THE UTILITY OF THE UNIVERSAL PERIODIC REVIEW IN THE IMPLEMENTATION OF THE RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION IN ZIMBABWE: CASE OF THIRD CYCLE REVIEW

BY

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DEDICATION

~Blessing Tatiana Magaya~

My Dear Daughter

and

~Noreen Brown~

My Dear Wife

ACKNOWLEDGEMENTS

Dr. Tarisai Mutangi, an accomplished human rights scholar and practitioner, I cherish your guidance

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My wife, Noreen Magaya-Brown, your support is supreme. Always

ABSTRACT

This study assesses the utility, impact or efficacy of the Universal Periodic Review (UPR) mechanism in holding to account the Zimbabwean government in the implementation of human rights, including the right to peaceful assembly and association. The UPR is a United Nations (UN) Member-State driven peer review mechanism that provides the opportunity for each State to identify key human rights issues and challenges as well as periodically declare what actions it has taken to improve human rights situations and fulfil human rights obligations. This study is anchored on the need to fill the legal gap which is suspected to continue to exist as a result of the utility of the UPR mechanism in implementing various rights in Zimbabwe including the right to peaceful assembly and association. The problem arises from the inherent scepticism towards Zimbabwe's participation in the UPR mechanism that it does not add any real value to the human rights system because it is flawed, given its dependence on the goodwill of other interested states who may be in similarly placed circumstances of having poor human rights records, yet they review Zimbabwe. Thus, the inquiry of this study is to assess whether the UPR is institutionally robust to undertake real scrutiny and hold Zimbabwe accountable for human rights violations in the field of the right to peaceful assembly and association in the eyes of human rights violations of violently managing assemblies and quashing dissent which authorities see as a result of exercising the right to association by demonstrators or petitioners. The major method used in this study consists of desktop research which focuses on understanding the extent to which the UPR mechanism has been effective in the implementation of the right to peaceful assembly and association in Zimbabwe. Secondary data collection and analysis is also undertaken on how the UPR mechanism has fared in turning around the human rights fortunes of Zimbabwe with specific focus on the right to peaceful assembly and association.

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LIST OF ACRONYMS AND ABBREVIATIONS

AIPPA	ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT
ASEAN	ASSOCIATION OF SOUTHEAST ASIAN NATION
CSO	CIVIL SOCIETY ORGANISATION
HRC	HUMAN RIGHTS COUNCIL
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
LOMA	LAW MAINTENANCE AND ORDER ACT
ILO	INTERNATIONAL LABOUR ORGANISATION
KNCHR	KENYA NATIONAL COMMISSION FOR HUMAN RIGHTS
LGBTI	LESBIAN, GAY, BISEXUAL, TRANS AND GENDER DIVERSE AND INTERESEX
MDC-A	MOVEMENT FOR DEMOCRATIC CHANGE- ALLIANCE
MOPOA	MAINTAINANCE OF PEACE AND ORDER ACT
NHRI	NATIONAL HUMAN RIGHTS INSTITUTION
NGO	NON-GOVERNMENTAL ORGANISATIONS
OHCHR	OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
POSA	PUBLIC ORDER AND SECURITY ACT
PVO	PUBLIC VOLUNTARY ORGANISATION
PVOA	PUBLIC VOLUNTARY ORGANISATION ACT
SAHRC	SOUTH AFRICA HUMAN RIGHTS COMMISSION
TI	TRANSPARENCY INTERNATIONAL
UNCT-SA	UNITED NATIONS COUNTRY TEAM-SOUTH AFRICA
UN	UNITED NATIONS
UNGA	UNITED NATIONS GENERAL ASSEMBLY
UPR	UNIVERSAL PERIODIC REVIEW
ZACC	ZIMBABWEAN ANTI-CORRUPTION COMMISSION
ZDHR	ZIMBABWE DOCTORS FOR HUMAN RIGHTS
ZANU-PF	ZIMBABWE AFRICAN NATIONAL UNION-PATRIOTIC FRONT
ZBC	ZIMBABWE BROADCASTING CORPORATION
ZHRC	ZIMBABWE HUMAN RIGHTS COMMISSION

CHAPTER 1

1.0 Introduction

The Universal Periodic Review (UPR) is a United Nations (UN) Member-State driven peer review mechanism that provides the opportunity for each State to identify key human rights issues and challenges as well as periodically declare what actions it has taken to improve human rights situations and fulfil human rights obligations. Zimbabwe appeared before the UPR Working Group on 10 and 12 October 2011, respectively, to present its National report on the UPR under the First Cycle. At that time, a total of 177 recommendations were made to it by Member States to the United Nations. A total of 81 recommendations were accepted, 65 did not receive the support of Zimbabwe and the Delegation undertook to consider 31 and provide responses prior to or during the 19th Session of the Human Rights Council[1].

On the 2 November 2016, the Zimbabwean delegation presented its National Report under the Second Cycle Review before the 28th session of the UPR Working Group. In this review, Zimbabwe received a total of 260 recommendations of which it accepted 151 and accepted 6 in part[2]. The Government of Zimbabwe made a commitment not only to implement the second cycle recommendations but also to carry forward first cycle recommendations, to the extent to which they remained unfulfilled and are consistent with accepted second cycle recommendations.

Subsequently, Zimbabwe presented a voluntary mid-term report to the UPR Working Group in 2019, which culminated into the development and presentation of the Third Cycle Report on 26 January 2022 in Geneva, Switzerland. The Third Cycle Report contained actions undertaken, challenges faced, and new human rights issues in the implementation of second cycle recommendations since the last review.

Given the above three reviews to date, it is the objective of this study to analyse the efficacy of the UPR mechanism in the implementation of the right to peaceful assembly and association.

Zimbabwe underwent its latest review under the third cycle on 26 January 2022.

[1] 2017 UPR National Action Plan, p. 1
[2] Ibid.

1.1 Background to the Study

In view of the foregoing introduction, the Third Cycle Report included the actions undertaken, challenges faced and new human rights issues pertaining to the subject matter of this thesis: the right to peaceful assembly and association in Zimbabwe. Therefore, this thesis seeks to assess or examine the utility of the UPR mechanism in the implementation of the right to peaceful assembly and association in Zimbabwe using 2022 Third Cycle review as a case Study.

This study is informed by the need to assess the utility, impact or efficacy of the UPR mechanism in holding to account the Zimbabwean government in the implementation of human rights, including the right to peaceful assembly and association. This stems from the fact that Zimbabwe has in the past reviews either rejected or merely noted far reaching recommendations which have a real capacity to transform its human rights architecture thus rendering the mechanism to be viewed by others as only favourable to the political protagonists, thus rendering it as a *brutum fulmen*.

1.2 Statement of the Problem

This study is anchored on the need to fill the legal gap which is suspected to continue to exist as a result of the utility of the UPR mechanism in implementing various rights in Zimbabwe including the right to peaceful assembly and association. The problem arises from the inherent scepticism towards Zimbabwe's participation in the UPR mechanism that it does not add any real value to the human rights system because it is flawed, given its dependence on the goodwill of other interested states who may be in similarly placed circumstances of having poor human rights records, yet they review Zimbabwe. Thus, the inquiry of this study is to assess whether the UPR is institutionally robust to undertake real scrutiny and hold Zimbabwe accountable for human rights violations in the field of the right to peaceful assembly and association in the eyes of human rights violations of violently managing assemblies and quashing dissent which authorities see as a result of exercising the right to association by demonstrators or petitioners.

Some problematic aspects of the UPR which encapsulate this study are that it is an instrument which lacks the capacity to strongly name and shame Zimbabwe which is viewed by some as a systematic human rights violator such that no improvements in holding it accountable have been witnessed. The inactivity of the UPR mechanism in scrutinising Zimbabwe's human rights violations has also been anchored on the solidarity of states with similar human rights records in

manipulated the system to limit participation by non-state actors, leading to political bargaining, thus not criticising one another during the review of Zimbabwe by other African states. Thus, the tendency of the African Group to use their group alliance to circumvent real scrutiny is an eloquent testimony to the fact that there is need for a more effective option or approach in enhancing the UPR mechanism. Therefore, this study shall close the has failed to live up to expectations' because attendant gap by analysing the UPR mechanism in as far as it relates to Zimbabwe given its dependence upon the goodwill of other states, which are interested political entities to the extent that that status compromises them to make proper legal assessment or interpretation of the human rights obligations for Zimbabwe.

Further, in assessing the utility of the UPR mechanism, it is assumed that all states in the contemporary world, including great powers, are compelled to justify their behaviour according to international legal rules, standards and accepted human rights norms. However, there is evidence that the development of international human rights law, good practices including the adoption of the UPR mechanism and other widely accepted human rights norms have not compelled states to comply all the time especially when it does not suit their domestic political interests. Thus, besides that Zimbabwe for example, has adopted the UPR mechanism, systematic violations have been recorded in various areas of human rights, including the right to peaceful assembly and association. These violations by a State which religiously follow the ritualism of the UPR mechanism, thus call for an evidence-based study in order to interrogate whether the UPR approach really leads to acceptable state behaviour.

A related challenge boarders on the motive of states, including Zimbabwe to become party to international human rights mechanisms such as the UPR, whose advocated standards they sometimes and in some cases, systematically and blatantly violate. This study therefore becomes necessary in order to inquire if states are really concerned with the public-good human rights values availed by the UPR mechanism, to ensure that it is not merely for the purpose of using such mechanisms or platforms as global public relations tools to embellish their human rights images and projecting their influence.

The other problem is of rights ritualism. According to Charlesworth, 'rights ritualism' is 'a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to

avoid accountability for human rights abuses'[3]. In the context of the UPR, ritualism is 'participation in the process of reports and meetings but with an indifference to, or even reluctance about, increasing the protection of human rights'[4]. Some critiques associate with this view that Zimbabwe only participates for the purposes of being counted as having acceded to the UPR process, but with no deep-seated intention to improve the human rights situation on the ground.

This study therefore seeks to make good, through a scientific legal inquiry, whether participation in the UPR mechanism by Zimbabwe, with the right to peaceful assembly and association as a case study, has a corresponding positive impact on its behaviour.

1.3 Objectives of the Study

The overarching objective of this study is, in the main, to assess the efficacy of the UPR mechanism in the implementation of the right to peaceful assembly and association in Zimbabwe using the 2022 Third Cycle review as a case Study. Specific objectives of the study are to:

1.3.1 Define the general and normative UPR mechanism?

1.3.2 Assess the extent to which the UPR mechanism has improved the implementation of the right to peaceful assembly and association in Zimbabwe.

1.3.3 Recommend proposals for policy making on how the UPR mechanism can enhance the implementation of the right to peaceful assembly and association.

1.4 Literature Review

As a result of the foregoing background, the UPR has problematically divided literature since its inception in 2006, thus raising scepticism about the aptitude of a human rights mechanism or instrument based on collaboration to act as an efficacious worldwide mechanism for monitoring the human rights compliance of states including Zimbabwe which has religiously complied with the mechanism. Scholars and UPR stakeholders analyse the UPR from different viewpoints in an endeavour to provide insights into the capability of the UPR mechanism to influence states including Zimbabwe and improve the human rights situation on the ground.

[3] Charlesworth, H (2010), *Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict*, 29(1) Australian Yearbook of International Law 1, 12.
[4] Ibid.

One seminal scholar on the subject matter, Otone[5] classified the literature into two main groups—the sceptical group and the evolutionary group. This part therefore reviews literature on the subject matter of the utility or efficacy of the UPR mechanism with special focus on the African States and by extension, Zimbabwe.

1.4.1 The Skeptical School of Thought on UPR

According to Otone[6], the sceptical group argues that the UPR mechanism does not add any real value to the human rights system because it is flawed, in that it is dependent on the goodwill of states and has a debilitating effect on other human rights mechanisms. Otone[7] further notes that according to the sceptics, the UPR is institutionally weak and needs to be overhauled or replaced by an entirely new institution that will undertake real scrutiny and hold states accountable for human rights violations. For instance, in 2006, one of the earliest critics of the UPR, the United Nations Watch[8] stated that the UN has little need for another toothless mechanism for cooperative dialogue[9]. In that vein, the UN Watch called on Council members to fashion a mechanism that will, in a fair manner, apply real scrutiny, to hold governments to account and cite them for violations and abuses[10].

