

Chapter 2

The Universal Periodic Review as Utopia

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1. Introduction

Oscar Wilde stated:

[a] map of the world that does not include Utopia is not worth even glancing at, for it leaves out the one country at which Humanity is always landing. And when Humanity lands there, it looks out, and, seeing a better country, sets sail. Progress is the realization of Utopias.¹

Utopia² can be read as a methodology to inform the creation of a better place. It can inspire and propel. In *The Principle of Hope*, Ernst Bloch observed, ‘the world is propensity towards something, tendency towards something, latency of something, and this intended something means fulfilment of the intending’.³ Informative processes are required to teach the world how the refusal to accept what is can translate unsatisfactory states of being into an ambition for the potentiality of what might *be*.⁴ When political, legal, economic, and social protections breakdown and fail us, we need a particular cognitive approach to alter the situation which Rutger Bregman informs:

We have to direct our mind to the future. To stop consuming our own discontent...To consider alternatives and form new collectives. To transcend this confining zeitgeist and recognize our shared idealism.⁵

In the midst of violent troubles we can (we need to) imagine a better world and, consistent with Oscar Wilde, Ruth Levitas places our humanity at the centre of this creative process so we can, ‘think about our conceptions of human needs and human flourishing in those possible futures.’⁶ Each era may point to examples of the rise of dystopian manifestations which seek to thwart our needs and flourishing. During these times the world’s regulatory mechanisms must respond

¹ Oscar Wilde, *The Soul of Man Under Socialism and Selected Critical Prose* (Penguin 2001) 141.

² Thomas More, *Utopia* (Everyman 1992). Rutger Bregman, *Utopia for Realists: How We Can Build the Ideal World* (Little, Brown 2017) 20. Bregman reminds us that, ‘[t]he word utopia means both “good place” and “no place.”’ *ibid*. He maintains, ‘[i]t’s time to return to utopian thinking. We need a new lodestar, a new map of the world that once again includes a distant, uncharted continent – “Utopia.”’ *ibid*, as ‘[w]ithout utopia, we are lost,’ *ibid* 21.

³ Ernst Bloch, *The Principle of Hope* (Wiley Blackwell 1986) 1375. Perhaps the viability of a moral enterprise requires us to maintain hope and so we must ensure Bertrand Russell’s ‘world where imagination and hope are alive and active,’ in Bertrand Russell, *Political Ideals* (Kessinger Publishing 2010) Chapter 1.

⁴ For the metaphor of the ‘arrow of time’ see Arthur S Eddington, *The Nature of the Physical World* (CUP 1944) 34-36.

⁵ Rutger Bregman, *Utopia for Realists: How We Can Build the Ideal World* (Little, Brown 2017) 20.

⁶ Ruth Levitas, *Utopia as Method: The Imaginary Reconstitution of Society* (Palgrave Macmillan 2013) xi.

with creating meaningful ameliorative systems. An ability to cognitively transcend the world's problems and be able to envisage solutions is essential.

The United Nations (UN) is where imagination and hope can flourish.⁷ However, the institutions and mechanisms need to be easily accessible not just by the executive branch of governments, but by all relevant stakeholders including parliamentarians, lawyers, judges, civil society organisations (CSOs), and victims of human rights violations. An important part of how this can be achieved is through the theory, methodology, and practical application of utopia. This was implicitly recognised by Kofi Annan in 2005 through "*In Larger Freedom*" *Decision Time at the UN*,⁸ when the then-Secretary-General set out his plans and hopes for a greater protection of human rights through the restructuring of the Office of the High Commissioner for Human Rights (OHCHR), the creation of a Human Rights Council (HRC), and the laying of the foundations for a new 'Universal Periodic Review' (UPR). The word 'universal' to describe the reach of the review did not just provide an encompassing phrase for the body of member states, but it also possessed an inspirational and aspirational quality. Whilst geography, history, and culture reveal there are characteristic differences reflected within the peoples of the world, there are also fundamental principles for the furtherance of humanity and dignity which should be celebrated and protected. This is what the UPR should help to recognise and achieve.

Ultimately, utopia through the UPR would be signified through the effective operation of its modalities. These would help ensure improved human rights protections within the state's domestic jurisdictions. In undertaking its review, the world's governments are reminded to apply a 'good faith' implementation of the Charter of the United Nations (UN Charter), consistent with the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*.⁹ The more states that complete the package of ratifications of the UN's nine core human rights treaties and protocols,¹⁰ the *larger* will be the opportunities to protect our *freedoms*. New futures will emerge where legitimate sovereignty is increasingly identified through the codifying and safeguarding of human rights standards. This is opposed to a preservation of antiquated perspectives of statism which jealously close itself to outside, reasoned viewpoints.

⁷ In 2014 UNICEF launched the 'Imagine Project,' and numerous people sang John Lennon's song 'Imagine,' see UNICEF, 'OFFICIAL VERSION: Sing IMAGINE with your favourite stars & John Lennon | UNICEF' (YouTube, 21 November 2014) <www.youtube.com/watch?v=rpTzkiul8Iw> accessed 6 May 2023.

⁸ Kofi Annan, 'In Larger Freedom: Decision Time at the UN,' (United Nations Secretary General, 25 April 2005) <www.un.org/sg/en/content/sg/articles/2005-04-25/larger-freedom-decision-time-un> accessed 15 May 2023 citing the Charter of the United Nations, Preamble.

⁹ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) UNGA 25th sess. 1970, The General Assembly has affirmed, '[e]very State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations,' and that, '[e]very state has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law,' *ibid* 124.

¹⁰ UN OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies' <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 15 May 2023.

The UPR is therefore a multilateral forum for recognising how to ameliorate the harms associated with certain aspects of the ‘Westphalian experience’.¹¹ This is witnessed when outlier states seek to maintain harmful national laws under a falsely claimed legitimacy of sovereignty. Such circumstances can be achieved through a misapplication of Chapter I of the UN Charter. Borrowing from John Rawls,¹² a positivist construct is considered in that national laws can be legitimately created, but when their very application is considered at the UPR, both recommending states and CSOs, along with wider actors, may provide points of view which can challenge the legitimacy of state policies. Therefore, the UPR becomes a lens to question the legitimacy of state sovereignty, through a cosmopolitan reflection. The Preamble text to the UN Charter confirms in order to achieve, ‘better standards of life in larger freedom’, we must have ‘faith in fundamental human rights’, and we must ‘establish conditions’ in which states respect their obligations under international law.¹³ If national laws violate international human rights standards in practice, the national law in question should be assessed through the UPR and revealed for what it is, under the multilateral consideration. As Edward McMahon and Elissa Johnson have argued, the consensual nature of the UPR is ‘slowly chipping away at the national sovereignty argument’ as ‘it makes it more legitimate for states...to push for change in the human rights situations in other countries’.¹⁴ A new lens (utopia *in*, or *through*, the UPR) is provided to bring into stark focus harmful national laws.

The UPR is creating new imaginings for the improved future protection of rights, revealing hitherto unexplored opportunities, and bringing together various processes for promoting global change. There are wider implications from what occurred in the first three UPR Cycles (2006-2022).¹⁵ The review is now forming a specific synergy with UN human rights entities, including the treaty bodies,¹⁶ the Special Procedure mandates (country and thematic),¹⁷ and the UN Sustainable Development Goals.¹⁸ The UPR is being cited within national parliaments, it is used to contribute to the recognition of the rule of law as applied domestically,¹⁹ and as an evidentiary resource to understand how international norms contribute to this through the

¹¹ M Cherif Bassiouni, ‘Human Rights and International Criminal Justice in the Twenty-First Century’ in Margaret M deGuzman and Diane Marie Amann (eds), *Arcs of Global Justice: Essays in Honour of William A. Schabas* (OUP 2018) 7.

¹² John Rawls stated, ‘[a]t some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy’ in John Rawls *Political Liberalism* (Columbia University Press 2005) 248.

¹³ The Charter of the United Nations, Preamble states, ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained to promote social progress and better standards of life in larger freedom’.

¹⁴ Edward R McMahon and Elissa Johnson, *Evolution Not Revolution: The First Two Cycles of the U.N. Human Rights Council Universal Periodic Review Mechanism* (Friedrich Ebert Stiftung 2016) 17 available at <https://library.fes.de/pdf-files/iez/global/12806.pdf> accessed 15 July 2023.

¹⁵ See the Universal Periodic Review website at <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

¹⁶ Including the Security Council and the General Assembly.

