CAN AN INTERGOVERNMENTAL MECHANISM INCREASE THE PROTECTION OF HUMAN RIGHTS? THE POTENTIAL OF UNIVERSAL PERIODIC REVIEW IN RELATION TO THE REALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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Abstract

The Universal Periodic Review (UPR) mechanism, one of the most significant innovations of the new Human Rights Council, promises to improve the scrutiny of human rights and raise their position within the United Nation’s system. This article analyses the current and potential impact of the UPR on the realisation of economic, social and cultural rights. It considers the practice of the first five UPR working group sessions and makes recommendations to increase the impact of the mechanism on UN member State behaviour in the future. With the implementation of these recommendations it is hoped the UPR can make a real impact on the realisation of economic, social and cultural rights and human rights more generally.

1. INTRODUCTION

Universal Periodic Review (UPR) is a key feature of the reform of United Nations (UN) human rights machinery which resulted in the dissolution of the Commission on Human Rights and the establishment of the Human Rights Council (HRC). The reform elevated human rights within the UN placing them, according to the Secretary General, in ‘a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations’. The UPR is lauded as one of the most significant innovations of the HRC and in large part, the success of this new body...
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rests on the ability of the UPR to deliver on its potential. Fundamentally, it is hoped that the UPR will move the HRC beyond the problems that led to the dissolution of the Commission on Human Rights, particularly the selectivity of its interventions and its politicisation. The design of the mechanism reflects these concerns.

The UPR subjects all UN member States to periodic peer review, a process which should be objective, transparent, non-selective, constructive, non-confrontational and non-politicised. States are reviewed by the UPR every four years and at the time of writing 128 States had been subject to the process. The UPR is governed by a number of principles including:

- the universality, indivisibility, interdependence, and interconnectedness of all rights;
- cooperation and interactive dialogue;
- universal coverage and equal treatment of States;
- complementarily to other mechanisms such as to represent an added value to the existing UN human rights machinery; and
- participation of relevant stakeholders.

It has the commendable objectives of improving the situation of human rights on the ground, the enhancement of States’ capacity and of technical assistance, sharing of best practices, and support for cooperation in relation to the protection of human rights and with other human rights bodies. It is against these objectives that the success of the UPR must be judged.

The purpose of this article is to provide an analysis of the value of the UPR in relation to the realisation of economic, social and cultural rights. These rights have not been focused on in the literature on the UPR to date, are not subject to the same level of international scrutiny and agreement as civil and political rights, and they have aspects which require political agreement, particularly in relation to international assistance and cooperation, which may make them especially amenable to the UPR process.

This article will consider the practice of the UPR so far with a particular focus on economic, social and cultural rights and analyse this practice in the light of the UPR’s objectives. Drawing on this analysis recommendations will be made for improvements in the future. Despite the limited information available on implementation to date, the review of the HRC in 2011 necessitates early analysis.

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5 Idem.

6 Ibidem, para. 4.
Part 1 addresses actual UPR practice to date. Firstly, it discusses the UPR process in general, drawing attention to emerging practice. It then considers the value of the UPR’s treatment of economic, social and cultural rights through an analysis of Least Developed Countries (LDCs) and OECD countries that have appeared before the UPR.\(^7\) This includes detailed consideration of two case studies: Benin from the LDC group and the United Kingdom (UK) from the OECD countries. Part 2 proposes recommendations to increase the UPR’s impact on human rights. It is hoped that with the implementation of these recommendations, the UPR will ensure greater human rights protection.

2. PART 1 – THE MECHANISM SO FAR

This part considers UPR practice to date highlighting key aspects of the process. Firstly, the UPR process in general is discussed. This discussion demonstrates that current UPR practice includes a number of features suitable to its objectives, particularly: highlighting best practice; criticising bad actors; and monitoring and reporting requirements which take account of the risk of institutionalising non-compliance if such behaviour is over emphasised. It also highlights that substantial improvements need to be made to ensure its objectives are met. These include improvements in current practice around the support of national reporting, international assistance and cooperation, and the facilitation of domestic processes. In section 2.2., the consideration of economic, social and cultural rights by the UPR to date will be analysed in light of UPR objectives. The extent to which the UPR addresses States obligations as defined in international law in relation to these rights is assessed. This includes consideration of the specific international assistance and cooperation requirements of economic, social and cultural rights. Additionally, current practice in relation to complementarity to existing human rights mechanisms, specifically treaty bodies and special procedures, is addressed.

2.1. UPR PROCESS IN GENERAL

The UPR process is designed to influence State behaviour in relation to the full range of human rights as indicated by its broad basis of review. This basis includes: a State’s obligations under any ratified human rights treaties; the Universal Declaration on Human Rights (UDHR); the UN Charter; and any voluntary pledges made by the State in relation to human rights.\(^8\) It has three key elements: the documents forming the basis of the review; the working group session of the HRC; and the plenary session.

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\(^7\) At the time of writing this was 30 countries in all. Some States of particular interest to commentators, such as the US, had not been reviewed at this time. The Calendar of the First Cycle of the UPR is at: www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf.

of the HRC, which provide the opportunity to highlight best practice, criticise bad actors, and involve monitoring and reporting. Importantly, the UPR process includes follow-up, and two trust funds which have been created to support the participation of developing States in the process, and the implementation of UPR recommendations.

Three documents form the basis of the UPR: a State report, a report compiling UN information and a report compiling information provided by stakeholders.\(^9\) The HRC has adopted general guidelines for the preparation of information under the UPR which apply to these documents.\(^10\) Of the three documents, State reports have the greatest impact on the content of the UPR process.\(^11\) They should be prepared following a broad national consultation process and include information on the consultation conducted; the country’s relevant legal and political background; the promotion and protection of rights on the ground; achievements; best practices; challenges; constraints; national priorities; requests for capacity building and technical assistance; and in later reviews, follow-up to previous reviews.\(^12\) State practice in relation to the content of reports is significantly varied. While a number of States provide detailed information across the range of human rights,\(^13\) many States fail to address all human rights. For example, in the category of economic, social and cultural rights, the Netherlands only addressed the right to education.\(^14\) Where rights are addressed, information is at times insufficiently detailed to allow an assessment of whether human rights obligations are being met; many countries, for instance, merely list relevant legislation.\(^15\) One LDC, Comoros, failed to provide a written report at all.\(^16\)

Both compilation reports are prepared by the Office of the High Commissioner of Human Rights (OHCHR).\(^17\) The UN compilation summarises available information from a broad range of UN sources including treaty bodies, Special Procedures and specialised agencies.\(^18\) It provides a useful synthesis of UN human rights information pertaining to a State which can be used not only in the UPR process but as a quick reference tool for human rights activists.\(^19\) However, as the potentially prodigious

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\(^9\) Ibidem, at para. 15.
\(^10\) HRC, Decision 6/102, Follow-up to HRC Resolution 5/1, 27 September 2007.
\(^11\) See the discussion below on the limited number of economic, social and cultural rights questions and recommendations directed to OECD countries whose State reports contained sparse information on these rights.
\(^12\) Resolution 5/1, supra note 8, at para. 15(a); and Decision 6/102, supra note 10, at chapter I.
\(^16\) See www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CKMSession5.aspx.
\(^17\) Resolution 5/1, supra note 8, at para. 15(b) and (c).
\(^18\) Ibidem, at para. 15(b).
amount of information available must be condensed to 10 pages, the compilations are necessarily non-exhaustive.\textsuperscript{20}

The stakeholder compilation allows NGOs and other stakeholders including National Human Rights Institutions (NHRIs) and regional bodies to provide information on the status of rights in the State under review.\textsuperscript{21} Stakeholder compilations often provide helpful information and, as they are official UN documents, are in an authoritative form. However, some compilations suffer from the insufficient number of submissions received, which means the compilation contains an incomplete picture of the situation of human rights on the ground. For example, only two contributions were received in relation to Mali.\textsuperscript{22} An additional limitation are rules governing when submissions must be received which mean that stakeholder information must be submitted long before the State report, and as such cannot directly add to or correct information contained in the State report.\textsuperscript{23} Positively, regional human rights bodies from Europe, such as the Council of Europe’s Commissioner on Human Rights and the European Social Committee, are making use of the UPR process.\textsuperscript{24} For example, the European Social Committee provided detailed comments in relation to the right to work in Luxembourg.\textsuperscript{25} This provided information not otherwise available concerning eligibility to unemployment benefits. It also indicates that the UPR is seen as having potential to further the implementation of regional as well as UN human rights obligations.

The working group sessions of the HRC perform the review of States, with three hours allowed for each review.\textsuperscript{26} The agreed process allows the State under review one hour in total to present its report, respond to questions and recommendations, and make a closing statement.\textsuperscript{27} Most States under review have sent high level delegations, often at the ministerial level, indicating that they are taking the process seriously.\textsuperscript{28} While many States have in good faith ensured that their presentation was short to allow adequate time to address questions, a number of States have used most of this hour for the State presentation. This undermines the dialogue which is key to the

\textsuperscript{20} Resolution 5/1, supra note 8, at para. 15(b). See further discussion of this issue in the case studies section 2.3. below.