Some problematic aspects of the UPR which encapsulate this study were echoed on various for a by European international human rights practitioners themselves. While the UN Watch advocated for a 'strong' mechanism that can 'name and shame' state human rights violators and hold them accountable[11] since the present mechanism is based on mere cooperation and dialogue, thus ineffective in scrutinising human rights violations by states, Allehone Abebe[12], an Ethiopian diplomat in Geneva and a human rights scholar who participated both in the negotiations on the institution-building text of the HRC and the first two sessions of the First Cycle of the UPR, expressed much criticism of the UPR. He particularly decried the *modus operandi* of the UPR

[5] Otone, D. (2020), *The Human Rights Council: The Impact of the Universal Periodic Review in Africa*, Routledge, 2 Park Square, Milton Park, Abingdon, Oxon OX14 4R.
[6] Ibid, p. 23.
[7] Ibid.
[8] N Watch is an NGO based in Geneva. Its role is to monitor the performance of the United Nations by the yardstick of its own Charter.
[9] Milewicz M.K and Goodin R.E 2016), *Deliberative Capacity Building Through International Organisations: The Case of the Universal Periodic Review of Human Rights*, British Journal of Political Science 1–21
[10] Ibid.
[11] Ibid.
[12]Abebe, A.M (2009), *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Counci*l, Human Rights Law Review 1, 16.

mechanism with respect of the participation of African states, arguing that they have 'deftly manipulated' the system during the formative years to limit NGO participation in the process and have engaged in regional dynamics and the politics of bargaining by not criticising one another during the review of African states[13]. According to Abebe, the tendency of the African Group to use their group alliance to circumvent real scrutiny of their human rights situation signals an ominous sign for the efficacy of the UPR mechanism[14].

Now with the end of the first three UPR Cycles, this study presents a comprehensive analysis of the extent of Zimbabwe's participation and an assessment of the efficacy of the UPR mechanism thereof. During the course of the first cycle of the UPR, de Frouville[15] criticised the UPR on three major grounds. From de Frouville's perspective, the UPR 'has failed to live up to expectations' because it overshadows the hard work of the treaty bodies, is wholly dependent upon the goodwill of states and cannot, as a political entity, make a legal assessment or interpretation of the human rights obligations of states[16]. Similarly, 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'[17]. For Nowak, the UPR, by not permitting special rapporteurs and treaty body experts to participate in the review, undermines the work of the treaty bodies and special procedures. The general presumption which underlies the criticisms of de Frouville and Nowak is that monitoring human rights implementation is best tackled by human rights expert bodies rather than states.

This writer however antagonises the analyses by de Frouville and Nowak in that undermine the potential value of the UPR and do not provide empirical data on whether the UPR is effective or not in improving the human rights situation of states.

1.4.2 The Optimistic School of Thought on UPR

On the other hand, evolutionary scholars or commentators who are desirous to give the UPR mechanism a chance view it through a positive or optimistic prism. They contend that the UPR is

[13] Ibid.
[14] Ibid.
[1515] de Frouville, O (2011), *Building a Universal System for the Protection of Human Rights*: *The Way Forward*, in M Bassiouni. C and Schabas W.A. (2011), *New Challenges for the UN Human Rights Machinery*, 264.
[16] Ibid, 250-55.
[17] Nowak, M (2009), *'It's Time for a World Court of Human Rights'* in M Cherif Bassiouni and William A Schabas (2011), *New Challenges for the UN Human Rights Machinery*, 23.

an integral and evolving mechanism with considerable potential, notwithstanding that its efficacy may be limited by factors such as politicisation, regionalism and ritualism. This group of scholars examine the UPR in action, including incessant state practice during the interactive dialogue and the recommendations made during the review process.

One such scholar is McMahon[18] who undertook one of the first empirical analyses of the UPR. McMahon analysed the first cycle of the UPR, focusing on the general quality and quantity of UPR recommendations and the responses by all states. He found that the UPR offers tangible benefits to human rights promotion by attracting universal and high-level state engagement and encouraging dialogue between some governments and civil society[19].

Nevertheless, he criticised the lack of specificity and the complementarity approaches adopted mostly by the African and Asian Groups in the review of their regional peers. In the final analysis though, he has expressed optimism that the UPR will evolve into a robust mechanism because states are taking the process seriously. In 2008, Elvira Dominquez Redondo undertook a similar general assessment to that of McMahon and drew a similar conclusion in relation to high-level state engagement with the UPR[20]. However, she conceded that the effectiveness of the mechanism would only be determined by the extent to which state participation in the UPR process improves the human rights situation on the ground, an assessment which she thought was too early for her to make at that point in time[21].

Further, Rhona Smith[22] has since 2012 analysed the impact of the UPR in different regions. Smith's 2012 case study of Pacific Island states demonstrated that these states actively engaged with the interactive dialogue of their reviews during the first cycle UPR and were receptive to UPR

[18] McMahon, E, (2012) *The Universal Periodic review: A Work in Progress, an Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council'* (Friedrich Ebert Stiftung) 1, 26.
[19] Ibid, P. 115.
[20] Redondo, E.D (2008), The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session, Chinese Journal of International Law 726, 729.
[21] A Review of Redondo in Marta Ascherio (2012), *A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council,* Global Governance 231.
[22] Smith, R (2014), *A Review of African States in the First Cycle of the UN Human Rights Council's Universal Periodic Review,* African Human Rights Law Journal, p. 346 and Smith R (2012), *The Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Periodic Review,* Melbourne Journal of International Law, p. 569

recommendations. Smith, however, pointed to the fact that their engagement was limited by their inability to participate in the review of other states due to technical and financial constraints[23].

With regard to the Association of Southeast Asian Nation (ASEAN) states Quane[24] argued in 2015 that the UPR mechanism has enhanced the relationship between ASEAN states and the global human rights mechanisms. According to Quane, the UPR impacts other mechanisms by making particular recommendations which have increased their engagement with the UN treaty bodies and special procedures[25]. Quane's case study also highlighted the fact that disagreements on the death penalty and the rights of LGBT persons have limited the engagement of many states in the region.

In Bulto's 2015 general analysis of Africa, he found that African states engage more with the UPR mechanism than with other human rights mechanisms because of the almost complete control they have over the outcome of the UPR process[26]. But he argues that their engagement lacks genuine commitment and is a manifestation of rights ritualism[27]. Bulto supports his claim by the fact that the African Group lobbied for a state-driven system that limits NGO participation and by their failure to be critical of the human rights situation of their peers during the reviews[28]. In view of the foregoing, the optimistic scholars therefore advocate for a positive view of the UPR, is an evolving mechanism with potential for greater state engagement over time.

1.5 Research Methodology

The major method used in this study consists of desktop research which focuses on understanding the extent to which the UPR mechanism has been effective in the implementation of the right to peaceful assembly and association in Zimbabwe. Secondary data collection and analysis is also undertaken on how the UPR mechanism has fared in turning around the human rights fortunes of Zimbabwe with specific focus on the right to peaceful assembly and association. The literature being targeted include: journal articles, authoritative texts, human rights reports, human rights

[23] Ibid.
[24] Quane, H (2015), *The Significance of an Evolving Relationship: Asian States and the Global Human Rights Mechanisms*, Human Rights Law Review 283, 303–9.
[25] Ibid.
[26] Bulto, T.S (2015), *Africa's Engagement with the Universal Periodic Review: Commitment or Capitulation' in Hilary Charlesworth and Emma Larking (eds), Human Rights and the Universal Periodic Review: Rituals and Ritualism*, Cambridge University Press 2015, P. 250–1.
[27] Ibid.
[28] Ibid, p. 247-51.

policy papers, Treaties containing the right under review, Acts of Parliament and the Constitution of Zimbabwe.

The desktop research will be triangulated by a comparative legal study of the utility of the UPR mechanism in in the implementation of human rights by states such as Kenya and South Africa.

1.6 Justification of the Study

This study generates knowledge on the ongoing debate of the implication of international human rights mechanisms such as the UPR in general, and the effect of Zimbabwe's UPR mechanism on the implementation of the right to peaceful assembly and association in particular. This research is pertinent especially at a time when Zimbabwe's fiscal space has shrunk in the past decade and with no prospects of a quick return from the financial woods, where complying with UPR mechanisms require financial and human capital resources to produce reports and payment of allowances to participate at the UN Human Rights Council. This research contributes significantly towards generation of the body of knowledge on human rights compliance which can be used by scholars in future to generate more knowledge on the implementation of the same.

1.7 Limitations of the Study

The limitations of the study were in the main occasioned by the difficulty with which the researcher accessed secondary data. Not much knowledge has been generated pertaining to the extent to which the UPR mechanism has impacted on the implementation of the right to peaceful assemble and association. Analysis of existing literature, which ordinarily is expected to be the repository of such information, was of no assistance as data on the issue, is very thin given that the UPR mechanism is relatively new given its recent adoption.

1.8 Organization of the Study

This study is divided into five chapters. **Chapter 1** will provide general introduction to the study focusing on the problem. It also covers a review of the existing literature on the subject matter under review and the research methodology to be used in data collection, analysis and presentation **Chapter 2** presents a fuller perspective of the establishment, operations and operational theories of the UPR mechanism. Further, the theoretical aspects of the nexus arising from the utility of the UPR mechanism and effective implementation of rights shall be presented. In that vein, a set of criticisms of the theories and views of scholars shall also be presented from the researcher's

perspective. **Chapter 3** presents a comparative analysis of how the UPR mechanism has enhanced implementation of human rights in Kenya and South Africa. **Chapter 4** covers major findings on how the implementation or practice of the right to peaceful assembly and association as a measure of the efficacy of the UPR mechanism in enhancing the practice of the right in Zimbabwe in line with the UPR recommendations. This is achieved through unravelling the normative, constitutional and legislative frameworks pertaining to the right to peaceful assembly and association in Zimbabwe and how it has been improved as a result of the UPR recommendations. Under **Chapter 5,** conclusions flowing from the findings shall be presented and a raft of recommendations to Zimbabwean policy makers in the field of human rights to make good Zimbabwe's participation in the UPR mechanism shall be proposed.

CHAPTER 2

THE UPR MECHANISM INTO PERSPECTIVE: ESTABLISHMENT, OPERATIONS AND APPLICABLE THEORIES

2.0 Introduction

This chapter proffers a conceptual, theoretical and jurisprudential framework under which the discourse of the efficacy of the UPR mechanism in the implementation of the right to peaceful assembly and association. Theories that undergird the research will be presented and the researcher's analysis of each theory will be discussed in order to lay bare the relevance of each theory. This will be undertaken in full view of the need to interrogate the serviceability and functionality of the UPR mechanism as an effective instrument of implementing the right under review.

2.1. The Universal Periodic Review in a Nutshell

The Universal Periodic Review operates under the auspices the Human Rights Council (HRC)[29] which was established by the United Nations (UN) General Assembly on 15 March 2006[30] to replace the Commission on Human Rights. Among one of the HRC's functions is to undertake a Universal Periodic Review (UPR), contribute through dialogue and cooperation to the prevention of human rights violations, responds promptly to human rights emergencies and makes recommendations with regard to the promotion and protection of human rights.

Upon its creation, the UPR mechanism represented a new and unique feature of the human rights architecture[31]. The UPR, which is based on objective and reliable information, enables the fulfilment by each Member State of the United Nations of its human rights obligations and commitments to be reviewed in a manner that ensures universality of coverage and equal treatment with respect to all States. It is a cooperative mechanism based on an interactive dialogue with the

[29] The HRC, which is supposed to be reviewed on a regular basis, is that of a subsidiary organ of the General Assembly. It is composed of 47 Members which are elected directly and individually by secret ballot by the majority of the members of the Assembly

[30] United Nations (UN) General Assembly in its Resolution 60/251 of 15 March 2006/ 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 (3 April 2006) ('Resolution 60/251') para 5 (e).

[31] Tistounet, E (202), *The UN Human Rights Council A Practical Anatomy*, Edward Elgar Publishing Limited, The Lypiatts, 15 Lansdown Road Cheltenham Glos, GL50 2JA U

full involvement of the country concerned. Since the inception of the UPR, with no exception, all UN Member States have been reviewed by the Council[32].

The periodicity of the review for the first cycle was four years, and for the second and subsequent reviews it was four and a half years[33]. During the first cycle, 48 States were reviewed per year. As from the second cycle onwards, 42 States were reviewed per year. The consideration of these States takes place during three sessions of two weeks each of the UPR Working Group. The Working Group is composed of the 47 Members of the Council and is chaired by the President.

This being stated, the UPR is a universal mechanism with the Council being involved in it heavily at every step of the procedure. Each review is based on three documents called 'reports': the first one is presented by the State itself[34]; the second and third ones are presented by the Office of the High Commissioner for Human Rights (OHCHR)[35]. The second report combines the information provided by treaty bodies, Special Procedures and other official UN documents. The last one is a summary of 'additional, credible and reliable' information provided by national human rights institutions and non-governmental organizations[36].

If there is a National Human Rights Institution (NHRI) of the State under review that is accredited as being in full compliance with the Paris Principles[37], it benefits from a separate section in this report. The UPR is a peer-review mechanism. Accordingly, only States may participate in the interactive dialogue organized by the Working. The stakeholders may attend the review without the possibility of taking the floor.

For each review a troika of three rapporteurs is selected by drawing of lots among the members of the Council and from different regional groups. They are formed to facilitate each review, in

[32] Ibid.
[33] Ibid.
[34] Which does not exceed a number of words corresponding to 20 pages: although it is usually in a written format, it can be also done in an oral manner, as has been done on an exceptional basis.
[35] Which do not exceed a number of words corresponding to 10 pages each.
[36] Ibid.
[37]Normally the A accredited NHRI.

particular the preparation of the report of the Working Group. The OHCHR provides the necessary assistance to the troikas.

