**The Effectiveness of South Africa’s Engagement with the Universal Periodic Review (UPR): Potential for Ritualism?**

**By**

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1. **Introduction**

Monitoring state implementation of human rights treaty standards was pivotal to the UN human rights system at its birth. Specific human rights treaties were established to monitor state compliance with treaty obligations primarily through the examination of state reports.[[1]](#footnote-1) The hope was that the reports would foster ‘constructive dialogue’ between states and the various treaty bodies composed by human rights experts.[[2]](#footnote-2) With the competence to examine state human rights reports and consider individual and inter-state complaints, these bodies soon ‘evolved into quasi-judicial bodies, displaying a formalised and relatively rigid procedure.[[3]](#footnote-3) However by 2000, the treaty monitoring system was in crisis as a result of the huge backlog in overdue reports, resource and financial constraints, and limited political support.[[4]](#footnote-4) While there have been several proposals in recent years to strengthen the human rights treaty body monitoring system,[[5]](#footnote-5) Olivier de Frouville, a member of the UN Human Rights Committee, notes that the development of the treaty bodies has reached its limits.[[6]](#footnote-6) As of January 2017, there were an overall total of 588 overdue treaty body reports.

The newest and distinct addition to the UN human rights system is the Universal Periodic Review (UPR) established by the HRC in 2006 to review the human rights situation in all states.[[7]](#footnote-7) The first cycle of the review (UPR I) spanned from 2008-2011 and the second cycle (UPR II) was undertaken from 2012-2016. The distinctive feature of the UPR, as a cooperative approach to human rights implementation, is that it is based entirely on cooperation and dialogue, and is inclusive, collaborative and a state-controlled process. The review takes place every 4.5 years in three main stages which include the preparation of state reports, review of the state in Geneva and the follow-up process. The four major principles underlying the review include objectivity, universality, cooperation and complementarity[[8]](#footnote-8) and with the principal objective of improving human rights situation on the ground.[[9]](#footnote-9) States are reviewed in accordance with obligations under the UN Charter, the Universal Declaration of Human Rights, binding human rights treaties, voluntary pledges and commitments made by states and applicable international humanitarian law.[[10]](#footnote-10) The review equally welcomes the participation of NGOs, albeit limited, during the plenary session of the HRC when a state report is being adopted.[[11]](#footnote-11)

South Africa undertook its UPR I in 2008 and UPR II in 2012. The South African government has been very vocal in showing its preference for the UPR. In 2010 it described the HRC as the body with ‘first instance’ responsibility for the universal enforcement of human rights, and the UPR as ‘the hallmark of the [Human Rights] Council’s work.’[[12]](#footnote-12) It is therefore important to examine whether this strong support for the mechanism can result in effective engagement with the UPR mechanism. The conclusion of UPR II (2012-2016) and the beginning of UPR III (2017-2021) invites a scholarly examination of the extent to which the mechanism is contributing to improving the human rights situation on the ground in South Africa.

Some scholars have questioned the efficacy of the UPR, especially the level of state control over the UPR process. Manfred Nowak, former UN Special Rapporteur on Torture, argues that the UPR ‘… suffers from the disadvantage that states’ performance in the field of human rights is assessed by other states rather than by independent experts.’[[13]](#footnote-13) According to Frouville, the UPR cannot address the compliance problem of the UN human rights system.[[14]](#footnote-14) Frouville contends that this problem can be effectively addressed by the creation of a World Commission of Human Rights with a strong institutional basis, and the powers to issue and enforce binding decisions.[[15]](#footnote-15) Similar desire for stronger and more confrontational approaches to human rights implementation is reflected in the argument that the best final model for securing human rights compliance is the establishment of a world court of human rights.[[16]](#footnote-16) For example, Manfred Nowak argues it is time for a world court of human rights because UN treaty bodies and other monitoring mechanisms have had little impact owing to their inability to issue and enforce binding decisions that would induce state compliance.[[17]](#footnote-17)

The notion that economic sanctions, adjudicative, legalistic and other confrontational approaches can best enforce human rights norms has undermined the potential for more cooperative mechanisms of monitoring human rights implementation. This article contends that the UPR mechanism which relies on cooperation and gives the state some degree of control over the process can be sometimes at least as, if not more effective than coercive mechanisms. However, a sincere and genuine engagement with the UPR is required to make the process effective. The interactive dialogue stage of the review in Geneva has been criticised for the lack of specificity with regard to state recommendations and the potential for rights ritualism. McMahon’s analysis of UPR I recommendations by states indicated that the majority were general recommendations.[[18]](#footnote-18) He argued that such recommendations give the implementing state freedom to determine the mode of implementation which can undermine the utility and impact of the recommendation.[[19]](#footnote-19) Abebe notes that African states generally make recommendations which are at times too general to be implemented.[[20]](#footnote-20) There is merit to the above criticisms given that such general recommendations can be frustrating because they are vague in terms of the means of implementation and the difficulties of measuring outcome. However, with the end of UPR II, it is important to further determine whether the lack of specificity with regards to recommendations by states was a challenge limited to UPR I. I argue in this article that the fact that a recommendation is general does not necessarily imply that it is not relevant and that such recommendations may translate into specific actions at the point of implementation.

Rights ritualism has also been highlighted as one of the core challenges to the central aspect of the UPR process.[[21]](#footnote-21) In the context of the UPR, Charlesworth and Larking, define ritualism as ‘participation in the process of reports and meetings but an indifference to, or even reluctance about, increasing the protection of human rights.’[[22]](#footnote-22) They identify elements of cynicism in state’s involvement during the interactive dialogue phase of the review.[[23]](#footnote-23) They argue that some states have claimed they recognise certain rights within their states when that is not the case.[[24]](#footnote-24) In contrast to Charlesworth and Larking, Milewicz and Goodin argue that the UPR is a deliberative success for peer-to-peer accountability because of its insistently cooperative and inclusive character which can facilitate a genuine discussion of existing human rights violations.[[25]](#footnote-25) According to Milewicz and Goodin, the interactive dialogue phase involving states, and to a limited extent civil society, effectively induces a cooperative and deliberative culture within the mechanism that is encouraging states to comply with human rights standards.[[26]](#footnote-26) This article considers the phenomenon of rights ritualism by examining South Africa’s receptiveness to UPR recommendations.

In determining the effectiveness of South Africa’s engagement with the UPR mechanism, this article develops a four-step approach to evaluating the ‘effectiveness’ of state engagement with the UPR which is applied in my analysis. This approach evaluates ‘effectiveness’ in terms of the level of state commitment to the UPR national consultation process; representativeness during the review; participation during the review sessions; and the aggregate percentage of implemented UPR recommendations. Part II of this article applies the first two steps in my four-step approach to determining the effectiveness of state engagement by examining South Africa’s commitment to the UPR national consultation process, and the quality of South Africa’s delegation for the UPR. With regard to the first issue, I examine South Africa’s approach to the UPR national consultation process and the inclusivity of the consultation process to determine whether the requirement of a ‘broad consultation with all relevant stakeholders at the national level ‘was satisfied. [[27]](#footnote-27) On the second issue, examining the quality of South Africa’s UPR delegations will enable a determination on the competency of the delegations for the review. The nature of South Africa’s UPR delegations will also contribute to determining whether the South African government viewed the UPR process as a foreign affairs issue or as a process facilitating the examination and improvement of the human rights situation on the ground.

In Part III, the third step in evaluating the effectiveness of state engagement with the UPR is applied by examining the participation of South Africa in UPR I and II as a reviewer and as a state under review. I underscore South Africa’s approach to cooperation, contrast the quality of the recommendations it made to its regional peers and those made to other groups of states, and consider South Africa’s responses to UPR recommendations. Part IV engages with the last step to assessing the effectiveness of state engagement with the UPR by analysing the extent to which South Africa implemented the UPR I recommendations. I underscore the potential for rights ritualism by examining three important issues that featured prominently in the review of South Africa. These are corporal punishment, violence based on sexual orientation, and racism and xenophobia. I argue that while there is a potential for rights ritualism, effective NGO engagement can contribute to countering rights ritualism in the UPR. This four-step approach to evaluating the effectiveness of state engagement with the UPR provides important indicators to a state’s level of engagement and enables a comprehensive assessment of that engagement by examining state engagement with the key stages of the UPR process.

