

CONFERENCE PROCEEDINGS

1ST INTERNATIONAL CONFERENCE

# UNIVERSAL PERIODIC REVIEW IN SOUTHEAST ASIA

15-17 SEPTEMBER 2016  
BANGKOK THAILAND



TAIWAN FOUNDATION  
for DEMOCRACY

財團法人臺灣民主基金會



HEINRICH BÖLL STIFTUNG  
**SOUTHEAST ASIA**



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## Preface

The Universal Periodic Review (UPR) is a mechanism under the Human Rights Council that reviews the human rights situation in all 193 UN Member States once every four and a half years. By 2016 all ASEAN member states have undergone two reviews of their respective human rights situations under the process. However, systemic problems remain with regards to its engagement with civil society stakeholders, the implementation of recommendations by the respective ASEAN governments, the efficacy of follow up processes and the UPR's ability to address hard political issues.

Asia Centre's 1st International Conference titled "Universal Periodic Review in Southeast Asia: A Regional Assessment" was convened to appraise these issues. The event was held on 15-17 September 2016 in Bangkok, Thailand. Over the course of three days, the conference hosted thirteen presenters and upwards of fifty participants from diverse backgrounds including academia, civil society organisations, national human rights institutions, the United Nations, as well as undergraduates and postgraduates. All of them came together to discuss the role of the UPR in Southeast Asia.

The papers in this conference proceeding examined the effectiveness of UPR in improving the human rights standard in the region. They identified trends and patterns of engagement with the UPR over the two cycles and provided a critical analysis of the UPR's achievement in Southeast Asia. They also assessed the process of UPR, the involvement of stakeholders and the effects of UPR on issues of human rights in the region. All papers in this conference proceedings have been formatted and presented here as received by the editors. The authors are responsible for the accuracy of facts, quotation, data, statements and the quality of the English language in their work. The papers are organised in the way it appeared in the conference program.

The papers received and compiled in this conference proceedings are only a selection of all presentations at the conference. However participants of this conference and new contributors went on to contribute chapters to Asia Centre's publication: "The Universal Periodic Review Of Southeast Asia: Civil Society Perspective" in 2018. This book reviews Southeast Asia's civil society engagement with the Universal Periodic Review (UPR) of the United Nations Human Rights Council during the first (2008-2011) and second (2012-2016) cycle. It is the first regional appraisal of the UPR in Southeast Asia.

For more information about Asia Centre's publication "The Universal Periodic Review Of Southeast Asia: Civil Society Perspective" click the link [here](#).

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# **Addressing Human Rights Protection Gaps: Can The Universal Periodic Review Process Live Up To Tts Promise?**

**Michael J V White**

New Zealand Human Rights Commission

## **Abstract**

The Universal Periodic Review (UPR) was designed to be a more inclusive, fairer and universal process. The enjoyment of all human rights in all States is reviewed. The process relies on a co-operative model to catalyse human rights implementation rather than the traditional confrontational model. Unlike the concluding observations of the United Nations Treaty Bodies State's must formally accept or reject recommendations made through the UPR. Accepted recommendations reflect a political commitment from the State to implement them before the next review. While States appear to take the UPR more seriously than other human rights treaty bodies, the process has been criticised as being overly politicised and less rigorous than a system reliant on independent experts. Regardless of these criticisms there is no doubt of the potential of the UPR to improve the realisation of human rights within member States. At the heart of this is the partnership model that is an integral feature of the UPR. The UPR provides a unique opportunity for NGOs, individuals and civil society groups to influence a State's human rights landscape and improve the realisation of rights across all sectors. It envisages States, National Human Rights Institutions and civil society working together. But is it living up to its promise and achieving change - without relevant follow-up the UPR will not achieve the requisite improvement of human rights on the ground. There are challenges for members of the Human Rights Council and civil society if the UPR is to deliver on its promise. This paper examines the effectiveness of the UPR across the two cycles that New Zealand has been involved in. It identifies areas of good practice, ongoing gaps and opportunities for the maturing of the process to better achieve improvement of the realisation of rights within member States.

## **Introduction**

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

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

Regardless of these criticisms there is no doubt of the potential of the UPR to improve the realisation of human rights within member States. At the heart of this is the partnership model that is an integral feature of the UPR. The UPR provides a unique opportunity for

NGOs, individuals and civil society groups to influence a State's human rights landscape and improve the realisation of rights across all sectors. It envisages States, National Human Rights Institutions and civil society working together.

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

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

## **Background**

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

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

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

It should be recalled that the CHR was not the sole mechanism for reviewing the extent to which States implement their human rights obligations. The core international human rights treaties<sup>1</sup> created independent bodies of experts to monitor the implementation of

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<sup>1</sup> International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Convention on the Rights of Persons with Disabilities; International Convention for the Protection of All Persons from Enforced Disappearance.

the provisions of each treaty (Treaty Bodies).<sup>2</sup> Each Treaty Body is composed of independent experts who are nominated and elected by States parties.

Treaty bodies are mandated to receive and consider periodic State reports setting out how well they are applying the treaty domestically.<sup>3</sup> The relevant Treaty Body examines the report – and any other relevant information it has received – and engages in a dialogue with the State Party. Following the dialogue, the Treaty Body publishes its “concluding observations” which detail concerns and recommendations to the State Party.

While the Treaty Body framework provides a platform for expert review of States human rights records, it has and continues to be problematic in several areas.

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

Table 1: State Reporting to Treaty Bodies

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

The OHCHR noted:

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

<sup>2</sup> Note, in the case of the International Covenant on Economic, Social and Cultural Rights, the treaty body is established through an ECOSOC resolution.

<sup>3</sup> Note, the SubCommittee on the Prevention of Torture, which is technically a treaty body, is the exception and does not have this mandate.

In 2016, the United Nations Secretary General submitted his first biennial report on the status of the human rights Treaty Body system (General Assembly, 2014). The report

found that the large majority of States continued to face challenges in submitting reports in a timely manner to the Treaty Bodies. “Two Treaty Bodies counted more than 20 States Parties whose periodic report was more than 10 years overdue (Committee on the Elimination of Racial Discrimination, Human Rights Committee)” (Ibid: 3).

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

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

Some States have also shown a reluctance to engage in the Treaty Body process because it is seen as an adversarial process.

### **A new mechanism – A noble aim**

Both the HRC and the UPR stem from Kofi Annan’s 2005 report. During a speech to the CHR on 7 April 2005, Kofi Annan recommended that the new HRC “should have an explicitly defined function as a chamber of peer review ... to evaluate the fulfilment by all States of all their human rights obligations...Under such a system every member State could come up for review on a periodic basis.” (Annan, 2005b). He believed that the peer review procedure should complement but in no way replace the States’ reporting system under the Treaty Bodies. Annan stressed that the procedure should be fair, transparent and workable, whereby States are reviewed against the same criteria (Ibid).

Accordingly, the General Assembly when creating the HRC, decided to include an innovative peer review process – the UPR. The HRC was instructed to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States” (General Assembly, 2006: 5(e)).

The UPR was intended to work cooperatively with States and not divisively against them. It was designed to prompt more regular reporting within a four-year period with 48 members to be reviewed every year, to be more inclusive, to be fairer and to be universal. All United Nations members are reviewed in much the same manner and by the same process and much the same criteria. (Human Rights Council, 2007). The enjoyment of all human rights in all States is reviewed. The Review is based on the Charter of the United Nations; the Universal Declaration of Human Rights; Human Rights instruments to which the State is a

party and other voluntary commitments made by States. This is considered by many to be one of the benefits of the UPR because “it epitomises the unity of human rights” (Tomuschat, 2011: 614).

The Review is informed by three sets of documents:

- a) A 20-page report prepared by the State under review. This report should be prepared through broad consultation domestically;
- b) A compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in Treaty Body reports and reports from other United Nations mechanisms; and
- c) A 10-page summary of additional information provided by other relevant stakeholders.

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

Central to the process is the interactive dialogue with the State under review. The State presents its report, other States can then comment on it, ask questions and/or make recommendations. While an innovative process, the timeframes for the dialogue are short. Three hours are allocated for each review with each State being given approximately 2 minutes to comment.

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

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

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

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

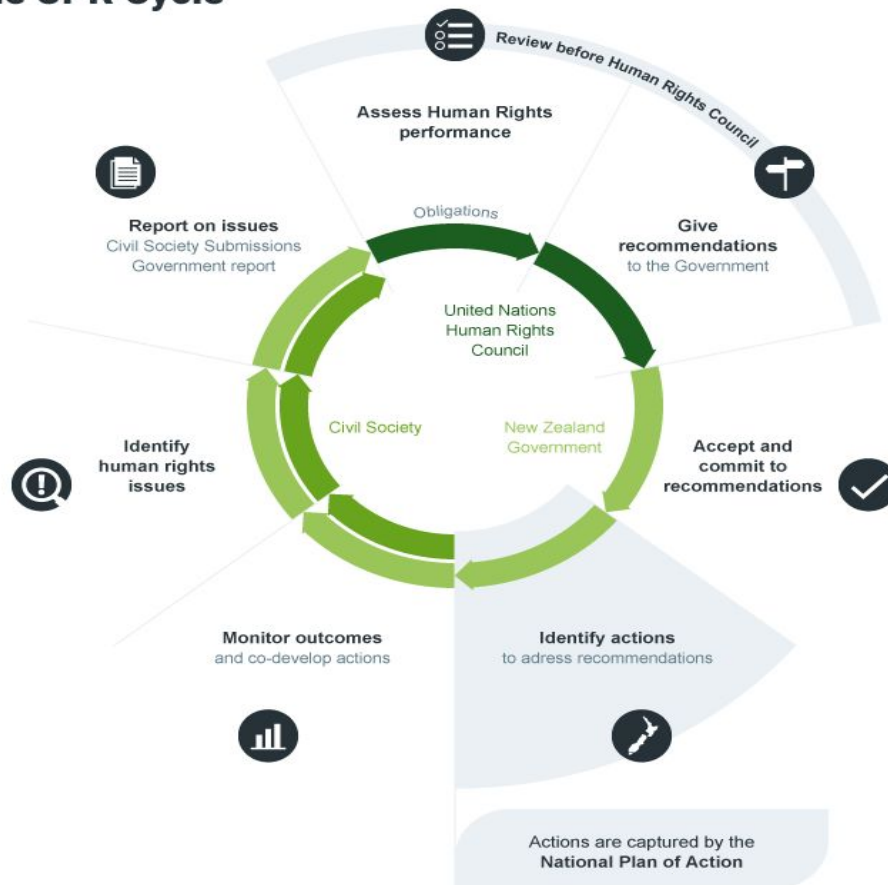
While the outcome of the review, as a cooperative mechanism, should be implemented primarily by the State concerned, States are encouraged to conduct broad consultations with all relevant stakeholders in this regard. (2007, Human Rights Council: Annex 17)

Taken collectively the requirement of participation and the universal scope of the UPR provides a unique opportunity to promote human rights in all settings. The UPR, captured in

the figure below, is a continuous process and requires each cycle to focus on the implementation of accepted recommendations from previous cycles.

**Figure 1: The UPR Process.**

### The UPR Cycle



*Source: New Zealand Human Rights Commission*

### Defining success; How to assess the effectiveness of the UPR

As the second cycle of the UPR ended in 2016, all States have been examined in the process twice. At the outset of its 3<sup>rd</sup> cycle it is worthwhile considering the effectiveness of the process and whether it is living up to its promise of improving the human rights situation on the ground. Before doing so it is useful to recall the principles and objectives of the process. The principles of the UPR include that it:

- should promote the universality, interdependence, indivisibility and inter-relatedness of all human rights;

- is a co-operative mechanism based on objective and reliable information and on interactive dialogue;
- be an intergovernmental process that is UN member-nation driven and action-oriented;
- fully involves the country under review;
- complements but does not duplicate other human rights mechanisms;
- not be overly burdensome on the State, not be overly long; be transparent, objective and non-confrontational and non-politicised;
- fully incorporates a gender perspective;
- takes country development into account without derogating from basic human rights; and
- ensures the participation of all relevant stakeholders including non-governmental organisations and national human rights institutions.

The objectives of the UPR are:

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

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

### **First impressions**

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

Dominguez-Redondo has described and analysed the major fears and criticism of the UPR. She suggests that the “non-confrontational, peer-review features of the UPR have been subject to significant criticism even before their merit could be assessed.” (Dominguez-Redondo, 2012: 673 -706). These criticisms relate in broad terms to the reliance on the goodwill of the State under review and fears of duplication.

Olivier de Frouville has voiced concerns about the quality and strength of questioning during the UPR and believes that better questions are asked by treaty bodies (independent experts) than by members of the HRC (Bassiouni and Shabas, 2011: 253). Manfred Nowak believes that States take the UPR more seriously than other human rights treaty bodies but he suggests that political bodies are less rigorous than a system or reporting reliant on independent experts. (Bassiouni and Shabas, 2011: 23).

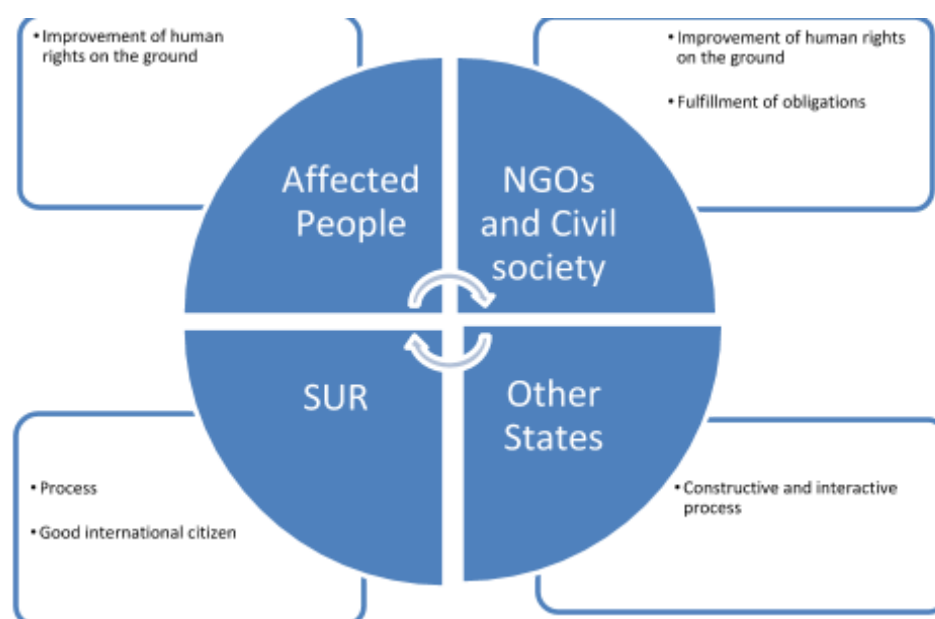
On the other hand the UPR has been described as, “incontestably an overwhelming and unprecedented success in terms of State engagement with a human rights review process.” (Dominguez-Redondo, 2012: 694). *UPR info* concluded – following the first cycle of the UPR that:

Several aspects of the UPR were deemed successful. Firstly, all 193 UN member states had participated in a review of their human rights records, voluntarily subjecting their national activities to international scrutiny. Secondly, over 21,000 recommendations were issued and 74 per cent of those recommendations were accepted by the States under review. Hopes were running high for the youngest child of the UN family. However, while the participation in the mechanism and the acceptance of recommendations are integral to the effectiveness of the mechanism, the main purpose of the UPR is to improve human rights in the member States through the implementation of the recommendations. (*UPR info*, 2012: 13)

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

### **Analysing the success of the UPR; delving deeper**

Before one can assess and measure the impact of the UPR it is necessary to define what is being assessed. As mentioned above the UPR has been referred to as both a mechanism and a process. Whether the UPR should be assessed as a process or a mechanism (for improved realisation of rights) will depend on the stakeholder’s eyes, depicted in Figure 2 below, through which one looks. It is of course a sliding scale with “affected people” most concerned with a mechanism for change and States under Review perhaps more focused on constructively engaging in the process.



**Figure 2: Stakeholders and the UPR Process**

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

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

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

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

### **Affected Person / Civil Society perspective**

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

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

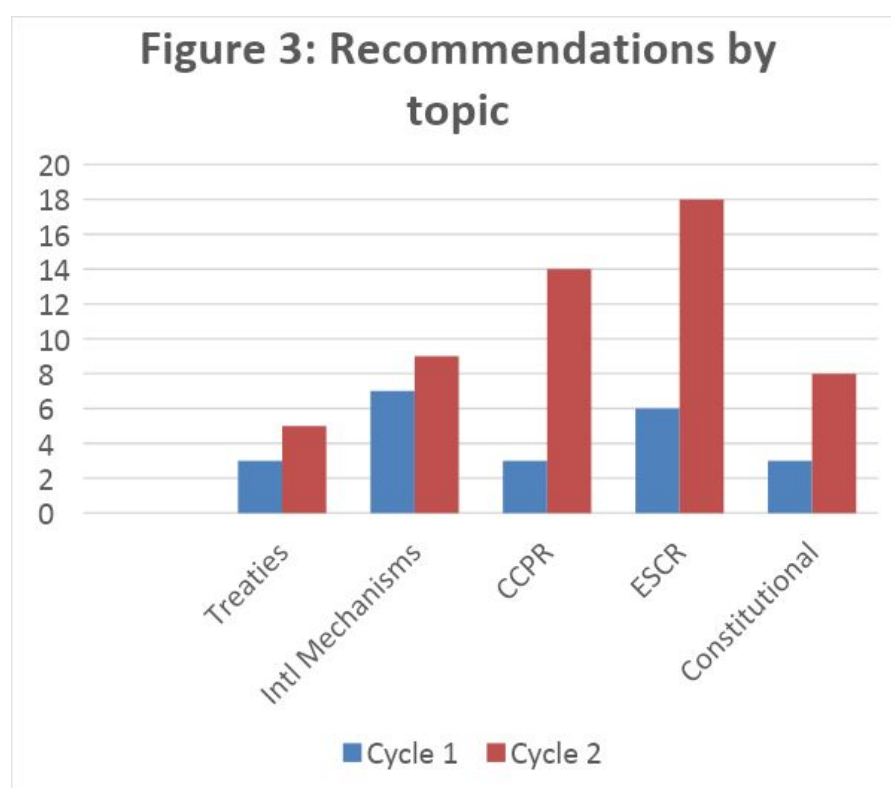
- the promotion universality, interdependence, indivisibility and inter-relatedness
- the improvement of human rights on the ground;
  - the fulfilment of the State’s human rights obligations and commitments and assessments of positive developments and challenges faced by the State;
  - enhancing the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

Effectiveness of the UPR must therefore be assessed against these criteria. If the UPR is not delivering in this regard, engagement from civil society and affected people may

invariably decrease or disappear as there is little value to their objective of improving the realisation of rights for people in their countries on the ground. If this were to occur then one of the fundamental pillars of the UPR would crumble leaving the mechanism vulnerable. This is not intended to sound overly pessimistic. However, it is important to acknowledge the potential impact of the UPR failing to achieve the change on the ground to understand why assessing the UPR as a mechanism – from the perspective of civil society – is vital.

The UPR has shown an equal recognition of economic, social and cultural rights and civil and political rights. (See Figure 3 below) This is even more evident in the second cycle where there is a growing salience of the fact that economic, social and cultural rights underpin many of the human rights concerns of vulnerable groups.

*Source: UPR info data*



Approximately 74 per cent of the recommendations were accepted by the SUR across both cycles. The Mid-term Implementation Assessments that *UPR info* have developed and provide information from 165 countries involved show that two and a half years after the initial review of those states 48 per cent of UPR recommendations triggered action. However, as this research shows, a more nuanced approach to what is meant by the language of recommendations used in the UPR, the degree of specificity of recommendations and the meaning of words and descriptions attached to “acceptance” make critical the need for a continuing refinement of evaluation (*UPR info*). There are essentially 5 categories of recommendations used in the UPR (See Figure 4):

- General action – approximately 40 per cent
- Specific action – approximately 34 per cent
- Continuing action – approximately 16 per cent
- Considering action – approximately 8 per cent
- Minimal action / Share – approximately 2 per cent.

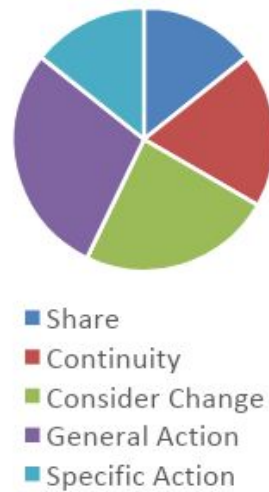
Category 1 requires the least cost and effort by the state. They are recommendations directed at non-SuR states, or calling upon the SuR to request financial or other assistance from, or share information with, non-SuR states. Category 2 concerns recommendations which emphasise continuity in actions and/or policies (verbs in this category would include continue, persevere, maintain). Category 3 embraces recommendations to consider change (consider, reflect upon, review, envision). Category 4 includes recommendations of action that contains a general element (take measures or steps towards, encourage, promote, intensify, accelerate, engage with, respect, enhance). Category 5 represents the greatest potential cost, as specific and tangible actions are being requested (undertake, adopt, ratify, establish, implement, recognise – in the international legal sense). These tend to be the farthest reaching and most important.