¹⁷ See chapter 5 of this research companion by Elvira Domínguez-Redondo and Rhona Smith.

¹⁸ United Nations Department of Economic and Social Affairs, ‘The 17 Goals’ <<https://sdgs.un.org/goals>> accessed 15 May 2023.

¹⁹ See the project, Universal Periodic Review 2022 – UK Civil Society Engagement available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/universal-periodic-review-2022-uk-civil-society-engagement> and the Project Briefing, ‘Legal Profession’, 16-17 available at <<https://bcuassets.blob.core.windows.net/docs/upr-project-uk-responses-briefing-march-2023-133245502177921230.pdf>> accessed 15 July 2023.

recognition of customary international law,²⁰ *opinion juris*, and peremptory norms of general international law (*jus cogens*).²¹ Recent initiatives have demonstrated a need for greater clarity on the role of the legal profession, including guidance for both lawyers and judges, on how to use the UPR to appropriately identify the rule of law. Increased transparency from national governments is being witnessed, and thematic processes are being created, for example, the high-level peer review of global public health policies.²² There are also enhanced opportunities for civil society networking and engagement, which, in part, is demonstrated by the authors' practical engagement with the UPR through their leadership of the UPR Project at BCU (UPR Project). The UPR Project participates in the mechanism as an academic stakeholder and is led by the three co-authors of this chapter. As of July 2023, the UPR Project has submitted 32 stakeholder reports to multiple countries on various human rights issues and has been a panellist at 3 UPR Pre-sessions.²³ Furthermore, following the Paris Principles, the number of National Human Rights Institutions (NHRIs) is increasing around the world,²⁴ which is providing new opportunities for the strengthening of the global network of parliamentarians promoting the norms created in a fulfilment of the Belgrade Principles.²⁵

What is explored below is a reading of the UPR through the 'utopia' and 'dystopia' lenses. We examine the extent to which utopia appears to have informed Kofi Annan's restructuring of the OHCHR, and specifically the creation of the UPR. It is argued that this set in motion a mechanism to analyse the translatability of utopia *as* theory into utopia *in* practice. We also identify outlier examples which are attempting to thwart the utopian aspiration, in effect seeking to maintain dystopia in many people's lives. We argue that viewing the UPR's modalities through a utopian lens leads to the recognition of the spectrum of opportunities for the protection of human rights. Through the UPR, the UN offers a wider, and more encompassing, way out of dystopic practices which are curtailing and violating human rights. This opportunity offered to every member state of the UN provides many reasons for the hope which stakeholders can bring in their participation in the UPR. Selected possibilities were recognised by Kofi Annan in 2005, but as time has moved forward new opportunities have arisen and more are being recognised and created. To understand the continued utility of the UPR is to comprehend the spectrum of possibilities this review has to offer for articulating the standards of international human rights law. It can empower governments and parliamentarians to promote national legislative change, along with informing judicial adjudicative functions, and providing empirical supportive evidence for lawyers dispensing legal advice and

²⁰ See chapter 3 by Frederick Cowell.

²¹ William A Schabas, *Customary International Law* (OUP 2021) 21-27.

²² UPR Info, 'A high-level peer-review process for future pandemic preparedness: practical lessons from the Universal Periodic Review' (30 November 2021) available at <www.upr-info.org/en/news/high-level-peer-review-process-future-pandemic-preparedness-practical-lessons-universal> accessed 5 June 2023.

²³ 'The UPR Project at BCU' (*Birmingham City University*) available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu> accessed 15 May 2023.

²⁴ Principles relating to the Status of National Institutions (The Paris Principles), Adopted by General Assembly resolution 48/134 of (20 December 1993) available at <www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>

²⁵ National institutions for the promotion and protection of human rights, A/HRC/20/9 (1 May 2012) available at <www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-9_en.pdf> accessed 15 July 2023.

presenting argument in court.²⁶ Civil society operating in the social, political, and legal spaces, can also use the UPR to enhance and strengthen their work. Ultimately, the UPR can inform the progress towards a better world.

2. Utopia as Theory in International Human Rights Law

In *Realizing Utopia: The Future of International Law*, Antonio Cassese brought together a panoply of experts of international law and he informed, '[w]e simply intend to suggest in utopian terms new avenues for improving the major deficiencies of the current society of states'.²⁷ Human rights stakeholders engage with and attempt to stop the damaging effects caused by certain members of the society of states, and utopian perspectives provide an intrinsic impetus sustaining the driving-force for this endeavour.²⁸ The theory of utopia's contribution to the history of human rights requires a particular conceptualisation of the roles of the actors in the driving-force. In the 'Introduction' to *Realizing Utopia*, Cassese referred to Aldous Huxley's distinction between two categories of sociologists, being, 'technicians' who too complacently accept structures and details, and 'utopians', who are occupied with 'what ought to be'.²⁹ Cassese proposed 'judicious reformers'³⁰ were needed which are the kind of international law stakeholders who can create an, 'efficient institutional mechanism for the abolition of outdated legal rules and the formation of more modern and adequate prescriptions'.³¹ Such stakeholders are the *movers and the shakers*. In the decade since *Realizing Utopia*, the qualities of the reformers have been analysed.³² They require multidisciplinary knowledge and skills to deconstruct the complex positivist structures which can be used by certain sovereigns to preserve an ability to inflict human rights violations. In light of this, Isabel Feichtner informs that the judicious reformer needs to be equipped with and utilise 'other disciplines, be they moral philosophy, economics, or social theory,' to 'broaden the base for principled contestation,' and in focusing upon legal pluralism, 'it will be necessary to venture into other disciplines such as anthropology or religion not only to make reasoned statements about what the law should be, but already to discern what the law is'.³³

²⁶ For example, the 'Universal Periodic Review' has been cited in *R. (on the application of AAA (Syria)) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin); *Mohammed v Secretary of State for Defence* [2017] UKSC 2; *K (FGM) Gambia CG, Re* [2013] UKUT 62 (IAC); *HM (Article 15(c): Iraq), Re* [2012] UKUT 409 (IAC); *Lodhi v Secretary of State for the Home Department* [2010] EWHC 567 (Admin).

²⁷ Antonio Cassese, *Realizing Utopia: The Future of International Law* (OUP 2012) xxi.

²⁸ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); Samuel Moyn views it as, '[t]here is no way to reckon with the recent emergence and contemporary power of human rights without focusing on their utopian dimension,' and that, 'it is crucial to link the emergence of human rights to the history of utopianism – the heartfelt desire to make the world a better place' *ibid* 4, 225.

²⁹ Antonio Cassese, 'Introduction' in Antonio Cassese, *Realizing Utopia: The Future of International Law* (OUP 2012) xvii. Citing Aldous Huxley, *Proper Studies* (Chatto and Windus 1929) ix.

³⁰ *ibid*.

³¹ *ibid* xviii.

³² See also Anne Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 4(2) *European Journal of International Law* 533-52.

³³ Isabel Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *European Journal of International Law* 1143, 1156-57.

To understand the potential impact of utopists informing the UPR it is necessary to consider what happens outside the confines of the positivist conceptions of international law, and to study this broader base through what Levitas recognises as, ‘the fulfilment moment’.³⁴ For our purpose, the normative version of the fulfilment moment is realised when states support and implement UPR recommendations for national legal change to protect human rights. A specific national process to help achieve this is the adoption of a National Mechanism for Reporting and Follow-up (NMRF).³⁵ This NMRF could help bring transparency over the conduct of each part of government as the UPR is implemented. It would also provide civil society with key information to help scrutinise the actions of the executive, the capacity of parliamentarians, and evidentiary documentation for lawyers and judges. Comprehending how this fulfilment moment arises requires a different inspection which reveals the multidisciplinary contributions keeping the driving-force in motion. We argue that a versatile interrogation reveals that embedded within the architecture of the UPR is the theory and practice of utopia; in fact, if utopia is a theory for the desire to make the world a better place (as convincingly explained by Levitas),³⁶ it is a cogent methodology to explain the lifeblood of the UPR. The fulfilment moments of the UPR can therefore be effectively realised when their inherent utopian qualities are brought into focus. The reverse is also true, in that when the UPR is not working as we would hope (perhaps due to stalwart maintenance of outlier state policies), we can see the looming shadow of dystopia. Before we explore these issues, however, we need to comprehend the extent to which ‘utopia’ was a foundational aspect of the creation of the UPR.