\textsuperscript{21} Ibidem, at para. 15(c).

\textsuperscript{22} UPR Stakeholders’ Compilation Mali, UN Doc. A/HRC/WG.6/2/MLI/3, 3 April 2008.

\textsuperscript{23} Information on deadlines for submissions can be found at: www.ohchr.org/EN/HRBodies/UPR/Pages/NewDeadlines.aspx.

\textsuperscript{24} Although other regional bodies are yet to make use of the mechanism. See Abebe, loc.cit. (note 3), p. 27.


\textsuperscript{26} Resolution 5/1, supra note 8, at paras 18 and 22.

\textsuperscript{27} HRC, 8/PRST/1, Modalities and practices for the universal periodic review process, 9 April 2008, at para. 7, www.ohchr.org/EN/HRBodies/UPR/Pages/BackgroundDocuments.aspx.

process. For example, Argentina took 40 minutes to present its State report leaving insufficient time for meaningful dialogue.\textsuperscript{29}

The remaining two hours of the working group’s time is divided among States who wish to take the floor to ask questions or make recommendations. All States may request to be placed on the speakers list for this ‘interactive dialogue’, with HRC members given three minutes and other States given two minutes speaking time.\textsuperscript{30} Several issues have become evident with the dialogue phase so far. These include the reality that in a number of reviews not all States that wished to take the floor could do so due to time constraints.\textsuperscript{31} Secondly, a number of States use their speaking time to praise the State under review without asking any questions or making recommendations which could lead to improvements in the realisation of human rights.\textsuperscript{32} This even occurred in relation to countries with acute human rights situations contemporaneous to their review. For example, during the review of Sri Lanka many States chose to praise Sri Lanka and made no reference to the then increasing violence against the Tamil minority.\textsuperscript{33} However, it is important not to overstate the problematic nature of the level of praise as it has been suggested that it may create an environment in which States are more disposed to be self critical.\textsuperscript{34}

Following the interactive dialogue phase the State under review makes concluding remarks.\textsuperscript{35} These have varied from indications as to which recommendations are accepted or rejected, to merely stating that recommendations will be reviewed and responses made at a more appropriate time.\textsuperscript{36} The second approach tends to enable States to provide much more detailed responses to recommendations including important information in relation to rejected recommendations.\textsuperscript{37}

The review of each State is facilitated by a \textit{troika} of States who prepare the report of the working group as well as receive and transmit questions in advance of the working group to the State under review.\textsuperscript{38} The \textit{troika} has been criticised for not contributing much to the process of the review,\textsuperscript{39} although NGOs have noted

\begin{itemize}
\item \textsuperscript{29} Rathgeber, \textit{loc.cit.} (note 19), p. 3.
\item \textsuperscript{31} \textit{E.g.} the UPR concerning Sri Lanka.
\item \textsuperscript{32} ISHR, \textit{op.cit.} (note 30), p. 5.
\item \textsuperscript{34} Rathgeber, \textit{loc.cit.} (note 19), p. 5.
\item \textsuperscript{35} HRC, \textit{op.cit.} (note 27), at para. 7.
\item \textsuperscript{37} \textit{E.g., UPR Views on conclusions and/or recommendations, voluntary commitments and replies UK}, UN Doc. A/HRC/8/25/Add.1, 25 August 2008.
\item \textsuperscript{38} Resolution 5/1, \textit{supra} note 8, at para. 18(d); HRC, \textit{op.cit.} (note 27), at para. 1.
\end{itemize}
that the reports prepared do provide an accurate summary of the working group sessions.\(^{40}\)

States can transmit, through the troika, questions in advance to the State under review.\(^{41}\) These should be addressed during the State’s initial presentation, and theoretically allow time for considered responses not available if questions are simply asked during the interactive dialogue stage. Particular problems relate to questions in advance, with few States making use of them.\(^{42}\) Many States fail to respond to questions in advance such that States that have asked such questions often need to take the floor during the interactive dialogue stage to encourage a response.\(^{43}\) This is particularly problematic given that, as stated earlier, in many reviews insufficient speaking time is available for all interested States to take the floor.

Following the working group, a plenary session of the HRC adopts the report as prepared by the troika.\(^{44}\) It is notable that the high level delegations seen at the working group are often not present for the plenary stage.\(^{45}\) At the plenary stage, the State under review, other States, and stakeholders, such as NGOs, can take the floor.\(^{46}\) A total of 20 minutes are available for stakeholder statements.\(^{47}\) Despite being the only opportunity for stakeholders to present, in many plenary sessions there has been limited or no NGO presentations, perhaps indicating that NGOs see little value in this aspect of the process.\(^{48}\) There has also been some controversy surrounding the involvement of NGOs at the plenary stage. Largely this stems from the vague wording of the institution-building package which states that NGOs are able ‘to make general comments before the adoption of the outcome by the plenary’.\(^{49}\) Some states have argued that this means that NGOs should not be able to make State-specific comments, with some States, such as Egypt, going so far as to interrupt NGOs during their presentations.\(^{50}\) Unfortunately, the President of the HRC, who as part of the

\(^{40}\) ISHR, \textit{op.cit.} (note 30), p. 11. Consequently, these reports were relied on as accurate representations of the interactive dialogue for the purposes of this article.

\(^{41}\) Resolution 5/1, \textit{supra} note 8, at para. 21.

\(^{42}\) Consistent use is limited to a small number of European States. Questions available here: www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx.


\(^{44}\) Resolution 5/1, \textit{supra} note 8, at para. 25.


\(^{46}\) Resolution 5/1, \textit{supra} note 8, at paras 30–31.


\(^{49}\) Resolution 5/1, \textit{supra} note 8, at para. 31.

\(^{50}\) Abebe, \textit{loc.cit.} (note 3), pp. 29–30.
HRC Bureau is responsible for all procedural matters, has done little to assist with the controversy, stating that NGOs should comply with the resolution which ‘is clear on its face’, failing to offer any interpretation of the phrase ‘general comments’.51

Follow-up is built into the UPR process. The institution-building package requires States to implement the recommendations contained in the review and to report on progress as part of their next review.52 Some good practice is emerging where States report on progress soon after they have been reviewed. This is generally undertaken as part of HRC sessions which include a standing agenda item concerning the UPR.53 Examples include the United Kingdom (UK) which has notified the HRC that it has ratified the Convention on the Rights of Persons with Disabilities in response to a UPR recommendation, and Colombia which notified that it had, amongst other things, invited four Special Rapporteurs to undertake country visits.54

The trust funds to support participation in the UPR and implementation of UPR recommendations could play an important facilitative role in the UPR.55 The fund for participation was created to support developing country participation in the UPR, particularly LDC participation. It provides funds for countries, which do not have permanent missions in Geneva, to have one official attend the UPR session in which their country is reviewed or in which it acts as a member of the troika.56 Money is also available for training in the preparation of reports.57 As yet the fund does not provide funding for participation as an observing country in the reviews of other States. Limited detail is available concerning the implementation fund which aims to provide technical assistance and capacity building.58

2.2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

All economic, social and cultural rights are subject to review under the UPR through the inclusion of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UDHR and States voluntary commitments as basis of review.59 In this section, the treatment of these rights in the UPR to date in light of the UPR’s objectives will be examined. Firstly, I will consider whether the UPR addresses States obligations

51 Idem.
52 Decision 6/102, supra note 10, at para. I (G).
53 Standing agenda item 6.
54 Resolution 5/1, supra note 8, at Chapter V.
57 Idem.
58 Resolution 6/17, supra note 55.
59 Resolution 5/1, supra note 8, at para. 1.
as defined in international law. The key aspects of economic, social and cultural rights which will be considered in this analysis are:

- justiciability and the indivisibility, interconnectedness and interrelatedness of all rights;
- the immediate obligations to take steps, of non-discrimination, and to ensure minimum essential levels of each right;
- the obligation to use the maximum available resources to progressively move towards full realisation of these rights, including the general prohibition on retrogressive measures; and
- the obligation to seek and provide international assistance and cooperation.  

Additionally, it will be considered whether the UPR supports the work of treaty bodies and Special Procedures, particularly noting reference to: recommendations; the need to submit reports; and encouragement of ratification of ICESCR and its Optional Protocol.

In order to evaluate the treatment of economic, social and cultural rights in the UPR this section will review, in relation to LDCs and OECD countries: the three reports which form the basis of the UPR; the questions asked in advance; the interactive dialogue; the recommendations; the plenary session and any implementation or follow-up.

2.2.1. State Reports

State reports play a key role in shaping UPR discussions. Due to the inclusion of the UDHR as a basis of review, all States are required to provide information on the implementation of economic, social and cultural rights. In keeping with this requirement, all OECD and LDC State reports make some reference to these rights. Nearly all LDC reports made reference to most economic and social rights. However, of the OECD countries, only Canada, Mexico, Germany and New Zealand contain comparable reference, with the Netherlands and the Czech Republic providing particularly limited reference. Notably, very few countries dealt specifically with cultural rights, Zambia’s being the only report to devote a separate heading to these rights.