1. **Commitment to the Pre-Review Process and the Quality of South Africa’s UPR Delegation**
   * 1. ***South Africa’s UPR National Consultation Process***

HRC Resolution 5/1 requires states to undertake a broad consultation in preparing their national reports but leaves it open as to the particular approach to broad consultation that states are required to take or what will be sufficient to amount to a broad consultation.[[28]](#footnote-28) The approaches that states have adopted have not been uniform and they are sometimes inconsistent. For example Nigeria during UPR I organised a National Consultative Forum[[29]](#footnote-29) but during UPR II set up an inclusive National Committee on the UPR.[[30]](#footnote-30) Morocco held four meetings with ministerial departments, public agencies and institutions, and the Consultative Council on Human Rights.[[31]](#footnote-31)

In the case of South Africa, the government did not effectively engage with the UPR national consultation process. During UPR I, South Africa did not undertake any consultation in the preparation of its UPR state report. Some NGOs in their UPR I submissions stated that no consultation was undertaken and that it was unknown whether a state report was being prepared.[[32]](#footnote-32) In fact, South Africa is reported to be the only UN member state that did not submit a written report in advance of its UPR I.[[33]](#footnote-33) State reports for the UPR are generally due six weeks prior to the review.[[34]](#footnote-34) South Africa’s report that was due in January 2008 was only submitted on 15 April 2008, the same day South Africa was reviewed in Geneva. In addition, the late report submitted by the state during the interactive dialogue did not follow some other guidelines for the state report.[[35]](#footnote-35) The guidelines for the preparation of state reports require that states provide in their UPR reports a ‘description of the methodology and the broad consultation process…’ followed in the preparation of their state reports.[[36]](#footnote-36) South Africa’s late UPR I report did not comply with this guideline, presumably because there was no such consultation.[[37]](#footnote-37) The South African Human Rights Commission (SAHRC) criticised the government for its lack of commitment to the reporting process.[[38]](#footnote-38)

The South African government made improvements during South Africa’s UPR II. It submitted the state report in time and complied with the structural guidelines of the UPR state report. However, while the state UPR report provided information on the nature of the national consultation process, the process did not satisfy the requirement for a broad and representative UPR consultation. On this issue, the government stated that it undertook an ‘extensive national consultative process across government’ in the preparation of its state report.[[39]](#footnote-39) This implicitly suggests that there was no meaningful national consultation with NGO stakeholders as the consultation was solely across government institutions. Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa, in their UPR II submission, criticised the failure of the South African government to consult NGO stakeholders in a timely and meaningful manner during UPR II.[[40]](#footnote-40)

Comparatively, the African Peer Review Mechanism (APRM) has had a higher level of engagement from South Africa than the UPR.[[41]](#footnote-41) For example in the preparation of its 2014 country report to the APRM, the South African government organised consultations across various provinces with various stakeholders, including NGOs, faith based organisations and the business sector.[[42]](#footnote-42) In addition this report was discussed and adopted in parliament.[[43]](#footnote-43) While the level of consultation in the preparation of state report for the APRM has not been sufficient,[[44]](#footnote-44) the mechanism has witnessed greater involvement of parliament, CSOs and individuals than the UPR. However, the UPR is comparatively a more recent mechanism than the APRM and state engagement with the UPR has improved across both cycles of the review.

Despite the disparity between the national consultation process in the APRM and the UPR, the UPR may have had some impact on South Africa’s human rights treaty body reporting obligations across South Africa’s UPR I and II. At the time of South Africa’s UPR I in 2008, South Africa, as many UN member states, had a backlog of overdue reports before the various human rights treaty bodies.[[45]](#footnote-45) After UPR II in 2012, the South African government has made a committed effort to comply with its reporting obligation. On 26 November 2014, it submitted to the various UN human rights committees 12 of its 14 outstanding treaty body reports. These include the initial report to the Human Rights Committee (due in 2000); II-IV reports to the Committee on the Elimination of all forms of Discrimination against Women (due in 2009); IV-VIII reports to the Committee on the Elimination of Racial Discrimination (due in 2002); and the initial report to the Committee on the Rights of Persons with Disabilities.[[46]](#footnote-46) While it may be uncertain to draw a causal relationship between engagement with the UPR and compliance with treaty body reporting obligations, it is plausible that the former has an impact on the latter, given that about 828 of the total UPR I recommendations by all states (about 4% of the total recommendations) were on state engagement with the treaty bodies.[[47]](#footnote-47)

* + 1. ***The Quality of South Africa’s UPR Delegation***

There are no stated guidelines on the composition of a state’s UPR delegation.[[48]](#footnote-48) However, for a state to participate effectively in the interactive dialogue, the delegates should have the competence to respond to questions and have up-to-date information on the efforts taken by their state to comply with its human rights obligations. The composition of a state’s UPR delegation can be indicative of the way in which the state perceives the UPR process. Sweeny and Saito mentioned that a UPR state delegation headed by the foreign ministries denote that the state views the review ‘as a foreign affairs exercise rather than a national process for the examination and improvement of human rights protection and promotion.’[[49]](#footnote-49) Further, while there are no requirements on the number of personnel to represent the state, there is a requirement for the integration of a gender perspective.[[50]](#footnote-50)

An analysis of the composition of South Africa’s UPR I delegation clearly indicates that the government took the UPR process more as a foreign affairs matter rather than a process for the examination and improvement of human rights. The delegation was composed of seven delegates. The South African Ambassador and Permanent Representative to the UN Office at Geneva headed the delegation and all the delegates were from her Department of Home and Foreign Affairs.[[51]](#footnote-51) Judith Cohen, Head of Parliamentary and International Affairs Programme of the South African Human Rights Commission, criticised the government for sending an exclusively Geneva-based delegation for its review.[[52]](#footnote-52) She expressed disappointment at the inability of the delegation to provide sufficient responses and up-to-date information to questions asked during the review.[[53]](#footnote-53)

During UPR II, the government made improvements to the quality of its UPR delegation and included representatives from the Justice and Human Rights Departments.[[54]](#footnote-54) The delegation was composed of 20 personnel and headed by the Deputy Minister of Justice and Constitutional Development.[[55]](#footnote-55) In addition, the South African government fully integrated gender balance in its UPR delegation. During UPR I, South Africa’s delegation was headed by Ms. Glaudine Mtshali, Ambassador, Permanent Representative of South Africa to the United Nations Office at Geneva, and four of the seven delegates were female. During UPR II, seven of the 13 delegates were female. However, the future composition of the South African UPR delegation could be strengthened by including representatives from Parliament.[[56]](#footnote-56) Parliament has an important role to play in the UPR process and could ensure that government complies with its UPR reporting obligations. Moreover, including parliamentary representatives in the UPR delegation can facilitate collaboration between government and parliament, with regard to the implementation of UPR recommendations that require parliamentary approval such as treaty ratification by the executive branch of government. Nevertheless, the UPR is an evolving mechanism and the engagement of South Africa on the above aspect of the review has improved across the two cycles of the review. The quality of the UPR I South Africa delegation may have indicated that the state was less committed to the process by viewing it simply as a foreign affairs exercise. However, the improvement that was evident in the UPR II delegation in the case of South by incorporating legal and judicial personnel as well as instituting a gender balance in its respective UPR delegations signals an increasing commitment to the UPR mechanism.

1. **South Africa as a Reviewer and as a State under Review**
   * 1. ***South Africa as a Reviewer***

An examination of South Africa’s engagement as a reviewer reinforces the universality and non-selectivity of the UPR mechanism. During UPR I, South Africa participated in the review sessions of all the five groups of states. It participated and made recommendations to 32 African States, 16 Asian states, 3 states from the Eastern European Group (EEG),[[57]](#footnote-57) 11 states from Group of Latin American states (GRULAC) and 10 states from the Western European Group (WEOG).[[58]](#footnote-58) It participated in a similar manner during UPR II.[[59]](#footnote-59) South Africa is among the top 5 African states that have made the highest number of recommendations during the first two cycles of the UPR.

However, only the quality - not the quantity of recommendations - has the capacity to improve the human rights situation on the ground. A good recommendation should be relevant and have the capacity to promote meaningful and measurable human rights changes on the ground. This falls in line with what Roland Chauville describes as SMART recommendations, those that are specific, measurable, achievable, relevant and time-bound.[[60]](#footnote-60) In the following analysis, I adopt McMahon’s action category which ranks UPR recommendations into five different categories.[[61]](#footnote-61) Rank 1 represents recommendations requiring only minimal action from the state under review and uses verbs such as to ‘seek’ technical assistance or ‘share’ experiences in framing the recommendations. Rank 2 includes recommendations which emphasize continuity. They require states to ‘continue’ certain actions already commenced. In this category, verbs such as ‘continue’, ‘maintain’, ‘persevere’, ‘persist’, and ‘pursue’ are used in making the recommendations. Rank 3 recommendations require states to consider undertaken a certain action and key verbs such as ‘analyse’ ‘consider’, ‘explore’, ‘examine’, ‘envisage’, ‘reflect upon’, ‘and ‘study’ are used. Recommendations that are categorized in rank 4 are those that request the state to undertake a general action. Examples of verbs used in their construction include ‘accelerate’, ‘encourage’, ‘intensify’, ‘promote’ and ‘strengthen.’ Rank 5 recommendations are the most specific recommendation and demand specific action from states. Verbs used to frame Rank 5 recommendations include ‘eliminate’, ‘abolish’, ‘adopt’, ‘amend’, ‘accede’ and ‘ratify.’ Figure 3.1 and 3.2 below provide further analysis of South Africa’s participation as a reviewer to determine the extent of its participation and the quality of its recommendations.