Since the start of the second UPR cycle, the duration of the review has been three and a half hours, of which one-third is made available to the State under review. The State under review must identify the recommendations that enjoy its support. All of the others are considered to be noted. In other words, those recommendations are not accepted and in certain instances are utterly rejected by the State under review. Although an inventive terminology may be used, the Council proceeds on the assumption that there are only two categories of recommendations[38].

The States under review may decide to inform the Working Group about its decision at any point in time, either at the Working Group or at the Council plenary level. The latest moment for this is when the final outcome of its review is adopted by the Council. The final outcome of the review is adopted by the plenary of the Council. The Council dedicates a one-hour segment to each State under review. It is divided in three parts of 20 minutes each. The State under review is provided with 20 minutes which it may organize as it wishes. The Council Members and Observers also have 20 minutes.

2.2 Situating the UPR Mechanism in International Law

Essentially, the extent to which states follow their international obligations has developed over the past four centuries. From a historical perspective, these international obligations and accepted norms were founded following two key developments in European history. Simmons[39] posits that in 1648, the Treaty of Westphalia ended the three-decade long war by acknowledging the sovereign authority of various European monarchies. This event marked the advent of traditional international law, based on principles of territoriality and state autonomy. Then in 1945, as Simmons[40] further argues, states began to integrate on a global scale following the major wars initiated in Europe. By the end of the World War II in 1945, the UN Charter became the central

[38] Para. 32 of HRC Resolution 5/1.
[39] Simmons, B (1998), *Compliance with International Agreements*, Annual Review of Political Science, Vol 1, pp. 75-93
[40] Ibid.

watershed for a new international legal order, undergirded by a strong veneer of sovereignty and strict rules of international law, peace and human rights.

Tetley[41] argues that this has provided an opportunity for international law and accepted norms to reach every corner of the globe and a platform for an implosion of bilateral and multilateral agreements in form of treaties, conventions, protocols and customary international law relating to human rights and regulating the behaviour of states and international organizations.

Although the United Nations Charter, incidental human rights conventions, and international human rights mechanisms such as the UPR mechanisms do not permit violating international law, the extent to which states follow their international obligations varies. As such, the trend in contemporary international relations is that violation of international law remains possible, but it is much less acceptable now than it was a century or even half a century ago as Tetley[42] argues.

While the scholars above appear optimistic about the impact of international law on states behavior, other scholars such as Henkin[43] suggest that human rights mechanisms are quite ineffectual at changing domestic practices in most cases. Henkin further holds that positive effects these human rights mechanisms have on observance of human rights and altering states behaviour are thought to be conditional at best, depending on state-level characteristics as regime types that are conducive to good human rights implementation. Chayes and Chayes[44] argue in support of Henken that in international law, the state may be criticized for non-compliance with a human rights mechanism, but depending on how the treaty was written, that same state could counter argue that it is complying but in a manner that suits its interpretation and national interests.

Essentially, states do not always fulfil obligations because they may lack the capability to carry out their obligations. Boyle[45] uses an example of weak states in which new norms may not have

[41] Tetley, W (2000), *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, Louisiana Law Review 60, 682

[42] Ibid.

[43] Henkin, L (1979), *How Nations Behave. New York*, Columbia University Press

[44] Chayes, A. and Chayes, A (1998), The New Sovereignty: Compliance with International Regulatory Agreements. Cambridge, Harvard University Press.

[45] Boyle, F. A (1999), *The Irrelevance of International Law*, CALIF. WEST. INT'L L. J. 10.

the ability to be implemented by domestic institutions, or new norms could conflict with existing norms. Boyle[46] argues that poor domestic institutions hamper the ability of weak African states, leading to poor anti compliance to international human rights standards. Even powerful states can lack the capacity if domestic institutions hamper compliance.

Notwithstanding the various arguments presented by scholars on the debate of the effect of efficacy of international human rights mechanisms, literature supports the view that the development of international law and accepted norms over the past half century has affected state behaviour. The effect has consistently demonstrated that states, more often than not, reliably behave or comply with international law and human rights mechanisms such as the UPR most of the time. Ultimately, the most persuasive argument to explain why all states, weak and strong, behave according to legal rules and accepted norms involves interpreting the major theories and various variables that are likely to influence state behaviour as demonstrated below.

2.3 Fundamental Principles of the UPR

The principles that guide the UPR aim to address some of the criticisms which were levelled against the former UN Commission on Human Rights. These principles include universality, cooperation, complementarity and the equal treatment of all member states in monitoring human rights compliance[47]. They recognise the importance of ensuring universality, objectivity, non-selectivity and the elimination of double standards and politicisation[48]. These principles, with their principal goal of improving the human rights situation on the ground, reflect a positive continuation of the reformist efforts of the UN to promote human rights while eschewing the 'naming and shaming' strategy.

[46] Ibid.
[47] 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, annex (18 June 2007) ('Resolution 5/1') para 2.
[48] Resolution 60/251, UN Doc A/Res/60/251, above n 21, preamble

2.3.1 Universality

The principle of universality is an integral part of the UN human rights system. The notion that human rights are universal is enshrined in the Universal Declaration of Human Rights (UDHR)[49]. Universality is a key principle of the UPR which is characterised in terms of not only the universality of the process but also the rights covered. This distinguishes it from the human rights treaty bodies. The scope of the work of the treaty bodies is limited only to states that have ratified the specific treaty within their competence and only to the rights specified in each treaty. In terms of the rights covered, the UPR examines broader obligations under the UDHR and applicable international humanitarian law, including commitments and voluntary pledges made by individual states[50]. It is truly universal because all UN member states are reviewed, regardless of whether the state has ratified any human rights treaties[51]. The UPR mechanism ensures universal coverage of all states.

2.3.2 Regionalism

Regionalism has an influence on the participation of states in the UPR process, despite the universality of the UPR process. Regionalism generally occurs within an international organisation when a group of interdependent states form a subgroup within the main organisation[52]. Rosa Freedman argues that regionalism is detrimental because it polarises and undermines the work of the UN[53]. As highlighted before, Bulto argues that the African Group has used its regional alliance to prevent 'real' scrutiny of the human rights situation of their regional peers at the HRC and in the UPR process. However, while there is a risk that regionalism may polarise the UPR and limit

[49] Universal Declaration of Human Rights, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948).
[50] Resolution 5/1, UN Doc A/HRC/RES/5/1 para 1.
[51] Except for Israel, which temporarily boycotted its UPR II in January 2013, all UN member states have been reviewed in the first two cycles of the UPR, even North Korea.45 Israel did not attend its UPR II, which was initially scheduled for 29 January 2013, causing the HRC to postpone Israel's review to 29 October 2013. Israel returned on this new date and undertook its UPR II.
[52] Kaiser, K (1968), The Interaction of Regional Subsystems: Some Preliminary Notes on Recurrent Patterns and the Role of Superpowers, (1968) 21(1) World Politics 86.
[53] Freedman, R (2013), *The United Nations Human Rights Council: More of the Same*, 31 (2), Wisconsin International Law Journal 208, 209.

its effectiveness by preventing cooperation across regional groups, Bulto and Freedman do not consider the positive outcomes that regionalism can achieve in the UPR process.

2.3.3 Cultural Relativism

The principle of universality as articulated in the UPR does not resolve questions which have continuously been raised about the universal application of human rights[54]. The argument of cultural relativism infringes on the notion of universality of human rights[55]. Fernando Tesón appropriately defines cultural relativism in the context of international human rights law as 'the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society'[56]. Two dominant forms of cultural relativism describe the degree to which culture impacts on the universality of international human rights norms. Strict cultural relativists hold an extreme view that there is no possibility of constructive dialogue between cultural values because belief systems are culturally specific and incomprehensible to one another[57].

The above perspective in some way validates arguments by many African scholars in the post-independence period who argued that claims to universal human rights represent cultural imperialism and are a sign of Western hegemony[58]. The Asian region, in particular, has asserted cultural relativism on the premise of 'Asian values' which has continued to influence political and judicial thinking in Southeast Asian states like Malaysia and Singapore[59]. While there is no similar collective approach taken by African states, they have, almost unanimously, opposed same-sex relationship on the basis that it is culturally unacceptable or a form of cultural imperialism.

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[54] Donnelly, J (2007), The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly 281; Christian Tomuschat, Human Rights: Between Idealism and Realism (Oxford University Press 2014).
[55] Tesón L. R (1985), 'nternational Human Rights and Cultural Relativism', Virginia Journal of International Law 869, 870–1.
[56] Ibid.
[57] Meyer, W (1996), *Toward a Global Culture: Human Rights, Group Rights and Cultural Relativism'* International Journal on Group Rights 169, 175;
[58] Osabu-Kle, D.T (2000), *Compatible Cultural Democracy: The Key of Development in Africa* (University of Toronto Press)
[59] Moody P.R (1996), *Asian Values*, V.1 International Affairs 50.

A number of scholars have sought a middle ground between the universal and cultural relativist conceptions of human rights[60]. Jack Donnelly seeks to reconcile the reality of both the universal and contextual elements of human existence by grounding human rights in the concept of 'relative universality' that leaves room for claims of relativism[61]. However, Goodhart argues that the conception of human rights either as universal or relative is unhelpful because it could diminish the value of human rights and that various aspects of human rights can be successfully discussed without resorting to the terms 'relative' and 'universal'[62]. Nevertheless, the UPR mechanism purports to engage with and promote a universal conception of human rights. In view of the foregoing, it is only reasonable in the circumstances to hold that States that are advocate of cultural relativism in human rights implementation continue to argue that human rights are dependent on the context and respective cultures in which they are applied.

2.3.4 Cooperation

The UPR mechanism, by relying on cooperation and dialogue, represents an evolving maturity of the international human rights system through its detachment from exclusively legalistic approaches to human rights implementation[63]. Therefore, within the framework of cooperation, an important question arises of whether the UPR, which is based on cooperation, can significantly contribute to improving the human rights situation within African states. African states have adopted a 'soft' approach to the UPR, at least among each other, in contrast to Western states that take a more critical, close to adversarial, approach. The soft approach, which largely produces 'friendly' recommendations, has been criticised for not being sufficiently critical of the human rights situation in states[64]. According to Abebe, this approach results in weak recommendations and tends to ignore serious human rights concerns within states that require immediate attention[65].

[60] An-Na'im, A.A (1990), Problems and Prospects of Universal Cultural Legitimacy for Human Rights in Abdullahi Ahmed An-Na'im and Francis M Deng (eds), Human Rights in Africa: Cross Cultural Perspectives (Brookings Institution) 336.
[61] Jack Donnelly, see note. 52, 281.
[62] Goodhart, M (2008), *Neither Relative nor Universal: A Response to Donnelly*, 30(1) Human Rights Quarterly 183, 187–9.
[63] Bassiouni M.C and William A Schabas, W.A (2011), *New Challenges for the UN Human Rights Machinery*, 353–76.
[64] Abebe, M.A. (2009, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council*, Human Rights Law Review 1, 16.
[65] Ibid.

2.3.5 Complementarity

The need to prevent duplication of treaty body functions was a great concern during many stages in the negotiations leading to the establishment of the UPR in 2006[66]. The principle provides that the UPR mechanism 'shall complement and not duplicate the work of treaty bodies[67]'. HRC resolution 5/1 reiterates this principle as one of the essential bases of the review and a guarantee that the UPR will add value to the human rights monitoring system. The concept of complementarity is increasingly used in international law to underline the relationship between two or more autonomous organs. In the context of the UPR, complementarity regulates the relationship between the UPR mechanism and the UN human rights treaty bodies. This principle aims to ensure consistency and coherence in the operation of the monitoring organs with the goal of avoiding unnecessary duplication of functions which may lead to wastage of resources.

However, there is disagreement among scholars and practitioners regarding the ability of the UPR to complement the work of the human rights treaty bodies. This disagreement has been approached from three viewpoints. The first is duplication, in that the UPR overlaps with the functions of the human rights treaty bodies. Second is that the UPR process has a debilitating effect on existing human rights obligations insofar as it weakens and overshadows treaty body recommendations. The third viewpoint is that the UPR enhances state engagement with treaty bodies. Bernaz[68] takes the first perspective by arguing that the UPR encroaches on the work of the treaty bodies resulting in significant overlap between the two mechanisms because of the common features they share.

2.3.6 The Participation of Non- State Actors and other Stakeholders in the UPR process

Ensuring the participation of 'all relevant stakeholders, including non-governmental organisations and national human rights institutions' in accordance with Resolution 5/1 of the HRC is an important principle guiding the UPR[69]. Resolution 60/251 acknowledged that 'non-governmental

[66] Billaud, J (2019), *Keepers of the Truth: "Transparent" Documents for the Universal Periodic Revie*w' in Hilary Charlesworth and Emma Larking, Human Rights and the Universal Periodic Review: Rituals and Ritualism (Cambridge University Press 2015) 76–7.
[67] Complementarity is reflected in UNGA Resolution 60/251.
[68] Bernaz, N (2009), *Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review* in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Ox Resolution 5/1, UN Doc A/HRC/RES/5/1 para 3(m). ford University Press) 78, 88.
[69] Resolution 5/1, UN Doc A/HRC/RES/5/1 para 3(m).

organisations play an important role at the national, regional and international levels, in the promotion and protection of human rights'[70]. The NGOs/CSOs are relevant 'stakeholders' in the UPR but there is no universal understanding of the term 'civil society' as the term means different things in different countries and languages[71].