3. Utopia as Method in Kofi Annan’s *In Larger Freedom*

On 25th April 2005, Kofi Annan published “*In Larger Freedom*”: *Decision Time at the UN*, in which he provided his plan of action and strategic vision for the future direction of the OHCHR. Annan set in motion a new capacity building of the OHCHR, he identified the need for appropriate funding for the global initiatives, the Commission of Human Rights was to be replaced with a new HRC, and a new state peer-review mechanism would be created which became known as the Universal Periodic Review. Recalling the motivation of the preamble text of the UN Charter, of, ‘[w]e the peoples of the United Nations determined...to promote social progress and better standards of life *in larger freedom*’,³⁷ he affirmed the inherent future-looking motivation. Annan utilised utopian expressions in endorsing US President Franklin Roosevelt’s ‘Four Freedoms.’ In his State of the Union address in 1941 he stated, ‘[i]n the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms,’ and after identifying each freedom (of speech and of expression; religious worship; from want; from fear), he repeated each time, ‘anywhere in the world’.³⁸ Annan was concerned that the UN was failing to deliver on promoting freedom globally and

³⁴ Ruth Levitas, *Utopia as Method: The Imaginary Reconstitution of Society* (Palgrave Macmillan 2013) 12.

³⁵ UN OHCHR, ‘National Mechanisms for Reporting and Follow-up’ (2016) available at <www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf> accessed 15 May 2023.

³⁶ Ruth Levitas, *The Concept of Utopia* (Peter Lang 2011).

³⁷ Annan (n 8). Emphasis added.

³⁸ Franklin D Roosevelt, ‘State of the Union Address’ (6 January 1941).

he asked us to heed a temporal warning as, '[f]uture generations will not forgive us if we continue down this path'.³⁹

Such lack of forgiveness may be derived from the witnessed and/or experience of the denigration of rights and so following the outcome of the Millennium Summit, Annan authored *In Larger Freedom: towards development, security and human rights for all*.⁴⁰ The not-yet-there utopia was clear and so a 'strategic vision'⁴¹ was set out, '[i]n an organization pledged to promote and protect human rights, this is a *call to action*. In a world plagued by daily assaults on dignity and freedom, it is a *call to conscience*',⁴² (a not-yet *action/consciousness*) because in language reflecting utopian imaginings:

Our objective must be to help bridge the gap between the lofty rhetoric of human rights in the halls of the United Nations and the sobering realities on the ground. The plan of action calls for strengthening the profile and capacities of OHCHR, adopting new approaches, improving its planning and management and significantly expanding its resources.⁴³

Whether the metaphor of a bridge, island or map is offered, the story is the same; the need for a point of view for how to get from here-to-there. The *here* of an unsatisfactory human rights landscape to the *there* of a global protection of human freedoms and dignity. How the UN, and specifically the OHCHR, can lead us to the destination needed to be articulated, or at least point to the correct path. In fact, whether 'utopian' imaginings are applied, or a 'technician's' focus is placed upon the infrastructure of the UN through a 'normative lens', Annan recognised it is still a theory of here-to-there, as 'the gap between rhetoric and reality is wide indeed. Put simply, the challenge is to close that gap'.⁴⁴ This was a voyage requiring an encompassing effort, as:

Our collective task is to find a means to turn international human rights commitments into reality, so that individual people and communities see a real difference in their lives. The challenges are many, and continue to defeat the best efforts of a whole range of national and international actors.⁴⁵

This was a call to (intellectual) arms which foreshadowed collective engagement and contributions that will emanate from a new review mechanism as, 'the pursuit of the full enjoyment of human rights is best achieved through local initiative and response. The role of international actors is to support and encourage national reform initiatives',⁴⁶ because:

³⁹ Annan (n 8).

⁴⁰ UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights For All- Report of the Secretary General' (26 May 2005) UN Doc A/59/2005/Add.3 [Emphasis added].

⁴¹ *ibid* 2.

⁴² *ibid* 5.

⁴³ *ibid* 5.

⁴⁴ *ibid* 7.

⁴⁵ *ibid* 12.

⁴⁶ *ibid* 13.

It is mainly through action at the national level that international human rights obligations can be translated into reality. Responsibilities falling on [the] OHCHR and other actors are secondary to the primary role of the state. Implementation therefore requires first and foremost working with Governments.⁴⁷

The need for a new synergy was identified as the ‘OHCHR must engage in a much more concerted manner with Governments’,⁴⁸ expressed in the formation of, ‘some system for measuring States’ human rights obligations against their actual practice’,⁴⁹ and that:

Country scrutiny be exercised through a system of *peer review*... This system should be built on the principle of universal scrutiny, whereby all States submit to a review of law and practice concerning their human rights obligations. For such a system to be credible and gain the confidence of all, it will be essential that a fair and transparent method be developed to compile information upon which to base the peer review... The precise details of the peer review will need to be worked out, and in particular it will be important to distinguish a system of peer review by other states from reporting to expert treaty bodies.⁵⁰

The initial details of the ‘peer review’ for ‘universal scrutiny’, were set out in 2006 within the General Assembly’s Resolution 60/251. The preamble noted the ‘purposes and principles contained in the Charter of the United Nations’, as they have forward looking and evolving strategic aims which included, ‘developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems’, which require, ‘all states to continue international efforts to enhance dialogue and broaden understanding’, necessitating, ‘cooperation and genuine dialogue’, in which, ‘non-governmental organizations play an important role’.⁵¹ It is clear that this was an aspirational plan and in the creation of a then-new HRC,⁵² in paragraph 5(e) the HRC should:

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; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full

⁴⁷ *ibid.*

⁴⁸ *ibid* 14; Along with the role of the UPR, the report affirmed the importance of the role of High Commissioner and the Special Procedure mechanisms, as: ‘OHCHR has a range of tools at its disposal, including the good offices of the High Commissioner, technical cooperation projects and policy advice, cooperation with Governments through the process of reporting to treaty bodies and follow-up to their recommendations, follow-up to recommendations and reports of special procedures, regional and country presence, monitoring and public reporting’, *ibid.*

⁴⁹ *ibid* 22.

⁵⁰ *ibid* [Emphasis added].

⁵¹ UNGA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120 (3 April 2006) UN Doc A/Res/60/251 (‘*Resolution 60/251*’), preamble.

⁵² *ibid* para 1.

involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the *universal periodic review* mechanism within one year after holding of its first session.⁵³

Then, on 18th June 2007 the newly created HRC adopted Resolution 5/1, which set out the initial modalities, principles and objectives of the UPR. Important for the utopian lens is that the UPR should have an objective for the ‘improvement of the human rights situation on the ground’ (in the individual countries).⁵⁴ We have not yet arrived at this protection on the *terra firma* of our islands of utopia. Perhaps for many issues it will be an ongoing navigational project for the ‘fulfilment of the State’s human rights obligations and commitments and assessment of the positive developments and challenges faced by the State’.⁵⁵ It will provide ‘enhancement of the State’s capacity and in technical assistance, in consultation with, and with the consent of, the State’,⁵⁶ and perhaps this respectful, and transparent help offered through the UPR may smoothen the sharp edges of the thorny issues, and the consensual nature of the review and the all-encompassing modalities may help calm the waters to the islands of utopia.

4. Identifying Utopia within the UPR

Resolution 5/1 provided the basis for the principles, objectives and modalities of the mechanism, as McNeilly sets out in chapter 1, and, as three UPR cycles have now concluded, there is a wealth of evidence to examine the extent to which the theory of utopia is being translated into practical improvement for protecting rights domestically. In fact, in 2022, UPR Info and Friedrich Ebert Stiftung carried out a study titled ‘Beyond Reporting: Transformational Changes on the Ground’, identifying a plethora of examples where the UPR has had a positive impact for human rights on the ground.⁵⁷ The case studies provided are from all across the world and cover a wide range of human rights issues, for example, fighting against human trafficking in Jordan, recognising the basic right to housing in Canada, promoting youth agency in Morocco, and many more. This section identifies further examples of utopian practice within the mechanism.

The UPR was created to complement, rather than duplicate, the work of existing UN bodies and human rights initiatives.⁵⁸ There has been a mixed reaction to this in practice. While Olivier de Frouville has faulted the UPR for ‘overshadowing the work of the treaty bodies and of the

⁵³ *ibid* para 5(e); [Emphasis added].

⁵⁴ UNHRC, *Institution Building of the United Nations Human Rights Council*, HRC Res 5/1, UN HRC OR, 5th sess, Annex [IB] (18 June 2007) UN Doc A/HRC/RES/5/1, para 4(a).