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60 Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3, UN Doc. E/1991/23, 14 December 1990, paras 1, 2, 8, 10 and 13.
63 UPR State Report Zambia, op.cit. (note 61).
The quality of these references is also greatly varied. Generally more detailed information is provided on these rights in LDC reports than is provided by OECD countries. Differences exist in terms of format, terminology used, rights covered and detail of information provided. Most reports make some positive reference to justiciability and the indivisibility, interconnectedness and interrelatedness of all rights, with the notable exceptions of the UK and Switzerland which attempt to question the justiciability of economic, social and cultural rights and the indivisibility, interconnectedness and interrelatedness of human rights in parts of their State reports. Despite generally positive references to economic, social and cultural rights, there is evidence of the continuing differential treatment between the categories of rights. All reports discussed separately civil and political and economic, social and cultural rights. In all but two reports, Canada and the Central African Republic, civil and political rights are addressed first.

In State reports there is limited reference made to the terminology of General Comments and international law. However, in many cases the information provided is sufficient to ascertain whether the key obligations are being met. No State expressly notes the obligation to take steps, however, many States provide information on steps taken towards the realisation of economic, social and cultural rights. Similarly, there is no express reference to the language of core obligations although many reports provided information relevant to these obligations, such as the provision of essential medicines in relation to the right to health. Additionally, while the language of progressive realisation is not often utilised, LDCs in particular, and some OECD countries, provide significant statistical detail of spending levels and current realisation levels of these rights (such as health budgets and maternal and infant mortality rates) which would enable future UPR scrutiny to measure progress towards full realisation. Most positively, almost all reports dealt in some detail with the obligation of non-discrimination in relation to economic, social and cultural rights, and many noted the position of vulnerable groups, such as women and indigenous peoples, in relation to these rights.

With regard to supportive reference to the work of treaty bodies and Special Procedures, practice was also mixed. Several State reports made specific reference to recommendations from these bodies, see for example, the reports of Finland and

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Even in reports where no specific reference is made, the content of the report to some degree addresses previous recommendations. In an interesting example, the Czech Republic’s only reference to economic, social and cultural right was about steps taken in response to two CESC recommendations concerning discrimination against Roma and unemployment rates of Roma and other vulnerable groups. This selective reference does not discuss the other recommendations of the CESC and excludes part of the recommendation on unemployment which specifically referred to women, however, it does provide important detail on progress in relation to the Roma minority. Other support for the work of treaty bodies was offered in relation to the submission of overdue reports to CESC, with some States noting plans for submission of these. Additionally, ratification of the ICESCR was occasionally discussed and some States noted their involvement in the drafting of the Optional Protocol ICESCR (OP-ICESCR).

Concerning international assistance and cooperation, most OECD and LDC reports make some relevant references. In almost all LDC reports a separate section is devoted to requests for capacity building and technical assistance. Most of these sections are quite general, although there are examples of some useful requests in relation to economic, social and cultural rights. For example, Burkina Faso requested support for the implementation of the strategic framework for combating AIDS. A number of LDCs also make reference to international assistance already being provided. For example, Vanuatu highlights its agreements with Australia and Cuba to provide training for health professionals. OECD countries generally note their levels of development assistance and some provide specific detail on their support for economic, social and cultural rights overseas.

2.2.2. UN Compilation

The compilation of UN information plays a key role in highlighting recommendations of treaty bodies, Special Procedures and information produced by specialised...
agencies. With a few early exceptions, these reports contain information on economic, social and cultural rights in a standard format: the right to work and to just and favourable conditions of work; the right to social security and an adequate standard of living; and, the right to education and to take part in the cultural life of the community.

Unsurprisingly, as they are based on information from UN sources, UN compilations address the key aspect of economic, social and cultural rights including justiciability. CESCR recommendations concerning justiciability feature in relation to many States. In relation to the indivisibility, interconnectedness and interrelatedness of rights, all rights are discussed although information on the implementation of rights is listed in a similar order to the UDHR with economic, social and cultural rights discussed after civil and political rights. Compilation reports contain helpful information on steps taken by the State under review, and some particularly helpful references are made to good practice which had been praised by treaty bodies. For example, the UN compilation about Burkina Faso noted a successful programme which led to a reduction in the practice of female genital mutilation (FGM). There is substantial information in UN compilations concerning LDCs which discusses minimum essential levels of rights including, for example, access to basic health care, food and sanitation, and in relation to Afghanistan core obligations were expressly mentioned. As with State reports, there is a strong focus on discrimination and economic, social and cultural rights, particularly gender discrimination in relation to the rights to work, education and health. Additionally, information on progressive realisation obligations features in the compilations, with retrogressive measures highlighted. For example, reference is made to reductions in education spending in the compilation concerning Zambia.

The UN compilations all strongly support the work of treaty bodies and Special Procedures. They provide a useful synthesis of recommendations on economic, social and cultural rights which are within the competence of a number of treaty bodies and Special Procedures. It is noted, however, that these compilations do not cover all recommendations, omitting some seemingly important recommendations. It is not clear on what basis the OHCHR decides what information to include in relation to each State. Additionally, the compilations support the work of the treaty bodies and Special Procedures by noting, inter alia: reservations to ICESCR; the need for States...
to provide reports to treaty bodies; and the support States provided in the drafting of OP-ICESCR.\footnote{UPR UN Compilation the Netherlands, op.cit. (note 80), at para. 1; UPR UN Compilation Mali, UN Doc. A/HRC/WG.6/2/MLI/2, 8 April 2008, at para. 6; UPR UN Compilation Finland, UN Doc. A/HRC/WG.6/1/FIN/2, 20 March 2008, at para. 7.}

In relation to international assistance and cooperation, UN compilations contain useful information on LDCs from specialised agencies such as United Nations Development Programme (UNDP).\footnote{UPR UN Compilation Central African Republic, UN Doc. A/HRC/WG.6/5/CAF/2, 9 March 2009, at paras 50, 52 and 64.} Priority areas for further assistance were also addressed.\footnote{UPR UN Compilation Mali, op.cit. (note 88), at para. 47.} In relation to OECD countries reference was made to the levels of development assistance provided and the need to adopt human rights approaches in relation to this assistance.\footnote{UPR UN Compilation Japan, UN Doc. A/HRC/WG.6/2/JPN/2, 8 April 2008, at para. 35.} Additionally, in some cases good practice was highlighted, such as the adoption of gender perspectives in development policy.\footnote{UPR UN Compilation France, UN Doc. A/HRC/WG.6/2/FRA/2, 10 April 2008, at para. 7; and UPR UN Compilation Germany, UN Doc. A/HRC/WG.6/4/DEU/2, 25 November 2008, at para. 47.}

\subsection*{2.2.3. Stakeholder Compilation}

Stakeholder compilations followed a similar format to the UN compilations. However, many reports did not contain reference to all three headings.\footnote{E.g. UPR Stakeholders’ Compilation Tuvalu, UN Doc. A/HRC/WG.6/3/TUV/3, 16 September 2008; UPR Stakeholders’ Compilation Luxembourg, op.cit. (note 25); and UPR Stakeholders’ Compilation Congo, UN Doc. A/HRC/WG.6/5/COG/3, 9 September 2009.} This indicates that NGO submissions did not cover the full range of economic, social and cultural rights. In relation to the key aspects of economic, social and cultural rights, stakeholder compilations provided important information not evident in State reports. In particular, stakeholder compilations highlighted the situation of rights on the ground, and differences between law and practice in many States.\footnote{UPR Stakeholders’ Compilation Vanuatu, UN Doc. A/HRC/WG.6/5/VUT/3, 23 February 2009; UPR Stakeholders’ Compilation Chad, UN Doc. A/HRC/WG.6/5/TCD/3, 23 February 2009; UPR Stakeholders’ Compilation Comoros, UN Doc. A/HRC/WG.6/5/COM/3, 24 February 2009; and UPR Stakeholders’ Compilation Burundi, UN Doc. A/HRC/WG.6/3/BDI/3, 15 September 2008.} Similarly to State reports, stakeholder compilations did not make great reference to the language of General Comments or international law. However, they did provide information on justiciability, the obligations to take steps, and to ensure minimum essential levels of rights. A number of compilations contained information on the legal status of economic, social and cultural rights, highlighting the need for these rights to be made justiciable within domestic systems.\footnote{UPR Stakeholders’ Compilation Switzerland, UN Doc. A/HRC/WG.6/2/CHE/3, 3 April 2008, at para. 2; and UPR Stakeholders’ Compilation Netherlands, UN Doc. A/HRC/WG.6/1/NLD/3, 13 March 2008, at para. 4.}
Information was also provided on steps being taken towards the realisation of economic, social and cultural rights, which in many cases, usefully supplemented information provided by the State. Again like State reports, significant information was often provided in relation to discrimination and economic, social and cultural rights. This included, for example, important information on vulnerable groups, such as information about women’s right to health.\(^{96}\) Compilations concerning LDCs addressed minimum essential levels although without express reference to this legal obligation.\(^{97}\) Some useful information was also provided in relation to progressive realisation obligations. In a positive example, the compilation concerning Mexico made reference to retrogressive steps and insufficient spending on education.\(^{98}\) The compilation on Congo also provided interesting information on the failure of the State to spend oil revenues appropriately.\(^{99}\)