NGOs and other stakeholders can attend the review session in the HRC Working Group on the UPR but cannot make statements or pose questions to the state under review. Also, they can participate in the adoption of the outcome of the review during the plenary session of the HRC and make comments. The limited opportunity for direct NGO participation in the UPR has been criticised by scholars. Abebe notes that the lack of direct participation by NGOs weakens the review process by not granting NGOs an opportunity to express directly their concerns during the interactive dialogue[72]. Bulto argues that by preventing NGOs from participating in the interactive dialogue, the UPR shields African states from open criticism from NGOs[73]. According to McMahon, NGO engagement with the UPR needs to be heightened by giving them a recognised role during the review session in Geneva. In McMahon's view, this would strengthen the UPR mechanism. However, Ben Schokman and Phil Lynch provide pragmatic suggestions on how NGOs can effectively engage in the UPR process even with the institutional constraints noted earlier[74]. These include the formation of NGO coalitions, effective media engagement and a focused advocacy strategy[75].

2.4 Theoretical Framework

It is to be acknowledged that this study is knowledge generation around the subject matter of international human rights law. Although various international law theories exist to offer a number of pathways in explaining the efficacy of human rights mechanisms in the implementation of human rights, the three competing theories of neo-realism, institutionalism and liberalism present a compendious embodiment of all other potential theories in a manner that best illuminates the 'international law' and 'states behaviour' debate as discussed below. This section therefore

[70] Resolution 60/251, UN Doc A/Res/60/251 para 5(h).
[71] Martens, K (2002), Mission Impossible? Defining Nongovernmental Organizations', 13 International Journal of Voluntary and Nonprofit Organizations, 282.
[72] See Abebe M.A, n 71, 29.
[73] See Bulto T.S, n 48, 250.
[74] Schokman, B and Lynch, P*, Effective NGO Engagement with the Universal Periodic Review*.
[75] Ibid.

considers the best theoretical framework to understand the potential impact of the UPR by reviewing five major theoretical approaches to state compliance with international human rights law. These are the coercive compliance-centred theory, the 'naming and shaming' approach, the transnational legal process theory, the five-stage 'spiral model' and the theory of acculturation. By incorporating a theoretical conception of the potential impact of the UPR process, this section contributes to existing scholarship in this area which generally has limited theoretical engagement with the impact of the UPR process.

2.4.1. The Coercive-Compliance Theory

The coercive compliance-centred theory's starting point is the argument that human rights compliance mechanisms rely exclusively on coercive/confrontational approaches although some view them as limited and thus, do undermine the potential benefit of cooperative mechanisms. Proponents of a coercive compliance-centred theory hold onto the traditional notion that coercive mechanisms are the principal means to induce state compliance with human rights. According to this view, compliance with human rights norms occurs when powerful states coerce relatively weak states into complying through sanctions, punitive or other confrontational measures[76]. This therefore limits the threshold of enforcement in that human rights norms will be enforced only to the extent that it is in the strategic interest of powerful states to enforce them[77]. According to Henry Steiner[78], institutions make rights more effective by threatening or taking actions that may lead a state to comply. However, this writer argues that the UN treaty bodies in general cannot be characterised as coercive because they do not have the power to compel states to comply with their findings or recommendations. Viewing international monitoring institutions with this compliance centred optic has led many scholars to regard the monitoring institutions as basically weak and ineffective, underscoring their inability to meaningfully advance human rights.

While there have been several proposals in recent years to strengthen the human rights treaty body monitoring system, Frouville advocates for the creation of a World Commission of Human Rights

[76] Redondo, E.D (2008), *The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session*, Vol 7 Chinese Journal of International Law 726, 681–94.
[77] Baumgartner, S.P (2011), *Does Access to Justice Improve Countries' Compliance with Human Rights Norms—An Empirical Study*, *Vol* 44, Cornell International Law Journal 447
[78] Steiner, H. J, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee, in* Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 20.

with a strong institutional basis and the power to issue and enforce binding decisions[79]. The argument that the best and final model for securing human rights compliance is the establishment of a world court of human rights is informed by the desire for more confrontational approaches to monitoring human rights compliance. The aforementioned arguments are not without merit. They are founded on the premise that human rights norms have a normative force. This helps explain the earlier call for a judicial articulation of rights by a judicial body, the violation of which should attract punitive sanctions that will secure compliance.

2.4.2 The 'Naming and Shaming' Approach

Compliance mechanisms based on the coercion model are unsatisfactory in explaining state engagement with the UN treaty monitoring bodies. This is because the treaty bodies do not have the power to compel states to comply with their findings or recommendations. 'Naming and shaming' is one of the predominant approaches engaged by the UN human rights monitoring bodies[80]. As pointed out by Geir Ulfstein[81], UN human rights treaty bodies have no coercive power except for 'naming and shaming'. This approach relies on expressing public disapproval of a state's non-compliance with its international human rights obligations and has been used by most of the UN human rights machinery. In the case of the treaty bodies, the sanctions available in the event of non-compliance are limited, for the most part, to 'naming and shaming'. This involves public reporting of the violation and possibly condemnation.

Redondo[82] classifies 'naming and shaming' as a confrontational approach, especially when it calls for a country-specific resolution or requests country-specific actions. African states, as well as many other states, have repeatedly condemned findings and resolutions which target the human rights practices of specific states or regions, arguing that they breed selectivity and double standards. For example, South Africa adheres to the belief that 'naming and shaming' is

[79] Frouville, D. O, *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*, 264
[80] See Ivira Domlnguez-Redondo, opcit, p. 687
[81] Ulfstein, G (2014), *Law-Making by Human Rights Treaty Bodies'* in Rain Liivoja and Jarna Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (Routledge).
[82] Opcit, p. 134.

counterproductive and has at various times voted against country-specific resolutions condemning human rights abuses in Myanmar, Sudan and the Democratic Republic of Congo (DRC)[83].

2.4.3 The Transnational Legal Process

The theory propounded by Harold Koh holds that the way to achieve compliance with international law is through the repeated participation of states in a variety of law-creating and interpreting fora which results in the internalisation or domestication of norms[84]. Koh makes a distinction between three forms of norm internalisation: social, political and legal. Social internalisation occurs when there is widespread adherence to a norm as a result of that norm acquiring public legitimacy. With political internalisation, the government accepts an international norm as a matter of policy. Koh argues that legal internalisation occurs when the international norm is incorporated into the domestic legal system through executive action, legislation, judicial interpretation or a combination of the three.

Central to the transnational legal process theory are the successive processes of interaction, interpretation and internalisation. In the context of human rights law compliance, Koh contends that compliance is ultimately achieved as a result of the repeated process of interaction, interpretation and internalisation through which international human rights norms are 'obeyed' (complied with)[85]. The interaction and interpretation processes are triggered by non-state actors in an effort to compel the state to implement the findings or recommendations of human rights mechanisms. The treaty monitoring or international adjudicative monitoring bodies then serve as an interpretive community which defines or clarifies the definition of the relevant norms and their violation. The state then achieves legal internalisation through the constitution or other domestic law; political internalisation by incorporating the norm into governmental policy; and social internalisation when the norm acquires public legitimacy.

[83] Edoard Jordaan, E 92014), *South Africa and the United Nations Human Rights Council*, 36(1) Human Rights Quarterly 90, 100–9.
[84] Koh, H.H (2006), *How Is International Law Enforced' in Richard Pierre Claude and Burns H Western* (eds), Human Rights in the World Community Issues and Actions (University of Pennsylvania Press) 305–15.
[85] Ibid.

2.4.4 The Five-Stage Spiral Model

The spiral model was developed by Risse et al. to explain how states ultimately come to comply with human rights norms[86]. The central tenet of the spiral model is that the diffusion of international human rights norms that results in domestic change is dependent on the power of transnational human rights pressures exerted by national and transnational advocacy networks. The spiral model examines the process by which international norms are internalised and implemented domestically, with governments, transnational societies and domestic civil societies as key actors[87].

This theory captures the moral strength of human rights ideas and the central role of domestic and transnational non-governmental actors in shaping the decisions of states to comply with international human rights norms. However, the significance of the spiral model in relation to explaining the potential impact of the UPR is limited by the incorporation of coercion and 'naming and shaming' approaches at some stages of the model.

2.4.5 The Theory of Acculturation

Theories of human rights compliance which integrate coercive or confrontational strategies do not account for acculturation. Acculturation was first defined in 1936 as 'those phenomena which result when groups of individuals sharing different cultures come into continuous first-hand contact, with subsequent changes in the original culture patterns of either or both groups[88]'. A psychologist's perspective the term 'acculturation' was later provided by Graves, who described acculturation as changes to an individual's identity, attitudes and values resulting from his contact with other cultures[89]. In 2004 and 2005, Goodman and Jinks transferred the concept of acculturation to states and international regimes which is handy in the analysis of the UPR mechanism.

The theory calls into question the view that compliance with human rights norms is best induced by the exercise of coercive power or by binding decisions emanating from human rights

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[86] Risse, T *et al* (1999), The Power of Human Rights: International Norms and Domestic Change (Cambridge University Press) and Risse T *et al (2013), The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).

[87] Ibid.

[88] Redfield,R et al, (1936), *Memorandum on the Study of Acculturation*, 56 American Anthropologist 973–1002.

[89] Graves, T.D (1937), *Psychological Acculturation in a Tri-Ethnic Community*, 23(4) Southwestern Journal of Anthropology 337, 338.

monitoring institutions. It postulates that power is not merely prohibitive, material and centralised but also productive, cultural and diffuse[90]. Goodman and Jinks argue that mechanisms based on coercion are inadequate because coercion 'fails to grasp the complexity of the social environment within which states act'. They therefore hold that monitoring and reporting are highly effective and important functions in an acculturation-based institutional regime, while sanctions and binding decisions are potentially counterproductive. The acculturation approach shows preference for 'soft law' mechanisms but does not call for a complete abandonment of coercive mechanisms. Rather, it argues that acculturation, like coercion, is more likely to succeed and more likely to fail under certain conditions or when combined with other mechanisms.

2.5 Conclusion

This Chapter has presented a full perspective of the UPR mechanism using the definitional approach complemented by the principles based and theoretical approaches. It has been noted in this chapter that of the five theories, the UPR provides such a platform for acculturation that promotes cooperation and encourages continuous improvement of the human rights situation within states. Applying the fifth theory of acculturation can contribute to an understanding of the efficacy of human rights strategies based on cooperation. Therefore, cooperative mechanisms can be beneficial in realising incremental progress in human rights. Notwithstanding, different human rights mechanisms may be more or less effective depending on the political system in the state in question, along with other contextual factors. The next chapter covers the implementation of UPR mechanism normative dimensions of the right to peaceful assembly and association, as a dependent variable of the capacity of the independent variable, Zimbabwe's UPR mechanism.

[90] Ibid.

CHAPTER 3

THE UTILITY OF THE UPR MECHANISM IN THE IMPLEMENTATION OF HUMAN RIGHTS RECOMMENDATION IN OTHER JURISDICTIONS: KENYA AND SOUTH AFRICA AS USEFUL COMPARATORS

3.1. Introduction

This Chapter presents a comparative assessment of the utility of the UPR mechanism in the implementation of selected human rights recommendations in other jurisdictions. Kenya and South Africa will be used as useful comparators. This is in view of the fact that lessons can be drawn by Zimbabwe from these three jurisdictions pertaining to the utility of the UPR mechanism in the implementation of certain recommendations by the UPR process as it primes itself for the implementation of recommendations on the right to peaceful assembly and association.

3.2. The Kenyan Experience

3.2.1. Introduction

Kenya underwent its first cycle UPR I in 2010 (when it was not a HRC member) and UPR II in 2015 (by which time it was a HRC member). Kenya was scheduled to undergo its third cycle UPR in 200 but was rescheduled to 2022 as a result of the Covid-19 Pandemic thus the comparative analysis herein shall cover the first and second cycle reviews. Kenya's first cycle UPR took place within the period when the country was undergoing a major constitutional review process. This process served as both an incentive and impediment to the realisation of many of its UPR recommendations. A distinctive feature of Kenya's engagement with the UPR mechanism is the difference which its civil society made to the state's level of engagement. The role played by NGOs in Kenya in the state's review process has been cited internationally as good practice and emulated by other states[91]. This was critical in engaging the Kenyan government in the pre-review, review and follow-up stages of the UPR.

