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978-1-107-08630-2 - Human Rights and the Universal Periodic Review: Rituals and Ritualism

Hilary Charlesworth and Emma Larking

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Introduction: the regulatory power of the Universal Periodic Review

HILARY CHARLESWORTH AND EMMA LARKING

The Universal Periodic Review (UPR) is an intriguing and ambitious development in international human rights monitoring. A mechanism employed by the United Nations (UN) Human Rights Council (HRC), its ‘ultimate aim’ is said to be ‘to improve the human rights situation in all countries and address human rights violations wherever they occur’.¹ While UN Secretary-General Ban Ki-Moon describes it as having ‘great potential to promote and protect human rights in the darkest corners of the world’,² the UPR was in fact designed to shine a light equally on the human rights practices of all countries – and to ‘ensure equal treatment for every country when their human rights situations are assessed’.³

Background to the establishment of the UPR

The ‘equal treatment’ aspiration was a response to the perceived failings of the HRC’s predecessor, the UN Commission on Human Rights. By the new millennium, the Commission was widely derided and regarded as a tool deployed by states to mask their human rights abuses. In 2005, then Secretary-General Kofi Annan declared:

the Commission’s capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.⁴

¹ Office of the High Commissioner for Human Rights, ‘Universal Periodic Review’, www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

² *Ibid.* ³ *Ibid.*

⁴ UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 59th sess., UN Doc. A/59/2005 (21 March 2005) para. 182.

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The HRC was established in 2006 to replace the Commission as the UN's central political human rights institution.⁵ It was perhaps the most significant product of the institutional reform process generated by the UN's sixtieth anniversary. The UPR was created under the same General Assembly Resolution that established the Council.⁶ Although Kofi Annan proposed a smaller standing body,⁷ in the end the Council has forty-seven members – only slightly less than the Commission's fifty-three. The geographical distribution of the smaller number of seats has had the perhaps unintended effect of increasing the influence of developing states and the Organisation of Islamic Cooperation in the Council as compared to the Commission.⁸ In many ways, however, the Council mirrors the procedures of its predecessor: it has a complaints mechanism, a system of independent human rights experts (the 'special procedures') and an expert Advisory Committee replaces the Sub-Commission on the Promotion and Protection of Human Rights. The Council has also attracted criticism comparable to that directed at the Commission for double standards in responding to human rights violations.⁹ Nevertheless, when the UPR began functioning in 2008, it was depicted as charting a new course in human rights monitoring, enhancing the Council's legitimacy through a universally applicable form of scrutiny.

The mechanics of the UPR

According to its founding resolution:

3. The universal periodic review should:
 - (a) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
 - (b) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;
 - (c) Ensure universal coverage and equal treatment of all States;
 - (d) Be an intergovernmental process, United Nations Member-driven and action-oriented;

⁵ UN General Assembly, *Human Rights Council*, GA Res. 60/251, 60th sess., UN Doc. A/RES/60/251 (15 March 2006).

⁶ *Ibid.* para. 5(e). ⁷ Secretary-General, *In Larger Freedom*, n. 4 above, para. 183.

⁸ The distribution is thirteen African states, thirteen Asian states, six Eastern European states, eight Latin American and Caribbean states and seven Western Europe and other states.

⁹ See, e.g., John Cerone, 'Inappropriate Renderings: The Danger of Reductionist Resolutions' (2008) 33 *Brooklyn Journal of International Law* 357.

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- (e) Fully involve the country under review;
- (f) Complement and not duplicate other human rights mechanisms, thus representing an added value;
- (g) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner;
- (h) Not be overly burdensome to the concerned State or to the agenda of the Council;
- (i) Not be overly long; it should be realistic and not absorb a disproportionate amount of time, human and financial resources;
- (j) Not diminish the Council's capacity to respond to urgent human rights situations;
- (k) Fully integrate a gender perspective;
- (l) Without prejudice to the obligations contained in the elements provided for in the basis of review, take into account the level of development and specificities of countries;
- (m) Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions.¹⁰