⁵⁵ *ibid* para 4(b).

⁵⁶ *ibid* para 4(c).

⁵⁷ Valeria Reyes Menéndez, *Beyond Reporting: Transformational Changes on the Ground* (UPR Info 2022) <www.upr-info.org/sites/default/files/general-document/2022-07/Beyond%20Reporting-EN-Web.pdf> accessed 26 April 2023.

⁵⁸ UNHRC Res 5/1 para 3(f); UNGA Res 60/251 para 5(e).

special procedures’,⁵⁹ Manfred Nowak has identified that ‘most [s]tates seem to take the UPR more seriously than the [s]tate reporting procedure before treaty bodies’,⁶⁰ offering more empowerment to the UPR mechanism. Furthermore, the treaty bodies can only monitor implementation of the individual treaties if a state has ratified them,⁶¹ providing the UPR with the utopian opportunity to fill a gap in the monitoring of human rights. There are underlying strengths to how the UPR’s complementing process can work in practice.

The UPR has had success in keeping states accountable to their international human rights obligations in terms of the nine core treaties. Frederick Cowell has identified that member state recommendations from the UPR ‘have been complementing and enhancing the work of the human rights treaty bodies in relation to reservations’.⁶² When a state becomes a party to a treaty, the *pacta sunt servanda* principle applies, meaning that treaties are binding and states must perform them in good faith, a principle which the Vienna Convention on the Law of Treaties (VCLT) enumerated.⁶³ However, states may also lodge ‘reservations, understandings, and declarations’ alongside its ratification of a treaty. According to the VCLT, a ‘reservation’ is defined as ‘a unilateral statement...made by a state...whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that [s]tate’, and it can be lodged at any time between signature and ratification.⁶⁴ States have the sovereign right to place reservations against a treaty, although there is an exception to this in Article 19(c) VCLT, which provides that the reservation must not be ‘incompatible with the object and purpose of the treaty’.⁶⁵ Cowell’s study demonstrates that,

recommendations on reservations can have a positive impact on some [s]tates’ commitment to human rights law, pushing them towards the removal of recommendations incompatible with the object and purpose of a human rights treaty.⁶⁶

In encouraging states to adhere to the full spectrum of international human rights, in particular through avoiding harmful reservations that limit the effect of human rights domestically, the UPR is specifically contributing to the strengthening and realisation of human rights on the ground. However, this is not the case for every state. The US has been criticised by UN member states and scholars alike for its reservations lodged against the International Covenant on Civil and Political Rights (ICCPR), in particular Article 6 (the right to life) and Article 7 (the right

⁵⁹ Olivier de Frouville, ‘Building a Universal System for the Protection of Human Rights: The Way Forward’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 251.

⁶⁰ Manfred Nowak, ‘It’s Time for a World Court of Human Rights’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 23.

⁶¹ Felice D Gaer, ‘A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System’ (2007) 7(1) Human Rights Law Review 109, 125.

⁶² Frederick Cowell, ‘Reservations to Human Rights Treaties in Recommendations from the Universal Periodic Review: An Emerging Practice?’ (2021) 25 The International Journal of Human Rights 274, 275.

⁶³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969) [hereinafter referred to as ‘VCLT’].

⁶⁴ *ibid* Article 2(d).

⁶⁵ *ibid* Article 19(c).

⁶⁶ Cowell (n 62) 275.

to be free from torture and cruel, inhuman or degrading treatment), on the basis that these provisions are non-derogable and are therefore incompatible with the object and purpose of the ICCPR.⁶⁷ In fact, these reservations are described by William Schabas as ‘far and away the most extensive reservations to the capital punishment provisions of any international human rights treaty’.⁶⁸ While recommendations have been made to the US during its three UPRs to date regarding removal of these reservations, no action has been taken, indicating that the UPR still has some way to go to assist the US in abolishing both the federal and state death penalty, and achieving its utopian ideal.

A further way that the UPR and treaty bodies complement each other, is that each mechanism has its own strengths and weaknesses. Valentina Carraro has identified that the treaty bodies’ strengths lie in ‘providing accurate overviews of states’ internal situations and learning opportunities’, whereas the ‘UPR’s perceived strength lies in generating peer and public pressure’ on states.⁶⁹ Where the treaty bodies can lack impetus in terms of ensuring states adhere to their recommendations, the UPR can seemingly fill that gap by allowing peer-review to encourage adherence with treaty body conclusions and recommendations.

There has also been a concerted effort to synergise the UPR and the UN’s Sustainable Development Goals (SDGs). The SDGs form the 2030 Agenda for Sustainable Development across the world, comprised of 17 themed goals in acknowledgement of the interconnectivity of rights.⁷⁰ As Judith Bueno de Mesquita et. al. demonstrated in the context of health rights, the UPR can be used to monitor the implementation of the SDGs and, importantly, keep states accountable to the goals.⁷¹ To assist with this, the Danish Institute for Human Rights has created ‘The SDG-Human Rights Data Explorer,’ which

is a searchable database that links monitoring information from the international human rights system to the Goals and targets of the 2030 Agenda for Sustainable Development. It allows users to explore the recommendations and observations of international human rights monitoring bodies, as they relate to the implementation of the SDGs and their 169 targets in specific countries.⁷²

⁶⁷ UN Human Rights Committee, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee – United States of America’ (7 April 1995) UN Doc CCPR/C/79/Add.50 para 14; William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 79; Chrissy Fox, ‘Implications of the United States’ Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations’ (2003) 11 *Tulsa Journal of Comparative and International Law* 303, 307; Alice Storey, ‘The USA’s Engagement with the UN’s Human Rights Committee on the Question of Capital Punishment’ (2022) 17 *Intercultural Human Rights Law Review* 53.

⁶⁸ Schabas, *The Abolition of the Death Penalty in International Law* (n 67) 79.

⁶⁹ Valentina Carraro, ‘Promoting Compliance with Human Rights: The Performance of the United Nations’ Universal Periodic Review and Treaty Bodies’ (2019) 63(4) *International Studies Quarterly* 1079, 1090.

⁷⁰ United Nations Department of Economic and Social Affairs ‘Sustainable Development Goals: The 17 Goals’ available at <<https://sdgs.un.org/goals>> accessed 15 May 2023.

⁷¹ Judith Bueno de Mesquita and others, ‘Monitoring the Sustainable Development Goals through Human Rights Accountability Reviews’ (2018) 96(9) *Bulletin of the World Health Organization* 627, 629.

⁷² The Danish Institute for Human Rights, ‘The SDG-Human Rights Data Explorer’ available at <www.humanrights.dk/sdg-human-rights-data-explorer> accessed 15 May 2023.

This excellent resource includes recommendations from the UPR, which is of particular help to CSOs that engage with both the UPR and SDGs. We argue that the UPR is meeting its utopian ideal to complement and not duplicate the work of other UN bodies and, as demonstrated through the examples provided above, we believe that this provides a unique opportunity to solidify global human rights protections.

At this point, we should engage in a brief discussion of whether solidifying a global universal approach to international human rights really is a utopian ideal. The first two principles of the UPR are ‘universality’⁷³ and ‘equal treatment’⁷⁴ indicating that the UPR aligns itself with the universalist view of international human rights. It can be questioned whether this approach does provide a utopian experience for all people across the world. Consider, for example, the role of cultural relativism in the problem of the death penalty, which Amna Nazir has found to have ‘the potential to pose a barrier to the realisation of universal human rights’.⁷⁵ For example, retentionist Muslim countries tend to rely on Islamic law principles to legitimise the application of the death penalty without acknowledging the pluralistic nature of the Islamic legal tradition, or the use of pragmatic eclecticism, which can contribute to safeguarding the right to life. Nazir suggests that, in the context of capital punishment, ‘the historical, cultural and religious background’ should be explored,⁷⁶ an idea that could be replicated across other human rights issues.