[91] Danish Institute for Human Rights, 'Universal Periodic Review First Cycle: Reporting Methodologies from the Position of the State, Civil Society and National Human Rights institutions' (2011) 38; OHCHR, Government of Republic of Moldova and UNDP, 'International Conference on Responding to the Recommendations of the Universal Periodic Review: Challenges, Innovation and Leadership, 4–5 November 2011' (2013) 10

3.2.2 Kenya's Implementation of UPR recommendations

This section engages with an analysis of the implementation of recommendations by Kenya. The analysis is limited to the first and second cycles UPR reviews for Kenya[92]. At the end of Kenya's first cycle UPR, more than 50% of the accepted recommendations had triggered an action on the part of the Kenyan government. Out of the 149 recommendations that were accepted, about 16% were fully implemented (FI), 43% were partially implemented (PI), and 37% were not implemented (NI)[93]. A higher level of implementation was observed during UPR II where 26% of 253 recommendations were fully implemented and 32% partially implemented[94]. In terms of the fully implemented recommendations during first cycle UPR, Kenya fully implemented the specific recommendation 5 to 'establish an independent, credible and authoritative Police Oversight Authority, with sufficient powers and resources' and to 'adopt legislation and a coherent national policy criminalising female genital mutilation'. The state, NGOs and the UN Country Team for Kenya[95], all agreed that these recommendations were fully implemented.

The aforementioned recommendations were implemented through the establishment of an Independent Police Oversight Authority and through the enactment of the Prohibition against Female Genital Mutilation Act, 2011[96]. The Second cycle UPR II recommendations that were fully implemented include to 'continue its efforts to establish an institutional and legislative framework for the provision of affordable legal aid and awareness services for all'; [fully implement the Kenya National Water Master Plan'; and 'adopt the human rights action plan'[97].

However, some recommendations such as the recommendation 4 to 'further promote good governance' were quite difficult to assess implementation because of their vagueness. Little action on the part of the state could result in a full or partial implementation. The Kenya National Commission for Human Rights (KNCHR) stated that the recommendation to 'further promote

[92] The UPR I implementation period for Kenya ran from May 2010 when the UPR Working Group adopted Kenya's UPR I report to November 2014 when it submitted its UPR II report. UPR II implementation period covered is January 2015 to July 2018.
[93] About 4% of the recommendations were not assessed because stakeholders did not provide any commentary on implementation.
[94] See The Kenya UPR Stakeholders' Coalition, Kenya's 2nd Cycle Universal Periodic Review Mid Term Report (UPR INFO 2018) 3 available at accessed 22/09/2019.
[95] Article 19 is a NGO working on the right to freedom of expression and has branches in many parts of the world including Bangladesh, Brazil, Kenya, Mexico, Senegal, Tunisia and the USA.
[96] Prohibition of Female Genital Mutilation 2011, Law No. 32 of 2011 (Kenya).
[97] The Kenya UPR Stakeholders' Coalition, above n 162, 38, 50, 16

good governance' was 'difficult to assess' implementation[98]. Notwithstanding, the fact that Kenya fully implemented some of the specific recommendations underscores the government's commitment and the impact of stakeholder advocacy at the follow-up stage of the review. Arguably, the transitional justice processes that were taking place in Kenya during this period facilitated the full and partial implementation of many of Kenya's UPR recommendations. The enactment of a new Constitution in 2010 provided the basis for the full realisation of many of the state's UPR commitments[99].

The recommendations which were partially implemented by Kenya targeted several key issues, including institutional failure identified as a major factor which made Kenya predisposed to violence following the 2007 presidential elections[100]. The judiciary was weak, lacked independence and police brutality and a culture of impunity went unabated. Most of the recommendations partially implemented by Kenya during UPR I were on police and judicial reform, a process which in some respects is still unfinished. The government carried out major judicial reforms, including the vetting of judges, but was slow on police reforms. Other prominent UPR recommendations which were partially implemented targeted issues included poverty and socio-economic recovery, violence to women and children, and internally displaced persons[101].

About 37% and 29% of the recommendations accepted by Kenya during UPR I and II respectively were not implemented. None of the 12 first cycle UPR recommendations which required Kenya to sign or ratify international human rights treaties was implemented. According to various stakeholders, the implementation of any of these recommendations was hindered by the delay in the enactment and operationalisation of the Treaty Making and Ratification Act[102]. This law gives effect to Article 2 (6) of the Kenya Constitution, defines the procedure for the making and ratification of treaties, and entrusts the general responsibility for the initiation, negotiation and ratification of treaties to the executive arm of government. While the constitutional reform process

[98] UPR Info, 'Mid-Term Implementation Assessment—Kenya' (2013) 49 available at accessed 22/09/2019.
[99] For example, the recommendations by Zimbabwe, Niger, UK and Republic of Korea for Kenya to support the enactment of a new constitution, HRC UPR I—Kenya, UN Doc A/ HRC/15/8 para 101.6–101.9.
[100] Mueller, D. S (2011), Dying to Win: Elections, Political Violence, and Institutional Decay in Kenya, 29(1) Journal of Contemporary African Studies 99, 104; Commission of Inquiry into the Post-Election Violence (CIPEV), above n 7, 355–460.
[101] Kenya UPR Stakeholder Coalition (KSC).
[102] Treaty Making and Ratification Act 2012, Law No. 45 of 2012 (Kenya).

may have impeded the realisation of these recommendations within the implementation period, the Treaty Making and Ratification Act was passed in 2012 and many of the recommendations on treaty ratification during UPR I and II were yet to be implemented[103].

It can be observed from the earlier analysis that the Kenyan government engaged with the implementation of specific and general recommendations which have contributed to positive human rights changes in Kenya by their full or partial implementation. Cooperative mechanisms have traditionally been overlooked as a model for human rights implementation in favour of a compliance-centred paradigm which leans more on coercive mechanisms. The potential impact of the UPR mechanism should not be dismissed or it cannot be labelled as 'weak and inefficient'. It can contribute to improve the human rights situation on the ground as evident in the case of Kenya where more than 50% of the recommendations have either been fully or partially implemented during first and second cycles of the UPR of Kenya.

However, while the state has made progress on the implementation of some recommendations to improve the human rights situation on the ground, a significant percentage of the recommendations were not implemented during first cycle of the UPR I (37%) and second cycle UPR (29%). Continuous effective NGO engagement is invaluable and can play a significant role to pressure the government to live up to its UPR commitments. The development of a four-year UPR II implementation plan by the Kenyan government through an inclusive UPR consultation plan with government ministries, domestic NGOs and the KNCHR was an indication of the government's particular commitment to implementing the UPR II recommendations[104]. The plan outlined individual UPR recommendations, the specific priority action areas and the indicators to measure progress in realising their implementation[105]. This was particularly useful in measuring UPR II implementation and monitoring mid-term implementation progress by the Kenyan government.

[103] The Kenya UPR Stakeholders' Coalition, p. 13.
[104]office of the Attorney General and Department of Justice (Kenya), 'Universal Periodic Review Second Cycle Implementation Matrix 2015–2019' (2015) available at accessed 22/09/2019.
[105] P L O Lumumba, 'A Journey Through Time in Search of a New Constitution' in M K Mbondenyi, P L O Lumumba Steve and O Odero (eds), The Constitution of Kenya: Contemporary Readings (Law Africa Publishing Ltd 2011) 23–44.

3.2.3. Conclusion

In view of the above comparative analysis for Kenya, it can be deciphered that UPR engagement will not be meaningful if it does not contribute to some degree to improve the human rights situation on the ground by implementation. An analysis of the transformations from the extent of human rights compliance before the UPR mechanisms to the point when they were reviewed during the first and second cycles demonstrate that the UPR process can over time influence changes within states as was evident in some of the UPR recommendations to Kenya that were not implemented within the implementation time frame but were subsequently implemented by the state. While implementation of UPR recommendations continues to remain a major issue across the two cycles of the Kenyan UPR, the positive attitude by Kenya and other African states towards the UPR process could have long-term positive implications for the nature of their implementation of UPR recommendations and similar recommendations by other domestic, regional and UN mechanisms and Zimbabwe has a lot to learn in enhancing its implementation regime of the UPR.

3.3 The South African Experience

3.3.1. Introduction

South Africa undertook its first cycle UPR review in April 2008, second cycle UPR review in May 2012 and third cycle UPR review in May 2017. Eighteen states made 22 recommendations to South Africa during the first UPR review[106]. South Africa did not directly respond or clarify its position on any of the 22 recommendations at the adoption of its first cycle UPR outcome report, contrary to the norm[107]. 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. During second cycle UPR review, 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

[106] HRC UPR I Report—South Africa, UN Doc A/HRC/8/32 para 67.
[107] HRC Report on its 8th Session, UN Doc A/HRC/8/52 paras 562–592.

acceptable' and less than 1% were 'rejected'[108]. During the third cycle UPR review, South Africa received 243 recommendations and accepted 77% of the total recommendations.

3.3.2. South Africa's Implementation of UPR Recommendations

The previous section highlighted the relevance of the UPR recommendations made during the review of South Africa on issues such as corporal punishment, violence based on sexual orientation, racism and xenophobia. The implementation of these recommendations could contribute to improving the human rights situation on the ground. Implementation of UPR recommendations is therefore a central component in evaluating the impact of the UPR mechanism. The implementation time frame for South Africa to implement its UPR I recommendations ran from April 2008 to May 2012 and UPR II from May 2012 to May 2017. It is important to consider these time frames when assessing implementation because the UPR is a dynamic and ongoing process and the human rights situation on the ground is constantly changing. As a result, the implementation of South Africa's UPR I and II recommendations are only analysed within the respective time frames. The analysis of implementation employs the IRI, which is based on an average of stakeholders' responses on the implementation outcome of each recommendation[109].

At the conclusion of South Africa's UPR cycle, the South African government had fully implemented about 14% of the 22 recommendations, 46% were partially implemented and 32% were not implemented. About 9% of the recommendations were not assessed because the stakeholders did not provide any responses on implementation. In relation to the second cycle UPR, 17% of the total 151 recommendations were fully implemented, 43% partially implemented and 34% were not implemented. No information from stakeholders was available for about 5% of the recommendations to South Africa during second cycle UPR review. Some of the recommendations to South Africa during the first and second cycles of UPR were vague, making it very difficult to assess their implementation outcome. An example is the recommendation by Sudan during first cycle UPR review that the South African government should 'give special

[108] N Human Rights Council, Report of the Working Group on the Universal Periodic Review— South Africa Addendum, 21st , Agenda Item 6, UN Doc A/HRC/21/16/Add.1 (12 July 2012).

[109]Commentary on South Africa's first Cycle implementation was provided by stakeholders such as the SAHRC, the Government of South Africa, Ubuntu Centre, Community Law Centre (University of the Western Cape), Consortium for Refugees and Migrants in South Africa (CoRMSA), World Vision South Africa and other non-state actors.

attention to the role of international cooperation for the enjoyment of economic, social and cultural rights[110]. The Legal Resource Centre in its commentary on South Africa's UPR II implementation criticised recommendations with the wording '[continue] in its efforts' as 'nebulous' and difficult to assess implementation[111].

The first cycle UPR recommendations which stakeholders considered to be fully implemented only related to the issue of 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. With regard to the second cycle implementation regime, there was agreement among various UPR stakeholders that most of the recommendations concerning ratification of treaties and human trafficking were fully implemented by the South African government. For example, SAHRC, UN Country Team for South Africa (UNCT–SA) and Law Society of South Africa103 all agreed that recommendations for South Africa to ratify ICESCR and ILO were fully implemented. There was also consensus that the recommendations calling for the enactment into law of the Prevention and Combating of Trafficking in Persons Bill were fully implemented[112].

Most of the UPR second cycle recommendations considered to be partially implemented touched on issues including Health/HIV, socio-economic rights and torture. Many recommendations on issues involving violence against women and children, privacy and freedom of information, and racism and xenophobia were not implemented within the second cycle UPR implementation time frame. Some of the recommendations which were not implemented during first cycle UPR were repeated during the second cycle of UPR and still not implemented.

Issues on corporal punishment, violence based on sexual orientation and gender identity, and racism and xenophobia were major areas covered by the recommendations for South Africa. 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

[110] HRC UPR I Report—South Africa, UN Doc A/HRC/8/32 para 18.
[111] Legal Resource Centre, 'UPR Submission: Right to Adequate Food and Nutrition' (2016) 1 available at accessed 19/07/2019.
[112] Prevention and Combating of Trafficking in Persons Act, Act No. 7 of 2013 (South Africa) (29 July 2013) available at accessed 20/07/2019.

recommendation and repeated the exact wording of the recommendation made by Slovenia on this issue[113].

Violence based on sexual orientation was one of the issues that featured prominently among state recommendations to South Africa across the three UPR cycles. Recommendations that member 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. In some ways, South Africa is one of the few exceptions to the general criminalisation and discriminatory treatment confronting the LGBT community in Africa. Only seven of 54 Africa states have some form of protection against discrimination based on sexual orientation[114]. South Africa is the only UN member state from the African regional group to recognise same-sex marriage. At the international level, South Africa has achieved a milestone in advancing the rights of LGBT persons worldwide.