The UPR's initial cycle was four years, allowing forty-eight states to be reviewed annually.¹¹ This has been extended to four and a half years for the second cycle, which commenced in May 2012 and will run until November 2016, allowing forty-two states to be reviewed each year.¹² Formally, the UPR is undertaken by a UPR Working Group (the forty-seven members of the Council), sitting in special sessions of the Council. Each review is managed by a group of three states, termed a 'troika', chosen by drawing lots among the Council's membership and from different regional groups. A state under review can request that one member of the troika come from its own regional group and also has the right to request the substitution of one member of the troika.¹³ Troika states also act as rapporteurs, shepherding states through the various stages of the UPR and drafting the HRC's report. The review considers a state's performance in relation to its obligations under the UN Charter; the Universal Declaration of Human Rights (UDHR); UN human rights treaties to which it is a party; any voluntary pledges it has

¹⁰ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, HRC Res. 5/1, 5th sess., UN Doc. A/HRC/RES/5/1 (18 June 2007) Annex. These principles were reaffirmed in Human Rights Council, *Review of the Work and Functioning of the Human Rights Council*, HRC Res. 16/21, 16th sess., UN Doc. A/HRC/RES/16/21 (12 April 2011).

¹¹ Human Rights Council, Resolution 5/1, para. 14.

¹² Human Rights Council, Resolution 16/21, para. 3.

¹³ Human Rights Council, Resolution 5/1, paras. 18(d), 19.

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made regarding human rights, including, after the first cycle, commitments made during previous reviews; and the principles of international humanitarian law.¹⁴

The UPR has three distinct phases: review of a country's human rights situation, including an 'interactive dialogue' with all UN members; implementation of recommendations accepted during the review; and monitoring the implementation of recommendations during subsequent UPR cycles. The review is based on information provided by the state under review, generally in the form of a written 'national report'; information supplied by the special procedures, as well as the UN's dedicated human rights treaty bodies and other UN entities; and reports from other stakeholders such as national human rights institutions (NHRIs) and non-governmental organisations (NGOs).¹⁵ The procedure is closely regulated. All material must be submitted to the Office of the High Commissioner for Human Rights (OHCHR), which is responsible for compiling and circulating it in the six official languages of the UN.¹⁶ States may choose to present their report orally, but where they do provide written material it may be no more than twenty pages. In the case of material provided by the special procedures and treaty bodies, the OHCHR Secretariat reduces and synthesises the information into a report no longer than ten pages. This is also the case for material provided by NHRIs and NGOs, which the Secretariat must consider 'credible and reliable',¹⁷ and which it translates into an 'other stakeholders' report. The Secretariat has provided guidelines for stakeholders specifying that submissions must be based on first-hand information, and submitted in one of the UN's six official languages.¹⁸

¹⁴ *Ibid.* para. 2.

¹⁵ *Ibid.* Annex, paras. 15–17. General guidelines for the preparation of information under the UPR are contained in: Human Rights Council, *Follow-up to Human Rights Council Resolution 5/1*, HRC Dec. 6/102, 6th sess., UN Doc. A/HRC/DEC/6/102 (27 September 2007); and see Office of the High Commissioner for Human Rights, *Information and Guidelines for Relevant Stakeholders on the Universal Periodic Review Mechanism* (July 2008) para. 7, available at www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf. All original submissions are made publicly available online (OHCHR, *Information and Guidelines for Relevant Stakeholders* (July 2008) para. 12).

¹⁶ Human Rights Council, Resolution 5/1, Annex, para. 17.

¹⁷ *Ibid.* Annex, para. 15(c).

¹⁸ OHCHR, *Information and Guidelines for Relevant Stakeholders* (July 2008) pp. 7–8. Submissions will not be considered if they exceed the specified page length (five pages for individual submissions and ten pages for submissions from large coalitions of stakeholders); are not in an official language of the UN; are received outside the specified deadline for receipt of submissions; or if they contain 'manifestly abusive' language.