**[INSERT FIGURE 3.1 and 3.2 HERE]**

As figure 3.1 and 3.2 above indicate, South Africa reviewed states across all the regional groups, with some variation. The fact that it participated and made more recommendations to states within the African Group indicates that its first loyalty is to the African Group. About 48% and 46% of the total South African recommendations made during UPR II and I respectively were made to African states.[[62]](#footnote-62) In terms of the specificity of the recommendations made (R5 recommendations), South Africa engaged the various groups of states with specific recommendations across the first two cycles of the UPR. The African Group in particular has experienced an increase in the percentage of specific recommendations made by South Africa (from 5% to 7%).[[63]](#footnote-63) However, in proportion to the total number of recommendations made to each group of states, GRULAC and WEOG have had more specific recommendations (R5) compared to African states. Notwithstanding, the recommendations made by South Africa to other states (including African states) are more specific compared to those made by other African states like Nigeria and Kenya but there is a general improvement in the specificity of UPR recommendations across UPR I and II. For example, Nigeria’s percentage of specific recommendations (R5) to its African regional peers increased from 1% to 4% across UPR I and II, as well as its percentage of specific recommendations to WEOG increased from 2% to 3%. This is in line with the commitment entered into jointly by the African Group (including South Africa) together with other states, to make UPR recommendations that are ‘precise, practical, constructive, forward-looking and implementable.’[[64]](#footnote-64) This reinforces the potential for the UPR to evolve over time in relation to the nature of UPR recommendations and to dispel early criticism with regard to their general lack of specificity.

An examination of the substance or relevance of the recommendations made by South Africa demonstrates a tendency to shield regional neighbouring states from critical review. South Africa exhibited a ‘quiet diplomacy’ in the review of Zimbabwe which undermined the objectivity of South Africa’s participation as a reviewer. During UPR I, South Africa made comments about the obstacles impeding the human rights efforts of the Zimbabwean government,[[65]](#footnote-65) but ignored the government’s repression and failed economic policies which impact on rights enjoyment. In addition, most of South Africa’s recommendations to African states were on socio-economic and development rights issues. However, no recommendation on these issues were made to Zimbabwe in spite of the fact that South Africa has recently experienced an unprecedented influx of Zimbabweans, largely attributed to failed economic policies and governance crisis.[[66]](#footnote-66) South Africa equally failed to be critical of Sudan despite its appalling human rights situation by making just one general recommendation with no particular focus.[[67]](#footnote-67) This recommendation lacking specificity required Sudan to ‘[g]ive priority to the promotion and protection of human rights in all policies developed by the Government.’[[68]](#footnote-68)

Further analysis on South Africa’s participation as a reviewer raises questions on its commitment to human rights, especially to protecting the rights of sexual minorities. Amidst criticism from the African Group, South Africa tabled a draft resolution before the HRC titled ‘Human Rights, sexual orientation and gender identity’, which expressed concern at violence and discrimination against sexual minorities.[[69]](#footnote-69) However, South Africa’s participation as a reviewer during the UPR does not reflect its support for the rights of sexual minorities, at least within the African region. African states received the highest number of recommendations on the decriminalisation of same sex relations.[[70]](#footnote-70) Despite this fact, South Africa made no recommendation on the issue to an African state, ignoring the growing specific legislation criminalising same-sex relations within Africa. South Africa made recommendations on sexual orientation to many states including the United States, Demark and Cuba, except to states within Africa and Asia where the criminalisation is predominant.[[71]](#footnote-71) This undermines South Africa’s commitment to protecting the rights of sexual minorities and demonstrates the potential for regionalism in the engagement of African states with the UPR mechanism by underscoring the inability for South Africa to break away from the general position of the African Group on sexual minorities in its intra-African UPR engagement. Nonetheless, the increasing relevance and specificity of UPR recommendations underscores the potential for the UPR mechanism to evolve into an effective cooperative mechanism for monitoring human rights implementation.

* + 1. ***South Africa as a State under Review***

South Africa undertook its UPR I and II in April 2008 and May 2012 respectively. Eighteen states made 22 recommendations to South Africa during UPR I.[[72]](#footnote-72) South Africa did not directly respond or clarify its position on any of the 22 recommendations at the adoption of its UPR I outcome report, as was the norm.[[73]](#footnote-73) This may be explained by the fact that South Africa was the second state reviewed under the UPR mechanism and the practice for states to clearly communicate their responses to UPR recommendations had not fully developed. Responses to UPR recommendations are crucial because the modalities for the UPR provides that ‘[t]he second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations.’[[74]](#footnote-74) In 2011, a review of the work and functioning of the HRC resulted in the adoption of a resolution requiring states under review to ‘… clearly communicate to the Council, in a written format preferably … its positions on all received recommendations...’[[75]](#footnote-75)

During UPR II, there was an improvement in South Africa’s responses to recommendations from its peers. Sixty-seven states made 151 recommendations to South Africa. South Africa directly responded to about 90% of the recommendations but still failed to declare its position on about 10% of the recommendations. From the 151 recommendations, South Africa declared 80% as ‘acceptable’, about 9% ‘not acceptable’ and less than 1% were ‘rejected’.[[76]](#footnote-76) The only recommendation explicitly rejected concerned allegations of sexual exploitation and abuse by South African peacekeepers.[[77]](#footnote-77) The South Africa delegation stated that ‘[i]n view of the political gravity of this exaggerated allegation, the South African government has decided to reject this allegation and take the matter up bilaterally with the Canadian government at a political level.’[[78]](#footnote-78) South Africa did not provide a clear response to about 10% of the recommendations. These included recommendations such as to ‘[a]ccede to the Agreement on Privileges and Immunities of the ICC’ and to establish without delay an independent national monitoring mechanism on the Rights of Persons with Disabilities. Figure 3.3 below analyses the recommendations made to South Africa during UPR II and its responses to the various categories of recommendations.

**[INSERT FIGURE 3.3 HERE]**

Figure 6.3 indicates that South Africa engaged with the various categories of recommendations. The majority of the recommendations accepted by South Africa were general recommendations (about 37% of overall 151 recommendations). However, it accepted some specific recommendations (20% of overall 151 recommendations). Another observation is that South Africa rejected more specific (R5) recommendations (about 9% of the total recommendations) when compared to the percentage of recommendations rejected from the other categories.[[79]](#footnote-79) The majority of recommendations made by African states to South Africa during UPR II (74%) required a general (R4) or continuing (R2) action from South Africa. All of these recommendations were declared ‘acceptable’ by South Africa. In contrast, 92% of the recommendations that were declared ‘not acceptable’ by South Africa were made by Western states. This reinforces the theme of regionalism and highlights the diverging approach to cooperation in the UPR between African and Western states. In addition, the improvement in the response of South Africa across UPR I and II is an indication of evolving practice as states are increasingly providing clearer responses to their position on each UPR recommendation.

The rank under which a recommendation falls presents a clearer picture of a state’s level of receptiveness and plays a crucial role during implementation. General recommendations (R4) give the state under review greater autonomy to define the manner of implementation but the more general a recommendation is, the harder it is to measure implementation. Unlike general recommendations, specific recommendations, when implemented, have the capacity to promote meaningful and measurable human rights changes on the ground. However, states can implement general recommendations through specific actions. In addition, the fact a recommendation is non-specific or less actionable does not necessarily mean it is qualitatively inferior or inconsistent with the ideals of the UPR. On the other hand, a specific recommendation (R5) may be more actionable but inconsistent with the ideals of the UPR by failing to ‘take into account the level of development and the specificities of countries’,[[80]](#footnote-80) consider the capacity needs of the country[[81]](#footnote-81) or aim to secure the ‘the improvement of the human rights situation on the ground.’[[82]](#footnote-82) The fact that the recommendations states make are non-specific does not necessary imply they are not relevant. Table 3.1 below provides a list of the top 12 issues raised during South Africa’s UPR I and II.