Addressing racism and xenophobia against foreigners was a prominent issue in the review of South Africa with a dramatic increase from two recommendations during the first, second and third cycle UPR review to and 46 during the third cycle UPR. 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'[115]. The similarity between the recommendations from various human rights mechanisms emphasises the relevance of these UPR recommendations to improving the human rights situation on the ground. Also, it underscores the potential for the UPR to create a synergy with other national, regional and international human rights mechanisms by amplifying and reinforcing their recommendations.

3.3.3. Conclusion

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 first, second and third cycles UPR. Its participation as a reviewer across regional lines demonstrates the universality and non-selectivity of the UPR mechanism and contributes to enhancing the acculturation process. In addition, the South African government's commitment to provide a mid-term UPR implementation

[113] SAHRC, 'NHRI submission to the Universal Periodic Review Mechanism' (28 November 2011) para 11.
[114] Constitution of the Republic of South Africa Act 1996 (South Africa) Ch 2, art 9 (3).
[115] HRC UPR I Report—South Africa, UN Doc A/HRC/8/32 paras 124.33–124.46.

report, which it did, 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 mid-term implementation report. By July 2019, this number had increased to 75 states.161 This provides evidence of emulation and mimicry associated with the process of acculturation which can produce positive results over time.

3.4. Lessons learnt

This chapter also considered the ability of the UPR to reinforce and amplify the implementation of human rights recommendations by State Parties to the HRC. Despite the worries about the potential for the UPR to weaken and facilitate the evasion by states of treaty body recommendations, it is important to acknowledge that the soft approach of the UPR is reflective of its very nature as a cooperative mechanism. More so, the rejection of a UPR recommendation or failure to implement it cannot invalidate a state's legal obligation under the relevant treaties or under customary international law. The ability of the UPR to strengthen and reinforce human rights concerns raised by other human rights mechanisms is seen to serve as a model that has inspired proposals on human rights, which advocates for a web of global effective monitoring that complements and reinforces efforts at the domestic and regional levels. In the case of Kenya and South Africa, the UPR has been used as a platform to strengthen and support judicial and police reform, and the truth and reconciliation processes, among other human rights issues challenging the state. Zimbabwe has a lot to learn from the experience of the two as it implements its UPR recommendations pertaining to the right of peaceful assembly and association.

Further as a result of the South African experience, one can learn that the UPR has attracted the full engagement of African states and there has been improvement across reviews, especially in terms of state representation and responses to recommendations. As has been evident in the case of Kenya and South Africa, their engagement with the UPR has contributed to enhance their treaty body engagement in terms of meeting their reporting obligations. In the case of South Africa, the UPR process has contributed to greater engagement of the South African government with the treaty bodies in terms of the committed efforts made by the government to meet many of its outstanding reports after its second cycle UPR review. Finally, the ability for the UPR to reinforce treaty body recommendations underscores the potential for the UPR mechanism to evolve into an

effective cooperative mechanism that could complement other mechanisms for monitoring human rights implementation.

3.5. Conclusion

This Chapter has presented a comparative assessment of the utility of the UPR mechanism in enhancing implementation of UPR recommendations by Kenya and South Africa. While their human rights circumstances may different, maybe as a result of the regime types, different levels of development and many more reasons, the UPR is fast crystallising into a force to reckon with in terms of altering the behaviour of states as far as their attitude in implementing human recommendations passed during the UPR reviews. Zimbabwe may as well adopt best practices as it braces for implementing its UPR recommendations passed in February in Geneva during the occasion of its 3rd cycle review.

CHAPTER 4

ASSESSMENT OF THE UTILITY OF THE UPR MECHANISM IN ENHANCING IMPLEMENTATION OF THE RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION

4.1. Introduction

This chapter assesses the utility of the UPR mechanism in enhancing the implementation of the right to peaceful assembly and association in Zimbabwe. It focusses on analysing whether the membership and participation of Zimbabwe in the UPR process has improved the human rights situation in the country with specific attention to the right of peaceful assembly and association. Selected recommendations which relate to the human right in focus will be tracked in order to assess whether Zimbabwe adopted constitutional, legislative or administrative measures to implement the recommendations.

This Chapter is very crucial as it concentrates on presentation, analysis and interpretation of data collated from the research. Thus, this chapter brings out results of the research carried out as it relates to the discussion of the efficacy of the UPR mechanism to enhance the compliance regime of Zimbabwe with its human rights obligations regarding the right to peaceful assembly and association. The gaps arising from the analysis as a result of findings in Chapter 4, laid bare and inform solutions which shall be proffered in Chapter 5.

4.2. Zimbabwe's UPR Review in Brief

Zimbabwe was reviewed by the HRC on 10 October 2011 under the first cycle review[116]. At that time, a total of 177 recommendations were made to it by Member States to the United Nations. A total of 81 recommendations were accepted, 65 did not receive the support of Zimbabwe and the Delegation undertook to consider 31 and provide responses prior to or during the 19th Session of the Human Rights Council[117].

On the 2 November 2016, the Zimbabwean delegation presented its National Report under the Second Cycle Review before the 28th session of the UPR Working Group. In this review, Zimbabwe received a total of 260 recommendations of which it accepted 151 and accepted 6 in

[116] Zimbabwe 2011 UPR Report
[117] Zimbabwe 2017 UPR National Action Plan, p. 1

part[118]. The Government of Zimbabwe made a commitment not only to implement the second cycle recommendations but also to carry forward first cycle recommendations, to the extent to which they remained unfulfilled and are consistent with accepted second cycle recommendations[119].

Subsequently, Zimbabwe presented a voluntary mid-term report to the UPR Working Group in 2019, which culminated into the development and presentation of the Third Cycle Report on 26 January 2022 in Geneva, Switzerland before the 40th Session of the UPR. The Third Cycle Report contained actions undertaken, challenges faced, and new human rights issues in the implementation of second cycle recommendations since the last review.

4.3. A Synopsis of the Contents of the Third Cycle Report: Response to Second Cycle Recommendations to Zimbabwe on the right to Peaceful Assembly and Association

One of the recommendations relating to the right to freedom of association was raised by Sweden in 2016. Recommendation 132.96 by Ireland encouraged Zimbabwe to ensure the protections guaranteed by the Constitution be implemented, that a safe and enabling environment for civil society be created in law and practice and that the Government facilitate a visit by the Special Rapporteur on the situation of human rights defenders (Ireland[120]). On this recommendation, Zimbabwe's third cycle UPR Report highlighted that;

> The law governing public assemblies and such other public gatherings, the Public Order and Security Act (POSA), was replaced by the Maintenance of Peace and Order Act (MOPOA) was promulgated on 15 November 2019. The new Act allows more space for the enjoyment of freedoms of assembly and association. Furthermore, the limitations imposed by the Act are now consistent with the Constitution and international best practice. The powers of the regulating authority (commander of a police district) have been greatly curtailed for the benefit of citizens. The Act also provides for the process of filing of appeals against the decisions passed by regulating authorities regarding issues of the exercise of freedom of assembly. This is a great improvement from the previous Act.[121]
>
> Human rights defender's rights to operate freely is guaranteed by the Constitution. Civil society organisations (CSOs) are also entitled to operate freely in terms of the law and are guaranteed by the Constitution. Some CSOs are required to register in terms of the Private Voluntary Organisations Act (PVO Act) while others may register as trusts under the Deeds Registries Act

[118] Ibid.
[119] Ibid.
[120] A/HRC/34/8/Add.1 - Para. 34
[121] Zimbabwe UPR Matrix, p. 4 of 81.

> or simply operate without registration in terms of the common law as voluntary associations or organisations. The requirements of the PVO Act for registration are very liberal. PVOs are allowed to operate without interference from authorities. About 1000 PVOs are registered in Zimbabwe and none has been de-registered in the last three years although some of them have been acting outside their constitution and have been violating the law. [122]

Further, Recommendation 131.15 by Czech encourages Zimbabwe to review the legislation to ensure its full compliance with the international obligations of Zimbabwe and with the country's Constitution with regard to the rights to freedom of expression, association and assembly and the elimination of discrimination against women (Czechia[123]). Zimbabwe highlighted in its response to this recommendation that:

> As previously reported in the 2nd Cycle report, the Constitution recognises the rights to freedom of expression, association and assembly. Government has repealed and replaced laws such as the Public Order and Security Act and the Access to Information and Protection of Privacy Act as part of alignment of laws to the Constitution and to enhance the enjoyment of these right[124].

The above recommendations have featured prominently in the previous recommendations under the first and second cycles and has been responded to by Zimbabwe. The recurrence of the recommendation is a demonstration that Zimbabwe has not invested much in improving the human rights situation pertaining to the right of peaceful assembly and association. While the Constitution[125] of Zimbabwe has provided for this right, there is therefore need for an analysis of the normative framework of the right, its practical implementation on the ground and the administrative and/or institutional framework of the same. This is of utility in assessing whether Zimbabwe has improved its implementation of the right to peaceful assembly and association.

4.4. Right to Peaceful Assembly and Association: Zimbabwe's Position

An analysis of the responses by Zimbabwe in its UPR third Cycle Report needs to be analysed further in as far as implementation of the right to peaceful assembly and association. It is from the analysis that a derivation of the extent of implementation of the right can be made. The Government's position arises from the responses by Government of Zimbabwe through its

[122] Ibid.

[123] Zimbabwe UPR Matrix, p.13 of 81 and A/HRC/34/8 - Para. 131

[124] Zimbabwe UPR Matrix, p.13 of 81.

[125] Section 58 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

comments[126] to the Human Rights Council Report[127] by the United Nations Special Rapporteur to the United Nations Human Rights Council on the rights to freedom of peaceful assembly and of association, Mr. Clément Nyaletsossi Voule, on his visit to Zimbabwe (17-27 September 2019).

The Government of Zimbabwe demonstrated that it is committed to implementing the right through various measures. Among other measures, the Government of Zimbabwe reported that it established a robust Constitutional Framework providing for the right. Further, the comments[128] make a case that Zimbabwe's respect for the right to Freedoms of Peaceful Assembly and Association are anchored on a progressive Constitution; a sound and modern legal system; establishment and support of key structural human rights institutions. Further, the Responses to the Report highlighted that Zimbabwe is committed to the need for continuous review of legislation in order to incorporate new emerging good practices in promoting the right to peaceful assembly and association. A synopsis of the Government's response on the status of the right is presented below:

4.4.1 Cooperating with International Human Rights Mechanisms

Government made a case that the mere invitation of the Special Rapporteur, Mr. Voule, demonstrated Zimbabwe's commitment to the promotion and protection of its citizens' rights and was a clear expression of the Government's willingness to constructively engage with international human rights mechanisms in fulfilment of its international obligations including implementation of the right to peaceful assembly and association[129].

The Comments proceeded to highlight other evidences which demonstrates cooperation with human rights mechanisms as accommodating the Special Rapporteur on the Right to Food, Professor Hilal Elver, on her visit to Zimbabwe between 18 and 28 November 2019; submission of human rights reports, responding timely to the communications from the various regional and international human rights mechanisms.

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[126] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his visit to Zimbabwe - Comments by the State (A/HRC/44/50/Add.3), 14 May 2020.

[127] Visit to Zimbabwe - Report of the Special Rapporteur on the right to food Government of Zimbabwe responses to the Report by the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Mr. Clement Nyaletsossi Voule's Visit to Zimbabwe From 17 to 27 September 2019.

[128] Opcit, See Note 26.

[129] A/HRC/44/50/Add.3), 14 May 2020, p. 1.

4.4.2. Constitutional Framework of the Right to Peaceful Assembly and Association

Government made a case that the Zimbabwe is committed to upholding, respecting, promoting, enforcing, implementing and fulfilling local and international human rights obligations relating to the Rights to Freedom of Peaceful Assembly and of Association. Government argued that the Constitution recognizes the right to freedom of assembly and association in terms of Section 58 (1) and (2) as follows:

> *(1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others.*
> *(2) No person may be compelled to belong to an association or to attend a meeting or gathering."*

Government was however quick to raise a disclaimer by quoting Section 59 of the same Constitution which provides that:

> "*Every person has a right to demonstrate and present petitions, but these rights must be exercised peacefully*."

Further, Government emphasised that Section 58 must be read with Section 86 (2) (d) which provides that enjoyment of rights must take due regard to

> "*…the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others…"*

Government also justified limitation of the right in terms of Section Section 86 (2) of the Constitution that:

> ***"****The fundamental rights and freedoms set out in [the bill of rights] may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom…"*

Government even went on to justify the above position by referring to Article 27 (2) of the African Charter on Human Peoples Rights which provides that:

> *"…the rights and freedoms of the individual shall be exercised with due regard to the rights of others, collective security, morality and common interest…*"

The authorities also quoted Article 5 (1) of the International Covenant on Civil and Political Rights which provides that:

> *"…Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any*

of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

4.4.3. Legislative Framework of the Right to Peaceful Assembly and Association

In its comments, Government highlighted that it repealed the Public Order and Security Act [***Chapter 11:17***]and replaced it with the Maintenance of Peace and Order [***Chapter 11:23***]. It highlighted that repeal of the Public Order and Security Act (POSA) and replacing it with the Maintenance of Peace and Order (MOPOA) was evidence enough that Zimbabwe was committed to implementing the right as envisaged in that the act directly respond to the UPR recommendations.