After the review material is circulated, any state, including those who are observers rather than members of the HRC, can provide notice of its intention to ask questions of, comment upon or make recommendations to the state under review. These questions and issues are relayed to the state under review and circulated among HRC member and observer states.¹⁹ The troika may group issues or questions to facilitate the conduct of the interactive dialogue,²⁰ but it must ensure the equal allocation of speaking time among those HRC member states wishing to be involved, and similarly among all observer states wishing to take the floor. Representatives of individual states commonly have little more than a minute or two in which to speak.²¹ This is because only three hours was allocated to each interactive dialogue in the first cycle, and three and a half hours in the second cycle, and the state under review has up to seventy minutes for its initial presentation, replies to questions and concluding comments.²² Relevant stakeholders, including NGOs in a consultative relationship with the UN Economic and Social Council, may attend the review but they may not take the floor.²³

Following the interactive dialogue, the troika, with input from the state under review and assistance from the OHCHR, prepares an ‘outcome report’. The outcome report is designed to summarise the dialogue and reflects the questions, comments and recommendations put to the state under review, as well as the state’s responses. It identifies recommendations that ‘enjoy the support’ of the state under review, and notes those recommendations that the state does not support, along with

¹⁹ Human Rights Council President, *Modalities and Practices for the Universal Periodic Review Process*, 8th sess., UN Doc. A/HRC/PRST/8/1 (9 April 2008) para. 4.

²⁰ This process must ‘guarantee ... fairness and transparency’ (Human Rights Council, Resolution 5/1, Annex, para. 21).

²¹ The established procedures allow three minutes speaking time for HRC member states and two minutes for observer states when all states wishing to speak can be accommodated within the time available. When it is impossible to accommodate all states wishing to speak on this basis, the speaking time is reduced to two minutes for all. If it is still impossible to accommodate all speakers on this basis, the speaking time is divided equally among all delegations (*ibid.* paras. 5–7).

²² Human Rights Council, *Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review*, 17th sess., UN Doc. A/HRC/DEC/17/119 (19 July 2011) para. 3.

²³ Human Rights Council, Resolution 5/1, Annex, para. 18(c) and OHCHR, *Information and Guidelines for Relevant Stakeholders* (July 2008) para. 18.

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the state's comments.²⁴ In line with the cooperative character of the UPR, any commitments made by the state in response to recommendations are considered to be voluntary.²⁵ States that have participated in another state's review have an opportunity to edit their statements as they appear in the outcome report prior to the report being adopted at a plenary session of the HRC. During this session the state under review has a further opportunity to reply to questions and respond to issues raised during the interactive dialogue.²⁶ Other states, NHRIs, NGOs and other stakeholders are also given an opportunity to comment on the outcome of the review.²⁷ Revised modalities for the second cycle provide that NHRIs of the state under review are entitled to intervene directly after the state during the adoption of the outcome report by the Council plenary.²⁸

The reviewed state bears the primary responsibility for implementing the recommendations it has accepted, and of reporting during subsequent periodic reviews on the progress of implementation, as well as more broadly on its human rights situation.²⁹ Another feature of the UPR process is that capacity-building and technical support can be sought by states when it is required in order to implement recommendations.³⁰ The HRC has now established a Voluntary Fund for Financial

²⁴ Human Rights Council, Resolution 5/1, Annex, paras. 26 and 32, and see Human Rights Council, Resolution 16/21, paras. 15 and 16.

²⁵ Human Rights Council, Resolution 5/1, Annex, paras. 26 and 27(e). While the Human Rights Council envisages the possibility of non-cooperation with the UPR process, its founding resolution does not specify how it will respond beyond noting that '[a]fter exhausting all efforts to encourage a state to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism'. *Ibid.* para. 38. In 2013, in the face of Israel's refusal to participate in the second UPR cycle, the Council adopted a decision on non-cooperation by states with the UPR. It called on Israel to reconsider its participation and postponed Israel's review to later in the cycle to encourage this: UN Doc. A/HRC/OM/7/1 (4 April 2013). In the end, Israel participated at the rescheduled time.

²⁶ Human Rights Council, Resolution 5/1, Annex, para. 29.

²⁷ *Ibid.* paras. 30 and 31. NGOs must be accredited by the Office of the High Commissioner for Human Rights to attend these sessions: OHCHR, *Information and Guidelines for Relevant Stakeholders* (July 2008) para. 19.

²⁸ Human Rights Council, Resolution 16/21, para. 13.

²⁹ Human Rights Council, Resolution 5/1, Annex, paras. 33 and 34 and Human Rights Council, Resolution 16/21, paras. 6 and 17. States are encouraged to 'conduct broad consultations with all relevant stakeholders' during the implementation process (*ibid.* para. 17). States are also encouraged to provide the Human Rights Council with a mid-term update on their implementation of accepted recommendations (*ibid.* para. 18).