**[INSERT TABLE 3.1 HERE]**

The majority of the recommendations to South Africa during UPR I focused on violence against women and children, HIV/AIDS treatment and discrimination based on race or sexual orientation.[[83]](#footnote-83) The three issues that appeared predominantly in the recommendations to South Africa during UPR II included violence and discrimination based on race, gender or sexual orientation (about 30% of overall 151 recommendations);[[84]](#footnote-84) treaty ratification (about 12%);[[85]](#footnote-85) and HIV/AIDS (about 11%).[[86]](#footnote-86)

In response to UPR I recommendations from its peers, South Africa stated that ‘[m]ost of the recommendations proposed for South Africa require serious contextualization… and have already been implemented through national legislation and programmes.’[[87]](#footnote-87) This could be interpreted to mean the recommendations were not relevant. For example, during UPR I, Slovenia made a specific recommendation that South Africa:

Commit not only to removing the defence of reasonable chastisement but also to criminalizing corporal punishment with the concomitant pledges towards raising awareness and providing the necessary resource to support parents in adopting positive and alternative forms of discipline.[[88]](#footnote-88)

The government of South Africa responded by stating that the issue of corporal punishment at home is being dealt with by the South African Domestic Violence Act 1998.[[89]](#footnote-89) It further stated that it has outlawed corporal punishment at school by legislation but there are only ‘isolated cases of non-compliance with legislation for which corrective measures are usually taken.’[[90]](#footnote-90) However, NGOs such as Children Now, Global Initiative to End Corporal Punishment of Children, and the South African Human Rights Commission have repeatedly made recommendations for the government to ban corporal punishment at home and to remove the defence of ‘reasonable chastisement.’[[91]](#footnote-91) The special attention given to the issue of corporal punishment by various stakeholders during South Africa’s UPR I underscores the relevance of the recommendations on corporal punishment. The relevance of these recommendations was reinforced by Mexico during UPR II when it recommended that the South African government should ‘[p]rohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons.’[[92]](#footnote-92) In Part IV of this article, I examine the extent to which the South African government implemented these recommendations on corporal punishment.

On other issues, such as violence based on sexual orientation, racism and xenophobia, the government of South Africa responded by referring to the constitutional protection in place and to its international endorsement of LGBT rights at the HRC.[[93]](#footnote-93) However, this undermines the commitment to increase domestic protection of the relevant human rights issues because the substance of many of the UPR recommendations raised concern on the inadequacy and inefficacy of the existing protective measures. Examples of such UPR recommendations to South Africa include ‘reinforce measures to combat and prevent xenophobia…’[[94]](#footnote-94) and to enhance the prevention, investigation and prosecution of crimes of violence against individuals based on their gender or sexual orientation.[[95]](#footnote-95)

Nevertheless, it is observable, from an examination of South Africa as a state under review, that there has been an improvement in the engagement of South Africa with the UPR across UPR I and II. South Africa, has provided clarification and comments on the government’s position on each of the UPR II recommendations. It accepted a high percentage of the total UPR II recommendations (80%). This provides evidence of an increasing level of engagement with the UPR mechanism. In addition, the parallel between some of the recommendations made by states and NGOs underscores the relevance of such recommendations to improving the human rights situation on the ground. However, the receptiveness of South Africa to its UPR I recommendations demonstrates the potential for rights ritualism. As I noted in the introduction to this article, this concept in the context of the UPR relates to the participation of states in the UPR process but with reluctance about increasing the domestic protection of human rights.[[96]](#footnote-96) The reluctance of the South African government to accept recommendations that raised concern on the inadequacy and inefficacy of the existing measures for human rights protection limits the extent of the state’s engagement at this stage of the review.

1. **South Africa’s Implementation of UPR Recommendations**

Implementation of UPR recommendations is a central component of my model to evaluating the effectiveness of state engagement with the UPR mechanism. This section engages with the last component of the four-step approach to measuring the effectiveness of state engagement with the UPR by analysing the extent to which South Africa implemented its UPR recommendations. I limit the analysis to UPR I recommendations because UPR II only recently ended and information on implementation is not yet available.

The implementation timeframe for South Africa to implement its UPR I recommendations ran from April 2008 to May 2012 when it submitted its UPR II report. It is important to consider this timeframe when measuring implementation because the UPR is a dynamic and on-going process, and the human rights situation on the ground is constantly changing. As a result, the implementation of South Africa’s UPR I recommendations is only analysed within this timeframe. The analysis on implementation employs the Implementation Recommendation Index (IRI) that is based on an average of stakeholders’ responses on the implementation outcome of each recommendation.[[97]](#footnote-97) The analysis is based on the 22 UPR I recommendations made to South Africa.

At the conclusion of South Africa’s UPR I, the South African government had fully implemented about 14% of the 22 recommendations, 46% were partially implemented and 32% were not implemented. About nine percent of the recommendations were not assessed because the stakeholders’ did not provide any responses on implementation. The recommendations not assessed were vague, making it very difficult to assess their implementation outcome. An example is the recommendation by Sudan that the South African government should ‘give special attention to the role of international cooperation for the enjoyment of economic, social and cultural rights.’[[98]](#footnote-98) The recommendations that UPR stakeholders considered as fully implemented only related to HIV/AIDS, while the partially implemented recommendations were mostly on the issues of poverty and education, xenophobia and discrimination based on race and sexual orientation. I specifically examine below the implementation of three groups of issues that featured prominently in the review of South Africa and I consider the potential for rights ritualism. These three issues are corporal punishment, violence based on sexual orientation and gender identity, and racism and xenophobia. As I earlier highlighted, many of these issues were relevant and addressed the inadequacy or ineffectiveness of the measures put in place by the government to address these human rights concerns.

* + 1. ***Corporal Punishment***

The issue of corporal punishment featured among both state and NGO recommendations to South Africa during UPR I and II. As earlier indicated, the government of South Africa responded to these recommendations during the review by referring to existing legislation that outlaws corporal punishment at schools and that there were only ‘isolated cases of non-compliance.’ The government provided a similar response in its comments on the implementation of the recommendation on corporal punishment and further stated that ‘the country has experienced a significant reduction in regard to corporal punishment.’[[99]](#footnote-99)

However, various UPR stakeholders were in consensus in their response that the government did not implement this recommendation. For example, the South African National Human Rights Commission responded that the South African government has not taken steps to implement the recommendation and repeated the exact wording of the recommendation made by Slovenia on this issue for South Africa during UPR II.[[100]](#footnote-100) Global Initiative to End Corporal Punishment of Children stated that despite recommendations made to South Africa on this issue, ‘the legality of corporal punishment of children in South Africa has not changed since the review in 2008’ as corporal punishment continues to be lawful at home.[[101]](#footnote-101) The South African Schools Act (1996) and other relevant laws expressly prohibit corporal punishment in schools. Section 10 of the South African Schools Act provides that ‘[n]o person may administer corporal punishment at a school to a learner.’ The Constitutional Court of South Africa in the case of *Christian Education SA v Minister of Education* reinforced this.[[102]](#footnote-102) However, there is no explicit prohibition of corporal punishment at home. According to Save the Child et al, the South African government did not implement the 2008 UPR recommendation on corporal punishment as corporal punishment continued to be practised at home, in schools and other social settings.[[103]](#footnote-103)

In addition, 2014 findings by the Centre for Child Law at Pretoria University suggest that there is an ‘official ambivalence’ towards the ban on corporal punishment.[[104]](#footnote-104) The Centre found that approximately 2.2 million children were exposed to corporal punishment and that the phenomenon has been on a steady increase in certain provinces in South Africa.[[105]](#footnote-105) Similar recommendations made by the UN Committee on the Rights of the Child, the UN Committee against Torture and more recently by the African Committee of Experts on the Rights and Welfare of the Child have not been implemented.[[106]](#footnote-106) They expressed concern at the continuous use of corporal punishment in schools. Their recommendations were that the government ensure that legislation banning corporal punishment is strictly implemented in schools and take effective measures to prohibit corporal punishment at home.[[107]](#footnote-107) The response of the government that simply points to existing legislation on corporal punishment underscores its reluctance about increasing the domestic protection of human rights. It fails to consider the inadequacy or ineffectiveness of the measures put in place to end corporal punishment at school and home.[[108]](#footnote-108) This demonstrates the potential for rights ritualism, which as I argue, can be overcome over time by effective NGO advocacy that engages the government in dialogue about the implementation of UPR recommendations and hold them accountable for their UPR commitments.