Stakeholder compilations supported the work of treaty bodies and Special Procedures. Reports made note of recommendations, and failures of States to meet reporting requirements, disseminate concluding observations, and act on recommendations.\(^{100}\)

Many stakeholder compilations contained some specific information on international assistance and cooperation not available from the other reports. This was particularly the case in a number of compilations concerning OECD countries. For example, in relation to the right to health, the compilation concerning Switzerland noted concerns about the impact of enforcing certain intellectual property requirements in trade agreements.\(^{101}\) The compilation concerning Canada noted the problematic complexity of the Canadian policy which is intended to enable Canadian companies to produce generic drugs for provision to developing countries.\(^{102}\)

### 2.2.4. Questions in Advance

Despite the limitations of questions in advance noted above, a number of States, particularly OECD countries, have asked questions in advance that concern economic, social and cultural rights. Questions concerning civil and political rights do, however,


\(^{97}\) UPR Stakeholders' Compilation Afghanistan, op.cit. (note 96), at paras 34 and 37; and UPR Stakeholders' Compilation Burundi, op.cit. (note 94), at para. 42.


\(^{99}\) UPR Stakeholders' Compilation Congo, op.cit. (note 93), at para. 23.

\(^{100}\) UPR Stakeholders' Compilation the Netherlands, op.cit. (note 95), at paras 10–12; and UPR Stakeholders' Compilation South Korea, UN Doc. A/HRC/WG.6/2/KOR/3, 2 April 2008, at para. 8.

\(^{101}\) UPR Stakeholders' Compilation Switzerland, op.cit. (note 95), at para. 33.

dominate. Almost all LDCs received some questions in advance concerning economic, social and cultural rights, in contrast to OECD countries where no relevant questions were asked in relation to many countries.\footnote{Cf. questions in advance to Mali, at: www.ohchr.org/EN/HRBodies/UPR/Pages/MLQuestions.aspx with questions in advance to the UK at: www.ohchr.org/EN/HRBodies/UPR/Pages/GBQuestions.aspx.}

In terms of the quality of questions in advance, very limited reference was expressly made to the international legal standards. It is notable, however, that similar to the three reports which form the basis of UPR, questions related to discrimination and economic, social and cultural rights, particularly work, education and health, were by far the most common way in which questions were asked about these rights.\footnote{E.g., the UK advance question to Poland at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/PL/QUESTIONSPOLAND-ADD1.pdf; and the UK advance question to NZ at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/NZ/NEWZEALAND.pdf.}

Important support for treaty bodies and Special Procedures was evident, with a number of countries regularly basing their questions on recommendations.\footnote{E.g., Argentina advance question to Congo at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/CG/CONGO_ADD1.pdf; and Austria advance question to Canada at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/CANADA.pdf.} Additionally, a number of States took the opportunity to ask about failure to submit reports to treaty bodies and the possibility that non-State parties would ratify ICESCR.

Questions concerning international assistance and cooperation were also rare. The UK’s question to the Republic of Korea concerning what role it could play in realising human rights internationally provides one of the few examples.\footnote{UK advance question to Republic of Korea at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/KR/QUESTIONSKOREA.pdf.}

### 2.2.5. Interactive Dialogue

Economic, social and cultural rights featured strongly in the interactive dialogue stage particularly in discussions concerning LDCs. In relation to a number of OECD countries, however, discussion was more limited.\footnote{E.g., UPR Final Report France, UN Doc. A/HRC/8/47, 3 June 2008; and UPR Final Report the Netherlands, UN Doc. A/HRC/8/31, 13 May 2008.} For OECD countries the level of discussion of these rights seemed to reflect the importance they were given in State reports. So despite the generally limited discussion, in the interactive dialogues concerning Germany and Canada, who provided extensive information in their State Reports on economic, social and cultural rights, more attention was given to these rights.\footnote{UPR Final Report Canada, UN Doc. A/HRC/11/17, 3 March 2009; and UPR Final Report Germany, UN Doc. A/HRC/11/15, 4 March 2009.}

The quality of these discussions was variable, although some valuable dialogue did occur. In relation to justiciability, Switzerland, problematically, used the interactive
dialogue as an opportunity to restate its views concerning the justiciability of economic, social and cultural rights noting that they were merely 'programmatic in nature'. This negative approach was counterbalanced by Egypt which questioned the different treatment of economic, social and cultural rights and civil and political rights in the Swiss Constitution, and several other States which reiterated their commitment to the indivisibility, interconnectedness and interrelatedness of rights during their review.

In many cases, the value of the discussion of economic, social and cultural rights was limited due to the broadness of the questions asked. Key features of economic, social and cultural rights as highlighted by General Comments and international law were raised. Again, many States demonstrated a strong interest in and understanding of the importance of non-discrimination with much discussion focusing on vulnerable groups such as women and migrants. For example, despite France’s refusal to review its approach to minorities, Canada raised important questions reiterating CESCR concerns and the need to collect disaggregated data.

Some States specifically asked questions about recommendations of treaty bodies and Special Procedures. A number of references were also made to late reports and the need for States to seek the technical assistance offered by the OHCHR to ensure reports are provided to treaty bodies on time. Additionally, non-State parties were asked about steps taken towards ratification, and some States were encouraged to consider the ratification of OP-ICESCR.

Discussion of international assistance and cooperation in relation to economic, social and cultural rights was also quite strong. This was particularly the case in interactive dialogues in which LDCs were reviewed. In these reviews, many States expressed support for LDCs’ requests for technical and financial assistance, encouraged LDCs to seek technical assistance from the OHCHR, as well as taking the opportunity to encourage developed countries to provide greater assistance.

2.2.6. Recommendations

Recommendations concerning economic, social and cultural rights were made in many reviews. Similarly to the interactive dialogue, such recommendations featured

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more strongly in relation to LDCs than for OECD countries. In fact, in relation to three OECD countries, there were no recommendations made concerning these rights.\textsuperscript{117} For most LDCs quite extensive recommendations were made concerning the range of economic, social and cultural rights.\textsuperscript{118} Whereas for OECD countries focus was on a smaller range of these rights.\textsuperscript{119} Positively, in most cases recommendations concerning economic, social and cultural rights were accepted by States.\textsuperscript{120}

Unfortunately, the overwhelming majority of recommendations are of limited value due to their vagueness and failure to refer to the key obligations in relation to economic, social and cultural rights. Many simply encourage the State under review to continue their efforts in relation to the realisation of these rights.\textsuperscript{121} Despite their vagueness, some value can be observed in the focus of recommendations on key areas such as Millennium Development Goals (MDGs), poverty reduction, and equality for vulnerable groups, particularly in relation to women’s health and education.\textsuperscript{122} Notable exceptions to the general practice of making vague recommendations provided guidance in relation to implementation and were measurable. New Zealand, for example, helpfully recommended in relation to the right to education, that Germany:

Adopt time-bound measures to increase children with disabilities’ access to inclusive education in mainstream schools, and that it ensure funding for the specific services necessary to help these students reach their full learning potential and participate along with other students.\textsuperscript{123}

And that Zambia, in relation to the right to health:

Consider developing a strategy that ensures that the experiences of community practitioners are taken into account in the development of its national strategies to improve health standards in maternal neo-natal and child health.\textsuperscript{124}

The work of treaty bodies and Special Procedures also finds some support in recommendations presented by States. In a particularly interesting example of support, Saudi Arabia recommended that Senegal ‘use the upcoming visit of the Special Rapporteur on the Right to Education to set up national plans for the

\begin{itemize}
\item \textsuperscript{118} E.g. UPR Final Report Djibouti, op.cit. (note 111), at paras 67–70; UPR Final Report Tuvalu, op.cit. (note 115), at paras 67–70; and UPR Final Report Mali, op.cit. (note 114), at paras 56–59.
\item \textsuperscript{119} E.g., UPR Final Report France, op.cit. (note 107), at paras 60–62.
\item \textsuperscript{120} E.g., UPR Final Report Djibouti, op.cit. (note 111), at paras 67–70; and UPR Final Report Mali, op.cit. (note 114), at paras 56–59.
\item \textsuperscript{121} E.g., UPR Final Report France, op.cit. (note 107), Recommendation 33.
\item \textsuperscript{122} E.g., UPR Final Report Djibouti, op.cit. (note 111), Recommendations 17 and 18; and UPR Final Report Mexico, op.cit. (note 111), Recommendations 66 and 69.
\item \textsuperscript{123} UPR Final Report Germany, op.cit. (note 108), Recommendation 34.
\item \textsuperscript{124} UPR Final Report Zambia, UN Doc. A/HRC/8/43, 2 June 2008, Recommendation 16.
\end{itemize}
promotion of the right to education'. In a number of cases, States recommended the implementation of previous recommendations. Additionally, recommendations focused on the provision of timely reports to treaty bodies and the need for LDCs to enlist the technical assistance available from the OHCHR for this purpose. Recommendations also concerned the ratification of ICESCR, OP-ICESCR, and other treaties related to economic, social and cultural rights such as the UNESCO treaty on discrimination in education.