³⁰ Human Rights Council, Resolution 5/1, Annex, paras. 27(d) and 36.

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and Technical Assistance, whose focus is on assisting least developed countries and small island developing states to engage with the UPR.³¹

The regulatory character of the UPR

The UPR's first complete cycle concluded in 2012. There is now a considerable body of writing focused on the UPR, constituting a cautious endorsement of the process.³² Much has been made of the fact that all 193 members of the UN participated in the first cycle.³³ Assessments of the success of the UPR often focus on statistics relating to states' implementation of recommendations, without assessing the UPR's impact more broadly. In particular, there has been little analysis of the performative or embodied processes of the UPR – the function and influence of its many rituals. This book seeks to fill this gap, as well as to provide a nuanced account of the UPR's potential impact. It examines the UPR in a variety of contexts: as part of the work of the HRC; within particular national situations; and as a tool for civil society. Its central focus is how the UPR functions as a regulatory mechanism.

The concept of regulation is a broad one, encompassing a range of influences on the course of events. A useful definition of regulation is offered by Julia Black:

the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve

³¹ Human Rights Council, *Establishment of Funds for the Universal Periodic Review Mechanism of the Human Rights Council*, HRC Res. 6/17, 6th sess., UN Doc. A/HRC/RES/6/17 (28 September 2007); Human Rights Council, Resolution 16/21, para. 19.

³² See, e.g., Elvira Dominguez-Redondo, 'The Universal Periodic Review: Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 *New Zealand Law Review* 637; 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' in *Dialogue on Globalisation Report* (Geneva: Friedrich Ebert Stiftung, September 2012); Karolina Milewicz and Robert E. Goodin, 'The Deliberative Capacity of International Organizations' (14 August 2013, unpublished); and Rhona Smith, 'To See Themselves as Others See Them': The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35 *Human Rights Quarterly* 1, 28.

³³ Participation in the first UPR cycle involved near universal provision of written reports, even though states have the option of submitting oral reports only. Cape Verde and Comoros were the only states in the first cycle to rely solely on oral reports (Dominguez-Redondo, 'The Universal Periodic Review', n. 32 above, n. 75).

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mechanisms of standard-setting, information-gathering and behaviour-modification.³⁴

This definition makes clear that regulation goes beyond legal rules or mechanisms. It is not limited to the activities of a centralised authority with coercive power and takes us beyond traditional ‘command and control’ models that characterise the state as the major regulatory authority. Black’s definition recognises that regulation may have unintended consequences. It is also broad enough to encompass political, social, economic and psychological pressures associated with or implied by the ‘attempt to alter the behaviour of others’. Characterising the UPR as a regulatory mechanism draws attention both to the goals it seeks to realise and to the specific devices it deploys in order to achieve these goals. Using a regulatory lens to examine the UPR brings the social and political power that the process exerts into focus, without assuming that the power is effective in relation to the explicit aims of the UPR. Such an analysis encourages rich description as well as critique in respect of the power relations at play. As we discuss below, regulatory theory also offers prescriptive tools that extend beyond those commonly relied upon in the arena of human rights.

The chapters in this book acknowledge the UPR’s contribution to moulding an international human rights agenda, and engage with its claim to influence the recognition and realisation of rights within states. Contributors also recognise that over time the UPR may itself be shaped by those who participate in the process, as well as by external influences. They consider how the UPR has affected particular states, and how states and their representatives have engaged with the process. They discuss how the UN bureaucracy shapes the proceedings, and how NGOs deploy the UPR. The chapters therefore go beyond a legal analysis of the UPR; they pay attention to its formal and ceremonial aspects and reveal both the UPR’s dependence on rituals and its tendency towards ritualism. They raise questions of the relationship between rituals and ritualism in the UPR process, and the effect of both on the UPR as a regulatory mechanism.

Rituals and the UPR

We understand rituals as ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody. Rituals are a means of enacting a social consensus – or at least of

³⁴ Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.