A core objective of the UPR is ‘[t]he improvement of the human rights situation on the ground’.⁷⁷ As Annan set out his utopian vision through *In Larger Freedom*, he made it clear that the UN must ‘help bridge the gap between the lofty rhetoric of human rights in the halls of the United Nations and the sobering realities on the ground’.⁷⁸ The UPR has an impact across the globe, as McMahon and Johnson identified in a wide-scale study of UPR cycles 1 and 2 that the UPR in general ‘appears to be generating some traction in promoting human rights’.⁷⁹ More specific examples include Cristian Talesco’s and Brigitte Valentine’s findings that ‘the UPR has proved an important mechanism in advocating the protection of human rights in Timor-Leste’ as it rebuilds its domestic human rights structure since gaining independence from Indonesia.⁸⁰ Others have contended that there are further opportunities for the UPR to impact human rights on the ground, for example, Damian Etone suggests in chapter 6 that the UPR could develop its utopian successes further by supporting and promoting transitional justice mechanisms. Namibia’s UPR provides a further example of this utopian ideal being implemented in practice. During its first cycle of UPR in 2010, a clear attack on women’s rights

⁷³ UNGA Res 5/1 (18 June 2007) para 3(a).

⁷⁴ *ibid* para 3(c).

⁷⁵ Amna Nazir, ‘The Universal Periodic Review and Muslim States’ Engagement’ (2019) 15 *Journal of International Law and Islamic Law* 1, 25; Amna Nazir, ‘The Universal Periodic Review and Muslim States’ Engagement’ (2019) 15 *Journal of International Law and Islamic Law* 1, 25.

⁷⁶ *ibid* 26.

⁷⁷ *ibid* para 4(a).

⁷⁸ Annan (n 8).

⁷⁹ McMahon and Johnson (n 14) 3.

⁸⁰ Cristian Talesco and Brigitte S Valentine, ‘The Universal Periodic Review of Timor-Leste: Achieving justice for past human rights abuses under Indonesian rule’ in James Gomez and Robin Ramcharan (eds), *The Universal Periodic Review of Southeast Asia: Civil Society Perspectives* (Asia Centre 2018) 139-40.

was uncovered, as ‘young women who were HIV positive...had been sterilized at public hospitals in Namibia without their informed consent’.⁸¹ The information provided throughout the 2010 UPR, along with two accepted recommendations on this point from the United Kingdom and Canada,⁸² contributed to the practice of sterilisation without informed consent being prohibited⁸³ by the Supreme Court of Namibia in *LM and Others v The Government of the Republic of Namibia*.⁸⁴ Although the UPR alone did not direct this change in law, it did provide a further stimulus from the international community to proscribe this abhorrent practice, ultimately playing a part in an important development for women’s rights in Namibia. Currently, the UPR has a confined direct impact on domestic laws and policies,⁸⁵ but it should be viewed as one part of a homogenous group of UN and regional bodies seeking the solidification of human rights protections globally.

Moreover, in *LM and Others*, while the Namibian Supreme Court affirmed that informed consent must be provided in cases of sterilisation,⁸⁶ it dismissed the claim that they were sterilised *because* they were HIV positive.⁸⁷ Alicia Yamin and Corey Prachniak-Rincon find that this decision ‘failed to consider the level of discrimination and bias faced by women living with HIV in practice in Namibia’.⁸⁸ Noting that this was still a fundamental human rights issue to be resolved, the UPR Project turned its attention to the rights of women and girls living with HIV in Namibia.⁸⁹

In October 2020, the UPR Project submitted a report to Namibia’s Cycle 3 review, which focused on two key issues for women and girls living with HIV: (1) the effect of HIV-related stigmatisation, and (2) prevention of mother-to-child HIV transmission (PMTCT).⁹⁰ Our report received significant attention and citations from the OHCHR in its Stakeholder Summary document,⁹¹ and in March 2021, the UPR Project was invited to be a panellist for Namibia’s UPR Pre-session, where we discussed the core issues relating to the rights of women and girls with HIV with UN Member States and other CSOs. As this Pre-session was conducted online due to Covid-19 restrictions, instead of in-person in Geneva, this limited the scope for further engagement with other UN permanent missions. We did engage in email discussions with

⁸¹ UNHRC, ‘National Report of Namibia’ (10 November 2010) UN Doc A/HRC/WG.6/10/NAM/1, para 14.

⁸² UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Namibia’ (24 March 2011) UN Doc A/HRC/17/14, para 96.54 (United Kingdom), para 96.60 (Canada).

⁸³ UNHRC, ‘National Report of Namibia’ (28 October 2015) UN Doc A/HRC/WG.6/24/NAM/1 para 113; UNHRC, ‘Summary of Stakeholders Information: Namibia’ (6 November 2015) UN Doc A/HRC/WG.6/24/NAM/3, para 43; UPR Project at BCU Stakeholder Report para 10.

⁸⁴ *LM and Others v Government of the Republic of Namibia* (1603 of 2008) [2012] NAHC 211 (30 July 2012).

⁸⁵ However, examples are significantly increasing, see UPR Info and Friedrich Ebert Stiftung (n 58).

⁸⁶ *LM and Others* (n 84) para 80.

⁸⁷ *ibid* para 83.

⁸⁸ Alicia Ely Yamin and Corey Prachniak-Rincon, *Compounded Injustice and Cautionary Notes for ‘Progress’ in the Sustainable Development Era: Considering the Case of Sterilization of Women Living with HIV* (2018) 41 *Harvard Journal of Law & Gender* 395, 422.

⁸⁹ UPR Project at BCU Centre for Human Rights, ‘Namibia’ available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-namibia> accessed 15 July 2023.

⁹⁰ *ibid*.

⁹¹ UNHRC, ‘Summary of Stakeholders’ submissions on Namibia: Report of the Office of the United Nations High Commissioner for Human Rights’ (18 February 2021) UN Doc A/HRC/WG.6/38/NAM/3, paras 40, 42.

selected permanent missions, but our experience (as detailed below) is that in-person advocacy is more effective in terms of positively influencing Member State recommendations.

Nevertheless, during Namibia's Cycle 3 review it received three specific recommendations on women and girls with HIV, focusing on stigmatisation and PMTCT, appearing to use the information provided by the UPR Project.⁹² This was a significant improvement, as Namibia had received 0 recommendations specifically on women with HIV in Cycle 2. In its previous cycles, HIV recommendations had been broad and bracketed all people living with HIV together, instead of demonstrating the intersectional experiences and discrimination that women living with HIV specifically face.

Affirming its support of protecting women and girls' right to health, the Namibian government attended its UPR Pre-session and agreed to work with CSOs to ensure effective implementation of recommendations after its Cycle 3 review. This included the UPR Project, through which we will help to ensure the recommendations on women living with HIV are implemented into health policy and practice in Namibia. It was a positive initial step for Namibia to begin working with CSOs and the extent to which this is implemented in the period leading to the next review will be monitored.

The involvement of CSO engagement within the UPR process as 'stakeholders' is a distinct feature of the UPR. Currently, stakeholders can engage in the National Consultations, submit individual and joint stakeholder reports, attend the review, speak at the adoption of the review, and assist in the implementation of UPR recommendations domestically. Scholars have identified the importance of CSO engagement with the UPR, for example, Miloon Kothari says that '[t]he role of [civil society stakeholders] has been crucial to the success and effectivity of the UPR mechanism'.⁹³ Yet others have argued that this engagement is somewhat narrow. McMahon and Johnson note that '[t]here are only limited formal opportunities for CSO engagement'⁹⁴ and Alice Storey suggests additional ways in which CSOs could formally engage with the UPR, without adding an additional burden to the OHCHR or Member States.⁹⁵ Natalie Baird's assessment of CSO engagement with Pacific Island States showed that a high number of international CSO reports, whilst submitted with good intentions, could have the effect of 'distorting [the] authentic local voice'.⁹⁶ Baird suggests that international CSOs should try to form a closer connection with their national counterparts,⁹⁷ something which we believe

⁹² UNHRC, 'Report of the Working Group on the Universal Periodic Review: Namibia (29 June 2021) UN Doc A/HRC/48/4 para 138.92 'Increase its efforts to tackle stigmatization of and discrimination against persons, especially women and girls infected with HIV/AIDS, by prioritizing support and education' (South Africa); para 138.200 'Intensify its efforts to combat HIV/AIDS and prevent mother-to-child transmission' (Thailand); para 138.205 'Step up efforts to end stigmatization and discrimination against women and children infected with HIV/AIDS (Kenya).

⁹³ Miloon Kothari, 'Study on Emerging Good Practices from the Universal Periodic Review' UN OHCHR (9 June 2021) para 66.

⁹⁴ McMahon and Johnson (n 14).

⁹⁵ Alice Storey, 'Challenges and Opportunities for the UN Universal Periodic Review: A Case Study on Capital Punishment in the USA' (2021) 90 UMKC Law Review 129, 143-44.