* + 1. ***Violence based on Sexual Orientation***

As indicated on Table 3.1, violence based on sexual orientation is one of the issues that featured prominently among state recommendations to South Africa during UPR I and II. Recommendations that states made to South Africa on sexual orientation include: undertaking credible investigation and prosecuting perpetrators; enhancing prevention and monitoring capacity; training police and judiciary; and launching awareness-raising campaigns.[[109]](#footnote-109) In some ways, South Africa is an exception to the general criminalisation and discriminatory treatment confronting the LGBT community in Africa. Article 9 (3) of the South African Constitution explicitly prohibits discrimination against anyone based on sexual orientation.[[110]](#footnote-110) At the international level, South Africa has achieved a milestone in advancing the rights of LGBT persons worldwide. In 2011, despite strong criticisms from its regional peers, South Africa tabled a draft resolution before the HRC that expressed concern at violence and discrimination against persons based on their sexual orientation.[[111]](#footnote-111) South Africa was the only African state that voted in favour of a subsequent resolution on sexual orientation in 2014.[[112]](#footnote-112) South Africa’s response to state recommendations on this issue during UPR I and its comments on implementation simply made reference to the above domestic constitutional protection, government policy framework on combating hate crime and its international endorsement of the LGBT rights at the HRC.[[113]](#footnote-113)

However, South Africa’s role on the issue of sexual orientation lacks a consistent actual commitment domestically and internationally. According to various NGO reports, the domestic situation of LGBT individuals remained generally grim as they reportedly faced violence and intimidation because of their sexual orientation.[[114]](#footnote-114) In 2011, Human Rights Watch published a report that found a dichotomy between the constitutional ideals and public attitude towards such individuals.[[115]](#footnote-115) Furthermore, it found that despite the constitutional protection on the rights of the LGBT community, discrimination against them remained institutionalised in the communities, families and state institutions.[[116]](#footnote-116)

According to a joint report by the Centre for Applied Psychology of the University of South Africa and NGOs working on gay rights, State responses to violence based on sexual orientation have fallen short in many aspects.[[117]](#footnote-117) They argue that there is lack of official monitoring and reporting since there is no effective system to monitor and collect data on such crimes.[[118]](#footnote-118) The absence of such a system, they further argue, impedes policymakers from understanding the scope of the problem and developing adequate responses.[[119]](#footnote-119) Moreover, there is the growing phenomenon of ‘corrective’ or ‘curative’ rape in South Africa, in relation to which Lea Mwambene argues that the government has failed to fulfil its constitutional mandate.[[120]](#footnote-120) According to Mwambene, the government failed in its constitutional mandate by defining ‘corrective’ rape as a crime of rape instead of a hate crime, and for the failure of the courts to resolve the conflict between the right to culture and the rights to equality in the context of ‘corrective’ rape.[[121]](#footnote-121) Likewise, in 2011, the UN Committee on the Elimination of All Forms of Discrimination against Women expressed ‘… serious concern about the practice of so called “corrective rape” of lesbians’ in South Africa.[[122]](#footnote-122)

Nevertheless, various NGOs have commended several positive efforts by the South African government in responding to domestic violence based on sexual orientation such as the increasing high-level government rhetoric in support of tolerance and non-discrimination and the advancement of a Hate Crime Bill.[[123]](#footnote-123) But the rhetoric and strong conservative views about sexual minorities held by some other key public figures and those who design government policies in South Africa have not been helpful. For example, in 2012, Peter Holomisa, Chairperson of Parliament’s Constitutional Review Committee, stated that ‘homosexuality was a condition that occurred when certain cultural rituals have not been performed’ and further said, ‘when rituals are done, the person starts to behave like others in society.’[[124]](#footnote-124) Jacob Zuma, now President of South Africa, was criticised in 2006 for publicly describing same-sex marriages as ‘a disgrace to the nation and to God.’[[125]](#footnote-125) While he did not hold any public position at the time the statement was made, it may colour his level of commitment to protecting the rights of sexual minorities. Such statements and views by public officials undermine the commitment of the South African government to protect the rights of LGBT individuals.

At the international level, South Africa’s commitment to protecting the rights of sexual minorities has also been inconsistent. As earlier noted, it made no recommendations on the issue to its regional peers during UPR I and II despite the fact that African states received the highest number of recommendations on sexual orientation. This demonstrates a reluctance to take a definite position at odds with the majority of African states. Graeme Reid has criticised South Africa for supporting a regressive HRC resolution on ‘Protection of the Family’ that infringed on the rights of the LGBT community.[[126]](#footnote-126) He argued that reference to a singular ‘family’ in the resolution without acknowledging diversity could be used as precedent to oppose rights for LGBT couples in later negotiations.[[127]](#footnote-127) Reid equally observed in 2014 that South Africa stopped attending meetings of the core group of LGBT-friendly states.[[128]](#footnote-128)

South Africa’s role in the advancement of LGBT rights is an important one. However, the government of South Africa has not been consistent in its commitment internationally or taken the lead in engaging its regional peers on this issue that tends to be hypersensitive within the continent. At the domestic level, the government has not addressed the inadequacies of the existing protective measures for the protection of the rights of sexual minorities. Enhancing prevention and monitoring capacity, and launching awareness-raising campaigns as recommended by UPR stakeholders, could help narrow the gap between the constitutional ideals and the attitude of the public towards the LGBT community.

* + 1. ***Racism and Xenophobia***

Addressing racism and xenophobia was a prominent issue in the review of South Africa with a dramatic increase from two recommendations during UPR I to 12 recommendations during UPR II. Most of these recommendations required the government to ‘reinforce measures to combat and prevent xenophobia…’ and to ‘take all necessary steps to address the issue of xenophobia through legislation…’[[129]](#footnote-129) Most of these recommendations focused on the ineffectiveness of existing measures to combat racism and reflected similar concerns raised by the human rights treaty bodies and other African regional mechanisms. For example in August 2006, the UN Committee on the Elimination of Racial Discrimination (CERD) was concerned about the frequency of hate crimes in South Africa and the ‘inefficacy of the measures in preventing such crimes.’[[130]](#footnote-130) It recommended that the government ‘adopt legislative and other effective measures to prevent, combat and punish hate crimes.’[[131]](#footnote-131) In 2007, similar recommendations came from the African Peer Review Mechanism after observing that ‘xenophobia… is currently on the rise and should be nipped in the bud.’[[132]](#footnote-132) The similarity between the recommendations from various human rights mechanisms emphasizes the relevance of these UPR recommendations to improving the human rights situation on the ground. In addition, it reinforces my argument that the UPR can potentially create a synergy with other national, regional and international human rights mechanisms by amplifying and reinforcing their recommendations.

However, the recurrence of subsequent xenophobic incidents may be an indication that the South Africa government did not engage with the above recommendations to proactively prevent its recurrence. In May 2008, a spate of xenophobic violence in South Africa left more than 60 people dead, 342 shops looted and 213 burnt down, and about 100,000 people displaced.[[133]](#footnote-133) Mauritania and Switzerland questioned the South African delegation on this incident, which had been described as xenophobic, during the adoption of South Africa’s UPR I report in June 2008.[[134]](#footnote-134) The government in its response at the eight session of the HRC was hesitant to recognise the incident as xenophobic. It stated that: ‘[t]he government of South Africa is on record as having publicly deplored the recent acts of violence against foreigners in the country by individuals and groups, ostensibly motivated by xenophobia.’[[135]](#footnote-135) More than two major instances of xenophobic attacks continued between 2008 and 2011.[[136]](#footnote-136) In April 2015, there was recurrence of major xenophobic violence in Durban with at least five people killed, about 2,000 displaced and several foreign-owned shops looted.[[137]](#footnote-137) This recurrence of xenophobic incidents in South Africa underscores the ineffectiveness of the government’s measures to combat xenophobia.