In relation to international assistance and cooperation recommendations were also generally vague. Recommendations rarely went beyond suggesting that LDCs seek, and developed countries provide, such assistance, although it is somewhat positive that such recommendations were made in relation to all LDCs.

2.2.7. Plenary

The plenary is the only opportunity for NGOs and other stakeholders to orally present their views as part of the UPR. Due to this, it is somewhat surprising that in many cases NGO involvement at this stage is limited. This is particularly the case in relation to LDCs. References to economic, social and cultural rights have been limited at the plenary stage and not covered the content of these rights in any detail. However, some useful comments have been made by NGOs in relation to OECD countries. For example, in the reviews of both Poland and Mexico, NGOs were able to raise the controversial issue of abortion and to present information which contradicted that provided by the State.

2.2.8. Implementation and Follow-up

There is limited information available about implementation and follow-up thus far, particularly for LDC countries. Substantially more information is available concerning

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128 Recommendations were often numerous, e.g., UPR Final Report Djibouti, op.cit. (note 111), Recommendations 28, 29, 31, 34, 35 and 36.
129 It should be noted that States reviewed in the 5th Session of the Working Group have not been through the plenary stage yet. It may be that NGO involvement in relation to this session is increased, as there seemed to improvement in later LDC reviews.
the implementation of recommendations related to civil and political rights than for economic, social and cultural rights.\textsuperscript{132} However, some States have provided information on implementation to the HRC. This includes the positive example of Colombia which has presented a detailed report of implementation so far which contains reference to economic, social and cultural rights' recommendations.\textsuperscript{133}

2.3. CASE STUDIES

A number of the key aspects of the treatment of economic, social and cultural rights in the UPR process, relevant to the consideration of whether the UPR is meeting its objectives can be illustrated by looking in detail at case studies from the LDC and OECD groups. For this purpose the UK and Benin have been selected. The UK provides an interesting case study due to its strong public commitment to the UPR process, its regular presentation of reports to CESCR and the fact that it was visited by the Special Rapporteur on the Right to Education in 2003. Similarly, Benin has submitted reports regularly to CESCR and been visited by Special Rapporteurs before and after it was reviewed by the UPR process.

2.3.1. State Reports

The State reports of the UK and Benin contained some information on economic, social and cultural rights. In relation to economic, social and cultural rights, the UK's report, disappointingly, contained only vague and oblique references to these rights as a group.\textsuperscript{134} No detail was provided in relation to the realisation of individual economic, social and cultural rights domestically, apart from reference to anti-discrimination legislation which includes discrimination in employment.\textsuperscript{135} Reference was made to the issue of justiciability, and indivisibility, interconnectedness and interrelatedness of rights, with the UK noting that economic, social and cultural rights were as important as civil and political rights, that they were subject to some review by the courts, and that the issue of more direct justiciability was likely to be raised during discussion on a proposed Bill on rights and responsibilities.\textsuperscript{136} Additionally, the report contained some discussion of the UK's fulfilment of its international assistance and cooperation obligations in relation to economic, social and cultural rights. For example, the amount of spending on: the right to education, which should reach 8.5 billion pounds sterling by 2016; and the right to health, which in relation to HIV/AIDS

\[\text{\textsuperscript{132} Information on follow up can be found here: www.upr-info.org/-Follow-up-.html.}\]

\[\text{\textsuperscript{133} 'Initial report by Colombia on the implementation of UPR recommendations and voluntary pledges', at: www.derechoshumanos.gov.co/epu/documentos/InfAvances-jun2009_090611a.pdf (only in Spanish).}\]

\[\text{\textsuperscript{134} UPR State Report the UK, op.cit. (note 65), at paras 33–35.}\]

\[\text{\textsuperscript{135} Ibidem, at para. 38.}\]

\[\text{\textsuperscript{136} Ibidem, at para. 35.}\]
was 1.5 billion pounds sterling between 2005–2008, making the UK the second largest donor in relation to HIV/AIDS, were noted.\(^{137}\) Although the report does not mention CESCR, the UK makes some supportive reference to individual complaints received by the Committee on the Elimination of Discrimination Against Women (CEDAW) and the fact that all Special Procedures are welcome to visit.\(^{138}\)

Benin, in contrast, provided some detail on all economic and social rights, although information on the right to culture was limited to information on education and a reference to the establishment of a new Ministry on literacy and national languages.\(^{139}\) Much of the information provided on economic and social rights was limited to reference to legislation and other laws that protect these rights.\(^{140}\) However, reference was made to legislation and policy steps taken regarding some key economic, social and cultural rights obligations, including free preschool and primary school, free education for under five’s, vaccination programmes for mothers and children, and the provision of mosquito nets and free health care for those with HIV/AIDS.\(^{141}\) On justiciability, Benin noted the status of international law, and that ICESCR now takes precedence over domestic law.\(^{142}\) In relation to progressive realisation obligations, direct reference was made to the level of spending on education, which is 22.55 percent of the national budget.\(^{143}\) Interestingly, there is not a strong focus on discrimination in the Benin State report with only limited reference to issues for vulnerable groups, such as reproductive health rights for women.\(^{144}\) Additionally, in language similar to that used by CESCR, Benin requested international assistance to help it ‘to establish minimum standards in order to ensure effective and universal respect for human rights’.\(^{145}\) Benin’s report did not make express reference to the work of treaty bodies or Special Procedures.

2.3.2. UN Compilation

The UN compilations for the UK and Benin follow the same general format as for all other LDCs and OECD countries discussed above. They contained information on the full range of economic, social and cultural rights obligations.\(^{146}\) Reviewing the UN compilations for the UK and Benin in light of the concluding observations of CESCR and Special Rapporteur reports, it was interesting to note that, despite broad coverage,

\(^{137}\) Ibidem, at para. 116.
\(^{138}\) Ibidem, at para. 19.
\(^{140}\) See, in particular, ibidem, at para. 60.
\(^{141}\) Ibidem, at para. 24.
\(^{142}\) Ibidem, at paras 43–44.
\(^{143}\) Ibidem, at para. 63.
\(^{144}\) Ibidem, at paras 66–67.
\(^{145}\) Ibidem, at para. 94.
\(^{146}\) UPR UN Compilation Benin, UN Doc. A/HRC/WG.6/2/BEN/2, 7 April 2008, at para. 35; and UPR UN Compilation the UK, op.cit. (note 82), at para. 46.
there are a number of omissions. For example, while the compilation concerning Benin contained significant detail of CESCR, the Convention on the Rights of the Child (CRC) and CEDAW recommendations, it does not refer to CESCR recommendations concerning the minimum wage, the right to strike and national culture.\footnote{Concluding observations of the Committee on Economic, Social and Cultural Rights Benin, UN Doc. E/C.12/1/Add.78, 5 June 2002, at paras 16, 34 and 47.} In relation to the UK, several recommendations are not referenced, including those about behaviour in the International Monetary Fund (IMF) and the World Bank (WB), tuition fees in universities, the right to strike and homelessness.\footnote{Concluding observations of the Committee on Economic, Social and Cultural Rights UK, UN Doc. E/C.12/1/Add.79, 5 June 2002, at paras 26, 34, 38 and 41.}

2.3.3. Stakeholder Compilation

In relation to the stakeholder compilations of the UK and Benin, as can be seen across OECD and LDC reports, substantially more submissions were received for the UK (25), than for Benin, only seven.\footnote{UPR Stakeholders’ Compilation the UK, UN Doc. A/HRC/WG.6/1/GRB/3, 11 March 2008; and UPR Stakeholders’ Compilation Benin, UN Doc. A/HRC/WG.6/2/BEN/3, 9 April 2008.} Both stakeholder compilations did provide information on important aspects of economic, social and cultural rights. For the UK, this included aspects not highlighted in either the State report or the UN compilation, such as; the need for the UK to control the actions of private companies overseas to ensure they do not breach human rights, inequalities in the education system, and the lack of a statutory right to education for imprisoned children.\footnote{UPR Stakeholders’ Compilation the UK, op.cit. (note 149), at paras 32 and 33.} Important and up-to-date information was also provided in relation to a number of issues raised by treaty bodies, including child poverty and the national targets to halve such poverty by 2010, abortion, and poor mental health services in Northern Ireland.\footnote{Ibidem, at paras 28–31.} Also, as is seen in the reviews of many European States, a number of European regional bodies provided information. These included the Advisory Committee on the Framework Convention for the Protection of National Minorities of the Council of Europe, which highlighted ongoing problems of discrimination against vulnerable groups in relation to economic, social and cultural rights.\footnote{Ibidem, at para. 9.}