⁹⁶ Natalie Baird, 'The Role of International Non-Governmental Organisations in the Universal Periodic Review of Pacific Island States: Can 'Doing Good' Be Done Better?' (2015) Melbourne Journal of International Law 18.

⁹⁷ *ibid.*

should be replicated across the UPR and is a point of action for us to strengthen the UPR Project.

Our experience to date, through the UPR Project, is that whilst all our stakeholder submissions have been cited by the OHCHR, in order to truly influence Member State recommendations stakeholders must engage in advocacy prior to the Working Group session. An example of this can be demonstrated through the UPR Project at BCU's engagement with the UK's Cycle 4 review.

In September 2022, following its submission of two stakeholder reports,⁹⁸ the UPR Project spoke at the 41st Pre-session in Geneva regarding the UK in advance of its Cycle 4 review in November 2022. This allowed for other government delegations to consider key themes for their recommendations, including the 'Bill of Rights' Bill, the rights of migrants, asylum seekers, and refugees, detention and imprisonment, and racism.⁹⁹ Subsequently, we were also invited to attend the 'Informal Exchange of Views with EU Member States' on the same key themes, prior to the UK's review. Whilst in Geneva, we met with UN government delegations and discussed what is required to help to achieve protection of human rights in the UK, ultimately leading to important recommendations being made to the UK on themes we had raised as significant.

Being present in Geneva allowed for the meeting of other UK CSOs that had submitted stakeholder reports and were attending the Pre-session. Whilst engaging in these dialogues, we reflected upon the fact that CSOs in the UK must be better informed on the modalities of the UPR and to see that the UK government is not being as transparent as it could be regarding the opportunities for CSOs to engage with both the executive and parliament. One of the UK's three NHRIs, the Equality and Human Rights Commission (EHRC), should be commended as it also understood this need and thereafter created the funded project titled 'Universal Periodic Review 2022 – Civil Society Engagement'. The funding bid was awarded to the UPR Project at BCU, allowing us to provide training events for the UK's CSOs, including a live streaming of the UK's UPR, a conference to help equip CSOs, a symposium in the UK Parliament, and a roundtable discussion for members of the UK's legal profession.¹⁰⁰

On 27th March 2023, the UK government presented its responses to the HRC, and this allowed for the UPR Project to publish a timely Briefing Document on the outcome of the review, within which we identify key issues that can contribute to the realisation of the UPR in the UK. Amongst our recommendations we stated:

⁹⁸ These reports focused on women's rights (including access to abortion and domestic abuse) and minorities and deprivation of liberty and are available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-uk> accessed 25 April 2023

⁹⁹ See The UPR Project at BCU, 'Joint-Submission of the BCU Centre for Human Rights and 4 King's Bench Walk, Inner Temple' (29 August 2022) available at <<https://bcuassets.blob.core.windows.net/docs/the-upr-project-at-bcu-pre-session-statement-on-the-uk-133126348239673018.pdf>> accessed 15 July 2023.

¹⁰⁰ The project materials are available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-uk> accessed 15 July 2023.

1. Establish a National Mechanism for Reporting and Follow-up which should identify appropriate aims, objectives, and indicators for the effective implementation of UPR recommendations. This should include the participation of all UK governments and have input from each of the National Human Rights Institutions.
2. Allow meaningful participation and contributions from civil society organisations, parliamentarians, the devolved administrations, and those who have a lived experience as victims of human rights violations when engaging with the UPR and other UN mechanisms.
3. Present its responses to Parliament to ensure that its approach to the UPR can be effectively scrutinised.
4. Publish a timetable providing all stakeholders with time to prepare appropriately so as to be able to make reasoned contributions to future UPR submissions. Engagement events should be held throughout the present and future UPR cycles so that an informed, evidenced-based approach is adopted.
5. Improve its engagement with other UN mechanisms, including the UN treaty bodies, the Special Procedures, and achieve the standards identified within each of the 17 Sustainable Development Goals. The Government should also enhance its cooperation with international organisations which have standing to operate as observers, such as the Permanent Delegation of the Council of Europe, and the Permanent Delegation of the European Union.

The UPR Project is now working alongside the UK parliament and other CSOs to provide expert guidance on implementing these recommendations domestically. Whilst this work was specific to the UK's UPR, there are wider lessons to be learned in terms of the UPR achieving its utopian ideal. Ensuring that there is a mobilised and informed civil society throughout the UPR cycle of each Member State is fundamental to the success of the UPR and achieving utopia. There are existing coalitions of CSOs in countries across the world who work together throughout the UPR cycle, for example, the Kenya UPR Stakeholder Coalition was created in 2008 and now 'has a membership of at least 250 organizations'.¹⁰¹ Similar coalitions exist in Malaysia and Denmark,¹⁰² and, following the work of the UPR Project's EHRC-funded work, in the UK. This work should be built on by other states across the world.

5. Recognising the Persistency of Dystopian Elements

As Arthur Giannattasio observes, 'utopian discourses are burdened by a dystopian potential as they embody an instrumental dimension of reason which conveys, although with good intent expectation or hope, historic bloodshed experiences'.¹⁰³ According to a utopian perspective, it is essential to discover the source of present malaise, injustice and misery in order to achieve a better place. We must first recognise the dystopia to achieve the ultimate utopia. In many ways

¹⁰¹ Kothari (n 93) para 68.

¹⁰² *ibid* para 69.

¹⁰³ Arthur Roberto Capella Giannattasio, 'International Human Rights: A Dystopian Utopia' (2014) 4 ARSP: Archiv für Rechts- und Sozialphilosophie 514, 514.

the UPR helps to cast light over the dystopian elements in a state, and provides guidance for the change of policy to protect rights. However, some dystopian elements remain persistent.

The term ‘dystopia’ was first used by John Stuart Mill during his speech in the House of Commons in 1868 where he criticised the British government’s land policy, terming its sponsors as ‘dys-topians or caco-topians...what they appear to favour is too bad to be practicable’.¹⁰⁴ It could be argued that we are living under a dystopian shadow, and at times it manifests on the ground, and at different locations. Indeed, it is harmful state practices that are the antithesis to the utopian UPR vision for the realisation of universal human rights. This is also reflected in states’ engagement with the UPR’s modalities and it is recognising and challenging these dystopian elements that will help ameliorate the harms caused by maintaining certain national laws under the guise of state sovereignty.

Under the UPR process, the State under Review (SuR) is expected to engage in a national consultation process with relevant stakeholders to better inform its national report. However, a dystopian practice often observed is the governmental control of information, or at least, the lack of transparency over policy implementation. It is often argued that states will fail to engage in meaningful consultations. One of the key reasons for a national consultation process is to allow stakeholders, such as CSOs, to provide valuable input into the SuR’s national report and provide independent and impartial perspectives against the State’s sanitised version of its human rights record. It also gives a voice to the marginalised and vulnerable groups which highlights the universality and indivisibility of human rights. Hence national consultations allow for a more accurate and comprehensive portrayal of the human rights situation on the ground and it is also able to reflect progressive efforts made by the state to ameliorate any human rights violations. Additionally, the influence of stakeholders can help identify that the proposed recommendations are substantial, relevant, and important.

However, no detailed instructions are provided on the manner in which the consultative national process should be carried out. As a result, only a small number of state reports and submissions have identified the specific nature of consultations such as the time, location, and number of participants.¹⁰⁵ One such example is Pakistan which, in Cycle 2, listed the date and location of its consultations with government departments and civil society organisations but failed to disclose their identities or the number of organisations actually involved.¹⁰⁶ Similarly, the UAE held several meetings and workshops ‘with a wide range of civil society organisations and government bodies’¹⁰⁷ in advance of Cycle 3, but no further detail was provided. Consequently, Nazir argues the true level of cooperation and engagement with stakeholders cannot be determined and can include stifling effective interpretation of international human

¹⁰⁴ House of Commons Debate (Hansard, March 12, 1868) vol. 190, col 1415, 1516-17 (remarks of J Stuart Mill).

¹⁰⁵ Allehone Mulugeta Abebe, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) 9 Human Rights Law Review 4, 10.

¹⁰⁶ UNHRC, ‘National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Pakistan’ (6 August 2012) UN Doc A/HRC/WG.6/14/PAK/1, Annex 1.