*Source: UPR info data*

Most recommendations have tended to be in the continuity, consider change and general action categories. In the Asia region, the generality of recommendations are even more stark, as set out in the below pie graph (Figure 5):

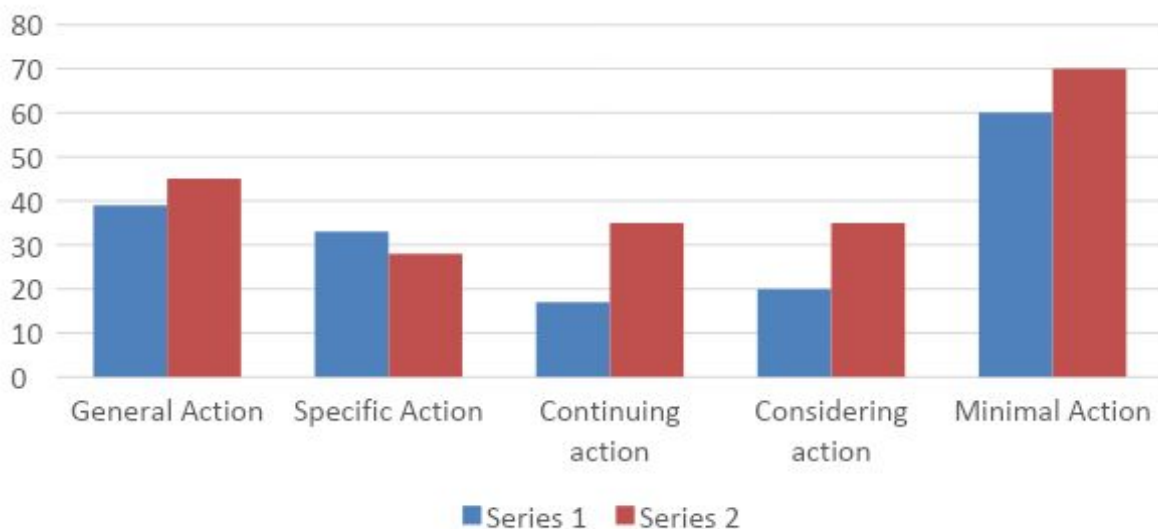
**Figure 5: Number of recommendations made against levels of action in Asia**



*Source: UPR info data*

While this trend shows the non-critical and constructive framework within which the UPR operates. It does inherently limit the ability for follow up and implementation. The situation becomes even more problematic when we consider the recommendations to which States respond (Figure 6). Approximately 39 per cent of accepted recommendations are general, with 17 per cent continuing action and around 9 per cent considering action.

**Figure 6: Acceptance by type of recommendation**



*Source: UPR info data*

It should not be overlooked that there are a significant number of specific action recommendations that are accepted – approximately 33 per cent. However, whether this

results in any real impact depends on how the State responds. Across both cycles States continue to use vague language in responding to recommendations, such as:

- is exploring;
- is working towards;
- will consider;
- is beginning to;
- will be able to;
- Will continue, continues to;
- is committed to;
- is developing, has developed;
- has established;
- will meet;
- already ensures;
- has placed, etc.

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

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

## **Concluding Comments**

States cannot avoid the UPR and the universality and absence of selectivity in electing which States to examine, which was a flawed characteristic of the Commission of Human Rights, have been welcomed (Lauren, 2007). Across 2 cycles we have seen some significant positive developments including the constructive engagement of all States, the increasing engagement of civil society and a commitment from States – at least at the political/international level – to take action.

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

- a commitment from States that is limited to the political dialogue, not the implementation;
- a failure to report and analyse implementation of recommendations from cycle to cycle;
- an absence of robust follow up and implementation mechanisms domestically;

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<sup>4</sup> SMART is a mnemonic acronym giving criteria to guide in the setting of objectives or actions. Each letter refers to a different criterion: S = Specific; M = Measurable; A= Achievable; R = Relevant; T = Time-bound.

- vague language both in recommendations and in responses;
- “friendly States” not wanting to ask the hard questions and make the hard recommendations; and
- the failure to engage in an ongoing dialogue with stakeholders between cycles.

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

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

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## **Assessing Suhakam's Effectiveness in bridging the implementation gap of Malaysia's Universal Periodic Review<sup>5</sup>**

**Khoo Ying Hooi**

University of Malaya

### **Abstract**

The Universal Periodic Review (UPR) mechanism established by the United Nations Human Rights Council (HRC) provides a window of opportunity for human rights practitioners to monitor states' human rights performances. Despite the growing prominence of the UPR, a number of challenges continue to hinder the realization of the process. One key question confronting the peer-based UPR is whether the UPR succeeds in influencing state obligation with international rights regimes. This is so because the states have the option of not to comply with UPR recommendations in the name of national interests which will prevail over its international human rights obligations in the event that the two clash. After two cycles of UPR exercise on the government of Malaysia in 2009 and 2013, the debate remains as to whether the UPR has any meaningful influence on Malaysia's human rights performances. Although it is a state-driven process, the UPR is ideally a mechanism of multi-stakeholder approach in addressing pressing national human rights concerns, in which the national human rights institutions (NHRIs) is one of the key stakeholders. The position of NHRIs is however a peculiar one. Although NHRIs are established by the state, at the same time, they are the "watchdog" of the state. They also serve as the bridge between the civil society organizations (CSOs) and the state. With such a position, the NHRIs have the opportunity to unleash its "power" by utilizing their "advantages" in enhancing the human rights promotion and protection in the region. By using the experience of the Human Rights Commission of Malaysia (SUHAKAM), this paper evaluates the effectiveness of SUHAKAM as an NHRI in its engagement with the state in UPR implementation back home.

### **Introduction**

The Universal Periodic Review (UPR) is a mechanism established by the United Nations Human Rights Council (HRC), which aims to improve the human rights situation in each of the 193 UN Member States by reviewing their human rights records every five years. It is a significant innovation that is based on equal treatment for all States. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also aims to provide technical assistance to States and enhance their capacity to deal effectively with human rights challenges and to share best practices in the field of human rights among States and other stakeholders. In short, it is designed to be a tool for States to

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<sup>5</sup> Paper prepared for UPR in Southeast Asia: An Evidence-Based Regional Assessment, 15 September 2016, Asia Centre, Bangkok, Thailand. (Rough draft, please do not quote)

use to measure themselves against other states, and to improve their human rights performance.

By design, this state-driven UPR mechanism provides a unique form for all stakeholders to examine, criticize, support and suggest the promotion and protection of human rights on the ground. However, the government has the option to do as it pleases in the name of national interests that will prevail over its international human rights obligations in the event that the two clash.

In the case of Malaysia, it underwent the first UPR in 2009 and the second one in 2013. The latter UPR drew much attention especially with the differing views of political and civil society groups. Ironically, the UPR is based on mandatory and voluntary approaches, but what worth noting is; nothing beyond the performance of the review is mandatory. The HRC has no power to reject or to enforce any recommendations because the mechanism is not legally binding.

## **UPR MECHANISM**

The UPR was established when the HRC was created on 15 March 2006 by the UN General Assembly in resolution 60/251. This mandated the HRC to “undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”.

There are three cycles of the UPR mechanism: preparation, review and implementation and follow-up. There are three key documents for the UPR process at the level of preparation. First is the state report, which is prepared by the State under Review (SuR). Second is the Office of the United Nations High Commissioner for Human Rights (OHCHR) report that is compiled by the OHCHR based on information contained in reports of treaty bodies, special procedures and other UN documents. Third is the stakeholders’ report that is compiled by the OHCHR based on NHRI and CSO submissions.

For the review stage, it involves interactive dialogue and adoption of outcome reports. During the session of the interactive dialogue, the SuR presents its national report and UN Member States pose questions, comments and provide recommendations to SuR. SuR then may choose to accept, reject or comment on the recommendations. That later on led to the summary of proceedings, recommendations and comments adopted as outcome report. The most important stage is the implementation and follow-up. At this stage, the government is to implement accepted recommendations. Implementation of rejected recommendations is also encouraged. For monitoring and advocacy, NHRI and CSOs may monitor and push for the implementation of recommendations.

## **NATIONAL HUMAN RIGHTS INSTITUTIONS**

The current departure point to discuss NHRIs is the Paris Principles. Paris Principles was devised in 1991 in Paris and adopted by the UN General Assembly in December 1993. Although debatable, the Paris Principles is recognized as an important document for all the NHRIs because it provides an international standard for such institutions. NHRIs are

statutory bodies and generally state funded. These human rights institutions are set up either under an act of parliament, the constitution, or by decree with specific powers and a mandate to promote and protect human rights. NHRIs vary significantly in their composition and structure. It can take many forms, such as Ombudsmen, Hybrid Human Rights Ombudsman and Human Rights Commissions.

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

Most often characterized as a bridge between international norms and local implementation, NHRIs are in principle constructed to assure the state’s compliance with its international legal obligations (Cardenas, 2001). In related to the UPR process, NHRIs accredited with “A” status are allocated a dedicated section in the summary of other stakeholders’ information and given the floor directly after the SuR during the adoption at the HRC plenary session.

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

## **MALAYSIA’S UPR**

The first UPR in Malaysia took place in 2009 and the second UPR took place in 2013. Below is the table to show the breakdown of UPR recommendations on Malaysia:

| <b>Year</b> | <b>Total of Recommendations Received</b> | <b>Accepted Recommendations</b> | <b>Rejected Recommendations</b> | <b>Noted Recommendations</b> |
|-------------|------------------------------------------|---------------------------------|---------------------------------|------------------------------|
|             |                                          |                                 |                                 |                              |

|      |     |                                                                              |    |    |
|------|-----|------------------------------------------------------------------------------|----|----|
|      |     |                                                                              |    |    |
| 2009 | 103 | 62                                                                           | 22 | 19 |
| 2013 | 232 | 150<br>(113 accepted in full, 22 accepted in principle, 15 accepted in part) | 82 |    |

Malaysia underwent its first UPR in 2009. Its troika consisted of Egypt, Qatar and Nicaragua. At its first UPR, Malaysia received a total of 103 recommendations: 62 of the recommendations enjoyed the support of the Malaysian government while 22 recommendations did not enjoy the support of the government. 19 recommendations were noted and responded by the government. The 62 recommendations are clustered into the following categories by SUHAKAM: accession to international treaties, review of laws and judicial system, marginalized groups, trafficking in persons, education, poverty eradication, healthcare and housing.

Malaysia's second UPR took place on 24 October 2013. During the session, 104 UN Member States made interventions. Malaysia received a total of 232 recommendations. At the 25<sup>th</sup> session of the HRC, the outcome report of Malaysia's 2<sup>nd</sup> UPR was adopted. Of these, 150 recommendations enjoyed the support of the government while 82 did not. Of the 150 recommendations that enjoyed the support of the government, 113 were accepted in full, 22 were accepted in principle and 15 were accepted in part.

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

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

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

## **GAPS IN ADVOCACY AND IMPLEMENTATION FOR UPR IMPLEMENTATION**

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

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

During the first UPR on Malaysia, SUHAKAM has taken the initiative to publish an information booklet in both English and Bahasa Malaysia on the mechanism itself, which serves as an awareness-raising tool regarding the UPR process (New Straits Times, 12 November 2012). The objective was to provide an explanation on the UPR and more importantly, to highlight recommendations that were accepted by the Malaysian government. The information booklet is widely distributed to stakeholders, including government departments and CSOs for the purpose of informing stakeholders about the UPR recommendations that have been accepted by the government. In addition, SUHAKAM has also recommended to the government to include the UPR recommendations as a point of reference in the development of Malaysia's National Human Rights Action Plan (NHRAP).

SUHAKAM has held several briefing sessions on Malaysia's 2<sup>nd</sup> UPR from July to August 2014 in Kuala Lumpur, Kuching, Kota Kinabalu, Johor Bahru, Pulau Pinang and Kuala Terengganu. The briefing sessions not only involved the government agencies at the federal and state levels, but also civil society organisations (CSOs) and the media. The two key objectives of the briefing sessions were to create awareness about the UPR and the commitments made by Malaysia, also to encourage active participation of all stakeholders including the CSOs and the media in the UPR process. SUHAKAM has then subsequently made the following recommendations to the government deriving from the inputs that they have gathered during the briefing sessions:

1. Establishment of Task Force and development of UPR plan of action;
2. Broad and meaningful consultations with stakeholders on implementation;
3. Cluster-based discussions between relevant agencies and CSOs;
4. Submission of midterm report and incorporation of UPR recommendations in National Human Rights Action Plan (NHRAP);

5. Translation of UPR information into national language and dissemination to public;
6. Discussion of recommendations not accepted by the government.

Malaysia accepted in full all three recommendations relating to SUHAKAM in Malaysia's 2<sup>nd</sup> UPR specifically to increase cooperation with SUHAKAM as well as to strengthen it. In December 2013, SUHAKAM submitted a proposal to the government to amend its enabling law with a view to strengthen its mandates and powers. Unfortunately, the proposed amendments<sup>6</sup> were not found favorable by the government. Moreover, the government has decided to reduce SUHAKAM's grant for 2016 by 49.85 percent in comparison to the amount approved for 2015. This could have a negative impact on SUHAKAM's ability to carry out its planned activities and programmes.

### **Minimal Engagement between the Government of Malaysia and SUHAKAM**

According to Council Resolution 5/1 of 18 June 2007, states are encouraged to prepare the information they submit through a broad consultation process at the national level with all relevant stakeholders. Aside from state submission of its UPR, SUHAKAM and other stakeholders may also submit separately their own reports for the UPR in Malaysia. That meaning, ideally, all stakeholders should play an active role in the UPR exercise especially in implementing the UPR recommendations. Stakeholders should consist of the government, the NHRI, CSOs, the media and the public. The government in this case should include the federal and state governments and local authorities as well as all three organs of government namely the executive, the legislature and the judiciary. Although the government is encouraged to consult regularly with the stakeholders, this is however not the case in Malaysia for reasons such as lack of resources and political will. As reported by SUHAKAM in their mid-term report in April 2016, SUHAKAM had found especially from the two series of nationwide consultations it had organised in 2014 and 2016, that the involvement of state governments and local authorities in the UPR process has been minimal at most. At the same time, CSOs operating at the state level in general have not been active in advocating for the implementation of the UPR recommendations.

There are misconceptions regarding the UPR and international agreements. Attacks by certain quarters against the Coalition of Malaysian NGOs in the UPR Process (COMANGO) who are exercising their constitutional rights and who are consistent with the UN guidelines is unacceptable and a violation of human rights. COMANGO's participation faced a severe backlash. Fundamentalist and ethno-nationalist groups, as well as state agencies, accused COMANGO of being anti-Islam and anti-Malay. To some extent, these accusations had gained ground among the public, in particular Muslims. Such attacks reveal the ignorance of the UN system as well as the UPR process. Extremist Islamic NGOs such as the Coalition of Muslim NGOs in the UPR Process (MURPO) accused COMANGO of attacking the Malaysian government and baselessly branded them as traitors who incite violence. The attacked focused on lesbian, gay, bisexual and transgender (LGBT) and freedom of religion,

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<sup>6</sup> The proposed amendments are: further strengthen the selection process of the Commissioners, appoint full time and/ or part time Commissioners, increase the period of the Commissioner's terms, enable the Commission to conduct unannounced visits to places of detention, enable the Commission to undertake mediations, formalize a consultation process between the government and the Commission in the formulation or amendment of laws, ensure that adequate funds are allocated to the Commission annually via Parliament, enable the Commission to have an amicus curiae role in selected court cases that involve alleged human rights violations, and ensure that the Commission's Annual Report is debated in Parliament.

where were interpreted as “free sex” and apostasy. In 2013, there were 28 submissions for the UPR from various stakeholders reflecting the strength of CSOs in Malaysia.

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

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

### **Disconnection of Human Rights Obligations**

Recommendations posed by UN Member States and accepted by the SuR should be adequately substantial to effect meaningful improvements on the situation of human rights in the country. SUHAKAM notes that the majority of recommendations presented by UN Member States to Malaysia are general and indefinite in nature. SUHAKAM also observes with disappointment that recommendations, which are more specific and deliberate in character, are mostly not accepted by Malaysia. Such circumstances are likely to result in situations where the government may be able to fully implement the accepted recommendations without actually addressing the key concerns of the various human rights issues and without having much impact on the ground. In its reluctance to adopt the more substantive aspects of human rights obligations, it indirectly reveals the government’s insincere and window-dressing commitment based on the benchmark of international human rights norms.

Through analysis on the two UPR exercises in Malaysia, there is a similar trend that most of the recommendations made pertained to accession to treaties and UN mechanisms. Ratification of core human rights conventions is another major area of concern. Malaysia is embarrassingly behind in ratification track record. Malaysia has so far ratified only three of the core human rights conventions. And even in the two ratified – Convention to Eliminate All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC), the government made some reservations. In terms of comparison with other countries, we are at the bottom of the global performance index. Malaysia’s unwillingness to ratify major human rights conventions such as Convention on the Elimination of Racial Discrimination (ICERD), International Convention against Torture (CAT), International Convention of Civil and Political Rights (ICCPR) and the International Convention of Economic, Social and Cultural Rights (ICESCR). Malaysia is among the last few internationally at the level of ASEAN. Malaysia has two terms on the HRC and in a

non-permanent seat at the UN Security Council. The frequent excuses offered by the government are “we are not ready”. The government has argued that unless Malaysia has domestic legislation in place, it will not sign treaties.

The business community is another significant partner that needs to be engaged to uphold human rights, with particular regard to workers’ rights. There must be continued engagement on human rights between all stakeholders, from diplomats, government and business, to civil society and the media, and an enabling environment must be provided for this. During the interactive dialogue in Geneva for the 2<sup>nd</sup> UPR, SUHAKAM noticed that none of the recommendations address the issue of business and human rights. There was only one recommendation made by Sierra Leone on the possible impact of the Trans-Pacific Partnership Agreement (TPPA) and how it affects access to healthcare. This shows the lack of recognition by states on the role of business entities in promoting human rights.

## **Human Rights Public Policy**

One important advocacy by SUHAKAM in UPR implementation is the NHRAP. Malaysia accepted in full the recommendation to continue efforts to develop Malaysia’s NHRAP. As early as in 2001, SUHAKAM has made recommendations to the government to formulate a NHRAP. An NHRAP is important for the country because such a plan could help strengthen the promotion and protection of human rights by placing the human rights discourse in the proper context of public policy. In 2012, the Cabinet announced the decision to develop Malaysia’s first ever NHRAP. The NHRAP is a direct impact from the UPR exercise. The progress in developing the five-year NHRAP has been rather slow, despite SUHAKAM’s repeated calls for the process to be expedited.

Following the conclusion of the UPR in 2013, the government of Malaysia continues its effort in preparing the NHRAP by appointing the Legal Affairs Division (BHEUU) of the Prime Minister’s Department as the focal agency. The proposed NHRAP would contain five core features which are civil and political rights; economic, social, religious and cultural rights; rights of vulnerable groups, rights of the indigenous people and international obligations (BHEUU official portal). In this regard, SUHAKAM is working closely with the government to ensure that the UPR recommendations will be taken into consideration in the preparation of the NHRAP so that it will be a more comprehensive and effective national plan. It was originally expected to be finalized in 2016, however an external consultant had been commissioned by the government to develop the NHRAP in November 2015 and that the complete draft would be presented by external consultants to the government in April 2017 (SUHAKAM 2015 Annual Report, p.23).

Making a comparison with the first UPR, there was a rise in percentage of Specific, Measurable, Achievable, Realistic and Time bound (SMART) recommendations. The previous UPR has been criticized for being rife with recommendations buried in phrases such as ‘continued to make steps’, thus making it difficult to assess what would represent fulfillment of a recommendation. Review of the previous UPR for Malaysia shows that of the 62 recommendations accepted by the government, only one was under the SMART category while the rest were vague. When there is a rise of SMART recommendations and particularly

a rise of those recommendations involving accession to treaties, it could influence the government's decision to accept more of these SMART recommendations. Yet, SUHAKAM notes that it will be difficult for the government to maintain the same percentage of acceptance of recommendations as in the first UPR, since the second UPR has more SMART recommendations, especially those related to accession to treaties. This is a positive thing and would encourage the government to take action (SUHAKAM Speech in Denison Jayasooria (ed.), 2016, p. 111).

The Foreign Ministry is tasked with replying to the UPR recommendations, but it may not have the smooth cooperation of the Attorney General, or other ministries, for example, they may delay responding or lack the will to make strong commitments. The ministry also does not have the mandate to ensure that the commitments are followed through. Moreover, government agencies for the most part are not too familiar with the UPR recommendations and were slow and unenthusiastic in their implementation of these recommendations. Within the government machinery, the nature of the UPR process remains a bureaucrat's process and that leaves little role for members of parliaments and politicians. SUHAKAM also submitted mid-term progress reports for first and second UPR. However, the Malaysian government had not provided such a report although they could.

## **CONCLUSION**

The position of SUHAKAM is a peculiar one. Although it is established by the government, at the same time, SUHAKAM acts as the "watchdog" on the government's UPR implementation and follow-up. At the same time, SUHAKAM also serves as the bridge between the CSOs and the state. The key challenge for SUHAKAM is hence on how to maintain their role by securing their independence and at the same time, utilise their "advantages" in pressuring the government to enhance the human rights promotion and protection back home. Currently, SUHAKAM is purely an advisory body and therefore the government agencies and those in the public office do not take the majority of its recommendations seriously. However its role is crucial because they can have a powerful impact on the human rights performance in the country. Moreover, SUHAKAM in the context of Malaysia has more weight at the national and international levels than the CSOs in its capacity as a neutral stakeholder.

The UPR demands a level of accountability, so the government is very guarded about accepting recommendations because it does not want to be blamed for not doing what it agreed to do. While acknowledging that the government has the primary responsibility to implement the UPR recommendations, there is a need for the government to engage with stakeholders in the implementation process. The government in fulfilling its UPR commitments should work together and in consultation with stakeholders including the NHRI and CSOs. The NHRI and CSOs are well positioned to offer their respective expertise and input, which would complement the efforts of the government towards achieving the country's UPR goals. SUHAKAM became operational on 24 April 2000 and it has since prepared an annual report but none has ever been debated in Parliament. SUHAKAM however needs a legislative boost in terms of investigative and punitive powers. Its annual report must also be tabled in Parliament, which should establish a human rights parliamentary select committee.

By and large, the government has made greater strides in fulfilling recommendations relating to economic, social and cultural rights in comparison to those pertaining to civil and political rights. The government continues to consider SUHAKAM a cosmetic rather than a corrective organisation, as can be seen by appeals to SUHAKAM. It is worth noting that SUHAKAM does not share the government's assessment of the police and the indigenous people. As noted by SUHAKAM in its mid-term report, various programmes and initiatives carried out by the government in promoting economic, social and cultural rights are mostly devoted to Malaysian citizens. As a result, vulnerable groups who are not Malaysian nationals such as migrant workers, refugees, asylum seekers and stateless persons continue to fall through the cracks and remain the most vulnerable to human rights abuses.