For Benin, the stakeholder compilation added important emphasis to areas already covered in the State report and the UN compilation. These included information on the rights of women, traditional practices, disparities between rural and urban areas, and the need for training programmes on FGM, sexual and reproductive health and HIV/AIDS.\footnote{UPR Stakeholders’ Compilation Benin, op.cit. (note 149), at paras 44–46 and 49.} The stakeholder compilation also made supportive reference to CEDAW and CRC concluding observations.\footnote{Ibidem, at paras 10 and 45.}
2.3.4. Questions in Advance

Relevant questions were limited, but in keeping with the general trend seen in all OECD and LDC reviews, questions were asked concerning vulnerable groups, particularly women and children, and economic, social and cultural rights.\textsuperscript{155}

2.3.5. Interactive Dialogue

The interactive dialogue of the UK and Benin in many ways mirrors the focus given to economic, social and cultural rights in State reports. Few questions were asked of the UK about economic, social and cultural rights, although some discussion of aspects of these rights, not covered in the national report, did occur.\textsuperscript{156} This indicates that at least some States are looking beyond State reports to guide their involvement in the UPR. Relevant discussion included child poverty, and steps taken in relation to the CESCR recommendation concerning the level of the minimum wage.\textsuperscript{157} Additionally, some discussion of justiciability and the indivisibility, interconnectedness and interrelatedness of rights occurred, including States highlighting with approval the UK’s statement that economic, social and cultural rights are as important as civil and political rights.\textsuperscript{158} A number of the questions directly supported the work of treaty bodies and Special Procedures which had noted, for example, concerns over child poverty and justiciability of economic, social and cultural rights.\textsuperscript{159}

In contrast to these sparse references, the interactive dialogue with Benin covered the range of economic, social and cultural rights.\textsuperscript{160} Much of this discussion involved vague or uncritical supportive comments which merely noted steps already being taken and did not lead to useful recommendations that can be followed-up. Despite this, some useful questions were asked. For example, Benin was asked to specify the international assistance it required, what measures had been taken to ensure food security in light of the world food crisis, and what practical measures were being undertaken to ensure clean water supply in line with the MDGs.\textsuperscript{161} A number of comments supported the work of treaty bodies, such as CRC and CESCR, which had previously expressed concern in relation to FGM, for example.\textsuperscript{162}


\textsuperscript{157} Ibidem, at paras 10 and 52.

\textsuperscript{158} Ibidem, at paras 40 and 44.

\textsuperscript{159} Ibidem, at para 40.


\textsuperscript{161} Ibidem, at paras 10, 11 and 34.

\textsuperscript{162} Ibidem, at para. 18.
2.3.6. Recommendations

Again a contrast between the UK and Benin can be seen in relation to recommendations. Only two recommendations concerning economic, social and cultural rights were made to the UK. The two recommendations did cover important aspects of economic, social and cultural rights, the first dealing with inequalities in the realisation of economic, social and cultural rights, and the second concerning the provision of information on the strategy to reduce child poverty.\(^{163}\) Notable omissions, highlighted by CESCR in its subsequent Concluding Observations, include the right to housing in the context of the Olympics, the failure to develop a national strategy on economic, social and cultural rights and the recommendation that the UK should ratify the OP-ICESCR.\(^{164}\)

Benin received 11 relevant recommendations which ranged across economic, social and cultural rights including poverty, gender discrimination and international assistance. Many of these recommendations are arguably of limited value as they merely encourage Benin to continue or intensify efforts in relation to the realisation of certain or all economic, social and cultural rights.\(^{165}\) Some do usefully highlight the next steps towards full realisation that should be taken. For example, Algeria recommended that ‘Benin consider, with targeted international support, the extension of free education up to the secondary level’.\(^{166}\) While no recommendations directly reference treaty body concluding observations, a number were in line with the approach of treaty bodies, such as Ireland’s recommendation that a national plan on the rights of disabled people be devised.\(^{167}\) Notable omissions include no recommendations relating to low cost housing, and particular disadvantage in rural areas, which have been highlighted by CESCR.\(^{168}\)

2.3.7. Plenary

Only one NGO made relevant comments during the plenary session on Benin, highlighting infanticide, infant mortality and the need to increase access to maternal health care, particularly in rural areas.\(^{169}\) Similarly for the UK, the only

\(^{163}\) UPR Final Report UK, op.cit. (note 156), Recommendations 15 and 16.


\(^{166}\) Ibidem, Recommendation 24.

\(^{167}\) Ibidem, Recommendation 31.


relevant comments came from one NGO highlighting the situation of children in poverty.\textsuperscript{170} The UK itself did provide some information in response to both relevant recommendations.\textsuperscript{171}

2.3.8. Implementation and Follow-up

The UK has provided some information on implementation to the HRC since its review. This review has not addressed the two recommendations relevant to economic, social and cultural rights.\textsuperscript{172} It is also disappointing to note that neither the CESCR, nor the UK, in its initial response to this year’s concluding observations, mentioned the UPR process.\textsuperscript{173} This is despite the fact that CESCR expressly recommended that efforts on the child poverty reduction targets be increased, which was highlighted during the UPR discussions.\textsuperscript{174} Benin has not provided any information to the HRC on implementation of UPR recommendations. The Special Rapporteur on the Right to Food has visited Benin since Benin’s UPR but there is no reference to the UPR in his report.\textsuperscript{175} This is disappointing in light of the recommendations to Benin concerning the food crisis.

2.4. EVIDENT TRENDS

From the above analysis of UPR practice so far, both positive and negative trends can be seen. Most UPR sessions involve significant discussion of economic, social and cultural rights, and practice in general saw reasonable reference to States obligations in relation to these rights. However, in some cases, particularly with a number of OECD counties, discussion of economic, social and cultural rights was limited in terms of both breadth and depth. Reference to these rights did not adopt the language of international human rights law. The key documents and discussions did contain some important information on the key aspect of economic, social and cultural rights but generally not on all rights, thus only enabling limited assessment of whether States are meeting their obligations in relation to these rights. Additionally, with some notable exceptions, most countries supported the justiciability of economic, social and cultural rights during the UPR process.


\textsuperscript{171} UPR Views on conclusions and/or recommendations, voluntary commitments and replies the UK, UN Doc. A/HRC/8/25/Add.1, 13 August 2008.

\textsuperscript{172} Information available at: www.upr-info.org/-Follow-up-.html.

\textsuperscript{173} Concluding Observations, op.cit. (note 164); and Comments by the UK on the Concluding Observations, UN Doc. E/C.12/GBR/CO/5/Add.1, 20 July 2009.

\textsuperscript{174} Concluding Observations, op.cit. (note 164), at para. 28.

\textsuperscript{175} Mission to Benin Report of the Special Rapporteur on the right to food, UN Doc. A/HRC/13/33/Add.3, 22 December 2009.
The UPR process is largely supportive of treaty bodies and Special Procedures. Good practice is emerging in relation to economic, social and cultural rights with significant reference to recommendations, and States promoting submission of reports and ratifications. It should be noted, however that these references are selective. Stakeholder engagement is evident for OECD countries, however, such engagement is problematically limited for a number of LDCs. It is noted that the involvement of European regional bodies is an interesting stakeholder development. In addition, the UPR is providing a forum for discussion of international assistance and cooperation, if only in the narrow sense, that which concerns the receipt and provision of technical and financial assistance.

In light of this mixed practice it appears that improvements will be necessary to ensure the UPR meets its objectives of improving the situation of human rights on the ground, the enhancement of States capacity and of technical assistance, sharing of best practice, and support for cooperation in relation to the protection of human rights and with other human rights bodies.

3. PART 2 – RECOMMENDATIONS FOR DIFFERENT APPROACHES AND CHANGE

Drawing on the analysis above, it is possible to make a number of recommendations to improve the UPR’s impact on the realisation of economic, social and cultural rights, and its ability to meet its objectives. These recommendations include changes that can be made within the existing UPR framework and those that require amendment of the founding documents of the UPR, which should be considered when the HRC reviews its new procedures in 2011. Within the existing framework, recommendations can helpfully be made to all actors in the UPR process. These include recommendations in relation to: improving the extent of discussion of States obligations as defined in international law; increasing support of the work of treaty bodies and Special Procedures; and, ensuring the equitable treatment of States under review. Other recommendations aim to ensure that stakeholders can be successfully engaged so that maximum impact on the ground is gained from the UPR process. Recommendations will also be made that should be considered during the review of the mechanism. These include: changes to existing UPR modalities and guidelines; improvements to the two trust funds established as part of the UPR process; and changes to the institution-building package itself.
3.1. POTENTIAL CHANGES WITHIN THE EXISTING UPR FRAMEWORK

3.1.1. The Extent of Discussion of States Obligations as Defined in International Law

In order for the UPR to lead to improvements in the realisation of economic, social and cultural rights, and for it to meet its objectives, sufficient reference must be made to these rights so as to highlight their importance and the content of these references must reflect international standards. It can be seen from the experience of the UPR so far that significant improvements in relation to both reference and content of references could be made. All actors in the UPR process can contribute to improvements in this regard.