¹⁰⁷ UNHRC, ‘National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: United Arab Emirates’ (13 November 2017) UN Doc A/HRC/WG.6/29/ARE/1 para 5.

rights law.¹⁰⁸ Bahrain has also been criticised for failing to hold nationally accessible consultations. In Bahrain's Cycle 1 review, the state failed to consult with ten highly active human rights groups, including the Bahrain Centre for Human Rights despite an appeal to the Prime Minister to include them in the consultation process. In fact, the stakeholders that did participate revealed that the consultations held 'were for information not consultation, and that their comments had no reflection in the final national report'.¹⁰⁹

Also integral of each review are the OHCHR-compiled reports, as the Compilation of UN Information provides key findings and conclusions from independent UN mechanisms and the Stakeholder Summary provides an overview of all reports submitted by civil society organisations. Yet, as scholars have identified, how the OHCHR compiles these two reports is not clear and to achieve the utopian ideal, more transparency is required from the OHCHR,¹¹⁰ particularly as transparency is one of the UPR's core principles.¹¹¹

The outcome of the review can further be influenced by the quality of statements and recommendations received. For example, on many occasions during Cycle 1, state representatives would stay overnight in order to enrol onto the list of speakers which would open at 8.45am the day before the review. States would adopt strategies that involved getting blocks of allied states to speak together thereby enhancing the impact of their praise and using up the majority of the allotted time. This tactic was seen in the first review of Bahrain which was dominated by its allied states delivering positive, empty statements. These allies included Palestine, India, Pakistan, Qatar, Tunisia, the UAE, Saudi Arabia, Turkey, Malaysia, Algeria, Libya, and Cuba.¹¹² Similarly, Tunisia's review heard from numerous allies¹¹³ giving the impression that it was 'an exercise in filibustering'.¹¹⁴ As a result of political and regional allies dominating the review, many countries inscribed on the speakers' list did not get a chance to participate due to insufficient time.¹¹⁵

¹⁰⁸ Amna Nazir, 'A UPR Perspective on Capital Punishment and the Kingdom of Saudi Arabia' 19(1) *Muslim World Journal of Human Rights* (2022) 77, 79.

¹⁰⁹ UNHRC, 'Written Statement Submitted by Cairo Institute for Human Rights Studies (CIHRS), a Non-Governmental Organization in Special Consultative Status' (28 May 2008) UN Doc A/HRC/8/NGO/42, 2, para 3.

¹¹⁰ Alice Storey and Mark Eccleston-Turner, 'Transparency, Accountability, and Legitimacy in the United Nations' Human Rights Council's Universal Periodic Review', in, Salvador Santino Regilme Jr and Irene Hadiprayitno (eds) *Human Rights at Risk: Rethinking International Institutions, American Power, and the Future of Dignity* (Rutgers University Press 2022).

¹¹¹ UNGA Res 5/1 (18 June 2007) para 3 (g).

¹¹² See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Bahrain' (9 April 2008) UN Doc A/HRC/WG.6/1/BHR/4, paras 19-31.

¹¹³ The first 15 countries to speak in the interactive dialogue were Kuwait, Palestine, Pakistan, Philippines, Chad, Saudi Arabia, the Russian Federation, Slovenia, China, India, Madagascar, Ghana, Mauritania, Bangladesh and Angola. UNHRC, 'Report of the Working Group on the Universal Periodic Review: Tunisia' (22 May 2008) UN Doc A/HRC/8/21, paras 12-26.

¹¹⁴ Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) 9(2) *Human Rights Law Review* 203, 210.

¹¹⁵ Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform' (2013) 7 *ICL Journal* 1, 41.

Regionalism through protecting allied states from scrutiny continued to impact the efficacy of most Cycle 1 reviews.¹¹⁶ Using the Organisation of Islamic Cooperation (OIC) as an example, Qatar's review heard from 49 states,¹¹⁷ with only six (non OIC) asking critical questions.¹¹⁸ The implications of this are not to be understated. Filibustering against states which are in violation of their human rights obligations will dilute the review process and hinder the opportunity to question state practice and lobby for change.¹¹⁹

As a result of this drawback to the UPR mechanism, Decision 17/119 was adopted in 2011 to allow the process to become fairer and more transparent for future cycles. The speakers' list now opens a week before the review and the first speaker is drawn by lot with the list proceeding alphabetically from that point. States are permitted to swap places if they should so desire. Strict time limits have also been enforced in regards to state speaking time.¹²⁰ This change was seen in Bahrain's second review which heard from a range of states such as Slovenia, Spain, Sudan, Switzerland, Thailand, Turkey, and the UAE allowing for a more balanced approach.¹²¹ Hearing from states that are not from the state under review's regional group reduces the chances of bias and praise.

It is important to note that the HRC makes it clear that 'the state under review is sovereign in addressing the questions and/or issues it chooses to answer of those transmitted to it by the troika members or raised during the proceedings of the working group'.¹²² This was reflected in North Korea's first review where it failed to accept a single recommendation.¹²³ Refusing to address vital human rights issues put forth by other member states demonstrates a lack of genuine engagement with the mechanism and suggests the state under review is merely paying

¹¹⁶ See for example the reviews of Azerbaijan, Bangladesh, Jordan, Malaysia, Saudi Arabia, Uzbekistan, United Arab Emirates, Yemen which were dominated by other OIC states delivering complimentary statements and few critical questions or recommendations.

¹¹⁷ Algeria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Canada, Chile, Cuba, Djibouti, DPRK, Egypt, France, Hungary, Indonesia, Iran, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Mexico, Morocco, Nepal, Nicaragua, Norway, Oman, Pakistan, Philippines, Russia, Saudi Arabia, Singapore, Slovenia, Sri Lanka, Spain, Sweden, Syria, Sudan, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Venezuela, Yemen.

¹¹⁸ Brazil, Canada, Norway, Spain, Sweden, United Kingdom.

¹¹⁹ See Eduard Jordaan in chapter 8.

¹²⁰ HRC Decision 17/119, 'Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review' (19 July 2011) UN Doc A/HRC/DEC/17/119, paras 5-8: 'The established procedures, which allow three minutes speaking time for Member States and two minutes for observer States, will continue to apply when all speakers can be accommodated within three hours and thirty minutes available to Member and observer States. Should it be impossible to accommodate all speakers within three hours and thirty minutes based on three minutes speaking time for Member States and two minutes for observer States, the speaking time will be reduced to two minutes for all. If all speakers still cannot be accommodated, the speaking time will be divided among all delegations inscribed so as to enable each and every speaker to take the floor'.

¹²¹ See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Bahrain' (23 May 2012) UN Doc A/HRC/WG.6/13/L.4, paras 26-33.

¹²² *ibid* para 5.

¹²³ Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 31. See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea' (4 January 2010) UN Doc A/HRC/13/13, para 91 and Hisham Badr, 'Report of the Human Rights Council on its Thirteenth Session' (8 February 2011) UN Doc A/HRC/13/56, paras 644-45.

lip service to the UPR and using sovereignty as a shield to avoid investigation into its human rights abuses.

In order to achieve a successful UPR for the solidification of human rights, the state under review needs to address all recommendations put forward to it, providing a clear explanation for any recommendations it is unable to accept in order for the international community to understand what is preventing acceptance and enable ways to potentially overcome this. At the same time, it must also be noted that the potential impact of recommendations, on the human rights situation of a country, varies depending on the *quality* of recommendations that are issued during the review session (emphasis added). Edward McMahon has categorised recommendations on a scale of 1 to 5 depending on the verb that is used in each recommendation.¹²⁴ See chapter 4 by McMahon and Botwicz for a breakdown of each category.

When considering the formulation of recommendations, it is important that recommending states refer to the review criteria in Resolution 5/1, which includes the UN Charter, UDHR, or human rights instruments to which the SuR is party to, in order to ensure recommendations remain specific. However, it is also proposed that the UPR mechanism can go beyond this and promote the work of human rights entities and bodies which uphold the nine core human rights treaties. For example, when considering the issue of child, early and forced marriage (CEFM), UPR recommendations predominantly refer to ‘child marriage’, whereas reference to the UNFPA-UNICEF project on CEFM¹²⁵ can enhance the quality of recommendations.

Other instances of poorly formulated recommendations are when member states attempt to problematise human rights issues to protect domestic state laws. This can be seen when assessing Egypt and Sudan’s recommendations at the UPR regarding the use of the death penalty. Instead of making recommendations challenging retentionist states’ use of the punishment, they went one step further and used the UPR mechanism to encourage other states to *maintain* the death penalty (emphasis added). Egypt recommended Afghanistan, Viet Nam, Central African Republic and Chad to ‘continue using its sovereign right to apply the death penalty as a tool of criminal justice in accordance with the proper safeguards specified under international human rights law’.¹²⁶ It also encouraged China to ‘continue observing its national legal safeguards surrounding the application of death penalty as one of the legitimate tools of criminal justice’.¹²⁷ All these states under review accepted the recommendations except Chad

¹²⁴ Edward 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’ (Friedrich Ebert Stiftung, September 2012) 14-15.