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

**Celine Martin**

Destination Justice

### **Abstract**

Born only three years apart, the Universal Periodic Review (UPR) and the ASEAN Intergovernmental Commission on Human Rights (AICHR) are two of the main components of the protection of Human Rights in Southeast Asia. As of today, all ASEAN States have completed their second cycle of review allowing us to assess their improvement in protecting Human Rights at the national level and their implication at the regional level. Our study of the UPR recommendations will show that ASEAN States are being encouraged to foster their role and engagement toward the building of a protective regional human rights mechanism in Southeast Asia. Our study will highlight that a high number of those recommendations are made by fellow ASEAN States in a bid to internationally recognize the efforts made since the creation of the AICHR in 2009, as well as to acknowledge the individual contribution made by the ASEAN States to participate into the development of a protective mechanism. The diversity of political regimes in the region does not make the task of achieving a regional human rights mechanism easy, but other regional mechanisms have needed time and they still are being continuously improved, when they are not financially drowning (IACHR). Our study will choose to believe that adherence to the UPR recommendations by the States, even as shy that it can be, is a positive sign that needs to be talk about. We have to bear in mind that the principal forum to address the protecting role of the AICHR is the Commission itself, and the ASEAN, but the growing impact of the UPR recommendations has its role to play. Indeed, UPR recommendations fostering the protecting role of the AICHR are still rare but their number and pertinence have grown over the second cycle of reviews. However, beyond the level of adherence of the States to the UPR recommendations, the question of its level of implementation has a role to play that our research will address by studying the follow-up reports and the civil society recommendations.

### **Introduction**

Established only three years apart, the Universal Periodic Review (UPR) and the ASEAN Intergovernmental Commission on Human Rights (AICHR) are two key components of the protection mechanisms of human rights in Southeast Asia. As of November 2016, all ASEAN States have completed their second cycle of review allowing an assessment of their

willingness to protect human rights at the national level and evaluate their implications for the regional level. This chapter reviews the role played by the UPR in developing AICHR's protection capacity.

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

The UPR provides an opportunity for the AICHR to receive recommendations from other States which have been enjoying a regional human rights mechanism for decades in Europe, Latin America or Africa. However, many of the recommendations calling for a better adherence to the AICHR are actually being made by fellow Southeast Asian States.

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

Beyond the level of adherence of the States to the UPR recommendations, the question of its level of implementation also has a role to play. This chapter examines the follow-up reports and the civil society recommendations pertaining to the AICHR before discussing ways of how the UPR and the AICHR could consolidate one another in order to enhance human rights protection in Southeast Asia.

### **UPR: A forum for improving the protection function of AICHR**

With the United Nations reforming the Human Rights Commission into a Human Rights Council in 2006, the Universal Periodic Review was created. Formally established in 2007, the first cycle (2008-2012) was the occasion to review the state of human rights in every single country in the world, but also to lay the ground for improvement of every one of those countries. The States are under no obligation of accepting the recommendations, but they are under obligation to implement the ones they accept. The primary objective of the UPR is to improve the human rights situation in every country, but by stepping up the level of human rights implementation in each of every one country of a region, it can impact its regional mechanism. As such, if every one of the ten (soon-to-be eleven) ASEAN countries improves its relation with the ASEAN human rights mechanism and participates into its implementation, the mechanism has a better chance to grow into a binding mechanism.

The table below shows the list of recommendations for the improvement of the AICHR made during the UPR cycles one and two.

**Table 1**  
**List of all recommendations received by Southeast Asian States calling for a better regional mechanism**

| STATE REVIEWED | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                        | STATE RECOMMENDING | CY | CA |
|----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|----|----|
| LAOS           | Further enhance and strengthen the work of the ASEAN Intergovernmental Human Rights Commission to effectively promote and protect the human rights and fundamental freedoms of the peoples of ASEAN                                                                                                                                                   | Indonesia          | 1  | 4  |
| MYANMAR        | Enhance its engagement with the ASEAN Intergovernmental Commission on Human Rights                                                                                                                                                                                                                                                                    | Indonesia          | 1  | 4  |
| MYANMAR        | Accede to the remaining core human rights treaties and core labor standards it has yet to become a party to, and continue to cooperate with international and regional human rights mechanisms in implementing its obligations                                                                                                                        | Thailand           | 1  | 5  |
| THAILAND       | Continue to work closely with ASEAN to build on the mechanisms of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) to promote and protect the rights of the peoples of ASEAN                                                        | Singapore          | 1  | 2  |
| BRUNEI         | Take more concrete measures with a view to fostering a genuine human rights culture with due regard to national and regional particularities as well as historical, cultural and religious backgrounds                                                                                                                                                | Iran               | 1  | 5  |
| TIMOR-LESTE    | Continue to build partnerships with friendly countries and organizations, and explore all possible avenues of cooperation, either at bilateral, regional or international levels, to improve the country's capacity and to enhance its manpower in order to allow the people of Timor-Leste full enjoyment of their rights                            | Philippines        | 1  | 2  |
| TIMOR-LESTE    | Further increase regional and international cooperation on human rights, particularly with the ASEAN nations and with the Human Rights Council                                                                                                                                                                                                        | Viet Nam           | 1  | 4  |
| BRUNEI         | Continue its engagement with various institutions to promote and protect human rights in the regional and international fora                                                                                                                                                                                                                          | Kuwait             | 2  | 2  |
| BRUNEI         | Continue and strengthen the active interaction with regional and international organizations of human rights                                                                                                                                                                                                                                          | Morocco            | 2  | 4  |
| BRUNEI         | Continue its constructive role and contribution in the promotion and protection of human rights in the region, particularly through established regional frameworks in ASEAN, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) | Myanmar            | 2  | 2  |
| CAMBODIA       | Strengthen human rights cooperation and constructive dialogue, including those through the ASEAN Human Rights                                                                                                                                                                                                                                         | Viet Nam           | 2  | 4  |

|                  |                                                                                                                                                                                                             |             |   |   |
|------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|---|---|
|                  | Commission and with the relevant United Nations human rights bodies and mechanisms                                                                                                                          |             |   |   |
| <b>INDONESIA</b> | Ratify the Rome Statute of the ICC to be a front runner again within ASEAN                                                                                                                                  | Germany     | 2 | 5 |
| <b>LAOS</b>      | Enhance the implementation of the international human rights treaties, to which the Lao People's Democratic Republic is a party and the ASEAN Human Rights Declaration to benefit the entire Lao population | Cambodia    | 2 | 4 |
| <b>LAOS</b>      | Strengthen international and regional cooperation in the protection and promotion of human rights                                                                                                           | Vietnam     | 2 | 4 |
| <b>VIETNAM</b>   | Continue to be actively engaged in regional human rights bodies, particularly those concerning the promotion and protection of the rights of women and combating trafficking in persons                     | Philippines | 2 | 2 |

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

CY : Cycle // CA : Category of recommendation

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

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

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

such as Indonesia, Thailand or Singapore, even if in theory, each ASEAN States' voice has the same weight.

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

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

The most interesting recommendation of the second cycle is from Cambodia which highlighted the importance for Laos to "Enhance the implementation of the international human rights treaties, to which the Lao People's Democratic Republic is a party and the ASEAN Human Rights Declaration to benefit the entire Lao population." (UPR Info, 2016). In its recommendation, Cambodia is reminding Laos its obligations toward the AHRD even if the document is non-binding.

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

### **Limited interest for AICHR**

With a total of 20,452 recommendations (UPR Info, 2016) given over the past 8 years worldwide, only 14 of them address AICHR, which is almost a negligible number. The most surprising element in the collection of the UPR recommendations is that 85% were by Southeast Asian States to their peers. Only Iran and Germany showed an interest in delivering recommendations on this topic. This singularity shows the lack of interest from the international community for AICHR or at least little interest compared to other issues such as women and children rights, migrant workers or trafficking issues for instance.

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

In closing this 2014 workshop, the Representative of Thailand to the AICHR concluded that the current Terms of Reference (TOR) of the AICHR may not allow for the AICHR to take up all the recommendations of the workshop. This said, it may be open to creative interpretation in order to develop a regional plan of action and or organize possible activities that can be used to support the ASEAN Member States UPR processes. (AICHR, 2014).

This new role could be a good opportunity for the Commission to empower itself and to gain experience and acknowledgment from the ASEAN States and from the international community.

However, a closer look must be taken at the interactive dialogue where recommendations and discussions were held on the AICHR that did not make it to the final report. Those discussions have their importance as they are testimonies of a stronger interest in AICHR than the final recommendations suggest. The interactive dialogue can sometimes be the witness of unsuspected cooperation between states.

For instance, during Cambodia's first review,

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

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

### **The question of the effectiveness of the UPR recommendations**

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

#### *Measuring the effectiveness of the recommendations*

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

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

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

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

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

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

Of the 11,527 recommendations that were commented on in the Follow-up programme by the UPR Info team, the most common categories were 2 (14%), 4 (43%), and 5 (34%). These are the three categories that have been used by the States recommending AICHR. Indeed, if we look back at our Table 1, 28% are recommendations from category 2, 57% are recommendations from category 4 and the remaining 15% are recommendations from category 5. Those statistics, especially the high rate of general recommendations can be explained as “by the fact that states do face diplomatic or other constraints for making precise recommendations. At the same time, the rate of category 5 recommendations is encouraging because these recommendations are easy to assess and can help to identify the concrete actions taken to improve human rights” (UPR Info, 2014).

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

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

- Recommendation to Myanmar by Thailand (1<sup>st</sup> cycle) to focus on acceding to the remaining international and regional human rights instruments. Since this recommendation was made in 2011, Myanmar has indeed signed three more international HR treaties: The International Covenant on Economic, Social and Cultural Rights (ICESC) in 2015, The first optional protocol to the Convention on the rights of Children about the involvement of children in armed conflict in 2015, and the second first optional protocol to the Convention on the rights of Children against child prostitution in 2012.
- Recommendation to Brunei by Iran (1<sup>st</sup> cycle) to “take more concrete measures with a view to fostering a genuine human rights culture with due regard to national and regional particularities as well as historical, cultural and religious backgrounds”. Since then, Brunei has adopted the Sharia Law in 2014 (Ozanick, 2015). It is not clear if it was what Iran had in mind when they mentioned the “genuine human rights culture” ....
- Recommendation to Indonesia from Germany (2<sup>nd</sup> cycle) to “*ratify the Rome Statute of the ICC to be a front runner again within ASEAN*”. Indonesia first pledged to ratify the Rome Statute in 2008, but finally recognized in 2013 that the country will not ratify the treaty in a near future (The Jakarta Post, 2013). So far, only two countries have ratified the Rome Statute in ASEAN: Cambodia in 2002 and the Philippines in 2011.

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

*The role AICHR could play in assisting the States improve their human rights situation*

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

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

protect national security. Therefore, enforcing UPR recommendations made on those last issues can be challenging.

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

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

## **Conclusion**

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

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# **Universal Periodic Review and the Abolition of the Death Penalty in Singapore, Malaysia, Brunei and Myanmar: The Arduous March Forward**

**M Ravi**

International Human Rights Lawyer

## **Abstract**

South East Asia comprises a region often associated in the media with the liberal use of the death penalty, particularly for drug related offences. In recent years, however, trends suggest a move towards abolishment, through moratoriums and legal reform.<sup>7</sup> This is especially the case in former British colonies. In 2012, Singapore amended its laws on the death penalty, making it no longer mandatory for those convicted of drug trafficking or murder to receive death sentences.<sup>8</sup> In Malaysia, while the death penalty is still handed down for drugs and trafficking, the reluctance to carry out these penalties has been noticeable.<sup>9</sup> In Brunei Darussalam and Myanmar a de facto Moratorium is in place, where executions have not taken place since 1957 in Brunei and all death sentences were commuted in Myanmar in 2014.<sup>10</sup> At the same time, UN Member States throughout the region are on the precipice of a third cycle of Universal Periodic Review (UPR), set to begin in 2017. Judging by the emphasis on the death penalty in the previous two UPRs, it is likely that the topic will again be a focus of attention at the third review and these member states will be urged to step further towards abolishment. Previous reviews included emphasis by other member states and human rights groups on the use of the death penalty for drug related offences and the imperative to move beyond moratorium and establish an outright abolishment. In the lead up to the 3<sup>rd</sup> UPR cycle of the UN Human Rights Council, this paper will provide a comparison of four UN Member States, Singapore, Malaysia, Brunei Darussalam and Myanmar, and the prominence their 1<sup>st</sup> and 2<sup>nd</sup> cycle UPR gave to each of their respective death penalty regimes. In doing so, it will analyse and compare four primary UPR sources: national reports, submissions from UN Special Procedures and treaty bodies, summary of stakeholder information (including submissions by Non-Governmental Organizations (NGOs)), as well as the final outcome reports. The paper is divided into 6 sections: 1. Introduction; 2. Review of Singapore; 3. Review of Malaysia; 4. Review of Brunei; 5. Review of Myanmar; 6. Broad Comparisons Between Member States; 7. Looking towards the 3<sup>rd</sup> UPR Cycle and Concluding Remarks.

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<sup>7</sup>Moving Away from the Death Penalty Lessons in South East Asia, 2013, UNOHCR, <http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>

<sup>8</sup> Evidenced from the Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

<sup>9</sup> Yingyos Leechaianan and Dennis R. Longmire, 2013, The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis, *Laws*, 115-149, 115.

<sup>10</sup> Cornell Law School Death Penalty Database: Brunei, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>; UN Rights Office Praises Myanmar for Commuting all Death Sentences, 2014, UN News Centre: <http://www.un.org/apps/news/story.asp?NewsID=46904#.V6q9UiN962x>

## Introduction

South East Asia comprises a region often associated in the media with the liberal use of the death penalty, particularly for drug related offences. In recent years, however, trends suggest a move towards abolishment, through moratoriums and legal reform.<sup>11</sup> This is especially the case in former British colonies. In 2012, Singapore amended its laws on the death penalty, giving judges more discretion by partially lifting the mandatory requirement in some limited cases.<sup>12</sup> In Malaysia, while the death penalty is still handed down for drugs and trafficking, the reluctance to carry out these penalties has been noticeable.<sup>13</sup> In Brunei Darussalam and Myanmar a de facto Moratorium is in place, where executions have not taken place since 1957 in Brunei and all death sentences were commuted in Myanmar in 2014.<sup>14</sup> At the same time, UN Member States throughout the region are on the precipice of a third cycle of Universal Periodic Review (UPR), set to begin in 2017. Judging by the emphasis on the death penalty in the previous two UPRs, it is likely that the topic will again be a focus of attention at the third review and these member states will be urged to step further towards abolishment. Previous reviews included emphasis by other member states and human rights groups on the use of the death penalty for drug related offences and the imperative to move beyond moratorium and establish an outright abolishment.

In the lead up to the 3<sup>rd</sup> UPR cycle of the UN Human Rights Council, this paper will provide a comparison of four UN Member States, Singapore, Malaysia, Brunei Darussalam and Myanmar, and the prominence their 1<sup>st</sup> and 2<sup>nd</sup> cycle UPR gave to each of their respective death penalty regimes. In doing so, it will ultimately show that while there are glimmers of hope, the road ahead for abolishing the death penalty in these countries will be long and arduous. The paper analyses and compares four primary UPR sources: national reports, submissions from UN Special Procedures and treaty bodies, summary of stakeholder information (including submissions by Non-Governmental Organizations (NGOs)), as well as the final outcome reports. It is divided into 3 primary sections: 1. The Universal Periodic Review; 2. A Cross Country Analysis of CSO Recommendations at the UPR; 3. Brief consideration of the laws in Brunei, Malaysia, Myanmar and Singapore carrying the death penalty, followed by concluding remarks.

## 1) The Universal Periodic Review

### 1.1) The Universal Periodic Review – A Brief Overview

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<sup>11</sup>Moving Away from the Death Penalty Lessons in South East Asia, 2013, UNOHCHR,

<http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>

<sup>12</sup> Evidenced from the Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed). These limited situations may include those where murder is not intentional and drug possession within certain (low) thresholds.

<sup>13</sup> Yingyos Leechaianan and Dennis R. Longmire, 2013, The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis, *Laws*, 115-149, 115.

<sup>14</sup> Cornell Law School Death Penalty Database: Brunei,

<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>; UN Rights Office Praises Myanmar for Commuting all Death Sentences, 2014, UN News Centre:

<http://www.un.org/apps/news/story.asp?NewsID=46904#.V6q9UiN962x>

The Universal Periodic Review (UPR) is a mechanism of the United Nations Human Rights Council (UNHCR), which reviews the human rights record of every member state on a periodic basis. As a state-driven process, the UPR ensures the equal treatment of each Member State in the assessment of human rights.<sup>15</sup> Core to its functioning is the cooperative, constructive, non-confrontational and non-politicized nature of the process.<sup>16</sup> Established in 2006 through UN General Assembly resolution 60/251, the process is without parallel in the world, making it an important means by which countries can cooperate in highlighting and respecting the importance of human rights. Within the process, a number of key documents are prepared for each country as part of a peer review: 1. Information from the State concerned; 2. Information from reports of treaty bodies, special procedures and other relevant UN documents compiled by the Office of the High Commissioner for Human Rights (OHCHR); 3. Information provided by relevant stakeholders, including research institutes, non-governmental organizations (NGOs) and civil society organizations (CSOs).<sup>17</sup> At the conclusion of a Member State's review, a national report is finally prepared and published. At the time of writing, the UPR mechanism is concluding its second cycle, with the third set to begin in 2017.<sup>18</sup> Various analysis of the first cycle generally found cautious optimism. Some suggested that, although an imperfect process, the UPR enables dialogue and cooperation between member states and with stakeholders.<sup>19</sup> Challenges, however, echo current reflections on the second cycle. In particular, the fundamental test of recommendation implementation. Cycles can come and go, but ultimately human rights law practitioners and supporters value practical outcomes. At the precipice of the third cycle of review, this element of implementation will be closely watched. At its conclusion, a decade and a half of experience will clarify trends in this respect.

The UPR process has been met with universal participation from Member States.<sup>20</sup> Commentators have highlighted the value that the UPR process brings to increasing dialogue between governments and non-state actors, while creating a baseline of valuable documentation for reference.<sup>21</sup> Furthermore, it has facilitated a self-evaluation process for States, creating a norm, which, although arguably generating lip-service, has nevertheless heightened the awareness of human rights at a universal level. Generally, the UPR has cemented its role as an important element of the application of human rights law internationally; creating a vital system for valuing human rights, relied upon by governments and stakeholders alike. Some have hailed the UPR as a paradigm shift in the way CSOs and governments interact, facilitating cooperative rather than adversarial communication.<sup>22</sup>

<sup>15</sup> Universal Periodic Review, *Office of the High Commissioner for Human Rights*, United Nations, 2016, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

<sup>16</sup> UNGA Resolution 60/251

<sup>17</sup> UPR Documentation, *Office of the High Commissioner for Human Rights*, United Nations, 2016, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>

<sup>18</sup> UPR Sessions, *Office of the High Commissioner for Human Rights*, United Nations, 2016: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx>

<sup>19</sup> Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 2011, *New Zealand Yearbook of International Law* 9:187.

<sup>20</sup> Participation by All Crucial for Successful Universal Periodic Review of National Records, Third Committee Told, *GA/SHC/4089*. 13 November 2013.

<sup>21</sup> Edward R. McMahon, The Universal Periodic Review: A Work in Progress: An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council, September 2012, *Dialogue on Globalization*, 9.

<sup>22</sup> Roland Chauville, 4 June 2016, 'Between the Cycles: The UPR's Achievements and Opportunities', *International Service for Human Rights*: <https://www.ishr.ch/news/between-cycles-uprs-achievements-and-opportunities>

The UPR has also been met with criticism that it does not go far enough to include NGO involvement.<sup>23</sup> This is a delicate topic in a system that is organized and carried out by the UN Member States themselves, where some less democratic States may wish to suppress the voice of human rights NGOs critical of their record. NGOs and CSOs often bring critical detail and practical examples to the process that shed light on human rights abuses that may otherwise go unnoticed. From the perspective of NGOs, the efficacy of the UPR lies in its ability to achieve the objective of ‘improving the situation of human rights on the ground.’<sup>24</sup> Early NGO assessments of the UPR underscored the need for the mechanism to pressure States to uphold their international commitments to human rights, asserting that time would tell of the usefulness of the UPR.<sup>25</sup> Later analysis found that there is difficulty in evaluating the implementation of Recommendations arising from the UPR and that the Recommendations themselves are often imprecise in nature, confounding the challenge of implementation.<sup>26</sup> In 2013, Hickey noted that in the 12 sessions of the first cycle, 75% of all recommendations were accepted.<sup>27</sup> However, the gulf between accepting recommendations and implementing them remains a challenge.

## 1.2) The Universal Periodic Review and the Death Penalty

In each review, fundamental sources of international human rights law are called upon to hold each Member State to account. These include, broadly, the Universal Declaration of Human Rights, the Charter of the United Nations, pledges and commitments made by a State and the various human rights instruments to which a state is a party.<sup>28</sup> Within these sources of law are a wide range of human rights standards which Member States can choose to accept, and some that can be considered a part of international custom. Among all the topics highlighted from this framework during UPR cycles for review, the death penalty is consistently among the issues that are reiterated yet go unimplemented by countries with capital punishment laws.<sup>29</sup>

Among the recommendations made by States during the UPR are those to abolish the death penalty, impose a moratorium on implementing the death penalty and ratifying the Second Optional Protocol of the International Covenant on Civil and Political Rights to abolish the death penalty.<sup>30</sup> Other recommendations on the subject are myriad and reflect a spectrum of abolitionist views, from upholding moratoriums to increasing education and awareness around the denial of human rights constituting the death penalty.

As most countries in South East Asia retain the death penalty in domestic law, the region is no stranger to recommendations against the death penalty during the Universal Periodic Review. A closely associated aspect of these recommendations is the fact that a significant

<sup>23</sup> Human Rights Monitor Quarterly 2.2012 [http:// www.ishr.ch/document-stuff/browse-documents/doc\\_download/1440-universal-periodic-review-hrmq2-2012-](http://www.ishr.ch/document-stuff/browse-documents/doc_download/1440-universal-periodic-review-hrmq2-2012-)

<sup>24</sup> Council Resolution 5/1, 18 June 2007, A/HRC/RES/5/1 at para. 4(a)

<sup>25</sup> Gareth Sweeney and Yuri Saito, NGO Assessment of the New Mechanisms of the UN Human Rights Council, *Human Rights Law Review* 9:2, March 2009, 218.