Government also stated that it had repealed the Access to Information and Protection of Privacy Act (AIPPA) and replaced it by the Freedom of Information Act, which came into effect on 10 July 2020, as part of the alignment process to provide for additional guarantees to the constitutional rights to freedom of expression and freedom of the media which is interdependent to the freedom of peaceful assembly and association. Further, Government cited the Broadcasting Services (Digital Terrestrial Broadcasting Services), Regulations, 2020 and the Broadcasting Service (Community and Campus Radio Broadcasting Services) Regulation, 2020 which were gazetted as integral to the realisation of the right under review. Government also mentioned implementing other measures such as operationalising independent institutions as a way of enhancing the right to peaceful assembly and association.

4.5. Analysis of Implementation of the UPR Recommendations on the Right on to Freedom of Peaceful Assembly and Association

4.5.1 Background

It is settled now that Zimbabwe was reviewed under the UPR in 2011, 2016 and 2022. As afore demonstrated, during all the last reviews, concerns were raised with regards to the exercise of civil and political rights and the need to align legislation and policies with the 2013 Constitution. More specifically, relevant recommendations made referred to the repeal of the Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act (AIPPA) in the first and second reviews to halt the banning on public demonstrations, to create an environment that fosters the exercise of the rights to freedom of expression, assembly and association, including

respect of the independence of civil society organizations and to ensure the operationalization of its key independent institutions[130]. Even most recently, complaints were raised on the recent MOPOA as some still view it as a perpetuation of the POSA with a changed title. This part therefore seeks to raise the criticisms which shall inform if surely Zimbabwe's implementation of the UPR recommendation on the right to peaceful assembly and association has been enhanced as a result of the UPR mechanism.

4.5.2 Analysis of the Legal Framework: Right to Freedom of Peaceful Assembly

The legal framework regulating the exercise of the right to freedom of peaceful assembly has been characterised as restrictive and its implementation inherited from the colonial times[131]. The Law Maintenance and Order Act (LOMA) of 1960 was used as an instrument of repression to supress civil unrest as the liberation struggle intensified, leaving a very limited space for the exercise of this freedom. Although this act was repealed in 2002 and replaced by POSA, its provisions replicated many of the limitations imposed by the LOMA and its application more often was selective, abusive and misinterpreted aiming to silence dissenting voices and heavily restricting the exercise of fundamental freedoms. While the right to freedom of peaceful assembly is a constitutional right now regulated by the MOPOA that came into force as law in November 2019, some sections of the human rights actors still feel and regrets that MOPOA was adopted without taking due consideration of the complaints of yester year.

Under the MOPOA, peaceful assemblies are regulated by some provisions which the critics consider are not in alignment with international human rights standards. Section 7 which requires conveners of public gatherings to give the local regulating authority advance notice of their gatherings was viewed by the Special Rapporteur[132] on the Right to Peaceful Assembly and Association as restrictive. Failure to give notice is a criminal offence rendering the defaulting convener liable to imprisonment. Worse still, the information to be provided is particularly bureaucratic as it includes the anticipated number of participants in the gathering, the exact and complete route (for demonstrations), the number and names of marshals and what have you.

[130] (A/HRC/34/8).
[131] Human Rights Council Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/44/45/Add.1
[132] Ibid, p.5.

Further, if Sections 5 to 8 require advance notice to be given of all gatherings, leaving no room for spontaneous assemblies regardless of the number of individuals exercising the right as per that provision is restrictive. There are no exceptions allowing demonstrations to be held in immediate response of matters of public concern. Section 10 bans public gatherings close the Parliament, courts or places declared to be protected placed under the Protected Placed and Areas Act yet they are places where citizens usually value as critical and symbolic in holding authorities to account by grieved assemblies of citizens.

Section 12 states that if conveners fail to give the regulating authority notice of their gatherings, or fail to comply with the directives, notices or orders given by a regulating authority, they will be civilly liable for any damage, injury or death "occasioned by any public disorder or breach of the peace caused by or arising out of or occurring at the gathering". The provision of civil liability is quite ominous in that instils real fear in assemblies of aggrieved citizens who may want to organise themselves as demonstrators or petitioners. This shields away the duty of the police to protect and manage assemblies professionally to avoid the loss of property during demonstrations or assemblies.

The Rapporteur[133] noted that MOPOA does not protect spontaneous assemblies which is not considered to be a best practice in the legislation of the right to assembly. Spontaneous assemblies should be recognized in law, and exempted from prior notification as well as simultaneous assemblies should be allowed, protected and facilitated, whenever possible.

Further in relation to the location of the assemblies, the Rapporteur[134] considered that Section 10 is intrusive in imposing location prohibitions. Spaces in the vicinity of iconic buildings such as presidential palaces, parliaments or memorials should also be considered public spaces, and peaceful assemblies should be allowed to take place in those locations. The imposition of restrictions on "venue, time and manner" should meet the test of necessity and proportionality.

While it is acknowledged that organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behavior of others. To do so would violate the principle of individual liability, weaken

[133] Ibid. p.7.
[134] Ibid.

trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights. The UPR mechanism should never have envisaged that in repealing the POSA, room is left for a person to be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest.

5.4.3 Analysis of the Legal Framework: Right to Freedom of Association

The right to freedom of association is a constitutional right in terms of Section 58 as discussed before. Although different forms of associations are legally recognised, the main manifest as Private Voluntary Organizations (PVOs), trusts, political parties and unincorporated associations. The primary framework governing PVOs is the Private Voluntary Organisation Act (PVOA) of 2005, which retains a lot of the form of the Welfare Organisations Act from the pre-independence time. The registration body for PVOs is the Registrar and the PVO Board (PVOB), which is composed of representatives from six Ministries and three PVO representatives. Registration for PVOs who want to operate in the country is mandatory. The PVOA prohibits any individual from servicing in the management or collecting funds of an unregistered association and establishes a pecuniary sanction or imprisonment in case of violation, thus restricting the right to associate.

The law provides for an onerous registration procedure that infringes on the right to associate as such registrations have been rendered impossible for some organisations perceived to pursue a political objective. Applications are required to provide a proof of public notice in national newspapers in order to call for objections. If an association is denied registration due to their political activities or under vague circumstances there is no appeal system for challenging the decision. The General Notice 99/2007 requires an international organization to file its application with the Registrar of PVOs and the application documents must include curriculum vitae and an Interpol or local police clearance certificate for the country representative as well as the additional requirements established by the PVOA.

Section 21 of the PVOA grants wide discretionary powers to the Minister of Public Sector, Labour or and Social Welfare and to the PVOB to interfere in the internal governance of the association, under different grounds including perceived lack of compliance with its objectives or constitution, maladministration, illegal activities, or when “necessary or desirable” in the public interest, thus diminishing the latitude of association.

Considering the excessive limitations, multiple challenges and harsh sanctions provided in the PVOA, many NGOs have resorted to register as trusts under the Deeds Registries Act (2001). Trusts can pursue unlimited objectives, the only limitation being the wishes of the trustees in the trust deed. Although its establishing process is more costly, it is more expeditious and allows association greater flexibility to work on different issues. However, at the time of writing, a limitation on the enjoyment of the right to associate is looming by virtue of an administrative moratorium on registration of other forms of trusts other than family trusts.

4.5.4 Zimbabwe's Exercise of the Right to Peaceful Assembly and Association in Practice

It should be emphasised that assemblies should not be feared and repressed but rather they should be encouraged for there is a value in expressing disagreement and differences peacefully and publicly, particularly in light of the current political and socio-economic situation, as there is no better way of expression than the right to assemble and associate freely. In the management of the assemblies in Zimbabwe, the general tilts towards maintaining the law and order rather than the one of facilitating and guaranteeing the holding of assemblies and enable the exercise of the right to freedom of peaceful assembly.

Recent complaints have been raised that peaceful assemblies that align with the views of the ruling party tend to be authorised more easily as actors such as labour movements and civil society demonstrations. They end up relying on the judicial system in order to challenge decisions by the regulating authority and get favourable court orders that would enable them to peacefully voice out their views. Opposition groups have more often than note faced serious risks such as threats, harassment, physical abuse and torture, disproportionate and excessive use of force, illegal dispersals as well as arbitrary arrests, detentions and even disappearances. Flagship cases where the right to peaceful assembly and association has been violated in practice is the perennial case of Itai Peace Kadizi Dzamara, who led a movement Occupy Africa Unity Square[135]. Concerns remain no individual has been held accountable for his disappearance.

Similarly concerning is the frequents and incessant occurrences of related arrests, detentions and even abductions of trade union leaders that have taken place in connection with the exercise of the right to peaceful assembly despite trade union activities before and after MOPOA. Cases of the

[135] ZWE 1/2015, 23 Mar 2015

alleged abduction of Dr. Peter Magombeyi, the then leader of the Zimbabwe Hospitals Doctors Association (ZHDA) and many more. During the third Cycle, allegations of arbitrary arrest and judicial harassment were abound: Mr. Evan Mawarire's arrests; allegations of violations of civil liberties of Zimbabwean citizens during and after demonstrations which occurred during January 2019; allegations of arbitrary arrest and judicial harassment against Mr. Okay Machisa; allegations of arbitrary detention of human rights defender Rashid Mahiya; violent repression and excessive of use of force; closure of internet and many other allegations. During the fateful days, 995 suspects were denied bail and 146 persons went for trial, with a staggering 80 persons getting convicted, and a mere 66 persons were found not guilty and acquitted[136].

In 2020, a series of arrests recorded between April and June undermined the role of the UPR mechanism in implementing recommendations on the right to peaceful assembly and association in that the likes of Cecilia Chimbiri, Netsai Marova, and MDC Alliance legislator Joanna Mamombe were allegedly abducted and tortured by security agents in May 2020, faced trial in hospital, detained and rearrested in June for "faking" the abductions. During the period under review, Government has also targeted pro-democracy activists the likes of Job Sikhala, Jacob Mafume, Tendai Biti, Karenyi-Kore, Fadzai Mahere, Allan Moyo, Tawanda Muchehiwa, Jacob Ngarivhume and Hopewell Chingono. Thabani Mpofu and Choice Damiso who are advocates of the superior courts of Zimbabwe; Admire and Miriam Rubaya, Tapiwa Makanza, Lawman Chimuriwo, Joshua Chirambwe who are Harare attorneys and Dumisani Dube, a Bulawayo attorney were arrested on spurious charges of cases associated with their work in violation of Article 16 of the United Nations (UN) Basic Principles on the Role of Lawyers.

Further, in the aftermath of the presidential election, on 1 August 2018, political opposition party supporters took the streets of Harare and gathered outside the Zimbabwe Electoral Commission to demand the immediate release of the results of the presidential election. The demonstrations started in a spontaneous and peaceful manner, however in view of the delayed of the results, the situation turned riotous with property such as cars and private businesses destroyed. The police and later the national army were deployed to control the chaotic situation experienced in the aftermath of

[136] Zimbabwe UPR Mid Term Report, p. 2.

the elections. In order to investigate these events, President Mnangagwa appointed a Commission of Inquiry (Motlanthe Commission) which presented a final report with recommendations in which it was concluded that six people were killed, several injured, and extensive damage and destruction of property was caused[137]. Regarding the use of force, the Commission concluded that "the use of live ammunition directed at people especially when they were fleeing was clearly unjustified and disproportionate" and it added that "The use of sjamboks, baton sticks and rifle butts to assault members of the public indiscriminately was also disproportionate".

Up to the day of compiling this thesis, much has not been achieved to bring to book those who perpetrated the killings and most recommendations of the Commission are yet to be implemented. This dampens the optimism of the UPR mechanism when its recommendations on managing assemblies and allowing citizens to freely associate are ignored.

4.6. Zimbabwe's implementation of the Right to Peaceful Assembly and Association During the third Cycle: Perspectives of the UPR Mechanism

While Zimbabwe has introduced a constitutional framework on the right, the legislative framework to give effect to the right manifesting through the MOPOA has been found wanting by this study. Further and worse still, the right's practice in Zimbabwe, is contrary to standards envisaged within the framework of the UPR mechanism as it has been blighted by a belligerent conduct of Zimbabwean's government in dealing with opposition, especially where human rights defenders seek to associate and assemble peacefully with the view to bring authorities to account.