¹²⁵ See ‘UNFPA-UNICEF Global Programme to End Child Marriage’ available at <www.unfpa.org/unfpa-unicef-global-programme-end-child-marriage> accessed 15 July 2023.

¹²⁶ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Afghanistan’ (4 April 2014) UN Doc A/HRC/26/4, para 136.118; UNHRC, ‘Report of the Working Group on the Universal Periodic Review: Viet Nam’ (2 April 2014) UN Doc A/HRC/26/6, para 143.114. The recommendation to the Central African Republic and Chad is worded slightly differently: ‘Continue exercising its sovereign right of implementing its penal code in conformity with universally agreed human rights standards, including the application of the death penalty.’

¹²⁷ UNHRC, ‘Report of the Working Group on the Universal Periodic Review: China’ (4 December 2013) UN Doc A/HRC/25/5, para 186.111.

which did not provide an explanation. It would have proven fruitful for Chad to explain why it did not accept the recommendation which would have allowed for greater discussion on this issue.

Egypt's pro death penalty stance was further highlighted in its recommendation to the Netherlands, a state that had abolished the death penalty in 1870, to 'initiate a debate on the death penalty, with a view to reaching responsive conclusions consistent with international human rights law'.¹²⁸ Netherlands did not accept the recommendation affirming its 'firm opposition to the death penalty, and that its respect for human rights is basic in this position'.¹²⁹ These examples show Egypt's attempts to problematise the abolitionist perspective in the UPR as it did not base its recommendations on the review criteria¹³⁰ but instead focused on state practice to maintain the death penalty or consider its reintroduction contrary to international law.¹³¹

Both Egypt and Sudan also made similar recommendations to Malaysia to 'continue exercising its sovereign right of adopting national legislation and the penal code, including the application of the death penalty'.¹³² Sudan also recommended Yemen to 'abide only by internationally agreed principles of international law. In this regard, capital punishment does not fall within such agreed norms, the imposition of capital punishment is the prerogative of individual States'.¹³³ This indicates a misinterpretation of the role of the death penalty in international law which provides for a very restricted application of the punishment. Member states encouraging other states to maintain the death penalty reinforces the attitude that it is not a matter of human rights but rather it is a legitimate criminal sanction which the state, as sovereign, can apply as it wishes. It does not consider the implications of such a recommendation, especially if the country in question has a poor record of human rights, for example, failing to observe fair judicial processes. This risks the death penalty being arbitrarily applied and the right to life ultimately subjugated.

The UPR extends beyond mere reaffirmation of human rights standards by requiring states to explicitly accept support or note recommendations. As a result, the SuR is faced with expectations that it will take progressive steps to implementation.¹³⁴ The subsequent review focuses on the extent to which the previous cycle's recommendations have been implemented.

¹²⁸ UNHRC, 'Report of the Working Group on the Universal Periodic Review: The Netherlands' (13 May 2008) UN Doc A/HRC/8/31 para 78.2.

¹²⁹ *ibid* para 39.

¹³⁰ UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, Annex, para 1. The review criteria are: (a) The Charter of the United Nations; (b) The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is party; (d) Voluntary pledges and commitments made by States.

¹³¹ The Human Rights Committee's General Comment No. 36 'bars' the reintroduction of the death penalty.

¹³² UNHRC, 'Report of the Working Group on the Universal Periodic Review: Malaysia' (3 March 2009) UN Doc A/HRC/11/30, para 104.15.

¹³³ UNHRC, 'Report of the Working Group on the Universal Periodic Review: Yemen' (5 June 2009) UN Doc A/HRC/12/13, para 91.53.

¹³⁴ Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 37-38.

Implementation is one of the fundamental challenges facing the UPR. The contradictions between what is promised, through acceptance of recommendations, and what is delivered, through the failure to implement said recommendations, is stark. The presence of such dystopian elements means the utopian objective does not translate into a utopian world. The UPR needs to promote human rights on the ground level and ameliorate violations by, as Alex Conte argues, ‘translating the recommendations and commitments made...into measurable improvements’.¹³⁵

Recommendations therefore need to be S.M.A.R.T.¹³⁶ in order to facilitate implementation. For example, a recommendation to simply, ‘consider restricting the death penalty’ lacks any specificity for application. Rather, this could be replaced with a recommendation to ‘adopt the punishment only for the “most serious crimes” under ICCPR Article 6(2) and present to Parliament a motion for a moratorium within two years’ which is both measurable and achievable.¹³⁷ Furthermore, Article 6(6) is a time limiting provision which should lead to abolition, as it is designed to neutralise the ability of member states to perpetually claim domestic legitimacy for the continued use of the punishment.

In the UPR Project’s stakeholder reports, we have recommended this incremental approach. For example, in South Sudan’s Cycle 3 report we recommended the SuR: (a) Develop, in consultation with civil society and relevant regional bodies, a comprehensive action plan to work towards a moratorium, with a view to abolition, within the next three years; (b) Amend the 2011 Transitional Constitution of South Sudan to prohibit the death penalty; and (c) Ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.¹³⁸

Unfortunately, tracking implementation is not a straightforward task as there is no formal guidance or official mechanism in place. This hinders the ability to engage with the extent to which the SuR has implemented its accepted recommendations. One way to counter this is through the submission of a midterm report which all states are encouraged to provide, on a voluntary basis, to the HRC in relation to the accepted recommendations.¹³⁹ However, the voluntary nature of this means that, many a times, the SuR will simply not submit.

6. Conclusion: Keeping the Aspirational Imagination

¹³⁵ Alex Conte, ‘Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism’ (2011) 9 *New Zealand Yearbook of International Law* 189, 201.

¹³⁶ Specific, Measurable, Achievable, Relevant, Time-bound.

¹³⁷ See Amna Nazir, ‘The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan’ (2020) 2020 *RSIL Law Review* 126, 153.

¹³⁸ UPR Project at BCU, ‘South Sudan Stakeholder Submission: Third Cycle’ available at <www.bcu.ac.uk/law/research/centre-for-human-rights/consultancy/upr-project-at-bcu/upr-project-at-bcu-south-sudan>.

¹³⁹ UNHRC Res 16/21, ‘Review of the work and functioning of the Human Rights Council’ (12 April 2011) UN Doc A/HRC/RES/16/21, para 8.

Since the creation of the UPR and its inception in 2006, it has become a critical, multilateral system of the UN for facilitating a consensual and encompassing review of the status of human rights across the world. UPR Info inform that within the completed three cycles to date, there have been around 100,000 recommendations, over 70 human rights issues raised, and that as each cycle is completed we are witnessing an enhanced engagement of recommending states, parliamentarians, national human rights institutions, the judiciary and the legal profession.¹⁴⁰ The UPR provides significant opportunities for cooperation and dialogue not just in Geneva, but during each phase of the UPR in the domestic settings. It is therefore a potentially empowering mechanism which is distinct from the other UN entities' reporting and monitoring. States have made voluntary commitments, which are documented in the UPR materials, and which can be utilised to call on governments to fulfil their promises through national legal protections against human rights abuses.

We find hope and visions for a better future through the creation of the UPR, and these utopian ideals live strongly within this UN review process. What is necessary to achieve successful outcomes is the continued education on the UPR, and that each key actor is fully informed about how to use the process. Domestically, the role of National Human Rights Commissions, and the creation and operation of a National Mechanism for Review and Follow-up are vital.

In line with our suggestions throughout this chapter for realising utopia through the UPR, the mechanism must be viewed as constantly evolving, shifting its modalities as the situation requires. In comparison with other UN mechanisms such as the treaty bodies and special procedures, the UPR is still in its relative infancy, and given its success in terms of 100% co-operation from all UN member states, it provides a platform for keeping an aspirational imagination for a global human rights utopia.

¹⁴⁰ See Message from Mona M'Bikay, Executive Director of UPR Info, *The UPR Beyond Reporting: Transformational Changes on the Ground* (June 2022) 4 available at <www.upr-info.org/sites/default/files/general-document/2022-07/Beyond%20Reporting-EN-Web.pdf> accessed 15 July 2023.