<sup>26</sup> Emma Hickey, ‘The UN’s Universal Periodic Review, Is it Adding Value and Improving the Human Rights Situation on the Ground?’ *ICL Journal*, Vol 7, 2013, 24

<sup>27</sup> Emma Hickey, ‘The UN’s Universal Periodic Review, Is it Adding Value and Improving the Human Rights Situation on the Ground?’ *ICL Journal*, Vol 7, 2013, 23

<sup>28</sup> United Nations Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 2007, Annex to Resolution 5/1, 1.2

<sup>29</sup> UPR-Info, 2014, ‘Beyond Promises: The Impact of the UPR on the ground’, 31.

<sup>30</sup> John Morrison Liam Riordan, 2015, ‘The Implacable Ritual: A study examining the inertia of death penalty abolition within the Universal Periodic Review, despite tacit support and global trends’, Master’s Thesis in Public International Law, Universiteit Leiden.

proportion of Member States in the region have not ratified the ICCPR.<sup>31</sup> Stemming from that international legal instrument is Article 6, which states that, '[e]very human being has the inherent right to life.'<sup>32</sup> Which very limited exception, this article is a cornerstone of criticism for the death penalty. Clause 6 of the article states, 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'<sup>33</sup> Viewed through this lens, Member States that have ratified the ICCPR often recommend Member States within South East Asia to take steps to align with the Covenant. The corresponding Optional Protocol 2 is also a foundation stone for abolitionist countries to make recommendations against the death penalty during UPR.

Beyond the central position against the death penalty arising from the ICCPR are related corollary recommendations. These include, the use of the death penalty on 'protected persons',<sup>34</sup> and beyond 'most serious crimes',<sup>35</sup> such as is cases of drug use and trafficking, provisions for fair trial in death penalty cases, the urging of use of moratoriums, and the methods by which the death penalty is carried out which can be considered cruel and inhumane.<sup>36</sup> Altogether, taking into consideration both UPR cycles to date, a total of 157 recommendations were made regarding the death penalty to the Member States comprising ASEAN and 69 to the countries highlighted in this paper particularly.<sup>37</sup> The top 5 Member States making these recommendations were France, Spain, Italy, Australia and Belgium—all abolitionist States.<sup>38</sup>

The UPR, then, presents an apparent opportunity for abolitionist Member States to recommend moves away from the death penalty to countries that still maintain capital punishment, on the global stage. These recommendations are an important part of the peer review process of the UPR that ensures equal human rights record scrutiny for every Member State. Issues raised in relation to the 4 countries the subject of this paper ranged in the two cycles from urges to ratify the ICCPR to specific comments regarding Sharia law, to abolishing the death penalty for drug crimes, to unequivocally urging the abolishment of the death penalty altogether. In response, these Member States replies ranged from 'nothing' to accepting in limited circumstances<sup>39</sup>, yet avoiding any voluntary pledges. Malaysia accepted Egypt and Sudan's recommendation to maintain national sovereignty in carrying out the death penalty and 'maintain a good example' in observing legal safeguards around the death penalty. At the same time, Singapore accepted France's recommendation to modify legislation and shift the burden of proof of person facing death penalty to the prosecution. Singapore also accepted Finland's recommendation to make available statistics and facts on the use of the death penalty in Singapore.<sup>40</sup> Overall, however, Singapore has rejected almost half of all total recommendations it received.<sup>41</sup>

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<sup>31</sup> Moving Away from the Death Penalty: Lessons in South-East Asia, 2012, *Office of the High Commissioner for Human Rights Regional Office for South-East Asia*, 21.

<sup>32</sup> International Covenant on Civil and Political Rights, Article 6.

<sup>33</sup> International Covenant on Civil and Political Rights, Article 6.6; Note also the Second Optional Protocol GA Resolution 44/128 of December 1989.

<sup>34</sup> ICCPR, Art. 6(5).

<sup>35</sup> ICCPR Art. 6(2).

<sup>36</sup> UN General Assembly, *Interim report of the Special Rapporteur on torture*, 2012, A/67/279, 33.

<sup>37</sup> UPR-Info, 2016, Database of UPR Recommendations.

<sup>38</sup> UPR-Info, 2016, Database of UPR Recommendations.

<sup>39</sup> UPR-Info, 2016, Database of UPR Recommendations.

<sup>40</sup> UPR-Info, 2016, Database of UPR Recommendations.

<sup>41</sup> Oral Statement Delivered on behalf of (FORUM-ASIA) at the 24<sup>th</sup> June 2016 Universal Periodic Review plenary on Singapore, <http://www.thinkcentre.org/article.php?id=3265>.

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

## **2) A Cross Country Analysis of CSO Recommendations at the UPR**

Throughout the first two cycles of the UPR, NGOs and other CSOs have played an important role in highlighting human rights violations in the region, where other Member States have not. Of these, Amnesty International (AI) is particularly active in its stakeholder submissions and is essentially the foremost international non-governmental organization raising death penalty issues at the UPR for Brunei Darussalam, Malaysia, Myanmar and Singapore. Other international organizations include World Coalition against the Death Penalty (WCADP), International Bar Association's Human Rights Institute and Child Rights International Network. Regional and local organizations are numerous and include Working Group for an ASEAN Human Rights Mechanism (MARUAH), Singapore Anti-Death Penalty Campaign (SADPC), the Human Rights Commission of Malaysia, as well as coalitions of Malaysian and Singaporean NGOs.

These organizations raised varied and overlapping death penalty related issues during the 1<sup>st</sup> and 2<sup>nd</sup> UPR cycles for each country. There is a noticeable increase in highlighted issues between the 1<sup>st</sup> and 2<sup>nd</sup> cycles for each country, bar Brunei Darussalam where the 2<sup>nd</sup> review made no apparently direct references to the death penalty or capital punishment. Generally, the number of organizations contributing to the UPR was higher for Singapore and Malaysia, resulting in richer emphasis for these countries. Brunei and Myanmar also have de-facto moratoriums on the death penalty, consequentially attracting minimal attention.

### **1<sup>st</sup> UPR Cycle**

In the first cycle (2008-2011), Amnesty International was especially active. For Brunei Darussalam, it noted that the country was a de facto 'abolitionist' country as an execution has not been carried out there since 1957. Still, it highlighted the offences punishable by death including murder, drug trafficking and the unlawful possession of firearms and explosives.<sup>42</sup> Furthermore, AI recommended a permanent abolishment of the death penalty by repealing relevant laws to replace the death penalty with other punishments.<sup>43</sup> AI's light touch of the death penalty issue was raised again with Myanmar in a similar manner. It commented that Myanmar was abolitionist in practice, however a number of crimes including murder and drug trafficking maintained capital punishment.<sup>44</sup>

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<sup>42</sup> SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2009, A/HRC/WG.6/6/BRN/3, 3.

<sup>43</sup> Ibid.

<sup>44</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/10/MMR/3, 4-6.

In the review of Singapore and Malaysia, AI made a number of other recommendations. For both, it mentioned that details of inmates on death row or those who have been executed are not made public, creating suspicion that more are executed than reported in the media.<sup>45</sup> In the case of Malaysia, it highlighted that the timing of executions is often not made public. It also noted that for certain crimes, such as drug trafficking, a mandatory death penalty remains in place.<sup>46</sup> This was particularly so for Singapore, where AI highlighted that any possession of drugs over a certain weight draws the mandatory death sentence.<sup>47</sup> As with Brunei Darussalam and Myanmar, AI invoked the 18 December 2007 General Assembly resolution 62/149.39, calling for complete abolition of the death penalty. Accordingly, AI recommended a moratorium on the death penalty come into effect with the ultimate aim of complete abolition.<sup>48</sup> It also put forward that the imposition of mandatory death sentences violated the human right to life, recommending that all laws carrying the death sentence be rewritten to use a different form of punishment.

Contributions from local organizations were less numerous in the 1<sup>st</sup> cycle. The Working Group for an ASEAN Human Rights Mechanism based in Singapore (MARUAH) recommended that the death penalty be reviewed and imposed only for the most serious crimes.<sup>49</sup> It also recommended that capital punishment not be used on accessories in group crimes and highlighted the need for ‘rigorous’ pre-trial and trial processes where legal counsel is immediately available to the accused after arrest. MARUAH also went on to recommend that Singapore publish persuasive and objective evidence of the deterrent effect of the death penalty, presumably relying on the fact that there is little, if any, evidence to demonstrate the deterrent effect of the death penalty.<sup>50</sup> The Singapore Anti-Death Penalty Campaign (SADPC) also contributed to this cycle. It argued that the death penalty was not consistent with absolute necessity and proportionality requirements in the case of drug-related offences. SADPC went on to recommend an independent clemency appeals board so case-by-case reviews could be conducted.

Malaysia’s review had contributions from local organizations in the form of the Human Rights Commission of Malaysia (SUHAKAM) and coalition of Malaysian NGOs that submitted jointly to the UPR review (COMANGO).<sup>51</sup> SUHAKAM recommended that the

<sup>45</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

<sup>46</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/10/MMR/3, 4-6.

<sup>47</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

<sup>48</sup> SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2008, HRC/WG.6/4/MYS/3, 4.

<sup>49</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

<sup>50</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

<sup>51</sup> These NGOs included 56 NGOs: All PJ Residents’ Association Coalition (APAC) (a coalition of 9 residents’ associations), All Women’s Action Society (AWAM), Centre for Independent Journalism (CIJ), Centre for Orang Asli Concerns (COAC), Centre for Public Policy Studies (CPPS), Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Community Action Network (CAN), Education and Research Association for Consumers, Malaysia (ERA Consumer), Health Equity Initiative, Human Rights Committee of the Malaysian Medical Association, Independent Living and Training Centre (ILTC), Indigenous and Peasant Movement Sarawak (Panggau), International Association for Peace (IAP), Indian Malaysian Active

Pardons Boards review death row cases and COMANGO lamented that no public information existed on the number of prisoners on death row.<sup>52</sup>

## 2<sup>nd</sup> Cycle

The number of recommendations from NGOs and CSOs, both local and international, increased significantly in the 2<sup>nd</sup> cycle (2012-2016), highlighting a range of important human rights issues related to the death penalty. This with the exception of Brunei Darussalam, where a de facto moratorium remains in place, where the most significant concern was with its new Shariah Penal Code set to introduce the death penalty for a wide array of offences.<sup>53</sup>

In the second cycle, AI was again an active participant in making recommendations to Malaysia (2013) and Singapore (2015) related to the death penalty. It noted Government reports that 930 prisoners were on death row and that drug offences under certain circumstances would avoid mandatory the death penalty.<sup>54</sup> Both the reporting and the consideration of reforming the mandatory sentence showed a marked improvement from the first cycle. AI also raised the ‘most serious crimes’ threshold for the death penalty, perhaps pushing for an incremental approach to eventual abolition. A joint submission from JS8 highlighted the use of the mandatory death penalty for drug trafficking and recommended that Malaysia limit the use of the death penalty to the most ‘serious crimes’, highlighting a similar issue to AI.<sup>55</sup> In other words, avoiding the death penalty for drug related offences. AI did, however, note the positive step Singapore took to maintain a moratorium while the Misuse of Drugs Act 2012 and the Penal Code Act 2012 was reviewed (the moratorium ending in 2014). AI was concerned that while reform allowed judges to use more discretion in deciding whether to impose the death penalty (such as for group crimes), the laws still don’t go far enough to align with international human rights law and standards.<sup>56</sup> It also noted

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

<sup>52</sup> SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2008, HRC/WG.6/4/MYS/3, 4.

<sup>53</sup> Report of the Working Group on the Universal Periodic Review of Brunei Darussalam (A/HRC/27/11), p. 8, at para 49, p. 10, at para 69, p. 11, at para 85, p. 12, at para 99, 103

<sup>54</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2013, HRC/WG.6/17/MYS/3, 2.

<sup>55</sup> Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2013, HRC/WG.6/17/MYS/3, 2.

<sup>56</sup> Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

that families with members on death row are not notified far enough in advance of execution dates.

Another international organization, Child Rights International Network (CRIM) commented that the death penalty was lawful for children under 18 years of age and recommended reform in both the Malaysia and Singapore reviews.<sup>57</sup> Other legal reform recommendations came from JS1, a joint submission from 54 organizations.<sup>58</sup> It recommended that parliamentarian, judges and judicial officers be trained to have greater awareness of human rights issues, including the right to life. AI also recommended to Singapore that the presumption of innocence be maintained in death penalty cases and the burden of proof be placed on the prosecution. It also stated that Singapore should ensure the right to fair trial and the presumption of innocence in its cases.<sup>59</sup>

In Singapore's review, the local anti-death penalty NGO, Second Chances, raised the issue of the legality of execution of persons who are mentally ill, where there was no legal requirement to consider clemency. It also echoed the first cycle recommendations in that public information was lacking in Singapore related to the death penalty and very little notice given to families.<sup>60</sup> These points were also reiterated by AI.

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

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<sup>57</sup> Ibid.

<sup>58</sup> Joint submission No. 1 by 54 organizations: [Pusat Kesedaran Komuniti Selangor (EMPOWER), Suara Rakyat Malaysia (SUARAM), Education and Research Association for Consumers, Malaysia (ERA Consumer), All Petaling Jaya, Selangor Residents' Association (APAC), All Women's Action Society (AWAM), Amnesty International, Malaysia, ASEAN Institute for Early Childhood Development, Association of Women's Lawyers (AWL), Association of Women with Disabilities Malaysia, Coalition to Abolish Modern Day Slavery in Asia (CAMSA), Centre for Independent Journalism (CIJ), Childline Malaysia, Christian Federation Malaysia, Community Action Network (CAN), Centre for Rights of Indigenous Peoples of Sarawak (CRIPS), Dignity International, Foreign Spouses Support Group, Good Shepherd Welfare Centre, Health Equity Initiatives, Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM), Jaringan Rakyat Tertindas (JERIT), Justice For Sisters, Pusat Komunikasi Selangor (KOMAS), Knowledge and Rights with Young people through Safer Spaces (KRYSS), KLSCAH Civil Rights Committee, Land Empowerment Animals People (LEAP), Malaysians Against Death Penalty and Torture (MADPET), Malaysian Child Resource Institute (MCRI), Malaysian Physicians for Social Responsibility, Malaysia Youth & Student Democratic Movement (DEMA), Migration Working Group (MWG), PANGGAU, Persatuan Masyarakat Selangor dan Kuala Lumpur (PERMAS), PS The Children, PT Foundation, People's Service Organisation (PSO), Seksualiti Merdeka, Perak Women for 13 Women Society, Persatuan Guru-Guru Tadika Semenanjung Malaysia (PGGT), Persatuan Komuniti Prihatin Selangor dan Kuala Lumpur, Persatuan Sahabat Wanita Selangor, Rainbow Genders Society, Sabah Women's Action-Resource Group (SAWO), Southeast Asian Centre for e-Media (SEACem), Sinui Pai Nanek Sengik (SPNS), SIS Forum (Malaysia) Bhd (SIS), Tenaganita, Voice of the Children (VOC), Writers' Alliance for Media Independence (WAMI), Women's Aid Organisation (WAO), Women's Centre for Change, Penang (WCC), Yayasan Chow Kit, Young Buddhist Association, Youth Section, Kuala Lumpur and Selangor Chinese Assembly Hall, Youth Section];

<sup>59</sup> Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

<sup>60</sup> Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

Myanmar's review (2015) had brief recommendations related to the death penalty in the 2<sup>nd</sup> cycle. AI and a joint submission from global NGOs commented that the death penalty remained a part of Myanmar law and death penalties were still handed down, although a moratorium is technically in place. They urged Myanmar to go the step further to move towards abolition.<sup>61</sup>

### **3) A brief consideration of the laws in Brunei, Malaysia, Myanmar and Singapore carrying the death penalty**

#### **Brunei Darussalam**

##### **i. General laws: ending the death penalty vs gradual elimination**

Since 2014, Brunei Darussalam has maintained a new Shariah Penal Code that carries the death penalty for certain offences. As part of this new Code, a third phase of implementation focuses on offences carrying the death penalty to be enforced from 2018. The types of offences that will attract this law include rape, extramarital sexual relations for Muslims, insulting the verses of the Quran or Hadith, blasphemy, declaring oneself a prophet or non-Muslim, and murder. This list will also include death by stoning for sodomy and adultery.<sup>62</sup> This is a concerning development, as currently Brunei maintains the death penalty as a punishment, in theory only, for offences that are more serious in nature, such as terrorism and murder. However, the penalty still remains in place for drug trafficking, possession, arson and treason.<sup>63</sup> In practice, a de-facto moratorium has been in place since the last reported execution in 1957. This is a promising sign towards gradual elimination of the death penalty. However, the Shariah Penal Code, which lies on the horizon, poses a serious challenge to progressive elimination. Ending the death penalty still appears to be a distant possibility.

##### **ii. Moratorium on the death penalty**

Brunei has maintained a de-facto moratorium since 1957, though this does not amount to a denouncement of the death penalty. In fact, the death penalty is still handed down and there are thought to be 4 known prisoners technically on death row.<sup>64</sup> While the moratorium is a positive step, it is quite possible that the country will engage in executing prisoners again when the totality of the new Shariah Penal Code is implemented.

#### **Malaysia**

##### **i. General laws: ending the death penalty vs gradual elimination**

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<sup>61</sup> Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/23/MMR/3, 4.

<sup>62</sup> Brunei-Update on Shariah Penal Code, 2016, Anti Death Penalty Asia Network: <https://adpan.org/2016/06/09/brunei-update-on-shariah-penal-code-and-death-penalty/>.

<sup>63</sup> Brunei Crimes and Offenders Punishable by Death, 2015, Death Penalty Worldwide: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>.

<sup>64</sup> Brunei Crimes and Offenders Punishable by Death, 2015, Death Penalty Worldwide: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>.

Malaysia imposes the death penalty for a wide range of offences including arguably less serious crimes such as drug trafficking, and in certain circumstances, robbery, resisting arrest with a firearm, kidnapping and burglary.<sup>65</sup> Mandatory death sentencing is imposed for drug trafficking.<sup>66</sup> The Penal Code of Malaysia and the Dangerous Drugs Act of Malaysia set out most of these offences.<sup>67</sup> In total, the death penalty is mandatory for 12 of 20 total offences in Malaysia.<sup>68</sup> Although death sentences are carried out yearly, there is a potential change on the horizon for Malaysia. A recent government backed report on the death penalty is nearing publication as highlighted recently by Nancy Shukri, Minister in the Department of the Prime Minister.<sup>69</sup> At the 6<sup>th</sup> World Congress Against the Death Penalty, the Minister commented that based on this report, Malaysia was on a path to change in death penalty laws. What this means in practice remains to be seen.

## ii. Moratorium on the death penalty

Malaysia does not currently maintain any moratorium on the death penalty. At least 3 executions were carried out in 2016.<sup>70</sup>

## Myanmar

### i. General laws: ending the death penalty vs gradual elimination

The Burma Penal Code maintains the death penalty for a number of offences including murder, terrorism and treason.<sup>71</sup> The Myanmar Narcotic Drug and Psychotropic Substances Law imposes a mandatory death penalty for drug possession and trafficking.<sup>72</sup> In 2014, Myanmar took a widely lauded step to commute all death sentences.<sup>73</sup> Signs of gradual elimination are only conceivable in steps like these and the fact that no death sentence has been carried out since 1988.<sup>74</sup>

## ii. Moratorium on the death penalty

Myanmar maintains a de-facto moratorium on the death penalty. The last execution in the country was carried out in 1988.<sup>75</sup> The Special Rapporteur on the Situation of Human

<sup>65</sup> Penal Code of Malaysia, art. 307(2), 396, 194 and 305, 1936, as amended by Act 574 of 2006.; Firearms (Increased Penalties) Act of Malaysia, art. 3(A), 1971

<sup>66</sup> Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980

<sup>67</sup> Penal Code of Malaysia, 1936, as amended by Act 574 of 2006; Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980

<sup>68</sup> Nancy: Malaysia One Step Closer to Amending Death Penalty, 2016, The Star Newspaper: <http://www.thestar.com.my/news/nation/2016/06/22/nancy-malaysia-one-step-closer-to-abolishing-death-penalty/>.

<sup>69</sup> Nancy: Malaysia One Step Closer to Amending Death Penalty, 2016, The Star Newspaper: <http://www.thestar.com.my/news/nation/2016/06/22/nancy-malaysia-one-step-closer-to-abolishing-death-penalty/>.

<sup>70</sup> The Guardian, Malaysia hangs three men for murder in 'secretive' execution, <http://www.theguardian.com/world/2016/mar/25/malaysia-hangs-three-men-for-in-secretive-execution>, Mar. 25, 2016.

<sup>71</sup> Burma Penal Code, art. 302, No. 45 of 1860, May 1, 1861.

<sup>72</sup> Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22-23, No. 1 of 1993.  
; Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22-23, 26, No. 1 of 1993..

<sup>73</sup> UN Office Praises Myanmar for Commuting all Death Sentences, 2014, <http://www.un.org/apps/news/story.asp?NewsID=46904#.V8rGDCN962x>.

<sup>74</sup> Death Penalty Worldwide, Cornell Law School, 2015, Myanmar: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Myanmar>.

<sup>75</sup> Death Penalty Worldwide, Cornell Law School, 2015, Myanmar: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Myanmar>.

Rights in Myanmar commended the Government for this effective moratorium, however noted that lower courts still hand down death sentences.<sup>76</sup> The fact that the Member State voted against a UN moratorium resolution in 2012<sup>77</sup> suggests that it is still unclear whether progress towards abolition is occurring.