Nevertheless, various stakeholders in their commentary on implementation recognised the specific challenge of racism and xenophobia in South Africa and some of the steps taken by the government to address the problem. The joint report by the Centre for Applied Psychology of the University of South Africa and other NGOs, among other things, commended the periodic public denunciation of specific xenophobic incidents by President Jacob Zuma and for taking steps to adopt specific legislation to address hate crime violence such as the drafting of the *Prevention and Combating of Hate Crimes and Hate Speech Bill*.[[138]](#footnote-138) In addition, the South African government in its comments on implementation referred to the substantive content of a draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP), which was being finalised.[[139]](#footnote-139) It also pointed to its leadership on resolutions against racism and xenophobia at the international level.[[140]](#footnote-140)

While South Africa has undertaken some measures to address the problem of racism and xenophobia, the ineffectiveness of these measures in preventing future recurrence in some parts of the country undermine the government’s effort. The narratives constructed by some South African government officials and influential traditional leaders on the xenophobic attacks help to undermine the efforts of the government. Shortly after the April 2015 xenophobic attacks in Durban, the Small Business Development Minister, Lindiwe Zulu, stated that the businesses of foreign Africans based in township areas could not expect to co-exist peacefully with local business owners unless they share their ‘trade secrets’.[[141]](#footnote-141) The reluctance of the government to condemn the rhetoric of King Goodwill Zwelithini, King of the Zulu people in South Africa undermines its commitment to addressing the problem of racism and xenophobia. King Zwelithini arguably played a role in inciting the 2015 xenophobic violence when he said at a public gathering that ‘African migrants should take their things and go.’[[142]](#footnote-142) The initial denial and ritual condemnation of such rhetoric and narratives undermines the government’s commitment to combat racism and xenophobia.

In summary, this section engaged with the issue of implementation as a component of the four-step approach to measuring the effectiveness of state engagement with the UPR mechanism. At the conclusion of UPR I, about 46% of the UPR I recommendations were either fully or partially implemented. This underscores the potential for the UPR to contribute to human rights change within states through an inclusive, cooperative and collaborative process. South Africa has made statements of strong support for the UPR mechanism and increased the level of its participation as a reviewer and as a state under review across UPR I and II. Its participation as a reviewer across regional lines demonstrates the universality and non-selectivity of the UPR mechanism. Moreover, the evidence of states implementing some of the UPR recommendations over time reinforces the potential value of a cooperative mechanism to contribute to human rights change within states. On 18 January 2015, South Africa implemented the UPR I recommendation to ‘ratify the International Covenant on Economic, Social and Cultural Rights [ICESCR]’[[143]](#footnote-143) In addition, the government’s commitment to provide a mid-term UPR implementation report, further indicates an increasing level of engagement with the UPR process. At the end of 2016, only 55 of the 193 UN member states submitted a UPR I mid-term implementation report.

However, the responses by the government to some of its UPR recommendations and the government’s commentaries on implementation indicates the potential for rights ritualism. As highlighted above, the South African government did not undertake a national UPR consultation process with NGOs during UPR I and II. There were some indications of rights ritualism in relation to implementation. In its response to state recommendations during UPR I, the government of South Africa claimed that it had already implemented most of the recommendations made by its peers.[[144]](#footnote-144) This underscores the reluctance of the government about increasing human rights protection and as I examined in this section, many of the UPR recommendations raised concern on the inefficacy or inadequacy of the existing measures for human rights protection. Another aspect of rights ritualism is evidenced in South Africa’s support for HRC resolutions on sexual orientation but its unwillingness to recommend de-criminalisation of same-sex relations or at least sensitisation, among its African regional peers.

**Conclusion**

An examination of South Africa’s engagement with the UPR mechanism showed an increasing level of engagement with the UPR process. While noting the potential for this cooperative mechanism to contribute to influencing changes within states, this article critiqued of some of the core challenges to the UPR process. I examined the phenomenon of rights ritualism in relation to the responses of the government of South Africa to UPR recommendations and its commentaries on implementation. Applying the four-step approach to evaluating the effectiveness of state engagement with the UPR provided a comprehensive analysis of South Africa’s engagement at various stages of the review.

In terms of its engagement at the pre-review process, there was a general lack of substantial commitment to a broad and inclusive UPR national consultation process. A state that undertakes an inclusive UPR national consultation process that seeks the views of domestic stakeholders and reflects those views in the final report would provide its peers with a reliable and realistic basis for reviewing the state’s human rights situation and for making relevant recommendations. Nevertheless, the improvements in the quality of South Africa’s UPR delegation that incorporated legal and judicial personnel and reflected a gender balance signalled an increasing level of commitment to the UPR mechanism. It also indicated a transformation of the government’s view of the UPR from a foreign affairs exercise to a process for the examination and improvement of human rights.

South Africa effectively engaged as a reviewer by reviewing states across all the five regional groups - demonstrating the universality and non-selectivity of the UPR mechanism. However, South Africa adopted separate approaches to the review of African states compared to Western states. South Africa’s review of African states was one of positive reinforcement compared to a more critical approach towards Western states. The divergent approach was illustrated with examples of Zimbabwe and Sudan and by the proportion of specific recommendations made to WEOG and GRULAC compared to African states. South Africa’s engagement equally underscored the potential for regionalism by its inability to break away from the position of the African Group, especially in relation to sexual orientation.

As a state under review, an improvement was observed in the engagement of South Africa across UPR I and II in terms of its responses to UPR recommendations. The high percentage of accepted recommendations (81%) and providing clearer responses to recommendations indicates an increasing commitment to the UPR process. However, as I examined, there is a potential for rights ritualism in the response of South Africa to recommendations on issues such as corporal punishment, and violence based on sexual orientation.

With regard to implementation, about 59% of the UPR I recommendations which were either partially or fully implemented indicated the potential for the UPR to contribute in influencing human rights change within states. The potential for some of the recommendations to be implemented outside the implementation timeframe demonstrate the potential for the UPR to evolve over time into an effective cooperative mechanism for monitoring human rights implementation. This was illustrated by reference to South Africa’s ratification of the ICESCR which was implemented outside the UPR I implementation timeframe. However, the phenomenon of rights ritualism poses a challenge as was examined in relation to issues such as corporal punishment, violence based on sexual orientation, and racism and xenophobia. Nevertheless, the increasing relevance and specificity of UPR recommendations, and the ability for the UPR to reinforce treaty body recommendations underscores the potential for the UPR mechanism to evolve into an effective cooperative mechanism for monitoring human rights implementation.