States under review should ensure that their reports make specific reference to all economic, social and cultural rights. State reports should also provide information in relation to these rights that makes it possible to assess whether the State is meeting its obligations as defined in international human rights law and clearly spelt out by the general comments of CESCR. In particular, this should include specific reference to obligations of international assistance and cooperation. Additionally, States under review should ensure that the treatment of economic, social and cultural rights signifies their equal status to civil and political rights. LDCs, in particular, but also other developing countries, should make use of technical assistance to improve the content of their reports. Such assistance is available from the OHCHR and can also be sought from developed countries, as shown by the successful example of assistance by New Zealand to Tonga in its preparation for the UPR.176

In the interactive dialogue States under review should ensure that adequate attention is given in their presentation to economic, social and cultural rights. They should also ensure that adequate responses to questions concerning these rights are provided, and that relevant recommendations are adopted in a considered manner. Improvements in reporting of progress in relation to relevant recommendations should also be made. Such reporting should not be vague but provide information that reflects the content of economic, social and cultural rights and allows measurement of progress. This will help the UPR meet its objectives by maximising the information available concerning the impact of the UPR on the ground. The report provided by Colombia on implementation which included information on economic, social and cultural rights, poverty and rural development, could be used as a model for such reporting.177

Similarly, other States should ensure that adequate focus is given to economic, social and cultural rights in the interactive dialogue through asking relevant questions

177 ‘Initial report by Colombia on the implementation of UPR recommendations’, loc.cit. (note 133).
and making recommendations. It is noted that in relation to the LDCs, many developing countries are already making recommendations concerning the seeking and provision of, international assistance and cooperation. These recommendations could be improved with direct reference to the fact that these are obligations arising under ICESCR. Additionally, greater consideration must be given to the quality of recommendations and making these specific enough so that implementation can be undertaken and measured. Good examples which could provide helpful models are discussed above. In areas where international human rights standards are questioned, States must actively defend agreed human rights standards.\textsuperscript{178} There has been some positive defence of the justiciability of economic, social and cultural rights and this should be replicated in relation to other international standards.\textsuperscript{179}

NGOs and other stakeholders can also play a role in ensuring adequate and quality reference to economic, social and cultural rights in all key aspects of the UPR. NGOs should ensure that where they are consulted, gaps in State reports in relation to these rights are highlighted and information provided to fill such gaps. In relation to stakeholder compilations, NGOs should ensure that quality information on economic, social and cultural rights is provided. Particular efforts should be made to stress neglected aspects, such as the obligations of international cooperation.

The OHCHR Guidelines highlight the importance of covering all rights and voluntary commitments.\textsuperscript{180} A useful way in which to ensure such information is covered while not overburdening small domestic NGOs, is for such NGOs to provide a joint submission covering large numbers of stakeholders, as encouraged by the OHCHR.\textsuperscript{181} The successful joint work of civil society in Burundi in relation to the UPR is highlighted as a positive example. Through working together domestic NGOs were even able to send representatives to Geneva.\textsuperscript{182} While NGOs cannot take the floor themselves in the interactive dialogue, they should make suggestions to States in relation to appropriate questions and recommendations, and they should ensure these include economic, social and cultural rights.\textsuperscript{183} Additionally, NGOs should make better use of the plenary session to highlight gaps in recommendations and discussions about economic, social and cultural rights. Recommendations relating to the substantial contribution NGOs can make regarding implementation and the prevention of decoupling will be dealt with below.

\textsuperscript{178} Rathgeber, \textit{loc.cit.} (note 19), p. 6.

\textsuperscript{179} UPR Final Report Switzerland, \textit{op.cit.} (note 109), at para. 15.


\textsuperscript{181} \textit{Ibidem}, at p. 13.

\textsuperscript{182} \textit{Paper on treaty bodies and universal periodic review mechanism for the 9th Inter-Committee Meeting of the human rights treaty bodies}, Geneva 29 June – 1 July 2009, UN Doc. HRI/MC/2009/3, 24 June 2009 (document currently not available online; a copy is on file with the author).

\textsuperscript{183} Purna, \textit{op.cit.} (note 176), p. 30.
The OHCHR can also contribute to ensuring that economic, social and cultural rights are adequately referenced, and quality information is available on these rights. Additionally, the OHCHR should ensure that as much information as possible is available in all UN languages to increase accessibility. ¹⁸⁴

3.1.2. Support of Treaty Bodies and Special Procedures

Treaty bodies and Special Procedures play important roles in ensuring improvements in the realisation of rights on the ground. They are needed in conjunction with other mechanisms such as the UPR to help ensure States implement their obligations. A number of recommendations can be made to improve the complementarity of these mechanisms and to ensure that the UPR does not undermine the work of these existing bodies. It is noted that in the UPR so far, reference has often been made to the recommendations of treaty bodies and Special Procedures although this reference is necessarily selective. States under review should ensure that they do not use the UPR as an opportunity to reject treaty body and Special Procedure recommendations and instead use it as an opportunity to update the international community on progress made in relation to these. Other States should continue to make reference to treaty body and Special Procedure recommendations in their questions and recommendations and should increase this practice. Direct reference to previous recommendations of these bodies is also a useful way to add specificity to UPR recommendations which is lacking in many cases. Additionally, other States should continue to use the UPR as an opportunity to encourage cooperation with these mechanisms through meeting reporting requirements or extending standing invitations for visits, as well as encouraging ratification of ICESCR and the new optional protocol.

Similarly, NGOs should continue their reference to previous recommendations of these bodies, increasing it where possible. They should also give careful consideration to the selection process for highlighting previous recommendations to ensure that this is appropriate and does not exclude economic, social and cultural rights. The OHCHR could assist both States and NGOs in the task of selecting previous recommendations to be followed-up in UPR. This could occur through the OHCHR seeking information from the treaty bodies and Special Procedures themselves as to which previous recommendations should be addressed as a priority.

Additionally, the complementarity of the UPR and these other mechanisms could be improved by action on the part of treaty bodies and Special Procedures themselves. This could include providing information on priorities to OHCHR as indicated above or through making priorities clear in concluding observations.¹⁸⁵ Greater use of referencing of UPR recommendations in subsequent concluding observations, where appropriate, would also be helpful. It is important that the recommendations of the

¹⁸⁵ Inter-Committee Meeting Paper, op.cit. (note 182).
UPR are seen to be noticed and taken seriously by the rest of the UN human rights system for the process to have the legitimacy to be really effective.

3.1.3. Equal Treatment of All States

As selectivity was seen as one of the most significant problems of the old Commission on Human Rights, continuing unequal treatment threatens the legitimacy of the UPR mechanism and the HRC as a whole. As such, it is important that all States are equally subject to questions and recommendations relating to economic, social and cultural rights. It can be seen from the experience of LDCs and OECD countries in the UPR so far that there is some degree of unequal treatment in relation to the extent that economic, social and cultural rights are raised. LDCs receive substantially more questions and recommendations on these rights. States, with the assistance of suggestions from NGOs, should ensure that attention is given to these rights in the reviews of developed countries and should ensure that questions are asked and recommendations made even where the State report lacks detailed information on these rights.

3.1.4. Supporting the Role of Stakeholders

Stakeholders themselves and other UPR players can take a number of steps to ensure that civil society is able to take maximum advantage of the political space created by the UPR to ensure human rights improvements on the ground. Some good practice is emerging in relation to standard recommendations which remind States of their obligation to involve NGOs in the UPR process and the preparation of the State report. In addition, States should consider establishing national consultations with stakeholders following the UPR process to support implementation of UPR recommendations. Disappointingly, some States have attempted to limit NGO involvement at the plenary stage. It is urged that these States desist from this practice and that other States make clear statements about the important role of NGOs.

Important research indicates that improvements on the ground are stronger where there are links between domestic NGOs and international NGOs (INGOs). Domestic NGOs should ensure that they are involved in and aware of the outcomes

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186 The UK has adopted the practice of recommending to each State under review that all States continue consultation with stakeholders in the follow-up to the UPR as a matter of standard practice; for example, UPR Final Report Luxembourg, UN Doc. A/HRC/10/72, 8 January 2009, Recommendation 2.

187 Inter-Committee Meeting Paper, op.cit. (note 182).

188 See discussion in the section concerning the UPR process in general, noting the behaviour of Egypt in particular.

of the UPR process. While many such NGOs will not have the resources to send delegations to the working group or plenary sessions of the HRC, it is still possible to be involved with the process. In addition to recommendations noted above, domestic NGOs should establish networks to work on UPR implementation. These networks can organise meetings to watch webcasts of the UPR sessions which are available, both live and archived, from the OHCHR website, and develop a plan for implementation.190 Domestic NGOs should also develop links with INGOs that are involved in the UPR session for their home country, where possible.