## Singapore

### i. General laws: ending the death penalty vs gradual elimination

As a starting point, Singapore's constitution says that the state may not deprive someone of his or her life, 'save in accordance with law'.<sup>78</sup> (Singapore is not the only state to have such a constitution.<sup>79</sup>) The first legal issue, then, concerns the presumption of innocence absent from the law relating to drugs.<sup>80</sup> Singapore upholds the death penalty in cases of trafficking or manufacturing drugs. In such cases, a presumption of innocence is not granted to the accused. The Misuse of Drugs Act empowers courts to presume a defendant in possession of a low requisite quantity of drugs is a drug trafficker. At every point, the burden is on the defendant to prove those presumptions incorrect, effectively creating a presumption of guilt in Singapore.<sup>81</sup> This is significant especially because there has been historically a large number of executions in Singapore for drug convictions.<sup>82</sup>

Another legal issue is the broad interpretation in Singapore of what amounts to a 'serious crime' attracting the death penalty. Singapore claims it only uses the death penalty for the 'most serious crimes'. But this is a controversial question in many jurisdictions around the world and Singapore's highest court has not had to decide this issue directly.<sup>83</sup> It is also significant that Singapore is not a signatory to the ICCPR or any international legal instruments that would place limitations of Singapore's use of the death penalty. This creates a limited international recourse, although some commentators have discussed that there may be an argument for appealing to international custom.<sup>84</sup>

While Singapore amended its laws in 2012 on the death penalty, making it no longer mandatory for those convicted of drug trafficking or murder to receive death sentences, this is a far cry from eliminating the death penalty.<sup>85</sup> While some may view it as a gradual step

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<sup>76</sup> Report of the Working Group on the Universal Periodic Review of Myanmar (A/HRC/17/9), p. 18, at para 106.9

<sup>77</sup> World Coalition Against the Death Penalty, 2016, Myanmar: <http://www.worldcoalition.org/Myanmar>

<sup>78</sup> Constitution of the Republic of Singapore (1999 Rev. Ed.), Art. 9(1).

<sup>79</sup> The Constitutions of the United States, India and Malaysia, and the European Convention are similarly drafted. "The Constitutionality of the Death Penalty" (1983) 25 Mal.L.Rev. 148.

<sup>80</sup> Misuse of Drugs Act of Singapore, secs.15-33(A), Second Schedule, Cap. 185, 2008 Rev. Ed., amended by S 402/2007, 2007; U.S. Dept. of State, 2009 Human Rights Report: Singapore, <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136008.htm>, Mar. 11, 2010.

<sup>81</sup> Misuse of Drugs Act of Singapore, secs.15-33(A), Second Schedule, Cap. 185, 2008 Rev. Ed., amended by S 402/2007, 2007; U.S. Dept. of State, 2009 Human Rights Report: Singapore, <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136008.htm>, Mar. 11, 2010.

<sup>82</sup> Amnesty Intl., Singapore: The Death Penalty—A Hidden Toll of Executions, p. 6, ASA 36/001/2004, Jan. 2004; Ministry of Home Affairs, The Singapore Government's Response to Amnesty International's Report Singapore: The Death Penalty—A Hidden Toll of Executions, [http://www.mha.gov.sg/basic\\_content.aspx?pageid=74](http://www.mha.gov.sg/basic_content.aspx?pageid=74), Jul. 24, 2007.

<sup>83</sup> Michael Hor, Page 108

<sup>84</sup> For example Michael Hor

<sup>85</sup> Marked by Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012

towards this end, Singapore still adamantly maintains the death penalty for drug and other offences. A glimmer of hope in the law reforms of 2012 may prove to be a tiny step towards elimination of the penalty, but ultimately the prospect of this is hard to conceive at present.

## ii. Moratorium on the death penalty

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

### 3.1) Country Justifications of the Death Penalty

Historically speaking, countries maintaining the death penalty in the region have cited cultural reasoning for excusing the death penalty for offences seen as ‘lighter’ by other Member States, such as drug possession.<sup>86</sup> For Malaysia and Singapore, this is generally still the case.

Malaysia maintains that it imposes the death penalty for the most serious offences.<sup>87</sup> However, it uses similar arguments to Singapore in arguing that culturally drug possession and trafficking is a ‘most serious crime’. Singapore’s response to recommendations and comments regarding the death penalty is to rehash old arguments connecting capital punishment with drug and crime deterrence.<sup>88</sup> In fact, from Singapore’s independence, the death penalty was used as deterrence to drug addition and trafficking by mandating the death penalty for drug trafficking and manufacturing offenses.<sup>89</sup> In reality, the proof of the deterrence argument is dubious.<sup>90</sup> Like with Malaysia, justifications are also made on a cultural basis, arguing that drug offences are culturally considered the most serious crimes. However, the Special Rapporteur on extrajudicial, arbitrary or summary executions has stated that these types of justifications are counter to the spirit of universality of human rights law.<sup>91</sup>

## 4) Conclusion

The wide range of offences attracting the death penalty in these countries suggests a complicated relationship with capital punishment that goes deeper than peer review. The universality of human rights law, the socio-cultural acceptance of the death penalty and the lack of human rights law education for law makers make up just a few of the challenges that must be faced across the four countries and throughout the South East Asian region. Still, the universality of the UPR mechanism promises the emergence of internationally accepted best

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and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

<sup>86</sup> Politics and Constitutions in Southeast Asia, 2016, Routledge, Marco Bunte and Bjorn Dressel, 163.

<sup>87</sup> A/HRC/WG.6/17/MYS/1, op. cit., p. 8, at para 45.

<sup>88</sup> Ministry of Foreign Affairs, Singapore, Press Release,

[https://www.mfa.gov.sg/content/mfa/media\\_centre/press\\_room/pr/2016/201601/press\\_20180128\\_01.html](https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2016/201601/press_20180128_01.html)

<sup>89</sup> Then Minister for Home Affairs and Education, Chua Sian Chin said, Sing., Parliamentary Debates, vol. 37, col. 34 (27 May 1977), “unless drug trafficking and drug addiction [are] checked, they [will] threaten our national security and viability. To do this, both punitive and preventive measures must be taken. The [Misuse of Drugs] Act was thus amended to provide enhanced penalties for traffickers, including mandatory death penalty for drug trafficking and manufacturing”.

<sup>90</sup> Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” (2001) 13 Sing.Ac.L.J. 54

<sup>91</sup> Roger Hood, 2005, The Enigma of the Death Penalty

practices that may guide Member States to an eventual abolishment of the death penalty. There is no doubt that, particularly in this region, an arduous road lies ahead. This path calls for more involvement from NGOs and CSOs to march side by side in using the UPR as a vital mechanism to highlight death penalty issues across all four nations highlighted in this paper.

# **Indonesia and the Universal Periodic Review: Analysis of Freedom of Religion and Belief**

**Hesty Dewi Maria Siagian**

Bogor Agricultural University

## **Abstract**

According to the 2010 census by Central Bureau of Statistics (BPS), the most recent available, approximately 87.18% of Indonesian identified as Muslim (with Sunnis more than 99%, Shias 0.5%, Ahmadis 0.2%), 6.96% Protestant, 2.91% Catholic, 1.69% Hindu, 0.72% Buddhist, 0.05% Confucianism, 0.13% other, and 0.38% unstated or not asked. With this diversity, Indonesia recognizes freedom of religion and belief as an important element of human rights. Indonesia has committed itself to regulating norms of freedom of religion and belief in its constitution and also in other positive legal sources. But nevertheless these rights are often not perceived by some groups.

Besides, the current government has been more open to human rights recommendations made before international events such as the Universal Periodic Review. Indonesia's participation in the UPR represents its strong desire to share the efforts and the challenges in the promotion and protection of human rights with the international community. Indonesia underwent its first cycle on 9 April 2008 and its second cycle on 23 May 2012. A total of 193 recommendations were received in both cycles. Many states expressed their grave concern about religious intolerance and violence against religious minorities in Indonesia, notably Ahmadis, Shias and Christian communities. Recommendations also included intensifying efforts to investigate human rights violations against people from religious minorities and to bring perpetrators to justice; speeding up the adoption of the religious harmony bill; and establishing programmes to raise awareness and training courses for provincial and municipal officials regarding the freedom of religion.

After whole recommendations that have been accepted by Indonesia, has Indonesia government become aware and implement it and what impact has the mechanism enjoyed on the ground? This paper is going to review the implementation of the UPR recommendations relating to the rights to freedom of religion and belief in Indonesia based on available evidence.

## **A. Introduction**

In accordance with the recommendations of the 1993 Vienna Declaration and Program of Action, and from the outcome of the Second National Workshop on Human Rights organized by the Indonesian Government in close cooperation with the National Commission of Human Rights and the United Nations' Center for Human Rights on 24-26 October 1994,

the Indonesian Government adopted the First National Action Plan (NAP) on Human Rights for the period 1998-2003, which will be renewed every five years. Then, in 2004 the Government launched the Second Plan for the period 2004-2009, with one of its six pillars strengthening the implementing agencies of the Plan both at the national and regional levels. Furthermore, the Third NAP for the period 2011 to 2014 and the current period of NAP is to 2019.

The NAP on Human Rights includes concrete measures to be undertaken by the Government over a five-year period for the promotion and protection of human rights, in accordance with cultural, religious and traditional values, and without discrimination as to race, religion, ethnicity and faction. Based on available data, in total there are 436 implementing committees at the provincial and regional/city levels located in all provinces in Indonesia. These implementing committees are mandated to provide input on the situation of the promotion and protection of human rights on the ground in their respective regions.

The implementing committees have also been entrusted with the mandate of ensuring that the regional regulations of the local governments at the provincial and regency/city levels are in compliance with the human rights instruments that have been ratified by Indonesia. This principle is in line with Article 5 (2.b) of Presidential Decree No. 40/2004 on RAN-HAM for 2004-2009, and with Law No. 10 of 2004 on the Rules to Draft National Legislation which, inter alia, should be adjusted with higher legal products and should not contradict public interests. To this end, the Ministry of Law and Human Rights holds training programs on a regular basis for regional parliaments on the formulation of human rights-oriented regional regulations.

### **Freedom of Religion and Belief Rights**

According to the 2010 census by Central Bureau of Statistics (BPS), the most recent available, approximately 87.18% of Indonesian identified as Muslim (with Sunnis more than 99%, Shias 0.5%, Ahmadis 0.2%), 6.96% Protestant, 2.91% Catholic, 1.69% Hindu, 0.72% Buddhist, 0.05% Confucianism, 0.13% other, and 0.38% unstated or not asked. Religious identity is very important for the Indonesian people so that “Belief in one God Almighty” becomes the state ideology and the Constitution also affirms that “the State shall be based upon belief in one God”. Furthermore, “Principle of belief in one God” becomes increasingly robust and considered to have been able to deal with various challenges and is believed to be the most suitable with the Indonesian nation.

Nowadays, formalization and institutionalization of the “belief in one God” principle penetrated into all of the constitutional and administrative aspects in Indonesia. But, in the midst of a situation more favorable to promotion of the rights to freedom of religion and freedom of belief, there is still a fact that the fulfillment of the right to the freedom of religion in Indonesia is a complex problem to solve. There are some antinomies ranging from the constitutional level to the application of norms in administrative action of the local government, which have resulted in a series of violations of human rights and in some serious cases, brought about casualties, especially for the minority religious group/minority belief groups.

## **State of The Law Related to Freedom of Religion and Belief Rights**

### **I. Constitution**

In the 1945 Constitution, there are several passages guaranteeing the rights to religious freedom, namely the articles 28E, 28I, and 29;

#### Article 28E

- 1. Each person is free to worship and to practice the religion of his choice, to choose education and schooling, his occupation, his nationality, his residency in the territory of the country that he shall be able to leave and to which he shall have the right to return.*
- 2. Each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience.*
- 3. Each person has the right to freely associate, assemble, and express his opinions.<sup>4</sup>*

#### Article 28I

- 1. The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.*
- 2. Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment.<sup>5</sup>*

#### Article 29

- 1. The state is based on the belief in the One and Only God.*
- 2. The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.<sup>6</sup>*

However, there are some restrictions to this freedom, as is laid out in the Article 28J Indonesia Constitution:

- 1. Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state.*
- 2. In exercising his rights and liberties, each person has the duty to accept the limitations determined by law for the sole purposes of guaranteeing the recognition and respect of the rights and liberties of other people and of satisfying a democratic society's just demands based on considerations of morality, religious values, security, and public order.<sup>7</sup>*

## **II. The Legislation Guaranteeing the Speech and Religious Freedom**

Aside from the ratified international human rights instrument, Indonesia has several

legislations such as the Human Rights Law no 39/1999. The said legislation strengthens the guarantee on the freedom of expression and religious freedom, especially in the articles 4, 12, and 22. The Article 4 states that: *“The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever.”*

The Article 23 (2) states, *“Everyone has the freedom to hold, impart and widely disseminate his beliefs, orally or in writing through printed or electronic media, taking into consideration religious values, morals, law and order, the public interest and national unity.”* And the Article 25 states, *“Every citizen has the right to express his opinion in public, and this includes the right to strike, according to prevailing law.”* In practice, however, this law is disregarded. What prevails are the legislations that are in direct violation of religious freedom, hence the pervasive persecutions against religious minorities and religious freedom in general.

## **B. Indonesia Universal Periodic Review**

Indonesia’s laws prohibiting and punishing the “abuse or defamation of religions” are contrary to international human rights law, according to the amicus curiae brief submitted by ARTICLE 19, Amnesty International, the Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights to the Indonesian Constitutional Court on 11 March 2010. The organisations submitted the brief to the Indonesian Constitutional Court in the judicial review of Law Number 1/PNPS/1965 concerning the prevention of religious abuse and/or defamation. The 1965 law prohibits “interpretation and activities [that] are in deviation of the basic teachings” of “a religion adhered to in Indonesia”, which includes some faiths with followers in the country but not others.

These organisations recommended that defamation laws should be amended to bring them into line with international standards and, in particular, to limit the size of damage awards and to bolster the defences available to defendants. Its first worked on Indonesia in 1996 on a report entitled Muted Voices: Censorship and the Broadcast Media in Indonesia, and has since provided evidence before the Indonesian Constitution Court to challenge imprisonment for defamation, campaigned against defamation of religions and book banning, contributed to the stakeholders’ report for Indonesia’s first cycle of the Universal Periodic Review (UPR) during the eighth session, and supported the drafting and implementation of the Freedom of Information Law, amongst others.

The UPR is a new mechanism under which the Human Rights Council will examine the human rights situation in every Member State of the UN, this mechanism was attended by all sides concerned with the preparation of the UPR documents for the Indonesia’s review (government, national and international civil society, as well as the OHCHR) – an achievement underlining the potential of the UPR to “Be conducted in an objective,

transparent, non-selective, constructive, non-confrontational and non-politicized manner”. As the UPR mechanism gives important new opportunities for civil society involvement in the evaluation of states’ human rights performance, this event aimed at both contributing to the follow-up on the UPR process in the context of Indonesia; and to assisting other states (as they prepare for their UPR participation) with regard to conducting constructive consultations with civil society and identifying other lessons learned through the experience of the first states scheduled for a review.

## **C. Recommendations and Implementations**

### **I. Indonesia UPR First Cycle**

The Working Group on the Universal Periodic Review, established in accordance with Human Rights Council resolution 5/1 of 18 June 2007, held its first session from 7 to 18 April 2008. The review of Indonesia was held at the 4th meeting on 9 April 2008. The delegation of Indonesia was headed by H.E. Rezlan Ishar Jenie, Director General of Multilateral Affairs, Department of Foreign Affairs. For the composition of the delegation, composed of 21 members, see appendix below. At its 10th meeting held on 11 April 2008, the Working Group adopted the present report on Indonesia. On 28 February 2008, the Human Rights Council selected the following group of rapporteurs (troika) to facilitate the review of Indonesia: Jordan, Canada and Djibouti.

## **Challenges**

Despite the enactment of Law No. 23/2006 on Population Administration, enabling believers outside professed religions to register their marriages at the Civil Registrars, there are still cases where followers of certain beliefs in the country have not yet fully enjoyed this right to have their marriage formally registered. The aforementioned Law, in Article 64 (2), clearly stipulates that those who do not profess a religious faith as recognized by the law can leave the column on religion blank and are subsequently entitled to have their marriages formally registered by the Civil Registrars.

## **Indonesia Presentation**

This state highlighted that the concept of crimes relating to religion and belief is also stipulated in the new Criminal Code Bill. As a party to the International Covenant on Civil and Political Rights (ICCPR), Indonesia is in the process of harmonizing its laws, administrative practices and policies, including bringing the Criminal Code Bill into line with the principles of the ICCPR. Eight articles on crimes related to religion and belief have been incorporated into the Bill. Many initiatives have been introduced at the community level based on the work of a prominent think-tank which in 2006-2007, conducted research into monitoring the situation of pluralist dynamics and freedom of religion in Indonesia.

Their findings were used to identify the problems and challenges faced by Indonesia in the field of pluralism and freedom of religion, in particular threats to freedom of conscience and expression, in order to find possible solutions. Indonesia values this work highly and will work on these findings to improve the implementation of the rights guaranteed by the ICCPR, in line with the Government's efforts to convene interfaith dialogues.

### **Religious Freedom Rights to participate in public and political life**

Indonesia government wishes to emphasize and reiterate its strong commitment to ensure the promotion and protection of this right as well as all the rights of all Indonesians to all their religious manifestations. It is the Government's responsibility to guarantee that people from different religions and/or beliefs are provided with government services, including the registration of their marriage, without discrimination. The Special Rapporteur on freedom of religion or belief and CERD expressed concern at distinctions made between different religions. In 2004, the Special Rapporteur sent a communication about a bill which reportedly would, inter alia, ban interreligious adoptions and marriages, ban teachings that "deviate from the main teachings of that religion" and stipulate that places of worship could be established only with the permission of the Government. CERD was concerned about the law requiring the mention of faith on legal documents. CERD also noted with concern difficulties faced by men and women of different religions in registering their marriages and that their children are not provided with birth certificates, and recommended that civil marriages be allowed.

The Special Rapporteur also wrote to the Government regarding the taking into custody of a religious community leader under the pretext of protecting her and later charging her with blasphemy; the detention of three women allegedly for trying to convert children to Christianity; and the killing of three Christian schoolgirls. In replying that investigations were being taken in the latter case, the Government highlighted that it should not be automatically assumed that the killings were religion-based. The Special Rapporteur also noted alleged attacks and threats against Ahmadiyyah families, following a fatwa banning the Jammah Ahmadiyyah. The Government replied that measures were taken to keep the peace and guard the assets and activities of the Ahmadiyyah.

CERD in 2007 welcomed efforts made towards the decentralization of power and consolidation of regional autonomy, but regretted receiving insufficient information on the implementation of the 2001 Special Papua Autonomy Law. In 2007, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people noted that, while constructive arrangements have been seen as positive steps, the West Papua experience is disquieting. Indonesia has continued promoting the massive arrival of settlers, the region is still heavily militarized, and episodes of repression and abuse in Puncak Jaya and other parts of the highlands have recently been reported. Besides, CEDAW welcomed a law establishing a 30 per cent quota for women candidates for political parties in the legislature, but was concerned at the lack of sanctions or enforcement mechanisms to ensure compliance and urged Indonesia to make it mandatory. The seats held by women in the national parliament increased from 8.0 per cent in 2004 to 11.3 percent in 2007.

## **Interactive Dialogue and Responses**

- Saudi Arabia indicated that it carefully studied the national and other reports of Indonesia, and examined the general framework in the first and second NHRAPs, which included practical measures undertaken by Indonesia to strengthen human rights in keeping with cultural and religious values without discrimination on the basis of race, religion or belief. Saudi Arabia asked for more information on the role that the Indonesian national human rights institutions play for the promotion and protection of human rights.
- Singapore noted the progressive democratic reforms made by Indonesia, which are recognized by many countries in Southeast Asia and around the world, and referred to four rounds of constitutional amendments introduced between 1999 and 2002 and the first ever direct presidential election held in 2004. Indonesia, which has the world's largest Muslim population, has a proud record of accommodating a diversity of religions and ethnicity within its borders, and Singapore asked how Indonesia achieves this. Singapore strongly supports the actions taken by Indonesia to safeguard women and children's rights and to protect them from violence, in particular efforts to combat trafficking in persons. The Indonesian Constitutional Court deserves special mention for the important role it plays and the contributions it has made to promote and maintain the rule of law in Indonesia, and even though it is a relatively new institution, it has already passed a number of critical rulings.
- The Republic of Korea welcomed all measures taken by Indonesia to enhance the enjoyment of human rights in the country, as well as the preparation and implementation of the Second National Action Plan (2004-2009). It also noted positive developments in the area of civil and political rights, including freedom of opinion, freedom of religion, political freedoms such as the freedom of election, and the growth of civil society that enables a stronger involvement of NGOs in the policy-making process. It also asked if the Government has any concrete plan to strengthen measures to better protect the human rights of indigenous people, in particular in the process of exploitation of natural resources.

### **Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by Indonesia**

This state addressed the recommendations that it took note of during the dialogue last April. On the question of Ahmadiyah, it was stressed that freedom of religion and the practices linked to individual belief are guaranteed under the Constitution. Articles 28 E, 28 I and 29 of the Constitution state that the exercise of freedom of religion cannot be limited otherwise than by law. Moreover, legal guarantees in respect of freedom of religion and religious practice are also stipulated in various laws, specifically Law No 39 of 1999 on Human Rights. Indonesia stated that, on the one hand, the doctrinal aspect of this particular religious movement has long been considered by some communities as deviant. On the

other, sporadic acts of violence by a mob against members of this group have constituted public disturbance carrying with them dimensions of intolerance acts and crimes punishable by law.

In this regard, Indonesia informed the meeting that it has just issued a specific policy on the issue which takes into account the principle of freedom of religion and the observance of existing relevant laws and regulations in the country. The policy, which is in the form of a decree and was announced today, contains among others the following elements: it does not outlaw the belief, but orders its followers to halt their proselytization (Syi'ar) activities and to fully respect the existing laws and regulations; it appeals to the Ahmadiyah followers to return to the Islamic mainstream and at the same time appeals to the others to refrain from violent acts against them. The issuance of such a decree is never meant to be an intervention of the State in people's freedom of religion. It is merely an effort by the Government to uphold law and public order and the protection of the followers

of Ahmadiyah from criminal attack. In other words, the Government limits its role to the levels of maintaining law and order and the protection of citizens. It does not interfere with religious doctrines or limit religious freedom.

Concerning the criticism on the way the Government has handled the issue of Ahmadiyah, Indonesia reiterated that it has never interfered in interpreting religious doctrine or limiting religious freedom in the country. The Ahmadiyah issue is not simply a question of freedom of religion. Extra caution is needed since this issue is highly sensitive and involves dual aspects. On the one hand, the Government is responsible for promoting a harmonious life amongst religions and their believers. On the other hand, the Government is mandated to uphold law and order, and committed to eradicate extremism and radicalism.

