was an important focus on members of the public, and that the US State Department's website provided a large amount of information on the UPR. However, according to Ms Storey, it is questionable whether a large portion of the general US public actually knows or has heard about the UPR. Moreover, she explained that, as opposed to the 2010 report, the US 2015 national report dedicated merely two paragraphs to methodology and

made no mention of the public. In fact, in the report the US focused solely on the recommendations made in the previous report and which they were willing to accept.

Moving on, Ms Storey highlighted that recommendations made in the UPR in fact constitute the most criticised aspect of the UPR process. *Inter alia*, they have been described as being too broad, repetitive and used unnecessarily to praise allies.

With regard to the US, from UPR Info's Statistics of UPR Recommendations website, the issue on which the country has received the highest number of recommendations is 'International Instruments'. To examine this, Ms Storey focused particularly on the Vienna Convention on Consular Relations (VCCR) of which Article 36 stipulates that any foreign national in detention must be advised of their right to consular assistance without delay. She noted that the US, a party to the VCCR, has been found by the International Court of Justice to be in breach of this provision. Ironically, in Switzerland's UPR, the US recommended that they adhere to Article 36 VCCR. This behaviour, Ms Storey pointed out, was not unique to the US. For instance, Iran recommended that the US ratify the Rome Statute of the International Criminal Court, when it itself has not ratified it.

In conclusion, Ms Storey pointed out that while the UPR stands as a promising human rights mechanism, there are some aspects which require strengthening, notably: the recommendations process; reliance upon recommendations accepted in the country's previous review - in the case of the US, the high number of recommendations in the 2010 review asking it to abolish the death penalty, led it to mention the death penalty less in its 2015 national report; and publicity of the UPR. Emphasising the latter point, Ms Storey concluded that until the general public is cognisant of the UPR process and able to participate in it, the UPR will not be able to fulfil its full potential as an innovative human rights mechanism.

The Universal Periodic Review and its engagement with Islam and the death penalty

Amna Nazir, Birmingham City University

Ms Amna Nazir began by underlining the key challenge facing the UPR, namely whether the mechanism asks the right questions to Islamic States to engender productive discourse on (the potential reduction of) the application of the death penalty.

After an overview of the UPR mechanism, Ms Nazir noted that the factors which influenced the implementation of recommendations from the first two cycles were States' responses to recommendations received and the nature as well as subject-matter of the recommendations. She emphasised that the potential impact of recommendations on the human rights situation of a country varies depending on the quality of recommendations issued during the review session itself.

The abolition of the death penalty, Ms Nazir highlighted, appeared in 'Category 5' recommendations in the UPR, which were amongst the most non-implemented and least accepted recommendations. She further noted the status of the death penalty in international law: Article 3 of the UDHR, Articles 6, 7 and 14 of the ICCPR and the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty altogether provide for a restrictive application of capital punishment. Crucially Islamic countries, whose constitutions are primarily based upon Sharia law, are amongst the most vocal retentionists of the practice.

Looking at the example of Saudi Arabia, she noted that it made no specific reference to its use of the death penalty in its first national report. However other stakeholders brought the issue to the forefront during the First Cycle. For instance, the information compiled by the Office of the High Commissioner for Human Rights (OHCHR) showed that treaty bodies have asked Saudi Arabia to

review its legislation on the death penalty, especially with regard to child offenders, torture and unfair trial proceedings. Moreover other stakeholders, such as Amnesty International and the International Commission of Jurists, brought attention to the government's disproportionate use of the death penalty for a wide range of offences, including non-violent offences, in defiance of international law standards. While Saudi Arabia did not accept any recommendation on a moratorium on the death penalty or the abolition of the death penalty, Ms Nazir noted that it did accept the recommendation to protect the rights of those facing the death penalty.

Ms Nazir highlighted the contrast with the Second Cycle for Saudi Arabia's review, where it dedicated an entire section to safeguards and criminal cases in which it raised the issue of the death penalty. Yet Ms Nazir highlighted that while this has allowed a more open and transparent dialogue to take place within the UPR, it nevertheless remains that the death penalty continued to be applied to crimes not considered serious under international law, including drug offences, apostasy, and witchcraft. In her view, the main focus should be on challenging the monopoly of interpretation of Sharia law, as distinct from and opposed to challenging the authority of Sharia law itself.

She moved on to consider the current status of the death penalty within Sharia law. The permissibility of the death penalty derives from the primary sources of Sharia law, namely the Quran and Sunna (or Haddith, which refer to the statements of the Prophet Mohammed). Because there exist many collections of the latter and there is a lack of consensus on their validity, the application of its punishments, especially the death penalty, remains controversial. Ms Nazir then described the three categories of crimes in Islamic penal law, namely: Qisas (offences against the physical integrity of an individual) are those that most closely reflect international law standards in that the death penalty is restricted to the most serious of crimes; Huddud (crimes transgressing the limits placed by God himself, including adultery, apostasy, waging war against God and highway robbery resulting in death) which can incur the penalties of corporal punishment and death; and Tazir concerning which there is no mandatory requirement as to the type of penalty that should be imposed upon the perpetrator.

By referring to the works and reports of Penal Reform International and Prof. William Schabas amongst others, Ms Nazir noted that Islam does not necessitate the death penalty but Islamic States, in their varied interpretations of Islamic law, fail to acknowledge the more limited role of the death penalty in religious discourse. While the UPR presented itself as a unique platform to share different ideas and conduce productive dialogue, this has not translated into practice. With regard to Saudi Arabia's second review, for instance, the OHCHR as well as the Special Rapporteur on Extrajudicial or Arbitrary Executions condemned the continued practice of the death penalty as violating international law standards. Although the UPR provides for an open dialogue, Ms Nazir underlined the lack of discussion on the Islamic stance on the death penalty which provides for a more restrictive application of the death penalty. No attention was paid to two key themes in the Quran and in Islam, namely forgiveness and mercy, and to the importance of repentance in Islamic discourse. In her view, countries applying Sharia law fail to give due regard to these factors.

On concluding, Ms Nazir noted the importance of academic work on Islam which addresses this particular problem of monopolised interpretation and selective application of Sharia law, for instance by calling for international moratoriums on the death penalty in Islamic countries. Once more she highlighted the significance of the UPR in making it possible to put to the fore contentious issues such as the relationship between the application of capital punishment and the interpretation of Sharia law in Islamic states.

Report by Heyashi Gunesh, LLM Candidate.