1. James Crawford, ‘The UN human rights system: A system in crisis’ in Phillip Alston and James Crawford (eds), *The Future of UN human rights treaty monitoring* (Cambridge University Press 2000) 1. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Frans Viljoen, ‘Fact-Finding by UN Human Rights Complaints Bodies – Analysis and Suggested Reforms’ (2004) 8 Max Planck Yearbook of United Nations Law 49, 63. [↑](#footnote-ref-3)
4. Ibid, 1-12 [↑](#footnote-ref-4)
5. See Navanethem Pillay, *Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights* (OHCHR 2012); Suzanne Egan, ‘Strengthening the United Nations Human Rights Treaty Body System’ (2013) 13 (2) Human Rights Law Review 209-243. [↑](#footnote-ref-5)
6. 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* (Intersentia 2011) 264. [↑](#footnote-ref-6)
7. UN General Assembly, *Resolution Adopted by the General Assembly – Human Rights Council,* GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/Res/60/251 (3rd April 2006) [5] (e). [↑](#footnote-ref-7)
8. Human Rights Council, *Institution Building of the United Nations Human Rights Council,* HRC Res. 5/1, UN HRC OR, 5th sess, Annex [IB], UN Doc A/HRC/RES/5/1 paras [3] and [4]. [↑](#footnote-ref-8)
9. Ibid,[4a]. [↑](#footnote-ref-9)
10. Ibid, [1]. [↑](#footnote-ref-10)
11. Ibid, [31]. [↑](#footnote-ref-11)
12. Statement by Ambassador Baso Sangqu, Permanent Representative of South Africa on the Report of the Human Rights Council to the 42nd Plenary meeting of the United Nations General Assembly, UN GAOR, 65th Sess, 42nd plen mtg, (2 November 2010). [↑](#footnote-ref-12)
13. 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* (Intersentia 2011) 23. [↑](#footnote-ref-13)
14. Frouville, above n 6, 250-255. [↑](#footnote-ref-14)
15. Ibid, 264-265. [↑](#footnote-ref-15)
16. Andrew Clapham, “Overseeing Human Rights Compliance” in Antonio Cassesse (ed.) *Realizing Utopia. The Future of International Law* (Oxford University Press 2012) 318, 323-324; Nowak, above n 13, 26-33. [↑](#footnote-ref-16)
17. Nowak, above n 13, 26. [↑](#footnote-ref-17)
18. 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’ (2012) Friedrich Ebert Stiftung 1, 26. [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. Allehone M Abebe, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’ (2009) Human Rights Law Review 3, 16. [↑](#footnote-ref-20)
21. See Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015). [↑](#footnote-ref-21)
22. Ibid, 16. [↑](#footnote-ref-22)
23. Ibid, 14-15. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. See Karolina M Milewicz and Robert E Goodin, ‘Deliberative Capacity Building Through International Organisations: The Case of the Universal Periodic Review of Human Rights’ (2016) British Journal of Political Science*,* 1-21. [↑](#footnote-ref-25)
26. Ibid, 17. [↑](#footnote-ref-26)
27. HRC, *Institution Building of the United Nations Human Rights Council,* above n 8, [15] (a). [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council resolution 5/1 – Nigeria*, 4th sess, UN Doc A/HRC/WG.6/NGA/1 (5 January 2009) [2]. [↑](#footnote-ref-29)
30. Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council resolution 5/1 – Nigeria*, 17th sess, UN Doc A/HRC/WG.6/NGA/1 (30 July 2013) [4]. [↑](#footnote-ref-30)
31. Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council resolution 5/1* – *Morocco,* 1st sess, UN Doc A/HRC/WG.6/1/MAR/1 (11 March 2008) [11]. [↑](#footnote-ref-31)
32. Commonwealth Human Rights Initiative, ‘Submission of the Commonwealth Human Rights Initiative for the Universal Periodic Review ‘ (2007) < <http://www.upr-info.org/sites/default/files/document/south_africa/session_1_-_april_2008/commonwealthhrinitiativesouthafricaoff2008.pdf>> 3; Children Now, ‘Submission by Children Now, An Alliance Of South African NGOs brought together to prepare the Alternate Report To The UN Committee On The Rights Of The Child’ (2007) < [www.upr-info.org/sites/default/files/document/south\_africa/session\_1\_-\_april\_2008/childrennowsouthafricaoff2008.pdf](http://www.upr-info.org/sites/default/files/document/south_africa/session_1_-_april_2008/childrennowsouthafricaoff2008.pdf)> 1. [↑](#footnote-ref-32)
33. Lilian Chenwi, *South Africa: State of State Reporting under International Human Rights Law* (Community Law Centre 2010) 64; The South African Human Rights Commission criticised the government for this. See Parliamentary Monitoring Group, ‘Strategic Planning Workshop: Human Rights Commission, Commission on Gender Equality, Child Rights Institute, Human Sciences Research Council, University of Stellenbosch, Disability Alliance presentations’ (2009) < <https://pmg.org.za/committee-meeting/10645/>>. [↑](#footnote-ref-33)
34. HRC, *Institution Building of the United Nations Human Rights Council,* above n 8, [17]. [↑](#footnote-ref-34)
35. Chenwi, above n 33. [↑](#footnote-ref-35)
36. Human Rights Council, ‘Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review’ UN Doc A/HRC/DEC/17/119 (19 July 2011). [↑](#footnote-ref-36)
37. See also Committee against Torture, ‘Conclusions and recommendations of the Committee against Torture, South Africa) UN doc. CAT/C/ZAF/CO/1 (7 December 2006) [3]. [↑](#footnote-ref-37)
38. See Parliamentary Monitoring Group, above n 33. [↑](#footnote-ref-38)
39. Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1 – South Africa*, 13th sess, UN Doc A/HRC/WG.6/13/ZAF/1(7 March 2012) [1]. [↑](#footnote-ref-39)
40. Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa, ‘Submission from Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa to the second cycle of the South African Universal Periodic Review 2012’ (2012) 11 < <http://www.upr-info.org/sites/default/files/document/south_africa/session_13_-_may_2012/js5uprzafs132012jointsubmission5e.pdf>>. [↑](#footnote-ref-40)
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42. Yarik Turiansky, ‘South Africa’s Implementation of the APRM: Making a Difference or Going through the Motions’ (2014) South African Institute of International Affairs 1-4. [↑](#footnote-ref-42)
43. Parliamentary Monitoring Group, ‘African Peer Review Mechanism: Department of Public Service & Administration briefing’ (2014) < <https://pmg.org.za/committee-meeting/16800/>>. [↑](#footnote-ref-43)
44. Ross Herbert and Steven Gruzd, *The African Peer Review Mechanism: Lessons from the Pioneers* (The South African Institute of International Affairs 2008) 267 and 271. [↑](#footnote-ref-44)
45. In 2010, South Africa had 14 overdue reports to the UN human rights treaty bodies. See Lilian Chenwi, *South Africa: State of State Reporting under International Human Rights Law* (Community Law Centre 2010) 28-50. [↑](#footnote-ref-45)
46. South Africa (as of February 2017) only has three overdue reports. See OHCHR, ‘Status of Late and Non- reporting by state Parties’ < http://tbinternet.ohchr.org/\_layouts/TreatyBodyExternal/LateReporting.aspx>. [↑](#footnote-ref-46)
47. There were 621 UPR II recommendations on treaty bodies (about 2% of the total UPR recommendations to states). See UPR Info < https://www.upr-info.org/database/statistics/index.php?cycle=1>. [↑](#footnote-ref-47)
48. HRC Resolution 5/1 provides that ‘Each member State will decide on the composition of its delegation.’ See Human Rights Council, *Institution Building of the United Nations Human Rights Council,* above n 8, [18] (a). [↑](#footnote-ref-48)
49. Gareth Sweeny and Yuri Saito, ‘An NGO assessment of the New Mechanism of the Human Rights Council’ (2009) 2 Human Rights Law Review,209. [↑](#footnote-ref-49)
50. Human Rights Council, *Institution Building of the United Nations Human Rights Council,* above n 8, [3] (k). [↑](#footnote-ref-50)
51. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ UN Doc A/HRC/8/32 (23 May 2008) annex. [↑](#footnote-ref-51)
52. See Parliamentary Monitoring Group, above n 33. [↑](#footnote-ref-52)
53. Ibid. [↑](#footnote-ref-53)
54. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ UN Doc A/HRC/21/16 (9 July 2012) annex. [↑](#footnote-ref-54)
55. Ibid. [↑](#footnote-ref-55)
56. This can equally be contrasted with its engagement with the APRM which has had Parliamentary involvement. See Economic Commission for Africa, ‘The Role of Parliament in the APRM’ (2011) 12-23 <<http://www.uneca.org/sites/default/files/PublicationFiles/5-pamphlet_the_role-of-parliament-in-aprm.pdf>>. [↑](#footnote-ref-56)
57. This included Russia, Slovakia and Azerbaijan. [↑](#footnote-ref-57)
58. This included Australia, France, Belgium, Germany, Denmark, Netherlands and New Zealand. [↑](#footnote-ref-58)
59. During UPR II South Africa made recommendations to 42 African states, 15 Asian states, 3 states from the EEG, 13 states from GRULAC and 11 states from WEOG. [↑](#footnote-ref-59)
60. UPR Info, ‘Seminar on the role of “Recommending States” at the UPR’ (2014) < <http://www.upr-info.org/en/news/seminar-role-recommending-states-upr>>. [↑](#footnote-ref-60)
61. For details, see McMahon, above n 18, 1-28. [↑](#footnote-ref-61)
62. This is calculated from 166 recommendations made by South Africa during UPR I and 138 during UPR II. [↑](#footnote-ref-62)
63. See ‘Joint Statement on the Universal Periodic Review’ (2013) Item 6 General debate HRC22-15 March 2013 < http://www.upr-info.org/sites/default/files/news/89\_states\_gd\_item6\_mid-term\_report\_commitment.pdf>. [↑](#footnote-ref-63)
64. See ‘Joint Statement on the Universal Periodic Review’ above n 63. [↑](#footnote-ref-64)
65. See UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – Zimbabwe’ UN Doc A/HRC/19/14 (19 December 2011) [28]. [↑](#footnote-ref-65)