## **II. Indonesia UPR Second Cycle**

Arguments among certain groups of religious followers in recent years continue to be a challenge. In particular, the issues at hand are, inter alia, the protection to the Ahmadis, the disputes regarding building places of worship, and the problems of practicing one's religion. The Government recognized the efforts of civil society to promote religious harmony. It is noted that various fora of dialogue between religious groups have been established, including the Religious Harmony Forum (Forum Kerukunan Umat Beragama/FKUB), which are present at national and sub-national levels. The Forum's main goal is to maintain and enhance the religious harmony in Indonesia through dissemination of various rules and regulations relating to religious issues, garnering and discussing community inputs to be channelled to the local and/or central government, putting forward recommendations regarding the proposals to build a place of worship, and acting as mediator to reconcile differences among religious groups.

Along the same line, the Government also continues to evaluate the policies to better reflect the Government's policy in promoting and protecting human rights as well as maintaining public order. One of the examples is the initiative to formulate a draft Law on Religious Harmony, which has begun to be debated in public. Regarding the protection of the Ahmadis, the Government is of the view that the Law No. 1/PNPS/1965, which has

undergone a judicial review at the Constitutional Court, provides the basis for maintaining public order in the community in terms of religious issues. It does not prohibit the Ahmadis to profess and practice the religion, instead it protects them to do such activities. The law only regulates the proselytisation of the religion. Indeed, in this spirit, the implementing regulation. i.e. the 2008 Joint Ministerial Decree on Ahmadiyah, regulates the proselytisation of the Ahmadis as well as the call for all people to forbid resort of violence against certain religious groups.

On the issue of places of worship, it is indeed the duty of the Government to ensure that the right to practice religion is fulfilled, while at the same time, the Government also needs to ensure public order. Moreover, the existing mechanism dealing with this issue, namely Joint Ministerial Regulations (PBM) No. 9 and 8 of 2006 on the Guidelines for Head of Provincial/Local Governments in maintaining religious harmony, in empowering Religious Harmony Forum and in building places of worship, proves to be adequate. Nevertheless, in certain cases which cannot be settled under this mechanism, other relevant institutions including the Parliament, Ombudsman as well as the National Commission on Human Rights, will be involved. One of the outstanding cases which remains to be a

The challenge is Taman Yasmin Church in Bogor. On the other hand, decentralization and implementation of Regional Autonomy have provided regional governments the authority to produce by-laws, except for the issues of foreign policy, religion, defense and national security, judicial, national monetary and fiscal arrangement. In certain cases, it leads to the inconsistency between local regulations/by-laws and higher Laws, which require further harmonization.

## **Indonesia Presentation**

The second cycle of Indonesia UPR occurred on 23 May 2012, this state is cementing the building blocks of democratic and human rights institutions. Central to this is an effective system of checks and balances. Like any other country, the realization of such a vision is not totally free of challenges. Indonesia's response is a "democratic" one. It remains steadfast in respecting and upholding freedom of religion, association and expression. It remains committed to ensuring that the mass media and labour unions, political parties and civil society organizations continue to flourish in freedom. It remains consistent in ensuring an independent judiciary, as a key pillar in the democratic transformation.

## **Religious Freedom Rights to participate in public and political life**

Four special procedures, in February 2011, communicated their concern at increased attacks against the Ahmadiyya community over the previous year. Issues relating to freedom of religion and belief were raised in about 17 submissions including by the Centre for Human Rights and Democracy (CHRD), European Centre for Law and Justice (ECLJ), Equal Rights Trust (ERT), Human Rights First (HRF), Jubilee Committee (JC), JS8, OpenDoors (OD), Pax Christi International (PCI). Particular reference was made to

violations affecting the Ahmadiyah in Cisauk and the Indonesia Christian Church Taman Yasmin Bogor.

ERT, JS8 and Komnas-Perempuan drew attention to the discrimination faced by adherents of indigenous faiths regarding their right to equality before the law and government. JS8 indicated that the Government was in the process of generating electronic ID cards (E-KTP) which, when applied, would make the rehabilitation of victims' identities more complicated. JS8 urged the Government to revise legislation and policy such as Law No. 23/2006 (Population Administration); and revise Law No. 1/PNPS/1965 concerning the "Prevention of the Misuse and/or Defamation of Religion" and declare the law inapplicable.

### **Cooperation With Human Rights Mechanisms**

CAT recommended that Indonesia respond favourably to the request of the Special Rapporteur on freedom of religion or belief to visit the country. UNCT noted that since November 2007, Indonesia had not hosted any visits by special procedures, despite requests and reminders made since 2008.

#### **Implementation of International Human Rights Obligations, Taking Into Account Applicable International Humanitarian Law**

Religious freedom suffered a set-back, as reflected in the attack on Jemaah Ahmadiyah followers in Cikeusik and the deterrence of Jemaah Christians from worshipping in the Church of Yasmin, Bogor. KOMNAS HAM recommended the formation of a new law that guarantees the protection of freedom of religion or belief and a shift in managing religious plurality from repressive and discriminatory practices to fair treatment of all religions and beliefs. The Special Rapporteur on freedom of religion alleged that the new Islamic Criminal Legal Code in Aceh legalized marital rape. CAT remained concerned about the high reported incidence of domestic violence and recommended that Indonesia adopt all necessary measures to implement Law No. 23/2004 on domestic violence.

### **Interactive dialogue and responses**

- Qatar noted that Indonesia had launched its Third National Action Plan on Human Rights. It noted that the Constitution of Indonesia protects freedom of religion and belief and encouraged religious tolerance despite the great challenges faced by the country.
- The Russian Federation noted achievements in ensuring freedom of religion, gender equality, freedom of speech, economic, social and cultural rights, equal access to education, and elimination of the phenomenon of street children and poverty. Steps taken to prevent trafficking and family violence can be considered examples of best practices.
- Sweden noted that religious tolerance is the hallmark of Indonesian democracy but that

certain incidents suggested that persons belonging to religious minorities may face discrimination and persecution for expressing or practising their religion or belief. According to credible reports, ill-treatment of prisoners occurred in the country.

- Bangladesh commended action taken by Indonesia in the fields of health and education and the promotion and protection of the rights of women and the child. It welcomed action to ensure freedom of religion and highlighted the role of the Religious Harmony Forum. Bangladesh offered to share its best practices with Indonesia.
- Chile highlighted the promotion of the rights of the child noting the adoption of a number of concrete measures in this regard. Noting that the national report refers to the theme of freedom of religion, Chile asked what kind of measures had been taken to prevent possible problems regarding this issue.
- Denmark welcomed the improvements made by Indonesia in the field of human rights over the past decade. However, it noted with concern attacks and harassment against religious communities and that some local administrations had introduced religiously founded by-laws that were discriminatory against women and religious minorities.
- Ecuador highlighted the work in the defence of human rights carried out through various institutions. It welcomed the process of revision of the Penal Code and the measures taken to promote and protect freedom of religion, to eliminate violence

against women as well as to protect children, persons with disabilities and migrant workers.

- Netherlands appreciated Indonesia's responses to its questions on freedom of religion, the ICC and revision of the Military Tribunal Law and Criminal Code. It welcomed the invitations extended to several Special Rapporteurs. It acknowledged the challenges faced in protecting the right to freedom of religion and belief. Netherlands made recommendations. Indonesia reaffirmed its absolute and total commitment to ensuring the protection and freedom of religion and to respect and promote freedom of expression. Indonesia is determined to ensure that incidents of religious intolerance are addressed and perpetrators of acts both physical and of intimidation are brought to justice. The delegation expressed its eagerness to work with all countries to ensure that freedom of religion is constantly promoted and receives required attention.

## **D. Conclusion**

Indonesia Government remains strongly committed to upholding freedom of thought, conscience Religion and belief play an important role in Indonesia, both in determining a person's own identity and in the nation's identity. As a various, multi-ethnic, multi religious country, Indonesia attached the highest priority to the issue of freedom of religion. Indonesia, as a matter of principle, did not interfere in the issue of individual belief and shared respect with all religions. There was sometimes a misperception that Indonesia recognized only six official religions; Islam, Catholicism, Protestantism, Hinduism, Buddhism and Khong Hu Chu. This mistaken view came from an incomplete reading of law No. 1 of 1965. The law unacceptably allows the limitation of freedom of religion or belief and has become a justification for restricting the freedoms and actions of minority

groups and indigenous peoples. It did not mean that other religions were not allowed in Indonesia. Indonesia was too conscious of recent incidents which indicated an intolerance of religion. It explained that other democracies had found their democratic space exploited by those who professed intolerance and hatred amongst religions.

The Government is determined to address such cases of intolerance amongst religions and to ensure believers, such as Ahmadis, were able to practise their faith in a good manner. CAT recommended that Indonesia respond favourably to the request of the Special Rapporteur on freedom of religion or belief to visit the country. UNCT noted that since November 2007, as mentioned in the second cycle, Indonesia had not hosted any visits by special procedures, despite requests and reminders made since 2008.

After the two cycles of UPR that Indonesia has held, this state is becoming increasingly aware of the right to freedom of religion or belief as a human right, and the associated obligations of the State to guarantee this right. The Constitutional Court gives a new and positive opportunity to citizens who feel their rights have been breached to bring an application to the Court to annul the laws which violate their constitutional rights. Although the Court is yet to use international human rights law as an interpretative aid to domestic law, the two decisions outlined above indicate a positive approach to religious freedom in Indonesia by the Court. Most recently, the second amendment to the 1945 Constitution on Human Rights, together with the ratification of the ICCPR and ICERD are achievements in efforts to protect human rights. Yet, it is important that all legislation, regulations, policies and practices that are discriminatory towards followers of religions and beliefs are amended or revoked, irrespective of the political pressure exerted by certain interest groups. To do so would be in keeping with the character of Indonesia as a state based on law that upholds human value and dignity, and is essential to safe-guarding the harmony which guarantees Indonesia's entity.

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

**Cristian Talesco and Brigitte S. Valentine**

Hong Kong Polytechnic University

### **Abstract**

In 2011, Timor-Leste underwent a first Universal Periodic Review (UPR), which identified 126 recommendations for improving human rights. The East Timorese government accepted 118 recommendations and rejected 8. In November 2016, the second UPR will be completed. Nevertheless, as many countries, Timor-Leste's democratic and human rights system is not perfect. The 2011 UPR's recommendations have identified some of the shortcomings to be faced, including improving the justice system, women and children rights, people with disabilities rights, and justice to victims of past human rights violations during the Indonesia invasion from 1975 to 1999. This latter point has attracted the widespread criticism of civil society organizations involved in the 2011 UPR's cycle, including Amnesty International and the International Center for Transitional Justice. Timor-Leste has established two truth commissions to investigate past human rights violations: the Commission for Reception Truth and Reconciliation, and the Commission for Truth and Friendship. Both commissions have given specific recommendations to achieve justice, but their implementation remains largely stalled. This paper, therefore, attempts to establish how the Universal Periodic Review can be a useful tool to strengthen human rights in Timor-Leste, and its limitations in dealing with matters regarding international human rights abuses. In particular, the paper draws on the language of the UPR's documents and qualitative data collected from officials and civil society organizations.

### **Introduction**

Timor-Leste has suffered twenty-four years of Indonesian invasion which left the country to be one of the poorest in Southeast Asia. In 1975, Indonesia invaded Timor-Leste to annex it to West Timor, and only left in 1999 after the referendum for independence. Overall, the terrifying invasion cost the lives of hundreds of thousands of East Timorese. Since Timor-Leste's independence on 20 May 2002: the nation, with the support of the United Nations, has begun to rebuild the country and its institutions from scratch. Uniquely for Southeast Asia, Timor-Leste has established a human rights framework which includes an Ombudsman: helping to give a voice to civil society and assisting in the advancement of free political elections. Hence, Timor-Leste has created the basis for a democratic society which grants rights to its citizens.

On 3 November 2016, Timor-Leste, which is not yet part of ASEAN, completed its second cycle of human rights assessments under the UPR. Timor-Leste's first UPR cycle was

conducted in 2011. In both reviews, the UPR cycles evinced two human rights dimensions: one domestic and one international. At the domestic level, Timor-Leste received suggestions to ameliorate human rights problems, namely improving women's and children's rights. At the international level, the feedback focused on achieving justice for past human rights abuses.

This paper attempts to answer the following research questions: is the UPR an effective mechanism to achieve justice for past human rights abuses in Timor-Leste? What are the UPR's limitations in facing international human rights violations in Timor-Leste? The paper attempts to answer these questions by assessing the feedback received by Timor-Leste, and also that given by Timor-Leste to Indonesia, other ASEAN countries, and to the so-called Western democracies, which played a role during the Indonesian invasion of Timor-Leste, namely: Australia and the USA. This chapter's analysis relies on the documents of the UPR as well as on the discourses of the civil society and those of the government officials in Timor-Leste.

### **UPR of Timor-Leste**

The UPR mechanism provides feedback to all member states about their human rights achievements and problems. Timor-Leste completed its second cycle on 3 November 2016, and overall, its performances in democracy and human rights far exceeded that of all of the ASEAN member countries (Talesco, 2016), of which Timor-Leste is not included, despite its geographical location indicating that it should be included in ASEAN. The UPR evidenced one issue that so far has not been solved either by the government of Timor-Leste nor the international community: granting justice to the victims of past human rights abuses.

In the first UPR for Timor-Leste conducted on 12 October 2011, it received 126 recommendations by 39 participating states, and accepted 118 and rejected 8 (UPR Info, 2012). The main issues raised by the recommending states to Timor-Leste, the state under review (SuR), focused on two different levels: one domestic and one international. On the domestic level, recommending states have urged Timor-Leste to improve women's and children's rights, the rights of people with disabilities, and to make improvements to the justice system. These problems can be fixed in a liberal democracy by implementing specific laws to grant rights to disadvantaged categories. On the international level, recommending states pressed Timor-Leste to achieve justice for past human rights violations during the Indonesian invasion. This latter case is more convoluted than that pertaining to solving violations at the domestic level. In fact, when Timor-Leste was invaded by Indonesia, there were several international players, including Australia and the USA, which did not discourage the invasion in any way. Therefore, in this instance with Timor-Leste, granting rights for past human rights abuses requires an international answer. Meanwhile, the UPR evinced that all the burden had mistakenly been put on the SuR.

During the first UPR, 15 governments raised questions or made recommendations about past human rights abuses. These countries included the Czech Republic, Ireland, the Netherlands, New Zealand, USA, Germany, Argentina, Austria, Canada, South Africa, Norway, France, the UK, Korea and Indonesia (UN Human Rights Council, 2012). Indonesia focused its stance on achieving the recommendations of the Commission on Truth and Friendship, which is - as the following section shows - a commission created by both countries to achieve a peaceful settlement of past human rights abuses. However, it is highly

criticised because it does not seek to bring the actual perpetrators responsible for the crimes against humanity in Timor-Leste, before the court. Countries that failed to raise this issue were the Holy See, Australia, Portugal, Japan and Brazil. Notwithstanding this, on several occasions these countries have reinforced their support to achieve justice for the abuses occurred during the Indonesian invasion (Ibid).

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

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

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

### **Restorative and Transitional Justice in Timor-Leste**

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

Other scholars (McCloskey and Hainsworth, 2000; Taylor, 1991, 2000; Dunn, 1983, 2003; Robinson, 2006, 2009; Cristalis, 2009) have analysed human rights abuses in

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

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

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

Nevertheless, there is a necessary publication to which any scholar writing on Timor-Leste and human rights should make reference: *Chega! (Enough!): the report of the Commission for Reception, Truth, and Reconciliation of Timor-Leste* (CAVR, 2005). This report is the most comprehensive piece of writing on what happened in Timor-Leste between 25 April 1974 and October 1999. It portrays the truth about the Indonesian human rights abuses in Timor-Leste, addressing violations related to widespread killing and disappearances, displacement, detention, torture, sexual abuses, self-determination, etc. The report is also made freely available on the internet, with the intent to objectively and impartially deal with the horror of the bloody invasion. It recognises the key role of civil society in upholding the principle to self-determination of Timor-Leste, and in fighting the indifference of other governments (ASEAN, Australia, the US), which turned a blind eye to the atrocity perpetrated by the Indonesians (CAVR, 2005: 50). Moreover, the report itself inspired a workshop in June 2000 on transitional justice organised by the East Timorese civil society, the Catholic Church and community leaders, and with the support of the Human

Rights unit of the United Nations Transitional Administration in East Timor (UNTAET). The aim of the CAVR was to reconcile with Indonesia, with the intention to acknowledge “past mistakes including regret and forgiveness as a product of a path inherent in the process of achieving justice” (CAVR, 2005: 18).

Yet, justice, in the form of bringing the human rights abusers before a court, remains largely unachieved. Cristalis (2009: 263) poses a very relevant question: “reconciliation, but where is the justice?” In fact, independence and reconciliation are not enough to heal the wounds of those who suffered losses. Only justice in the form of a tribunal could have relieved the feelings of the East Timorese. Dunn (2001) and Robinson (2006) had been commissioned to complete a report from the UN on the human rights violations, and they both suggested that a tribunal needed to be established. This however, did not happen. Both presidents Ramos-Horta and Gusmão suggested that reconciliation was of utmost importance, rather than a focus on justice.

The UPR process, with its two cycles, has attempted to shed light on past human rights abuses. The process has shown that justice in Timor-Leste has not been achieved yet, although the process has provided a platform to keep discussions open.

### **Seeking Truth and Reconciliation Between Indonesia and Timor-Leste**

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

The CTF report, however, has not been considered as trustworthy as the CAVR report. CSOs, in particular the Aliansa Nasional Timor-Leste ba Tribunal Internasional (Timor-Leste National Alliance for International Tribunal – ANTI), complained about the lack of consultation with victims and of parliamentarians approval of the commission. ANTI - in a letter to the commission dated 15 July 2008 and whose object states: “We have the Truth, now we need Justice” - pointed out that the CTF report was nothing new compared to what was already discovered in the CAVR report *Chega!*. There was a difference however, the CAVR report gives a strong emphasis on the establishment of an International Tribunal “to try cases of 1999 crimes” (CAVR, 2005: 10), it further recommends that the UN and the Security Council remain committed to achieving justice for crimes against humanity in Timor-Leste (Ibid: 187). On the contrary, the CTF avoided the justice issue by claiming institutional responsibility, rather than individual responsibility, which it assigned to Indonesia. This, according to ANTI, goes against the principles of international law and against article 160 of the Timor-Leste constitution, which states that “Acts committed between the 25<sup>th</sup> of April 1974 and the 31<sup>st</sup> of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts” (Constitution of RDTL). ANTI emphasised the importance of reconciliation with Indonesia, although the organisation sustained the view that justice for the victims should be the cornerstone for true reconciliation. This follows the lines of the reconciliation definition adopted by the CNRT (Conselho Nacional da Resistência Timorense - National Council of Timorese Resistance) in August 2000, which states that “Reconciliation

is a process, which acknowledges past mistakes including regret and forgiveness as a product of a path inherent in the process of achieving justice” (CAVR, 2005: 18). Nevertheless, scholars at the War Crimes Studies Center at the University of California Berkeley, who have been involved in the CTF, have argued that despite the criticism, the report can be acknowledged as credible (War Crimes Studies Center, n.d.). Moreover, recognition of the crimes and regret by the Indonesian president are indications that the right direction is being taken in the discourse of reconciliation. In addition, Indonesia’s commitment to support Timor-Leste’s bid for ASEAN membership is an indication of the willingness of both countries to make amends regarding the wrongs of the past, and to look towards a positive, progressive and peaceful future relationship.

The philosophy of José Ramos-Horta, as well as that of Xanana Gusmão, have promoted reconciliation and forgiveness of Indonesia, which are further indications of Timor-Leste’s willingness to live in a peaceful, stable society. This perspective has not been easy to accept by many East Timorese. Ramos-Horta, himself, lost two brothers and one sister, all killed by the Indonesian militia. Of his brothers, he does not even know where they are buried. Many have criticized Ramos-Horta for being too forgiving, as in 2008 also forgave the men who attempted to kill him, and he has supported the forgiveness of reconciliation with those Indonesians and the militia who committed genocide in Timor-Leste. However, Ramos-Horta has an interesting perspective about justice, which is one that is not granted by the judgement of a tribunal, but rather from the historical happenings in Timor-Leste. He affirmed in 2012, “[...] the greater justice is that we are free”, adding “[...] let us forgive those who did harm because God gave us a greater gift: our independence. Let’s forget about an international tribunal – it will never happen”(McDonnell, 2012). Many East Timorese have disagreed with him, and feel betrayed by his comment. The capacity of Ramos-Horta and Gusmão to forgive for the wrong of the past is in light of achieving peace and stability, two factors that can grant the long-term development of Timor-Leste. Both of them knew that Timor-Leste would have developed faster by having good relationships with its neighbours; which is why reconciliation was on the top of their political agenda. Gusmão - talking in a lecture in Singapore in 2013 - affirmed that for his country, it was very important to pursue reconciliation. He clearly stated that fighting in the style of Palestinian Intifada was not in the interest of his country. In order to prosper, countries need peace and Timorese leaders realised this very soon (Timur, 2013). Moreover, on the same occasion, Gusmão made clear that pursuing a claim of crimes against humanity against Indonesian military would have also rendered responsible all of the countries that furnished weapons to Suharto. As such, several Western countries would have faced blame.

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

Overall, Indonesian military, as well as the people running the government, are well aware of the wrongs perpetrated against the East Timorese. Nowadays, Indonesia is a strong supporter of Timor-Leste joining ASEAN. A key reading of this stance is that Indonesia looks forward to a peaceful and democratic coexistence in the Southeast Asian region. However, although Ramos-Horta did not call for a tribunal like in the case of Cambodia and Rwanda, Indonesia's responsibility for the killing of thousands of East Timorese, is, at least on moral grounds, a national shame for the country. In other words, Ramos-Horta left both the choice of whether to prosecute, and the timing of now or later: to the culprit, Indonesia. The culprit responsible for the attempted genocide in Timor-Leste. This attitude is in line with the recognition to award Ramos-Horta and the renowned Catholic bishop in Timor-Leste, Carlos Ximenes Belo, the Nobel Prize for Peace in 1996. During the ceremony, the chairman of the committee, Francis Sejersted, affirmed that this prize is in recognition "for their long-lasting efforts to achieve a just and peaceful solution to the twenty-year-old conflict in East Timor" (Sejersted, 1996).