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demonstrating the efficacy of the mode of power they internalise. They can be markers of success, indicating that a way of thinking or of being has achieved some degree of permanence and importance: enshrining a practice as ritual reduces contestation. An example is rituals of transitional justice and of apology that mark a break between the old and the new, and signal a society's recognition of certain wrongs, as well as its determination to leave these wrongs behind. Although they seek to inaugurate a new order, such rituals are signs of success in the sense that they embody a new consensus about how a society now relates to its past and also intends to move beyond it.³⁵ In doing so, rituals can help to establish and entrench that consensus. Rituals can also be understood as a more prosaic form of human engagement, helping make sense of incoherence in our social and political lives. On this account, rituals are concerned with 'the endless work of building, refining, and rebuilding webs of relationships in an otherwise fragmented world'. They may contribute to 'a world that, for brief moments, creates pockets of order, pockets of joy, pockets of inspiration'.³⁶

To engage in a ritual is to take part in an embodied performance. As such, participants' focus is often on the requirements of the performance rather than on its regulatory significance. Our aim here is, first, to highlight the presence of ritual in the UPR process. The cyclical nature of this process, and its carefully managed calendar of events, contributes to its ritualistic character. The process itself is also intricately managed and highly formalised. All parties must conform to the requirements of the process in order to secure their participation. Gerd Oberleitner's account of the functioning of global human rights institutions illuminates this nicely. As he argues, these institutions:

translate the concerns of human rights – upholding human dignity, protecting the vulnerable, empowering the powerless, remedying wrongdoing – into processes and procedures. In order to gain access to global human rights institutions, victims have to be turned into 'parties' submitting a 'communication', or else they go unheard; perpetrators have to be labelled as 'agents of the state', or else they cannot be held accountable; and NGOs have to seek 'consultative status' with inter-governmental bodies, or else they will not gain access to the conference hall.³⁷

³⁵ Danielle Celermajer, 'Mere Ritual? Displacing the Myth of Sincerity in Transitional Rituals' (2013) 7 *International Journal of Transitional Justice* 289.

³⁶ Adam B. Seligman, Robert P. Weller, Michael J. Puett and Bennett Simon, *Ritual and its Consequences* (New York: Oxford University Press, 2008) p. 180.

³⁷ Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Cambridge/Oxford/Boston, MA: Polity Press, 2007) p. 14.

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Observers of the UPR, whether sitting in the spectacular Salle XX of the Palais des Nations in Geneva where the Council meets, watching webcasts of proceedings, or ploughing through the summary records, are spectators to the elaborate rituals embedded in the process. These include the extended formal introductions, the courtly congratulations, the rigorously observed time constraints (speakers who exceed their allocated time have their microphones cut off)³⁸ and the formulaic structure and style of UPR documents.³⁹ Observers may register these rituals as entertaining, foreign, intimidating, bizarre, or perhaps just enervating, but they may be less likely to understand them as forms of social control and instances of regulatory power.

Ritualism and the UPR

As distinct from the concept of ritual, we use the term ritualism to describe a way of adapting to a normative order. Sociologist Robert Merton identifies five modes of individual adaptation to cultural values: conformity, innovation, ritualism, retreatism and rebellion.⁴⁰ These modes also appear at the level of organisations and among collectivities. All five modes are evident in responses to international human rights regulation, but ritualism is particularly pervasive. It can be defined as ‘acceptance of institutionalised means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves’.⁴¹ 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. A typology of responses to regulation that builds on Merton and that has resonance in the human rights field is that of ‘motivational postures’. Valerie Braithwaite identifies postures towards normative systems such as commitment, capitulation, disengagement, resistance and game-playing,

³⁸ Human Rights Council, Decision 17/119, para. 8(c).

³⁹ See, e.g., the HRC’s detailed guidelines on the subject matter to be covered in national reports: Human Rights Council, Decision 17/119, para. 2. The Council has also introduced strict word limits for working group reports, written views presented by the state under review after the interactive dialogue, and outcome reports: Human Rights Council, *Follow-up to President’s Statement 8/1*, UN Doc. A/HCR/PRST/9/2 (24 September 2008).

⁴⁰ Robert Merton, *Social Theory and Social Structure* (New York: Free Press, 1968) p. 194.

⁴¹ John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care* (London: Edward Elgar, 2007) p. 7.