66. Nicola de Jager and Catherine Musuva, ‘The influx of Zimbabweans into South Africa: a crisis of governance that spills over’ (2016) 8 (1) Africa Review 15-30. [↑](#footnote-ref-66)
67. This is in contrast to the recommendations made by most Western states specifically targeting issues such as treaty ratification, torture, enforced disappearance, justice, freedom of the press, public security and the death penalty. See UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – Sudan’ UN Doc A/HRC/18/16 (11 July 2011). [↑](#footnote-ref-67)
68. Ibid, [83.48]. [↑](#footnote-ref-68)
69. Human Rights Council, ‘Human rights, sexual orientation and gender identity’ UN Doc A/HRC/RES/17/19 (14 July 2011). [↑](#footnote-ref-69)
70. This constituted 27% of the total recommendations made during UPR I and II. See UPR Info, <http://www.upr-info.org/database/statistics/index_issues.php?fk_issue=47&cycle=>. [↑](#footnote-ref-70)
71. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – Cuba’ UN Doc A/HRC/24/16 (8 July 2013) [170.132]. [↑](#footnote-ref-71)
72. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 51, [67]. [↑](#footnote-ref-72)
73. Human Rights Council, ‘Report of the Human Rights Council on its Eighth Session’ UN Doc A/HRC/8/52 (1 September 2008) [562]-[592]; Since South Africa did not clearly communicate acceptance of any of the UPR I recommendations, the data on figure 3 below is limited only to UPR II recommendations most of which received a clear response from South Africa. [↑](#footnote-ref-73)
74. See UN Human Rights Council, *Review of the work and functioning of the Human Rights Council*, above n 108, [6]. [↑](#footnote-ref-74)
75. Ibid, [16]. [↑](#footnote-ref-75)
76. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa - Addendum’ UN Doc A/HRC/21/16/Add.1 (12 July 2012) annex B. [↑](#footnote-ref-76)
77. Ibid, [124.96]. [↑](#footnote-ref-77)
78. Ibid. [↑](#footnote-ref-78)
79. This included the recommendations South Africa considered unacceptable and those it failed to provide direct response. [↑](#footnote-ref-79)
80. See Human Rights Council, *Institution Building of the United Nations Human Rights Council,* above n 8. [↑](#footnote-ref-80)
81. Ibid, [4] (c). [↑](#footnote-ref-81)
82. Ibid, [4] (a). [↑](#footnote-ref-82)
83. Ibid. [↑](#footnote-ref-83)
84. There were 27 recommendations. Fifteen recommendations were on sexual orientation and 12 on racial discrimination. [↑](#footnote-ref-84)
85. Twenty recommendations were on treaty ratification. [↑](#footnote-ref-85)
86. Twelve recommendations were on HIV/AIDS treatment. The three issues mentioned above accounted for about 53% of the overall 151 recommendations made to South Africa during UPR II. [↑](#footnote-ref-86)
87. Human Rights Council, ‘Report of the Human Rights Council on its Eighth Session’ above n 73, [567]. [↑](#footnote-ref-87)
88. UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 51, [67] (1); See also UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 76, [124.88]. [↑](#footnote-ref-88)
89. Human Rights Council, ‘Report of the Human Rights Council on its Eighth Session’ above n 73, [568]. [↑](#footnote-ref-89)
90. Ibid; See also UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 54, [124.88]. [↑](#footnote-ref-90)
91. See Global Initiative to End All Corporal Punishment of Children, ‘Corporal Punishment of Children in South Africa’ (2015) 1-6 < <http://www.endcorporalpunishment.org/assets/pdfs/states-reports/SouthAfrica.pdf>>; South African Human Rights Commission (SAHRC) ‘NHRI submission to the Universal Periodic Review Mechanism’ (2007); Children Now, ‘Alternate Report to the UN Committee on the Rights of the Child, prepared for the Universal Periodic Review of South Africa, Scheduled for April 2008’ (2008). [↑](#footnote-ref-91)
92. See UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 76, [124.88]. [↑](#footnote-ref-92)
93. Human Rights Council, ‘Report of the Human Rights Council on its Eighth Session’ above n 73, [571] – [574]. [↑](#footnote-ref-93)
94. See UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 76, [124.44]. [↑](#footnote-ref-94)
95. Ibid, [124.82]. [↑](#footnote-ref-95)
96. See Charlesworth and Larking, above n 21, 16. [↑](#footnote-ref-96)
97. Commentary on South Africa’s UPR I implementation was provided by various stakeholders including the South African Human Rights Commission (SAHRC), the Government of South Africa, Ubuntu Centre, Community Law Centre (University of the Western Cape) and Consortium for Refugees and Migrants in South Africa (CoRMSA). The value of the IRI index is that it takes in to account stakeholders responses and any dispute which they may have over the implementation of a recommendation. Whenever a stakeholder claimed that no aspect of a recommendation was been implemented, the index score is 0. the score is 0.75 when the State under Review claims that the recommendation has been fully implemented but a stakeholder says it has only been partially implemented. In some cases, partial implementation of a recommendation was indicative that an action was started by the state such as introducing a bill but the final action, enacting a law, was not realized. The average of the scores is then transformed into an implementation level where 0-0.32 = Not Implemented, 0.33-0.65 = Partially Implemented and 0.66-1 = Fully Implemented. [↑](#footnote-ref-97)
98. See UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 51, [18]. [↑](#footnote-ref-98)
99. See Working Group on the Universal Periodic Review, above n 39, Annex 1. [↑](#footnote-ref-99)
100. South African Human Rights Commission (SAHRC) ‘NHRI submission to the Universal Periodic Review Mechanism’ (28 November 2011) [11]. [↑](#footnote-ref-100)
101. Global Initiative to End Corporal Punishment, ‘South Africa: Briefing for the Human Rights Council Universal Periodic Review – 13th Session, 2012’ (2011) [1.3]. [↑](#footnote-ref-101)
102. The appellants argued that the ban on corporal punishment violated the rights of the pupil’s parents to freedom of religion that permits the use corporal punishment on children. The court did not find any violation of freedom of religion and upheld the ban on corporal punishment in schools as lawful. See Christian Education South Africa v Minister of Education 2000 (4) SA 757. [↑](#footnote-ref-102)
103. Save the Child et al, ‘Children’s Rights Organisations Submission to the Universal Periodic Review of South Africa – 13th Session in 2012’ (2011) [2.4]. [↑](#footnote-ref-103)
104. Centre for Child Law, *Promoting Effective Enforcement of the Prohibition against Corporal Punishment in South African Schools* (Pretoria University Press 2014). [↑](#footnote-ref-104)
105. Ibid, 11. [↑](#footnote-ref-105)
106. Committee on the Rights of the Child, ‘Concluding Observations of the Committee on the Rights of the Child, South Africa’ UN Doc CRC/C/15/Add.122 (2000) [28]; Committee Against Torture, ‘Concluding Observations of the Committee on the Rights of the Child, South Africa’ UN Doc CAT/C/ZAF/CO/1 (7 December 2006) [25]; African Committee of Experts on the Rights and Welfare of the Child, ‘Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Republic Of South Africa Initial Report on the Status Of Implementation of the African Charter on the Rights and Welfare of The Child’ (2014) [35] < <http://www.acerwc.org/?wpdmdl=8754>>. [↑](#footnote-ref-106)
107. Ibid. [↑](#footnote-ref-107)
108. The existing enforcement mechanisms regulating the prohibition of corporal punishment in schools have been found to be inadequate and ineffective. See Global Initiative to End All Corporal Punishment of Children, ‘Corporal Punishment of Children in South Africa’ (2015) 1-6 <<http://www.endcorporalpunishment.org/assets/pdfs/states-reports/SouthAfrica.pdf>>. [↑](#footnote-ref-108)
109. See for example UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 76, [124.50], [124.51] and [124.75]-[124.87]. [↑](#footnote-ref-109)
110. *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2, art 9 (3). [↑](#footnote-ref-110)
111. Human Rights Council, ‘Human rights, sexual orientation and gender identity’ UN Doc A/HRC/RES/17/19 (14 July 2011). [↑](#footnote-ref-111)
112. Human Rights Council, ‘Human rights, sexual orientation and gender identity’ UN Doc A/HRC/RES/27/32 (2 October 2014). [↑](#footnote-ref-112)
113. Human Rights Council, ‘Report of the Human Rights Council on its Eighth Session’ above n 73, [572]; UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa - Addendum’ UN Doc A/HRC/21/16/Add.1 (12 July 2012) annex A, [124.51]. [↑](#footnote-ref-113)
114. The Centre for Applied Psychology of the University of South Africa et al, ‘Violate Hate Crimes in South Africa’ (2012) 1-9 < <http://www.upr-info.org/sites/default/files/document/south_africa/session_13_-_may_2012/js6uprzafs132012jointsubmission6e.pdf>>; Human Rights Watch, ‘“We’ll Show You You’re a Woman”: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa’ (2011) < <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf>>. [↑](#footnote-ref-114)
115. Ibid, 1. [↑](#footnote-ref-115)
116. Ibid, 14-15. [↑](#footnote-ref-116)
117. See The Centre for Applied Psychology of the University of South Africa et al, above n 114, 7-8. [↑](#footnote-ref-117)
118. Ibid; See also UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – South Africa’ above n 76, [124.81]. [↑](#footnote-ref-118)
119. The Centre for Applied Psychology of the University of South Africa et al, above n 114. [↑](#footnote-ref-119)
120. Lea Mwambene, ‘Realisation or Oversight of a Constitutional Mandate?: Corrective rape of black African lesbians in South Africa’ (2015) 15 (1) African Human Rights Journal 58-88. [↑](#footnote-ref-120)
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