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

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

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

Overall, the whole UPR process of the last nine years has shown that steps in the direction of justice have been taken, although they are slow and complicated. This is

particularly so in consideration of the limited capability of the government of Timor-Leste, which is still facing most of the primary challenges of development.

### **The Absence of “Justice” during Timor-Leste’s UPR**

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

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

The shift from granting justice, to reconciliation without justice, is evident in the UPR process when it comes to the government's position. Moreover, until 2010, Ramos-Horta accused the UN of ‘hypocrisy’ in not setting up the Tribunal for prosecution of human rights abusers (Amnesty International, 2010). Later, in 2012, the discourse of justice changed. Horta claimed: “The greater justice is that we are free. Let us forgive those who did harm because God gave us a greater gift: our independence. Let’s forget about an international tribunal – it will never happen” (McDonnell, 2012). By the same token, the most prominent figure in the struggle for independence of Timor-Leste, Xanana Gusmão, affirmed that “for his country it was very important to pursue reconciliation. Fighting for justice was not in the interest of Timor-Leste. Rather peace and stability were the ingredients of Timor-Leste’s future” (Timur, 2013).

The position of the government of Timor-Leste in relation to justice can be more clearly explained in the words of an East Timorese diplomat who said, “The UPR process is important for Timor-Leste. We need to be part of these international forums to express ourselves as an independent country. However, we cannot use aggressive language, or confront other states. The capacity of Timor-Leste to argue about specific matters is limited. We are a small state, struggling to develop, we cannot jeopardize our future by taking a very tough stance on human rights issues, especially with our neighbours” (East Timorese diplomat, 2016). This position explains significantly the dynamics of international politics, which often underestimate the importance of achieving and granting justice in favour of an opportunistic neoliberal plan of international relations. In this sense, the UPR process has been very important in disclosing these dynamics, and it is also very important to see the role

of CSOs. In fact, civil society organisations have a different role and standing position during the UPR in comparison to governments. CSOs in Timor-Leste have always repeated that Timor-Leste is “still not yet free of the shadow of serious crimes committed during the 24 years of Indonesian occupation. We have suffered a lot during that period; physically and psychologically... [...]... [W]e must not sacrifice fundamental principles of human rights and justice in favour of diplomacy” (A-N-T-I, 2011).

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

Within this panorama, the burden of achieving justice for past human rights abuses is mostly put on the East Timorese government. Even if an international tribunal is set and could trial people in contumacy, it is impossible to jail those judged because there is no agreement with Indonesia for extradition. Prior to the first and second cycles, several countries submitted questions and in both cases those countries asked the East Timorese government to clarify what steps had been taken to achieve justice for the past human rights abuses. By the same token, most of the suggestions given from recommending states were focused on adopting points from the CTF and the CAVR. No recommending state has attempted to push Indonesia to prosecute the perpetrators of human rights abuses in Timor-Leste. In fact, in both cycles, Indonesia has never been put before the reality of its abusive past in regard to Timor-Leste.

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

### **Conclusion: Looking towards the third cycle**

Overall, the two UPR cycles have been relevant to remind the international community that not much has been done to achieve reparation for past human rights abuses. The UPR helps Timor-Leste to be part of an international forum which can give and receive feedback, and support human rights improvements, including the achievement of justice. However, positive outcomes of the UPR cycle are limited by the so-called ASEAN way of non-interference, which prevents the East Timorese government from freely advocating for justice in ASEAN. Moreover, the UPR has no enforcement mechanisms, but instead is only a forum to discuss how human rights can be improved. Therefore, implementation remains in the interests and responsibility of the SURs. Thus far, the UPR has provided a forum where NGOs can give extensive feedback and opinions about past human rights abuses. NGOs represent the outspoken voice, which seeks solutions on how to achieve justice. However, this ‘voice’ is in contrast with the non-confrontational language used by recommending states, especially other

ASEAN members. The UPR has clearly shown the different stances between civil society and the diplomatic apparatus of the SUR, and the recommending states. However, the UPR, as seen, puts the burden of achieving justice for past human rights abuses on Timor-Leste, while in reality, Indonesia has the main responsibility as well as those Western states which supported the invasion of Timor-Leste. The UPR also has another important flaw, which is related to the lack of responsibility of the international community in helping Timor-Leste with past human rights violations. The process, in fact, seems to be too heavy on ritualism, and disturbingly, too light on effective solutions.

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

However, much still needs to be done, and the CSOs have indicated the probable way forward as one of greater reliance on the role of the United Nations, as a key player in the achievement of justice in Timor-Leste. In this regard, leverage on the third cycle UPR to address past human rights abuses will require: a) A clear strategy by the State seeking justice for past human rights abuses. This may require an objective membership in ASEAN and the support of its members to solve the current impasse to achieve justice; b) In the next 4 years, NGOs should be much more cohesive and assertive in shifting the burden of granting justice from the government of Timor-Leste to the Indonesian government, and the United Nations. Local and regional coalitions will help too. In particular, joint submissions from East Timorese NGOs, together with regional partners and international organisations such as Amnesty International, can help and support the bringing about of justice; c) Lobbying of key States to raise the issue is crucial. So far, Indonesia has not taken much responsibility for past human rights abuses. Australia, New Zealand, the USA should also be more committed to advocating for justice and in pushing the government of Indonesia – the most populous democracy in Southeast Asia - to comply with the human rights treaties signed. During the next four and half years, the UPR process should focus on shifting the burden from the SUR to Indonesia, Australia, the USA and all the other countries which supported the catastrophic, bloody invasion; and who today have still neglected to seek, nor encourage, justice.

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## **The situation of LGBTIQ HRDs in Southeast Asia**

**Celine Martin**

Destination Justice

### **Abstracts**

In Southeast Asia, same-sex relationships are criminalized in four of the eleven countries under Section 377 of their penal codes, inherited from British colonial rule. This means LGBTIQ Human Rights Defenders (HRDs) face greater risk in Malaysia, Myanmar, Brunei, Singapore, and since 2016, in Indonesia with a resurgence of public homophobic statements by authorities. HRDs are usually at risk in the Southeast Asian region; LGBTIQ HRDs are at even higher risk. However, since the creation of the Universal Periodic Review mechanism in 2006, countries have made and received recommendations on how to promote and protect human rights in general and LGBTIQ rights in particular. All Southeast Asian countries will have completed two cycles of review as of November 2016. Consequent to two full cycles, it is possible to observe whether States have acted or omitted on the recommendations it received concerning LGBTIQ rights and/or HRDs. Overall, recommendations concerning LGBTIQ rights and/or HRDs remain largely unaddressed by the Southeast Asian States. The civil society in Southeast Asia, composed of thousands of organizations, has been active for dozens of years. It started to be organized regionally with the first regional ASEAN People's Forum in 2005. This forum, which gathers around 1000 to 1500 activists and HRDs every year, has included Timor-Leste in its discussion knowing that one day the young country would be part of the regional organization. This allows a network that has been widely used in submission to the UPR, international and regional organizations supporting local NGOs. UPR recommendations addressing human rights defenders' safety and/or LGBTIQ rights' promotion and protection in Southeast Asian States are usually made by the same set of countries composed of Canada, Norway, France, Switzerland to mention only four of them. It is quite rare for other Southeast Asian countries to make recommendations on those specific topics. However, during the course of our research we highlighted few recommendations from Southeast Asian countries to other Southeast Asian Countries, which have to be studied in their context and in light of the principle of sovereignty.

### **Introduction**

Last June 2016, the deadliest homophobic mass shooting in the United States of America, Orlando (New York Times 2016), highlighted that even in countries with legal protection for members of the Lesbian, Gay, Bisexual, Transgender, Intersexual, and Queer community, LGBTIQ peoples remains at risk.

In many parts of the world, democratic values are increasingly under threat. In these areas, Human Rights Defenders (HRDs) serve as key agents of change, dedicating themselves to the

realization of human rights and fundamental freedoms. Through peaceful struggle, HRDs address a range of human rights concerns, such as arbitrary arrest and detention, discrimination based on sexual orientation and/or ethnicity, censorship, and land and employment issues. In promoting respect for the rule of law and human rights, HRDs challenge powerful interests and therefore put themselves at risk. In a worldwide effort to assist and protect LGBTIQ HRDs, Destination Justice's report aims at empowering the LGBTIQ HRDs by providing them extensive legal research and advocacy training, tools that are currently too scarce and not easily accessible in the Southeast Asian region.

In Southeast Asia, same-sex relationships are criminalized in four of the eleven countries under Section 377 of their penal codes, inherited from British colonial rule. This means LGBTIQ Human Rights Defenders face greater risk in Malaysia, Myanmar, Brunei, Singapore, and since 2016, in Indonesia with a resurgence of public homophobic statements by authorities.

Since the creation of the Universal Periodic Review mechanism in 2006, countries have made and received recommendations on how to promote and protect human rights in general and, for some countries, on LGBTIQ rights in particular.

All Southeast Asian countries will have completed two cycles of review as of June 2016. Consequent to two full cycles, it is possible to observe whether States have acted or omitted on the recommendations it received concerning LGBTIQ rights and/or HRDs. Overall, recommendations concerning LGBTIQ rights and/or HRDS remain largely unaddressed by the Southeast Asian States.

Our article, based on the findings of our report will explore the situation of the LGBTIQ HRDs in the region, from the legal situation to the backlash on human rights in general. In the upcoming lines we will also focus on how the civil society is getting organized regionally and what could be the role of the ASEAN if there would be one (Paragraph I).

Building on those remarks we will see if and how the UPR mechanism is/could be used to improve the situation of the LGBTIQ rights and the situation of the HRDs in particular. And, what could we do to help the LGBTIQ HRDs to reclaim their rights and the rights of the community across the region and in every one of the eleventh Southeast Asian countries. (Paragraph 2).

## **I. LGBTIQ rights in Southeast Asia**

As mentioned above, in Southeast Asia, same-sex relationships are being criminalized in four of the eleven countries under Section 377 of their Penal Code which they inherited from British colonial rule (UNESCO 2011). However, some of the Southeast Asian countries have been taking steps during the last year to protect LGBTIQ communities through non-discrimination regulations or the de-criminalization of same-sex relationships. Accompanying this movement, civil society across the region has started to network and exchange on similar issues, and very little research has been conducted except for the UNDP 'Being LGBT in Asia' project (UNDP 2016). Additionally, no comprehensive, regional legal research has been conducted on the HRDs promoting the rights of the LGBTIQ communities,

and the risk, discrimination and stigma they endure, first as LGBTIQ individuals, and then as human rights defenders

In this paragraph, we will explore the legislative background and context of the LGBTIQ rights and how the civil society is getting organized in the region to assist in promoting and protecting the rights.

### **A. Legislative background**

The Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer community is visible in Southeast Asia. In every country: Brunei-Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Timor-Leste, Thailand, and Vietnam. However, same-sex relationships are still being criminalized in Myanmar, Malaysia, Brunei, Singapore and in the region of Aceh, Indonesia. But, the non-criminalization of same-sex relationships does not mean that the LGBTIQ community and the ones advocating for our rights are safe.

### **Fundamental international legal protection**

Discrimination based on sexual orientation, gender identity and gender expression is widespread in our world, Southeast Asia included. The principle of non-discrimination is, however, a fundamental rights guaranteed by the most important instruments adopted for the protection of rights, such as:

- Article 2 of the United Nations Universal Declaration on Human Rights (UDHR): “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]”. (United Nations 1948).
- Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. (United Nations 1966).
- Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (United Nations 1966).
- Article 1 of the Convention on the Elimination of Discrimination against Women (CEDAW): “For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of

human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” (United Nations 1979).

- Principal 2 of the Yogyakarta Principles: “Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.”

- Principle 2 of the ASEAN Human Rights Declaration (AHRD): “Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status”.

While the UDHR is not legally binding, its principles serve as a foundation for and were developed in other United Nations treaties. Moreover, several UDHR principles such as universality, interdependence and indivisibility, equality and non-discrimination are considered as International Customary Law (United Nations 2016b) and therefore are binding for all states.

In *Toonen v. Australia*, the Human Rights Committee held that reference to “sex” in the Articles 2(1) and 26 of ICCPR is to be taken as including “sexual orientation” (*Toonen v. Australia* 1994). Sexual orientation is therefore a proscribed ground of discrimination. *Toonen* was reaffirmed in *Young v. Australia* and *X. v. Colombia*. In its Concluding Observations, the Human Rights Committee regularly expressed concerns as to the criminalization of consensual acts between adults of the same sex (Concluding observations: Barbados 2007) and welcomed decriminalization of sexual acts between adults of the same sex (Concluding observations: United States of America 2006).

Similarly, the Committee on Economic, Social, and Cultural Rights held that “other status” in Article 2(2) includes sexual orientation. The Committee further held that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights.” (Committee on Economic, Social and Cultural Rights 2009). And the Committee on the Elimination of Discrimination against Women referred to the “sexual orientation” as part of the term “sex” for the first time in a 2010 General Recommendation. In particular, it stated: “Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class,

caste and sexual orientation and gender identity.” (Committee on the Elimination of Discrimination against Women 2010).

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

The 2012 AHRD, adopted in Phnom Penh on 18 November 2012, fails to protect LGBTIQ in particular, but the Declaration contains General Principles which address general discrimination issues. This declaration is not binding and acts more like a guide of good conduct regarding human rights issues. The ASEAN Human Rights Commission is currently working toward the establishment of an ASEAN Human Rights Court. According to the international literature, the expressions “sex” and “gender” are not synonyms, and the effort made by ASEAN here should be acknowledged. Sex refers to male and female while gender refers to masculine and feminine, which means that gender is more inclusive for the LGBTIQ community (Milton Diamond 2002). Nonetheless the AHRD fails to address SOGIE issues and to protect minorities such as the LGBTQIA community (ASEAN LGBTIQ Caucus 2013).

### **Human Rights Council Resolutions**

With Resolution 17/19, on 14 July 2011, the United Nations Human Rights Council (HRC) decided for the first time to act regarding its “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity” and “Requests the United Nations High Commissioner for Human Rights to commission a study, to be finalized by December 2011, documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity” (Human Rights Council 2011).

The adoption of this resolution paved the way for the first official United Nations report on the issue prepared by the Office of the High Commissioner for Human Rights (A/HRC/19/41) (OHCHR 2011). The report’s findings formed the basis for the creation of a panel discussion that took place at the Council in March 2012 – the first time a United Nations intergovernmental body held a formal debate on the subject. In September 2014, the Human Rights Council adopted a new resolution (27/32) (Human Rights Council 2014), once again expressing grave concerns over such human rights violations and requesting the High Commissioner to produce an update of report A/HRC/19/41 with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards, and to present it to the 29th session of the HRC.

On 30 June 2016 the UN Human Rights Council, in its 32nd session, passed a ground-breaking resolution (United Nations 2016) that will establish the first global-level Lesbian, Gay, Bisexual, and Transsexual (LGBT) monitor in the form of an Independent Expert on Sexual Orientation and Gender Identity. We will explore the role of this new expert later in our lines.

### **Application of the International legal protection in Southeast Asia**

The compliance to the legal framework exposed above is the main basis for the Universal Periodic Review, among other UN Conventions, Regional Mechanisms and the national legislation. However, this international and regional protection is not binding -except for the UDHR- to all the Southeast Asian States. Indeed, this depends on signatures and ratifications of the optional protocols (for ICCPR, ICESCR and CEDAW) and the capacity of the mechanism. The optional protocol allows individual communications from victims of rights violations against the State which has committed this violation and which is party to the Convention.

The table below highlights the low ratification state of the Southeast Asian States, and therefore the lack of accountability of those States to their citizen on the international stage for their rights violation, in particular the ones related to discrimination based on sexual orientation and gender identity and expression (SOGIE). This is why the UPR mechanism is an important tool that we will specifically look into in our second paragraph

Table 1: Status of ratification of Southeast Asian States

| Country     | ICCPR | OP-ICCPR | ICESCR   | OP-ICESCR | CEDAW | OP-CEDAW |
|-------------|-------|----------|----------|-----------|-------|----------|
| Brunei      | No    | No       | No       | No        | 2006  | No       |
| Cambodia    | 1992  | 2004 (s) | 1992     | No        | 1992  | 2010     |
| Indonesia   | 2006  | No       | 2006     | No        | 1984  | 2000 (s) |
| Laos        | 2009  | No       | 2007     | No        | 1981  | No       |
| Malaysia    | No    | No       | No       | No        | 1995  | No       |
| Myanmar     | No    | No       | 2015 (s) | No        | 1997  | No       |
| Philippines | 1986  | 1989     | 1974     | No        | 1981  | 2001     |
| Singapore   | No    | No       | No       | No        | 1995  | No       |

|             |      |    |      |          |      |      |
|-------------|------|----|------|----------|------|------|
| Thailand    | 1996 | No | 1999 | No       | 1985 | 2000 |
| Timor-Leste | 2003 | No | 2003 | 2010 (s) | 2003 | 2003 |
| Vietnam     | 1982 | No | 1982 | No       | 1982 | No   |

Source: Status of ratification, <http://indicators.ohchr.org/> (9/9/2016) (s) signed only, no ratification

## **B. Regional organization of the civil society**

### **The regional platforms**

The civil society in Southeast Asia is composed of thousands of organizations working in the different areas of human rights, development, human security or aid relief. It has been really active for dozens of years and it started to be organized regionally with the first regional ASEAN People's Forum in 2005 (ASEAN People's Forum 2016). From the beginning, this forum which gathers around 1000 to 1500 activists and HRDs every year, has included Timor-Leste in its discussion knowing that one day the young country would be part of the regional organization (Hunt 2016).

At the 6<sup>th</sup> ASEAN Peoples' Forum in September 2010 in Hanoi, Vietnam for the first time included the human rights of LGBTIQ people in the meeting's final statement (Ging Cristobal 2011). And workshops on the promotion and protection of human rights for LGBTIQ people in ASEAN were held at the 7<sup>th</sup> ASEAN People's Forum in 2011 and every year since then. This platform allows activists and Human Rights Defenders from the region to gather around the same and to learn from each other, connect, and work together. Those workshops were held even in countries prohibiting homosexuality, for instance in Malaysia in 2015 where the rainbow flag flew over the stage with the national flags.

The main regional LGBTIQ organizations are, however, IGLA-Asia and ASEAN SOGIE Caucus. Those two organizations are umbrella organizations that are committed to promote the rights of the LGBTIQ people to the United Nations mechanisms, regional mechanisms or at the national level. As such IGLA, established in 1978, enjoys consultative status at the UN ECOSOC Council, and ASEAN SOGIE Caucus advocate to the ASEAN Human Rights Commission for a better protection of people's rights regardless of their SOGIE. They are both committed to work for the equality of LGBTIQ people and their liberation from all forms of discrimination, and are organizations on which grassroots NGOs from the region can rely on for advocacy or reporting to the United Nations, included for the UPR mechanism.

### **Common LGBTIQ submission to UPR: case of Myanmar**

Submissions to the UPR mechanism come from the State, the civil society and the United Nations through a compilation of all the relevant documentation of the different organs. No strict framework is given to the civil society which means that one organization can submit a

report on a wide range of issues while several organizations can submit together a report on a single issue (per theme). Thematic reports are more and more common, and in the past years few reports specific to LGBTIQ rights have been submitted during reviews of Southeast Asian countries. We will take the example of the Submission to the UN Universal Periodic Review regarding the protection of the rights of LGBTI persons in the Republic of the Union of Myanmar made by Kaleidoscope Australia, Equality Myanmar and Myanmar LGBT Rights Network in March 2015 for the 21th HRC session (Kaleidoscope Australia, Equality Myanmar, and Myanmar LGBT Rights Network 2015).

Former British colony, the Republic of the Union of Myanmar ('Myanmar') became an independent republic in 1948. Following a coup d'état in 1962, Myanmar was ruled by a military junta until 2011 when the military government was officially dissolved. The last general election, held in November 2015, saw the National League for Democracy party win an absolute majority of the national Parliament's seats. On 15 March 2016, Htin Kyaw (National League for Democracy) was elected as the first non-military president of Myanmar since 1962.

Myanmar's first and second UPRs were held in early 2011 and late 2015, respectively. At both sessions, Myanmar received recommendations directly relevant to HRDs. While Myanmar has made efforts to attend to the recommendations received, the situation of LGBTIQ HRDs in particular remains largely unaddressed. The situation of LGBTIQ HRDs in Myanmar is still a work in progress.

Kaleidoscope Australia, Equality Myanmar and Myanmar LGBT Rights Network issued the following recommendations:

We urge the UNHRC to recommend that Myanmar:

(a) at a minimum, Myanmar amends section 377 of the Penal Code to apply only to instances of non-consensual acts;

(b) ratify the key international human rights treaties including, but not limited to, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR);

(c) enact comprehensive anti-discrimination laws that prohibit discrimination on the grounds of sexual orientation, gender identity and gender expression;

(d) amend section 348 of the Constitution to include sexual orientation and gender identity and gender expression among the grounds upon which a person cannot be discriminated against; and

(e) enact laws that expressly recognize same-sex marriage.

Those recommendations were not addressed, first by the States conducting the review, and second by Myanmar. Despite this, the report led by Kaleidoscope Australia chose to highlight the improvement of the situation of the LGBTIQ HRDs and their rights since the re-opening of the country.

What was interesting in this example was to see how an international and renowned organization can assist and partner with local communities and organizations to issue a report that voiced their concerns on the protection of LGBTIQ rights in the country. Only the UPR mechanism can allow this as of today, and there is hope that one day (during the next cycle?) Those concerns will be at least addressed by the States reviewing Myanmar. There is also hope that this example leads the way to more UPR reports addressing only LGBTIQ rights.

## **II. The role the UPR in improving the situation of the LGBTIQ HRDs**

A comprehensive research on how the UPR is used within the ASEAN to tackle LGBTIQ rights' violations is indispensable to lay the ground for efficient advocacy at the national, regional and international level. Empowering Southeast Asian LGBTIQ HRDs by providing them data, comprehensive analysis and recommendations for a more holistic use of the UPR mechanism is essential nowadays.