The attitude of the Zimbabwean government, which has been subjected to, in some cases, global condemnation as a result of excessive and disproportionate use of force by police during managing assemblies does not dovetail with the expectations of the Human Rights Council UPR mechanism. The above record in the implementation by the Zimbabwean government of UPR recommendations on the right to peaceful assembly and association indicates an unwillingness to act on recommendations that require changes to the Zimbabwean practices. The response by the Zimbabwean government to the UPR recommendations demonstrates a willingness to engage with the process but a reluctance to commit to recommendations that will strengthen the domestic human rights situation within the jurisdiction is ironic.

[137] Report of the Commission of Inquiry into August 1 Violence.

4.7. Zimbabwe's Progress on Implementation of the right to Peaceful Assembly and Association: Rhetoric versus Action

The follow-up stages of the UPR process provide an opportunity for states to translate their UPR rhetoric and commitments into actions that will contribute to improving the human rights situation on the ground. As the UPR entered its third cycle, scholars and UPR stakeholders have raised key questions on the extent to which UPR recommendations from previous cycles were being implemented and how to share best practice in relation to the national implementation process for UPR recommendations[138].

Politics and a lack of genuine engagement with the UPR process have resulted in many states not giving serious consideration to the implementation of UPR recommendations. As Matthew Davies observed, while the HRC and its UPR mechanism were designed to depoliticise the UN human rights system and transition to a persuasive-based model, the UPR mechanism is not entirely free from politics[139]. However, Davies notes that for the UPR to achieve a successful outcome through rhetorical action, the deliberations must be meaningful and sustained and the participants must have a truthful commitment to the process[140]. The argument to be developed from this point onwards is that Zimbabwe, in relation to its implementation of UPR recommendations on the right to peaceful assembly and association, was trapped between rhetoric and action and its implementation of UPR recommendations has been influenced by politics, culture and fears of regime change by the incumbent government.

4.8. Conclusion

This chapter demonstrated presented the findings of the study and an analysis of the same. In that vein, Chapter 5 below shall focus on the conclusions and recommendations drawn from this study.

[138] UPR Info, Ensuring Sustainable UPR Implementation (UPRinfo 2016); Gujadhur, Subhas and Marc Limon, Towards the Third Cycle of the UPR: Stick or Twist? Lessons Learnt from the First Ten Years of the Universal Periodic Review (Universal Rights Group 2016) 35–7.
[139] Davies, M 92010), Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations, 35(4) Alternatives: Global, Local, Political 449–68.
[140] Ibid.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.0. Introduction

This Chapter presents conclusions and recommendations of the study on the utility of the UPR mechanism in the implementation of the UPR recommendations during the third cycles review of 2016-2022. Furthermore, the conclusions and recommendations are proffered within the framework of adoption of good practices of well-established standards of human rights implementation.

5.1. Restating the Purpose of the Research

The overarching purpose of this study was, in the main, to assess the efficacy or utility of of the UPR mechanism in the implementation of the UPR recommendations during the third cycles review of 2016-2022. The study also sought to unearth the gaps inflicting the implementation of the right to freedom of peaceful assembly and association. Further, the study sought to undertake an analysis of the attendant gaps and solutions thereof, which can be proffered to strengthen the UPR system in Zimbabwe to unlock value for them.

5.2. Summary of Arguments of the Study

To achieve the foregoing, the study, under Chapter 1 introduced the research topic, objectives and problem statement. It further outlined the aims of the research and the factual background underpinning the research and explored the conceptual aspects of corporate governance in Zimbabwean SOEs and presented a review of literature on the same.

A legal comparative research methodology and assessment of the topic was executed, with the local experiences being analysed through the lenses of practices of other UPR processes in the region. The research also employed a thorough desktop research which focused on understanding the history and rationale of the UPR process and implementation of UPR recommendations. This was achieved through an examination of constitutional provisions, statutes, authoritative texts and comparative laid out guidelines, reports and standards on the UPR.

Chapter 2 of the study explored the perspective of the establishment, operations and operational theories of the UPR mechanism. Further, the theoretical aspects of the nexus arising from the utility of the UPR mechanism and effective implementation of rights were presented. In that vein, a set

of criticisms of the theories and views of scholars were presented from the researcher's perspective.

Chapter 3 presented a comparative analysis of how the UPR mechanism has enhanced implementation of human rights in Kenya and South Africa.

Chapter 4 covered major findings on how the implementation or practice of the right to peaceful assembly and association as a measure of the efficacy of the UPR mechanism in enhancing the practice of the right in Zimbabwe in line with the UPR recommendations. This is achieved through unravelling the normative, constitutional and legislative frameworks pertaining to the right to peaceful assembly and association in Zimbabwe and how it has been improved as a result of the UPR recommendations. Under Chapter 5, conclusions flowing from the findings were presented and a raft of recommendations to Zimbabwean policy makers in the field of human rights to make good Zimbabwe's participation in the UPR mechanism shall be proposed.

5.4. Summary of Conclusions of the Study

5.4.1 Efficacy of the UPR Mechanism

The study found out that the Zimbabwean Government's engagement with the UPR presents a state of affairs which questions the effectiveness of the UPR mechanism in improving the human rights situation on the ground. This is so because an analysis on the ground in as far as the peaceful assembly and association right *vis a vis* Zimbabwe's participation in the first to third cycles of UPR review did not immediately translate to implementation within the state.

Further, political interests continue to impact on Zimbabwe's engagement with the UPR process. The impact of the UPR process is a phenomenon which has been examined by many scholars, and this has implications for the effectiveness of the implementation of the right to peaceful assembly and association. Therefore, the UPR as a human rights mechanism may be more or less effective, depending on the political regime in the relevant state with other contextual factors. Zimbabwe faces this dilemma.

5.4.2 Implementation of the Right to Freedom of Peaceful Assembly and Association

Grounded on its Constitution, Zimbabwe is going through a process of restructuring and reforms with a renewed intention to deliver on government commitments and should thus implement this

right in earnest. In this UPR process and considering the constraints of the current economic, political and social environment, it is essential that the exercise of the rights to freedom of peaceful assembly and of association is guaranteed as it will contribute to open and create a space for meaningful pluralistic dialogue, transparency, accountability and shared development.

The existing political polarisation profoundly affects the opportunity of progress. In this regard, the implementation of the right under study, within the prism of the UPR mechanism, will build eventual and sustainable trust on adherence to the rule of law and respect for the Constitution; strengthening of the judiciary and independent constitutional institutions; fighting against corruption and impunity; and support to the work of civil society.

As Zimbabwe has declared itself to be open for business, economic reforms need to go hand-in-hand with the ability of individuals to exercise their fundamental freedoms and that legislation and policies need to be compliant with international human rights norms and standards. A society with space for critical voices to speak, associate and freely assemble is sustainable as it generates long term benefits within the framework of the democratic dividend. Government should capitalise on the values of the right under study and facilitate an unfettered exercise of fundamental freedoms, thus anchoring the same on the trajectory of making good human condition through a mix of the implementation of the right and economic development.

The government has on many occasions decried the detrimental effects of bilateral restrictive measures imposed on Zimbabwe and its impact in the economy and in the enjoyment of social, economic and cultural rights. This is notwithstanding that the European Union decided[141] continues to support Zimbabwe, within the framework of the political dialogue, for economic development, primary health care, resilience building, as well as humanitarian assistance while maintaining an arms embargo and targeted asset freeze against institutions such as the Zimbabwean Defence company and travel by some of the Zimbabwean Government authorities under the terms of Article 98 of the Cotonou Arrangement on political measures. Instead of merely complaining of the restrictive measures the Government has the duty to fulfil its human rights

[141] https://www.consilium.europa.eu/en/press/press-releases/2020/02/17/zimbabwe-council-adopts-conclusions-and-renews-its-arms-embargo-and-targeted-assets-freeze-againIst-one-company.

obligations, by demonstrating its sincerity in the implementation of rights and freedoms in the Constitution. In that sense, the right to freedom of peaceful assembly and association presents Zimbabwe with an opportunity to break ranks with the past and chart a new way forward founded in religiously complying with the UPR mechanism to ensure effectiveness in implementing the right under study.

5.5. Recommendation

5.5.1 Efficacy of the UPR Mechanism

Zimbabwe, just like any other country that is desirous to make its UPR process work, must pay due regard to the purpose for which the UPR mechanism was introduced. This will capacitate it to assess its own framework, identify strengths and weaknesses, and address the shortcomings in the implementation of UPR recommendations to make them effective. Thus, the UPR process provide an opportunity for Zimbabwe to translate its UPR rhetoric and commitments into actions that will contribute to improving the human rights situation on the ground.

In view of the foregoing, Zimbabwe can harness the potential of the UPR to reinforce and amplify the implementation of human rights recommendations by State Parties to the HRC. For Zimbabwe, the ability of the UPR to strengthen and reinforce human rights concerns raised by other human rights mechanisms must be seen to serve as a model that has inspired proposals on human rights, which advocates for effective monitoring that complements and reinforces efforts at the domestic level. In the case of Zimbabwe, the UPR, with requisite political will, can be used as a platform to strengthen and support human rights reforms. Zimbabwe also has a lot to learn from the experience of the two comparators: Kenya and South Africa, as it implements its UPR recommendations pertaining to the right of peaceful assembly and association.

Further as a result of the South African experience, one can learn that the UPR has attracted the full engagement of African states and there has been improvement across reviews, especially in terms of state representation and responses to recommendations. As has been evident in the case of Kenya and South Africa, their engagement with the UPR has contributed to enhance their treaty body engagement in terms of meeting their reporting obligations. In the case of South Africa, the UPR process has contributed to greater engagement of the South African government with the

treaty bodies in terms of the committed efforts made by the government to meet many of its outstanding reports after its second cycle UPR review. Finally, the ability for the UPR to reinforce treaty body recommendations underscores the potential for the UPR mechanism to evolve into an effective cooperative mechanism that could complement other mechanisms for monitoring human rights implementation

5.5.2 Implementation of the Right to Freedom of Peaceful Assembly and Association

With regards to the implementation of the right under study, Zimbabwe is recommended to work within the UPR mechanism and take UPR recommendations seriously with the view that the rights to peaceful assembly and of association are freely exercised in law and practice, with the subsequent aim of playing a decisive role in the transition and maintenance of an effective democratic system and as a channel for dialogue, pluralism, inclusiveness, tolerance and broad-mindedness.

The Government of Zimbabwe is also urged to repeal legislation inconsistent with the Constitution, particularly those affecting the exercise of fundamental freedoms and undertake a comprehensive reform on legislation related to the security sector, governance, electoral system and anti-corruption as they are the triggers of state actions which are directed to quell dissent and violate the right to peaceful assembly and association. This will guarantee a conducive and safe environment for everyone exercising or seeking to exercise his or her rights to freedom of peaceful assembly and of association and that there is no discrimination in the application of the laws governing the rights to freedom of peaceful assembly and of association, in particular regarding the groups most at risk and those expressing dissenting voices.

Government should also ensure that no one is criminalised for exercising the rights to freedom of peaceful assembly and of association, nor subject to threats, harassment, persecution, intimidation and reprisals. Where there are attendant fixations by Government on limitations, it must ensure that any restrictions on the rights to freedom of peaceful assembly and of association are prescribed by the law, necessary in a democratic society and proportionate to the aim pursued, so that it does not harm the principles of pluralism, tolerance and broadmindedness and that they are subject to an independent, impartial and prompt judicial review.

Government must also ensure that that victims of violations and abuses of the rights to freedom of peaceful assembly and of association have the right to an effective judicial remedy to obtain redress. In Zimbabwe, this can be achieved through support of the work, independence and operation of all constitutional independent institutions and implementations of the observations and recommendations made by the UPR, Special Rapporteurs, Treaty Body mechanisms and ZHRC in relation to the respect for human rights and particularly the rights to freedom of peaceful assembly and of association.

Government must also ensure that a wide range of civil society actors with pluralistic views are systematically consulted before the adoption of any legislative initiative and policies; guarantee that law enforcement apparatus who violate the right to freedom of peaceful assembly and of association be held accountable for such violations by an independent oversight body, in line with Section 210 of the Constitution, and by courts and the law.

5.6. Overall Conclusion

Zimbabwe boasts of a constitutional framework that provides a foundation for the implementation of the right to freedom of peaceful assembly and association. However, on the ground, concerns are replete that the right is not being exercised effectively, especially within the framework of Zimbabwe's participation in various human rights mechanisms such as the UPR mechanism. This research was concerned with the engagement of Zimbabwe with the UPR mechanism of the HRC to ensure that it unlocks the value of implementing specific actions in relation to recommendations from their engagement with the UPR mechanism.

The starting point of this research was the recognition that the effectiveness of Zimbabwe's engagement with the UPR mechanism is determined by the extent or degree to which it contributes to improving the human rights situation on the ground, which is the principal goal of the UPR mechanism. Therefore, this study aimed at calibrating effectiveness of the UPR mechanism aimed at appreciating the aggregate number of implemented recommendations pertaining to the right f peaceful assembly and association. In conclusion therefore, as Zimbabwe looks forward to its fourth review in the next four and half years during the fourth cycle it should take advantage of the UPR mechanism to sustain its human rights record especially pertaining to the aspect of managing assemblies.

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