INGOs, particularly those that are able to attend the UPR working group and plenary sessions, should ensure information is sought from domestic NGOs on priorities and realities on the ground, and that domestic NGOs are kept informed of how they can assist in relation to INGO priorities. INGOs should also seek to develop strong relationships with domestic NGOs to support the implementation process.

Additionally, the involvement of established regional human rights bodies strengthens the UPR process through increasing the information available to it and indicating it has legitimacy in the international human rights system. Other regional bodies, particularly from the African and Inter-American human rights systems, should draw on the example of European bodies and make submissions to the OHCHR to be included in the stakeholder compilations.  

### 3.2. CHANGES TO BE PURSUED DURING THE REVIEW OF THE MECHANISM

#### 3.2.1. UPR Modalities

The interactive dialogue component of the working group is the most vital part of the process offering the greatest potential of exerting influence on States to improve human rights. It is crucial that States under review maximise the time available to respond to questions and recommendations in this part of the UPR by restricting the length of their presentation of the State report. Currently, the UPR Modalities give States discretion in relation to the division of the 60 minute speaking time between the initial presentation, responding to other States and the concluding statement.192 While some good practice can be seen, a number of States have used substantial time to present their reports and were consequently unable to respond to all the points raised in the interactive dialogue.193 It is recommended that the UPR Modalities

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191 E.g. UPR Stakeholders’ Compilation Luxembourg, op.cit. (note 25).
192 HRC, op.cit. (note 27), at para. 7.
193 See discussion above in the section concerning the UPR process in general, particularly the discussion on Argentina.
specify a time for the presentation of State reports that reflects the importance of the interactive dialogue, a time of 15 minutes is suggested as appropriate providing at least 30 minutes for responses to other States if 15 minutes is also used in the concluding statement. A longer period is unnecessary as all participants have access to the text of the State report.

Additionally, it is suggested that broader coverage of economic, social and cultural rights would occur in the interactive dialogue if the discussions were framed not only by the presentation of the State report, which particularly in relation to OECD reports often lack information on these rights, but also by the presentation of the UN and stakeholder compilations. The presentation of these compilations has the potential to improve the range of issues covered and the quality of the discussion by highlighting discrepancies in the State report and, particularly in the case of the UN report, is an opportunity to ensure that international human rights standards are accurately presented. It is recommended that the modalities be amended to allow representatives of the OHCHR and stakeholders, if they are present at the working group, to present the compilation reports for 10 minutes each following the presentation of the State report before the interactive dialogue commences. It is noted that there is likely to be strong resistance to this idea as many States vehemently rejected the inclusion of experts or NGOs in the working group discussions.194 Some of this resistance may be allayed, however, if it is clear that experts and NGOs will still not be able to take the floor during the interactive dialogue. It may also be possible to have the OHCHR present both compilations. Resistance to this recommendation may be less given the substantial role the OHCHR already plays in the process.

3.2.2. UPR General Guidelines

The Guidelines for the Preparation of Information for the UPR contain broad indications of what should be included in documents prepared for the UPR process. In relation to the current status of the implementation of rights, the following should be covered:

Promotion and protection of human rights on the ground: implementation of international human rights obligations identified in the ‘basis of review’ in resolution 5/1, annex, section IA, national legislation and voluntary commitments, national human rights institutions activities, public awareness of human rights, cooperation with human rights mechanisms…195

The guidelines also require that current difficulties faced, best practice, challenges, priorities and technical assistance required be covered.196

194 Abebe, loc.cit. (note 3), p. 3.
195 Decision 6/102, supra note 10, at C.
196 Idem.
As noted in the discussion above, the broadness of these guidelines has seen many State reports fail to give sufficient attention to economic, social and cultural rights. This limits the capacity of the UPR to impact on the implementation of these rights. Consequently, the Guidelines should emphasise the importance of the coverage of all rights. At a minimum the Guidelines should be amended to include a reminder to participants similar to that in the OHCHR technical guidelines for stakeholders:

Stakeholders are encouraged, while drafting their contribution, in accordance with Human Rights Council resolution 5/1 (paragraph 1), to take into consideration all human rights obligations and commitments, including those set out in the United Nations Charter, the Universal Declaration of Human Rights, Human Rights instruments to which the country under review is a party, voluntary pledges and commitments made by that country, as well as applicable international humanitarian law.197

3.2.3. Trust Funds

The creation of trust funds to support the involvement of developing countries in the UPR and to support the implementation of UPR recommendations is a positive inclusion in the UPR process. It is crucial developing country delegations are able to be involved in the process. The secretariat of the HRC has published a note which sets out what support countries may request from the fund. This note states that funding will be provided for one delegate to attend the working group session where a country does not have a diplomatic presence in Geneva. This is very limited support, indicating the fund is not attracting sufficient donations. It is recommended that OECD States, in particular, provide greater support to the fund so that it is able to increase its support of developing country involvement in the UPR.

Disappointingly, there is no similar note concerning the fund for implementation indicating that this fund is not yet operational. It is recommended that the Secretariat of the HRC continue its work to operationalise this fund and that developed States provide the fund with appropriate levels of financial support. In this regard developing countries should use the opportunity presented when developed States are under review to recommend that support be provided to these funds.

3.2.4. Resolution 5/1

As discussed above, NGOs and other stakeholders play a crucial role in ensuring the improvements of human rights on the ground. For this reason, their involvement in the UPR process should be encouraged. Despite this importance, or perhaps because of it, the role of stakeholders in the plenary is somewhat unclear. Resolution 5/1 allows stakeholders to make ‘general comments’ and the modalities for plenary

197 OHCHR, op.cit. (note 180), at p. 10.
sessions provide 20 minutes for stakeholders to do this.\textsuperscript{198} It is not clear, however, how ‘general comments’ should be interpreted with a number of States pushing for a narrow interpretation which prevents stakeholders from making statements directed at specific States.\textsuperscript{199} The HRC should consider clarifying the role of NGOs when it reviews its operations in 2011. Such clarification should allow NGOs to make comments specifically directed to States under review.

Another consideration which would have a direct impact on the extent of discussion of States obligations as defined in international law relates to a role for experts in the UPR process. Throughout the negotiations which led to the creation of the HRC a number of different proposals were put forward, and eventually rejected, positing a role for independent experts. These varied from ensuring their involvement in State delegations to having them oversee the process in a role similar to that now performed by the troika.\textsuperscript{200} It is noted that any recommendation relating to a role for independent experts is likely to meet with opposition from many States, and that the involvement of experts may place the UPR in greater conflict with existing treaty bodies. Consequently, it may be better to limit expert involvement to the presentation of the compilation reports as discussed above. In addition to this role, perhaps there is a role for experts to make a presentation at the plenary stage following the presentation of the State under review indicating which recommendations should be implemented as a priority and any serious human rights issues not covered by UPR recommendations.

4. CONCLUSION

As an intergovernmental and inherently political mechanism the UPR is different from other human rights monitoring mechanisms. Despite this difference, the UPR can play an important role in the realisation of human rights, including economic, social and cultural rights. Fundamentally, this requires a forum designed to meet the UPR’s objectives. In relation to economic, social and cultural rights, this requires that these rights are discussed in a manner reflective of international standards to ensure States are influenced to meet their obligations. Analysis of the reviews of LDCs and OECD countries in relation to economic, social and cultural rights shows that a number of the necessary features are emerging in the practice of UPR. This includes highlighting best practice, criticising bad actors and monitoring and reporting. Economic, social and cultural rights have featured quite strongly in the reviews of LDCs, with UPR discussions including key aspects of States’ legal obligations in some cases.

Additionally, the UPR needs to work with other existing mechanisms, such as treaty bodies and Special Procedures, if the objective of improving the situation of human

\textsuperscript{198} Resolution 5/1, supra note 4.
\textsuperscript{199} See discussion above in the section concerning the UPR process in general.
\textsuperscript{200} Sweeney and Saito, loc.cit. (note 28), p. 205.
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rights on the ground is to be achieved. Some positive practice is emerging in this regard with some reference to economic, social and cultural rights recommendations and encouragement of ratification of relevant treaties.

In this article, a number of recommendations have been made which, if implemented, will strengthen the impact of the UPR on economic, social and cultural rights and the ability of the UPR to meet its objectives. These recommendations recognise the important role of the UPR itself, but also the significance of other mechanisms such as treaty bodies and Special Procedures, and the work of NGOs in realising human rights. Analysis of the UPR mechanism elucidates its significant potential in relation to the realisation of human rights including economic, social and cultural rights. With the good will of all participants, most particularly States, and the implementation of the recommendations contained in this article, it is possible that the UPR will realise this potential thus ensuring that human rights are protected in a manner that appropriately reflects their status in the UN Charter.