All Southeast Asian countries will have completed two cycles of review as of November 2016 if we include Timor-Leste. Consequent to two full cycles, it is possible to observe whether States have acted or omitted on the recommendations they received concerning LGBTIQ rights and/or HRDs. Looking at recommendations received by States, but not only, our research uses also as a reference the interactive dialogue review which highlights the gap(s) between civil society and States' concerns, and the recommendations made during the Universal Periodic Review. Along with a wider contextual research and stories of prominent LGBTIQ HRDs, our research tries to draw a neutral and realistic portrait of each ASEAN countries. And what role is playing the UPR in the assessment of the rights situation.

A. The partiality of the UPR recommendations

### **Theory vs Practice**

As explained above, the UPR mechanism lays on the submission of three types of report: one from the State, one from the civil society, and a compilation of the UN organs and procedures. This mechanism helps in having a balanced view of the human rights situation in the country reviewed. However, at the end of the process, the recommendations are made by other States. Those recommendations are meant to be neutral and for the State review to help improve its rights situation, either by improving its legislation, building new institutions or freeing political prisoners for instance. But those recommendations are never impartial, they are always based on the State's history and vision from which it is from. As such North Korea will never recommend to another State to drop its nuclear program. Our point here is to point out a weakness of the mechanism to better analyze the recommendations.

In general, recommendations addressing human rights defenders' safety and/or LGBTIQ rights' promotion and protection are made by the same set of countries composed of Canada, Norway, France, Switzerland to mention only four of them. It is quite rare for other Asian countries to make recommendations on those specific topics, even more for Southeast Asian countries. Indeed, recommendations from countries like Korea, Nepal or Thailand appear sporadically to mention human rights education or the reinforcement of National Human Rights Institutions. However, during the course of our research we highlighted few recommendations from Southeast Asian countries to other Southeast Asian Countries. We

have split between the ones linked to human rights defenders and/or human rights in general, and the ones specifically linked to the LGBTIQ rights violation.

### **Recommendations from Southeast Asian Countries to Southeast Asian Countries**

In the table below, we are presenting the UPR recommendations made by Southeast Asian States to other Southeast Asian States regarding measures that can be taken in order to improve the protection of Human Rights Defenders. This table highlights that Southeast Asian states, for their majority, do not give recommendations following strictly the principle of sovereignty which is governing the organization of the ASEAN.

The few recommendations that are being made are not groundbreaking recommendations and have so far been made by the traditional ASEAN leaders (Indonesia, Thailand and Vietnam) during the first UPR cycle. However, the analysis of the recommendations for the second cycle shows the “smallest” States stepping-in, Timor-Leste leading the way. Looking back at our Table 1, it is without a doubt that Timor-Leste is the most compliant Southeast Asian State to the Human Rights universal standards.

The lack of recommendations during the second cycle from Southeast Asian States to their peers can be interpreted as a will to keep their recommendations behind the closed doors of the ASEAN and in respect of the principle of sovereignty.

A nuance has to be made as this table only gathers recommendations made toward Human Rights Defenders and their protection, which is a highly sensitive issue in Southeast Asia. Indeed, Southeast Asian States have made broader recommendations regarding other human rights issues, such as women, children or migrant workers that have not been recorded in this table because of our specific topic of interest.

**Table 2: UPR recommendations from and to Southeast Asian States on HRDs**

| Country   | Cycle 1                                                                                                                                 | Cycle 2                                                                                                                                                                                           |
|-----------|-----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Brunei    | None                                                                                                                                    | None                                                                                                                                                                                              |
| Cambodia  | Take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly (Indonesia) | None                                                                                                                                                                                              |
| Indonesia | None                                                                                                                                    | Further promote human rights education and training at all educational levels in partnership with all relevant stakeholders to promote and protect the rights of every person (Thailand, Myanmar) |

|             |                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                           |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Laos        | None                                                                                                                                                                                                                                                              | Establish a national human rights institution in accordance with the Paris Principles (Timor- Leste)                                                                                                                      |
| Malaysia    | Continue to focus efforts on ensuring full protection of human rights for all vulnerable groups, one such avenue is through the ongoing rigorous capacity-building programs that Malaysia has initiated in this area, particularly for public officers (Thailand) | None                                                                                                                                                                                                                      |
| Myanmar     | Take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly (Indonesia)                                                                                                                           | None                                                                                                                                                                                                                      |
| Philippines | None                                                                                                                                                                                                                                                              | Continue efforts to tackle extrajudicial killings and enforced disappearances to strengthen the rule of law and respect for human rights (Singapore, Timor-Leste)                                                         |
| Singapore   | None                                                                                                                                                                                                                                                              | None                                                                                                                                                                                                                      |
| Thailand    | Continue efforts in promoting and protecting the human rights of its people, in particular those of vulnerable groups (Brunei Darussalam)                                                                                                                         | Continue support the work of the National Human Rights Commission in line with the Paris Principles (Indonesia)                                                                                                           |
| Timor-Leste | Expedite the completion of statutes that provide a guarantee for further human rights promotion and protection (Indonesia); Strengthen the state of laws and good governance, especially on the legal enforcement and                                             | Further increase regional and international cooperation on human rights, particularly with the ASEAN nations and with the Human Rights Council (Vietnam); Continue efforts to promote and protect the human rights of the |

|         |                                                                   |                                                   |
|---------|-------------------------------------------------------------------|---------------------------------------------------|
|         | capacity building for national agencies on human rights (Vietnam) | vulnerable (Indonesia)<br>Review in November 2016 |
| Vietnam | none                                                              | none                                              |

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

#### Recommendations on LGBTIQ rights to Southeast Asian Countries

In the table below, we are presenting UPR recommendations made to Southeast Asian States regarding LGBTIQ rights and SOGIE. Without a surprise, recommendations on those topics have been rare during the first UPR cycle (2006 to 2010-ish), but have been made to 8 of the 11<sup>th</sup> countries during the second cycle. Only Indonesia, Myanmar and Timor-Leste did not receive recommendations on those topics, which can't be interpreted as a good situation for the LGBTIQ community in those countries but rather to the need to focus on other more preoccupying situations.

A second observation leads us to note the total absence of recommendations made by a Southeast Asia country to another on those topics. Recommendations have always been made by the same set of countries from Europe and Latina America, and Canada. Those recommendations focus on improving legislation, especially in countries where Article 377 of the Penal Code is still applicable.

Table 3: UPR recommendations on LGBTIQ rights to Southeast Asian States

| Country   | Cycle 1                                                                                                                                                                                     | Cycle 2                                                                                                                                                                                                                                                     |
|-----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Brunei    | Decriminalised same-sex relationship (Sweden, Canada, Spain) and repeal the criminalization of 'carnal intercourse' to ensure the non-discrimination of LGBT individuals (The Netherlands); | Repeal the criminalization of same sex relationships (Spain, Canada, France) and sections of the Penal Code that prevent LGBT persons from having equal rights (The Netherlands); Decriminalize sexual activity between consenting adults (Czech Republic); |
| Cambodia  | None                                                                                                                                                                                        | Eradicate gender-based stereotypes (Colombia and Uruguay)                                                                                                                                                                                                   |
| Indonesia | None                                                                                                                                                                                        | None                                                                                                                                                                                                                                                        |
| Laos      | None                                                                                                                                                                                        | None                                                                                                                                                                                                                                                        |
| Malaysia  | None                                                                                                                                                                                        | Take legislative and                                                                                                                                                                                                                                        |

|             |                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                  |
|-------------|---------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|             |                                                                                                                           | <p>practical steps to guarantee that LGBTI persons can enjoy all human rights without discrimination (Germany, Argentina, Chile); Introduce legislation that will decriminalize sexual relations between consenting adults of the same sex (Croatia, France, The Netherlands, Canada)</p> <p>Enact legislation prohibiting violence based on sexual orientation (Canada)</p>                     |
| Myanmar     | None                                                                                                                      | None                                                                                                                                                                                                                                                                                                                                                                                             |
| Philippines | To establish an organic legal framework for eliminating gender-based discrimination and promoting gender equality (Italy) | Consider establishing comprehensive legislation to combat discrimination faced by LGBT people (Argentina)                                                                                                                                                                                                                                                                                        |
| Singapore   | None                                                                                                                      | <p>Repeal laws criminalizing homosexuality, especially section 377A of the Penal Code (Norway, Slovenia, Spain, Sweden, United Kingdom, United States, Austria, Czech Republic, France, Greece) and laws which discriminate against LGBTI persons (Brazil, Czech Republic)</p> <p>Remove discriminatory media guidelines to provide a more balanced representation of LGBTI persons (Canada)</p> |
| Thailand    | None                                                                                                                      | <p>Intensify efforts to promote policies in the area of prevention, sanction and eradication of all forms of violence against women, including measures aimed at promoting their rights regardless of its religion, race, sexual identity or</p>                                                                                                                                                 |

|             |      |                                                                                                                                                               |
|-------------|------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
|             |      | social condition (Mexico)                                                                                                                                     |
| Timor-Leste | None | None                                                                                                                                                          |
| Vietnam     | None | Enact a law to fight against discrimination which guarantees the equality of all citizens, regardless of their sexual orientation and gender identity (Chile) |

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

## **B. Empowering HRDs to organize submissions for the next UPR cycles**

With only Timor-Leste remaining for completing its second cycle, the analysis of the countries' comportment face to the UPR recommendations is interesting. This analysis is also an important tool for preparing the next cycles for the civil society. Indeed, it can highlight where advocacy is needed for a better implementation of the recommendations by the States.

In our previous analysis, we have left out the remarks made by the States during the Interactive dialogue, which is more informal. Those remarks have been taken into account for our Report on the situation of the LGBTIQ HRDs as they can enlighten the will of some Southeast Asian countries to help out without making formal recommendations. Those remarks, for Southeast Asian States, are often linked to the establishment or the improvement of a National Human Rights Institution following the Paris Principles.

Destination Justice's Report on the situation of the LGBTIQ HRDs is only the first step of a larger project: Championing Democratic Values and Celebrating Diversity by Empowering LGBTIQ Human Rights Defenders in Southeast Asia.

The purpose of the project is twofold: 1) to strengthen and increase the network and coordination amongst HRDs in ASEAN by providing them with advocacy tools and training; and 2) to raise awareness about LGBTIQ HRDs in ASEAN by promoting and encouraging more activists and advocates on the issue throughout the region. Following the release of Destination Justice's report evaluating the status of LGBTIQ HRDs, the project will build upon and strengthen existing networks of LGBTIQ HRDs in ASEAN countries in order to provide tools and training on advocacy strategies within the UN and ASEAN systems to promote and increase the rights of LGBTIQ communities. Additionally, the project will raise public awareness and strive to increase the number of HRDs working on LGBTIQ-related issues. Finally, the project will have long term, continued reach as the HRDs, armed with advocacy tools and training, will be empowered to continue to advocate on behalf of LGTBIQ rights and bring cases before various international and regional human rights mechanisms.

## **Future Perspectives**

Capitalizing on this experience of two cycles of UPR, the HRDs, the civil society and even the States will also have the possibility to rely on the expertise of the new special procedure created by the United Nations this year 2016.

On 30 June 2016 the UN Human Rights Council, in its 32nd session, passed a ground-breaking resolution (United Nations 2016) that will establish the first global-level Lesbian, Gay, Bisexual, and Transsexual (LGBT) monitor in the form of an Independent Expert on Sexual Orientation and Gender Identity. Through this historic appointment, the UN Human Rights Council (HRC) reaffirms its commitment to eradicating violence and discrimination against LGBT people around the world.

The resolution was introduced by the core seven Latin American countries and received support from more than 600 civil society organizations (IGLA 2016). Among the HRC members, 23 states voted in favor of the resolution, 18 against with 6 abstaining.

While this is not the first HRC resolution addressing sexual orientation and gender identity, it is the broadest in scope and most ambitious to date, coming just after the UN Security Council's unprecedented condemnation of the Orlando attacks in the USA. Previous resolutions (OHCHR 2016) have authorized reports on discrimination based on sexual orientation and gender identity. The current resolution, by contrast, signals a more active engagement with LGBT rights advocacy.

The Independent Expert will have a powerful mandate to address violence and discrimination based on sexual orientation and gender identity, exercising a strategic role in assessing existing human rights law, identifying gaps in legal protections, developing best practices, engaging in dialogue with States and other stakeholders, and in facilitating the provision of advisory services, technical assistance, and capacity building strategies to help end violence and discrimination against LGBT people at a global level. The Independent Expert will be a welcome addition to other ongoing UN LGBTIQ initiatives, such as its global public education campaign, 'Free & Equal' (United Nations 2016a), which focuses on education as a tool to end homophobia and transphobia. The Office of the Independent Expert will add much-needed weight behind this advocacy, working to change laws as well as minds.

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## **UPR and the Rights of Minority**

Gymbay Moua  
Congress of World Hmong People

### **Abstract**

Congress of World Hmong People is a Non-Governmental Organization based in Saint Paul Minnesota. The organization was established for advocates to safeguard the Hmong peoples' economic and social cultural rights. After the Vietnam War which ended in 1975, the majority of the Hmong who did not escape to the third world countries surrendered to the Lao regime. Immediately, they were classified as the wartime enemies. Many Hmong men disappeared, detained, and prisoned. Roughly 20-30,000 Hmong fled into the jungles of Laos. Today this group remains in hiding in the jungle, though their numbers have now been reduced to an estimated of 2000-4000. This group of Hmong is in direct result of a military campaign by the Lao regime to exterminate them since the last 40 years in the Xaysombun Region. The region immediately renamed to "Xaysombun Special Zone" after the Lao government recognized that the Vietnam War ended but the ethnic war has yet to begin. Therefore, the Xaysombun Special Zone region continues to be a restricted zone for entry. The ethnic conflict continues to be endless, a closed door zone, no outsider permitted, and what taken place in the zone must remain in the zone. As a result, human rights violations continue and no one is held accountable for crime committed against humanity there. In the past, the case has reached the United Nations and numerous recommendations were made and implemented in the UPR on Laos but no result. It seems like it is a dead-end for the Hmong. Even though the Lao government has ratified some UN Conventions but that is not enough to stop the killing of the Hmong in the Zone.

## **The Universal Periodic Review (UPR)**

The United Nations Universal Periodic Review is an effective mechanism of the Human Rights Council and we are very proud of this unique international mechanism.

We believed that throughout the year on the Universal Periodic Review, it became evident that the UPR provides an excellent platform for dialogue on the implementation of UN Human Rights Bodies.

Through these platforms, we witness many changes have been made such as the ratification of human rights treaties and mechanisms to better serve the rights of all people especially those under serve minority and indigenous communities. Even though recommendations have been made and ratified by the states member, the effectiveness of the enforcement from the international is continuing to be questionable due to the lack of monitoring agency in the country, cooperation and mandatory.

In Laos, my birth country, the UPR Committee in those past years continued to provide exceptional recommendations for Laos to comply with international human right standardization, and very specifically pertaining to the United Nations Human Rights Bodies and its Protocols. Since then, the Lao government has ratified many mechanisms of the human rights bodies' treaties. But after all, it continues to operate in the opposite courses of directions: cracking down on religious believers and continuing to oppress the Hmong Indigenous who sided with the west during the Vietnam War in the country.

This oppressive activity continues to be of concern not only in the Hmong community but also at the international levels in questioning the obligations and abilities of the Lao government to comply with the international UN Human Rights Mechanisms and UPR recommendations.

In Laos, there are 49 ethnic groups and the Lao government uses these 3 classifications to identify their identities: The Lao Soung, meaning the people residing in the higher elevation (particularly referring to the Hmong); Lao Theung residing in the middle (particularly referring to the Khamu people); and Lao Loune meaning the people in the low land which is the low land Lao, Lao nation.

These classifications have undermined their ethnicity, social and cultural distinction. They all live in the Lao country but they are not Lao Soung, Lao Theung, and Lao Loune

ethnically. They each carry different ethnicities and have their own social and cultural development that set them apart from one another.

The Hmong, however, is the indigenous people in Lao but never mentioned and recognized the term.

The government must identify those minority groups and indigenous groups to better determine their cultural characteristics according to UN and Indigenous declarations to better implement policies and governing.

The Human Rights Council Working Group on the Universal Periodic Review Twenty-first session, 19–30 January 2015 indicated that:

*“In the implementation of the UPR recommendations related to the rights of ethnic groups, the Lao Government has consistently carried out policies that enhance the harmony, solidarity and equality among the ethnic groups by prohibiting all forms of racial or ethnic discrimination. The Constitution of the Lao PDR stipulates that the Lao PDR is a unified country belonging to all multi-ethnic people and is indivisible. Every ethnic group has the right to protect, promote their fine tradition and culture. All acts of religious discrimination, threat to the harmony of the people and all acts of ethnical discrimination are prohibited. State implements all necessary measures to enhance and elevate the socio-economic conditions of ethnic groups. According to the Penal Law Article 66 and Article 176 division of solidarity among ethnic groups, discrimination, prevention from participation, exclusion or selectivity based on ethnicity are criminal offences.”*

The Lao Penal Law Article 66 and Article 176 said one thing and practiced another thing; If you are a Hmong person and you are going to the Office of Immigration for your passport to be taken, you would be instructed to rent their on hand clothing for the photoshoot. How could you explain this to make people understand this practice?

As a minority or indigenous people, the Lao government has no right to impose or claim such irrelevant ethnic classification among those ethnic groups and on the one hand, people must wear certain clothes to get their passport photo to be taken is not lawfully practiced. Is it fair to let them determine their social and cultural destiny to better improve their cultural development? And most importantly does it violate the natural laws that created them; and the international human rights laws that we must live up to?

### **How effective the UPR has been?**

The UPR has been the engine operating the vehicle effectively. We felt that it is the drivers who drive the car responsibly or irresponsibly, or recklessly. In this case, we felt that member states were the drivers who saw and recognized the problems but failed to improve its obligation and often committed information distortion. Having said that, the UPR often becomes a dialogue mechanism rather than a driving machine and a mandatory enforcement agency that moves forward for changes. Therefore, the use of the Special Rapporteur becomes questionable in the area of effectiveness or ineffectiveness mechanism; the Special

Rapporteur itself produces exceptional outcomes but the system lacks enforcement systems and continues dialogue back and forth with no solutions to the problems.

In the Hmong situation UPR Committee made very important recommendation that must be considered on the fact that the Hmong need assistance, items 24, 25, and 26 on the reports were clearly acknowledged on the Hmong suffering but the Lao government denied of any existing and called it “banditry”.

*“24. In 2007, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people expressed concern at reports of alleged deaths of civilians, including children, as a result of the struggle of Hmong rebel groups with the Government. Information was cited that approximately twenty rebel groups had been surrounded by the military and reduced to starvation and disease in the forest, where they had sought refuge. Similar concerns were raised jointly by the Independent Expert on minority issues, the Special Rapporteurs on the right to food and on adequate housing and the Special Representative of the Secretary-General on the human rights of internally displaced persons. In 2006, the Special Rapporteur on summary executions had drawn attention to reports alleging the killing of 26 ethnic Hmong by troops in an attack in northern Vientiane province.*

*25. Previously, in 2005, CERD expressed concern at reports of serious acts of violence against the Hmong, in particular allegations that soldiers brutalized and killed a group of five Hmong children on 19 May 2004. It strongly recommended that United Nations human rights bodies be allowed to visit the areas where Hmong have taken refuge. In its follow up response, Laos indicated that no complaint on the incident had been brought to Lao concerned authorities’*

*26. The Special Rapporteur on indigenous peoples also noted reports of arbitrary arrests, false criminal charges and other forms of threats and intimidation against indigenous and tribal peoples, as a result of their mobilization to defend their rights. The Special Rapporteur and CERD noted that repression persisted against ethnic Hmong as a consequence of their involvement in cold-war conflicts more than three decades ago. CERD called for measures to quickly find a political and humanitarian solution to this crisis and create the necessary conditions for the initiation of a dialogue. It strongly encouraged Laos to authorize United Nations agencies to provide emergency humanitarian assistance to this group. In its follow-up reply, Laos reiterated that there was no conflict between the Government and Hmong, citing that there had been acts of banditry.”*

We recommended further specific actions must be made and follow through throughout the course of the recommendation. The UPR Committee must not rely on the correspondent from the member state when facts are supporting the crime committed against humanity.

The Human Rights Council Working Group on the Universal Periodic Review Twenty-first session 19–30 January 2015, the Lao PDR government has committed to be more vigilant on their human rights practice and be more sincere on their human rights obligations.

*“75. accede to human rights conventions, including the ratification of the Convention on the Protection of All Persons from Enforced Disappearance, the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and other conventions such as the International Labour Organizations (ILO) conventions, etc,*

*76. translate the provisions of human rights conventions to which the Lao PDR is party into national policies, laws and regulations, national strategies, programmes and projects in order to bring benefits to the Lao multi-ethnic people,*

*77. disseminate information on the constitutional provisions, laws and human rights conventions to which the Lao PDR is a party as well as recommendations under UPR to government officials, stakeholders and the general public,*

*78. fulfill its reporting obligations under human rights conventions to which the Lao PDR is a party,*

*79. cooperate with the international community within the international, regional and bilateral frameworks in order to promote mutual understanding, exchange lessons and practices in the promotion and protection of human rights, and*

*80. consider extending an invitation to UN Special Rapporteurs to visit the country in the future as appropriate.*

So as we are looking back over the period of the UPR in Laos, it showed the potential of the UPR as a catalyst for change. And the state member sees it as a self-improvement and no mandatory enforcement on the matter.

According to the twenty-first session of the UPR on Laos, up to this date the Lao government has not been submitting their:

*“Outstanding and long overdue reports to the relevant treaty bodies (Sierra Leone); Submit national reports to the treaty bodies, including the ICESCR, and issue a standing invitation to special procedures (Japan); and*

*Cooperate more systematically with the treaty bodies and permit the visits by special procedures (Luxembourg)”*

Bottom line is the Committee on the UPR must develop a plan of actions including a deadline for compliance on international human rights, laws, and treaties. And imposed a penalty for failure to comply with its obligations; we put pressure on the drivers but not the car manufacturers. This is a policy of failure.